UNITED STATES OF AMERICA
Before the
OFFICE OF THRIFT SUPERVISION
DEPARTMENT OF THE TREASURY

In the Matter of PEDRO RAMON LOPEZ, Former Chairman of the Board, Chief Managing Officer and Stockholder, TERESA SALDISE, Former Director and Stockholder, of GENERAL BANK, a Federal Savings Bank, Miami, Florida	Re: Order No. AP 92-74 Dated: July 29, 1992 OTS Order No. AP 94-23 Dated: May 17, 1994

DECISION AND ORDER

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I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

The Respondents in this matter are Pedro Ramon Lopez ("Lopez") and Teresa Saldise ("Saldise"), insiders at General Bank, a Federal Savings Bank of Miami, Florida now in receivership ("GB" or the "Association").

Lopez and Saldise illegally acquired control of GB in 1982 when the institution converted from the mutual to the stock form of ownership. They designed and implemented a plan to conceal their control of the Association by registering stock to various nominees. After the conversion, Lopez and Saldise actually controlled approximately 70% of GB's voting stock, but less than 5% was registered in their names. The rest was registered in the names of nominees and in the names of persons acting in concert with Respondents. In this way, Lopez and Saldise, who are both attorneys, were able to avoid the regulatory oversight and accountability that the law is designed to ensure.

Having achieved control of GB, Lopez and Saldise used their positions of trust to enrich themselves at the expense of the institution's safety and soundness. They devised and executed an elaborate series of transactions to make it appear as though GB had received a significant capital infusion when, in fact, in had not. The false picture of GB's capital position that the Respondents presented enabled them to hide the institution's true condition from its regulators and to engineer a substantial capital distribution to themselves.

Lopez and Saldise also caused GB to invest $4.2 million in three subsidiaries formed in Spain for the purpose of participating in the secondary mortgage market there even though Spain had no secondary mortgage market at the time the subsidiaries were created. Nonetheless, they used these three firms as an excuse to travel back and forth to Spain, sometimes accompanied by a personal maid and their pets, ostensibly for the purpose of overseeing and managing the operations of the Spanish subsidiaries. They billed their expenses for these trips to GB, which ultimately lost its entire investment in the Spanish Subsidiaries.

This conduct and the other instances of self-dealing and exploitation that are developed on the record before the Acting Director exemplify the worst of the insider abuses that contributed to the savings and loan debacle of the 1980s. The Respondents' deliberate and repeated breaches of fiduciary duty and violations of the law brought about the deterioration of GB's financial condition and led ultimately to its demise. The record, thus, supports the imposition of stringent remedies and severe penalties.

Consistent with the recommendations of the Administrative Law Judge, the Acting Director will issue a Cease and Desist Order and an industry-wide Prohibition Order against both Lopez and Saldise. In addition, Respondents will be ordered to pay a total of $9.1 million in restitution to GB in receivership and total of $4.9 million in civil money penalties ("CMPs"). Because the record is insufficient to resolve issues involving an additional $2 million in restitution, the Acting Director will require further submissions from the parties on certain specific questions. Finally, the Respondents will be required to resign from any positions they currently hold in the Spanish subsidiaries and endorse all stock they hold in the subsidiaries to the Resolution Trust Corporation (the "RTC"), the receiver for GB.

II. <u>BACKGROUND</u>

A. <u>Summary of the Administrative Proceedings</u>[1]

Following the appointment of the RTC as receiver for GB, the Enforcement Office of the OTS ("Enforcement") issued a Notice of Intention to Prohibit and Notice of Hearing. OTS ERC Res. No. 90-45 (June 1, 1990). The notice alleged that Lopez and Saldise, as directors, and Lopez, as an officer, of GB violated laws, rules and regulations, engaged in unsafe and unsound practices in conducting the affairs of GB, and breached their fiduciary duties to GB. Enforcement sought an order prohibiting Respondents from participating in the affairs of any federally insured depository institution.

On May 3, 1991, Enforcement initiated a second enforcement action by serving a Notice of Assessment of Civil Money Penalty on Lopez and Saldise and a third respondent, Ramon Lopez (OTS Order No. AP 91-48).[2] This notice charged violations of the

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[1]Citations to various documents are as follows: "Tr." refers to the hearing transcript; "OTS Ex. ___" refers to an Enforcement exhibit admitted into evidence at the hearing; "L&S Ex. ___" refers to a Respondents' exhibit admitted into evidence at the hearing; "RD" refers to the Recommended Decision; "FOF ___" refers to a finding of fact in the Recommended Decision.

[2]Ramon Lopez executed a Stipulation and Consent to Issuance of an Order of Assessment of Civil Penalty on November 2, 1993, and is subject to Order of Assessment of Civil Money Penalty, OTS Order No. AP 93-96 (November 22, 1993). He is no longer a party

Change in Bank Control Act of 1978, 12 U.S.C. §1817(j) which superseded the Change in Savings and Loan Control Act of 1978, 12 U.S.C. § 1730(q); the regulations implementing this Act, 12 C.F.R. § 563.18-2 (1982) and 12 C.F.R. § 574.3 (1985); and the Conversion Regulations, 12 C.F.R. Part 563b (1982).[3]

On July 29, 1992, Enforcement filed an Amended Notice of Assessment of Civil Money Penalty, Amended Notice of Charges and Hearing to Direct Restitution and Other Appropriate Relief and Amended Notice of Intention to Prohibit Respondents from Participating in the Affairs of Federally-Insured Depository Institutions (OTS Order No. AP 92-74) ("Amended Notice"). The Amended Notice consolidated the two prior notices, added new allegations, and sought the additional remedy of a Cease and Desist Order including restitution against Lopez and Saldise. Respondents and Respondent Ramon Lopez filed answers to the Amended Notice.

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to this proceeding.

[3]Simultaneously, the OTS sought a restraining order prohibiting Respondents from withdrawing, removing, dissipating or disposing of any funds, assets or property, and appointing a receiver to administer the restraining order. See 12 U.S.C. § 1818(i)(4). The application for a permanent order was denied by the United States District Court for the Southern District of Florida. The District Court decision was reversed and remanded in OTS v. Lopez, 960 F.2d 958 (11th Cir. 1992). Thereafter, based on information that Lopez and Saldise were attempting to remove assets from the United States, the District Court issued a temporary restraining order on May 29, 1992, and appointed a temporary receiver on June 11, 1992. The District Court entered permanent orders on July 16, 1992. Director of the Office of Thrift Supervision v. Pedro R. Lopez, C.A. 91-0942-CIV-MORENO (S.D. Fla.).

Lopez' and Saldise's pre-hearing conduct in this proceeding was marked by efforts to delay,[4] and by refusals to provide discovery, attend depositions and comply with discovery orders. Ultimately, Administrative Law Judge Walter Alprin (the "ALJ") imposed sanctions precluding Respondents from introducing deposition transcripts of their testimony and any other evidence not disclosed in response to Enforcement's discovery requests.[5]

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[4]Respondents except to the ALJ's refusals to grant their requests to continue the hearing. The ALJ's orders reflect his attempts to guide the matter to a timely conclusion, his judgment that discovery, timely pursued, could be completed on schedule, and his refusal to permit any party to delay this proceeding by dilatory practices. There is no indication that the ALJ abused his authority to regulate the course of the hearing. 12 C.F.R. § 509.5(b)(5)(1993). The exception is denied.

[5]<u>See</u> ALJ Order issued December 14, 1992. <u>See also</u> ALJ Order issued December 10, 1992. Respondents except to these orders claiming that the ALJ lacked authority to impose discovery sanctions. This claim is rejected. The Rules of Practice and Procedure in Adjudicatory Proceedings (the "OTS Rules of Practice") permit ALJs to impose sanctions, and expressly state that a party's right to seek court enforcement of a subpoena does not limit the ALJ's power to sanction a party for failure to comply with deposition and document subpoenas. 12 C.F.R. §§ 509.5(b)(5), 509.25(h), 509.27(d) and 509.102(g)(4)(1993). Both Courts of Appeals that would have jurisdiction to review this Decision and Order have upheld evidentiary sanctions for failure to comply with discovery requests. <u>See</u> <u>Atlantic Richfield Co. v. United States Department of Energy</u>, 769 F.2d 771 (D.C. Cir. 1984); <u>NLRB v. American Art Indus.</u>, 415 F.2d 1223, 1230 (5th Cir. 1969), <u>cert. denied</u>, 397 U.S. 990 (1970).

Even if the Acting Director were to conclude that the ALJ abused his discretion by imposing discovery sanctions, Respondents failed to show that they were prejudiced by the ALJ's actions. Respondents had an opportunity to submit a proffer of proposed evidence for the record, but did not do so. Without the proffer, Respondents have no basis for asserting error. <u>See</u> Rule 103(a)(2) of the Federal Rules of Evidence.

On the eve of the hearing, Respondents responded to these sanctions by filing a motion for recusal of the ALJ.[6]

A hearing was held in Miami, Florida before the ALJ on January 5-21, 1993. Lopez and Saldise refused to appear and testify at the hearing in response to hearing subpoenas. Their counsel, however, participated fully by cross-examining witnesses and offering evidence through witnesses and exhibits. Respondent Ramon Lopez attended and was represented by counsel.

Shortly before post-hearing filings were due, counsel for Lopez and Saldise filed a motion for leave to withdraw which was granted on March 23, 1993.[7] Thereafter, Ramon Lopez and

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[6]The Acting Director's interlocutory order affirming the ALJ's denial of Respondents' recusal motion (OTS Order No. AP 93-63 (July 30, 1993)) was appealed. The United States Court of Appeals for the District of Columbia Circuit granted OTS's motion to dismiss the appeal on March 21, 1994. Pedro R. Lopez v. OTS, No. 93-1560 (D.C. Cir., filed Aug. 27, 1993).

On exceptions, Respondents attempt to inject a new claim of bias that this administrative action was based solely on the ethnic prejudice of the Supervisory Agent. This exception is wholly frivolous and is denied.

[7]This was the second withdrawal by counsel representing Respondents. Original counsel were permitted to withdraw by order of the ALJ issued October 2, 1992 based on their inability to contact or confer with the clients, to properly represent their clients and to be compensated for their services. The second withdrawal of counsel was based on allegations that counsel had no reasonable expectation of receiving payment of over $300,000 in unpaid fees and costs.

On exceptions, Respondents argue that they were prejudiced by the ALJ's approval of the second withdrawal "in that no briefs were filed or argued to the ALJ in the oral argument . . . [and because] seventy plus pages of argument go unfettered and without a response." The ALJ's action was fully supported by the record and applicable law. Respondents were notified of the pending withdrawal and the ALJ's Order granting withdrawal. Other than

Enforcement filed post-hearing proposed findings of fact, conclusions of law and briefs by April 2, 1993. Enforcement replied on April 16, 1993. Lopez and Saldise made no attempt to file post-hearing submissions following the withdrawal of counsel.

Counsel for Ramon Lopez and Enforcement appeared at post-hearing closing arguments on April 19, 1993. Lopez and Saldise did not participate, in person or through counsel, in post-hearing closing arguments.

The ALJ issued a Recommended Decision on September 10, 1993, including Recommended Findings of Fact and Conclusions of Law and a Proposed Order ("Recommended Decision"). On October 7, 1993, Lopez and Saldise, acting pro se, filed exceptions to the Recommended Decision and requested extensions of time to file further exceptions.[8] Enforcement filed exceptions on October 12,

to request a delay of indeterminate length, they did not protest this action until the filing of exceptions, a delay of over six months. While unrepresented at the time, Respondents are attorneys who are presumed to understand that adverse consequences may follow from their failure to raise any timely objection to the withdrawal. The exception is denied.

[8]Respondents delayed obtaining new counsel for six months, then asserted the lack of counsel as a basis for extensions of time to file exceptions. The Acting Director granted one extension by OTS Order No. AP 93-90 (Oct. 28, 1993). After hiring new counsel, Respondents sought additional extensions to obtain relevant documents based, in part, upon prior counsel's refusal to release files. In granting extensions, the Acting Director identified alternate sources for all relevant documents. OTS Order No. AP 93-97 (Nov. 28, 1993) and OTS Order No. AP 93-102 (Dec. 10, 1993).

On exceptions Respondents continue to object that they do not have access to necessary documents. Incredibly, Respondents do not represent that they attempted to obtain documents from

1993. Through new counsel, Respondents filed consolidated exceptions on January 10, 1994. Enforcement replied on January 26, 1994. On February 16, 1994, the parties were notified that the proceeding had been submitted to the Acting Director for review and final determination. 12 C.F.R. § 509.40(a)(1993).

B. Summary of the Facts[9]

Lopez and Saldise are husband and wife. At all relevant times, Lopez was the chairman of the board of directors, president or chief managing officer, and stockholder, and Saldise was a director and stockholder, of GB. GB was chartered by the Federal Home Loan Bank Board (the "FHLBB") in 1978 as a mutual

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sources other than former counsel. Two of the sources identified in the Acting Director's Order, the OTS Secretariat and Enforcement Counsel, received no requests from Respondents for documents. Given Respondents' failure to make reasonable attempts to acquire documents, the Acting Director concludes that this exception is unfounded. The exception is denied.

[9]Respondents except to virtually every finding of fact made by the ALJ based on hearsay. The OTS Rules of Practice do not require evidence to conform to the requirements of the Federal Rules of Evidence. Rather, all evidence, including hearsay testimony, is admissible if it is "relevant, material, reliable and not unduly repetitive." 12 C.F.R. § 509.36(a)(3)(1993). Richardson v. Perales, 402 U.S. 389, 402 (1971); OTS v. Lopez, 960 F.2d at 964. Accordingly, the Acting Director rejects Respondents' hearsay exceptions.

Respondents also argue that the ALJ relied on testimony by two witnesses, Maria and Sergio Fernandez, who, Respondents assert, are not credible. In general, the Director will defer to the ALJ's credibility findings, unless these findings are unreasonable, self-contradictory or based on inadequate reasoning. Stanley v. Board of Gov. of the Federal Reserve Board, 940 F.2d 267 (7th Cir. 1991). The ALJ's assessment of the credibility of the Fernandez testimony is sufficiently supported in the record. See RD at pages 130-31. Respondents' exception is denied.

savings bank. GB converted its charter to stock form on August 20, 1982. Almost immediately following the conversion, GB was subject to regulatory criticism regarding conflicts of interest, lending policies and practices, financial management, and other matters.[10] This criticism resulted in the execution of a Supervisory Agreement with the FHLBB on November 23, 1983 (the "1983 FHLBB Supervisory Agreement").

In subsequent years, FHLBB examination reports repeatedly cited GB for its failure to comply with the 1983 FHLBB Supervisory Agreement, criticized the effectiveness of the GB Board of Directors for its lack of knowledge regarding major decisions and lack of involvement in operations, and criticized the institution for its lending practices and policies and for other problems.[11] The 1986 Examination Report stated:

> This institution continues to operate primarily for the benefit of Chairman of the Board Lopez and Director-Attorney Saldise. . . . [T]he conflict of interest situations have become a matter of serious supervisory concern. It is this examiner's conclusion that immediate steps should be taken to restrict the activities of the board of directors especially Directors Lopez and Saldise.[12]

GB was placed into receivership and Respondents were dismissed from office on November 16, 1989.[13]

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[10] L&S Ex. 1 at 2a and 2b.

[11] OTS Ex. 86 at 1 (Report Summary), 15-19; OTS Ex. 269 at 7-13; OTS Ex. 268 at 1 (Report Summary); L&S Ex. 2 at 2.18 - 2.19.

[12] OTS Ex. 268 (Report Summary).

[13] The OTS appointed the RTC as receiver based on findings that: GB was in an unsafe and unsound condition to transact business, including substantially insufficient capital; that there were violation(s) of laws or regulations, or an unsafe or unsound practice or condition which was likely to cause

1. <u>Respondents' Illegal Control of GB</u>

In connection with GB's August 20, 1982 mutual to stock conversion, Lopez and Saldise implemented a scheme to acquire approximately 70 percent of the stock in the converting association through pooled stock purchases, stock purchases by nominees and other deceptive means. After the conversion, Lopez and Saldise maintained and added to their stock holdings while actively concealing their control from Federal regulators. Respondents retained control until GB was placed in receivership on November 16, 1989.

On November 30, 1981, GB filed an application with the FHLBB seeking regulatory approval to convert its charter from the mutual to the stock form. GB's directors, including Lopez and Saldise, signed the application and two amendments that recited the limitations on the acquisition of stock contained in the Conversion Regulations,[14] the Control Act and the Holding Company

insolvency or substantial dissipation of assets or earnings, or was likely to weaken the condition of the association, or otherwise seriously prejudice the interest of its depositors; and that there had been a substantial dissipation of assets or earnings due to violation(s) of laws or regulations, or to any unsafe and unsound practice(s). OTS Ex. 196.

Respondents attack the GB receivership in their exceptions. The legal basis for the receivership is not appropriately at issue in this administrative proceeding, however. The statute provides that the exclusive means for challenging the appointment of a receiver is for the institution to bring an action in Federal court seeking removal of the receiver within 30 days of the date of appointment. 12 U.S.C. § 1464(d)(2)(B)(1988 & Supp. IV 1992).

[14] 12 C.F.R. Part 563b (1982).

Act.[15] As a result, Respondents knew that it was illegal: for any person, together with any associate or group of persons acting in concert, to purchase more than five percent of the total offering of shares at the conversion;[16] for officers and directors of the converting insured institution and their associates to purchase over 25 percent of the total offering of shares in the conversion;[17] or for any person, either alone or in concerted action with others, to acquire more than 25 percent of GB's stock, without notice to the FHLBB.[18]

To evade these restrictions, Lopez and Saldise devised a scheme whereby a majority of stock would be held in the names of friends, family and business associates. Under this scheme, funds necessary to purchase the stock were provided by Lopez and Saldise; Lopez' brother, Juan Lopez; Lopez' father, Ramon Lopez; and Ramon Lopez' business associate, Teresita Yanes. The funds were invested in GB by a pooled payment made by six checks made to GB on the same day.[19]

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[15]The Change of Bank Control Act, 12 U.S.C. § 1817(j)(1988 & Supp. II 1990), and its predecessor, the Change in Savings and Loan Control Act, 12 U.S.C. 1730(q)(1982-88), contain substantially identical provisions and are jointly referred to in this decision as the Control Act. Similarly, the current Savings and Loan Holding Company Act, 12 U.S.C. § 1467a (Supp. II 1990), and its predecessor, 12 U.S.C. § 1730a (1982-88), are jointly referred to as the Holding Company Act.

[16]12 C.F.R. § 563b.3(c)(7)(1982).

[17]12 C.F.R. § 563b.3(c)(8)(1982).

[18]12 U.S.C. § 1730(q)(1982-88).

[19]These checks were issued by the Lopez and Saldise law firm (two checks), Ray Optical, Lopez Optical, Discount Optical and Juan Lopez. Respondents objects to the admission of OTS Ex. 230 which supports the ALJ's conclusions regarding the pooled payment. OTS Ex. 230 is obviously relevant and material since it

Following approval of the conversion application, on August 20, 1982, GB issued and sold 174,369 shares of common stock. In the conversion, Lopez and Saldise actually acquired control of 68.7 percent of the voting common stock, but less than 5 percent of the GB stock was registered in their names. The rest of the GB stock was registered in the names of nominees and in the names of persons acting in concert with Respondents.

Some nominees had express understandings with Lopez and Saldise regarding the distribution of losses and gains upon of the sale of the stock. Others were completely unaware that stock was registered in their names. To make it appear that these individuals purchased stock, Saldise forged at least five signatures on stock acknowledgement cards. Moreover, to prevent certain nominees from discovering that their names were used, Lopez withheld annual reports, normally mailed to all shareholders, from these nominees. Additionally, he instructed Maria Fernandez, Saldise's secretary, to forge the names of nominees on shareholder meeting attendance lists.

To ensure that Federal regulators did not discover their control, Lopez and Saldise submitted false statements concealing the extent of their stock ownership. In the conversion

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is a ledger sheet that details the purchase of GB stock at the conversion, the price of the stock, names of purchasers, and type of payment received for the stock. The reliability of this exhibit is established by the fact that it was found among GB records in the custody of the RTC. Other exhibits including copies of the Respondents' checks (OTS Ex. 42), GB stock certificate stubs (OTS Ex. 263), and GB escrow account passbook (OTS Ex. 264) corroborate Exhibit 230.

application and amendments, they falsely represented that no person would acquire more than five percent of the stock in the conversion, and that GB officers would not acquire more than a total of 25 percent of the stock. In 1985 and 1986, Lopez and Saldise filed three Schedules 13D that falsely represented that they had no arrangements, agreements or understandings regarding GB stock and misrepresented the extent of their stock ownership and control.[20] Lopez and Saldise made similar misrepresentations regarding their stock ownership and control in a Notice of Change of Control filed December 11, 1985 notifying the FHLBB of their intention to acquire additional shares.[21] On January 8, 1986, Respondents purchased 17,121 shares, an additional 9.9% of GB voting stock, from individuals not associated with the control group.[22]

Lopez and Saldise took additional steps to conceal their control from Federal regulators. Lopez hid stock conversion

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[20]A person must file a Schedule 13D after acquiring, directly or indirectly, beneficial ownership of 5 percent or more of a class of equity securities. In their submissions, Lopez and Saldise claimed beneficial ownership of only 19.99% of GB voting stock (OTS Ex. 31, stamped 3/20/85); and 24.818% of GB voting stock (OTS Ex. 32, stamped 7/17/85 and OTS Ex. 34, dated 1/3/86).

[21]Respondents stated that they planned to exercise an option to acquire 17,121 GB shares. With this option, Respondents stated that they would own 24.818% of GB stock, just under the 25% threshold requiring the filing of a notice. The Notice informed the FHLBB of Respondents' intention to purchase 500 additional shares which would cause their holdings to exceed the 25% threshold, thereby triggering the notice requirement. The FHLBB rejected the notice as materially incomplete on February 11, 1986. Respondents did not purchase the additional 500 shares.

[22]Later as part of the recapitalization of GB discussed in Section II.B.2., First Miami Insurance, a corporation, acquired common stock of GB from Lopez and Saldise.

documents off GB premises. Lopez and Saldise also instructed Maria Fernandez to remove other documents from files at GB executive offices and to shred relevant documents. Lopez assisted in the shredding. During an OTS investigation in 1989, Lopez and Saldise instructed Maria Fernandez to give false testimony in response to an OTS subpoena.

2. <u>Sham Recapitalization and Improper Dividend</u>

GB's capital position steadily deteriorated in 1987 and 1988.[23] By March 31, 1989, it had failed to meet regulatory minimum capital requirements. To shore up this declining capital, GB undertook a recapitalization in August 1989. The purported recapitalization was, however, a sham purposely designed to misrepresent GB's true capital position to the regulators. Through a complex series of transactions, Lopez and Saldise caused GB's cash-rich subsidiary to transfer funds to GB and procured other inadequate capital contributions to make it appear that GB had obtained capital. GB then improperly issued a dividend of subsidiaries to shareholders that served primarily to benefit the Respondents.

In late 1988, Lopez, Saldise, Sergio Fernandez (GB's President) and other GB officers, began discussions to recapitalize GB. Before the recapitalization, GB's simplified corporate structure was:

[23]OTS Ex. 86 at 2.

GB
100%
General Trust Financial Corporation (GTFC)
100%
General Trust Mortgage Corporation (GTM)

- 100% First Miami Insurance (FMI)
  - 100% South Florida Premium (South Florida)
- 100% Capital Americo Hispano, S.A.
  - 80% Caja Espanola Financiera, S.A.
    - 100% Americo Hispano Sociedad De Credito Hipotecario (the Spanish Subsidiaries)

GTFC and GTM were holding companies. FMI was a property and casualty insurance company with substantial assets held in cash. South Florida was formed to engage in the financing of insurance premiums, but had not begun operations.

To make it appear that GB met its minimum capital requirements, GB accepted three capital infusions on August 1, 1989 in return for GB Series A preferred stock. The three capital infusions included:

> $1.2 million in cash from Liborio Capital Corporation ("Liborio"), a company controlled by Ramon Lopez, Lopez' father. Liborio's contribution was, in fact, a cash infusion made by GB's subsidiary, FMI. Because Generally Accepted Accounting Principles and regulatory accounting principles requiring consolidated financial reporting by GB and its subsidiaries prohibited GB from using assets of its own subsidiary as capital, Lopez, Saldise and Ramon Lopez arranged to have Liborio advance cash for the GB recapitalization

to make it appear that GB had obtained new capital. The cash was returned to Liborio by FMI in September 1989 pursuant to a prior agreement between Lopez, Saldise and Ramon Lopez. In accordance with this agreement, FMI loaned $1.4 million to companies controlled by Ramon Lopez and the proceeds were deposited directly in Liborio's account.[24]

A third-party note contributed by IBIC, a wholly-owned subsidiary of Liborio. The note was issued by Union Radio and had a face value of $1.5 million. In fact, the Union Radio note was issued by a financially troubled company with substantial delinquencies on a smaller obligation to GB. This note also violated GB's loans-to-one-borrower threshold[25] and was not valued before it was accepted as a contribution. Lopez and Saldise failed to seek prior FHLBB approval required for non-cash capital contributions.

$150,000 in cash from Louis Sarabia, a business associate of Lopez' brother, Juan Lopez. The Sarabia infusion ensured that the amounts of the investments

[24] Neither the board nor the president of GB knew that FMI was the source of Liborio's contribution. Respondents, however, were aware that funds were to be returned to Liborio. _See e.g._, FOF # 186-87. Moreover, Respondents were directors and Saldise was president of FMI. Through these positions, they caused FMI to issue the September 1989 loans to Ramon Lopez' companies.

[25] 12 C.F.R. § 563.9-3(b)(1989).

from Liborio and IBIC would not trigger requirements for regulatory approval of the transaction.[26]

Based on the appearance of enhanced capital, GB's board of directors, including Lopez and Saldise, approved and issued dividends of GTM stock and South Florida stock. The GTM stock dividend included FMI.[27] These dividends were issued to shareholders of GB series B preferred stock.[28] Lopez and Saldise were the principal beneficiaries of these dividends.

The GTM (and South Florida) dividend was illegal since GB did not meet minimum capital requirements,[29] even after the sham

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[26]Tr. Fernandez 1947-48.

[27]This dividend of subsidiaries included certain assets formerly held by GB but transferred to FMI for less than fair market value while the recapitalization and dividend were under consideration. In March 1989, GB transferred a commercial property ("Brickell Bay property") to GTM for $552,122, GB's book value for the property. In June 1989, GTM contributed this property to its subsidiary FMI. The property was valued on FMI's books at its appraised fair market value of $1.6 million.

[28]Simultaneously, GB liquidated GTFC, created a new first tier subsidiary, General Trust Corporation ("GTC"), and transferred GB's Spanish Subsidiaries to GTC from GTM. As a result, the Spanish Subsidiaries were not part of the stock dividend. After the restructuring, GB's simplified corporate structure was:

GB
| 100%
General Trust Corporation
| 100%
Capital Americo Hispano, S.A.
| 80%
Caja Espanola Financiera, S.A.
| 100%
Americo Hispano Sociedad De Credito Hipotecario

[29]To avoid reducing GB's newly-enhanced capital levels by the amount of the dividend, GB reduced its book value for the GTM stock to zero before the dividend was declared. To do this, FMI

recapitalization was concluded. 12 C.F.R. § 563b.3(g)(2) (1989).[30]

Immediately after the dividend, one final sham act of recapitalization occurred. FMI purported to contribute $962,000 in cash to GB in return for GB Series A preferred stock. This contribution was a nullity because FMI was not properly divested from GB and the $962,000 was not new capital to GB.

GB never submitted these transactions to FHLBB for approval as required.[31] The FHLBB learned of them at a meeting with Lopez and Saldise to discuss other regulatory matters. Lopez falsely stated that the subsidiaries had been sold, and misrepresented

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advanced a $4.5 million "one-minute loan" (a concept devised by Lopez) to GTM. GTM forwarded the proceeds of this loan to GB which used the funds to offset GB's $4.5 million capital investment in GTM so that the value of the GTM stock held by GB was reduced to zero. In return for additional GTM stock, Lopez and Saldise transferred various assets to GTM, including 17,437 shares of GB common stock and 354,277 shares of series B preferred stock. GTM used these assets to repay FMI for the "one-minute" loan.

[30]This regulation prohibited converted institutions from declaring or paying a dividend if the institution did not meet regulatory capital requirements or if a dividend would cause regulatory capital to be reduced below the regulatory capital requirements. By its terms, the regulation prohibited payment of a cash dividend. To capture transactions structured for purposes of evading the rule, however, the FHLBB construed the prohibition on "cash dividends" to include non-cash dividends in the form of property. See FHLBB Op. by Deputy Chief Counsel (Aug. 3, 1988).

[31]While GB obtained a legal opinion from an outside law firm stating that the recapitalization and spin off could occur under the regulations and did not require FHLBB approval, counsel was not provided with material information on the transaction and the opinion did not address certain significant issues. GB did not seek a review of the transactions from its independent accounting firm.

that GB met capital requirements by $750,000. The FHLBB requested complete information on the transaction at the meeting. After the FHLBB went out of existence on August 9, 1989, the OTS made similar requests. GB never fully complied with the requests, but proposed to unwind the transactions -- on the condition that the OTS not place GB in receivership or take other actions addressed in the proposed cease and desist order.

3. Unsafe and Unsound Investment - Spanish Subsidiaries

Lopez and Saldise caused GB to make a substantial foreign investment that was demonstrably unsafe and unsound from the outset. Thereafter, Lopez and Saldise failed to ensure that GB exercised adequate managerial oversight of this investment and caused GB to incur significant expenses primarily benefitting Respondents.

In 1987 and 1988, Lopez and Saldise directed GB to invest $4.2 million -- 40 to 50% of its capital -- in three companies formed to participate in the secondary mortgage market in Spain. In those years, Spain had no secondary mortgage market.[32] Lopez and Saldise performed no analysis of the risk of the investment (e.g., no economic feasibility or market studies were performed)

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[32]Kovacic Tr. at 1222-23, Teed Tr. at 2448-49. Specifically, GB acquired, through GTM, 100 percent of the shares of Capital Americo Hispano, S.A. ("CAH"). CAH owned 80 percent of Caja Espanola Financiera, S.A., which owned 100 percent of Americo Hispano Sociedad De Credito Hipotecario (collectively the "Spanish Subsidiaries").

and prepared no business plan including the Spanish Subsidiaries.[33]

Lopez and Saldise directed this investment at a time when GB reported minimal earnings and marginal capital compliance, and had high levels of problem loans and non-performing assets,[34] yet they never asked GB's board to approve the investment. Although Lopez had no significant experience with the United States secondary mortgage market or in doing business in Spain, he served as the chairman of the board and president of CAH and oversaw all aspects of the Spanish Subsidiaries' operations. Saldise also participated in the establishment and operation of the Spanish Subsidiaries and served on the board of CAH. Lopez and Saldise made numerous trips to Spain, at GB's expense, to oversee the Spanish Subsidiaries.

Lopez and Saldise failed to operate the Spanish subsidiaries properly. They did not devote adequate managerial resources to the subsidiaries. The subsidiaries did not maintain adequate books and records of their activities. Lopez and Saldise did not establish and utilize audit procedures for the subsidiaries. The subsidiaries did not make adequate reports to GB. Lopez and Saldise made no effort to protect GB from currency exchange risks. Despite its poor financial position, GB spent over

[33]Lopez obtained a legal opinion from an outside law firm in January 1988 stating that GB had authority to invest in the Spanish Subsidiaries. The opinion did not address the safety and soundness of the investment.

[34]If the institution had properly recognized its problem assets, it would have failed to meet minimal capital requirements at the time of the investment. Teed Tr. at 2442.

$213,000 in unreimbursed expenses related to the Spanish Subsidiaries. Most expenses were incurred to maintain a luxury apartment, furnishings and an automobile for Lopez and Saldise while they resided in Spain.

The FHLBB learned of the investment during the 1988 examination and demanded that the $4.2 million be returned to GB. GB management refused. The investment in the Spanish Subsidiaries was classified as doubtful in the 1988 examination and GB was required to establish a reserve equal to 50 percent of its $4.2 million investment. GB never received any dividends or return from the investment.

After the RTC was appointed as receiver, it attempted, through the Federal Deposit Insurance Corporation (the "FDIC"), to obtain control of the Spanish Subsidiaries. Written demands and a court action proved unsuccessful in forcing the Spanish Subsidiaries to hold shareholders meetings at which the RTC could assert ownership. The entire investment, thus, was lost to GB.

4. <u>Other Transactions</u>

a. <u>Conflict of Interest - Saga Bay</u>

In the Saga Bay transaction, Lopez and Saldise exploited their positions of trust with GB to make a loan to a third party. The loan facilitated a transaction in which they had a personal interest and in which they gained a substantial benefit.

On June 4, 1984, Antonio Estevez acquired an option from the State Mutual Life Insurance Company ("SMLIC") to purchase 203 single family lots, townhouse lots, and undivided land in Saga Bay, Florida, for $1.4 million. Lopez, Saldise, Estevez and Estevez' wife agreed to hold this option as partners.[35] The option cost $65,000. Estevez paid $25,000 and Respondents paid $40,000 out of a trust account at the Lopez and Saldise law firm.[36] Thereafter, Respondents and Estevez formed a corporation, New Saga Corporation ("New Saga") to hold the option.[37]

On July 3, 1984, Lopez orchestrated a sale of 113 single family lots in the Saga Bay tract covered by the option to H.G. Land Development Co. ("HG Land") for $1,243,000. Lopez also arranged for GB to finance the sale by making a $3.5 million acquisition and development loan to HG Land. Lopez signed the GB commitment letter and his initials appear on the Loan Committee Action and Docket Sheet approving the loan. The loan closed on September 11, 1984. The loan closing statement, prepared by Saldise's law firm, specified that $1.2 million of the loan was to be used for the acquisition of land. The $1.2 million allotted to land acquisition was sufficient to pay substantially all of the purchase price for the entire Saga Bay tract, not only the property to be acquired by HG Land. Respondents' interest in

[35]Lopez and Saldise owned an undivided 50% interest in the option and Estevez and his wife owned a owned the other 50% of the option.

[36]Lopez and Saldise were the founding principals of the Lopez and Saldise law firm. In 1980 or 1981, Lopez resigned from the firm and Saldise was the sole owner. Tr. Fernandez. at 100-01.

[37]Lopez, Saldise, Estevez and his wife were equal owners of New Saga Corporation.

the transaction, however, was not disclosed to GB in the loan closing documents.[38]

On September 14, 1984, SMLIC conveyed title of the 113 single family lots to HG Land. The remaining 90 single family lots, the townhouse lots and the undivided land were conveyed to New Saga.[39] A closing statement dated September 18, 1984 jointly addressed the two SMLIC transfers and showed a total purchase price of $1.4 million for the entire tract. HG Land paid $1.2 million at closing. New Saga or the individual shareholders of New Saga paid only $200,000 for closing costs.[40] Each parcel was worth approximately $2 million in 1984. As a result of this transaction, Lopez and Saldise, through their interest in New Saga, acquired a 50% interest in land valued at $2 million in return for a nominal, if any, expenditure.

The GB board, including Lopez and Saldise, reviewed the HG Land loan on September 26, 1984.[41] Neither Respondent disclosed their interests in the transaction to the board.

Thereafter, Respondents attempted to conceal their interest in the Saga Bay property from the FHLBB. In 1988, another bank

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[38]OTS Ex. 70. M. Fernandez Tr. 181-86.

[39]Prior to the SMLIC transfer, Estevez assigned the options to respective portions of the Saga Bay tract to HG Land and New Saga.

[40]Estevez Tr. 1506.

[41]Contrary to the findings of the ALJ, the board did not ratify the loan at this meeting. Exhibit 77 indicates only that the board reviewed and discussed loans including the Saga Bay loan.

demanded payment on letters of credit that GB had issued in lieu of performance bonds on the Saga Bay property. Because Lopez feared that the payment would expose Respondents' interest to FHLBB examiners, he caused the Lopez and Saldise law firm to pay bond premiums due on the HG Land parcel in lieu of GB payment.

b. Preferential Treatment on Personal Loans

Lopez obtained improper preferential treatment on a series of personal loans from GB from 1986-89. He is in default on the last of these loans.

The 1983 FHLBB Supervisory Agreement, signed by Lopez, stated that GB would not allow its officers, directors or employees to make late payments on personal loans. Beginning in January 1986, GB made a series of unsecured personal loans to Lopez. Lopez routinely made late payments of principal and interest. GB continued to extend credit to Lopez despite these late payments and the receipt of adverse credit reports in January 1987 and March 1988. GB did not require Lopez to explain these adverse reports. FHLBB examination reports during the relevant periods criticized GB's noncompliance with the 1983 FHLBB Supervisory Agreement, including the loans to Lopez.[42]

The final loan was made in July 1989. Principal and interest payments were due on maturity in July 1990. Lopez has not made payments on this loan despite written demands. The outstanding principal is $100,000. Accrued interest was

[42]OTS Ex. 86 at 1 (Report Summary), 18-19; OTS Ex. 269 at 7-13; OTS Ex. 268 at 1 (Report Summary); L&S Ex. 2 at 2.18 - 2.19.

$39,126.68 on April 1, 1993. Interest continues to accrue at the rate of $21.85792 per day.

c. GB Purchase of Art for Personal Use

Lopez and Saldise personally chose, directed and authorized the purchase of all art by GB. By June 30, 1988, GB's collection consisted of 18 pieces with a book value of $780,000. Lopez and Saldise displayed art from GB's collection at their residence for considerable periods of time from 1987 through 1989. The use of this art at their residence was solely for their personal benefit and enjoyment, rather than for GB business purposes.

By letter dated March 27, 1989, and in sworn testimony before OTS representatives on August 14-15, 1989, Lopez falsely denied that art purchased by GB or any of its subsidiaries was displayed in his home and denied that he had made any personal use of GB art.

d. Charitable Contributions in Violation of Supervisory Directive

On two separate occasions in August 1989, the OTS Supervisory Agent directed GB to refrain from incurring any unnecessary expenses, including political, charitable or civic contributions, due to GB's critical capital deficiency. Nonetheless, one month later, Lopez directed GB to issue three charitable contributions in September 1989 including: a $2,000 check to the University of Miami, a $500 check to the Cuban Museum of Art, and a $3,000 check (subsequently voided) to the Cuban Museum of Art. Lopez and Saldise served on the board and were substantially involved in the affairs of the Cuban Museum of Art.

C. The ALJ's Recommended Decision

The ALJ found that Respondents engaged in unsafe and unsound practices, violated applicable laws and regulations, violated supervisory directives and written supervisory agreements with the agency, and breached their fiduciary duties to GB. Accordingly, the ALJ recommended the issuance of Cease and Desist and Prohibition Orders based on the following transactions: Respondents' illegal acquisition of control of GB in 1982; the improper recapitalization and dividend in 1989; the investment in, and Respondents' exercise of control over, the Spanish Subsidiaries; Respondents' participation in the Saga Bay transaction; the preferential treatment on Lopez' personal loan; Lopez and Saldise's personal use of GB art; and GB's charitable contributions in violation of a supervisory directive.

In connection with the Cease and Desist Order, the ALJ recommended that Respondents, jointly and severally, be required to make restitution of $11,261,626 and to take additional affirmative action, as follows:

$5,000,000 - The ALJ recommended this amount as restitution for GB losses from the sham recapitalization and dividend including: $4 million for the loss of FMI; and $1 million for losses from the transfer of the Brickell Bay property from GB to FMI.

\$5,120,000[43]	-	For GB losses from the Spanish Subsidiaries, the ALJ recommended restitution of: \$4,200,000 for the loss of GB's initial investment; "lost opportunity loss" of \$625,000; and \$213,000 in unreimbursed expenses. The ALJ further recommended that if the amount of restitution ordered with respect to the Spanish Subsidiaries was not recovered, Lopez and Saldise should be required to take the additional affirmative action of endorsing stock certificates of the Spanish Subsidiaries to the RTC.
\$1,000,000	-	The ALJ recommended restitution of this amount for the Saga Bay Transaction.
\$ 139,126	-	For GB losses from Lopez' personal loan, the ALJ recommended restitution of this amount plus per diem interest of \$21.87 beginning April 1, 1993.
\$ 2,500	-	The ALJ recommended restitution of this amount for GB losses from charitable contributions in violation of an OTS supervisory directive.

The ALJ rejected Enforcement's request for payment of certain costs of investigation and litigation in this proceeding.

Finally, the ALJ found that Respondents violated the Holding Company Act, the Control Act, regulations promulgated under these acts and the Conversion Regulations, and directed the Respondents to pay, jointly and severally, \$4,860,171.50, in CMPs.

D. Consideration of Respondents' Exceptions

Enforcement argues that, by their failure to file timely proposed findings of fact or conclusions of law with the ALJ, Respondents waived the right to raise any exceptions to the Recommended Decision. The OTS Rules of Practice provide:

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[43]The Recommended Decision's "\$5,120,000" is an arithmetic error. The sum of these figures is \$5,038,000.

> Any party who fails to file timely with the administrative law judge any proposed finding or conclusion is deemed to have waived the right to raise in any subsequent filing or submission any issue not addressed in such party's proposed finding or conclusions.[44]

The Acting Director agrees that there has been a waiver under the rules. However, because review of the record will of necessity overlap with certain of Respondents' exceptions, the Acting Director will address these exceptions.[45] Exceptions of the parties that are not specifically addressed in this Decision are denied.[46]

III. DISCUSSION

A. Cease and Desist and Prohibition Orders

1. Statutory Authority

The conduct at issue occurred before and after August 9, 1989, the effective date of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"). Under 12 U.S.C. § 1818(b), as amended by FIRREA, the OTS may issue a cease

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[44] 12 C.F.R. § 509.37(a)(2)(1993). See 12 C.F.R. § 509.39(b)(2)(1993) ("No exception need be considered by the Director if the party taking exception had an opportunity to raise the same objection, issue, or argument before the [ALJ] and failed to do so.")

[45] See 12 C.F.R. § 509.40(c)(1993).

[46] Respondents raise numerous general exceptions to the ALJ's Recommended Decision that fail to clearly identify issues for review. See 12 C.F.R. § 509.39(c)(1993). Even leaving aside the waiver issue, these general objections will not be considered or addressed in this Decision. See In re Simpson, Decision and Order, OTS Order No. AP 92-123, 15, n. 14 (Nov. 18, 1992)(appeal pending).

and desist order against an institution-affiliated party who, inter alia, engaged in an unsafe or unsound practice in conducting the business of an institution,[47] or who violated a law, rule or regulation, or any written agreement entered into with the agency.[48] The standards supporting the issuance of a Cease and Desist Order are essentially the same for pre- and post-FIRREA conduct.[49]

The agency may also require a party to "take affirmative action to correct the conditions resulting from any such violation or practice" under either the pre- or post-FIRREA statute.[50] The post-FIRREA statute clarifies that the OTS may

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[47]Unsafe and unsound practices involve conduct that is contrary to generally accepted standards of prudent operation of a financial institution, the possible consequences of which, if continued, may be abnormal risk, or loss or damage to an institution, its shareholders, or the Federal deposit insurance fund. See In re Keating, Final Decision and Order, OTS Order No. AP 93-85, 34-35 (Oct. 22, 1993)(appeal pending) and cases cited therein.

[48]The Acting Director rejects Respondents' argument that sanctions may be imposed under 12 U.S.C. § 1818 only if directors or officers engage in gross negligence. Respondents rely on RTC v. Gallagher, 10 F.3d 416 (7th Cir. 1993) which addressed the standard of liability for directors and officers in civil litigation initiated in United States District Court by the RTC in its capacity as receiver of a failed institution under 12 U.S.C. § 1821(k). Gallagher did not address the standards under 12 U.S.C. § 1818(b). Indeed, the Gallagher court observed that 12 U.S.C. § 1821(k) preserves the "ability to take other regulatory actions based on simple negligence" under removal and prohibition and cease and desist powers at 12 U.S.C. § 1818(b)-(g). 10 F.3d 420-21.

[49]See 12 U.S.C. § 1464(d)(2)(1982-88).

[50]12 U.S.C. § 1818(b)(1) and (6) and 12 U.S.C. § 1464(d)(2)(1988).

order restitution or reimbursement, indemnification, or guarantee against loss.[51] Restitution may be ordered if: (1) a party was unjustly enriched in connection with a violation or practice with respect to which a cease and desist order is issued; or (2) the violation or practice involved reckless disregard for the law or any applicable regulations or prior order of the appropriate Federal banking agency.[52] The OTS may order a party to make restitution for pre-FIRREA actions under these same standards.[53]

The statutory standard for issuing a Prohibition Order, however, differs according to whether the conduct was pre- or post-FIRREA. Compare 12 U.S.C. § 1818(e)(Supp. II 1990)(post-FIRREA conduct) with 12 U.S.C. § 1464(d)(4)(1988)(pre-FIRREA conduct). See also RD at pages 113-15 (ALJ's summary of pre- and post-FIRREA standards). While the post-FIRREA changes apply only to conduct that occurs after FIRREA's effective date,[54] FIRREA's

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[51] 12 U.S.C. § 1818(b)(6)(A). See H.R. Rep. No. 222, 101st Cong., 1st Sess. 439 (1989). The Acting Director rejects as meritless the Respondents' argument that restitution and civil money penalties must be determined in a trial before an Article III judge and must include the right to trial by jury under the Seventh Amendment. See In re Rapaport, Decision and Order, OTS Order No. AP 93-95, at 37-38 (Nov. 18, 1993)(appeal pending) and cases cited therein.

[52] 12 U.S.C. § 1818(b)(6)(A). The post-FIRREA statute also enumerates other remedies that the agency may impose as affirmative actions. 12 U.S.C. § 1818(b)(6)(B) - (F).

[53] See In re Keating at 25, citing Akin v. OTS, 950 F.2d 1180, 1183-84 (5th Cir. 1992).

[54] See Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. 101-73, 103 Stat. 183(1989), § 903(e).

expanded remedy of an industry-wide prohibition may be imposed for conduct occurring pre- or post- FIRREA.[55]

2. Application to Facts

a. Sham Recapitalization and Improper Dividend

Lopez and Saldise[56] engineered and implemented the sham recapitalization and dividend for their own benefit. They deliberately hid from Federal regulators GB's true capital position, then improperly deprived GB of valuable assets that they distributed to themselves. Respondents engaged in unsafe and unsound practices, regulatory violations and breaches of their fiduciary duties in connection with this transaction.

Respondents' scheme required GB to engage in regulatory violations and other imprudent practices that fell far below acceptable standards of operation of a financial institution including: the acceptance of capital contributions from an impermissible source; the acceptance of another infusion without substantiating its dubious value and despite serious regulatory deficiencies, including LTOB limitations at 12 C.F.R. § 563.9-3(b)(1989), that precluded its acceptance; and the issuance of a

[55] In re Keating, at 26; In re Simpson, at 34, n. 31; In re Lopez, Decision and Order, OTS Order No. AP 92-33 (April 15, 1992); and In re O'Keeffe, Decision and Order, FHLBB Res. No. 89-773, 13-15 (Apr. 26, 1990).

[56] Lopez, as chairman of the board, chief managing officer or president, director, and controlling shareholder, and Saldise, as a director and controlling shareholder, were institution-affiliated parties under 12 U.S.C. § 1813(u)(Supp. II 1990), and were directors, officers, employees, agents or other persons participating in the conduct of the affairs of GB under 12 U.S.C. § 1464(d)(2)(1988).

dividend of valuable subsidiaries (including real property transferred from GB to the subsidiaries at less than fair market value in anticipation of the dividend) while GB did not meet regulatory capital requirements, in violation of 12 C.F.R. § 563b.3(g)(2)(1989). Respondents engaged in further imprudent practices by withholding relevant information regarding the source of capital contributions from other directors and officers and by concealing essential facts from the regulators after the transaction was complete. Their false claim of capital compliance and the subsequent dividend of valuable assets based on this assertion exposed GB and the insurance fund to an undue risk of loss or damage.[57] Accordingly, the Acting Director concludes that each of these actions constituted an unsafe and unsound practice.

Respondents also violated their fiduciary duties of care, loyalty and candor to the institution. These violations constitute additional unsafe and unsound practices.[58] Lopez, as a director and managing officer, and Saldise, as a director of GB, owed a duty of care to GB that required them to exercise that degree of care which ordinarily prudent and diligent persons would exercise under similar circumstances. This duty requires directors to act diligently, prudently, honestly, and carefully

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[57]Respondents suggest that GB suffered no risk, loss or damage because the subsidiaries provided GB with $4.5 million in cash prior to the issuance of the dividend. GB, however, made no attempt to determine whether this return fairly reflected the fair market value of the subsidiaries. This claim is rejected.

[58]See Brickner v. FDIC, 747 F.2d 1198, 1202 (8th Cir. 1984); In re Seidman, Decision and Order, OTS Order No. AP 92-149, 30 (Dec. 4, 1992)(appeal pending); In re M, Decision and Order, FHLBB Res. 89-537, 42 (Mar. 6, 1989).

to ensure their institution's compliance with state and Federal banking laws and regulations.[59] Respondents' actions, as detailed above, fell far below the degree of prudence, honesty, and care expected from fiduciaries to a financial institution. Accordingly, the Acting Director concludes that Respondents violated this duty, a further unsafe and unsound practice.

Directors and officers also owe a duty of loyalty to their institutions:

> This duty requires directors and officers to administer the affairs of the institution with candor, personal honesty and integrity. They are prohibited from advancing their own personal or business interest . . . at the expense of the institution. [citation omitted]. . . A director who may experience a direct or indirect benefit is required to abstain from participating in the matter in which he has a conflicting interest and from voting on the matter [citation omitted].

In re Simpson, at 20.[60] The recapitalization and dividend scheme was designed to serve the interests of Lopez and Saldise at the expense of the Association. Lopez and Saldise received substantial benefits from their receipt of the illegal dividends and hoped to receive other personal benefits by deceiving Federal

[59]In re Simpson, at 22; see also In re M, at 41-42. Officers are responsible for implementing the policies and business objectives set by the board and for running the day to day operations of the institution consistent with those policies and objectives and in compliance with the applicable laws, rules, and regulations and the principles of safety and soundness. The officers must provide directors with timely and ample information so that directors may discharge their responsibilities. Inside directors, such as Lopez, generally have a greater knowledge, and greater responsibility for management of the institution. In re Simpson, at 23.

[60]See also 12 C.F.R. § 571.7.

regulators.[61] Respondents pursued these improper personal objectives without regard for the legality of the transactions, the safety and soundness of the transaction, or fairness to GB. Rather than abstain from participating and voting on these transactions, Respondents acted to ensure that the scheme was consummated. The Acting Director concludes that Lopez and Saldise violated their duty of loyalty, an additional unsafe and unsound practice.

Finally, Lopez and Saldise had a duty of candor to GB which required full disclosure of all material nonprivileged information relevant to a corporate decision from which he or she may derive a personal benefit.[62] Rather than disclose the complete details of their sham transactions to GB's directors and officers, however, Respondents concealed essential facts concerning the source of funds for the recapitalization. The action violated their duty of candor, a further unsafe and unsound practice.

Based on these unsafe and unsound practices and regulatory violations the Acting Director will issue a Cease and Desist Order against Respondents.

Restitution will be ordered under the standards set forth in 12 U.S.C. § 1818(b). Respondents were unjustly enriched by their

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[61]The sham recapitalization was intended to misrepresent the capital position of GB, prevent a receivership and, thus, protect Respondents' substantial investment in the Association.

[62]In re Bush, Decision and Order, OTS Order No. AP 91-16, 17 and 21 (Apr. 18, 1991); In re Simpson, at 27.

receipt of significant personal benefits from the improper dividend of valuable subsidiaries to GB shareholders. See 12 U.S.C. § 1818(b)(6)(A)(i).[63] Moreover, Respondents' attempts to mislead GB's regulators, officers and directors regarding compliance with capital requirements, and their distribution of GB assets to themselves were calculated and deliberate, and support a finding that Lopez and Saldise acted with reckless disregard for the law and applicable regulations. See 12 U.S.C § 1818(b)(6)(A)(ii).[64]

The ALJ recommended restitution of $5 million including $4 million to compensate GB for the loss of FMI and $1 million for losses associated with the transfer of the Brickell Bay property. The record supports the ALJ's findings that Respondents should be required to make restitution of $4 million for the loss of FMI. The OTS Supervisory Agent's uncontroverted testimony was that FMI's fair market value was within the range of $6 to $11 million. He explained that FMI's fair market value was 2.5 to 3 times its net worth. FMI's annual financial statement[65] supports the view that FMI's net worth at the time of the spin off was

[63] Unjust enrichment is broadly construed. A respondent is unjustly enriched when he gains a "significant personal benefit." Akin v. OTS, 950 F.2d at 1183-84.

[64] Reckless disregard for the law, applicable regulations, or an agency order exists when: (1) the party acts with clear neglect for, or plain indifference to, the requirements of the law, applicable regulations or agency orders of which the party was, or with reasonable diligence should have been, aware; and (2) the risk of loss or harm or other damage from the conduct is such that the party knows it, or is so obvious that the party should have been aware of it. In re Simpson, at 19.

[65] OTS Ex. 143 - Annual Statement of the Condition and Affairs of First Miami Insurance Company for the year ended December 31, 1989 (including data for prior year 12/31/88).

between $2.2 and $4 million, producing a fair market value in the range of $6 to $11 million. Respondents offered no contrary evidence, and it was within the ALJ's discretion to credit the testimony of the Supervisory Agent regarding the range of valuation. Based on this testimony, the ALJ computed the restitution amount by deducting $4.5 million -- the amount that FMI provided to GB to reduce the book value of GB's investment to zero -- from the Supervisory Agent's range, and selected the mid-point of the resultant range, $4 million, as the appropriate amount of restitution. RD at pages 165-66. The Acting Director will adopt the ALJ's conclusion regarding the valuation of FMI.

The Acting Director is concerned that the additional restitution of $1 million that the ALJ recommended for the value of the Brickell Bay property may provide a double recovery to GB. This issue cannot be resolved on the present record. The attached Order therefore requires the parties, within set timeframes, to make submissions to the Acting Director addressing the limited issue whether the $4 million in restitution for FMI includes compensation for the Brickell Bay property. Any additional facts must be stated in sworn affidavits. The Acting Director will issue a supplementary order resolving this issue following the submission of these documents.

In addition to the Cease and Desist Order, the Acting Director will impose an industry-wide Prohibition Order against Lopez and Saldise for the recapitalization and dividend transaction.[66] As a result of the unsafe and unsound practices, regulatory violations and fiduciary breaches described above, GB was illegally deprived of its subsidiaries and suffered substantial financial loss of at least $4 million, and Lopez and Saldise received a financial gain from the illegal dividends. Respondents' actions reflect a calculated, purposeful and deliberate attempt to mislead GB's regulators, officers and directors, and to convert GB assets to their own benefit. The evidence supports a finding that Lopez and Saldise acted with personal dishonesty,[67] and demonstrated willful and continuing disregard[68] for the safety and soundness of GB.

b. Unsafe and Unsound Investment - Spanish Subsidiaries

Lopez and Saldise established and operated the Spanish Subsidiaries in a manner wholly inconsistent with generally

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[66]The Prohibition Order is supported under both the pre- and post-FIRREA standards. 12 U.S.C. § 1464(d)(1988) and 12 U.S.C. § 1818(e)(Supp. II 1990).

[67]Personal dishonesty encompasses a broad range of conduct, including "disposition to lie, cheat[,] or defraud; untrustworthiness; lack of integrity[;] . . . misrepresentation of facts and deliberate deception by pretense and stealth[;] . . . [or] want of fairness and [straightforwardness]. Van Dyke v. Board of Gov. of Federal Reserve System, 876 F.2d 1377, 1379 (8th Cir. 1989); In re Seidman, at 26, n. 28.

[68]Willful disregard for the safety or soundness of an insured institution is established when an individual a) purposely, as opposed to accidentally, commits an act and that act evidences neglect or lack of thoughtful attention to the institution's safety or soundness, or b) acts with plain indifference to the institution's safety and soundness. Continuing disregard, by contrast, requires some showing of knowledge of wrongdoing, but it does not require proof of the degree of intent as willful disregard. See In re Kim, Decision and Order, OTS Order No. AP 93-30, 22-23 (Apr. 15, 1993).

accepted standards of prudent operation of a financial institution and in violation of their fiduciary duties of care and loyalty.

With knowledge of GB's poor financial condition, Lopez and Saldise directed the Association to make a significant investment in Spain equal to 40 to 50 percent of GB's capital, without the approval of the board, without adequate analysis of economic risks, without insulation from currency exchange risk, and without considering the compatibility of the investment with GB's business plan. Thereafter, the subsidiaries received inadequate managerial oversight and failed to maintain adequate books and records. GB also incurred excessive expenses to maintain Respondents while they resided in Spain. These actions fell far below acceptable standards of operation of a financial institution and subjected GB and the insurance fund to an undue risk of loss or damage from the investment. Accordingly, the Acting Director finds that Respondents engaged in unacceptable unsafe and unsound banking practices and clear violations of Respondents' fiduciary duties of care, a further unsafe and unsound practice.

Additionally, despite GB's poor financial position, Lopez and Saldise lived in luxury in Spain at GB's expense. This conduct advanced their personal interests at the expense of the institution and breached their fiduciary duties of loyalty, an additional unsafe and unsound practice.

Based on these unsafe and unsound practices,[69] the Acting Director will issue a Cease and Desist Order.

Restitution for the Spanish Subsidiaries is warranted under the reckless disregard standard. Respondents neglected the most basic requirements for inquiry into the safety and soundness of a proposed investment. They directed GB to make the investment without board agreement, without adequate analysis, and without any experience in any Spanish enterprise or any secondary mortgage market. This by itself is reckless; it is underscored by GB's precarious capital position and the inherently risky nature of the foreign enterprise. Respondents compounded the recklessness of the investment by their failure to manage and oversee the operations of the subsidiaries. Under these circumstances, the risk of loss to GB from Respondents behavior was so extraordinary and so apparent that Respondents either knew or must have known of it.[70] Accordingly, Respondents will be required to make restitution of $5,002,715 including: $4.2 million for the return of GB's investment, $213,000 for expenses incurred by GB in connection with the Spanish Subsidiaries, and

[69]Enforcement also argued that Lopez and Saldise improperly asserted control over the Spanish Subsidiaries following the receivership. The Acting Director does not find it necessary to address this issue. It is sufficient for the purposes of ordering restitution that Respondents caused GB to make an unsafe and unsound investment and structured the investment in a manner that prevented the RTC from asserting control.

[70]Lopez and Saldise also received significant personal benefits in connection with GB's payment of expenses of $213,000 for the Spanish Subsidiaries. The Acting Director concludes that Respondents were unjustly enriched to the extent that GB provided them with luxurious accommodations in Spain and other benefits such as the transportation of their personal maid and pets from Florida to Spain.

$589,715 reflecting GB's loss of use of the $4.2 million before going into receivership.[71]

In addition to restitution, Enforcement sought the affirmative remedies of requiring Respondents to endorse, or cause to be endorsed, to the RTC all of the stock certificates or other indicia of ownership, legal or beneficial, of the three Spanish Subsidiaries that they own or control, directly or indirectly; and to resign from any positions they hold as employees, officers, directors or consultants with the Spanish Subsidiaries. The restitution calculated above is intended to compensate GB for the loss of its original investment in the Spanish Subsidiaries. This amount may not fully compensate GB, however, because it does not include the recovery of any profit (above $589,715) that the subsidiaries may have generated subsequent to GB's initial investment. Since the current valuation of the subsidiaries is not of record in this proceeding, that return, if any, cannot be ascertained. To ensure that GB is not deprived of this return, however, the relief sought by Enforcement will be ordered. The Acting Director is aware that the retention of the restitution and the stock certificates may result in a double recovery to GB.

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[71]Restitution based on a breach of fiduciary duty may include an amount for loss of use of the property. <u>See</u> Restatement of Restitution §§ 138, 156, 157. The award for loss of use of the $4.2 million investment differs slightly from the ALJ's recommendation of $625,000. In his discretion, the Acting Director believes that, in the absence of proof of another investment specifically foregone, the best measure of loss of use is the rate on one-year United States Treasury Bills. <u>See</u> 28 U.S.C. § 1961(a). The rates in February 1988 and February 1989 were, respectively, 6.65% and 9.24%. This calculation takes into account that the period of the loss of use was 21 months.

Accordingly, he anticipates that the GB receiver will, upon receipt of the restitution and Respondents' performance of the affirmative actions described above and upon gaining control of the Spanish Subsidiaries, keep only the greater of $5,002,715 or the actual value of the Spanish Subsidiaries plus $213,000 in expenses.

Finally, the Acting Director will issue an industry-wide Prohibition Order against Lopez and Saldise for the Spanish Subsidiary investment based on 12 U.S.C. § 1464(d).[72] By reason of the fiduciary breaches and unsafe and unsound practices discussed above, GB suffered a substantial financial loss, and Lopez and Saldise received a financial gain to the extent that they were provided with luxurious accommodations in Spain. Based on Respondents' neglect for the most basic requirements for an inquiry into the safety and soundness of a proposed investment, their disregard of GB's precarious financial condition and the need for board approval of the investment, their initial and continuing failure to manage and oversee the operations of the subsidiaries, and their self-interested conduct with respect to expenses incurred on their behalf by GB, the Acting Director further concludes that Respondents' actions were purposeful and taken in willful and continuing disregard for the safety and soundness of the institution.

[72]The issuance of a Prohibition Order based on the Spanish Subsidiary investment is based on the pre-FIRREA prohibition statute.

c. Other Transactions

i. Conflict of Interest - Saga Bay

In connection with the Saga Bay transaction, the Acting Director will issue a Cease and Desist Order against both Respondents based on three sets of wrongful action. First, Lopez promoted and participated in the issuance of a GB loan that enabled HG Land to purchase real estate in which Lopez and Saldise had a financial interest. This self-dealing constituted a clear conflict of interest in violation of Lopez' duty of loyalty, and an unsafe and unsound practice. Second, Respondents failed to disclose information to the board regarding their interest in the loan at the time of the transaction. These actions violated each Respondent's fiduciary duty of candor, and constituted an unsafe and unsound practice. Third, Lopez and Saldise indirectly received compensation in connection with Lopez' procurement of a loan from GB on behalf of HG Land in violation of FHLBB regulations at 12 C.F.R. § 563.40(a)(1984).[73]

Restitution will be ordered on the two bases -- unjust enrichment and reckless disregard -- set forth in 12 U.S.C. §

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[73]This regulation provided: "No affiliated person of an insured institution may receive, either directly or indirectly, [from any source] any fee or other compensation of any kind in connection with the procurement of any loan from such institution. . ." The Acting Director rejects Respondents' exception that they did not receive compensation "in connection with the procurement of a loan." The loan to the Saga Bay developer was made for the purpose of purchasing property in which Respondents had an undisclosed interest. Based on this interest, compensation received by Respondents from the sale of the Saga Bay tract was obtained "in connection with" Lopez' loan procurement activities in violation of 12 C.F.R. § 563.40(a). See In re Simpson, at 27, n. 26.

1818(b)(6)(A). Respondents' receipt of significant personal benefits through their 50 percent interest in New Saga Corporation constitutes unjust enrichment.

Additionally, Lopez ensured the approval of a loan to advance a transaction in which he and Saldise had an interest. For her part, Saldise directed her law firm to prepare loan closing documents disguising Respondents' interest in the transaction. Both exhibited clear disregard for, and indifference to, the standards governing their conduct. Their failure to disclose their interest at the time of the transaction and their subsequent attempts to hide the transaction from the regulators also reflects their clear neglect for, and plain indifference to the law. Their promotion of the HG Land loan, which overstated land acquisition costs to include both the HG Land and New Saga Corporation parcels, so obviously increased the risk of loss on the HG Land loan that Respondents knew or should have known of the increased risk to GB.

Respondents argue that restitution may not be ordered in the absence of a showing that GB suffered any loss. The Acting Director disagrees. Section 1818(b)(6) authorizes the OTS to require an institution-affiliated party to "make restitution or provide reimbursement, indemnification, or guarantee against loss." Respondents mistakenly assume that the phrase "against loss" in the statute modifies "restitution," contrary to the unambiguous language of the statute. Moreover, read in its entirety, 12 U.S.C. § 1818 manifests a purpose of granting broad authority to financial institution regulators to check abuses by institution insiders.[74] A restrictive interpretation is inconsistent with such a broad grant. Accordingly, the Acting Director concludes that section 1818(b)(6)(A) authorizes the OTS to require Respondents to disgorge unjust gains even in the absence of an actual loss to the institution involved.[75]

The ALJ recommended that Respondents be required to pay restitution of $1 million, the amount of their unjust enrichment. This recommendation does not consider costs that may have been incurred by Respondents to acquire their interest in the Saga Bay purchase option ($40,000), or closing costs incurred by New Saga or one or more of its shareholders in the purchase of the Saga Bay land from SMLIC (approximately $200,000). Because the present record does not identify who bore particular costs, the attached Order requires the parties to make submissions regarding whether any offset should be made to the restitution amount to reflect expenditures by Respondents. The submissions shall address the amount of the costs identified above, and the identity of the person or entity that incurred these costs. The Acting Director will issue a supplementary order resolving this issue upon the submission of this additional documentation.

The Acting Director will issue an industry-wide Prohibition Order based on the Saga Bay transaction under 12 U.S.C. §

[74] Akin v. OTS, 950 F.2d at 1184. See 12 U.S.C. § 1818(b)(2), (b)(6)(A) and (b)(6)(F).

[75] See Simpson at 32-33 (institution-affiliated party was required to reimburse the benefits received from his usurpation of an institution's corporate opportunity, even though there was no quantification of the loss to the institution.)

1464(d).[76] As a result of the fiduciary breaches, unsafe and unsound practices, and regulatory violation described above, Respondents shared a financial gain in an amount yet to be determined, but at least approximately $760,000. Lopez' self-interested conduct, lack of candor and attempts to hide the transaction from Federal regulators demonstrate both personal dishonesty and willful and continuing disregard for the safety and soundness of the institution.[77] Similarly, Saldise's lack of candor and her efforts, through her law firm, to conceal Respondents' interest in this transaction from GB and the Federal regulators, reflect personal dishonesty and willful and continuing disregard for the safety and soundness of the institution.

ii. Preferential Treatment on Personal Loans

Lopez used his position with GB to obtain improper preferential treatment on personal loans. This preferential treatment allowed Lopez to obtain extensions of credit without explaining derogatory credit reports, to make late payments of principal and interest, and finally to default on a loan. By these actions, Lopez caused GB to violate the 1983 FHLBB Supervisory Agreement and to engage in unsafe and unsound

[76] All conduct occurred before the effective date of FIRREA.

[77] In re Seidman, at 26-27.

practices.[78] These actions also violated Lopez' fiduciary duty of care to GB, a further unsafe and unsound practice. Moreover, his failure to make timely loan payments or pay the principal advanced Lopez' personal interest at the expense of GB, in violation of his fiduciary duty of loyalty.[79] Based on these actions, the Acting Director will issue a Cease and Desist Order against Lopez.

GB suffered a loss from these violations and practices in the amount of $139,126.68 as of April 1, 1993, and continues to suffer daily losses of $21.85792 in accrued interest on this debt. Restitution is appropriate under either of the two alternative grounds set forth in 12 U.S.C. § 1818(b)(6)(A). Lopez was unjustly enriched because he received a significant personal benefit from his failure to honor his obligation to repay $100,000 in principal and to pay additional amounts in accrued interest on the loan. Additionally, Lopez acted with reckless disregard for the law because he acted with plain indifference to, and willfully ignored, the 1983 FHLBB Supervisory Agreement executed on behalf of GB. That agreement specifically forbade late payments on personal loans to GB officers and directors. Moreover, the conduct of a thrift director in making late payments and defaults to his own inadequately capitalized institution presented a danger of harm

[78] See First State Bank of Wayne County v. FDIC, 770 F.2d 81 (6th Cir. 1985)(a bank's failure to establish and enforce programs for the repayment of loans is an unsafe and unsound practice).

[79] In re Simpson, at 20, In re Bush, at 13-16. See In re O'Keeffe, at 41 (failure to make payments in accordance with loan terms constitutes a violation of the fiduciary duty of loyalty).

or loss to GB so obvious that Lopez knew or should have known of the risk. Accordingly, the Acting Director will order Lopez to make restitution of $139,126.68 plus interest computed at $21.85792 for each day after April 1, 1993 until payment.

The Acting Director will also issue an industry-wide Prohibition Order against Lopez under 12 U.S.C. § 1464(d)(1982-1988) and 12 U.S.C. § 1818(e)(Supp. II 1990). As a result of Lopez' pre- and post-FIRREA participation in unsafe and unsound practices and fiduciary breaches and his post-FIRREA violation of the 1983 FHLBB Supervisory Agreement,[80] GB suffered a substantial financial loss in the amount of $139,126.68 as of April 1, 1993, plus accumulated interest from that date, and Respondent received a financial gain of an equivalent amount. In light of his knowledge of the 1983 FHLBB Supervisory Agreement and his continuing refusal to honor his obligations under the loan, the Acting Director concludes that Lopez acted with willful and continuing disregard for the safety and soundness of GB.

iii. GB Purchase of Art for Personal Use

Respondents engaged in unsafe and unsound practices and breached their fiduciary duties of care and loyalty to GB by using Association funds to purchase art that Lopez and Saldise then displayed in their residence during 1987-89 solely for their personal enjoyment. In addition, Lopez falsely denied, in a written letter to the FHLBB and in sworn testimony before OTS

[80]Violations of agency agreements occurring before the effective date of FIRREA do not support the issuance of a Prohibition Order. Compare 12 U.S.C. § 1464(d)(4)(A) with 12 U.S.C. § 1818(e)(1)(A)(i).

representatives, that art purchased by GB was displayed in his home and that he made personal use of the art. These denials violated regulations that prohibit the making of false or misleading statements to the agency.[81] As recommended by the ALJ, the Acting Director will issue a Cease and Desist Order against Lopez and Saldise.

The Acting Director will also issue an industry-wide Prohibition Order under 12 U.S.C. § 1464(d) based on Respondents' improper use of art.[82] Respondents received a tangible financial advantage from their improper use of GB funds to purchase art for use in their home. By causing GB to maintain significant holdings of non-producing assets for Respondents' personal use while GB was in a poor financial condition, Respondents demonstrated willful and continuing disregard for GB safety and soundness.[83]

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[81] 12 C.F.R. § 563.18(b)(1989) provided:

> No insured institution or director, officer, agent, employee, affiliated person, or other person participating in the affairs of such institution . . . shall knowingly . . . make any written or oral statement to the Board, the Corporation, or an agent, representative, or employee of either of them that is false or misleading with respect to any material fact or omits to state a material fact concerning any matter within the jurisdiction of the Board or Corporation.

[82] The record does not clearly establish that Lopez and Saldise used GB art in their home after the effective date of FIRREA. RD at pages 87-88, and 156-158. Accordingly, the allegations regarding Respondents' use of GB art are analyzed under the pre-FIRREA prohibition statute.

[83] Lopez' misrepresentations to the Federal regulator provide further support for the prohibition order against him.

iv. Charitable Contributions in Violation of Supervisory Directive

Lopez directed GB to make three charitable contributions in September 1989 in violation of an express OTS supervisory directive. This action was contrary to accepted standards of prudent operation of a financial institution, damaged GB's ability to address capital deficiencies, constituted an unsafe and unsound practice and violated Lopez' fiduciary duty of care to GB. Accordingly, a Cease and Desist Order will be issued against Lopez under 12 U.S.C. § 1818(b).

Based on Lopez' knowledge of, and indifference to, the directive and GB's precarious capital position, the Acting Director concludes that Lopez acted with reckless disregard for the law and prior orders of the OTS, and will direct him to make restitution for GB's loss in the amount of $2,500.[84]

An industry-wide Prohibition Order will be issued against Lopez under 12 U.S.C. § 1818(e)(Supp. II 1990). Lopez' unsafe and unsound practices and breaches of his fiduciary duty in connection with the charitable contributions caused GB to suffer a financial loss or other damage in the amount of $2,500. Based on his knowledge of a supervisory directive and of GB's precarious capital position, the Acting Director further concludes that Lopez' actions were purposeful and taken in

[84] 12 U.S.C. § 1818(b)(6)(A)(ii). While Lopez was involved in the affairs of the Cuban Museum, there is no evidence that he received a significant personal benefit or was unjustly enriched by the $500 contribution to the museum. 12 U.S.C. § 1818(b)(6)(A)(i). <u>See</u> <u>Akin v. OTS</u>, 950 F.2d at 1183-84.

willful and continuing disregard for the safety and soundness of GB.

3. Restitution for Investigation and Litigation Costs

Enforcement seeks restitution for $31,303 in investigation and litigation costs incurred by the OTS in connection with this proceeding. The ALJ found no statutory basis for such an award and recommended denial of this remedy. Enforcement excepted to this recommendation.

The Acting Director has found no case law addressing whether Section 1818(b) permits the imposition of the agency's litigation and investigation expenses on Respondents in an enforcement action.[85] It is true that under an analogous, although not identical, statute, section 10(c) of the National Labor Relations Act, litigation costs have sometimes been awarded. See, e.g., Food Store Employees Local No. 347 v. NLRB, 476 F.2d 546 (D.C. Cir. 1973), reversed on other grounds NLRB v. Food Store Employees, Local 347, 417 U.S. 1 (1974). However, because no analysis of these or any other possible models[86] has been

[85]However, in del Junco v. Conover, 682 F.2d 1338 (9th Cir. 1982), cert. denied, 459 U.S. 1146 (1983), a director was required, under the affirmative action provisions of 12 U.S.C. § 1818(b)(1), to make restitution of litigation costs incurred in an administrative enforcement proceeding, to the extent that these costs had been paid on his behalf by an institution which was also a party to the proceeding.

[86]See, e.g., 28 U.S.C. § 2412 which describes the circumstances under which costs may be awarded to prevailing parties in civil actions brought by or against the United States or any agency of the United States and the range of discretion of the courts in making those awards; and 5 U.S.C. § 504(a) which describes the circumstances under which fees and costs incurred by a prevailing party other than the United States may be awarded

offered, the Acting Director is reluctant to make this case the vehicle for resolving this issue. In his discretion, the Acting Director will affirm the ALJ's denial of costs. This result should not, however, be treated as precedent in future proceedings.

B. Civil Money Penalties

1. Violations of the Control Act, the Holding Company Act, Regulations Implementing these Two Acts, and the Conversion Regulations

The facts summarized in Section II.B.1. above amply demonstrate, and the ALJ properly concluded (RD at pages 117-26), that the Respondents acted together and in concert with others to acquire and hold a controlling interest in GB. Respondents knew that it was illegal for any person, either alone or in concerted action with others, to acquire over five percent of the voting stock of GB in the conversion or to hold over 25 percent of the voting stock of GB without the prior approval of the FHLBB. To evade this restriction, Lopez and Saldise implemented a scheme to control approximately 70 percent of GB stock. This scheme, including pooled payments, disguised control through nominees, forged signatures and withheld documents, permitted Respondents to illegally obtain and exercise control of GB and to conceal this control from Federal regulators for years. They added to their control in January 1986 by acquiring additional shares without prior FHLBB notice or approval.

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in connection with adversarial administrative adjudications.

The Control Act and the Holding Company Act prohibit the direct or indirect acquisition of more than 25% of the voting stock of a savings association without prior regulatory notice or regulatory approval.[87] The two acts prohibit similar activities, and the language of the two statutes and the elements of the offense under either statute are substantially similar.[88] However, where a "company" as defined in the Holding Company Act[89] acquires control of a savings association, the Holding Company Act governs the transaction. All other acquisitions of control are governed by the Control Act.[90]

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[87]The Control Act is violated when a person, acting directly or indirectly or through or in concert with one or more persons, acquires control of any insured depository institution through a purchase, assignment, transfer, pledge or other disposition of voting stock . . ." unless written notice was given to OTS. 12 U.S.C. § 1817(j)(1)(1988 & Supp. II 1990); 12 U.S.C. § 1730(q)(1982-88). The Holding Company Act makes it unlawful for any company directly or indirectly, or through one or more subsidiaries or through one or more transactions, to acquire control of one or more savings associations, without prior written approval by the OTS. 12 U.S.C. § 1467a(e)(1)(Supp. II 1990); 12 U.S.C. § 1730a(e)(1)(1982-88).

[88]In re Rapp, Decision and Order, OTS Order No. AP 92-148, 15-16 (Dec. 4, 1992)(appeal pending).

[89]"Company" under the Holding Company Act is defined as "any corporation, partnership, trust, joint-stock company, or similar organization [excluding certain government agencies and government-affiliated entities]." 12 U.S.C. § 1467a(a)(1)(C) (Supp. II 1990); 12 U.S.C. 1730a(a)(1)(C)(1988).

[90]The Control Act applies to acquisitions of control by "persons," which includes individuals, corporations, partnerships and other entities. 12 U.S.C. § 1817(j)(8)(A)(1988 & Supp. II 1990); 12 U.S.C. § 1730(q)(9)(1988). While the definition of "person" under the Control Act and "company" under the Holding Company Act overlap to the extent that corporations and partnerships are included under both definitions, the Control Act specifically states that it does not apply to transactions that are otherwise covered by the Holding Company Act. 12 U.S.C. § 1817(j)(17)(C)(1988 & Supp. II 1990) and 12 U.S.C. § 1730(q)(19)(1988).

In reliance on the substantial similarity between the two acts, the ALJ found that the Respondents either violated the Control Act or the Holding Company Act from August 20, 1982 through November 16, 1989. RD at pages 129-30. Because the Control Act and the Holding Company Act prescribe substantially different maximum daily CMP amounts,[91] the Acting Director must determine which statute has been violated before beginning the CMP calculation.

Under the Holding Company Act, a company is deemed to "control" a savings association if, inter alia, the company directly or indirectly, or acting in concert with one or more persons, or through one or more subsidiaries, owns, controls, or holds with the power to vote more than 25 percent of the savings association's voting shares.

Six entities meeting the definition of "company" under the Holding Company Act are relevant to this determination. They are Lopez Optical, Ray Optical, Discount Optical, the Lopez and Saldise Law Firm, FMI and GTM.

The role of Lopez Optical, Ray Optical, Discount Optical and Lopez and Saldise Law Firm was limited. The sole participation of the four companies was the provision of checks totalling $589,321 which was used to purchase stock in the name of various

[91]For pre-FIRREA violations compare the Control Act, 12 U.S.C. § 1730(q)(18)(maximum daily CMPs of $10,000 for willful violations) with the Holding Company Act, 12 U.S.C. § 1730a(j)(4) (maximum daily penalties of $1,000 for all violations).

individuals.[92] The evidence of record, however, indicates that the sources of funds for these checks were individuals in the Lopez and Saldise control group, rather than the four companies.[93] No GB stock was registered in the name of these four companies on GB's records; it does not appear that any of the companies recorded GB stock as assets; and there is no indication that these companies held the power to vote GB stock, directly or indirectly or through other persons, or that these companies otherwise participated in the control or management of GB. Under these circumstances, the Acting Director concludes that the companies' role was limited to that of acting as a conduit of personal funds from various individuals to GB for the purchase of GB stock in the name of others in the control group.[94] The acquisition was not subject to the Holding Company Act by virtue of the involvement of these companies.

On the other hand, FMI's ownership of GB common stock implicates the Holding Company Act. As more fully detailed in

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[92]Juan Lopez, Lopez' brother, provided an additional $100,000.

[93]The $200,000 for the Ray Optical and Lopez Optical checks was considered by the owners of the companies to be "personal funds" rather than funds belonging to the businesses. Tr. Yanes at 1074. The $100,000 for the Discount Optical check was provided by Ramon Lopez to Discount Optical for the purchase of stock, including shares registered to Rene Lopez (Ramon Lopez's son and one of the owners of Discount Optical). Rene Lopez never repaid his father. Similarly, the ALJ concluded that the $289,321 paid by the Law Firm was provided by Lopez and Saldise through the firm. RD at page 121. <u>See also</u> Stip. 25-32.

[94]There is no evidence that these companies provided credit, pledged assets, or were instrumental in obtaining financing for any individual for the acquisition of stock. <u>See</u> 12 C.F.R. § 574.4(d)(1).

Section II.B.1. above, after consummation of the August 1, 1989 recapitalization and spin-off transaction, FMI owned 17,437 shares of GB common stock; GTM owned 100% of FMI stock; and Lopez and Saldise, with other members of the control group, controlled approximately 80% of the GTM shares.[95] Because Lopez and Saldise, through their control group, controlled in excess of 25 percent of GTM's stock and because GTM owned 100% of FMI, Lopez and Saldise are deemed to have had control of both GTM and FMI.[96] Because GTM and FMI were companies which, with the Lopez and Saldise control group, directly or indirectly controlled over 25 percent of the voting stock of a savings institution, GTM and FMI became savings and loan holding companies.[97] Thus, this acquisition of control of GB without prior approval of the FHLBB violated the Holding Company Act beginning August 1, 1989.[98]

Based on the above discussion, the Director concludes that Respondents violated the Control Act from August 20, 1982, until August 1, 1989, and violated the Holding Company Act from August 1, 1989, through November 16, 1989.

In addition to the statutory violations, the ALJ correctly determined that the Respondents violated the Conversion Regulations, 12 C.F.R. Part 563b (1982-89); the FHLBB regulations implementing the Control Act at 12 C.F.R. § 563.18-3 (1982-

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[95]The GTM stock dividend was issued to series B preferred stockholders. Because GB common shareholders held the same proportionate interest in the series B preferred shares, the Lopez and Saldise control group acquired approximately 80% of the shares of GTM from the dividend. RD at page 61, FOF # 159-160.

[96]12 U.S.C. § 1730a(a)(2)(B)(1988).

[97]12 U.S.C. §§ 1730a(a)(1)(D); and 1730a(a)(2)(A) and (B).

[98]12 U.S.C. § 1730a(e)(1988).

85)(the "Control Regulations"); and FHLBB and OTS regulations implementing the Control Act and the Holding Company Act at 12 U.S.C. Part 574 (1986-89)("Acquisition of Control Regulations").[99]

The computation of CMPs imposed for these statutory and regulatory violations is discussed below.[100]

2. Civil Money Penalty Computation

The OTS is the appropriate agency to impose CMPs for violations of the Conversion Regulations, the Control Act and the Holding Company Act, and regulations implementing the Control Act and Holding Company Act.[101] A predicate for the imposition of

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[99]Some of the ALJ's findings under the Control Regulations and Acquisition of Control Regulations are incorrect as a result of today's determination regarding the applicability of the Control Act and Holding Company Act and other minor matters. For example, the ALJ retroactively applied the Acquisition of Control Regulations to Respondents because they had illegal control of GB on the effective date of the regulation (December 26, 1985). The Regulations, however, become applicable to transactions consummated prior to December 26, 1985 only when an acquiror subsequently acquires additional stock or an additional control factor. 12 C.F.R. § 574.3(c)(3); In re Rapp, at 18-19. Respondents acquired such additional stock, and the Acquisition of Control Regulations became applicable on January 8, 1986. Nonetheless, the ALJ's findings are generally sufficient to support a determination that the Control Regulations and Acquisition of Control Regulations were violated.

[100]Enforcement sought, and the ALJ recommended, the issuance of Cease and Desist and Prohibition Orders based on Respondents' illegal control of GB. This sanction was not requested in the Amended Notice of Charges and, as a matter of discretion, will not be imposed by the Acting Director.

[101]Prior to 1989, the Conversion Regulations authorized the Federal Savings and Loan Insurance Corporation ("FSLIC") to collect penalties for regulatory violation. 12 C.F.R. §

CMPs under the pre-FIRREA Control Act and the Conversion Regulations is a finding that the violations were "willful."[102] The record sufficiently demonstrates that Lopez and Saldise, at all times, knew that their conduct was illegal. Such conduct is sufficient to support a finding of willfulness.[103]

Rapp prescribes a five-step analysis to determine the appropriate amount of the CMP ("the Rapp analysis"). The steps are as follows: first, determination of the appropriate tier of

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563b.9(g)(1982-87); 12 C.F.R. § 563b.3(i)(9)(1988-89). Respondents argue that the FDIC, as the successor to the FSLIC, must seek CMPs for violations of the Conversion Regulations. This exception is rejected. FIRREA divided the FSLIC's responsibilities. In place of the FSLIC, it created the SAIF, a new thrift insurance fund under the administration of the FDIC. 12 U.S.C. § 1821(a)(6). The FSLIC's regulatory functions were transferred to the OTS. 12 U.S.C. § 1463(a)(1) and § 1464(d)(2)(A). See In re Rapaport, at 21.

[102] 12 U.S.C. § 1730(q)(17)(1982), redesignated at 12 U.S.C. § 1730(q)(18)(Supp. IV. 1986 & 1988) and 12 C.F.R. § 563b.9(g)(2)(1982-87); 12 C.F.R. § 563b.3(i)(9)(1988-89). An additional requirement for the assessment of CMPs under the Conversion Regulations is a finding that the violator either: (1) has any connection with management of the converting association; or (2) controls more than 10% of the institution stock. 12 C.F.R. § 563b.9(g)(2)(1982-87); 12 C.F.R. § 563b.3(i)(9)(1988-89). See ALJ's Conclusion of Law 3, RD at pages 178-79. Based on both Respondents' stock holdings and Lopez' position in management at GB, this requirement has been met.

[103] Willfulness in this context means knowing or reckless disregard for whether the conduct is illegal. See United States v. Illinois Central R. Co., 303 U.S. 239, 243 (1938). See also Miller v. FDIC, 906 F.2d 972, 974-75 (4th Cir. 1990)(knowing conduct is sufficient to show a willful violation under 12 U.S.C. § 1818(j)(16)(1988)).

Respondents argue that willfulness requires a further showing that they acted with a "bad purpose" citing United States v. Murdoch, 290 U.S. 389, 394 (1933). This position, however, misstates the law since Murdoch addresses willfulness in a criminal rather than a civil context.

the violation under the applicable statute; second, selection of the starting daily dollar amount for computation of the penalty; third, determination of whether the violation is "continuing;" fourth, application of the Federal Financial Institutions Examination Counsel ("FFIEC") factors;[104] and fifth, application of the statutory mitigating factors.[105] The Acting Director will apply the Rapp analysis de novo to reach a decision as to what penalties to impose against Respondents.[106]

a. Determination of the Tier. The first step, determining the tier of the penalty, is inapplicable. None of the statutes or regulations violated by Respondents impose tiered penalties.

b. Selection of the Starting Amount. The starting amount is "generally . . . the amount [of] the loss or risk of loss to the institution, or personal gain to the respondent, if either is present." In re Rapp, at 41.[107]

Respondents' illegal control permitted Lopez and Saldise to engage in the unsafe and unsound transactions, regulatory violations and breaches of fiduciary duty discussed in Section

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[104] Interagency Policy Regarding the Assessment of Civil Money Penalties by the Federal Financial Institutions Regulatory Agencies, 45 Fed. Reg. 59423 (1980).

[105] A complete explanation of the Rapp analysis is contained in In re Rapp, at 35-51 and In re Paul, at 31-68.

[106] In re Paul, at 33-34.

[107] Where conduct does not cause an identifiable or substantial loss or risk of loss or gain, Rapp recommends an amount equal to one-half of the amount of the statutory maximum penalty for the violation be selected as the starting amount. In re Rapp, at 41-42.

III.A. above. These actions caused significant quantifiable gains to Respondents and substantial quantified losses to GB (e.g., GB's total quantifiable losses were at least $9.1 million, exclusive of any additional losses from the transfer of the Brickell Bay property and additional losses from accruing interest on Lopez' loan). Enforcement suggested, and the ALJ selected, a starting amount of $1,000 per day for all violations for both Respondents jointly, a fraction of the maximum daily CMPs permitted by the statutes and the regulation.[108] While the benefits to Respondents and losses and risk of loss to GB would support a starting point substantially higher and limited only by the statutory and regulatory daily maximums, the Acting Director, as a matter of discretion, will adopt the ALJ's recommended starting figure.

c. Continuing violations. The OTS uses an objective approach to determine whether a violation is continuing.[109] The legal test is whether (a) the detrimental effect of the violation continued; and (b) the effect could have been undone or cured by the respondent taking or refraining from a particular action.[110]

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[108] Maximum daily CMPs for each Respondent are: $10,000 per day for the pre-FIRREA Control Act violations, 12 U.S.C. § 1730(q)(17)(1982), redesignated at 12 U.S.C. § 1730(q)(18)(Supp. IV. 1986 & 1988); $1,000 per day for the pre-FIRREA Holding Company Act violations, 12 U.S.C. § 1730a(j)(1988); and $25,000 per day for the post-FIRREA Holding Company Act violations, 12 U.S.C. § 1467a(i)(Supp. II 1990). Maximum daily CMPs for violations of the Conversion Regulations for each Respondent are $500. See 12 C.F.R. § 563b.9(g)(2)(1982-87); 12 C.F.R. § 563b.3(i)(9)(1988-89).

[109] In re Paul, at 41.

[110] In re Rapp, at 42-43. Cf. United States v. ITT Continental Baking Co., 420 U.S. 223 (1975). In deciding whether to assess on a continuing basis, the Acting Director will also

Respondents' violations of the Control Act, Holding Company Act, the Control Regulations and the Acquisition of Control Regulations satisfy this test. Respondents' actions exposed GB to a risk of injury every day that Lopez and Saldise held control. Respondents could have eliminated this risk at any time by terminating control.

The Acting Director will adopt the ALJ's finding that Lopez and Saldise engaged in continuing violations lasting 2,645 days from August 20, 1982, through November 16, 1989. Applying the ALJ's starting figure of $1,000 per day for the full 2,645 day period of the violations, the Acting Director has computed a starting amount of $2,645,000.

d. Application of the FFIEC Factors.

Willfulness. FFIEC directs the agency to consider whether there is "[e]vidence that the violation or pattern of violation was intentional or committed with a disregard of the law or the consequences to the institution." This factor may warrant an increase in the penalty from the starting amount up to 25%.

Respondents knew that it was illegal for any person, alone or in concerted action with others, to acquire over 5 percent of stock at the time of the conversion or to hold over 25 percent of

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consider whether the Respondent continued the violation either intentionally or despite of warnings from regulators or others. In re Rapp, at 43. As noted above, however, Respondents' violations were, at all times, intentional and committed with full knowledge of the illegality of the actions.

the stock without regulatory approval. To evade this restriction, they devised and implemented a secret plan to have close friends and relatives hold the overwhelming majority of GB stock on Respondents' behalf. While the ALJ recommended an increase of only 15% for this factor, the Acting Director believes that Respondents' conduct was intentional, committed with deliberate disregard for the requirements of the law, and warrants the maximum increase of 25%.

Frequency or Recurrence. FFIEC instructs agencies to take into account "[t]he frequency or recurrence of violations and the length of time the violation has been outstanding." This factor may relate directly to culpability or to the risk to an institution. Even when it does not, it is important that a violation not be repeated and be terminated as early as possible. To prevent long-term or repetitious violations, evidence of this factor supports an increase from the starting point of up to 10%.

Respondents' violations lasted over seven years and ceased only when the institution was placed in receivership. During that time, Respondents made no attempt to terminate their violations. Instead, in January 1986 they unlawfully purchased more stock, exacerbating the severity of their violation. While such conduct would support the maximum increase under this factor, the Acting Director will adopt the 5% increase recommended by the ALJ.

Continuation of Violation. "Continuation after the respondent becomes aware of it, or its immediate cessation and correction" is another factor that an agency should consider.

Like "frequency or recurrence," this factor is intended to deter continuing violations. This factor, however, focuses on conduct once a Respondent becomes aware of a violation. Such conduct demonstrates culpability and warrants an increase of up to 15% from the starting amount. Correction of a violation indicates good faith and merits a deduction of up to 15%.

Both Respondents were aware, at all times, of the limitations imposed by the Conversion Regulations, the Control Act and the Holding Company Act. Such culpability warrants the maximum increase of 15%, as recommended by the ALJ.

Failure to Cooperate. An agency must weight a respondent's "[f]ailure to cooperate with the agency in effecting an early resolution of the problem." If the OTS attempts to correct or to remedy a violation through supervisory means, it is vital that each affected individual cooperates in the process. Failure to cooperate reflects willful or intentional wrongdoing. An increase of up to 15% may be made if this factor is present.

Neither Respondent cooperated with the agency. Instead, they attempted to impede an OTS investigation and caused important documents to be shredded to prevent the agency from discovering vital facts during an examination. For these reasons, the Acting Director will adopt the ALJ's recommended increase of 15%.[111]

[111]The ALJ erroneously considered Respondents' failure to comply with discovery orders and subpoenas issued during the administrative proceeding. RD at page 171. "Intransigence in contesting an assessed penalty--as distinguished from lack of cooperation in the investigation of and efforts to rectify a violation--is not relevant" to the CMP calculation. Dazzio v.

<u>Concealment</u>. FFIEC directs an agency to consider "[e]vidence of concealment of the violation, or its voluntary disclosure." An increase of up to 25% from the starting amount may be warranted. If a respondent voluntarily discloses a violation before its discovery by the agency, a reduction of up to 25% may be taken.

Lopez and Saldise actively concealed their violations over an extended period of time. Initially, they disguised stock purchases by utilizing pooled payments and by assigning slightly under 5 percent of the stock ownership to various nominees. As part of this scheme, they misrepresented the extent of their purchases in false statements in the conversion application. Saldise directed the forgery of stock acknowledgment cards and stockholder meeting attendance lists, and Lopez withheld annual reports. Thereafter, Lopez and Saldise concealed their stock ownership from regulators through false statements in Schedule 13D filings and a change of control application, by hiding documents outside GB premises, by destroying documents, and by instructing a witness to give false testimony in response to an OTS subpoena during the investigation. Such culpability warrants the maximum increase of 25%, as recommended by the ALJ.

<u>Harm to the Institution or Public Confidence</u>. "Any threat of or actual loss or other harm to the institution, including harm to public confidence in the institution, and the degree of any such harm" must be taken into account. The harm to the

~~FDIC, 970 F.2d 71,~~ 80-81 (5th Cir. 1992).

institution is important in setting the starting point for a CMP. However, if the wrongdoing poses other risks to the institution in addition to a quantifiable loss, an increase under this factor is appropriate. Very serious conduct warrants increases of the penalty up to 25%. If no harm or risk of harm to the institution occurred, then a reduction of up to 75% may be taken.

During their seven years of illegal control, Respondents were able to engage in numerous unsafe and unsound practices, violations of the law, and breaches of their fiduciary duties in conducting the business of the association which resulted in substantial quantifiable losses to GB. These losses materially contributed to the deterioration of GB's capital position, a major factor in the OTS' decision to place GB into receivership. The Acting Director believes that this harm to the institution fully supports an increase of the penalty by 25%, as recommended by the ALJ.[112]

Gain or Benefit. An agency should consider "[e]vidence that participants or their associates received financial or other gain or benefit or preferential treatment as a result of or from the violation." An identifiable gain may be used in setting the starting amount for a penalty. Other benefits, not quantifiable, may also be derived from misconduct. If such benefits result, an increase in the starting amount should be made. This increase should not exceed 10%.

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[112]In a similar case involving a family control group, the Director reduced a penalty by 75% because the violation did not affect the capital or the earnings of the institution. In re Rapp, at 56.

Respondents derived substantial benefits from their misconduct. For example, Respondents' misconduct permitted them to acquire controlling interests in former GB subsidiaries; to enjoy positions of trust on the GB Board of Directors, and on certain subsidiary Boards of Directors; to travel first class to foreign countries at GB's expense; and to enjoy the use of GB art in their residence. Such benefits warrant a 10% increase, as recommended by the ALJ.

Restitution. Assessment of a CMP should reflect "[e]vidence of any restitution by the participants in the violation." Respondents made no restitution or offer of restitution. The ALJ correctly concluded that mitigation under this factor is inappropriate.

Prior Violations. FFIEC directs the agency to consider the "[h]istory of prior violations, particularly where similarities exist between those and the violation under consideration." To deter repeated wrongdoing, an increased penalty may be imposed where a respondent has a history of violations before the current one. Alternatively, a first time offender may merit a slightly reduced penalty. This factor, however, is less important than those that concern loss to the institution or culpability. Adjustments under this factor should not exceed 10%.

While Lopez and Saldise are first time offenders, their violations were willful, continued for over seven years, were ended only by the GB receivership, and permitted them to engage in numerous serious unsafe and unsound practices, breaches of their fiduciary duties, and regulatory violations. Accordingly, the Acting Director concludes that the ALJ properly recommended no reduction for this factor.

Previous Criticism. "Previous criticism of the institution for similar violations" is considered because the failure to respond to repeated criticisms is evidence that an institution is not being run with appropriate diligence. This factor is not applicable.[113]

Compliance Program. The "[p]resence or absence of a compliance program and its effectiveness" is relevant in determining the CMP amount. The ALJ appropriately concluded that this factor is inapplicable.

Unsafe or Unsound Practices, or Breaches of Fiduciary Duty. An agency should take into account whether there is a "[t]endency to create unsafe or unsound banking practices or breaches of fiduciary duty." An increase of up to 25% may be appropriate.

As explained in Section III.A., above, Respondents went well beyond a tendency, and in fact engaged in numerous and varied unsafe and unsound practices and breaches of fiduciary duty. Both Respondents' conduct was sufficiently aggravated to warrant the full 25% increase recommended by the ALJ.

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[113]The ALJ increased CMPs by 10 percent under this factor citing pre-1989 FHLBB examinations that questioned Respondents' assertions that they did not control GB. This factor, however, evaluates prior criticism of the institution for similar violations, other than the violations at issue in the CMP proceeding.

Preventative Measures. An agency is expected to consider [t]he existence of agreements, commitments or orders intended to prevent the subject violation." Respondents made no effort to prevent violations. The ALJ correctly concluded that no adjustment is warranted.

e. Statutory Mitigating Factors. In addition to the FFIEC factors, the agency must take into account the statutory mitigating factors.[114] The FFIEC factors address the statutory mitigating factors of "gravity of the violation" and "history of the previous violation," and no further consideration of these statutory mitigating factors is required. The remaining statutory mitigating factors are the good faith of the person charged; the size of financial resources of the person charged; and such other factors as justice may require. Respondents' conduct is completely devoid of any indicia of good faith and the Acting Director has identified no other issues or factors that warrant increasing or decreasing the CMP. Respondents' combined financial resources are discussed below.

f. Calculation. Based on the above discussion, the starting amount of $2,645,000 will be increased by 145% to $6,480,250. No mitigating factors are present.[115]

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[114] See 12 U.S.C. § 1467a(i)(2)(B)(Supp. II 1990)(incorporating the mitigating factors in 12 U.S.C. § 1818(i)(2)(G)); 12 U.S.C. § 1730a(e)(j)(4)(B)(1988); and 12 U.S.C. § 1730(q)(18)(1988).

[115] The treatment of mitigating factors in a CMP calculation is discussed in In re Paul, at 52-53.

g. Financial Resources. The final stage of the CMP calculation is the consideration of the size of financial resources of the person charged. There is no limit on the degree to which a limited capacity to pay may mitigate a penalty. If a penalty exceeds a respondent's ability it will be reduced to a level that can be paid. In re Rapp, at 50.

The burden of proof on the financial capacity issue is governed by 5 U.S.C. 556(d), which states that "the proponent of a rule or order has the burden of proof." Burden of proof refers only to the burden of going forward with evidence, not the ultimate burden of persuasion.[116] Therefore, the initial burden is on Enforcement to produce some evidence on this point. If that minimal burden is met, the Respondents have the burden of demonstrating that they lack the financial resources to pay the assessed penalty.

Enforcement met its minimal burden. Enforcement introduced OTS Ex. 219, a joint financial statement prepared by Lopez and Saldise and submitted in the related asset preservation proceeding under penalty of perjury.[117] OTS Ex. 219 shows a net

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[116] See Dazzio v. FDIC, 970 F.2d 71 (5th Cir. 1992); Stanley v. Board of Gov. of the Federal Reserve System, 940 F.2d 267 (7th Cir. 1991); Bullion v. FDIC, 881 F.2d 1368 (5th Cir. 1989); In re Rapp, at 50-51, n. 55; In re Paul, at 64, n. 52.

[117] Respondents argue that the related asset preservation proceeding deprived them of due process under the Fifth Amendment; the right to counsel under the Sixth Amendment; and the right to "equal access to justice" under the Constitution. Having failed to successfully raise these arguments in the related asset preservation proceeding, Respondents may not collaterally attack that proceeding in this administrative forum. Moreover, the OTS's authority under 12 U.S.C. § 1818(i)(4) has been consistently upheld by the courts. See In re Bonar, OTS Order No. 93-17, at 4 (March 9, 1993) and cases cited therein.

worth of $7,985,000 as of October 26, 1992. Enforcement also offered testimony by the receiver in the asset preservation proceeding describing his attempts to locate and take custody of Respondents' assets, Respondents' failure to cooperate with his efforts, transactions occurring after the date of OTS Ex. 219, and assets excluded or undervalued on this exhibit. Shapiro Tr. at 2243-2351. Based on this evidence, the ALJ concluded that Respondents had a known net worth of $10,169,150. Respondents except to virtually every entry on OTS Ex. 219 and each adjustment made by the ALJ. They claim that they have no assets except for those held by the receiver.

After considering Respondents' exceptions, and Enforcement's reply to the exceptions, the Acting Director calculates that Respondents have a known net worth of at least $9,693,675.[118]

Respondents were accorded due process through the prompt post-seizure hearing process which the Respondents vigorously utilized to challenge the initial asset preservation orders entered by the District Court. See Speigel v. Ryan, 946 F.2d 1435 (9th Cir. 1991), cert. denied, 112 S.Ct. 1584 (1992); FSLIC v. Ferm, 909 F.2d 372, 374 (9th Cir. 1990). The challenge based on the Sixth Amendment right to counsel clearly has no merit. See United States v. Monsanto, 491 U.S. 600 (1989); Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989); FSLIC v. Ferm, 909 F.2d at 375; FDIC v. Cafritz, 762 F.Supp. 1503, 1510 n. 15 (D.D.C. 1991).

[118]The Acting Director's finding on net worth is $476,475 less than the ALJ's finding. This amount reflects a deduction of $250,000 for the Liborio promissory note. The footnotes to OTS Ex. 219 indicate this note is worthless. The Acting Director's finding also gives the benefit of the doubt on $226,475 in cash held by the receiver. This amount represents cash deposits of various corporations controlled or substantially owned by Respondents. In lieu of a valuation of Respondents' interest in the corporations, it may be inappropriate to include one asset, the corporate cash accounts, on Respondents' financial statement. The Acting Director notes that in at least one case, Respondents' interest in the corporation is reflected elsewhere in the ALJ's calculation.

This calculation is incomplete because it excludes assets located overseas and other unvalued assets, including interests in 41 corporations.

Once Enforcement produced evidence on Respondents' financial condition, Lopez and Saldise had the burden to show that their resources were insufficient to permit payment of the assessed penalty. Respondents did not produce such evidence. Instead, they refused to respond to subpoenas for depositions in this proceeding, failed to cooperate with the receiver's effort to locate and identify all assets, and attempted to withdraw assets

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The Director rejects Respondents' remaining exceptions including:

--Respondents' assertion that Procesys Inc. is valueless. OTS Ex. 219 states that an investment of $250,000 is required for "this company to obtain its full value." Contrary to Respondents' exceptions, OTS Exhibit 219 does not indicate that this asset is valueless absent the investment.

--Respondents' allegation that all equity in the Biscayne Bay residence was lost by foreclosure. In support of this allegation, Respondents request official notice of the foreclosure in the asset preservation proceeding. Because Respondents failed to attach or identify, by date or otherwise, the documents for which official notice is requested, this notice will not be taken. The ALJ's valuation of the Biscayne Bay property was based upon the Respondents' estimates contained in OTS Exhibit 219. The Acting Director cannot conclude that the estimate provided by Respondents for their own property under penalty of perjury was inaccurate. No adjustment will be made.

--Respondents' assertion that the receiver's conduct has rendered Community Broadcasting, Inc. worthless. OTS Exhibit 219 assigns a $750,000 value to this company, but states that the sole assets, a broadcast licence and contract, would be valueless if operations were not commenced "relatively soon." While future broadcasts were unlikely at the time of the hearing, it is unknown whether broadcasts commenced after the close of the record.

from the receiver's jurisdiction by surreptitiously removing assets to Spain. Respondents' actions are sufficient to raise an adverse inference that they are able to pay CMPs even above those that a net worth of $9,693,675 would support.[119]

The conclusions above that Respondents should be required to make restitution of at least $9.1 million and may be required additional restitution of up to $2 million will affect the ability of Respondents to pay CMPs for the control violations. In recognition of this factor, the Acting Director will reduce CMPs by 25%.[120] With this reduction, Lopez and Saldise will be required to make restitution in the amount of $4,860,187 payable on a joint and several basis.[121]

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[119]Respondents cannot be allowed to undermine the integrity of the process of imposing CMPs by defying an agency or court order requiring the provision of true financial information. If such a course of action is taken, the ALJ or Director may draw an adverse inference from the failure to produce evidence on this critical issue. In re Rapp, at 51, n. 55, and cases cited therein.

[120]This is the same reduction recommended by the ALJ. While the ALJ's recommendation was based upon a higher restitution amount of $11,261,626 and slightly higher net worth, the Acting Director will impose a similar reduction.

[121]Respondents argue that the Excessive Fines Clause of the Eighth Amendment applies to this proceeding and prohibits the imposition of a $4.8 million CMP. See Austin v. United States, 509 U.S. ____, 125 L.Ed 2d 488, 498 (1993) (the Excessive Fines Clause applies to civil fines and forfeitures that constitute payment to a sovereign as punishment for an offense and do not solely serve a remedial purpose). Assuming the Excessive Fines Clause applies to administrative CMP proceedings, the Acting Director concludes, based on the extensive consideration of factors set forth above, that the CMP imposed against Respondents is not excessive, disproportional to Respondents' wrongdoing, or violative of this constitutional restraint.

IV. CONCLUSION

For the reasons set forth above, the Acting Director concludes that the following remedies are appropriate:

--An Order directing Respondents to cease and desist from unsafe and unsound practices, regulatory violations, and violations of agreements with the agency; requiring Lopez and Saldise to pay, on a joint and several basis, restitution of $9,002,715; and requiring Lopez to pay additional restitution of $141,626 (plus accruing interest on an unpaid loan computed at $21.85792 for each day after April 1, 1993 until payment of the loan). Because the record is insufficient to resolve issues involving an additional $2 million in restitution, further submissions will be required on the Saga Bay transaction and on the Brickell Bay property. Respondents also will also be required to endorse all stock certificates of the Spanish Subsidiaries to RTC and to immediately resign from any position as employee, officer, director, consultant or other employment with these subsidiaries.

--An Order prohibiting Lopez and Saldise from further participation in the conduct of the affairs of General Bank, its successors, any of its subsidiaries, and all other institutions and entities listed in 12 U.S.C. § 1818(e)(7).

--An Order directing Lopez and Saldise to pay, jointly and severally, civil money penalties of $4,860,187.

O R D E R

Upon consideration of the entire record in this matter, including the Recommended Decision of the Administrative Law Judge and the exceptions to the Recommended Decision filed by Enforcement Counsel and by Respondents Lopez and Saldise, and Enforcement Counsel's reply to Respondents' exceptions, and for the reasons set forth in the accompanying Decision:

The Acting Director, pursuant to his authority under 12 U.S.C. § 1818(b)(Supp. II 1990) and 12 U.S.C. § 1464(d)(2)(A) (1982-1988) finds that: Pedro Ramon Lopez, in his former capacity of chairman of the board, chief managing officer, president, director and controlling shareholder of General Bank was an institution-affiliated party of General Bank and a person participating in the conduct of the affairs of General Bank who violated laws and regulations including 12 C.F.R. §§ 563.9-3(b)(1989), 563.18(b)(1989), 563.40(a)(1984), and 563b.3(g)(2)(1989), violated a written agreement entered into with the agency, engaged in unsafe and unsound practices, including breaches of his fiduciary duties to General Bank, including those defined in 12 C.F.R. § 571.7, in conducting the business of General Bank. Lopez was unjustly enriched in connection with these violations and practices, and the violations and practices involved reckless disregard for the law and applicable regulations. Accordingly, grounds exist under 12 U.S.C. § 1818(b) to issue a cease and desist order requiring affirmative action to correct or remedy conditions resulting from these violations and practices.

The Acting Director, pursuant to his authority under 12 U.S.C. § 1818(b)(Supp. II 1990) and 12 U.S.C. § 1464(d)(2)(A) (1982-88), finds that: Teresa Saldise, in her former capacity of Director and controlling shareholder of General Bank was an institution-affiliated party of General Bank and a person participating in the conduct of the affairs of General Bank who violated laws and regulations including 12 C.F.R. § 563.9-3(b)(1989), 563.40(a)(1984), and 563b.3(g)(2)(1989), engaged in unsafe and unsound practices, including breaches of her fiduciary duties to General Bank, including those defined in 12 C.F.R. § 571.7, in conducting the business of General Bank. Saldise was unjustly enriched in connection with these violations and practices, and the violations and practices involved reckless disregard for the law and applicable regulations. Accordingly, grounds exist under 12 U.S.C. § 1818(b) to issue a cease and desist order requiring affirmative action to correct or remedy conditions resulting from these violations and practices.

The Acting Director, pursuant to his authority under 12 U.S.C. § 1818(e)(Supp. II 1990) and 12 U.S.C. § 1464(d)(4)(1982-88), finds that: Pedro Ramon Lopez, in his capacity specified above, violated laws and regulations including 12 C.F.R. §§ 563.9-3(b)(1989), 563.18(b)(1989), 563.40(a)(1984), and 563b.3(g)(2)(1989), violated a written agreement between General Bank and the agency, engaged and participated in unsafe and unsound practices in connection with General Bank, committed and engaged in acts, omissions, and practices which constitute breaches of his fiduciary duties to General Bank, including those defined in 12 C.F.R. § 571.7. By reason of such violations, practices and breaches General Bank has suffered financial loss, including substantial financial losses, and other damage, and Lopez has received financial gain and other benefits. Lopez' violations, practices, and breaches involved personal dishonesty and willful or continuing disregard for the safety and soundness of General Bank. Accordingly, grounds exist to issue an order prohibiting Lopez from further participation in the conduct of the affairs of General Bank, its successors, any of its subsidiaries, and all other institutions and entities listed in 12 U.S.C. § 1818(e)(7).

The Acting Director, pursuant to his authority under 12 U.S.C. § 1818(e)(Supp. II 1990) and 12 U.S.C. § 1464(d)(4)(1982-88), finds that: Teresa Saldise, in her capacity specified above, violated laws and regulations including 12 C.F.R. §§ 563.9-3(b)(1989), 563.40(a)(1984), and 563b.3(g)(2)(1989), engaged and participated in unsafe and unsound practices in connection with General Bank, committed and engaged in acts, omissions, and practices which constitute breaches of her fiduciary duties to General Bank, including those defined in 12 C.F.R. § 571.7. By reason of such violations, practices and breaches, General Bank has suffered financial loss, including substantial financial losses, and other damage, and Saldise has received financial gain and other benefits. Saldise's violations, practices, and breaches involved personal dishonesty and willful or continuing disregard for the safety and soundness of General Bank. Accordingly, grounds exist to issue an order prohibiting Saldise from further participation in the conduct of the affairs of General Bank, its successors, any of its subsidiaries, and all other institutions and entities listed in 12 U.S.C. § 1818(e)(7).

The Acting Director finds that Respondents engaged in willful violations of the Control Act, 12 U.S.C. § 1730(q)(1982-88) from August 20, 1982 through August 1, 1989; violations of the Holding Company Act from August 1, 1989 through November 16, 1989, 12 U.S.C. § 1730a(1988) and 12 U.S.C. § 1467a (Supp. II 1990); and willful violations of the Conversion Regulations, 12 C.F.R. Part 563b.

The Acting Director is authorized to impose civil money penalties for willful violations of the Control Act under 12 U.S.C. § 1730(q)(17)(1982), redesignated 12 U.S.C. § 1730(q)(18)(Supp. IV. 1986 & 1988); violations of the Holding Company Act under 12 U.S.C. § 1730a(j)(4)(1988) and 12 U.S.C. § 1467a(i)(2) (Supp. II 1990); and willful violations of the Conversion Regulations under 12 C.F.R. § 563b.9(g)(2)(1982-87) and 12 C.F.R. § 563b.3(i)(9)(1988-89).

After consideration of factors in aggravation and in mitigation of Respondents' conduct, as fully set forth in the accompanying Decision, civil money penalties are imposed in the amount of $4,860,187 payable on a joint and several basis by Respondents Lopez and Saldise.

IT IS, THEREFORE, HEREBY ORDERED that:

1. Lopez shall cease and desist from engaging in any acts, omissions, or practices involving unsafe or unsound practices, violations of law or regulations, and/or violations of written agreements entered into with the agency;

2. Saldise shall cease and desist from engaging in any acts, omissions, or practices involving unsafe or unsound practices, and/or violations of law or regulations;

3. Within ten (10) business days after the effective date of this Order: (a) Lopez and Saldise shall jointly and severally pay restitution in the amount of $9,002,715; (b) Lopez shall pay additional restitution in the amount of $139,126.68 plus interest computed at $21.85792 for each day after April 1, 1993 until payment; and (c) Lopez shall pay additional restitution in the amount of $2,500. The money shall be paid to General Bank, in receivership, in a form acceptable to the Resolution Trust Corporation as receiver;

4. The RTC's failure, for any reason, to approve the form of restitution by Lopez and/or Saldise shall not relieve Respondents of their obligation to pay restitution to General Bank pursuant to this Decision and Order;

5. Within ten (10) business days after the effective date of this Order, the parties shall submit and serve on the Acting Director and all other parties to this proceeding further legal argument and additional facts in the form of sworn affidavits addressing the following limited issues: (a) whether the $4 million in restitution ordered by this Decision and Order fully compensates General Bank for the loss of the Brickell Bay property and whether additional restitution of $1 million should be ordered; (b) whether Respondents incurred and paid any costs to acquire their interest in the Saga Bay purchase option and, if

so, the amounts of such costs; and (c) whether Respondents incurred and paid any closing costs in connection with New Saga Corporation's purchase of the Saga Bay property and, if so, the amount of such costs. Within ten business days after service of any such submission, opposing parties may file a written response. The Acting Director will, within a reasonable time thereafter, issue a supplementary Final Decision and Order on any additional restitution that may be due;

6. All submissions made to the Acting Director under the foregoing provision of this Order shall be addressed to:

Acting Director
Office of Thrift Supervision
1700 G Street, N.W.
Washington, DC 20554

ATTN: Melba McCannon, Acting Secretary

7. Lopez and/or Saldise shall immediately endorse (or cause to be endorsed) and deliver to the RTC all stock certificates or other indicia of legal or beneficial ownership, representing General Bank's interests in Capital Americo Hispano, S.A., Caja Espanola Financiera, S.A., and Americo Hispano Sociedad De Credito Hipotecario, S.A.;

8. Lopez and/or Saldise shall immediately resign from and refuse reappointment to, any position as employee, officer, director, consultant or other employment or association with Capital Americo Hispano, S.A., Caja Espanola Financiera, S.A., and Americo Hispano Sociedad De Credito Hipotecario, S.A.;

9. Lopez and/or Saldise are prohibited from further participation, in any manner, in the conduct of the affairs of General Bank, its successors, or any of its subsidiaries pursuant to 12 U.S.C. § 1818(e);

10. While this Order is in effect, Lopez and/or Saldise shall not continue or commence to hold any office in, or participate in any manner in the affairs of, any institution or entity listed in 12 U.S.C. § 1818(e)(7)(A);

11. Conduct prohibited by this Order includes the conduct specified under 12 U.S.C. § 1818(e)(6); and

12. The provisions of paragraphs 1 through 12 of this Order apply separately to each of Lopez and Saldise and are effective as to each individual upon the expiration of thirty (30) days after the date of service of this Order upon Respondents and shall remain effective and enforceable, except to the extent that, and until such time as, any provisions of this Order shall have been stayed, modified, terminated or set aside by action of the Director or a reviewing court, or in accordance with 12 U.S.C. § 1818(e)(7)(B).

IT IS FURTHER ORDERED that:

13. After consideration of factors in aggravation and in mitigation of Respondents' conduct, as fully set forth in the accompanying Decision, Lopez and Saldise shall pay, on a joint and several basis, civil money penalties of $4,860,187;

14. Respondents shall make full payment of the civil money penalties assessed herein within sixty days after the date of service of this Order upon Respondents. Remittance of these penalties shall be payable to the Treasurer of the United States and delivered to:

Controllers' Division
Office of Thrift Supervision
U.S. Treasury Department
1700 G Street, N.W.
Washington, D.C. 20552

15. The provisions of paragraphs 13 through 15 of this Order are effective immediately upon service upon Respondents and shall remain effective and enforceable, except to the extent that, and until such time as, any provisions of this Order shall have been stayed, modified, terminated or set aside by action of the Director or a reviewing court, or in accordance with any applicable statute or regulation.

IT IS FURTHER ORDERED that:

16. Respondents are hereby notified that they have the right to appeal this Final Decision and Order to the United States Court of Appeals within 30 days after the date of service of such Final Decision and Order. 12 U.S.C. § 1818(h).

THE OFFICE OF THRIFT SUPERVISION

Dated: May 17, 1994

By: Jonathan L. Fiechter
Jonathan L. Fiechter
Acting Director

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of May 1994, a copy of the foregoing Order was served by overnight delivery or hand delivery on the following:

By Hand Delivery

Richard C. Stearns
David Doposovic
Christine Harrington
Office of Thrift Supervision
1700 G Street, N.W.
Washington, D.C. 20552

By Overnight Delivery

Samuel C. Ebling
Manchester/270 Office Building
12444 Powerscourt Drive
Suite 250
St. Louis, Missouri 63131

Melba McCannon

Melba McCannon for the Secretary
Office of Thrift Supervision