

evidence and reaching his opinions. Mr. Aesoph further avers that, as the Commission has alleged,* he was the victim of a collusive fraud by management and others that was designed to frustrate and interfere with the audit and deceive him, Mr. Bennett, and the KPMG auditors by, for example, providing audit evidence that appeared to be persuasive when, in fact it was not, due to management's fraud.

Response to Paragraph No. 2:

Mr. Aesoph admits that the KPMG engagement team identified TierOne's ALLL as a critical audit area for the 2008 audit, that TierOne experienced a significant increase in non-performing loans during 2008, that the bank represented to KPMG and led it to believe that management of TierOne generally estimated its loan losses for FAS 114 loans by evaluating the fair value of the collateral underlying these loans. Mr. Aesoph further admits that he was led to reasonably believe that in estimating the fair value of the collateral, management relied on appraisals and other information. Mr. Aesoph denies the remaining allegations in Paragraph 2.

Response to Paragraph No. 3:

Mr. Aesoph admits that he and Mr. Bennett correctly identified TierOne's loan losses as presenting a fraud risk and a risk of significant misstatement. Mr. Aesoph denies the remaining allegations in Paragraph 3.

Response to Paragraph No. 4:

Mr. Aesoph avers that AU Sections 328 and 342 speak for themselves. Mr. Aesoph otherwise denies the allegations in Paragraph 4.

Response to Paragraph No. 5:

Mr. Aesoph denies the allegations in Paragraph 5 and avers that he exercised professional skepticism and obtained sufficient competent evidential matter to support the opinion.

Response to Paragraph No. 6:

Mr. Aesoph denies the allegations in Paragraph 6.

Response to Paragraph No. 7:

Mr. Aesoph admits the allegations in Paragraph 7, except he is 41 years old and is currently licensed as a CPA in Nebraska and South Dakota and has previously been licensed as a CPA in Idaho, Indiana, Iowa, Kansas, and North Dakota.

Response to Paragraph No. 8:

Mr. Aesoph admits that Mr. Bennett was the senior manager for the 2008 TierOne audit and a member of KPMG's financial services practice, that Mr. Bennett worked on the TierOne audit each year from 2003 through KPMG's resignation in 2010 with the exception of one year, and that Mr. Bennett served as manager or senior manager on at least four financial services audits in addition to TierOne. Mr. Aesoph lacks personal knowledge of the remaining allegations in Paragraph 8.

Response to Paragraph No. 9:

Mr. Aesoph admits the allegations in Paragraph 9.

Response to Paragraph No. 10:

Mr. Aesoph admits the allegations in Paragraph 10.

Response to Paragraph No. 11:

Mr. Aesoph admits that TierOne had been in operation for approximately 100 years as of December 31, 2008, and that it had historically focused on residential and agricultural loans in the Nebraska/Iowa/Kansas region. Mr. Aesoph further admits that TierOne expanded its lending activities to Las Vegas, Florida and Arizona. Mr. Aesoph denies the remaining allegations in Paragraph 11.

Response to Paragraph No. 12:

Mr. Aesoph admits that TierOne deemed certain loans “impaired” pursuant to FAS 114, meaning it was probable the bank would not recover all amounts contractually due, and that TierOne’s reported impaired loan balance increased from less than \$4 million as of December 31, 2006 to nearly \$186 million as of December 31, 2008. Mr. Aesoph denies the remaining allegations in Paragraph 12.

Response to Paragraph No. 13:

Mr. Aesoph admits that, beginning in June 2008, the OTS conducted what it described as a “risk-focused examination” of TierOne, and that as a result of that examination, the OTS provided a report. Mr. Aesoph avers that the OTS report for the June 2008 examination speaks for itself. Mr. Aesoph denies the remaining allegations in paragraph 13.

Response to Paragraph No. 14:

Mr. Aesoph admits that under GAAP, TierOne was required to assess probable losses associated with its impaired loans that were inherent as of period-end and record those losses, and that such loan losses impacted the calculation of the bank’s capital ratios and potentially the bank’s compliance with OTS capital requirements. Mr. Aesoph avers that FAS 114 speaks for itself. Mr. Aesoph otherwise denies the remaining allegations in Paragraph 14.

Response to Paragraph No. 15:

Mr. Aesoph admits that TierOne prepared loan-by-loan spreadsheets that contained estimates of the fair value of the collateral and that management presented these spreadsheets, and supporting information including appraisals, to the auditors as their best estimates of the fair value of the collateral. Mr. Aesoph denies the remaining allegations in Paragraph 15.

Response to Paragraph No. 16:

Mr. Aesoph admits that in the fall of 2009, TierOne disclosed approximately \$120.2 million in loan loss provisions, that the OTS closed the bank on June 4, 2010, and that the holding company filed for bankruptcy later that month. Mr. Aesoph denies the remaining allegations in Paragraph 16.

Response to Paragraph No. 17:

Mr. Aesoph admits that KPMG resigned as TierOne's auditor in April 2010. Mr. Aesoph avers that KPMG's letter to the SEC, attached as Exhibit 99.4 to TierOne's May 14, 2010 Form 8-K, speaks for itself. Mr. Aesoph denies the remaining allegations in Paragraph 17.

Response to Paragraph No. 18:

Mr. Aesoph admits that in the course of the 2008 audit of TierOne, he correctly identified TierOne's loan losses as presenting a fraud risk and a risk of significant misstatement. Mr. Aesoph further admits that he was aware of the component of the loan loss allowance related to the bank's FAS 114 loans. Mr. Aesoph denies the remaining allegations in Paragraph 18.

Response to Paragraph No. 19:

Mr. Aesoph admits that the bank's ALLL had two primary components, and that those components were estimated in accordance with FAS 114 and Statement of Financial Accounting Standards No. 5 ("FAS 5"). Mr. Aesoph denies the remaining allegations in Paragraph 19.

Response to Paragraph No. 20:

Mr. Aesoph admits that he and Mr. Bennett, as well as the concurring review partner, reviewed and approved the Planning Document and avers that the Planning Document and related work papers speak for themselves. Mr. Aesoph otherwise denies the remaining allegations in Paragraph 20.

Response to Paragraph No. 21:

Mr. Aesoph denies the allegations in Paragraph 21.

Response to Paragraph No. 22:

Mr. Aesoph admits that the June 2008 OTS report was provided to KPMG in October 2008, considered by KPMG, and included in the auditors' work papers. Mr. Aesoph further admits that Mr. Bennett authored a memo contained in the auditors' work papers that discusses the OTS report. Mr. Aesoph denies the remaining allegations in Paragraph 22.

Response to Paragraph No. 23:

Mr. Aesoph admits that TierOne provided KPMG with spreadsheets analyzing more than fifty borrower relationships at year-end 2008, that third-party market data indicated decline in property values in Las Vegas, Nevada and Phoenix, Arizona, and that management applied discounts to several of the appraisals in estimating the fair value of collateral on a loan-by-loan basis. Mr. Aesoph denies the remaining allegations in Paragraph 23.

Response to Paragraph No. 24:

Mr. Aesoph admits that the OTS and members of the audit engagement team recommended that appraisals in certain circumstances be updated. Mr. Aesoph denies the remaining allegations in Paragraph 24.

Response to Paragraph No. 25:

Mr. Aesoph admits that during 2008 TierOne received updated appraisals or valuations on FAS 114 loans, including those listed in footnote 2 to Paragraph 25. Mr. Aesoph further admits that during 2008 TierOne received new appraisals on several loans that had been booked as FAS 114 loans at year-end 2007, including those listed in footnote 3 to Paragraph 25. Mr. Aesoph denies the remaining allegations in Paragraph 25.

Response to Paragraph No. 26:

Mr. Aesoph denies the allegations in Paragraph 26.

Response to Paragraph No. 27:

Mr. Aesoph admits that during the 2008 audit, the auditors reviewed a memorandum prepared by TierOne that set forth its estimation methodology for the period ended December 31, 2008, and that the auditors' work papers contain an annotated copy of that memorandum.

Mr. Aesoph avers that the memorandum speaks for itself and that TierOne provided the memorandum to KPMG as a complete and accurate description of management's ALLL estimation methodology and good faith determinations using all information then available to management. Mr. Aesoph otherwise denies the remaining allegations in Paragraph 27.

Response to Paragraph No. 28:

Mr. Aesoph admits that TierOne designated a portion of its ALLL as an "unallocated" reserve and that the unallocated reserve decreased from approximately \$7 million in the second and third quarters to approximately \$4 million at year end 2008. Mr. Aesoph denies the remaining allegations in Paragraph 28.

Response to Paragraph No. 29:

Mr. Aesoph denies the allegations in Paragraph 29 and avers that FRR No. 28 and SAB 102 speak for themselves.

Response to Paragraph No. 30:

Mr. Aesoph avers that the PCAOB auditing standards speak for themselves. Mr. Aesoph otherwise denies the remaining allegations in Paragraph 30.

Response to Paragraph No. 31:

Mr. Aesoph denies the allegations in Paragraph 31.

Response to Paragraph No. 32:

Mr. Aesoph admits that the OTS mandated an 8.5% core capital ratio and 11% risk-based capital ratio and that TierOne's core and risk-based capital ratios at December 31, 2008 were 8.9% and 11.6%, respectively. Mr. Aesoph further admits that the bank's net interest income after provision for loan losses was \$2.9 million at year end 2008 and that net interest income decreased from \$119.8 million at year end 2006 to \$48 million at year end 2007 to \$2.9 million at year end 2008. Mr. Aesoph avers that TierOne's 2008 10-K speaks for itself. Mr. Aesoph otherwise denies the remaining allegations in Paragraph 32.

Response to Paragraph No. 33:

Mr. Aesoph denies the allegations in Paragraph 33.

Response to Paragraph No. 34:

Mr. Aesoph avers that Paragraph 34 does not contain allegations to which a response is required.

Response to Paragraph No. 35:

The cited audit standards speak for themselves. Mr. Aesoph otherwise denies the remaining allegations in Paragraph 35.

Response to Paragraph No. 36:

The cited audit standards speak for themselves. Mr. Aesoph otherwise denies the remaining allegations in Paragraph 36.

Response to Paragraph No. 37:

The cited audit standards speak for themselves. Mr. Aesoph otherwise denies the remaining allegations in Paragraph 37.

Response to Paragraph No. 38:

The cited audit standards speak for themselves. Mr. Aesoph otherwise denies the remaining allegations in Paragraph 38.

Response to Paragraph No. 39:

Mr. Aesoph admits that, as the engagement partner, he bore final responsibility for the audit, and he was responsible for proper supervision of the engagement team members. Mr. Aesoph further admits that he delegated portions of the planning and supervision of the audit to Mr. Bennett, who was the senior manager on the 2008 TierOne audit. Mr. Aesoph denies the remaining allegations in Paragraph 39.

Response to Paragraph No. 40:

Mr. Aesoph admits the allegations in Paragraph 40.

Response to Paragraph No. 41:

Mr. Aesoph admits the allegations in Paragraph 41.

Response to Paragraph No. 42:

Mr. Aesoph denies the allegations in Paragraph 42.

Response to Paragraph No. 43:

Mr. Aesoph admits that KPMG performed an integrated audit of TierOne's financial statements. Mr. Aesoph avers that the PCAOB standards speak for themselves. Mr. Aesoph otherwise denies the remaining allegations in Paragraph 43.

Response to Paragraph Nos. 44 through 51:

Mr. Aesoph avers that AS No. 5 speaks for itself. Mr. Aesoph otherwise denies the remaining allegations in Paragraphs 44 through 51.

Response to Paragraph No. 52:

Mr. Aesoph denies the allegations in Paragraph 52.

Response to Paragraph No. 53:

Mr. Aesoph admits that he and Mr. Bennett both reviewed and approved key audit work papers involving the evaluation and testing of TierOne's controls over the ALLL. Mr. Aesoph denies the remaining allegations in Paragraph 53.

Response to Paragraph No. 54:

Mr. Aesoph denies the allegations in Paragraph 54.

Response to Paragraph No. 55:

Mr. Aesoph denies the allegations in Paragraph 55.

Response to Paragraph No. 56:

Mr. Aesoph denies the allegations in Paragraph 56.

Response to Paragraph No. 57:

Mr. Aesoph avers that TierOne's written lending policy speaks for itself. Mr. Aesoph otherwise denies the remaining allegations in Paragraph 57.

Response to Paragraph No. 58:

Mr. Aesoph denies the allegations in Paragraph 58.

Response to Paragraph No. 59:

Mr. Aesoph avers that the PCAOB audit standards speak for themselves. Mr. Aesoph otherwise denies the remaining allegations in Paragraph 59.

Response to Paragraph No. 60:

Mr. Aesoph admits that Mr. Bennett was directly involved in the audit engagement team's FAS 114 test work. Mr. Aesoph admits that Mr. Bennett, among other work he and other members of the engagement team performed around the loans evaluated under FAS 114: initially reviewed the individual spreadsheets prepared by TierOne that purported to set forth TierOne's estimation of the valuation of the underlying collateral of the bank's FAS 114 loans; conducted and supervised the audit test work and collection of evidential matter, including meeting directly with management to discuss management's estimates of the value of collateral; communicated with the KPMG Credit Specialist who reviewed certain TierOne loans; and approved the audit engagement team's FAS 114 test work prior to passing it to Mr. Aesoph. Mr. Aesoph further admits that, among other things, he also supervised the audit test work and collection of evidential matter, communicated with the audit engagement team and KPMG Credit Specialist who reviewed certain TierOne loans, and reviewed the FAS 114 test work prior to signing the audit opinion. Mr. Aesoph denies the remaining allegations in Paragraph 60.

Response to Paragraph No. 61:

Mr. Aesoph admits that the loss reserve associated with the bank's FAS 114 loans was an estimate. Mr. Aesoph avers that the PCAOB auditing standards speak for themselves. Mr. Aesoph otherwise denies the remaining allegations in Paragraph 61.

Response to Paragraph No. 62:

The cited audit standards speak for themselves. Mr. Aesoph otherwise denies the remaining allegations in Paragraph 62.

Response to Paragraph No. 63:

The cited audit standards speak for themselves. Mr. Aesoph otherwise denies the remaining allegations in Paragraph 63.

Response to Paragraph No. 64:

The cited audit standards speak for themselves. Mr. Aesoph otherwise denies the remaining allegations in Paragraph 64.

Response to Paragraph No. 65:

Mr. Aesoph admits that the auditors correctly identified TierOne's ALLL as presenting a risk of fraud and a high risk of error. Mr. Aesoph avers that the cited audit standards speak for themselves. Mr. Aesoph otherwise denies the remaining allegations in Paragraph 65.

Response to Paragraph No. 66:

The cited audit standards speak for themselves. Mr. Aesoph otherwise denies the remaining allegations in Paragraph 66.

Response to Paragraph No. 67:

The cited audit standards speak for themselves. Mr. Aesoph otherwise denies the remaining allegations in Paragraph 67.

Response to Paragraph No. 68:

The cited audit standards speak for themselves. Mr. Aesoph otherwise denies the remaining allegations in Paragraph 68.

Response to Paragraph No. 69:

The cited audit standards speak for themselves. Mr. Aesoph otherwise denies the remaining allegations in Paragraph 69.

Response to Paragraph No. 70:

Mr. Aesoph denies the allegations in Paragraph 70.

Response to Paragraph No. 71:

Mr. Aesoph admits the allegations in the first two sentences of Paragraph 71. Mr. Aesoph denies the remaining allegations in Paragraph 71.

Response to Paragraph No. 72:

Mr. Aesoph denies the allegations in Paragraph 72.

Response to Paragraph No. 73:

Mr. Aesoph admits that the audit engagement team performed audit procedures around the FAS 114 estimates that included, among other things, obtaining a sample of original appraisals for additional testing, reviewing loan files and related documentation, reviewing market data and having discussions with management. Mr. Aesoph denies that Paragraph 73 accurately describes the entirety of the procedures and the evidence obtained.

Response to Paragraph No. 74:

Mr. Aesoph admits that many of the properties that served as collateral were under development and in varying stages of completion. Mr. Aesoph denies the remaining allegations in Paragraph 74.

Response to Paragraph No. 75:

Mr. Aesoph denies the allegations in Paragraph 75.

Response to Paragraph No. 76:

Mr. Aesoph denies the allegations in Paragraph 76.

Response to Paragraph No. 77:

Mr. Aesoph denies the allegations in Paragraph 77.

Response to Paragraph No. 78:

Mr. Aesoph denies the allegations in Paragraph 78.

Response to Paragraph No. 79:

Mr. Aesoph denies the allegations in Paragraph 79.

Response to Paragraph No. 80:

Mr. Aesoph denies the allegations in Paragraph 80.

Response to Paragraph No. 81:

The cited audit standards speak for themselves. Mr. Aesoph otherwise denies the remaining allegations in Paragraph 81.

Response to Paragraph No. 82:

Mr. Aesoph avers that PCAOB standards and KPMG's audit program and the audit completion document speak for themselves. Mr. Aesoph otherwise denies the remaining allegations in Paragraph 82.

Response to Paragraph No. 83:

Mr. Aesoph denies the allegations in Paragraph 83.

Response to Paragraph No. 84:

Mr. Aesoph denies the allegations in Paragraph 84.

Response to Paragraph No. 85:

The cited audit standards speak for themselves. Mr. Aesoph otherwise denies the remaining allegations in Paragraph 85.

Response to Paragraph No. 86:

Mr. Aesoph denies the allegations in Paragraph 86.

Response to Paragraph No. 87:

Mr. Aesoph denies the allegations in Paragraph 87.

Response to Paragraph No. 88:

Mr. Aesoph denies the allegations in Paragraph 88.

Response to Paragraph No. 89:

Mr. Aesoph denies the allegations in Paragraph 89.

Response to Paragraph No. 90:

Mr. Aesoph denies the allegations in Paragraph 90.

AFFIRMATIVE DEFENSES

Respondent Aesoph asserts the following affirmative defenses:

First Affirmative Defense
(Failure to State a Cause of Action)

1. The allegations of the Order fail to state a cause of action under the cited provisions of Rule 201.102(e)(1)(ii).

Second Affirmative Defense
(Failure to Provide Fair Notice)

2. The text of the Order fails to honor the mandate, set forth in Rule 200(b), 17 C.F.R. § 201.200(b), that where an answer is required by the Commission, the order “shall set forth the factual and legal basis alleged therefor in such detail as will permit a specific response thereto” For the reasons set forth in the accompanying Motion for More Definite Statement, Mr. Aesoph has been denied his right to fair notice of the charges against him and adequate opportunity to prepare his defense thereto.

Third Affirmative Defense
(Due Process/Retroactivity)

3. The Order denies Mr. Aesoph due process and fair notice as provided in the Fifth Amendment to the United States Constitution and the Administrative Procedures Act because the Order seeks to retroactively apply new interpretations of the plain language of applicable rules and professional standards.

Fourth Affirmative Defense
(Due Process/Vagueness)

4. The Order contravenes Mr. Aesoph's right to due process as provided in the Fifth Amendment to the United States Constitution because it seeks to enforce vague and overbroad laws based on rules and professional standards, or interpretations thereof, that are unduly vague and subjective.

Fifth Affirmative Defense
(Due Process/Procedure)

5. The Order and these proceedings contravene Mr. Aesoph's rights to due process as provided in the Fifth Amendment to the United States Constitution because the proceedings do not afford an adequate opportunity to defend the charges and deprive Mr. Aesoph of access to information and evidence relevant to his defense.

Sixth Affirmative Defense
(Arbitrary and Capricious)

6. The Commission's authorization of these proceedings was arbitrary and capricious in that the allegations in the Order lack support either in the record or in applicable rules and professional standards, and are contrary to allegations made by the Division in related proceedings.

Seventh Affirmative Defense
(Penalties)

7. The penalties sought violate the Eighth Amendment of the United States Constitution and Mr. Aesoph's right to due process as provided in the Fifth Amendment to

the United States Constitution because the standards of improper professional conduct and the standards for determining resulting penalties are unduly vague and subjective, and permit arbitrary, capricious, excessive, and disproportionate punishment that serves no legitimate governmental interest.

Eighth Affirmative Defense
(Due Process/Federal Regulatory Findings)

8. The Order and these proceedings contravene Mr. Aesoph's rights to due process as provided in the Fifth Amendment to the United States Constitution to the extent that Mr. Aesoph made conclusions consistent with those reached by federal banking regulators regarding the bank's allowance for loan losses and related internal controls in 2008.

Ninth Affirmative Defense
(Estoppel/Federal Regulatory Findings)

9. The Commission is estopped from finding that Mr. Aesoph engaged in improper professional conduct to the extent that a federal banking regulator's conclusions regarding the bank's allowance for loan losses and related internal controls in 2008 were consistent with those reached by Mr. Aesoph during the same period.

Tenth Affirmative Defense
(Audit Interference)

10. TierOne management and employees directly interfered with the audit of TierOne's financial statement for the period ending December 31, 2008 by actively misleading and/or impeding the auditors' ability to perform the audit by, for example, causing the auditors to rely on evidence that appeared to be persuasive but was not, due to fraud, and, as a result, there can be no finding of improper professional conduct on the part of Mr. Aesoph.

Eleventh Affirmative Defense

(Estoppel/Fraud)

11. The Commission is estopped from finding that Mr. Aesoph engaged in improper professional conduct because the Commission has charged TierOne management—Gilbert Lundstrom, Jim Laphen, and Don Langford—with fraud on the auditors in the very same accounting matter at issue here and has adopted positions contrary to those asserted in this proceeding.

Twelfth Affirmative Defense

(Due Process/“Age of Case” Principles)

12. The allegations of the Order concern an audit and audit procedures conducted some four to five years ago. As such, the Order’s entry as of January 9, 2013, violates fundamental notions of fairness and due process in that the Commission has unjustifiably delayed issuance of its Order until such a significant amount of time has elapsed that Mr. Aesoph’s ability to summon witnesses and produce testimony is significantly and adversely affected. Given the age of events in this matter, it is “inherently unfair” and violative of due process to proceed against Mr. Aesoph.

Thirteenth Affirmative Defense

(Enforcement Action Deadline)

13. The Order is untimely under 15 U.S.C. § 78d-5, and the Commission’s approval of the institution of these proceedings was therefore arbitrary, capricious and contrary to law.

Fourteenth Affirmative Defense

(Additional Defenses)

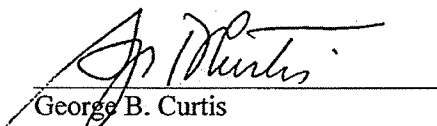
14. Mr. Aesoph expressly and specifically reserves the right to amend this Answer to add, delete, and/or modify defenses based upon legal theories, facts, and circumstances that may or will be divulged through discovery and/or further legal analysis of the Division’s position in this litigation. Mr. Aesoph adopts and incorporates by reference any and all other

defenses asserted or to be asserted by any other respondent to this action to the extent Mr. Aesoph may share in such defense.

WHEREFORE, Respondent John J. Aesoph respectfully requests that the relief requested by the Division be denied and that such relief be afforded him as the Court deems appropriate under the Rules.

Dated: February 4, 2013

Respectfully submitted,



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