

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

IN THE MATTER OF:)	
)	
FRED A. DAVIS, FORMER PRESIDENT)	OCC. DOCKETS
AND DIRECTOR,)	EC-00-01
MALTA NATIONAL BANK)	
MALTA, OHIO)	

ORDER

This matter is before the Comptroller of the Currency (“Comptroller”) on the recommendation of the Administrative Law Judge (“ALJ”) for entry of default against Respondent Fred A. Davis (“Respondent”) and the recovery of a Civil Money Penalty of \$100,000 assessed against Respondent, former president and director of Malta National Bank, Malta, Ohio. Upon consideration of the pleadings, the Recommended Decision submitted by the ALJ and the entire record, the Comptroller concludes that Respondent is in default and assesses a civil money penalty of \$100,000 against Respondent. For the reasons set forth below, this order is final and unappealable.

I. FACTUAL SUMMARY AND PROCEDURAL HISTORY

On January 21, 2000, the OCC commenced an enforcement action to impose a CMP of \$100,000 against respondent. In the Notice of Assessment of a Civil Money Penalty which initiated this case, the OCC’s Enforcement and Compliance Division (“E&C”) submitted that the CMP was imposed because Respondent had breached his fiduciary duties of loyalty and care, and also recklessly participated in unsafe and unsound banking practices and/or violations of law

which evidenced a pattern of misconduct by Respondent and resulted in more than minimal loss to the bank and/or resulted in pecuniary gain or other benefit to Respondent. As set forth in the Notice, the charges are based on the fact that from August 1995 to January 1997, Respondent aided, abetted or participated in the origination of six loans in the total amount of three hundred seventy-five thousand dollars (\$375,000) in the names of bank customers without their knowledge or consent, and caused loan proceeds to be deposited into accounts controlled by Respondent or in which Respondent held a beneficial interest. Respondent did not resign as president of the Bank until February 1998, when Bank officials detected the fictitious nature of these loans. By March 1998, the loans were not performing and were charged off as a loss. This loss contributed to the Bank's becoming under-capitalized.

To date, Respondent has failed to file an answer nor has Respondent requested a hearing as required by 12 C.F.R. § 19.19(a). In addition, Respondent did not participate in the prehearing conference scheduled on February 17, 2000, 11:00 A. M. (pursuant to OCC Practice and Procedure Rule § 19.31) and presided over by the ALJ. On March 9, 2000, Enforcement Counsel filed a Motion for Issuance of Final Order seeking a final and unappealable order for failure to request a hearing or file an answer. Respondent never responded to the motion. Respondent received personal service of the ALJ's Show Cause Order, but did not answer it. On April 3, 2000, the ALJ issued a Recommended Decision that a default judgment should be issued and the CMP should be assessed against Respondent.

II. DISCUSSION

Pursuant to 12 C.F.R. § 19.23, failure of a party to oppose a written motion is deemed consent by the party to the entry of an order substantially in the form of the order accompanying the motion. The failure of a party to file an answer may also result in a default. As set forth in 12 C.F.R. § 19.19(c)(2), "failure of a respondent to file an answer required by this section within the time provided constitutes a waiver of his or her right to appear and contest the allegations in the notice." In addition, the regulations provide that Enforcement Counsel may file a motion for entry of an order of default and that upon a finding that no good cause for the default has been shown, the ALJ shall file a recommended decision containing the findings and the relief sought. 12 C.F.R. § 19.19(c)(1).

A default order is appropriate in cases such as this, when a respondent fails to file an answer, request a hearing or appear in any fashion in a civil money penalty case.¹ As pointed out by the ALJ, Respondent knew of these proceedings when he signed the Stipulation and Consent agreement with the OCC. The agreement concerned the same facts at issue in this case. Furthermore, Respondent was properly served with notice as set forth in 12 C.F.R. § 19.11(b) and (c). The OCC accomplished service by either registered or certified mail and/or by Overnight Delivery. Furthermore, according to the FedEx receipt, Respondent signed personally for the package containing the Notice of Assessment on January 24, 2000. Based on the foregoing factors, in our opinion, notice was proper and Respondent's failure to respond justifies a default judgment.

¹ See *OCC v. Elena Espiritu*, AA-EC-98-04(1998)(issuing of default order by Comptroller where ALJ recommended default, when certified mail receipts were returned signed by the Respondent, but the Respondent failed to file an answer in response to the allegations).

A review of the civil money penalty matrix indicates that a \$100,000 CMP for the six nominee loans in which Respondent participated, the intentional misconduct involved, and the resulting loss to the bank of \$375,000 is within the bounds of reasonableness. Moreover, in the Notice of Assessment, E&C states that it took the appropriate statutory factors into account, such as the Respondent's good faith, financial resources, and history of previous violations. Notice at 1. *See* 12 U.S.C. § 1818(I)(2)(G). Pursuant to 12 U.S.C. § 1818(I)(2)(E) and 12 C.F.R. § 19.19(c)(2), if a respondent fails to request a hearing in a CMP proceeding, the respondent has no right of appeal before a Federal appellate court because the notice of assessment constitutes "a final and unappealable order."

III. ORDER

Based on the entire record of the proceeding and the Recommended Decision of the Administrative Law Judge, the Comptroller hereby finds that respondent is in default pursuant to 12 U.S.C. §§ 19.19(c)(1) and 19.23(d)(2). Pursuant to the Comptroller's authority under 12 U.S.C. § 1818, the Comptroller orders respondent to pay a civil money penalty in the amount of \$100,000. This order is final and unappealable.

Respondent shall make full payment of the penalties assessed against him within sixty days after the effective date of service of this Order, whichever is later. Remittance of civil money penalties shall be payable to the Treasurer of the United States and be delivered to:

Hearing Clerk
Office of the Chief Counsel
Office of the Comptroller of the Currency
Washington, DC 20219

SO ORDERED this 5th day of June, 2000.

JOHN D. HAWKE, JR.
Comptroller of the Currency