**IN THE UNITED STATES OF AMERICA**
**NATIONAL CREDIT UNION ADMINISTRATION**

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| In the Matter of | ) | |
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| **REGINALD CLARK,** | ) | |
| Institution-Affiliated Party of | ) | NCUA Docket No. 08-0016-R2 |
| | ) | |
| **HOYA FEDERAL CREDIT UNION,** | ) | |
| Washington, D.C. | ) | |
| | ) | |

## FINAL DECISION AND ORDERS

This case is before the National Credit Union Administration Board ("NCUA Board") for final disposition of the administrative enforcement action brought by the agency against Reginald Clark ("Respondent"), a former senior employee of Hoya Federal Credit Union, located in Washington D.C. ("Hoya"). The agency has received a Recommended Decision from the presiding Administrative Law Judge ("ALJ") in the case, and the NCUA Board now issues its final agency decision and orders.

For the reasons set forth below, the NCUA Board adopts in its entirety the Recommended Decision issued by the ALJ, and issues against Respondent the attached Order of Prohibition, and Order Assessing a Civil Money Penalty in the amount of $15,000. The ALJ's Recommended Decision is incorporated herein and attached as Appendix A.

### Procedural Background

On May 30, 2008, the National Credit Union Administration ("NCUA" or "agency") instituted a formal enforcement action by issuing a Notice of Charges against Respondent for his alleged misconduct as a senior employee of Hoya. Specifically, Respondent's alleged conduct included criminal schemes to defraud Hoya and obtain money for himself, his friends, and relatives. As a result of Respondent's schemes, Hoya suffered significant losses. Pursuant to NCUA's authority under the Federal Credit Union Act ("Act"), the Notice of Charges sought an order of prohibition, restitution for losses to Hoya, and an assessment of civil money penalty in the amount of $25,000. *See* 12 U.S.C. §§ 1786(g)(1), 1786(e)(3)(A), and 1786(k)(2).

Although the case was initiated by NCUA in the spring of 2008, it is only now before the NCUA Board for a final decision because the case underwent several procedural twists.

The case was initially assigned to Administrative Law Judge C. Richard Miserendino ("ALJ Miserendino") with the Office of Financial Institution Adjudication. On January 5, 2009, however, ALJ Misrenedino recused himself from further participation in the case, after the NCUA issued an order on January 2, 2009, overturning three of the ALJ's prior orders. The NCUA Order continued the scheduled hearing date in the case until at least 60 days after the ALJ had ruled on a pending motion for summary disposition. As a result of the ALJ's recusal, the case was reassigned to Administrative Law Judge Richard A. Pearson ("ALJ Pearson") with the Federal Labor Relations Authority on January 15, 2009.

This case took an additional procedural twist when, in late 2010 and early 2011, Respondent was indicted and subsequently tried in U.S. District Court on eight criminal offenses in connection with his activities at Hoya. The eight offenses involved four counts of bank fraud, two counts of wire fraud, and two counts of false entry of records. On February 1, 2011, a jury found Respondent guilty on all counts except one, and on August 19, 2011, he was sentenced to 63 months imprisonment and ordered to pay restitution in the amount of $219,286. He is currently serving his sentence at the federal prison in Morgantown, West Virginia.

Enforcement Counsel had previously filed a motion for summary disposition on December 19, 2008. Following the Respondent's criminal conviction and sentencing, NCUA Enforcement Counsel informed ALJ Pearson of the events in a letter dated September 8, 2011. The letter argued that the agency's charges mirrored many of the charges on which Respondent had been convicted, and urged ALJ Pearson to apply the principles of *res judicata* and grant summary disposition in NCUA's favor.

On February 7, 2013, ALJ Pearson issued an order granted partial summary disposition with respect to the agency's charges that were duplicated in the criminal case. However, the ALJ found that other allegations in the agency's Notice of Charges did not correspond to Respondent's criminal conviction. Consequently, the ALJ ruled that a hearing would still be necessary to resolve those charges. NCUA Enforcement Counsel subsequently withdrew all charges that would have required a hearing, leaving only those charges duplicated in Respondent's criminal conviction. Pursuant to its amended Notice of Charges, NCUA continued to pursue a prohibition order, but withdrew its request for restitution and reduced the civil money penalty assessment to a first-tier penalty.

On April 4, 2014, the U.S. Court of Appeals affirmed Respondent's conviction. On May 16, 2014, ALJ Pearson ruled on the agency's motion by granting summary disposition and issuing a Recommended Decision. Appendix A. The Recommended Decision sets forth the ALJ's basis for granting the motion, and makes recommended findings of fact and conclusions of law. Further, the Recommended Decision recommends that the NCUA Board issue against Respondent an Order of Prohibition, and an Order of Assessment of Civil Money Penalty in the amount of $15,000.

Following receipt of the Recommended Decision from the ALJ (along with a copy of the Certified Record), the parties had 30 days to file written exceptions and to request oral

argument before the NCUA Board. *See* 12 C.F.R. §§ 747.39-40. Both parties timely filed exceptions. Neither party, however, requested oral argument.

NCUA Enforcement Counsel's exceptions did not contest any of ALJ Pearson's findings or conclusions, and requested only that the NCUA Board accept and adopt in total the ALJ's Recommended Decision. Respondent's exceptions are brief and unclear but appear to challenge ALJ Pearson's authority to issue a Recommended Decision in light of ALJ Miserendino recusing himself from the case. Respondent provided no additional evidence or arguments in support of this exception. Moreover, Respondent provided no other exceptions contesting the ALJ's ruling on summary disposition, findings of fact, or conclusions of law in the Recommended Decision.

On July 29, 2014, the NCUA Board served notice on the parties that the record in the proceeding was complete and that the matter had been submitted to the NCUA Board for a final agency decision. Return receipt indicates Respondent received this notification on August 1, 2014. Pursuant to the Uniform Rules of Practice and Procedure, "the final decision of the NCUA Board will be based upon the review of the entire record of the proceeding, except that the NCUA may limit the issues to be reviewed to those findings and conclusions to which opposing arguments or exceptions have been filed by the parties." 12 C.F.R. § 747.40(c)(1).

## The ALJ's Recommended Decision

The ALJ's findings of fact and conclusions of law are set forth in detail in the Recommended Decision.

Hoya is a federal credit union whose membership is primarily comprised of Georgetown University faculty and staff. At the time of his fraudulent activities, Respondent was the second-highest-ranking official at Hoya, and his job duties included reconciling the credit union's general ledger accounts. This provided him unlimited access to Hoya's computer system, including transaction and account records for all members. The evidence adduced at his criminal trial, as well as the additional evidence provided by Enforcement Counsel, shows Respondent engaged in two types of criminal schemes to defraud the credit union and to obtain money for himself and his friends or relatives.

### Respondent's Share Draft Scheme

Respondent's first fraud involved a share draft scheme, whereby he wrote, or had his friends write, share drafts to pay for purchases or to pay bills. Most of these share drafts were written on Respondent's checking account at Hoya; the others were written on his friends' Hoya accounts. In all cases the accounts themselves were not debited for the share drafts. Instead, Respondent would enter a "stop payment" order on the share drafts, so that the account was not debited; he then deleted the record of the stop payment from the "draft return register," preventing Hoya from recovering the amount of the check from the payee's bank. Although Respondent was charged criminally with "only" four

counts of bank fraud for these actions, Enforcement Counsel introduced evidence of 52 such share drafts and 12 automated clearinghouse payments that followed the same methodology, occurring between May 23, 2002, and July 1, 2003. Respondent was found guilty of bank fraud for three share drafts (issued on December 26, 2002, December 31, 2002, and April 10, 2003); but he was found not guilty of bank fraud for an automated payment dated May 19, 2003.

Respondent's Wire Transfer Scheme

Respondent's second scheme involved wire transfers from Hoya to accounts at other financial institutions. In the agency's original Notice of Charges, NCUA identified three allegedly fraudulent wire transfers instigated by Respondent: a $2,500 transfer on December 4, 2002, a $40,000 transfer on April 21, 2003, and a $60,000 transfer on June 29, 2003. Respondent was not indicted for the $2,500 transfer, but he was indicted, tried, and convicted of wire fraud for the $40,000 and the $60,000 transfers. However, because of potential statute of limitation issues Enforcement Counsel withdrew the allegations regarding the two wire transfers that occurred before May 30, 2003, and pursued only the June 20, 2003, transfer of $60,000. Respondent abused his position as Hoya's accountant and second-ranking official by directing another employee to wire $60,000 of Hoya's funds to a Fidelity Investments account belonging to Respondent at a different financial institution. Respondent falsely told the employee that the wire transfer was for the purchase of certificates of deposits for Hoya, and that the transfer had been authorized by Hoya's manager.

With respect to the wire transfer scheme, ALJ Pearson reviewed in detail the transcripts from Respondent's criminal trial to ascertain whether the charges in NCUA's Notice of Charges were "actually contested" and "actually and necessarily determined" in the criminal case. Following his review he concluded that the legal requirements for summary disposition had been met. ALJ Pearson found that Respondent's fraud was an "open and shut case" and that it should not be re-litigated:

> The criminal verdict conclusively resolved that Clark did indeed defraud Hoya by instructing Ms. Armstrong to wire $60,000 from Hoya's own funds to Clark's personal account with Fidelity. Since that is precisely what NCUA alleges in our proceeding, there is no need to give Clark a second trial on the same fact, and doctrine of collateral estoppel, or issue preclusion, is appropriate. RD 9.

With respect to the share draft scheme, however, he found that the four counts of bank fraud found against Respondent in his criminal case did not precisely align with NCUA's charges. Thus, requirements for issue preclusion had not been met. Nonetheless, when evidence from Respondent's criminal trial was considered, along with the evidence offered by Enforcement Counsel and Respondent, the ALJ found that there were no genuine issues of material fact remaining and that summary disposition was also appropriate on this charge:

> While the jury was resolving Clark's guilt regarding four different share drafts, the evidence presented at the trial also included documentation showing Clark's fraudulent conduct regarding [the share drafts cited in NCUA charges], and I find the entire body of evidence against Clark to be so strong that a trier of fact can reach only one reasonable conclusion. RD 11.

Viewing the evidence of record in its entirety, ALJ Pearson concluded that there were no genuine issues of material fact with respect to NCUA's share draft charges, and thus again summary disposition was appropriate.

The NCUA Board agrees with ALJ Pearson's analysis and conclusions, and therefore agrees that summary disposition is appropriate in this case regarding both Respondent's share draft scheme as well as his wire transfer scheme.

The Penalty of Prohibition

The Act authorizes the NCUA Board to prohibit an institution-affiliated party from further participation in the conduct of the affairs of any insured credit union if that party's actions satisfy a three-part test. 12 U.S.C. § 1786(g)(1). The statute requires: (1) misconduct by the party; (2) adverse effect of this conduct which resulted in personal gain or harm to the credit union; and (3) culpability by the party that involves personal dishonesty or demonstrates unfitness to continue to serve. The requirements of the statute are written in the conjunctive; consequently all three tests must be met in order to impose the prohibition penalty.

In the present matter, ALJ Pearson found that Respondent's activities at Hoya satisfied all three tests required for the issuance of a prohibition order. First, misconduct is established when a party violates any law or regulation, engages in an unsafe or unsound practice, or commits a breach of his fiduciary duty. 12 U.S.C. § 1786(g)(1)(A)(i)-(iii). ALJ Pearson found that Respondent clearly violated the law; having already been found guilty by a federal criminal jury of three counts of bank fraud and two counts of wire fraud, in addition to the similar fraud regarding the other share drafts alleged by NCUA. He also found that those same crimes constituted unsafe and unsound practices, as well as breaches of his fiduciary duty to Hoya, although it was unnecessary to find that Respondent has committed more than one type of misconduct. RD 15.

Second, the adverse effects requirement is established when the credit union suffered a financial loss or the party received financial gain or benefit from his misconduct. 12 U.S.C. § 1786(g)(1)(B)(i) and (iii). Here again ALJ Pearson found that Respondent's conduct easily satisfied the statutory requirements. The evidence demonstrated that Hoya suffered a financial loss from Respondent's misconduct, and that he received financial gain or other benefit from the misconduct. ALJ Pearson stated:

> No sophisticated analysis is required to make such a determination regarding Clark's actions. His fraudulent schemes did not flirt with any gray areas of

> fiduciary conduct – they constituted outright theft of the bank's [sic] funds, with a redistribution of those funds either to his own account or to the accounts of his friends. *Id.*

He found that Hoya suffered a loss of $66,491.50 as a result of the fraud, while Respondent and his friends received a direct financial benefit of stolen money.

Finally, the culpability requirement of a prohibition is established when a party's conduct involves personal dishonesty or demonstrates his unfitness to participate in the conduct of the credit union. 12 U.S.C. § 1786(g)(1)(C). Once more, ALJ Pearson found the requirements easily satisfied. The judge stated that the courts have found that personal dishonesty was demonstrated in a wide variety of circumstances, where the accused party had shown a lack of integrity or trustworthiness, or a disposition to lie, cheat, defraud, or misrepresent facts in order to obtain a benefit. ALJ Pearson found the fact that Respondent had been convicted of bank fraud and wire fraud for the same or virtually identical actions as those charged by NCUA was proof enough that his conduct involved personal dishonesty. RD 15-16.

The NCUA Board agrees with ALJ Pearson's analysis, findings and conclusions, and therefore agrees that the statutory requirements for issuance of a prohibition order against Respondent have been met.

Civil Money Penalties

The Act authorizes the NCUA Board to assess three levels, or tiers, of civil money penalties, with first-tier penalties being the lowest. 12 U.S.C. § 1786(k)(2). NCUA's original Notice of Charges assessed a second-tier civil money penalty, which required proof of several elements related to the party's misconduct and the adverse effects of that misconduct. However, when NCUA amended its Notice of Charges to duplicate the charges in Respondent's criminal conviction (and thereby eliminate the need for a hearing in this matter) the agency also modified its request for second-tier civil money penalties to first-tier penalties. This modification reduced the burden of proof, as in order to qualify for first-tier penalties, an institution-affiliated party must simply be shown to have "violate[d] any law or regulation." 12 U.S.C. § 1786(k)(2)(A)(i).

In his Recommended Decision, ALJ Pearson found that there is no doubt that first-tier civil money penalties are appropriate, as Respondent violated a law by deleting pertinent records of four share drafts and by effecting a fraudulent wire transfer. RD 16. The real issue for the judge, however, was the appropriate size of that penalty.

Pursuant to the Act, the NCUA Board is authorized to assess first-tier penalties of $5,000 for each day during which a violation continues. 12 U.S.C. § 1786(k)(2)(A). However, Subparagraph (G) of that section also requires the consideration of a series of mitigating factors in determining the appropriateness of a penalty for each case. Those mitigating factors are "the size of financial resources and good faith of the insured credit union or

the person charged; the gravity of the violation; the history of previous violations; and such other matters as justice may require." 12 U.S.C. § 1786(k)(2)(G).

ALJ Pearson found that although neither party offered specific evidence regarding Respondent's financial resources, the record of proceedings in this case reflects that his financial resources have been severely diminished since the time of his misconduct. *Id.*

As such, ALJ Pearson found that it was appropriate to assess a penalty in this case, but that the penalty amount should be reduced due to mitigating factors. He decided to impose the maximum first-tier penalty of $5,000 for each day on which Clark committed fraud. Thus, while Respondent committed five frauds, the actions occurred on three days, and therefor he recommends a penalty of $15,000. RD 17.

The NCUA Board agrees with ALJ Pearson's analysis, findings and conclusions, and therefore agrees that the statutory requirements of first-tier civil money penalty against Respondent have been met. Accordingly, the NCUA Board agrees with ALJ Pearson's recommendation that an order assessing a civil money penalty against Respondent in the amount of $15,000 is appropriate.

Exceptions to the ALJ's Recommended Decision

In issuing its final agency decision, the NCUA Board may limit the issues to be reviewed to "those findings and conclusions to which opposing arguments or exceptions have been filed by the parties." 12 C.F.R. § 747.40(c).

As stated previously, NCUA Enforcement Counsel filed no exceptions to the ALJ's Recommended Decision and therefore did not contest any of its findings or conclusions. Instead, Enforcement Counsel merely requested that the NCUA Board accept and adopt in total the ALJ's Recommended Decision.

Similarly, Respondent's exceptions did not challenge any specific findings or conclusions of the Recommended Decision, but rather appears to argue that the Recommended Decision should be rejected because ALJ Pearson lacked authority to preside over this case.

Respondent's exceptions do not comply with the requirements of the agency's rules (12 C.F.R. § 747.39(c)), and are very disjointed and unclear. He cites to: (1) NCUA's rule on *ex parte* communications; (2) the Federal Rule of Civil Procedure on the defense of lack of subject matter jurisdiction; (3) the rule-making provision of the Administrative Procedure Act; and (4) Section 916 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 on improved administrative hearing procedures. In connection with these citations, however, Respondent provides no additional discussion or argument in support of why the ALJ's Recommended Decision should be rejected.

Respondent's exceptions seem to imply that ALJ Pearson's Recommended Decision should be rejected because he lacks subject matter jurisdiction over this case. Although Respondent does not elaborate, his citations seem to be arguing that NCUA's Order of January 2, 2009 (continuing the hearing in this case until after a ruling has been made on the agency's motion for summary disposition) was improper, and thus, invalidates the reassignment of the case to a new ALJ following ALJ Misenendino's recusal.

The Board can appreciate the fact that Respondent is acting *pro se* in this case, but it is not the role of the NCUA Board to construe or make a party's arguments. *See Tolbert v. Queens Coll.*, 242 F.3d 58, 75-76 (2d Cir. 2001) (Noting that "issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived."); *U.S. v. Hayter Oil Co.*, 51 F.3d 1265, 1269 (6th Cir. 1995) (Noting it's not a court's function to craft an appellant's arguments.); *U.S. v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("A skeletal 'argument,' really nothing more than an assertion, does not preserve a claim [for review].") To the extent that this is in fact Respondent's argument, it fails because the agency had the authority to issue the January 2, 2009 order, and because the agency properly had the matter reassigned to a new ALJ following the original ALJ's decision to withdraw from the case. To the extent this is not Respondent's argument, it fails for lack of clarity and support.

NCUA's Order of January 2, 2009, was issued by the Acting Board Secretary with the express approval of the NCUA Board. The matter was brought to the NCUA Board by the agency's General Counsel, after several rulings by ALJ Misenendino that the General Counsel felt incorrectly ignored language in the agency's Notice of Charges, as well as the uniform rules of practice and procedure. Pursuant to its authority under the rules, the NCUA Board approved, by a unanimous notation vote, issuance of an order by the Board Secretary if the ALJ refused to grant a continuance. Pursuant to rules: "The NCUA Board may, at any time during the pendency of a proceeding, perform, direct the performance of, or waive performance of, any act which could be done or ordered by the administrative law judge." 12 C.F.R. § 747.4.

Since ALJs have the authority to consider and rule upon all procedural motions, which includes the ability to order a hearing continuance (*See* 12 C.F.R. § 747.5(b)(7)), the NCUA Board likewise has the same authority. Consequently, NCUA's Order of January 2, 2009, continuing the hearing in this case was authorized.

When, following the issuance of the January 2, 2009, Order, ALJ Miserendino decided to recuse himself as presiding judge, NCUA again acted within its authority by having the matter reassigned to another ALJ. By letter dated January 9, 2009, NCUA requested the U.S. Office of Personnel Management ("OPM") approve the loan of another ALJ to preside over the case, pursuant to its authority under 5 U.S.C. § 3344, and 5 C.F.R. § 930.208. OPM agreed, and on January 15, 2009, appointed ALJ Pearson. Thereafter, ALJ Pearson properly exercised jurisdiction and presided over this case, ruling on numerous procedural and dispositive motions, including ultimately the issuance of his Recommended Decision.

Alleged *Ex Parte* Communications

At the beginning of his Recommended Decision, ALJ Pearson discusses the procedural posture of the case, including the circumstances of ALJ Miserendino's recusal. This discussion does not attempt to address whether the alleged actions that precipitated the recusal are accurate or appropriate; as ALJ Pearson explained, he does not have the authority to review NCUA's January 2, 2009, order of continuance. Rather, this discussion merely states the facts that led to his appointment over this case. The discussion does lead, however, to the judge urging in a footnote that the NCUA Board undertake a factual review of whether Enforcement Counsel and the Acting Board Secretary engaged in improper *ex parte* communications in connection with the issuance of the January 2, 2009, Order. ALJ Pearson states: "At least on its face, the action creates the appearance of *ex parte* communications, and this question should be addressed when the Board reviews my Recommended Decision." RD 2, footnote 1.

Following ALJ Miserendino's recusal, Respondent filed two complaints with the NCUA's Office of Inspector General ("OIG"). OIG subsequently conducted an independent investigation of the alleged improper communications. Based on this investigation, OIG found no evidence to support the conclusion that Enforcement Counsel or the Acting Board Secretary engaged in prohibited *ex parte* communications, as defined in uniform rules of practice and procedure (12 C.F.R. § 749.9(a)). ALJ Pearson was unaware that OIG had already investigated this matter when he issued his Recommended Decision urging the NCUA Board undertake a factual review. Consequently, in light of the OIG's investigation and its conclusions, the NCUA Board finds that no further review of the alleged *ex parte* communications is warranted.

## Conclusion

Based upon review of the entire record in this proceeding, the NCUA Board finds that:

(1) ALJ Pearson's decision to grant summary disposition in this matter is appropriate;

(2) ALJ Pearson's Recommended Decision, including his recommended findings of fact and conclusions of law, is based upon the preponderance of the evidence and correctly finds that Respondent's conduct meets the statutory requirements under the Federal Credit Union Act for issuance of a prohibition order (12 U.S.C. § 1786(g)(1)) and the assessment of a first-tier civil money penalty (12 U.S.C. § 1786(k)(2)); and

(3) The exceptions filed by Respondent in response to the ALJ's Recommended Decision are unsupported and unpersuasive, and provide no basis for not accepting the Recommended Decision.

Accordingly, the NCUA Board adopts in its entirety ALJ Pearson's Recommended Decision in this matter, including the findings of fact and conclusions of law, and issues against Respondent an Order of Prohibition, and an Order Assessing a Civil Money Penalty in the amount of $15,000.

Decided by the National Credit Union Administration Board on October 23, 2014.

Gerard Poliquin
Secretary of the Board

Dated: October 27, 2014

Orders and Recommended Decision are attached and incorporated herein.

**IN THE UNITED STATES OF AMERICA**
**NATIONAL CREDIT UNION ADMINISTRATION**

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| In the Matter of | ) | |
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| **REGINALD CLARK,** | ) | |
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| **HOYA FEDERAL CREDIT UNION,** | ) | |
| Washington, D.C. | ) | |
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## ORDER OF PROHIBITION

On May 30, 2008, the National Credit Union Administration ("NCUA") filed a Notice of Charges against Respondent Reginald Clark, as an institution-affiliated party of Hoya Federal Credit Union, and requested an order prohibiting Respondent from participating in the conduct of the affairs of any federally insured financial institution and assessing a civil money penalty against him. Respondent filed a timely Answer to the Notice of Charges. Subsequently, NCUA filed a Motion for Summary Disposition, with documentary evidence in support thereof, and the Respondent filed pleadings and evidence in opposition to the Motion for Summary Disposition.

Administrative Law Judge Richard A. Pearson issued a Recommended Decision, in which he concluded that there were no genuine issues of material fact and that summary disposition should be granted against Respondent on the charges that Respondent had engaged in a scheme to stop payment and delete paid share drafts and that Respondent had caused a fraudulent wire transfer. The Administrative Law Judge further recommended that Respondent be prohibited from participating in the conduct of the affairs of any federally insured financial institution and that Respondent be assessed a first-tier civil money penalty of $15,000.

The NCUA Board, having considered the entire record in the proceedings in this matter, including the Recommended Decision of the Administrative Law Judge, and pursuant to the authority vested in the NCUA Board by section 206(g) of the Federal Credit Union Act ("the Act"), 12 U.S.C. § 1786(g), and in accordance with part 747 of the NCUA Rules and Regulations, 12 C.F.R. part 747, hereby finds that the Respondent, Reginald Clark, has violated applicable law and regulation, has breached his fiduciary duty, and has engaged in unsafe and unsound practices in connection with his position as an institution-affiliated party of Hoya Federal Credit Union, Washington, D.C. As a result of such violations, breaches, and practices, the Respondent has received a financial benefit and the insured credit union has suffered a financial loss.

Accordingly, **IT IS HEREBY ORDERED**:

Reginald Clark is hereby prohibited, without the prior written consent of the appropriate Federal financial institutions regulatory agency, as that term is defined in section 206(g)(7)(D) of the Act, 12 U.S.C. § 1786(g)(7)(D), from:

(a) Participating in any manner in the conduct of the affairs of any financial institution or agency enumerated in section 206(g)(7)(A) of the Act, 12 U.S.C. § 1786(g)(7)(A);

(b) Soliciting, procuring, transferring, attempting to transfer, voting or attempting to vote any proxy, consent, or authorization with respect to any voting rights in any financial institution enumerated in section 206(g)(7)(A) of the Act, 12 U.S.C. § 1786(g)(7)(A);

(c) Violating any voting agreement previously approved by the appropriate Federal banking agency; or

(d) Voting for a director, or serving as an institution-affiliated party, as that term is defined in section 206(r) of the Act, 12 U.S.C. § 1786(r).

This ORDER shall become effective upon the expiration of thirty (30) days after its service. The provisions of this Order will remain effective and enforceable except to the extent that, and until such time as, any provision of this Order shall have been modified, terminated, suspended, or set aside by action of the National Credit Union Administration or a reviewing court.

**SO ORDERED**, this 23rd day of October, 2014.

**NATIONAL CREDIT UNION ADMINISTRATION BOARD**

Gerard Poliquin
Secretary of the Board

**IN THE UNITED STATES OF AMERICA**
**NATIONAL CREDIT UNION ADMINISTRATION**

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| | ) | |

## ORDER ASSESSING A CIVIL MONEY PENALTY

On May 30, 2008, the National Credit Union Administration ("NCUA") filed a Notice of Charges against Respondent Reginald Clark, as an institution-affiliated party of Hoya Federal Credit Union, and requested an order prohibiting Respondent from participating in the conduct of the affairs of any federally insured financial institution and assessing a civil money penalty against him. Respondent filed a timely Answer to the Notice of Charges. Subsequently, NCUA filed a Motion for Summary Disposition, with documentary evidence in support thereof, and the Respondent filed pleadings and evidence in opposition to the Motion for Summary Disposition.

Administrative Law Judge Richard A. Pearson issued a Recommended Decision, in which he concluded that there were no genuine issues of material fact and that summary disposition should be granted against Respondent on the charges that Respondent had engaged in a scheme to stop payment and delete paid share drafts and that Respondent had caused a fraudulent wire transfer. The Administrative Law Judge further recommended that Respondent be prohibited from participating in the conduct of the affairs of any federally insured financial institution and that Respondent be assessed a first-tier civil money penalty of $15,000.

The NCUA Board, having considered the entire record in the proceedings in this matter, including the Recommended Decision of the Administrative Law Judge, and pursuant to the authority vested in the NCUA Board by section 206(k) of the Federal Credit Union Act ("the Act"), 12 U.S.C. § 1786(k), and in accordance with part 747 of the NCUA Rules and Regulations, 12 C.F.R. part 747, hereby finds that the Respondent, Reginald Clark, has violated applicable law and regulation, has breached his fiduciary duty, and has engaged in unsafe and unsound practices in connection with his position as an institution-affiliated party of Hoya Federal Credit Union, Washington, D.C. As a result of such violations, breaches, and practices, the Respondent has received a financial benefit and the insured credit union has suffered a financial loss.

Accordingly, **IT IS HEREBY ORDERED**:

That the Respondent, Reginald Clark, be assessed a civil money penalty in the amount of Fifteen Thousand Dollars ($15,000).

Remittance of the civil money penalty shall be payable to the Treasury of the United States and delivered to the Secretary of the NCUA Board, Alexandria, VA.

**IT IS FURTHER ORDERED** that the provisions of this ORDER shall become effective upon the expiration of thirty (30) days after its service. The provisions of this Order shall remain effective and enforceable except to the extent that, and until such time as, any provision of this Order shall have been modified, terminated, suspended, or set aside by action of the National Credit Union Administration or a reviewing court.

**SO ORDERED**, this 23rd day of October, 2014.

**NATIONAL CREDIT UNION ADMINISTRATION BOARD**

Gerard Poliquin
Secretary of the Board

(APPENDIX A)
IN THE UNITED STATES OF AMERICA
NATIONAL CREDIT UNION ADMINISTRATION

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| | ) | |

## RECOMMENDED DECISION

**Appearances:**

**For the National Credit Union Administration:**
Steven W. Widerman
Jennifer Best Vickers

**For the Respondent:**
Reginald Clark, Pro Se

**Richard A. Pearson, Administrative Law Judge**

## STATEMENT OF THE CASE

This is a proceeding to obtain an order of prohibition and civil money penalties against an institution-affiliated party of a federally insured credit union, and it is governed by the Federal Credit Union Act (the Act), as amended, 12 U.S.C. §§ 1751-1795k, and the Uniform Rules of Practice and Procedure (the Uniform Rules) of the National Credit Union Administration (NCUA), 12 C.F.R. part 747.

The case was initiated by the filing of a Notice of Charges by the NCUA on May 30, 2008, against Reginald Clark (the Respondent or Clark). The Notice of Charges, filed pursuant to 12 U.S.C. §§ 1786(g)(1), 1786(e)(3)(A), and 1786(k)(2), sought an order prohibiting the Respondent from participating in any manner in the conduct of the affairs of an insured credit union; directing the Respondent to pay restitution to Hoya Federal Credit Union (Hoya); and assessing civil money penalties against him. Respondent filed a timely answer, and subsequently an Amended Answer to the Notice of Charges, in

which he denied the factual allegations and legal charges against him and asserted a number of affirmative defenses.

The case was initially assigned to Administrative Law Judge C. Richard Miserendino, who conducted pretrial proceedings, set the case for a hearing to be held on January 6, 2009, and directed any prehearing dispositive motions to be filed by October 31, 2008. On October 29, 2008, NCUA Enforcement Counsel moved for an extension of time to file a motion for summary disposition, but the motion was denied by Judge Miserendino on November 7, 2008. Nonetheless, NCUA Enforcement Counsel filed a Motion for Summary Disposition (MSD) on December 19, 2008, and further moved for a continuance of the January 6 hearing date. Judge Miserendino denied the continuance on December 29, 2008. On January 2, 2009, the Acting Secretary of the NCUA Board, citing section 747.29(b) of the Uniform Rules, ruled that a motion for summary disposition can be filed at any time and ordered that the hearing in this case be continued until at least 60 days following the Judge's ruling on the motion.

In an order dated January 5, 2009, Judge Miserendino recused himself from participating further in this case, asserting that Enforcement Counsel's actions in seeking a continuance of the hearing before the Acting Secretary of the Board constituted *ex parte* communication and interfered with the Judge's ability to serve in a fair and impartial manner in the case.[1] As a result, NCUA requested that the United States Office of Personnel Management (OPM) approve the loan of another Administrative Law Judge to preside over this case, pursuant to 5 U.S.C. § 3344 and 5 C.F.R. § 930.208. On January 15, 2009, OPM approved the assignment of the undersigned for that purpose.

Since that time, the parties have filed numerous motions and pleadings, most of which I disposed of in the Order on Motion for Summary Disposition and Other Pending Motions, dated February 7, 2013. Still to be resolved, however, is NCUA's Motion for Summary Disposition. Respondent has filed a detailed response and a memorandum in opposition to the MSD.

During the pendency of this case, Respondent Clark was indicted and tried in January and February of 2011 in the United States District Court for the District of Columbia on eight criminal offenses: four counts of Bank Fraud, in violation of 18 U.S.C. § 1344; two counts of Wire Fraud, in violation of 18 U.S.C. § 1343; and two counts of False Entry in Federal Credit Institution Records, in violation of 18 U.S.C.

[1] Ever since Judge Miserendino's recusal, the Respondent has repeatedly renewed his insistence that all charges against him should be dismissed on account of the Enforcement Counsel's allegedly improper actions. On November 5, 2009, I issued an Order Denying Motion to Dismiss and explained that I do not have the authority to review the Acting Secretary's January 2, 2009, Order Continuing Hearing Date. I reiterated this on February 7, 2013, in my Order on Motion for Summary Disposition and Other Pending Motions. However, I urge the Board to undertake a factual review of the events leading up to the Acting Secretary's Order Continuing Hearing Date. At least on its face, the action creates the appearance of *ex parte* communications, and this question should be addressed when the Board reviews my Recommended Decision.

§ 1006. On February 1, 2011, a jury found Clark guilty on all counts except the fourth count of Bank Fraud, on which he was found not guilty. On August 19, 2011, United States District Judge Reggie B. Walton sentenced Clark to imprisonment for 63 months and ordered Clark to pay restitution in the amount of $219,286.41. The Respondent has appealed his conviction, but he is currently in federal prison. [2]

After the Respondent was convicted of these crimes, NCUA Enforcement Counsel urged that the principle of *res judicata* offered an additional basis to grant summary disposition against Clark. Counsel argued that the three Bank Fraud counts on which Clark was convicted mirror exactly the "Scheme to 'Stop Payment' and Delete Paid Share Drafts" allegations in Paragraphs 10-14 of the Notice of Charges, and that the two Wire Fraud counts on which Clark was convicted mirror exactly the "Fraudulent Wire Transfers" alleged in Paragraphs 15-16 of the Notice of Charges. Counsel further asserted that since a jury found, beyond a reasonable doubt, that Clark committed these crimes, there is no genuine issue of material fact concerning the NCUA's charges, and that summary disposition is therefore appropriate. The Respondent opposed summary disposition, because his appeal of the criminal conviction was still pending, but he offered no factual basis for ignoring the jury's findings.

In my Order on Motion for Summary Disposition and Other Pending Motions, I discussed the case law on issue preclusion and claim preclusion, and I ruled that the Respondent is precluded from contesting the NCUA charges which duplicate his criminal convictions. Accordingly, I found that a hearing was not necessary on the "Scheme to 'Stop Payment' and Delete Paid Share Drafts" and on the "Fraudulent Wire Transfers." Order at 14-16. However, I also found that the other allegations in the Notice of Charges (skimming cash from daily deposits, and fictitious ATM deposits) did not correspond to Clark's criminal convictions; that genuine issues of material fact remained on those charges; and that a hearing would be necessary to resolve them. *Id.* at 17, 20. *See* 12 C.F.R. § 747.30. I also ruled that additional briefing was needed to determine whether the five-year statute of limitations of 28 U.S.C. § 2462 was applicable to those charges alleged to have occurred prior to May 30, 2003. *Id.* at 13-14.

In order to save the parties the time and expense of a hearing, NCUA Enforcement Counsel filed a Notice of Withdrawal of Charges on April 22, 2013, in which it withdrew the charge of Skimming Cash from Daily Deposits and the charge of Fictitious ATM Deposits. In other words, NCUA dropped any charges that would have required a hearing, leaving only those charges which duplicate Clark's criminal convictions. NCUA also withdrew all charges relating to conduct occurring before May 30, 2003, thereby eliminating the necessity of litigating the applicability of 28 U.S.C. § 2462. Finally, NCUA withdrew its request for restitution and reduced its request for civil money penalties from "second tier" to "first tier" penalties in the amount

[2] In a decision issued on April 4, 2014, the United States Court of Appeals for the District of Columbia Circuit affirmed Clark's conviction. It found that the District Court had used the wrong sentencing guidelines, however, and remanded the case for resentencing. Any action that the District Court takes on remand will not affect the issues before me.

of $25,000. The Respondent continues to oppose summary disposition and the requested relief, arguing (among other things) that the checks on which he was found guilty of bank fraud do not correspond to the checks identified in NCUA's amended charges, and that imposition of civil money penalties would violate his right against double jeopardy.

In response to these pleadings, I obtained the transcript of Clark's criminal trial, so that I could fully ascertain whether the remaining charges against him in this proceeding were "actually contested" and "actually and necessarily determined" by the jury in the criminal case. *Otherson v. Dep't of Justice*, 711 F.2d 267, 271 (D.C. Cir. 1983) (*Otherson*). I will discuss this in more detail later, but I conclude now that the requirements of issue preclusion have been met for the wire transfer charge, and that summary disposition should be granted on that basis. Contrary to my previous ruling, however, I find that the requirements for issue preclusion on the scheme to delete paid share drafts have not been met. Nonetheless, when the evidence from Clark's criminal trial (incorporated into the record of this case) is considered along with the evidence offered in this case by NCUA in support of its MSD and by the Respondent in opposition to the MSD, there are no genuine disputes of material fact remaining.[3] Accordingly, summary disposition against the Respondent is warranted on this charge as well as the wire transfer charge.

## The Allegations Against the Respondent

NCUA alleges that the Respondent engaged in two types of criminal schemes to defraud Hoya and to obtain money for himself and his friends or relatives. First, he wrote, or had his friends write, share drafts (checks) to pay for purchases or to pay bills. Most of these share drafts were written on Clark's checking account at Hoya; the others were written on his friends' Hoya accounts, yet in all cases the accounts themselves were not debited for the share drafts. NCUA alleges that Clark perpetrated this by abusing his position as Hoya's accountant: he entered a "stop payment" order on the share drafts, so that the account was not debited; he then deleted the record of the stop payment from the "draft return register," preventing Hoya from recovering the amount of the check from the payee's bank. Although Clark was charged criminally with "only" four counts of bank fraud for these actions, the government introduced evidence of 52 such share drafts and 12 automated (ACH) payments that followed the same methodology, occurring between May 23, 2002, and July 1, 2003. Clark was found guilty of bank fraud for three share drafts (issued on December 26, 2002, December 31, 2002, and April 10, 2003); but he was found not guilty of bank fraud for an ACH payment dated May 19, 2003.

The second alleged scheme involved wire transfers from Hoya to accounts at other financial institutions. In its original Notice of Charges, NCUA identified three allegedly fraudulent wire transfers instigated by Clark: a $2,500 transfer on December 4,

[3] References to the transcript of the Respondent's criminal trial in *United States of America v. Clark*, Docket No. CR-10-110-1, United States District Court for the District of Columbia, will be cited as "Tr. ___;" references to the Exhibits to NCUA's Motion for Summary Disposition will be cited as "Ex. ___."

2002, a $40,000 transfer on April 21, 2003, and a $60,000 transfer on June 29, 2003. Clark was not indicted for the $2,500 transfer, but he was indicted, tried, and convicted of wire fraud for the $40,000 and the $60,000 transfers. NCUA has now withdrawn its allegations regarding the two wire transfers that occurred before May 30, 2003, and is pursuing only the June 20, 2003, transfer of $60,000. NCUA alleges that Clark abused his position as Hoya's accountant and second-ranking employee to direct another employee to wire the $60,000 of Hoya's funds to a Fidelity Investments account belonging to Clark at a different financial institution. According to NCUA, Clark falsely told the employee that the wire transfer was for the purchase of certificates of deposits for Hoya, and that the transfer had been authorized by Hoya's manager.

In addition to arguing that Clark's conviction of bank fraud and wire fraud preclude the Respondent from contesting the remaining charges against him in this proceeding, NCUA Enforcement Counsel introduced a substantial amount of documentary evidence with its MSD, to support its position that Clark should be prohibited from participation in the financial industry and should be required to pay civil money penalties. This includes affidavits of several individuals who worked at Hoya or who examined Hoya's financial records, and copies of Hoya's records. All of this evidence will be cited, as appropriate, in my findings.

## FINDINGS OF FACT

1. Hoya Federal Credit Union is a federally chartered and federally insured credit union whose primary membership is the faculty and staff of Georgetown University in Washington, D.C. Ex. 1; Ex. 2 (Logan Declaration) at ¶1. All of Hoya's cash is deposited daily at Mid-Atlantic Federal Credit Union, where Hoya maintains its corporate bank account. Tr. 236.

2. Reginald Clark was employed as Hoya's accountant from April 2001 until July 25, 2003. Ex. 2 (Logan Declaration) at ¶2. He initially worked part-time, but by September 2001 he was working full-time for Hoya. Hazel Logan was at all material times Hoya's Manager and CEO, and Clark was its second-highest ranking official. Tr. 154, 176-77. When Logan was absent from the credit union's premises, Clark was in charge. Tr. 176-77; Ex. 2 (Logan Declaration) at ¶1, 2.

3. Clark's official duties included reconciling Hoya's General Ledger accounts and balancing its corporate account at Mid-Atlantic. Tr. 175-77. To carry out his duties, Clark was given unlimited access to Hoya's Galaxy computer system, which contained all of Hoya's General Ledger and other records, as well as the transaction and account records of Hoya's account-holders (members). Tr. 275-76. Although every Hoya employee had access to portions of the Galaxy system, only Logan and Clark had unlimited access to the Galaxy system. Ex. 2 (Logan Declaration) at ¶4. Every employee has a unique employee identification number that is recorded when he or she makes entries on the Galaxy system, and every employee is required to set his or her own password for accessing the system.

Employees are instructed to keep this password confidential and not to allow other employees to use that password. Clark's employee identification number on the Galaxy system was 003. Tr. 277-79.

4. Two Hoya employees, CEO Hazel Logan and loan officer Sandra Armstrong, were authorized in 2003 to wire money from Hoya's Mid-Atlantic account or from the accounts of Hoya members to other financial institutions. Tr. 245, 755-57; Ex. 2 (Logan Declaration) at ¶17. Hoya periodically invests its own funds by purchasing certificates of deposit from other financial institutions. Tr. 242-43, 755-56.

5. On June 20, 2003, Hoya's manager, Logan, was on vacation, and Clark was in charge at the credit union. Tr. 765-66. Clark instructed Armstrong to initiate a wire transfer for Hoya's purchase of a certificate of deposit. Tr. 765; Ex. 3 (Armstrong Declaration) at ¶6. This wire transfer was in the amount of $60,000, and the funds were wired from Hoya's account at Mid-Atlantic to an account in Clark's name at Fidelity Investments in Washington, D.C. Tr. 267-73; Ex. 2 (Logan Declaration) at ¶19 and Ex. I thereto. An account executive at Fidelity testified that Clark had opened a personal account at Fidelity on June 10, 2003, and that Fidelity received a wire transfer of $60,000 from Hoya's Mid-Atlantic account to Clark's account at Fidelity on June 20, 2003. Tr. 3-5.

6. Between May 23, 2002, and July 1, 2003, Clark wrote at least 34 share drafts on his personal account at Hoya, to pay for a variety of goods and services. *See, e.g.*, Tr. 305-87, 884-95, 915-20. Clark also wrote, or induced friends (Derrick Eatmon and Tonia Shuler) to write, 18 share drafts on their personal accounts at Hoya, to pay for goods and services that benefited Clark directly or indirectly. Tr. 91-100, 665-67, 704-10, 884-95, 915-20. For instance, on June 7, 2003, Clark wrote check number 1286 on his Hoya account, in the amount of $1,000 to Liljenquist & Beckstead Jewelers. Tr. 915-20; Ex. 2 (Logan Declaration) at ¶14 and Ex. G thereto. Clark's account at Hoya had a balance of $109.97 on June 7, 2003. Ex. G of Ex. 2 (Logan Declaration).

7. On July 1, 2003, Clark wrote check number 1289 on his Hoya account, in the amount of $1,000 to Chase Bank; and check number 1290 on his Hoya account, in the amount of $1,200 to Martin's Caterers. Tr. 915-20; Ex. 2 (Logan Declaration) at ¶13 and Ex. F thereto. An official of Martin's Caterers testified that Clark contracted with his company for a party, and that Clark paid a $1,200 deposit for this party with check number 1290. Tr. 740-42.

8. On June 10, 2003, Clark either wrote, or caused to be written, check number 1011 on Eatmon's Hoya account, in the amount of $5,438.82, to American Express. Tr. 100. An official of American Express testified that American Express received this check on June 14, 2003, and that the payment was credited to Clark's American Express account in the amount of $5,438.82. Tr. 665-66.

9. On June 17, 2003, Clark either wrote, or caused to be written, check number 1008 on Eatmon's Hoya account, in the amount of $2,000 to Clark's girlfriend, Ebony House. Tr. 89-90, 95. Ms. House testified that Clark gave this check to her. She deposited $2,000 in her bank account at SunTrust Bank on June 18, 2003. Tr. 592-93, 599, 619-20, 622-23, 633-34.

10. On June 20, 2003, Tonia Shuler, another girlfriend of Clark's, wrote check number 1613 on her personal Hoya account, in the amount of $3,291.50, to Theodore's, a furniture store, for the purchase of a sofa. Tr. 702, 704-16; Ex. 2 (Logan Declaration) at ¶15 and Ex. H thereto. Shuler testified that Clark offered to buy her the sofa; that Clark told her to write the check to Theodore's; and that Clark told her he would "cover" the check. Tr. 706-08. Shuler further testified that her Hoya account was never debited for the amount of check number 1613, and that the check never appeared in her monthly statements from Hoya. Tr. 714-16.

11. Hoya manager Logan testified as to how share drafts written by Hoya account-holders are paid to the payees and how those share drafts are cleared through the Federal Reserve System. When a payee presents a share draft or check to his own bank, the amount is automatically credited to the payee's account and debited from Hoya's corporate account at Mid-Atlantic. Tr. 280-82. That amount will also be automatically debited from the account of the Hoya member who wrote the share draft, unless a "stop payment" or insufficient funds order is initiated for that share draft. Tr. 282-86. When a stop payment order is initiated, the Hoya member's account is not debited, and the stop payment order and the corresponding share draft will be listed in Hoya's daily "exceptions report." Tr. 286-93; Ex. 2 (Logan Declaration) at ¶12. For every share draft on which a stop payment order has been listed on the exceptions report, a Hoya employee must make a manual entry on the credit union's computer system in order to list the share draft on the daily "draft return register." Those share drafts listed on the draft return register will be sent back, through the Federal Reserve, to the payee's bank, to be credited back to Hoya's corporate account at Mid-Atlantic. *Id.*

12. In each instance of the 52 share drafts cited in Paragraph 6 above, Hoya's computer system records show that Clark was the employee who handled both the exceptions report and the draft return register for those share drafts. Therefore, Clark handled the reports which recorded the stop payment order for those share drafts (or in some instances the notice to return the check for insufficient funds), and then he removed those share drafts from the draft return register, which prevented those share drafts from being returned to the payee's bank. Ex. 2 (Logan Declaration) at ¶ 12-15. As a result, the Hoya accounts of Clark, Eatmon, and Shuler were not debited for the amount of those checks, Hoya never returned those checks to the payees' banks, and the payees received the full amounts of those checks. *See, e.g.*, Tr. 305-36, 344-49. In each case, the checks were paid out of Hoya's Mid-Atlantic account, without any reimbursement from either the check writer or the payee. An investigator for the U.S. Attorney's office also

testified and explained a chart he had prepared, which listed the documents showing that the share drafts were not paid out of the accounts of the Hoya members (Clark, Eatmon, and Shuler) and that they were not returned to payees. Tr. 884-95, 915-20.

13. In addition to testimony at Clark's trial, NCUA Enforcement Counsel has submitted, in this proceeding, an affidavit from Logan, copies of Hoya records relating to the wire transfers and deleted share drafts, and reports from the independent auditing company that reviewed Hoya's records. Ex. 2 (Logan Declaration) at ¶12-15 and Exs. F, G, and H thereto. These documents further corroborate that Clark's actions: 1) caused Hoya to be charged for each of the share drafts cited in Paragraph 6 above; 2) enabled the payees of each share draft to receive the full amount of those drafts; and 3) prevented the accounts of Clark and his friends (Eatmon and Shuler) from being debited for the amount of those drafts.

14. The 52 share drafts cited in Paragraph 6 above resulted in a total loss to Hoya of $98,434.39. Tr. 920. Of that amount, the share drafts written after May 30, 2003, resulted in a loss to Hoya of $13,930.32. The wire transfer cited in Paragraph 5 above resulted in a total loss to Hoya of $60,000. In each of these fraudulent transactions, Clark profited either directly or indirectly.

## DISCUSSION

NCUA has moved for summary disposition and an order permanently prohibiting the Respondent from participating in the banking industry and imposing first-tier civil money penalties in the amount of $25,000. Summary disposition is appropriate when there is no genuine issue as to any material fact, and when those undisputed facts show that a party is entitled to a decision in its favor as a matter of law. 12 C.F.R. § 747.29(a). This rule follows the model established in Rule 56(c) of the Federal Rules of Civil Procedure. Accordingly, the moving party bears the initial burden of showing that there are no genuine issues of material fact and identifying those facts which support judgment in its favor, through documentary evidence such as affidavits, depositions, admissions in pleadings, and other material. 12 C.F.R. § 757.29(b)(2); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). If the moving party meets this burden, the opposing party cannot merely rely on the denials in its pleadings to demonstrate the existence of a material factual dispute; rather, it must come forward with specific facts, supported by appropriate evidence, showing that a genuine factual dispute remains. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986).

In my Order of February 7, 2013, I ruled that NCUA had not satisfied the requirements for summary disposition of some charges (i.e., the charges of making fictitious ATM deposits and of skimming cash from deposits), and that a hearing was necessary to resolve the factual issues regarding them. However, since the NCUA has now withdrawn those charges, we are left simply with charges that are identical, or virtually identical, to the wire fraud and bank fraud charges on which Clark has been

convicted by a federal criminal jury. The scope of this case has been narrowed further by NCUA's withdrawal of any charges relating to acts committed prior to May 30, 2003; as a result, Clark's statute of limitations defense is moot. This leaves us with NCUA's allegations that the Respondent: 1) fraudulently stopped payment on four share drafts between June 7 and July 1, 2003; and 2) made a fraudulent wire transfer on June 20, 2003.

In my February 7, 2013 Order, I compared the criminal jury's verdict to NCUA's charges against the Respondent, and I determined that the Respondent should be precluded from disputing that he committed the Scheme to Stop Payment and Delete Paid Share Drafts and the Fraudulent Wire Transfers. Subsequent to issuing that Order, I have reviewed the full transcript of the criminal trial, and I reaffirm my earlier determination that NCUA is entitled to summary disposition against Respondent. The basis for summary disposition of the Wire Transfer charge is different, however, from the Stop Payment charge, and this requires further explanation.

### 1. Fraudulent Wire Transfer

Let us first review the case against Clark regarding the June 20, 2003, wire transfer, as this is truly an "open and shut case" that should not be relitigated here. In his criminal trial, Clark was charged with two counts of wire fraud. The Indictment charged that Clark engaged in a scheme to defraud Hoya by transmitting wire transfers of $40,000 on April 21, 2003, and of $60,000 on June 20, 2003. Clark was found guilty on both counts. These are the identical wire transfers that were the subject of NCUA's charge of "Fraudulent Wire Transfers," in Paragraphs 15b, 15c, and 16 of its Notice of Charges. NCUA has withdrawn its charge relating to the April 21, 2003, wire transfer, in order to eliminate any question about the statute of limitations, but it stands by its charge relating to the June 20, 2003 wire transfer. The criminal verdict conclusively resolved that Clark did indeed defraud Hoya by instructing Ms. Armstrong to wire $60,000 from Hoya's own funds to Clark's personal account with Fidelity. Since that is precisely what NCUA alleges in our proceeding, there is no need to give Clark a second trial on the same fact, and the doctrine of collateral estoppel, or issue preclusion, is appropriate.

A review of the criminal trial transcript demonstrates that all the requirements for issue preclusion were met, as set forth in *Otherson*, 711 F.2d at 271. Clark was represented by counsel at that trial, and he expressly denied the charge that he had made a fraudulent wire transfer on June 20, 2003. Ms. Logan and Ms. Armstrong testified and described the Respondent's actions in inducing Armstrong to initiate the wire transfer. An official of Fidelity Investments testified that the $60,000 from that wire transfer went into Clark's personal account there. As I explained in my Order of February 7, 2013, the issues material to NCUA's fraudulent wire transfer charge were precisely the same issues that were contested in the criminal trial, and the jury's guilty verdict "actually and necessarily" determined the issues Clark has contested in our case. In the criminal trial, Clark's counsel contended that the government didn't know who actually committed the frauds and was simply accusing Clark for lack of a better culprit. Clark's counsel argued to the jury that any number of people could have committed the wire frauds and bank

frauds, and he sought to undermine the credibility of Logan and Armstrong and to direct suspicion toward them. The jury clearly rejected the Respondent's defense, and its finding that Clark was guilty of wire fraud for the June 20, 2003, wire transfer actually and necessarily determined the corresponding charge, brought by NCUA in our case, that Clark initiated a fraudulent wire transfer. NCUA's fraudulent wire transfer charge against Clark in our case. Finally, precluding Clark from disputing this charge here will not work an unfairness on the Respondent. The criminal action against him was not a case in which Clark pleaded guilty or entered a *nolo contendere* plea in the criminal action, or in which he may have lacked an incentive to fully contest his criminal charges. If convicted, Clark faced the likelihood of a significant period of incarceration, as evidenced by his ultimate sentence of 63 months imprisonment. Accordingly, it is appropriate that the Respondent be precluded from contesting his guilt of wire fraud in the wire transfer of June 20, 2003. No additional evidence is needed to support summary disposition against Clark on this charge. NCUA has, therefore, established that Clark engaged in a fraudulent wire transfer on that date, resulting in a loss of $60,000 to Hoya and the equivalent unjust enrichment to Clark.

### 2. Scheme to "Stop Payment" and Delete Paid Share Drafts

Unlike the wire fraud charge, the four criminal counts of bank fraud against Clark do not align precisely with NCUA's charge of a "scheme to 'stop payment' and delete paid share drafts." NCUA's charges, as modified in Paragraphs 18-20 of its Notice of Withdrawal of Charges, allege that Clark fraudulently stopped payment and then deleted the records of the stopped share drafts from Hoya's draft return register, regarding four share drafts: Check #1286 on June 7, 2003; Check #1613 on June 20, 2003; and Checks #1289 and 1290 on July 1, 2003. Although there was considerable testimony and documentary evidence regarding these checks at Clark's criminal trial, Clark was not specifically charged in the criminal case with bank fraud for those four checks. Rather, he was charged and found guilty of stopping payment and deleting records regarding three other checks: Check #1074 on December 26, 2002; Check #1007 on December 31, 2002; and Check #1170 on April 10, 2003. He was also charged, but found not guilty, of bank fraud for an automated payment made on May 19, 2003. As with the wire fraud charges, Clark denied his guilt on all of these counts and pointed the finger of suspicion at other Hoya employees.

In order to apply the issue preclusion doctrine to preclude the Respondent from disputing NCUA's "stop payment" charges in this proceeding, I must find that the criminal jury "actually and necessarily determined" Clark's guilt regarding Checks #1286, 1613, 1289, and 1290. I cannot make such a finding, based on the criminal jury's verdicts. To say, as the criminal jury did, that Clark fraudulently stopped payment and deleted records of Checks #1074, 1007, and 1170, it was not "necessary" for the jury to find that Clark committed similar frauds on those other four checks. Although the jury heard and saw considerable evidence of Clark's alleged fraud in relation to 52 different checks (including Checks #1286, 1613, 1289, and 1290), the jury was not asked to

determine Clark's guilt regarding the four checks that are the subject of NCUA's current charges. Therefore, it would be improper to preclude Clark from contesting his guilt on these charges in this proceeding. *See Chisolm v. Def. Logistics Agency*, 656 F.2d 42, 49-50 (3d Cir. 1981).

However, this does not mean that Clark is entitled to a hearing on the "stop payment" charges. Even though summary disposition is not warranted on the basis of issue preclusion, it is nonetheless justified, based on the entire record evidence (offered by both NCUA and Clark) in this case. A hearing on Checks #1286, 1613, 1289, and 1290 would serve no useful purpose, as the evidence clearly demonstrates the Respondent's misconduct. I have already outlined the evidence offered by NCUA regarding the "stop payment" charges, but it is worth noting as well what the Respondent has offered in his defense: virtually nothing in the way of specific evidence, but rather a general denial on his part that he did anything wrong, and vague accusations that other employees could have committed these fraudulent acts. *See, e.g.*, Clark's Affidavit in Support of his Opposition to NCUA's MSD at ¶12-13, 15-16. This is very similar to the arguments made by his defense counsel in the criminal trial, and those arguments were clearly rejected by the jury in regard to the three bank fraud counts involving share drafts.[4] While the jury was resolving Clark's guilt regarding four different share drafts, the evidence presented at that trial also included documentation showing Clark's fraudulent conduct regarding Checks # 1286, 1613, 1289, and 1290, and I find the entire body of evidence against Clark to be so strong that a trier of fact can reach only one reasonable conclusion.

Viewing the evidence of record in its entirety, I conclude that there are no genuine disputes of any facts material to NCUA's "stop payment" charge. It is clear the Respondent committed the four acts of fraud enumerated in Paragraphs 18-20 of NCUA's Notice of Withdrawal of Charges and in Paragraphs 6, 7, and 10 of my Findings of Fact, *supra*. In making this determination, I have considered the transcript of Clark's criminal trial, without giving any legal effect to the jury's findings in that case; I have also considered the documents submitted by NCUA in support of its MSD and the documents submitted by the Respondent in opposition thereto.[5]

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[4] The one criminal count on which Clark was acquitted involved an automated payment, not a share draft. The process for clearing those automated payments, as described by witnesses at the trial, was different from the process for paying share drafts. The draft return register is not used for automated payments; instead, Hoya must notify the payee's institution by telephone of a stopped payment. Accordingly, there was no specific document, such as the draft return register, that the government could directly offer to demonstrate Clark's direct involvement in the fraud relating to Count Four, on which Clark was acquitted. NCUA's ongoing charges against Clark do not allege that he engaged in fraud in relation to any automated payments; rather, they allege that Clark committed fraud regarding four share drafts. Accordingly, Clark's acquittal of fraud regarding the automated payment does not help his case regarding the share drafts.

[5] The documents submitted by NCUA during prehearing discovery, as part of its Prehearing Statement, have not been considered and do not constitute a basis for my decision.

When this evidence is viewed in full, there can be no doubt that Clark stopped payment on a series of share drafts and then deleted records of those stopped payments from the draft return register, so that the payees would receive their money but the accounts of Clark and Shuler would not be charged. Having already noted that NCUA accuses Clark of fraud concerning different checks than the ones named in the criminal indictment, I must also note that in all other important respects, the evidence before me of Clark's involvement in the "stop payment" scheme is virtually identical to the evidence presented at the criminal trial. Ms. Logan testified at the criminal trial; she also gave a sworn declaration that was submitted in support of NCUA's MSD, along with credit union records matching many of the exhibits admitted at the criminal trial. Exhibit 2 of MSD, and Exhibits F, G, and H thereto. Her declaration closely matches her trial testimony, describing the process by which Hoya and its employees handle stop payment orders on share drafts, to make sure that the payor's account is not charged for that draft, and the process by which the Draft Return Register is used to make sure that these drafts are returned to the payee's institution, so that Hoya is repaid for them. Tr. 280-93; Logan Declaration (Exhibit 2 of MSD) at ¶12-15. She also illustrated, using Hoya's computer system records, how the computer system had been used to initiate stop payment orders on Checks #1286, 1613, 1289, and 1290, and to delete the record of those stop payment orders from the Draft Return Register. Logan Declaration at ¶12-15 and Exhibits F, G, and H thereto; *compare to* Tr. 305-362. The frauds relating to the share drafts cited in NCUA's amended charges (Checks #1286, 1613, 1289, and 1290) were committed in exactly the same way as the frauds relating to the three share drafts on which Clark was convicted of bank fraud (Checks #1974, 1007, and 1170), as well as the frauds relating to the other 49 share drafts offered into evidence at the criminal trial. Clark offered no testimony or evidence – at the criminal trial or in the current proceeding – that casts any significant doubt that he himself was the perpetrator of these frauds.

It is important to note here the size and breadth of Clark's criminal scheme. Even though he is only charged by NCUA with fraud regarding four share drafts, the evidence clearly shows that the fraud went far beyond that limited scope. For over a year, dozens of share drafts were written by Clark or by one of his friends, and their Hoya accounts were not charged for any of them. "Stop payment" or "Insufficient Funds" orders were issued in each and every one of these instances, yet those orders were never communicated to the payee's bank. This scheme required the perpetrator to enter Hoya's computer records system twice: first to issue the stop payment order and prevent Clark and his friends from being charged for those checks; and second to delete the stop payment from Hoya's Draft Return Register and prevent the payees' banks from being notified of the stop payment. In each and every instance, Clark and his friends were the beneficiaries of this fraud, while Hoya was left to pay the bill for Clark's expensive lifestyle. In each and every instance, Logan testified that Clark himself had made the entries on Hoya's computer system that allowed the scheme to succeed. Logan Declaration at ¶12-15.

It appears that the copies of some of the Hoya records used at Clark's criminal trial were not identical to the copies NCUA offered in support of its MSD – specifically, Exhibits F, G, and H of Logan's Declaration. At the trial, Logan identified each of the checks that Clark was accused of issuing fraudulently, and for each check Logan identified where it was listed on the Share Draft Exception Report, and where it was omitted from the Draft Return Register. She testified and showed where the Draft Return Register identified the Hoya employee who made the computer entry, and in each case the entry was made by Employee 003, which was Clark's employee identification number. Tr. 314, 346, 356-59. Exhibits F, G, and H of Logan's Declaration also include the checks, the Share Draft Exceptions Reports, and the Draft Return Registers, but these copies of the Draft Return Register do not show any employee's identification number. In this respect, NCUA's evidence in this proceeding does not include the "smoking gun" that directly links Clark to the fraudulent acts that enabled his scheme to succeed, but the evidence is nonetheless conclusive against him.

Even without the "smoking gun" of Clark's identification number on the Draft Return Registers in Exhibits F, G, and H of Logan's Declaration, Logan's description, in her Declaration, of how the frauds were perpetrated matches closely to her testimony at the criminal trial. When Logan's trial testimony is considered in conjunction with her Declaration and the records attached to her Declaration, there can be no doubt that the only person who could have deleted the "stop payment" orders for Checks #1286, 1613, 1289, and 1290 from the Draft Return Register was Clark. Clark's argument, made personally by himself in this proceeding and by his attorney at the criminal trial, that other Hoya employees could have made these fraudulent entries, is preposterous and without any basis in evidence. It was Clark, not Logan or Armstrong or any other Hoya employee, who profited from the fraudulent entries. They were share drafts written by Clark and his friends, not Logan or any other employee or their friends. It was Clark's account at Hoya that was not debited for the checks, not the accounts of Logan or any other employee. The fraud allowed Clark, not Logan or any other employee, to pay bills and purchase expensive items such as sofas, jewelry, travel, and parties. To suggest that another Hoya employee would go to such lengths, perpetrate such theft, and risk imprisonment, in order to benefit Clark to the tune of thousands of dollars, defies credibility. If a fraudulent entry of this nature had occurred once, it could be attributed to accident or negligence; but the fact that it happened dozens of times, in exactly the same manner, and always benefiting the same person, makes it absolutely clear that Clark perpetrated this scheme, and that he did so with the conscious intent to benefit himself financially and to defraud Hoya.

It is also relevant, in considering whether Clark committed fraud in stopping payment on these four share drafts and deleting them from the Draft Return Register, that Clark has also been found to have ordered a fraudulent wire transfer (one such transfer in this proceeding and two in the criminal trial). While the wire transfer is a separate charge from the deleted share drafts, the wire transfers were committed during the same time period that the 52 fraudulent share drafts were being written. The fact that Clark

fraudulently ordered Armstrong to transfer $60,000 of Hoya's funds to his personal account is cumulative evidence that he also fraudulently manipulated Hoya's records to enable him to write a series of share drafts without being charged for them.

In light of all these factors, I conclude that there is no genuine dispute regarding any facts material to the remaining charges against the Respondent. Based on the principle of issue preclusion, I find that a hearing is not necessary to determine that the Respondent caused a fraudulent wire transfer of $60,000 to be made to his account on June 20, 2003. And based on the evidence submitted by the parties on the record in this case, I further find that NCUA is entitled to a decision in its favor, as a matter of law, on the charge that Clark fraudulently wrote, or had a friend write, four share drafts and then deleted records of those drafts, so that he and his friend were not charged for those drafts. The evidence of record allows a trier of fact to come to only one reasonable conclusion: the Respondent committed the frauds as alleged by NCUA in the remaining charges. Hoya suffered a loss of $60,000 as a result of the wire transfer, and it suffered a further loss of $6,491.50 as a result of the four share drafts; the Respondent was unjustly enriched in equivalent amounts by these actions. I therefore recommend that summary disposition against the Respondent be granted, and that the Respondent be found to have committed a fraudulent wire transfer and a scheme to stop payment and delete four paid share drafts.

### 3. The Penalty of Prohibition

The Act authorizes the NCUA Board to prohibit an institution-affiliated party from further participation in the conduct of the affairs of any insured credit union if:

> (A) Any institution-affiliated party has, directly or indirectly --
>
> (i) violated –
>
> (I) any law or regulation;
>
> (II) any cease-and-desist order which has become final;
>
> (III) any condition imposed in writing by the Board in connection with any action on any application, notice, or request by such credit union or institution-affiliated party; or
>
> (IV) any written agreement between such credit union and the Board;
>
> (ii) engaged or participated in any unsafe or unsound practice in connection with any insured credit union or business institution; or
>
> (iii) committed or engaged in any act, omission, or practice which constitutes a breach of such party's fiduciary duty;
>
> (B) by reason of the violation, practice, or breach described in any clause of subparagraph (A) –
>
> (i) such insured credit union or business institution has suffered or will probably suffer financial loss or other damage;
>
> (ii) the interests of the insured credit union's members have been or could be prejudiced; or

(iii)such party has received financial gain or other benefit by reason of such violation, practice, or breach; and

(C) Such violation, practice, or breach --

(i) involves personal dishonesty on the part of such party; or

(ii) demonstrates such party's unfitness to serve as a director or officer of, or to otherwise participate in the conduct of the affairs of, an insured credit union[.]

12 U.S.C. § 1786(g)(1). Subparagraphs A, B, and C of this provision are commonly referred to as the misconduct, effect, and culpability tests required for the imposition of a prohibition penalty. *Oberstar v. FDIC*, 987 F.2d 494, 500 (8th Cir. 1993). All three tests must be met in order to impose the prohibition penalty. *In re Seidman*, 37 F.3d 911, 930 (3d Cir. 1994).

Misconduct is established when an institution-affiliated party violates "any law or regulation;" engages in an unsafe or unsound practice; or commits a breach of his fiduciary duty. 12 U.S.C. § 1786(g)(1)((A)(i)-(iii). Having already been found guilty by a federal criminal jury of three counts of bank fraud (18 U.S.C. § 1344) and two counts of wire fraud (18 U.S.C. § 1343), in addition to the similar fraud regarding the other share drafts alleged by NCUA, the Respondent can hardly dispute that he has violated a law. It also follows that those same crimes constituted unsafe and unsound practices, as well as breaches of his fiduciary duty to Hoya, although it is unnecessary to find that the Respondent has committed more than one type of misconduct enumerated in section 1786(g)(1)(A). Clark has, therefore, engaged in misconduct cognizable under the Act.

Under Subparagraph B, the effect test requires NCUA to demonstrate either that Hoya suffered a financial loss from Clark's misconduct or that Clark received financial gain or other benefit from the misconduct. 12 U.S.C. § 1786(g)(1)(B); *see De La Fuente v. FDIC*, 332 F.3d 1208, 1223 (D.C. Cir. 2003). No sophisticated analysis is required to make such a determination regarding Clark's actions. His fraudulent schemes did not flirt with any gray areas of fiduciary conduct – they constituted outright theft of the bank's funds, with a redistribution of those funds either to his own account or to the accounts of his friends. Hoya suffered a loss of $66,491.50 as a result of the fraud, while Clark and his friends received a direct financial benefit of $66,491.50.

The culpability test requires a showing that the Respondent's conduct "involves personal dishonesty" on his part or demonstrates his unfitness to participate in the conduct of a credit union. 12 U.S.C. § 1786(g)(1)(C). Pursuant to this statutory provision, courts have found that personal dishonesty was demonstrated in a wide variety of circumstances, where the accused party had shown a lack of integrity or trustworthiness, or a disposition to lie, cheat, defraud, or misrepresent facts in order to obtain a benefit. *See, e.g. Hutensky v. FDIC*, 82 F.3d 1234 (2d Cir. 1996); *Van Dyke v. Bd. of Governors of Fed. Reserve Sys.*, 876 F.2d 1377 (8th Cir. 1989). The fact that Clark has been convicted of bank fraud and wire fraud for the same or virtually identical actions as those charged by NCUA is proof enough that his conduct involved personal

dishonesty, but the record before me amply confirms this conclusion. Therefore, I conclude that the three elements of the prohibition test have been met, and I recommend that the NCUA Board prohibit the Respondent from participating in the conduct of any insured credit union.

### 4. Civil Money Penalties

NCUA Enforcement Counsel has modified its initial request for second-tier civil money penalties to first-tier penalties, and in light of the reduced number of alleged violations against the Respondent, NCUA seeks a total of $25,000 in such penalties.

The Act, at 12 U.S.C. § 1786(k)(2), authorizes the imposition of three levels, or tiers, of civil money penalties, first-tier penalties being the lowest. In order to qualify for first-tier penalties, an institution-affiliated party must simply be shown to have "violate[d] any law or regulation[.]" 12 U.S.C. § 1786(k)(2)(A)(i). There is no doubt, based on my findings regarding Clark's fraudulent acts in this case, that the Respondent violated a law by deleting pertinent records of four share drafts and by effecting a fraudulent wire transfer, and that civil money penalties against him are appropriate. The real issue is the size of those penalties.

Pursuant to section 1786(k)(2)(A), first-tier penalties of "not more than $5,000 for each day during which such violation continues" are authorized.[6] But Subparagraph (G) of that section also requires the consideration of a series of mitigating factors in determining the appropriateness of a penalty for each case. Those mitigating factors are "the size of financial resources and good faith of the insured credit union or the person charged; the gravity of the violation; the history of previous violations; and such other matters as justice may require." 12 U.S.C. § 1786(k)(2)(G).

Although neither party has offered specific evidence regarding the Respondent's financial resources, the record of proceedings in this case reflects that Clark's financial resources have been severely diminished since the time of his misconduct. After having retained legal counsel at one point in these proceedings, he has had to represent himself for most of the time, and he is currently incarcerated in a federal penitentiary. It is also fair to consider that the federal judge who sentenced him also required him to make restitution in the amount of $219,286.41, with a monthly payment of $100, and the judge

[6] While NCUA has substantially reduced the total number of alleged violations against Clark, and the civil money penalties from first-tier to second-tier, it has increased its requested per-day penalty from $1,000 to $5,000 (*compare* Notice of Charges *to* Notice of Withdrawal of Charges *and* Motion for Recommended Decision). NCUA does not explain the rationale for this increase. Additionally, its calculation of a total of $25,000 in requested first-tier penalties is not explained. Although NCUA alleges (and I find) that the Respondent committed bank fraud regarding four share drafts and wire fraud regarding one wire transfer (for a total of five violations), the four fraudulent share drafts were written on three days (June 7, June 20, and July 1, 2003), and the fraudulent wire transfer also occurred on June 20, 2003 – therefore, technically, the five violations were committed on only three days. I am not aware of any case law on how to apply the per-day penalty assessment when several violations occurred on the same day.

additionally issued a Final Order of Forfeiture in the form of money judgments of $219,286.41 for each of the seven counts on which Clark was convicted. The judge also waived the requirement of paying interest on the restitution, based on Clark's inability to pay. It is fair to say that once the Respondent's incarceration ends, he is going to be hard-pressed to satisfy the restitution order, let alone a civil money penalty. My recommended order concerning his civil money penalty is made with a desire to avoid further burdening Clark unreasonably, while also balancing the interests of justice and the other factors set forth in the Act.

In 1998, the Federal Financial Institutions Examination Council issued a Federal Register Notice, titled "Assessment of Civil Money Penalties." 63 FR 30226 (June 3, 1998). The FFIEC, comprised of the many federal financial regulatory agencies, including NCUA, sought in this report to explain in more detail, as a uniform interagency policy, how to apply the statutory factors and to determine an appropriate penalty in each case. While this policy is not binding on me, it is worthy of deference. Among the exacerbating factors identified there, and which are present in this case, are: Clark's misconduct here was clearly intentional and committed with a disregard of the law or of the adverse consequences to Hoya; his fraudulent actions continued over a considerable period of time, on dozens of occasions;[7] Clark has refused to cooperate at any point in the resolution of the problems identified by Hoya and investigatory authorities; he concealed his fraudulent actions both before and after discovery; Clark and his associates received direct financial gain, dollar-for-dollar, from the losses imposed on Hoya. The direct loss suffered by Hoya for the five charged violations was $66,491.50, but as noted already, the total loss suffered by Hoya as a result of Clark's longstanding criminal scheme (both pre- and post-May 30, 2003, but not counting the allegedly fraudulent ACH payments) was over $198,000. In Clark's favor, I note that there is no evidence that he has any prior history of similar fraudulent conduct, and that he is already required to make restitution in the amount of $219,286.41.

Based on all these factors, I am impelled to impose the maximum first-tier penalty of $5,000 for each day on which Clark committed fraud, but I only consider three "days" in calculating that penalty. Thus, while Clark committed five frauds, the actions occurred on three days; while the statutory language may leave room to impose a $5,000 penalty for each of the five frauds, I consider it appropriate to err on the side of caution here, especially in light of the Respondent's clearly meager financial resources. But I am equally cognizant that Hoya's losses far outweigh the maximum $5,000 penalty per offense, even if it is multiplied five times rather than three. Just looking at the loss

[7] Although Clark is "only" charged with four fraudulent share drafts and one fraudulent wire transfer in this proceeding, and his civil money penalty can only be based on those charges, it is relevant to consider the evidence that was admitted (both in this proceeding and at his criminal trial) of at least 52 such share drafts and at least two such wire transfers, along with the total loss suffered by Hoya.

incurred by Hoya from the four charged share drafts and the single wire transfer, that amount ($66,491.50) is far more than a penalty of $15,000 or $25,000. The FFIEC policy, cited above, provides:

> The agencies will give additional consideration in cases where the violation, practice, or breach causes quantifiable, economic benefit or loss. In those cases, removal of the benefit or recompense of the loss usually will be insufficient, by itself, to promote compliance with statutory and regulatory requirements. The penalty amount should reflect a remedial purpose and should provide a deterrent to future misconduct.

63 FR at 30227. It will be impossible here to appropriately penalize Clark so as to fully deter future misconduct, since even a $25,000 penalty will be far less than what he gained financially from his fraud. For every fraudulent share draft Clark issued, he enjoyed the fruits of purchases of goods and services. But blood cannot be extracted from stone, and it is unlikely that he will be able to repay even $15,000 at any time soon after he is released from prison, particularly since he has a priority obligation to make restitution of more than $200,000. In these circumstances, I believe that a civil money penalty of $15,000 will be serious enough to make Clark think twice before repeating his misconduct, without becoming unduly onerous.[8]

### 5. Double Jeopardy

The Respondent argues that the proposed civil money penalties against him would constitute double jeopardy, but this claim does not stand up to scrutiny. Contrary to his contention, the courts have not held that a monetary penalty imposed under the Act or any of the FIRREA-related statutes after a criminal prosecution constitutes double jeopardy. Rather, the courts have held (as noted by NCUA) that the Constitution's double jeopardy clause prohibits only the imposition of multiple criminal punishments for the same offense. *Helvering v. Mitchell*, 303 U.S. 391, 398-99 (1938). In applying this rule, courts have sometimes looked beyond the legislative classification of an offense to determine "whether the statutory scheme is so punitive either in purpose or effect as to negate that intention." *U.S. v. Ward*, 448 U.S. 242, 248-49 (1980). For purposes of double jeopardy, "only the clearest proof" will be sufficient to transform a nominally civil penalty into a criminal one. *Hudson v. U.S.*, 522 U.S. 93, 99 (1997), quoting *Ward, supra*, at 249. In order to evaluate the civil or criminal purpose of a statute, the *Hudson* court applied a set of seven criteria that were originally set forth in a different constitutional context in *Kennedy v. Mendoza*, 372 U.S. 144, 168-69 (1963). It is not necessary here to restate all of those criteria, but I will emphasize three of them: "whether it comes into play only on a finding of *scienter*"; "whether the behavior to

[8] Since I have based my consideration of the amount of the penalty on the assumption that Clark has little or no current financial resources, a hearing on this issue would serve no purpose. Regardless of his limited means, I would not recommend a lower money penalty than I already have.

which it applies is already a crime"; and "whether an alternative purpose to which it may rationally be connected is assignable for it". *Id.* While the other criteria do not weigh in favor of either a civil or criminal label in our case, these three factors all weigh in favor of finding the Act's monetary penalties to be primarily civil.

As to the first factor cited above, it is important to note that NCUA is seeking only first-tier penalties against the Respondent. As I explained earlier, first-tier penalties require only a finding that that the Respondent has violated any law or regulation. Second-tier penalties require an additional element that has generally been interpreted as requiring *scienter*, or knowledge of the wrongfulness of the conduct, and for second-tier penalties Clark might have a stronger double jeopardy argument. But the case law under FIRREA (which includes cases under the Act) is replete with examples of institution-affiliated parties being held to violate the Act without having committed any crime, or even any act that requires *scienter*. *See, e.g. Gully v. NCUA*, 341 F.3d 155, 164-65 (2d Cir. 2003). This same analysis also shows that 12 U.S.C. § 1786 is not meant to punish acts that are already crimes. Indeed, NCUA's action against the Respondent was initiated long before Clark was indicted for bank fraud and wire fraud, and the legislative and judicial history of FIRREA clearly reflect that the law was intended to establish a comprehensive framework for protecting the assets and the overall soundness of federally insured credit unions and other financial institutions. While the charges against Clark in this proceeding are also crimes, many actions that might violate NCUA regulations, constitute unsafe or unsound practices, or breach a fiduciary's duties would not be a crime. *Gully, supra.* Similarly, it should now be clear that the Act and FIRREA in general, and section 1786 in particular, have alternative purposes other than punitive ones. They are intended to protect the soundness and stability of the nation's financial institutions, and as such, they should not be viewed as criminal. As the Supreme Court noted in *Hudson*, "all civil penalties have some deterrent effect." 522 U.S. at 102. The *Hudson* case involved civil monetary penalties imposed by the Office of the Comptroller of the Currency under provisions of FIRREA that parallel those of the Act here, and the Court held that while the money penalty provisions of FIRREA serve civil as well as criminal goals, FIRREA's underlying goal of promoting the stability of the nation's banking system is sufficient to render it civil, for purposes of double jeopardy. *Id.* at 105. That same analysis is equally valid to the money penalties sought against the Respondent in this case. Accordingly, I conclude that the first-tier civil money penalties requested by NCUA do not violate the rule against double jeopardy, and I will recommend the penalties specified earlier.

## CONCLUSIONS OF LAW

1. Hoya Federal Credit Union is a federally-insured credit union located in the District of Columbia. From April 2001 to July 2003, the Respondent was an employee of Hoya and was an institution-affiliated party, as that term is defined in 12 U.S.C. § 1786(r).

2. While he was employed by Hoya, the Respondent used his official access to the credit union's computer system to manipulate records and accounts, so that share drafts he wrote, or had his friend Tonia Shuler write, on his or Shuler's account at Hoya, were paid with Hoya funds, instead of being returned, and were not posted as debit items to the accounts of Respondent or Shuler.

3. In the manner described in paragraph 2, the Respondent fraudulently wrote the following share drafts on his Hoya account: share draft #1286, in the amount of $1,000 on June 7, 2003; share draft #1289, in the amount of $1,000 on July 1, 2003; and share draft #1290, in the amount of $1,200 on July 1, 2003.

4. In the manner described in paragraph 2, the Respondent fraudulently induced his friend Tonia Shuler to write share draft #1613, in the amount of $ 3,291.50, on Shuler's Hoya account, after telling her that he would "cover" the check.

5. For all of the share drafts listed in paragraphs 3 and 4, the Respondent made entries in Hoya's computer system to issue "stop payment" or "insufficient funds" notices, thereby preventing those share drafts from being entered as debit items to his or Shuler's account. The Respondent then removed those share drafts from Hoya's draft return register, thereby preventing those share drafts from being returned to the accounts of the payees.

6. All of the Respondent's actions described in paragraphs 2-5 were fraudulent and personally dishonest, performed by him with the intention of obtaining financial benefit to himself or to his friend, at the expense of Hoya. This scheme constituted bank fraud, in violation of 18 U.S.C. § 1344. The scheme also constituted an unsafe and unsound practice and a breach of the Respondent's fiduciary duties to Hoya.

7. As a result of the actions described in paragraphs 2-6, Hoya suffered a financial loss of $6,491.50, and the Respondent was unjustly enriched, directly or indirectly, by $6,491.50.

8. On June 20, 2003, the Respondent misused his official position to instruct another Hoya employee to initiate a wire transfer of $60,000 from Hoya's corporate bank account to a personal account in the Respondent's name at another financial institution, after telling the employee that the wire transfer was to purchase a certificate of deposit on Hoya's behalf.

9. The Respondent's actions described in paragraph 8 were fraudulent and personally dishonest, performed with the intention of obtaining financial benefit to himself, at the expense of Hoya. This scheme constituted wire fraud, in violation of 18 U.S.C. § 1343. The scheme also constituted an unsafe and unsound practice and a breach of the Respondent's fiduciary duties to Hoya.

10. As a result of the actions described in paragraphs 8 and 9, Hoya suffered a financial loss of $60,000 and the Respondent was unjustly enriched by $60,000

## RECOMMENDED ORDER

Based on the foregoing findings of fact, conclusions of law, and discussion, I recommend that summary disposition be granted against the Respondent on the charges of engaging in a scheme to stop payment and delete paid share drafts and causing a fraudulent wire transfer. I further recommend that the proposed orders, attached hereto as Appendices A and B, be issued: (1) prohibiting Respondent, Reginald Clark, from future participation in the affairs of federally insured financial institutions; and (2) assessing against Respondent a first-tier civil money penalty in the amount of $15,000.

**SO ORDERED.**

/s/

RICHARD A. PEARSON
Administrative Law Judge

Issued: May 16, 2014
Washington, D.C.