UNITED STATES OF AMERICA
BEFORE THE NATIONAL CREDIT UNION ADMINISTRATION BOARD
ALEXANDRIA, VIRGINIA

In the Matter of	)	
	)	
RAY A. WORTHY	)	**NCUA Docket No.**
	)	**98-1201-III**
Former Manager and Treasurer **Freight Handlers Federal Credit Union** **New Orleans, Louisiana**	)	

Final Decision and Order

Final Decision

This case is before the National Credit Union Administration Board for a final decision, following Administrative Law Judge Arthur L. Shipe's issuance of a Recommended Decision to prohibit Ray A. Worthy from participation in the conduct of the affairs of any insured financial institution or agency pursuant to Section 206(g) of the Federal Credit Union Act, and to impose restitution in the amount of $43,857.34 pursuant to Section 206(e) of the Federal Credit Union Act, 12 U.S.C. §§1786(e) and (g).

I. Procedural Background

On December 17, 1998, the National Credit Union Administration (NCUA) Board issued a Notice Of Charges And Hearings For An Order To Prohibit And An Order To Cease And Desist And To Direct Restitution against Ray A. Worthy (Respondent), former manager and treasurer of the Freight Handlers Federal Credit Union (the Credit Union). The Notice and Orders were issued pursuant to Sections 206(e) and (g) of the Federal Credit Union Act (the Act). The case was submitted to the Office of Financial Institution Adjudication (OFIA) and was assigned to Administrative Law Judge (ALJ) Arthur L. Shipe. Respondent failed to file a timely answer. An answer was finally filed on April 16, 1999, after ALJ Shipe issued an order requiring it.

On October 18, 1999, one week prior to the scheduled hearing, ALJ Shipe issued an order limiting Respondent to his own testimony. Respondent's counsel was precluded from calling any witnesses, other than Respondent, due to failure to follow administrative procedures. 12 C.F.R. § 747.32. The hearing was held on October 26, 1999, in New Orleans, LA. ALJ Shipe issued an Order on Post Hearing Scheduling on November 19, 1999, noting the following: findings of fact and conclusions of law were due by December 16, 1999; reply briefs were due by January 5, 2000; and the Recommended Decision would be issued on or before February 21, 2000. 12 C.F.R. § 747.37.

Enforcement counsel filed findings of fact and conclusions of law in a timely manner; Respondent did not submit findings of fact and conclusions of law. No reply briefs were filed. ALJ Shipe

issued his Recommended Decision and certified the case to the NCUA Board on February 18, 2000. 12 C.F.R. § 747.38. On February 21, 2000, Respondent's counsel submitted to ALJ Shipe a motion for leave to file his opposition to enforcement counsel's post hearing filings. On February 22, ALJ Shipe returned this filing to Respondent's counsel and informed him that any filing submitted after the issuance of the Recommended Decision should be filed with the NCUA Board. 12 C.F.R. §§ 747.13 and 747.38. On February 23, 2000, the Secretary of the NCUA Board notified the parties of their right to file exceptions to the Recommended Decision. 12 C.F.R. § 747.39. No exceptions were filed. On March 17, 2000, enforcement counsel filed with the NCUA Board a Motion to Exclude from Consideration Respondent's Post-Hearing Filings. On March 20, Respondent's counsel filed a motion for additional time with ALJ Shipe. ALJ Shipe returned this filing to Respondent's counsel on March 21, again informing him that the motion should be filed with the NCUA Board. The NCUA Board granted enforcement counsel's motion on April 10, 2000, although Respondent's filings had never been filed with the Board. By letter dated April 13, 2000, the parties were notified that the proceeding was submitted to the NCUA Board for final decision. 12 C.F.R. 747.40.

II. Board Adoption of Recommended Decision with Modifications

The NCUA Board hereby adopts, and incorporates herein, the Recommended Decision issued by ALJ Shipe, with modifications. The Recommended Decision is incorporated herein and attached hereto as Appendix A; modifications are incorporated herein and attached hereto as Appendix B.

III. Findings of Fact

The following is a summary of the Findings of Fact as modified and adopted by the NCUA Board. *See*, Appendices A and B.

Freight Handlers Federal Credit Union, a federally chartered and insured credit union, had assets of approximately five million dollars and was located in New Orleans, LA. The Dock Loaders and Unloaders of Freight Cars and Barges, Inc., ILA Local Union No. 854, was the sponsor of the Credit Union. Ray A. Worthy (Respondent) served as the manager/treasurer of the Credit Union; he also served on the credit committee. Mr. Worthy was also the president of the union. The Credit Union was operated out of the union hall. Mr. Worthy also had an ownership interest in Auto Mart, Inc., a retail motor vehicle dealer located in New Orleans.

The Credit Union underwent an NCUA examination in 1994. Examiner staff found problems with lending, including poor record keeping, problems with loan collateralization and creditworthiness of borrowers, and conflicts of interest involving Mr. Worthy and his positions with the Credit Union and Auto Mart. Used car loans for vehicles sold by Auto Mart, Mr. Worthy's company, constituted close to ninety percent of the Credit Union's used car loans. The Credit Union had a high delinquency rate. Under Mr. Worthy's stewardship, the Credit Union granted many used car loans in amounts greatly exceeding the industry standard, that is, above the fair market value of the cars. In addition, competitive bidding procedures were not used to dispose of repossessed vehicles. Many repossessed vehicles were sold through Auto Mart. Initially, Mr. Worthy covered up the Credit Union's dealings with Auto Mart. NCUA examiner staff independently verified such dealings as well as Mr. Worthy's ownership interest in Auto Mart.

The NCUA Board placed the Credit Union into conservatorship on March 1, 1995. On October 20, 1995, the NCUA Board liquidated the Credit Union due to its insolvency. Its assets and liabilities were purchased by NOME Federal Credit Union.

IV. Grounds for Prohibition

Respondent conceded that he was an institution-affiliated party as defined in section 206(r)(1) of the Federal Credit Union Act (12 U.S.C. § 1786(r)(1)). Respondent's actions support the issuance of a prohibition. He has violated NCUA's conflict of interest regulation (12 C.F.R.

§701.21(c)(8)) by taking advantage of his positions as manager of the Credit Union and owner of Auto Mart. He failed to follow proper procedures to dispose of repossessed vehicles by turning over vehicles repossessed by the Credit Union to Auto Mart, and personally benefited from these transactions. Respondent has engaged in unsafe and unsound practices through his failure to keep accurate documentation of car loans and repossessed vehicles, authorization of loans at above-collateral value, failure to follow industry standards for underwriting loans, commingling of Credit Union and Auto Mart assets, and failure to follow industry standards when handling vehicle repossessions. Respondent also breached his fiduciary duties to the Credit Union through his service as both Credit Union manager/treasurer and owner of Auto Mart, and through his failure to record the use, collect fees, or insure the condition of repossessed vehicles. Respondent further breached his duties of loyalty and care by placing Credit Union assets in the hands of third parties without proper documentation and permitting third parties to use Credit Union assets without compensating the institution. He also violated his fiduciary duty to the Credit Union through his failure to pursue collection action against Lloyd Brown, the co-owner of Auto Mart, on a personal vehicle loan. Respondent's actions caused more than a minimal loss to the Credit Union. Respondent's actions prejudiced the Credit Union's members' interests. As noted above, the Credit Union was liquidated due to insolvency. Respondent's actions indicate personal dishonesty as well as an unfitness to participate in the affairs of an insured financial institution.

Section 206(g) of the FCU Act, 12 U.S.C. § 1786(g), sets forth the requirements for the NCUA Board to issue an order of prohibition. The NCUA Board agrees with ALJ Shipe's conclusion that all three prongs of the *Prohibition* Test — misconduct, effect and culpability — have been met. ALJ Shipe held and the Board agrees that Respondent engaged in all three types of misconduct outlined in the NCUA Board's prohibition authority, 12 U.S.C. §§ 206(g)(1)(A)(i) – (iii). We agree with ALJ Shipe that both the effects and culpability prongs of the prohibition requirements have been met. 12 U.S.C. 1786(g)(1)(B) & (C). As fully addressed in ALJ Shipe's Recommended Decision, incorporated as amended herein, the requirements for prohibition have been met.

V. Grounds for Restitution

Respondent's actions support the NCUA Board requiring him to make restitution. As discussed under Grounds for Prohibition, *supra*, Respondent violated NCUA's conflict of interest regulation and engaged in unsafe and unsound practices. Through these violations and practices Respondent was unjustly enriched in that he benefited financially by taking advantage of his positions as manager of the Credit Union and owner of Auto Mart. His practices also showed a reckless disregard for the law in that Respondent admitted he lacked knowledge of the NCUA Rules and Regulations, and he knew or should have known that his actions would risk loss or damage to the Credit Union.

Section 206(e) of the Federal Credit Union Act, 12 U.S.C. § 1786(e), sets forth the requirements for the NCUA Board to impose restitution, and as fully addressed in ALJ Shipe's Recommended Decision, incorporated as amended herein, those requirements have been met.

VI. Issuance of New Orders

ALJ Shipe issued one recommended order covering both prohibition and restitution. For ease of understanding, the Board issues two orders, one for prohibition and one for restitution. The two orders below are substantively the same as ALJ Shipe's recommended order.

Order of Prohibition

Based upon the record of the administrative hearing held on October 26, 1999, pursuant to the Notice Of Charges And Hearings For An Order To Prohibit And An Order To Cease And Desist And To Direct Restitution against Ray A. Worthy, and upon the Recommended Decision of Administrative Law Judge Arthur L. Shipe, incorporated as Appendix A (as amended in Appendix B) to the Final Decision of the National Credit Union Administration Board, and

Pursuant to the authority vested in the National Credit Union Administration Board by Section 206(g) of the Federal Credit Union 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,

IT IS HEREBY ORDERED that Ray A. Worthy is prohibited from participating in any manner in the conduct of the affairs of any institution or agency specified in Section 206(g)(7) of the Federal Credit Union Act. Such prohibition includes prohibition from the specific activities set forth in Section 206(g)(5) of the Federal Credit Union Act. Pursuant to Section 206(g)(4) of the Federal Credit Union Act, this Order shall become effective thirty days after service upon Ray A. Worthy.

SO ORDERED, this 13th day of July, 2000, by the National Credit Union Administration Board.

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Becky Baker
Secretary, NCUA Board

Order of Restitution

Based upon the record of the administrative hearing held on October 26, 1999, pursuant to the Notice Of Charges And Hearings For An Order To Prohibit And An Order To Cease And Desist And To Direct Restitution against Ray A. Worthy, and upon the Recommended Decision of Administrative Law Judge Arthur L. Shipe, incorporated as Appendix A (as amended in Appendix B) to the Final Decision of the National Credit Union Administration Board, and

Pursuant to the authority vested in the National Credit Union Administration Board by Section 206(e) of the Federal Credit Union Act, 12 U.S.C. §1786(e), and in accordance with Part 747 of the NCUA Rules and Regulations, 12 C.F.R. Part 747,

IT IS HEREBY ORDERED that Ray A. Worthy shall immediately make restitution to the National Credit Union Share Insurance Fund in the amount of $43,857.34;
Pursuant to Section 206(e)(2) of the Federal Credit Union Act, this Order shall become effective thirty days after service upon Ray A. Worthy.

SO ORDERED, this 13th day of July, 2000, by the National Credit Union Administration Board.

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Becky Baker
Secretary, NCUA Board

APPENDIX A

UNITED STATES OF AMERICA
NATIONAL CREDIT UNION ADMINISTRATION
ALEXANDRIA, VIRGINIA

IN THE MATTER OF **RAY A. WORTHY,** **Former Manager and Treasurer** **Freight Handlers Federal Credit Union** **New Orleans, Louisiana**	**RECOMMENDED DECISION** **NCUA 98-1201-III**

APPEARANCES:

For the National Credit Union Administration:
Jon J. Canerday, Esquire
Paul Sosnowski, Esquire

For the Respondent:
William E. Lewis, Esquire

HEARD BY:
ARTHUR L. SHIPE, Administrative Law Judge

This matter arises from the issuance of a Notice Of Charges And Hearings For An Order To Prohibit And An Order To Cease And Desist And To Direct Restitution by the National Credit Union Administration on December 17, 1998. Respondent Worthy filed an Answer, contesting the majority of the allegations, on April 18, 1999. The NCUA, through enforcement counsel Canerday, and Respondent, accompanied by counsel, participated in the oral hearing on October 26, 1999, in New Orleans, Louisiana.

The NCUA submitted their post-hearing brief and despite oral commitments to do so, Respondent's counsel failed to file a brief. Based upon the evidence presented therein, and the totality of the circumstances as established by the record, I enter the following Recommended Decision.

INTRODUCTION

Before it was placed into conservatorship by the National Credit Union Administration, on March 1, 1995, Freight Handlers Federal Credit Union was a federally chartered and insured credit union doing business in New Orleans, Louisiana. Respondent Ray A. Worthy ran the credit union as Treasurer/Manager, and served on the Loan Committee for approximately ten years. In addition to that position, Respondent owned a business and directed the management of a local union. From at least March of 1993 to March of 1995, Respondent owned or co-owned a retail motor vehicle dealership, called Auto Mart Inc. and served as President of the Dock Loaders and Unloaders of Freight Cars and Barges, Inc., ILA Local Union No. 854, the sponsor organization of the former Freight Handlers Federal Credit Union. Respondent is still President of the local union.

Following low examination ratings, the National Credit Union Administration placed the credit union into conservatorship and appointed itself Conservator, taking possession and control of the institution's business, assets and records. That action effectively relieved Respondent of his duties as Treasurer/Manager. Subsequently, on October 20, 1995, the NCUA Board liquidated Freight Handlers and merged it into NOME Federal Credit Union.

The Notice of Charges alleges that Respondent violated his fiduciary duties and NCUA Rules and Regulations, as well as engaged in unsafe and unsound practices. The agency contends that prohibition is appropriate because Respondent engaged in self-dealing; disregarded the law regarding conflicts of interest; attempted to hide those conflicts and self-dealing; mishandled credit union assets by failing to keep adequate records and failed to follow generally accepted industry practices for disposing of repossessed vehicles; and breached his fiduciary duties.

Additionally, the NCUA alleges that Respondent should be required to make restitution for certain loan losses the credit union suffered during his management and by his hand. The discussion below is a comprehensive factual and legal analysis of the NCUA's contentions.

FINDINGS OF FACT

1. Freight Handlers Federal Credit Union, hereinafter the "credit union" of New Orleans, Louisiana, was a federally chartered and insured credit union subject to the rules and regulations of the National Credit Union Administration. Freight Handlers was a small credit union with assets valued at approximately five million dollars. The credit union was physically located in the same union hall as the union that Ray Worthy serves as President. Oral Hearing Transcript ("Tr. p.") 11.[1]

2. On March 1, 1995, the NCUA Board placed Freight Handlers into conservatorship, appointing itself as Conservator. The NCUA Board took possession and control of the credit union, its business, assets and records. In addition, the NCUA Board relieved Respondent of all duties associated with the credit union. Tr. p. 13-14.

3. On October 20, 1995, the NCUA Board liquidated the credit union and merged it into another federal credit union, NOME. Tr. p. 15.

4. For approximately ten years, Ray A. Worthy, served as manager, treasurer and member of Freight Handlers federal credit union, until March 1, 1995. While working at the credit union, and to the present, Ray A. Worthy is the president of the Dock Loaders and Unloaders of Freight Cars and Barges, Inc. ILA Local Union No. 854. That organization sponsored the credit union. Respondent's Answer ("Answer"), ¶¶ 1, 18; Tr. p. 121-122.

5. Respondent was either the sole owner or a joint owner of Auto Mart, Inc., hereinafter, "Auto Mart," a retail motor vehicle dealer, located in New Orleans, Louisiana, from at least March 25, 1993 to March 1, 1995. The address listed on Auto Mart's corporate checks is "4202 Marigny Street, New Orleans, Louisiana 70122," the same address as the credit union. Answer ¶2; Exhibit 1; Exhibit 3, pp.1, 6; Tr. pp. 18, 30, 131-5, 138, 230.

6. During 1994, the NCUA, through Examiner Jerry Tidmore commenced an annual examination of the credit union. Tr. p. 12. While conducting the examination, Mr. Tidmore fell ill, and principal examiner, Ross A. Jenus, assisted in the completion of the report on or about July 31, 1994. Tr. p. 12. In that report, the Examiner rated the

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[1] Citations to the record are as follows: Transcript – "Tr. p. __."; Exhibit – Exhibit ___, p. or pp. ___.; NCUA's Memorandum in Support of Findings of Fact and Conclusions of Law – "NCUA Memo, p. ___.

credit union a "four." An NCUA director ordered a follow-up examination, which resulted in finding the credit union insolvent. Tr. p. 14. The NCUA also noted the credit union's history of record keeping problems, basic accounting problems and a high loan delinquency rate. Tr. p. 14.

7. From June through October 1994, used vehicle loans for vehicles sold by Auto Mart constituted 87.5 percent of the credit union's total used vehicle loans. During that time period, the credit union granted only two used vehicle loans for other dealerships. The credit union, under Respondent's management granted a significant number of used car loans in amounts greatly exceeding the industry standard value. The industry standard is commonly known as the NADA value, a comprehensive manual that lists the market value of vehicles. See Exhibit 6 (excerpted portion of Examiner's report); Exhibit 7; Tr. p. 62-68, 131 (lines 22-25).

8. The credit union violated the lending rules for collateralized loans by granting automobile loans greater than the fair market value of the vehicle. In addition, other violations of industry lending standards occurred when the credit union failed to calculate applicants' debt ratios and failed to examine their credit reports. Tr. p. 65-5, 107.

9. NCUA Examiners recognized, in previous examination reports that Respondent owned Auto Mart and called that conflict to Respondents attention. At the latest, Respondent knew that owning Auto Mart and providing financing to his customers through the credit union violated NCUA regulations by March of 1994. Tr. p. 178, lines 7-16.

10. The credit union's books and records reflected several repossessed vehicles. No evidence existed that the credit union used competitive bidding procedures to dispose of the automobiles. It is a violation of NCUA policy to use non-competitive bidding procedures and it is also against generally accepted business practices for federally insured financial institutions. Tr. p. 20-1, 77.

11. Auto Mart, Respondent's business, obtained numerous repossessed vehicles from the credit union and then sold the automobiles to the general public. Auto Mart's customers obtained the money to purchase the vehicles from the credit union. A significant number of the loans granted by the credit union contained amounts greater than the purchase prices of the vehicles. Exhibit 5a, pp. 2,5,7,8; Exhibit 5c, pp. 2,4,5,13,14; Exhibit 5d, pp. 5,6,8; Exhibit 5e, pp. 5,7,9; Exhibit 5g, p.9.

12. Respondent, as owner of Auto Mart, personally financed an unknown quantity of vehicles. Tr. p. 179 (lines 17-24). In his entrepreneurial position, Respondent received fees or commissions, either directly or indirectly, for the automobiles sold by Auto Mart. Tr. p. 136, 154, 199.

13. During the second, follow-up, examination of the credit union, Examiner Jenus discovered documentation reflecting a recovery of $25,000.00, for repossessed automobiles, on September 17, 1994. Tr. p. 22. A cash receipt voucher marked with the $25,000.00 amount evidenced the recovery and reduced the Allowance for Loan Losses. Tr. p. 22, 25; Exhibit 3, p. 1. Examiner Jenus learned that the $25,000.00 paid for ten repossessed vehicles, sold in a package deal to 5 Star Auto Mart, Inc. The reverse side of the cash receipt voucher listed ten account numbers – associated with ten vehicle loans either in default or charged off the books. Tr. p. 27-9, Exhibit 3, p. 2. Credit union employees told Examiner Jenus that "this nice little old man," from 5 Star Auto paid the $25,000.00 for the vehicles. Tr. p. 22-3.

14. The NCUA determined that Respondent failed to provide satisfactory answers regarding the $25,000.00 payment. Tr. p. 78-9. Respondent failed to provide Examiners with any documentation pertaining to the sale of the repossessed automobiles to 5 Star Auto. Such failure to maintain proper records of transactions involving credit union assets violates generally accepted accounting principles. Tr. p. 23.

15. On September 17, 1994, the NCUA subpoenaed copies of the checks, relating to the $25,000.00 payoff, deposited by the credit union, from Whitney Bank, a National Bank. Whitney Bank produced documents reflecting that the credit union had deposited two checks totaling $25,000.00 on September 17, 1994. The documents showed one cashier's check, made in the amount of $20,000.00 and dated September 8, 1994. The "for" line on that check states "Joint-Dumas Auto and Auto Mart." The other check reflected in the subpoenaed documents listed an amount of $5,000.00 for the "purchase of autos." Tr. p. 29-30; Exhibit 3, pp. 1-6. Respondent, acting on behalf of Auto Mart, made the payments after the Examiner had questioned him about the repossessed vehicle discrepancies.

16. Examiner Jenus obtained vehicle ownership documentation from the Louisiana Department of Motor Vehicles for some of the repossessed vehicles paid for by Respondent and Auto Mart. Tr. p. 28-29. See also Exhibits 5a-g.

17. Examiner Jenus found the accounts for the numbers listed on the reverse side of a cash receipt voucher, Exhibit 3, pp. 1-2. He examined the respective Share and Loan Ledger cards and compared that data to the related title documents. Examiner Jenus determined that the payment for vehicles by Respondent (reportedly by 5 Star Auto Mart), included the following:

    a. Account #89 -- A 1988 Mustang that Auto Mart sold to a B. Jackson for $2,500 on June 1, 1993. Exhibit 5a, pp. 2,8. The car was financed with a loan from Freight Handles in the amount of $4,000. Exhibit 5a, p. 7. Respondent signed the security agreement as CEO of Freight Handlers. Exhibit 5a, p. 7. The loan went into default, leaving a total indebtedness of $4,326.29. Exhibit 4a. The credit union never charged off the loan. Tr. p. 34-37.

    b. Account #1540 -- A 1989 Dodge, purchased by L. Davis and financed with a loan of $14,999.32 from the credit union. Exhibit 5b, pp. 8,9. Davis defaulted and the credit union lost $6,151.93. The credit union charged off the loan on April 19, 1994. Exhibits 4b; Tr. p. 37-39.

    c. Account #194 -- A 1989 Volkswagen Jetta that Mary Ann Heim purchased from Auto Mart on August 23, 1993 for $6,234. Exhibit 5c, p. 13. The credit union provided Heim with a $9,400 loan. Exhibit 5c, p. 14. Heim defaulted and the credit union repossessed the vehicle on March 31, 1994. Exhibit 5c, p. 8. The credit union sold/transferred the car to Auto Mart, on April 20, 1994; no price is listed on the bill of sale. Exhibit 5c, p. 7. On May 20, 1994, Auto Mart sold the vehicle to a Christophe for $7,000. Exhibit 5c, p. 2,4. The credit union financed a loan in the amount of $8,500. Exhibit 5c, pp. 5. At the time of Heims default, her indebtedness totaled $10,262.33; the credit union never charged off the Heim loan. Exhibit 4c; Tr. p. 39-44.

    d. Account #285 -- A 1987 Acura, Auto Mart sold to D. Taylor on August 24, 1993 for $7,025. Exhibit 5d, p. 5,8. The credit union financed the purchase, providing the buyer with $10,500. Exhibit 5d, p. 6. Respondent signed the title to this vehicle on behalf of Auto Mart. Exhibit 5d, page 5. Taylor defaulted on the loan with a total indebtedness of $10,006,07. (Exhibit 4d). The credit union never

charged off the loan. Tr. p. 44-47.

e. Account #195 -- A 1990 Mazda 626 that Auto Mart sold to a Sereta Barrow on June 21, 1993 for $8,800. Exhibit 5e, p. 7,9. The credit union financed the purchase with a loan in the amount of $10,200. Exhibit 5e, p. 5. Barrow defaulted, leaving a total indebtedness of $8,880.83. Exhibit 4d. The credit union never charged off the loan. Tr. p. 47-50.

f. Account #2198 -- A 1987 Audi, purchased by a G. Tillman and financed with a loan from the credit union in the amount of $8,924.91 on February 28, 1992. Exhibit 5f, p. 5. The borrower defaulted with a total indebtedness of $5,707.84. Exhibit 4f. The credit union charged off the loan on December 31, 1993. Exhibit 4f, Tr. p. 50-2.

g. Account #2055 -- A 1985 Cadillac that C. Fine purchased and financed with a loan from the credit union in the amount of $5,114 on April 3, 1992. Exhibit 5g, p. 16. The credit union repossessed the vehicle on September 15, 1993. Exhibit 5g, p. 10. M. Green bought the vehicle on January 18, 1994, and financed it with a loan from the credit union in the amount of $6,400 Exhibit 4g. The vehicle was either repossessed or returned and the loan charged-off on February 25, 1994. Exhibit 4g. Then, Auto Mart obtained the vehicle on April 24, 1994. Respondent signed the bill of sale on behalf of Auto Mart. Exhibit 5g, p. 9. The bill of sale fails to list a price for the vehicle. On May 4, 1994, Auto Mart sold the vehicle to Jason J. Mitchell for $3,500. Exhibits 5g, p. 7. The credit union provided a loan to Mitchell in the amount of $4,900 Exhibit 5g, p. 5. Respondent signed the bill of sale as the salesman, Exhibit 5g, p. 7, and signed the back of the title on behalf of Auto Mart. Exhibit 5g, p. 4; Tr. p. 54-58.

h. Account #196 -- A 1986 Dodge for which an A. Meredith owed a total of $4,571.05 Exhibit 4h. Tr. p. 58. The credit union never charged off the loan. Exhibit 4h, Tr. p. 59.

i. Account #2416 -- A 1986 Pontiac for which a C. Worthy owed a total of $5,489.46 to the credit union. Exhibit 4i, Tr. p. 58. The credit union charged off the loan on December 31,1991. Exhibit 4i, Tr. p. 59-60.

j. Account #2419 -- A vehicle either 1989 Chrysler or a Porsche, for which a C. Smith owed a total of $16,061.54 on a loan to Freight Handlers. Exhibit 4j. The credit union charged off the loan on July 10, 1993. On August 23, 1993, Salazar Motor sports paid $9,000.00 for this vehicle, reducing the credit union's loss to $7,061.51. Exhibit 4j, Tr. p. 60-61.

DISCUSSION

Jurisdiction

Freight Handlers Federal Credit Union was a federally chartered and insured institution under the Federal Credit Union Act, "FCUA," and was subject to the rules and regulations of the National Credit Union Administration. 12 U.S.C.A. § 1751. There is no dispute between the parties regarding the authority of the NCUA over the former credit union, nor this matter. Respondent concedes that as Treasurer/Manager of the credit union, he was an institution-affiliated party, as defined by the FCUA. 12 U.S.C. § 1786(r)(1). I find, therefore, that jurisdiction is proper.

Prohibition

Pursuant to the FCUA, the NCUA may seek to prohibit institution-affiliated parties from participation in its insured member institutions 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 ;
  - (IV) with the grant of any application or other request by such credit union; or
  - (V) 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,

the Board may serve upon such party a written notice of the Board's intention to remove such party from office or to prohibit any further participation, by such party, in any manner in the conduct of the affairs of any insured credit union. 12 U.S.C.A §1786(g)(1).

The statute is generally referred to as the *Prohibition Test*, and is comprised of three prongs: misconduct, effect and culpability. Proffitt v. FDIC, _F.3d_, 2000 WL 19129 (D.C. Cir.). See also Oberstar v. FDIC, 987 F.2d 494, 500 (8th Cir. 1993), Cousin v. OTS, 73 F.3d 1242, 1247 (2d Cir. 1996); Grubb v. FDIC, 34 F.3d 956, 961 (10th Cir. 1994); Seidman v. OTS, 37 F.3d 911, 929 (3d Cir. 1994). It is well settled that all three elements of the statute must be met to prohibit an IAP. Each prong is addressed, in turn below.

Misconduct Prong

The first prong of the prohibition test is misconduct. The issue, here, is whether the actions or omissions of a Respondent constitute misconduct under any one of three statutory criteria. If the NCUA proves that Respondent, an institution-affiliated party: 1. violated any law or regulation, cease-and-desist order, express condition, or written agreement; or 2. engaged or participated in any unsafe or unsound practice; or 3. breached his fiduciary duty; then it has satisfied the misconduct prong. 12 U.S.C.A. § 1786(g)(1)(A)(i-iii).

The NCUA contends that Respondent Worthy's actions, while Treasurer and Manager of the credit union, qualify as misconduct under each of the three criteria. In support of its position, the NCUA offered numerous exhibits - relevant to questions surrounding the ownership of Auto Mart, the credit union's repossessed vehicles, vehicle transfer information, charged off loans and other credit union documents, as well as the testimony of NCUA Examiner Ross A. Jenus. Respondent did not present any documentary evidence, as precluded by previous Order. Respondent's testimony, however provided some insight into the issues at hand, including substantial concessions to the agency's allegations.

Violation of NCUA Regulations

The NCUA first alleges that Respondent Worthy's actions constitute misconduct because he violated the NCUA regulations regarding conflict of interest. 12 C.F.R. §701.21(c)(8) (1992-1994). Respondent denied this allegation in his answer. Answer ¶ 4.

The National Credit Union Administration regulations prohibit employees with significant management control from personally profiting from their credit union positions. The regulations, which are codified at 12 C.F.R. §701.21(c), "apply to all loans to members and, where indicated, all lines of credit (including credit cards) to members, except as otherwise provided." More specifically, subsection (8) *Prohibited Fees*, states,

> A Federal credit union shall not make any loan or extend any line of credit if, either directly or indirectly, any commission, fee or other compensation is to be received by the credit union's directors, committee members, senior management employees, loan officers, or any immediate family members of such individuals, in connection with underwriting, insuring, servicing, or collecting the loan or line of credit. However, salary for employees is not prohibited by this section. For purposes of this section, "senior management employees" means the credit union's chief executive officer, (typically this individual holds the title of President or Treasurer/Manager), any assistant chief executive officers (e.g. Assistant President, Vice President or Assistant Treasurer/Manager) and the chief financial officer (Comptroller), and "immediate family member" means a spouse or other family member living in the same household. 12 C.F.R. §701.21(c)(8)(1992-1994 versions).

The NCUA contends that Respondent Worthy engaged in proscribed conduct by owning Auto Mart and authorizing used-vehicle loans through the credit union to Auto Mart customers. The NCUA argues that Respondent's dealership sold cars to credit union members and collected the loan proceeds. The NCUA says this violates the conflict regulations. In support of its contention, the NCUA offered numerous exhibits demonstrating Respondent Worthy's ownership of Auto Mart. Exhibits 1, 2, 5.

Respondent's position on this issue is unclear. In his Answer, Respondent admitted that he "from time to time has been the sole owner of Auto Mart, Inc.," but disputes whether or not he was a fifty percent owner during the time periods alleged by the NCUA. Answer ¶ 2. In his testimony, however, Respondent neglects to give any specific dates of ownership or contest the NCUA's allegations that Auto Mart profited by selling cars financed by the credit union.

What is clear, based upon the testimony of the Examiner and Respondent, and the exhibits, is that Respondent violated the conflict of interest rule. There are only a few steps to take in order to reach that conclusion, as explained below. First, as Treasurer/Manager of the credit union, Respondent clearly participated in the authorization of the used vehicle loans. Tr. p. 121. Second, Respondent owned Auto Mart during the time period in question. Answer ¶2; Tr. p. 141; see also Exhibit 5g, p.7. And finally, as the owner of Auto Mart, whether in whole or part, Respondent received commissions and/or compensation when the credit union financed the cars sold by Auto Mart.

Respondent claims that he received no commission or money in connection with the Auto Mart arrangement, and states, alternatively, that he spent substantial amount of his own money to fix the repossessed cars. Tr. p. 120. He implies, in his testimony, that he was practically forced to take control of Auto Mart, in order to dispose of the repossessed vehicles and mitigate losses from the defaulted loans. Tr. pp. 135-141. In his own words, Respondent stated that "everything Auto Mart did was to straighten out the past." Tr. p. 231. Respondent's testimony at the hearing also implies a good faith argument – that he "was merely acting as a go-between to sell the car." Tr. p. 232, line 23. In addition, Respondent avers that Auto Mart experienced no gain or compensation for its "go-between" services. Tr. p. 233.

At the hearing, Respondent continuously denied that Auto Mart profited from selling vehicles that the credit union financed. But according to his own testimony, he actively engaged in sales transactions. At one point, Respondent explained that he operated as an agent for buyers and credit union members. Respondent purchased cars from other dealers to the buyer's specifications to take advantage of a dealer to dealer rate. Respondent, at one point described the arrangement:

> The dealer says, "This is what I want for the car." The guy brings it back, he says, "Look, I know you're a car dealer. Can you give me a better deal on this?" I said, "Okay, wait a minute. We're already taking a chance with you because we know you got bad credit, but we know we can get out money on the waterfront." So in order to cut the price down, all I did was to go over and buy the car, through Auto Mart, and come back and sell it to the guy. Tr. p. 131.

In the end, Respondent's testimony fails to refute the NCUA's allegations. Respondent offered little explanation to the evidence presented by the NCUA. It is simply inconceivable that Respondent operated Auto Mart solely to assist the credit union with its repossessed vehicles or to help buyers get a better deal on used cars, without any compensation for his efforts. I am convinced that Respondent enjoyed the benefit of compensation as owner of Auto Mart, a company actively engaged in the business of selling cars. I therefore find that Respondent violated 12 C.F.R. § 701.21(c)(8).

Unsafe and Unsound Practices

The NCUA's second allegation of misconduct is that Respondent engaged in unsafe and unsound banking practices. 12 U.S.C.A. §1786(g)(1)(A)(ii). More specifically, the agency charges that Respondent mishandled credit union assets, commingled credit union and Auto Mart assets, failed to keep adequate documentation regarding the repossessed vehicles, authorized loans at above-collateral value and failed to follow industry standards for underwriting loans. Respondent's testimony implies that he disputes the unsafe and unsound nature of the alleged actions.

Unsafe and unsound practices are not statutorily defined. Generally speaking, an unsafe or unsound practice embraces any action or lack of action, which is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk or loss or damage to an institution, its shareholders or the agencies administering the insurance funds. 112 Cong. Rec. 26474 (1996); S.Rep. No. 3158, 89th Cong. 2d Ses. 50; In the Matter of the Prohibition of Eric Majett, NCUA docket No 98-0401-II (1998). In order to give agencies "the ability to adapt to changing business problems and practices," the phrase "unsafe or unsound practice," is deliberately a flexible concept. In Re Seidman, 37 F.3d 911, 927 (3rd Cir. 1994). To establish that Respondent engaged in such practices, the NCUA must show he acted imprudently and caused an abnormal risk to the financial stability of the credit union.

Sale of Credit Union Assets at a Reduced Value

The first unsafe or unsound practice alleged by the NCUA is Respondent's acquisition of ten repossessed automobiles from the credit union for twenty five thousand dollars. The NCUA contends that the package sale of the vehicles, allegedly to 5 Star Auto, was a subterfuge to enable Respondent's dealership, Auto Mart, to obtain the vehicles below true value. The NCUA claims that Respondent and the credit union employees denied any knowledge of Auto Mart and the denials demonstrate an effort to conceal Respondent's outside business interest from Examiners. See NCUA Memo, p. 15; Tr. p. 16-7. In his answer, Respondent generally contested the unsafe or unsound accusation.

Although the NCUA focuses on the seemingly deceptive nature of the transaction, the real question here, is whether the acquisition of credit union assets by an officer of the credit union for a reduced price is an unsafe or unsound practice. The facts surrounding that question are not in

dispute. At hearing, Respondent admitted that the credit union had no set policy to deal with repossessed vehicles and it is clear that he, personally, took on the task of addressing that problem. Tr. p. 125. Respondent explained that the credit union never repossessed vehicles because the “guys were longshoremen, and they had a weekly payroll check.” Tr. p. 125. Essentially, the credit union granted loans to longshoremen, who worked sporadically on the docks and earned inconsistent income. Tr. p. 125-6. Respondent testified that the credit union usually obtained a “check-off,” for this type of borrower, which meant collecting a weekly payroll deduction. Tr. p. 127. But even this policy was enforced haphazardly. Tr. p. 127. Respondent claims that the Board authorized each step he took in attempting to recuperate loan losses. Tr. p. 219.

The bottom line, on this issue, is that Respondent admitted to paying for the vehicles as owner of Auto Mart. When confronted with the question of payment on cross examination, Respondent admitted that he authorized the payment. Tr. p. 214-5. Respondent testified at length regarding the condition of the repossessed vehicles. See Tr. p. 154, 157-8, 170-1, 177-8. The title documents in Exhibit 5 and the Share and Loan Ledger information in Exhibit 4, however, reflect much higher values for the vehicles.

Based on the Examiners largely uncontroverted testimony and Respondent’s admissions, I find that the purchase of the repossessed vehicles, at reduced value, constitutes an unsafe or unsound practice for the following reasons. First of all, if the package sale for twenty five thousand dollars had been a legitimate purchase, then there is no need to conceal the transaction as Respondent and the credit union employees attempted during the examination. Second, Respondent admitted to making the payment with funds from Auto Mart and his wife. Third, a repossessed vehicle is an asset of the credit union, as stated by Examiner Jenus. Tr. p. 21. Fourth, selling credit union assets to oneself at a reduced value is not a generally accepted standard of prudent operation. And finally, even if the credit union’s lack of set policy to deal with repossessed vehicles opened the door to abuse by Respondent, by taking advantage of that opportunity Respondent made his own choice to stray from generally accepted standards of prudent operation. I also find that if the credit union and Respondent had continued to sell repossessed vehicles to Auto Mart it would have been an abnormal risk to the institution. Furthermore, such an unsafe and unsound practice clearly damaged the credit union, its shareholders and the NCUA by contributing to the total loan losses and the ultimate dissolution of the institution.

Failure to Maintain Proper Documentation for Credit Union Assets

The second unsafe or unsound practice asserted by the NCUA is Respondent’s consignment of repossessed vehicles, (credit union assets), to 5 Star Auto without proper documentation or safeguards. Respondent initially denied this allegation in his Answer, but admitted to the poor record keeping of his receipts and Auto Mart’s receipts. Tr. p. 216-18.

There is virtually no documentation evidencing the existence, let alone status, of the repossessed vehicles. The NCUA stands by the testimony of Examiner Jenus, who investigated the situation during the NCUA’s follow-up examination. Respondent’s payment of twenty five thousand dollars and the notation on the reverse of that check voucher that indicates the existence of the vehicles, but the bulk of the evidence comes from Respondent’s testimony. See Exhibit 3.

When the NCUA conducted its follow-up examination, Examiner Jenus asked Respondent specific questions regarding the status of the repossessed vehicles and for any related records. Tr. p. 21-23. According to the Examiner, Respondent stated, “he didn’t have those records… he had no way of getting those records, that they didn’t keep those records in the credit union.” Tr. p. 23, lines 15-17. The Examiner also testified that failure to maintain such records is a violation of generally accepted accounting principles under the records retention requirements. Tr. p. 23, lines 21-22.

Respondent failed to refute the Examiner's statements during his testimony. Instead, Respondent confirmed the fact that the credit union maintained no records regarding the consignment of vehicles to 5 Star Auto or the repossession relationship between Auto Mart and the credit union. When asked on cross examination: "In fact, there's no real paper trail showing the transfer of these automobiles to Five Star; is there?" Respondent answered, "I doubt if there is, because that's what I'm trying to tell you, you understand, every car that left the credit union, the credit union didn't sell the cars. Auto Mart sold them for them, you understand, to Five Star." Tr. p. 217, lines 3-7.

It is clear that Respondent kept no records or documents to show ownership or status of the repossessed vehicles. Respondent argues that he saved the credit union time and money by skipping over the necessary paperwork or the appropriate legal documents. This is evident when Respondent states:

> The credit union signed and released them [the vehicles] to Auto Mart and said, "okay, dealer to dealer," boom. That don't mean money transacted hands. Even if the credit union will sign, releasing it, Auto Mart signs it, you understand, boom to the member. Now it looks like Auto Mart did the deal, but Auto Mart might not even did the deal. Its' a credit union deal. It's just a dealer to dealer to register—the credit union don't have a number to go to register the car and sell it, you under stand. The credit union would have to go through a whole routine, you understand, of changing the title all around, saying the credit union's going to sell it, Affidavits, here, Affidavits there, you know. Tr. p. 217, lines 8-24.

Respondent claims that he appeared before the Board and informed them of this arrangement between the credit union and Auto Mart. Tr. p. 218. But that claim is no defense for failing to maintain records of credit union assets.

Respondent's failure to keep records for credit union assets not only violated generally accepted standards of prudent operation, but also created an abnormal risk and ultimately a significant loss to the credit union. By failing to document the consignment relationship with 5 Star Auto, Respondent created an abnormal risk because no mechanism existed for the return of the vehicles. Tr. p. 189. Respondent, at one point in his testimony, stated, "and some of these cars went down to Mexico, where they got a little market down there for cheap cars and old cars, you know. The guy took some of them down to Laredo and got rid of some of them down there." Tr. p. 152. It would seem from that statement that Respondent had no ability to control the vehicles, nor maintain them. Respondent's actions caused the credit union to lose control over its assets. In addition, the lack of documentation left the credit union with no legal recourse against 5 Star, Auto Mart, or any other party that possessed the vehicles illegally.

I find that the NCUA established that Respondent engaged in unsafe and unsound practices by failing to maintain any records regarding credit union assets. I credit the Examiner's testimony accordingly. Sunshine State Bank v. FDIC, 783 F.2d 1580 (11th Cir. 1986). Alternatively, I question the credibility of Respondent, who changed his story from the version given during the examination process – there are no records – to the version he testified to at hearing – they were on consignment to Curtis at 5 Star. I find that in either version of Respondent's completely confusing explanations, he conceded that inadequate records were maintained. Failure to maintain records for placing cars on consignment or transferring them to Auto Mart is contrary to generally accepted standards of prudent operation.

Failure to Follow Loan Underwriting Standards

The third unsafe or unsound allegation, made by the NCUA, is that Respondent failed to perform normal underwriting functions required for lending institutions. More specifically, Examiner Jenus reported that the credit union granted used vehicle loans without obtaining credit reports for borrowers and failed to calculate debt ratios or verify borrowers' income. Tr. p. 65-66. The Examiner testified that completing the above listed tasks is standard procedure in the

industry. Tr. p. 65. In his Answer, Respondent denied this allegation, but failed to refute the NCUA's evidence at hearing.

The NCUA introduced several exhibits showing the credit union's failure to investigate the lending worthiness of borrowers. Exhibit 7 lists twenty one used vehicle loans the credit union granted. On the exhibit, a computer print-out of the loans, there is detailed information about each car, the loan amount, and whether or not the credit union checked debt ratios or credit reports. Nearly every loan is without a mark, indicating no examination of any credit report, and almost all of the loans are for Auto Mart sales. The evidence strongly suggests that the credit union completed virtually no investigation of borrowers before granting the loans. In addition, the weight of the evidence supports the NCUA's theory that Respondent's goal was to sell as many cars as possible at Auto Mart and that he therefore had a vested interest in the credit union's granting the related loans to his customers.

Respondent's testimony is replete with examples of borrowers who lacked lending worth, a fact that the credit union could have learned through a credit report, debt ratio calculation, or verification of income. But the thrust of the finding, here, is supported by the testimony of the Examiner and Exhibit 7. Failure to investigate the financial worth of borrowers is an unsafe and unsound practice, and a pattern of lending that ultimately contributed to the overall loan delinquency rate and subsequent failure of the credit union.

<u>Other Unsafe and Unsound Practices</u>

In brief, the NCUA argues that Respondent engaged in three other types of unsafe or unsound practice. The agency claims that Respondent engaged in such misconduct by commingling assets, authorizing loans for amounts above the value of the collateral, and failing to solicit competitive bids to dispose of the repossessed automobiles.

First, the agency contends that Respondent commingled Auto Mart's cars with the credit union's repossessed vehicles. Respondent admitted to such conduct during his testimony, "I recall paying for some vehicles that Curtis, Five Star, had. He also had some vehicles for me that had nothing to do with the credit union, you understand, that I ain't get paid for, you understand." Tr. p. 2-5, 216. The NCUA contends that such a commingling of assets with an outside vendor, without adequate documentation, created a situation in which it was virtually impossible to determine what reimbursement is due to the credit union.

I agree with the NCUA's position. By leaving both Auto Mart and credit union vehicles at 5 Star Auto and failing to properly document such activity, Respondent irresponsibly commingled his assets with the credit union's assets. That commingling, combined with inadequate record-keeping is an unsafe and unsound practice. Respondent created an abnormal risk of loss or damage to the credit union because he failed to insure the credit union's: a) protection from loss or recovery of property; or b) reimbursement for repossessed vehicles either rented or sold by 5 Star.

The NCUA next asserts that Respondent engaged in unsafe and unsound practices by permitting the credit union to finance loans for amounts greater than the value of the collateral. In support of its contention, Examiner Jenus testified on direct that authorizing loans for more than the value of the collateral is contrary to generally accepted lending rules. Tr. p. 64. Although the agency failed to clearly establish, during its case in chief, a nexus between the loan authorizations and Respondent, his own testimony filled in any gaps.

Respondent actively participated in the authorization of used vehicle loans, as a one-time member of the Loan Committee and as Treasurer, by regularly signing the loan documents. Tr. p. 195. Respondent claims he was without the power to influence the Loan Committee or its Chairman. Tr. p. 195, line 23; see also Tr. p. 123-4. But he rather confoundedly admits to authorizing loans at lines 12-15 and then reinforces that by stating, "And if it was a loan for somebody in my family, or it was a loan for me, then I didn't sign." Tr. p. 195, lines 17-19.

Respondent continues to explain the Loan Committee relationships and further admits to the slip-shod ways the Loan Committee employed when it authorized loans.

Respondent clearly participated in the loan approval process and approved loans at above collateral value. It is also readily apparent that Respondent, through Auto Mart, stood to gain from that arrangement. Respondent testified that borrowers received loan amounts higher than the value of the collateral to pay for insurance and other vehicle related expenses. Tr. p. 131. But that doesn't change the fact that the credit union stood to lose more than its interest in the vehicles if the borrowers defaulted, which is what in fact happened. Furthermore, the additional funds still ended up in the hands of Auto Mart for fees such as title and tags.

Granting loans to borrowers for more than the value of the collateral, of course, is risky business. That is why the industry generally is not authorizing such loans. Tr. p. 64. Following proper methods, the borrowers could have obtained additional funds for the expenses. See generally Tr. p. 63-65. But Respondent failed to employ that methodology and instead placed the credit union in a tenuous position. In light of the uncontroverted fact that this credit union had a delinquency rate of 12 percent, versus 1 percent for similarly sized credit unions, the pattern of authorizing above-value collateral loans clearly contributed to such high numbers. Respondent is responsible for engaging in such unsafe or unsound practices.

The final NCUA contention regarding unsafe and unsound practices is another defiance of industry standards. The NCUA alleges that Respondent failed to follow industry standards when handling vehicle repossession. Examiner Jenus testified that there are two ways to process repossessed vehicles in an impartial manner. Tr. p. 20-21, 77. Both of those methods involve competitive bidding procedures.

Respondent claims to have truly believed he helped the credit union grow and prosper, and that by personally handling the repossessed vehicles he assisted the credit union in recovering its losses. See generally Tr. p. 132-135. When questioned about following a bidding process, Respondent testified that he "invited numerous dealers in." Essentially, Respondent testified that the potential buyers offered very low bids. Tr. p. 133, lines 11-16.

Respondent failed to use either of the methods the Examiner referred to and clearly disregarded any impartial disposition of the vehicles. Respondent opted to deal with the repossessed automobiles himself, instead of soliciting outside assistance and gave the work to Auto Mart. By ignoring general industry methods Respondent engaged in an unsafe or unsound practice.

In summary, Respondent failed to maintain records of credit union assets or the assets themselves, granted loans for more than the value of the collateral without proper debt or credit checks, and commingled credit union assets for his personal benefit. Respondent clearly disregarded generally accepted standards of prudent credit union operation on a significant number of levels. The consequences of Respondent's actions produced not only abnormal risk to the credit union, its members and the NCUA, but also caused losses and damages.

Breach of Fiduciary Duties

The NCUA may seek to prohibit an institution affiliated party if he or she committed or engaged in any act, omission, or practice, which constitutes a breach of such party's fiduciary duty. 12 U.S.C.A. § 1786(g)(A)(iii). It is well settled that bank officers have a duty to act in the best interest of the bank, its shareholders, and depositors, and to conduct the affairs of the bank with care, diligence, candor and honesty. See In the Matter of Neil M. Bush, 1991 WL 540753 (O.T.S. 1991); In the Matter of Richard Salmon, 1998 WL 574898 (O.C.C. 1998). In Bush, the Director of the Office of Thrift Supervision recognized that, "No activity is more critical to the survival and success of any insured financial institution than the faithful performance by its officers and directors of their fiduciary duties." Bush at 1. "For this reason, a director's adherence to his fiduciary duties must be an obligation keenly appreciated and scrupulously followed." Id.

Additionally, it is noted that "the federal government as regulator and insurer has a compelling interest in establishing a uniform nationwide minimum standard of conduct, and to that end may establish a regulatory and common law of fiduciary duties that does not depend on the location of the institution." Id. (citing Brickner v, FDIC, 747 F.2d 1198, 1202 (8th Cir. 1984); Beverly Hills Fed. S&L Ass'n v. FHLBB, 371 F.Supp. at 314). In Bush, OTS also held that "directors have a fundamental duty to avoid placing themselves in a position that creates, or that leads to or could lead to a conflict of interest or appearance of conflict of interest." Bush at 4.

The NCUA asserts that Respondent violated his fiduciary duty to the credit union many times. Respondent disputes the agency's assertion and maintains that he only meant to build up the credit union's business and get back the money it lost on the bad loans. Essentially, Respondent pleads his good intentions. The NCUA claims Respondent breached his duties by: 1) mishandling the repossessed vehicles; 2) placing credit union assets in the hands of third parties without proper documentation; 3) permitting third parties to use credit union assets without compensating the institution; 4) usurping credit union opportunities; and, 5) failing to initiate collection action against his Auto Mart partner, Lloyd Brown.

The following discussion will highlight the key acts that I find constituted a breach by Respondent of his fiduciary duties.

Mishandling Credit Union Assets, etc.

The root, from which Respondent's multiple breaches of fiduciary duty grew, is grounded in his conflicting interests. From roughly March 1993 to March 1995, Respondent served as President of the Dock Loaders and Unloaders of Freight Cars and Barges, a local union; owned the Auto Mart car dealership; and ran the Freight Handlers Federal credit union as its Treasurer/Manager - all at the same time. The credit union, which mainly served local union members, was located in the union hall, also occupied by the union. Additionally, the credit union financed a significant number of vehicles for Auto Mart. Auto Mart repossessed and purchased various vehicles from the credit union and even listed the same address as the credit union and Dock Loader's on its company checks. These facts are not disputed and are the basis for Respondent's breaches of duty.

While it is not a per se conflict of interest to separately run these three entities, it is highly probable conflicts will arise. And that is exactly what happened in this case. Respondent acting as both Treasurer/Manager of the credit union and owner of Auto Mart, represented each entity in numerous transactions. In the circumstances of those transactions, conflicts of interest existed. More specifically, by taking the repossessed vehicles, or purchasing them from the credit union in a significantly reduced price package deal, Respondent chose his own interests over the credit union.[2] As an officer of the credit union, Respondent engaged in self-dealing and breached his duty of loyalty.[3]

Respondent further breached his duties of loyalty and care by placing credit union assets in the hands of third parties without proper documentation and permitting third parties to use credit union assets without compensating the institution. As stated above under the unsafe or unsound practices analysis, Respondent neglected to maintain any records for credit union vehicles that he placed on consignment with 5 Star Auto. Additionally, Respondent permitted third parties to use the repossessed vehicles for personal use, without compensating the credit union. "You

[2] For a more in depth discussion of Respondent's actions, see the above analysis under *Unsafe or Unsound Practices*.

[3] Respondent clearly felt personally responsible for each position he held, his downfall came when conflicts arose and it was impossible to uphold the fiduciary duties to each organization. One clear example of Respondent's feelings is during his testimony when he says, "And I had members out there, and as an obligation to the credit union, I got cars running around there that ain't got no title because the guys blow the money. So now I got to step in. 'I brought you in; I'm responsible for you.'" Tr. p. 138, lines 9-14.

know, let me tell you, a lot of times I did stuff, say for instance, you know, I had cars, and one of the mechanic guys said, 'I ain't had no car,' and I said, 'Okay, I'm going to let you ride in this car here." Tr. p. 179.

It is clear from Respondent's testimony that he commingled Auto Mart's cars and the repossessed vehicles owned by the credit union so much, that he failed to separate the assets. Respondent's lack of care to record the use, collect fees, or insure the condition of the repossessed vehicles is a breach of his duty to the credit union.

Failure to Pursue Borrowers in Default

Additionally, Respondent breached his fiduciary duties by failing to pursue collection action against Lloyd Brown. Lloyd Brown and Respondent collectively owned Auto Mart. Exhibit 1. During the NCUA examination, Examiner Jenus found that Lloyd Brown failed to pay his personal vehicle loan for fifteen months. Exhibit 7, loan #6; Tr. p. 66-67. The Examiner uncovered no evidence that the credit union or Respondent pursued any course of action against Mr. Brown to collect the debt. The NCUA's exhibit shows the balance outstanding in the amount of $12,943.52. As manager of the credit union, Respondent owed a duty of diligence to collect outstanding debts. By permitting such delinquency for his business partner, Respondent breached that duty and compromised the safety and soundness of the credit union.

Respondent impliedly argues that the credit union chose not to pursue debt collection activities, or charge-off loans. The reason Respondent gives for following such practices is that, "We try to give them every opportunity in the world to get the car paid for." Tr. p. 171, line 6-7. The generosity of the credit union is admirable, but by waiting more than fifteen months to collect loans, as in the Lloyd Brown example, Respondent compromised the interests of the other credit union members.

While the evidence in this case fails to directly reveal whether Respondent personally authorized the loan or participated in the approval of Brown's loan, it is clear that he knew or should have known of the delinquent account as manager. The NCUA persuasively argues that Respondent opted not to pursue that loan because that course of action would have had a negative impact on his business partner. I find that Respondent's failure to take action against defaulted borrowers was a breach of his fiduciary duties. As Treasurer, Respondent owed duties of diligence and care. See Bush, supra. Respondent's failure to pursue the collection of debt is a breach of those duties.

Conclusion

In light of the testimony of Examiner Jenus, the authority cited above, the evidence presented at hearing, and Respondent's own admissions, it is clear that Respondent's actions constitute misconduct under the law. I find that Respondent violated the NCUA conflict of interest regulations, engaged in unsafe and unsound practices and breached his fiduciary duties. The misconduct prong is more than satisfied and the next step is to examine the effect of Respondent's actions.

Effect Prong

The second element of the prohibition test is the effect prong. The issue under this prong is whether by reason of Respondent's misconduct, such insured credit union suffered or will probably suffer financial loss or other damage, the interests of the insured credit union's members have been or could have been prejudiced, or Respondent has received financial gain or other benefit. 12 U.S.C.A. § 1786 (g)(B)(i-iii). The NCUA asserts that all three criteria are established in this case.

First, the agency asserts the credit union suffered a loss because Respondent failed to fully collect defaulted used vehicle loans. More specifically, the agency contends it established a loss of $43,857.34. The NCUA arrived at that amount by adding the loans that correspond to the ten vehicle and account numbers on the reverse side of the deposit voucher, $68,857.34, and then subtracting the twenty five thousand Respondent paid in the package sale.

Second, the NCUA asserts that Respondent's actions prejudiced the interests of credit union members. The agency points out that because of the nature of credit unions as member-owned, financial cooperatives, when Freight Handlers sustained a loss, the members of Freight Handlers were prejudiced. Tr. p. 10; NCUA's Memo p. 22. Since such a loss reduces the credit union's ability to pay interest on it member's deposits, the loss limits the amount of funds available for lending.

Third, the NCUA asserts that Respondent benefited financially by selling automobiles financed by the credit union and by purchasing ten vehicles in a reduced price deal. The agency argues that Respondent's failure to use competitive bidding procedures or other arms-length transaction, it is virtually impossible to determine the fair price of the vehicles. Considering the difference between the value of the defaulted loans, $68,857.34 and the price Respondent paid for the cars, the agency says it is safe to infer some financial benefit.

Respondent contests that he received any financial benefit, and repeatedly testified that he lost money out of pocket. Respondent emphatically claimed, "No checks were cut to Ray Worthy. Ray Worthy wasn't - - ain't had no money. This money was credit union money… …Whatever was done, it went straight to that credit union." Tr. p. 220, lines 8-11. In addition, Respondent testified to the minimal value of the repossessed vehicles. One example is the 1987 Audi that Auto Mart sold to a Mr. Tillman, who defaulted on his loan. Respondent explained, "We go get the car, no battery, four flat tires, you understand… … it was in bad shape." Tr. p. 171, lines 11-12, 15-16.

After considering all the evidence, including the Share and Loan Ledger card documentation in Exhibit 4, I find that the NCUA clearly established financial loss to the credit union, and prejudice to the interests of credit union members. I further find, although only by circumstantial evidence, the agency established Respondent's financial gain. Respondent fails to contradict the agency's evidence and his misconduct negatively impacted the credit union. Respondent caused the credit union to authorize risky loans, which eventually defaulted, resulting in credit union financial losses of tens of thousands of dollars. Moreover, the effect of the bad loans contributed to the overall insolvency of the credit union, forcing it to close it's doors forever. I also find that Respondent prejudiced the interests of the members for the same reasons.

Finally, I find Respondent received financial gain directly through his automobile dealership, Auto Mart. Auto Mart enjoyed steady business, according to Respondent. It is more than reasonable to infer Respondent benefited financially, as its owner. It is clear that Respondent's misconduct caused losses to the credit union, prejudiced the interests of members and resulted in his personal gain.

Culpability

The third and final prong of the prohibition test is culpability. The issue presented here, is whether Respondent's misconduct involves personal dishonesty or demonstrates his 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.A. § 1786(g)(C)(i-ii). The NCUA asserts that by attempting to conceal Auto Mart's relationship with the credit union, and then upon its discovery, paying a lump sum for ten of the repossessed vehicles, Respondent's conduct involved personal dishonesty and demonstrated his unfitness to serve as an officer. Respondent's testimony suggests that he disputes such allegations and he repeatedly says he only exerted good faith efforts to perform his duties as the credit union's Treasurer/Manager.

Personal Dishonesty

As a general rule, "personal dishonesty," includes a disposition to lie, cheat, defraud, deceive or misrepresent. Van Dyke v. Board of Governors of the Federal Reserve System, 876 F.2d 1377, 1379 (8th Cir. 1989).

The NCUA says the best evidence Respondent acted in a personally dishonest manner is his attempt to conceal Auto Mart from NCUA Examiners. Enforcement counsel asked Examiner Jenus, on direct, if he ever discussed Auto Mart with any of the employees. Tr. p. 18, lines 12-14. The Examiner responded,

> Yes. Like I said, they had six employees. We talked to them, myself and other Examiners. We asked about Auto Mart, and they knew nothing about Auto Mart. That's what they told me, they knew nothing about it.

Tr. p. 18, lines 15-19. The Examiner further testified, as stated above, that each time he asked Respondent if he owned Auto Mart, Respondent denied his ownership. The agency, later introduced several exhibits establishing Respondent's ownership, which he later conceded in his own testimony.

The Examiner also asked Respondent about the repossessed vehicles and testified that he and Respondent had "several discussions." Tr. p. 21, line 8. The Examiner also testified that when he asked Respondent about the vehicles, Respondent, "told me that he did not know where they were, they could be in the junkyard, they could be in the repair shop; he didn't know." Tr. p. 21, lines 14-16.

Respondent's position, implied in his testimony, is that he never attempted to conceal his ownership of Auto Mart, or its relationship to the credit union. He maintained that he fully cooperated with the Examiners, including the Auto Mart investigation. Respondent testified that he "offered to take Mr. Jenus where they was at before I paid for them." Tr. p. 212, lines 15-17. Addressing another NCUA employee, Respondent claims to have stated, "Man, let me take [you] over here where these cars are at, so you can see these cars." Tr. p. 212, lines 21-22.

The parties presented testimony that supports diametrically opposed positions. The NCUA offered a number of exhibits which supported the testimony of the Examiner. Those documents, combined with Respondent's general testimony consisting primarily of long drawn-out and sometimes incoherent speeches, provide strength to the agency's position. It is clear that the truthful version of the facts lies with the NCUA.

For all of the following reasons, I find that Respondent intended to deceive Examiners and misrepresent his relationship with Auto Mart. I find Respondent acted in this manner in order to hide his conflicts of interest. The NCUA documents showed first, that Respondent owned Auto Mart during the time periods in question (Exhibit 1), second, that Auto Mart sold cars repossessed by the credit union (Exhibits 5), and third, regularly sold cars financed by the credit union (Exhibit 7). The most compelling evidence in this case, however, is Exhibit 6. That exhibit is a portion of Examiner Jenus's report, including Jenus's analysis of the used vehicle loans extended by the credit union . That analysis shows that from June 1994 to October 1994, more than 87 percent of the used vehicle loans granted by the credit union went to Auto Mart customers.

It is quite simply inconceivable that six employees, working in a very small room, inside a Union Hall, where their boss, Respondent Worthy, held the office of President, in a place where according to Respondent basically "everybody knew everybody," were completely unaware of the car dealership that occupied an overwhelming amount of their loan business. Circumstances such as those listed above are just not credible. The six employees had to know something about Auto Mart. According to the Examiner's testimony, when questioned about the repossessed vehicles, the employees told him, "this nice little old man had come in from 5 Star

Auto paid $25,000.00 for the cars." Tr. p. 22, lines 24-25; p. 23, line 1. That statement evidences the fact that the employees knew about the package sale. Respondent never refutes the NCUA Examiner on this issue. The fact that the credit union was a small institution and the fact that Auto Mart brought in such a large amount of business, establishes circumstances in which the employees had to know what was going on.

Respondent fails to refute the facts as presented by the NCUA. I agree with the NCUA, that Respondent attempted to cover up his involvement with Auto Mart and enlisted the aid of his subordinates in that lie. Respondent also withheld information about these matters at an earlier deposition, by invoking his Fifth Amendment rights. When questioned about this at the hearing, Respondent claimed, "I had no choice, you understand." Tr. p. 210, line 11. In addition, Respondent regularly offered inconsistent testimony. When explaining the circumstances surrounding the 1988 Mustang, Respondent gave two different versions of spending $1,400.00 on the car. At first, Respondent testified that he remembered Jackson's loan for the Mustang. He further states,

> We were looking for the car to repossess the car, and we finally found the car in a guy's garage, and we had to pay something like $1,400 bucks to get the car out. The transmission was bad. We later got the car. We had the car sitting around, along with a whole lot of other cars.

Tr. p. 125, lines 1-9. Then Respondent's testimony trails off on another tangent. Respondent finally returns to the facts involving the Mustang on page 141 of the transcript. There, Respondent's counsel asks him about the notes in the agency's Share and Loan Card exhibit that reflects a final balance of $4,326.29 and other charges that amounted to $1,075.00. Respondent states,

> I'd like to know where $1,000.00 comes from because the transmission on the thing cost $1,400.00. It had a bad engine, I think I paid $300 and something on that. None of this stuff is even reflected in the balance on this. Tr. p. 141, lines 16-20.

Respondent's recollection is so convoluted, that it is unclear exactly who he allegedly paid and for what purpose. Respondent was unable to consistently recall if he paid the $1,400.00 to get the car out of some "guy's garage," or if he paid that amount to fix the transmission. Respondent says he remembers, but then he tells two different versions of the facts. Taken as a whole, Respondent's testimony is simply not credible.

Further evidence of Respondent's deception and misrepresentations regarding Auto Mart is the untimeliness of his payment to the credit union for the repossessed automobiles. I agree with the NCUA's position that Respondent only remitted payment after he sold certain repossessed credit union cars. Respondent paid for a group of repossessed cars a lump sum of $25,000.00 on September 17, 1994. The evidence shows Respondent made this payment only after the Examiners questioned him about the cars. Exhibits 5c, pages 2, 4 and 5g, page 7 prove that Respondent sold the Volkswagen Jetta on May 20, 1994 and the 1985 Cadillac on May 4, 1994. The only logical reason Respondent waited to remit payment is that he kept the funds for his own benefit. This affirmatively supports the Examiner's claim that Respondent's actions were dishonest.

Unfitness to Serve

A finding of "unfitness to serve," must be supported by a finding of equal gravity to a finding of personal dishonesty. Doolittle v. NCUA, 992 F.2d 1531, 1537(11th Cir. 1993), cert. denied, 516 U.S. 987, (1995), aff'd, 43 F.3d 536 (11th Cir. 1995)(adopting other Circuits' analysis of similar provision, 12 U.S.C.A. § 1818(e)(1)(C), and citing: Jameson v. FDIC, 931 F.2d 290 (5th Cir.1991) (falsification of bank records to conceal bonus from other bank officials; Van Dyke, 876

F.2d 1377 (bank officer participated in check-kiting scheme); Brickner v. FDIC, 747 F.2d 1198 (8th Cir. 1984)(continuing disregard evidenced where bank officers knew cashier was engaging in unsafe and unsound practices, but failed to take action for months)).

Respondent's own testimony provides substantial grounds to base a finding of unfitness. By his own words, Respondent established a lack of knowledge of NCUA Rules and Regulations, accounting principles generally used in the industry, and ability to properly record and reconcile the credit union's holdings.

The most compelling argument for unfitness, however, is Respondent's total disregard of the conflict of interest regulations described above. Essentially, Respondent managed the local union, credit union and Auto Mart in whatever manner suited him. Additionally, Respondent's multiple breaches of fiduciary duty to the credit union and his unsafe and unsound practices, as detailed above, demonstrate that he is clearly unfit to hold office or participate in the affairs of a federally insured credit union.

During its case, the NCUA laid a strong factual foundation of Respondent's culpability. But Respondent's own testimony ultimately satisfied this prong of the prohibition test. In light of the above analysis, I find that the third and final prong of the prohibition test is satisfied.

In conclusion, I find that all three prongs of the prohibition test are established and I affirmatively recommend the NCUA prohibit Respondent from participating in the conduct of affairs of any insured credit union.

Cease and Desist Order (Restitution)

The FCU Act grants the NCUA the authority "to correct conditions resulting from violations or practices." 12 U.S.C. § 1786(e)(3). That subsection, in part, allows NCUA to require a credit union or party to:

> (A) make restitution or provide reimbursement, indemnification, or guarantee against loss if-
> (i) such credit union or party was unjustly enriched in connection with
> such violation or practice; or
> (ii) the violation or practice involved a reckless disregard for the law or
> any applicable regulations or prior order of the board.

12 U.S.C.A. § 1786(e)(3)(A)(i-ii). Generally speaking, restitution under the FCUA is reserved for "serious misconduct." H.R.Rep. No. 54, 101st Cong., 1st Sess., pt. 1, at 392 1989); Doolittle v. NCUA, 992 F.2d 1531 (11th Cir. 1993).

The NCUA contends that by accepting fees or commissions, directly or indirectly from Auto Mart, Respondent violated the NCUA's conflict of interest regulation. 12 C.F.R. § 701.21(c)(8). Based on that violation, the NCUA requests the issuance of a cease and desist order. The agency further submits that Respondent's management of the credit union constitutes unsafe and unsound practices and requests the cease and desist order issue on those grounds as well. Finally, the NCUA submits, that Respondent received unjust enrichment and exhibited a reckless disregard for the law. For all of the reasons listed above, the agency seeks restitution in the amount of $43,857.34, for the loan losses attributable to the ten repossessed automobiles.

Unjust Enrichment

The NCUA first submits that Respondent's conduct demonstrates that he was unjustly enriched through his self-dealing activities with the credit union. The agency further asserts that Respondent financially benefited from Auto Mart sales that the credit union financed and from the reduced package price he paid for the ten repossessed autos in an other-than-arms-length transaction.

The NCUA affirmatively established a chain of events that provides for only one conclusion – Respondent was enriched by his misconduct. Respondent's repeated statements that he in no way received money from the credit union or that Auto Mart benefited is simply not believable. Respondent's testimony fails, without more, to refute the NCUA's well-supported contentions that Respondent financially gained from the self-dealing transactions he made on behalf of Auto Mart.

Reckless Disregard

The NCUA also contends that the evidence satisfies the statute because Respondent's actions constituted a reckless disregard for the law and NCUA regulations. The FCUA fails to define the term, "reckless disregard," but the OTS's decision In the Matter of Simpson, provides the following:

> … reckless disregard for the law, applicable regulations, or any agency order exists when: (1) the party acts with clear neglect for, or plain indifference to, the requirements of the law, applicable regulations or agency orders of which the party was, or with reasonable diligence should have been aware and (2) the risk of loss or harm or other damage from the conduct is such that the party knows it, or is so obvious that the party should have been aware of it. In the Matter of Simpson, OTS Order
> No. 92-123 (1992).

In support of its contention, the NCUA points to Respondent's testimony, where he admitted lacking knowledge of the rules and regulations. See Tr. p. 177, 241. Additionally, the agency says conflict of interest rules are "part of the every day lexicon in today's society," and it is incredible that Respondent was unaware of such rules. NCUA Memo at 26. The NCUA argues that Respondent's failure to know of such regulation shows plain indifference or clear neglect for the requirements of the law.

First of all, it is clear that Respondent lacked the requisite knowledge of NCUA rules and regulations to sufficiently perform the duties owed by an officer of a credit union. Respondent's testimony clearly illustrates this failure.

Respondent should have been aware of the conflict of interest regulation. Officers owe certain fiduciary duties to the institution they run. They are expected to know what their duties are and scrupulously uphold them.

There is at least one instance where the courts failed to uphold the agency's finding of reckless disregard by a credit union officer. In Doolittle v, NCUA, the Eleventh Circuit disagreed with the agency's final decision to prohibit the credit union officer and impose restitution. The U.S. Court of Appeals held that Doolittle took what he thought were effective steps to curtail the extension of unauthorized loans. The Court further held that Doolittle's response to the discovery of the bad loans, reporting it to the board of directors and taking immediate action to mitigate losses, did not constitute reckless disregard and it reversed the NCUA's decision and remanded it accordingly. Doolittle v. NCUA, 992 F.2d 1531.

Unlike Doolittle, Respondent's remedy to the credit union's problem involved self-dealing. Respondent took the repossessed vehicles, let them out to third parties, commingled his own assets and resold them through his own car dealership. Respondent's violation of the conflict of interest regulation is a reckless disregard of the law. Restitution, therefore, is appropriate.

The NCUA asks for restitution in the amount of $43,857.34, the amount it says, the credit union lost on the ten repossessed vehicles, minus the lump sum of $25,000.00 paid by Respondent in the package sale. Upon careful consideration of all the evidence and Respondent's unjust enrichment, I find that the NCUA is entitled to recover $43,857.34.

CONCLUSION

Based on the foregoing discussion of the facts, evidence and law, I hereby recommend the NCUA Board issue an Order of Prohibition against Ray A. Worthy and impose a fine of restitution in the amount of $43,857.34.

____

Arthur L. Shipe

Administrative Law Judge

APPENDIX B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL CREDIT UNION ADMINISTRATION BOARD
ALEXANDRIA, VIRGINIA

In the Matter of	
RAY A. WORTHY	**NCUA Docket No.**
	98-1201-III
Former Manager and Treasurer	
Freight Handlers Federal Credit Union	
New Orleans, Louisiana	

Appendix B to Final Decision and Order
Corrections to Recommended Decision (Appendix A)

Introduction

Freight Handlers was purchased and assumed by NOME Federal Credit Union rather than merged into it. The last sentence of the first full paragraph on page 2 (beginning with "Subsequently") should be deleted and the following two sentences should be inserted in its place. "Subsequently, on October 20, 1995, the NCUA Board liquidated Freight Handlers. The assets and liabilities of the liquidated credit union were purchased and assumed by NOME Federal Credit Union."

Findings of Fact

Finding of Fact 3. is deleted and the following is inserted in its place. "On October 20, 1995, the NCUA Board liquidated the credit union. The assets and liabilities of the liquidated credit union were purchased and assumed by NOME Federal Credit Union."

Finding of Fact 5. The date "March 1, 1995" is changed to "December 12, 1994."

Finding of Fact 8. The reference "Tr. p. 65-5" is changed to "Tr. p. 63-65."

Finding of Fact 9. On the top of page 4, delete the sentence beginning with "At the latest" and the reference that follows it and replace it with the following: "At the latest, Respondent knew by March of 1994, that owning Auto Mart, Auto Mart's easy access to repossessed vehicles from the credit union, and the credit union's financing of automobiles purchased from Auto Mart, violated NCUA regulations. Tr. pp. 177-178."

Finding of Fact 11. Delete the first sentence and replace it with the following two sentences: "Auto Mart, Respondent's business, obtained numerous repossessed vehicles from the credit

union, without use of the bidding process. Auto Mart then sold the automobiles to the general public."

Finding of Fact 13. The names of two automobile companies – 5 Star Auto and Auto Mart – were combined into one – 5 Star Auto Mart – in the Recommended Decision. There is no company "5 Star Auto Mart" referred to in the record. Delete the third sentence that begins with "Examiner Jenus learned" and replace it with the following two sentences. "Examiner Jenus learned that the $25,000.00 was paid for ten repossessed vehicles. These vehicles were sold in a package deal to Auto Mart, Inc.(owned by Respondent), rather than 5 Star Auto." The reference to "Tr. p. 27-9, Exhibit 3, p.2" is changed to "Tr. p. 27-30, 78 and Exhibit 3, p.2."

Finding of Fact 17. Change the parenthetical from "(reportedly by 5 Star Auto Mart)" to "(owner of Auto Mart)."

<u>Discussion</u>

Top of page 7. NCUA's prohibition authority is incorrectly set forth. According to Section 206(g)(1)(A)(i) of the Federal Credit Union Act, 12 U.S.C. 1786(g)(1)(A)(i), the first of the three categories of misconduct is a violation of one of four authorities. The Recommended Decision mistakenly sets forth five authorities. Subsections (A)(i)(III), (IV), & (V) are deleted and are replaced by the following (A)(i)(III) & (IV) on p. 7 of the Recommended Decision.

> (III) any condition imposed in writing by the Board in connection with the grant of any application or other request by such credit union; or
> (IV) any written agreement between such credit union and the Board;

Top of page 9, third line. Change reference from "Tr. p. 141" to "Tr. p. 140."

Top of page 9. This change is made for a more complete description of Respondent's violation of the conflict of interest provision. Insert the following sentence after the reference to Exhibit 5g; p. 7: "Third, Respondent, as manager of the credit union, failed to use proper procedures in disposing of repossessed vehicles. He turned repossessed vehicles over to Auto Mart without competitive bidding and at a reduced price. (*See* complete discussion under <u>Sale of Credit Union Assets at a Reduced Price</u>, *infra*.) Respondent, through his ownership interest in Auto Mart, received a benefit in obtaining the vehicles from the credit union at a reduced price. Respondent, as owner of Auto Mart, then sold these vehicles."

Page 9, first full paragraph, 3rd line, reference to "Tr. p. 120" is changed to "Tr. p. 134 and 138."

Page 10, first full paragraph, fifth line. The cite to the Congressional Record and Senate Report is incorrect. Delete "112 Cong. Rec. 26474 (1996); S.Rep. No. 3158, 89th Cong. 2d Ses. 50" and replace it with: "<u>Financial Institutions Supervisory Act of 1966: Hearings on S. 3158 before the House Committee on Banking and Currency</u>, 89th Congress, 2nd Sess., at 49-50 (1966).

Page 10, third full paragraph, last reference to "Tr. p. 219" is changed to "Tr. p. 218-219."

Page 12, second full paragraph, fifth line. Delete reference to "Tr. p. 189."

Page 15, third full paragraph, third line. Change cite from "12 U.S.C.A. 1786(g)(A)(iii)" to 12 U.S.C.A. 1786(g)(1)(A)(iii)."

Page 15, third full paragraph, fifth and sixth lines. After the case name <u>In the Matter of Neil M. Bush</u>, add the following citation set off in commas: "OTS AP 91-16."

Page 15, third full paragraph, second to last line, delete reference "Bush at 1" and replace with "Bush, OTS AP 91-16 at 1."

Page 15, fourth full paragraph, last line. Delete reference "Bush at 4" and replace with Bush, OTS AP 91-16 at 11."

Page 18, first paragraph, fifth line. Change cite from "12 U.S.C.A. 1786(g)(B)(i-iii)" to "12 U.S.C.A. 1786(g)(1)(B)(i-iii)."

Page 18, third paragraph, delete the third (last) sentence and replace it with the following: "Such a loss reduces the credit union's ability to pay dividends on its members' shares and limits the amount of funds available for lending."

Page 20, second paragraph. Delete the reference to "Tr. p. 212, lines 21-22" and replace it with "Tr. p. 212, lines 20-21."

Page 20, last paragraph and page 21, first paragraph. In this paragraph, ALJ Shipe states his belief that Respondent enlisted and received the aid of the credit union employees in his attempt to cover up his involvement with Auto Mart. None of the credit union employees (other than Respondent) were deposed. It is not necessary to implicate the other credit union employees to meet the requirements for prohibition pursuant to Section 206(g)(1) of the FCU Act. Delete the last paragraph on p. 20, and the phrase "and enlisted the aid of his subordinates in that lie" from the second sentence of the first paragraph on p.21.

Page 22, second paragraph, second sentence. Delete this sentence and replace it with the following two sentences: "By his own words, Respondent established a lack of knowledge of NCUA Rules and Regulations and accounting principles generally used in the industry. His actions also showed an inability to properly record and reconcile the credit union's holdings."

Page 23, last paragraph, last line of page. Delete reference to "Tr. p. 177, 241" and replace it with Tr. p. 177-178, 241."