Docket #11170 Date Filed: 3/20/2013

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re	:	**Chapter 11**
WASHINGTON MUTUAL, INC., et al.,[1]	:	**Case No. 08-12229 (MFW)**
Debtors.	:	**(Jointly Administered)**
	:	**Re: Docket Nos. 11032, 11139, 11140, 11141, 11143, 11146, 11147, 11148 11149, 11150, 11151, 11157, 11159**

REPLY OF WMI LIQUIDATING TRUST IN FURTHER SUPPORT OF MOTION FOR LEAVE TO AMEND THE FIFTH, SIXTH, SEVENTY-NINTH, EIGHTIETH, EIGHTY-FIRST, EIGHTY-SECOND, EIGHTY-FOURTH, EIGHTY-FIFTH AND EIGHTY-EIGHTH OMNIBUS OBJECTIONS TO CLAIMS

WMI Liquidating Trust ("WMILT"), as successor in interest to Washington Mutual, Inc. ("WMI") and WMI investment Corp., formerly debtors and debtors in possession (collectively, the "Debtors"), hereby submits this reply (the "Reply") in further support of *WMI Liquidating Trust's Motion for Leave to Amend the Fifth, Sixth, Seventy-Ninth, Eightieth, Eighty-First, Eighty-Second, Eighty-Fourth, Eighty-Fifth, and Eighty Eighth Omnibus Objections to Claims*, dated February 19, 2013 [D.I. 11032] (the "Motion")[2], and in response to those Responding Claimants that objected to the Motion (the "Objecting Claimants"),[3] and respectfully represents as follows:

[1] The Debtors in these chapter 11 cases along with the last four digits of each Debtor's federal tax identification number are: (i) Washington Mutual, Inc. (3725); and (ii) WMI Investment Corp. (5395). The principal offices of WMILT, as defined herein, are located at 1201 Third Avenue, Suite 3000, Seattle, Washington 98101.

[2] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Motion.

[3] The objections of *pro se* claimants Gennadiy Darakhovskiy [D.I. 11140], Camille Everett [D.I. 11139], and Suzanne R. Lehrberger [D.I. 11159] do not respond to the Motion, but instead, respond to the respective Omnibus Objections related to their claims, as amended to include the Additional Defenses. The remainder of the objections [D.I. 11141; 11143; 11146; 11147; 11148; 11149; 11150; 11151; 11157] (collectively, the "Joint Objection") join in, adopt, and incorporate by reference the arguments advanced in the *Joint Objection of John McMurray, et al. to WMI*

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PRELIMINARY STATEMENT

1. It is plain and simple. WMILT is prohibited by federal law from making payments on the vast majority of claims that are subject to the Omnibus Objections. Under section 502(b)(1) of the Bankruptcy Code, such prohibition continues into bankruptcy. 11 U.S.C. § 502(b)(1) (a claim should be disallowed to the extent that it "is unenforceable against the debtor and property of the debtor, under . . . applicable law . . . "). The Objecting Claimants try to confuse the debate with respect to the two main regulations at issue, 12 C.F.R. § 163.39 (formerly 12 C.F.R. § 563.39) ("Section 163") and 12 C.F.R. § 359, et seq. ("Section 359" and, together with Section 163, the "Regulations"), by splaying platitudes and misconstructions, all in an attempt to collect otherwise prohibited payments. The Objecting Claimants posit three main arguments in an effort to deny the relief requested: (i) the Motion does not meet the requirements of Rule 15 of the Federal Rules of Civil Procedure; (ii) amending the Omnibus Objections would be futile; and (iii) the Motion fails to specify the claims to which the Additional Defenses apply.

2. The Objecting Claimants are wrong on all counts. First, the Additional Defenses are not the product of undue delay, dilatory motives, or bad faith and would not result in undue prejudice to the Responding Claimants. WMILT requested leave to amend the Omnibus Objections as soon as practicable after it became aware that the Additional Defenses were available to it. WMILT is not asserting such defenses as a delay tactic in these matters and such defenses are not being raised in bad faith. **Indeed, WMILT would welcome the opportunity to present the merits of the Regulations on an expedited basis.** Notably, WMILT requires virtually no discovery to establish the applicability of the Regulations and the prohibition of the payments at issue. Furthermore, there is clearly no prejudice here because many of the

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Liquidating Trust's Motion to Amend the Fifth, Sixth, Seventy-Ninth, Eightieth, Eighty-First, Eighty-Second, Eighty-Fourth, Eighty-Fifth, and Eighty-Eighth Omnibus Objections to Claims, dated March 18, 2013 [D.I. 11141].

Responding Claimants have already litigated and lost against the FDIC with respect to the applicability of the Regulations to some of the very same agreements at issue here. Discovery in these matters is ongoing and the Responding Claimants will have an opportunity to fully litigate the issues raised by the Additional Defenses. Thus, under the liberal amendment standard pursuant to Federal Rule 15, the Amended Objections should be allowed. Second, as other courts have found, the claims asserted by the Responding Claimants are prohibited by federal law. Accordingly, the Additional Defenses are not futile here. Finally, as asserted in the Motion, the Additional Defenses apply to virtually all of the claims of the Responding Claimants that remain outstanding because one or both of the Regulations render the remaining components unenforceable against WMILT.

BACKGROUND

The Regulations

3. Section 163 provides that certain of the contracts and benefits plans that give rise to the Responding Claimants' claims automatically terminated upon the appointment of the FDIC as the receiver for WMB. Additionally, Section 359 prohibits insured depository institutions, like WMB, and depository institution holding companies, like WMI, from making certain payments to an "institution affiliated party" ("IAP")[4] (*i.e.*, each the Responding Claimants) upon or after the termination of the IAP's employment or affiliation with the depository institution or holding company, where the requirement to make such payments is triggered by the termination of the IAP and such entity is in financial distress. The purpose of the Regulations is to, among other things, "prevent the improper disposition of institution assets and to protect the financial soundness of insured depository institutions, depository institution

[4] Pursuant to 12 C.F.R. § 359.1(h), "institution affiliated party" means, *inter alia*, "[a]ny director, officer, employee . . . of, or agent for, an insured depository institution or depository institution holding company . . . ."

holding companies, and the federal deposit insurance funds" and prevent windfall payments to those who may be responsible for, or who participated in risky business activities that contributed to, the troubled condition or failure of financial institutions. *See Regulation of Golden Parachutes and Other Benefits Which May Be Subject to Misuse*, Final Rule, 61 Fed. Reg. 5926-27 (Feb. 15, 1996). Each of the Regulations and its requirements are discussed in depth below.

12 C.F.R. § 163.39 (formerly 12 C.F.R. § 563.39)

4. Section 163, a copy of which is attached hereto as **Exhibit A**, provides that an employment contract between a savings association and its officers and other employees must provide that,"[i]f the savings association is in default (as defined in section 3(x)(1) of the Federal Deposit Insurance Act),[5] all obligations under the contract shall terminate as of the date of default . . . ." 12 C.F.R. § 163.39(b)(4). Such provision is incorporated into employment agreements between the parties regardless of whether it is expressly set forth in the written document. *See Williams v. FDIC*, 09-504(RAJ) (W.D. Wash. Aug. 30, 2011) (explaining that provisions of 12 C.F.R. § 563.39(b)(5), now 12 C.F.R. § 359, will be implied in employment contracts of insured institutions to the extent they are not expressly included in such contracts), *aff'd*, 492 Fed. Appx. 796 (9th Cir. 2012); *Modzelewski v. Resolution Trust Corp.*, 14 F.3d 1374, 1380 (9th Cir. 1994) (Thompson, J., concurring in part and dissenting in part) (same). As is clear from the Regulation, employment contract obligations between a savings association and its employees automatically terminate upon the date of default.

12 C.F.R. § 359, et seq.

[5] Section 3(x)(1) of the Federal Deposit Insurance Act defines default as "any adjudication or other official determination by any court of competent jurisdiction, the appropriate Federal banking agency, or other public authority pursuant to which a conservator, receiver, or other legal custodian is appointed for an insured depository institution . . . ."

5. Section 359, a copy of which is attached hereto as **Exhibit B**, provides that "[n]o insured depository institution or depository institution holding company shall make or agree to make any golden parachute payment, except as provided in this part." 12 C.F.R. § 359.2. The regulation defines what constitutes a "golden parachute payment" in a three part test. The first part is whether the payment is contingent on, or by its terms, payable on or after, the termination of an IAP's employment or affiliation with an insured depository institution or holding company. The second part is whether the payment is "received on or after, or is made in contemplation of"[6] any of the following events (each a "Distress Event" and, collectively, the "Distress Events"):[7]

- The insolvency (or similar event) of the depository institution or the bankruptcy or insolvency (or similar event) of the depository institution holding company;
- The appointment of a receiver or conservator for the insured depository institution;
- A determination by the appropriate federal banking agency that the depository institution or its holding company is in a "troubled condition";
- The depository institution or the depository institution holding company is assigned a composite rating of 4 or 5 by the appropriate federal banking agency;

  or

- The insured depository institution is subject to a proceeding to terminate or suspend deposit insurance.

[6] Note that numerous claimants have specifically asserted that their employment agreements were drafted in contemplation of a receiver of WMB being appointed. *See, e.g., Combined Response of John McMurrary, Alfred Brooks, Todd Baker, Thomas Casey, Debora Horvath, and David Schneider to WMI Liquidating Trust's Eighty-Fifth Omnibus (Substantive) Objection to, Among Others, Change in Control Claims*, dated Oct. 8, 2012 [D.I. 10735] ¶ 28 ("In construing [the change in control] provision of the CIC Agreement, the Court should take notice of the fact that . . . [t]he phrase 'assisted or unassisted, voluntary or involuntary' are commonly used to describe asset transfers made by the FDIC as receiver in connection with failed bank purchase and assumption transactions."); *Carey M. Brennan's Response to WMI Liquidating Trust's Seventy-Ninth Omnibus (Substantive) Objection to Claims*, dated, Aug. 28, 2012 [D.I. 10553] ¶ 11 (same).

[7] As discussed below, WMILT can readily establish, based upon largely undisputed facts, that at least four of the five conditions have been met, however, only one Distress Event must be satisfied to fulfill the second element of the regulation.

6. The final part is whether the IAP's employment or affiliation is terminated by the insured depository institution while any of the Distress Events are satisfied, or if the IAP is terminated by the depository institution holding company while any of the first (insolvency or bankruptcy), third (troubled condition determination), or fourth (composite rating of 4 or 5) Distress Events are satisfied.

Discovery Status

7. As set forth in the Motion, discovery in these matters continues and, based upon the breadth of the discovery requests, will likely need to continue beyond the schedule contemplated by the parties in the Amended Scheduling Order. To date, no depositions have been noticed under the Amended Scheduling Order. Third-party discovery has barely commenced, and no third parties have been subpoenaed for a deposition.[8] Expert disclosures have not occurred and no experts have been deposed. Many of the Responding Claimants have neither served responses or objections to WMILT's first request for production nor produced any documents. While WMILT has diligently reviewed hundreds of thousands of documents and produced tens of thousands of documents, which exceed one hundred thousand pages, hundreds of thousands of additional documents remain to be reviewed and WMILT is collecting a significant volume of additional documents that are not in its direct control, all of which must be reviewed and produced. Thus, while the initial hearing with respect to the change in control issues has been set to commence on June 3, 2013 (the "Hearing"), based on the status of the discovery process and various discussions among several of the litigants, it is clear that the Hearing is unlikely to commence on such date.

[8] The witness lists recently exchanged by the parties expressly contemplate dozens of third party witnesses, each of whom may need to be deposed. *See, e.g.*, Witness List of Todd Baker, et al. Pursuant to Court's Scheduling Order with Respect to Hr'g on Employee Claims, dated March 18, 2013 [D.I. 11152].

ARGUMENT

I. LEAVE TO AMEND WMILT'S OMNIBUS OBJECTIONS SHOULD FREELY BE GRANTED IN ACCORDANCE WITH FEDERAL RULE OF CIVIL PROCEDURE 15

8. The Court should permit WMILT's Motion because WMILT satisfies the requirements of Federal Rule of Civil Procedure 15 ("Rule 15"). Rule 15, made applicable to this proceeding by Local Rule 3007-1(f)(iv) and Bankruptcy Rule 7015, provides that a party may amend its pleading by motion and that the "court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2); *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Boileau v. Bethlehem Steel Corp.*, 730 F.2d 929, 938 (3d Cir. 1984), *cert. denied*, 469 U.S. 871 (1984) (noting a "general presumption in favor of allowing a party to amend pleadings"); *USX Corp. v. Barnhart*, 395 F.3d 161, 167 (3d Cir. 2004) (same); *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981) ("Rule 15's policy of favoring amendments to pleadings should be applied with extreme liberality.") (internal quotation marks omitted).

9. The Supreme Court has explained that:

> [i]n the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given."

Foman, 371 U.S. at 182;[9] *see Boileau*, 730 F.2d at 938 (applying the *Foman* factors to permit amendment of a federal complaint); *Alvin v. Suzuki*, 227 F.3d 107, 121 (3d Cir. 2000) (applying the *Foman* factors to determine that the district court abused its discretion in denying leave to amend the plaintiff's complaint).

[9] WMILT has not sought to previously amend the Omnibus Objections. Therefore, the fourth factor—repeated failure to cure deficiencies—is inapplicable here.

10. Without a clear reason such as delay, bad faith, or prejudice, it is an abuse of discretion for a court to deny leave to amend. *See Foman*, 371 U.S. at 182 ("Of course the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion, it is merely an abuse of that discretion and inconsistent with the spirit of the Federal Rules."); *Alvin*, 227 F.3d at 121 ("[I]t is an abuse of discretion to deny leave to amend unless plaintiff's delay in seeking amendment is undue, made in bad faith, [or] prejudicial to the opposing party . . . ."") (internal quotation marks omitted) (citing *Foman*, 371 U.S. at 182); *Boileau*, 730 F.2d at 938 (holding that it is an abuse of discretion to deny leave to amend absent a clear or declared reason such as delay, bad faith, prejudice or a repeated failure to cure a problem in the pleading sought to be amended).

11. As several of the Responding Claimants conceded in their recent motions to amend their proofs of claim, as well as in their objections to WMILT's Motion, the crucial factor to consider when granting leave to amend is not length of delay, but prejudice. *See, e.g.*, *Motion of Michael Reynoldson for Order Granting Leave to File Amendment to Proof of Claim No. 752 or, in the Alternative, Allowing Reynoldson to Assert Alternate Argument Regarding Claim Based on WaMu Severance Plan* [D.I. 11009] ¶ 22 ("The crucial inquiry is whether the opposing party would be unduly prejudiced by the amendment.") (citing *In re Wilson*, 96 B.R. 257, 263 (BAP 9th Cir. 1988); *United States v. Hougham*, 364 U.S. 310, 316 (1960); Joint Objection ¶ 11, 14(c) ("Courts have considered prejudice as the most important and most often used reason to deny leave to amend."); *CMR D.N. Corp. v. City of Philadelphia*, 703 F.3d 612, 629 (3d Cir. 2013) ("[P]rejudice to the nonmoving party is the touchstone for the denial of the amendment.") (internal quotation marks omitted).

12. Balancing the foregoing *Foman* factors, WMILT should be permitted to amend the Omnibus Objections to assert the Additional Defenses.

Undue Prejudice

13. WMILT should be granted leave to amend the Omnibus Objections to include the Additional Defenses because the amendments will not prejudice the Responding Claimants – other than the fact that the Additional Defenses are dispositive. Contrary to the Objecting Claimants' unsupported assertions, the Additional Defenses do not add to the discovery burden on the claimants and, therefore, will not significantly add to the time or expense of litigating these claims. Rather, the Additional Defenses merely apply prevailing law to facts that are well established. First, Section 163 governs contracts between thrifts (such as WMB) and their employees. The Court needs only three tools to dispose of the Responding Claimants' claims pursuant to Section 163: (1) the regulation, 12 C.F.R. § 163.39, (2) the OTS's September 25, 2008 Order finding WMB to be "in an unsafe or unsound condition," and (3) the Responding Claimants' contracts and benefits plans that were attached to their proofs of claim and WMILT's Omnibus Objections.

14. Under Section 163, commonly referred to as the "Automatic Termination Provision," the moment certain events occur, such as when the OTS Director determines a thrift is in "default" or in "unsafe or unsound condition," all obligations under employment contracts of the failed thrift (with narrow exceptions not applicable here) automatically terminate, and only rights that were vested prior to the OTS Director's determination are not extinguished.

15. It is beyond dispute that, on September 25, 2008, the OTS Director determined that WMB was in an "unsafe or unsound" condition to transact business and appointed the FDIC as receiver for WMB. At that very moment, pursuant to Section 163, all of WMB's

employment contracts terminated by operation of law. *See Williams v. FDIC*, No. 09-00504RAJ (W.D. Wash. filed Aug. 30, 2011), *aff'd*, 492 Fed. Appx. 796 (9th Cir. 2012) (the "District Court Litigation") (a copy of the district court decision is attached hereto as **Exhibit C**). The only obligations that remained under those employment contracts were such obligations, if any, that had vested prior to September 25, 2008. In *Modzelewski*, the Ninth Circuit squarely held that, as a matter of law, benefits similar to those that the Responding Claimants are seeking here (for example, change-in-control payments) did not vest *prior* to the OTS intervention. *See* 14 F.3d at 1378-79. Rather, they vested simultaneously with the OTS intervention, and this was insufficient to constitute "vesting" within the meaning of Section 163. In fact, this is precisely what the United States District Court for the Western District of Washington found with respect to these very claims, and with respect many of these same Responding Claimants,[10] in the District Court Litigation. Accordingly, as the Responding Claimants are well aware as a result of their familiarity with the Regulation, including Section 163 as an Additional Defense will not require significant discovery (if any), nor will it slow down these proceedings.

16. Similarly, the analysis of Section 359 involves few, if any, disputed facts. Here, the Court needs three tools to dispose of the Responding Claimants' claims: (1) the regulation, 12 C.F.R. § 359, (2) the letter directing the appointment of the FDIC as receiver for WMB, and/or WMI's chapter 11 petition, and (3) the contracts and benefits plans that were attached to the Responding Claimants' proofs of claim and WMILT's Omnibus Objections. With respect to the first element of Section 359—whether the payments are contingent on, or payable on or after, the IAP's termination—this inquiry is limited to the contracts and benefits plans

[10] The fact that some of the same Responding Claimants (just to name a few, Robert Bjorklund, Camille Everett, Brian Foster, Peter Freilinger, Keith Fukui, Mary Beth Davis, Michele Grau-Iversen, Robert C. Hill, Rajiv Kapoor, John Murphy, Scott Shaw, Jacob Sorenson, Andrew Tauber, Radha Thompson, Ann Tierney and Stephen Whittaker) were part of the Western District of Washington case bolsters the argument that there is no prejudice here. Those claimants are well aware of the legal issues and factual disputes related to the Regulations.

themselves. With respect to the second element—whether the payment is received after, or is made in contemplation of, one of the five enumerated Distress Events—the facts needed to satisfy this element are not in dispute. Clearly, the parties do not dispute that WMI filed for chapter 11 protection on September 26, 2008. Moreover, the parties do not dispute that the FDIC was appointed as receiver for WMB on September 25, 2008. The Objecting Claimants mistakenly imply that WMILT must attempt to satisfy all five (5) Distress Events and that doing so would require significant additional discovery. Nevertheless, even if the parties were to litigate whether WMI or WMB was in "troubled condition" or received a composite rating of 4 or 5, these are easily established facts that require virtually no discovery. In addition, some of the same issues—for example, WMI's solvency—are being litigated in the adversary proceedings pending against some of the Responding Claimants and are included within the scope of ongoing discovery relating thereto. As the Court is aware, discovery with respect to the adversary proceedings is being conducted simultaneously with the discovery relating to the Omnibus Objections. With respect to the third element—whether the IAP was terminated at a time when the paying entity satisfied a Distress Event—this element is particularly clear cut here, where nearly all of the Claimants were terminated subsequent to the seizure of WMB and the appointment of the FDIC as receiver. Thus, the Objecting Claimants vastly overstate the potentially disputed issues of fact raised by the Additional Defenses and exaggerate the amount of additional discovery that would be needed to litigate these defenses.

17. Moreover, to the extent that the Claimants assert that their various contracts or benefits plans fall into relevant exceptions to the golden parachute restrictions in Section 359, litigating these issues will not require any documents or information that has not already been requested from WMILT by the Claimants and/or adversary proceeding defendants. For

example, certain exceptions to Section 359 require knowing whether a plan constitutes a "pension or retirement plan which is qualified . . . under section 401 of the Internal Revenue Code," or whether a particular plan satisfies certain ERISA definitions. To the extent any exceptions are potentially applicable here—and WMILT contends that they are not—any potential documents or facts needed to litigate such issues already are included within the Claimants' broad discovery requests. In that regard, Responding Claimants have served WMILT with 934 requests for production and 285 interrogatories, many of which are broad and cover the same documents and facts necessary to litigate the Additional Defenses. For example, Responding Claimants have requested the following from WMILT:

- All documents relating to all deferred compensation plans, pension plans, equity incentive plans, severance plans or any other benefit plans offered by WMI and/or WMB to its employees, including any amendments to such plans. *See, e.g.*, Claimant Carey M. Brennan's First Req. Prod. Doc. No. 8, Dec. 11, 2012 [D.I. 10906].

- All documents and communications from the Office of Thrift Supervision or the Federal Deposit Insurance Corporation that refer or relate to the seizure of WMB and/or WMB, fsb. *See, e.g.*, Req. Prod. Doc. Claimants Daryl D. David, et al. to Washington Mutual Inc. Liquidating Trust [Set No. 1] No. 6, Nov. 6, 2012 [D.I. 10818].

- All documents and communications that refer or relate to any and all memoranda prepared by or from the HR Committee during the years 2005 through 2008. *See, e.g.*, Req. Prod. Doc. Claimants Jose Tagunicar, et al. to Washington Mutual Inc. Liquidating Trust [Set No. 1] No. 228, Dec. 10, 2012 [D.I. 10894].

- All lists of employees of WMI and such employees' title and job descriptions (January 1, 2004 – present). *See, e.g.*, Resp't Michelle A. McCarthy's First Req. Prod. Doc. No. 4, Nov. 14, 2012 [D.I. 10839].

- All lists of employees of WMB and such employees' title and job descriptions (January 1, 2004 – present). *See, e.g.*, Resp't Randy Melby's First Req. Prod. Doc. No. 4, Nov. 14, 2012 [D.I. 10840].

18. At bottom, the issues raised in the Additional Defenses are primarily legal issues that require virtually no additional discovery. Any factual issues raised by the Additional

Defenses are either (i) contained in the proofs of claim, the original Omnibus Objections and/or the public record, or (ii) clearly within the very broad scope of the written discovery that has already been propounded in these proceedings. In addition, numerous Responding Claimants have already litigated certain aspects of the Additional Defenses in the District Court Litigation. Accordingly, they should be intimately acquainted with the pertinent facts and legal issues.

19. Nonetheless, *even if* more discovery were required, this would not prejudice the Responding Claimants. Not only is discovery in these matters ongoing, third party discovery has barely begun. Although WMILT has expended significant efforts and resources for several months in order to resolve the employee claims as expeditiously as possible, the parties are still in the midst of the discovery process, contrary to what the Objecting Claimants assert. Moreover, many of the Responding Claimants recently filed or were permitted to file amended proofs of claim on which WMILT may take additional discovery. *See* D.I. 11136; 11063; 11062; 11061. Thus, discovery and the parties' development of their respective cases are ongoing and, as noted above, the current timetable under the Amended Scheduling Order will likely need to be further amended. The case law in the Third Circuit is clear that, where discovery is still ongoing, an amendment would not unduly prejudice the party opposing the amendment and should be permitted. *See, e.g.*, *Ndubizu v. Drexel University*, Civ. No. 07-3068, 2009 WL 3459182, at *2 (E.D. Pa. Oct. 26, 2009) (acknowledging that an amendment may impact litigation tactics and strategies, but allowing the amendment because "[d]iscovery is ongoing, and an opportunity remains for [the party opposing the amendment] to develop the facts necessary to pursue alternative legal strategies without significantly delaying resolution of this dispute."); *Formosa Plastics Corp., U.S.A. v. Acme American Ins. Co.*, Civ. No. 06-5055, 2009 WL 2517071 at *3 (D.N.J. Aug. 14, 2009) (finding no prejudice where "the proposed

amendment [would] not significantly delay resolution of the action, as fact discovery [was] still ongoing."). Additionally, because discovery is ongoing, the circumstances here clearly are distinguishable from instances where litigants have threatened to delay proceedings by seeking to amend their pleadings on the eve of the close of discovery. *Cf. Solomon v. N. Am. Life & Cas. Ins. Co.*, 151 F.3d 1132, 1139 (9th Cir. 1998) (denying motion to amend that was filed on the "eve of discovery deadline" because it would have required reopening discovery); *Krumme v. WestPoint Stevens Inc.*, 143 F.3d 71, 87 (2d Cir. 1998) ("[P]roposed amendment . . . is especially prejudicial . . . [when] discovery ha[s] already been completed and [non-movant] ha[s] already filed a motion for summary judgment.") (internal quotation marks omitted).

20. Furthermore, as discussed above, the Responding Claimants had notice of the Additional Defenses. Not only has WMILT learned through discovery that various Responding Claimants were aware of the applicability of the Regulations, even attempting to plan or orchestrate around their absolute applicability in the face of WMB's deteriorating financial condition, but also, many of the Responding Claimants have recently litigated Section 163 in the District Court Litigation. Therefore, the claimants have had ample time to consider the Additional Defenses and are not prejudiced by WMILT's Motion. To be sure, if the Responding Claimants were prejudiced by the Amended Objections in any way, such prejudice is far less than that which WMILT will suffer as a result of the Responding Claimants' being granted leave to amend their proofs of claim just days before the March 11, 2013 discovery response deadline, more than four months into discovery, almost four years after the bar date, and more than one year after the Plan was confirmed.

Undue Delay

21. WMILT has not unduly delayed the assertion of the Additional Defenses. The question of undue delay focuses on the moving party's reasons for not amending their pleading sooner. *See CMR D.N. Corp*, 703 F.3d at 629 ("[T]he question of undue delay requires that we focus on the movant's reasons for not amending sooner.") (internal quotation marks omitted); *Cureton v. Nat'l Collegiate Athletic Ass'n*, 252 F.3d 267, 273 (3d Cir. 2001) (same); *Adams v. Gould*, 739 F.2d 858, 868 (3d Cir. 1984). Here, it was only shortly after WMILT commenced discovery for the Hearing that WMILT became aware of the federal regulations.

22. After determining the applicability of the Regulations, the illegality of making golden parachute payments to the Responding Claimants, and the necessity of amending the Omnibus Objections to assert the Additional Defenses, WMILT acted promptly and expeditiously in filing the Motion. In addition, upon information only recently acquired in the discovery processes, it became readily apparent that the claimants were well aware of the potential for WMILT to assert the Additional Defenses and were aware of the applicability of the Regulations to their claims. Not only were certain claimants made aware of the Regulations in the course of their prepetition employment with WMI or WMB (as applicable), but also, the Responding Claimants no doubt knew that these Regulations were relevant to the FDIC-Receiver's denial of their exact same claims submitted in the WMB receivership. In fact, subsequent to the Receiver's denial of the claimants' claims, many of the Responding Claimants litigated Section 163 against the FDIC, as receiver for WMB, in the District Court Litigation. *See Williams v. FDIC*, No. 09-504RAJ (W.D. Wash. Aug. 30, 2011). Thus, the claimants have not been harmed by the delay. Furthermore, as admitted by several of the Responding Claimants in their pleadings, including their own Motions to Amend, delay alone is insufficient

to deny a motion to amend. *See, e.g.*, Joint Objection ¶ 14(b). *USX Corp. v. Barnhart*, 395 F.3d 161, 167 (3d Cir. 2004) ("The mere passage of time does not require that a motion to amend a complaint be denied on grounds of delay; delay alone is an insufficient ground to deny leave to amend.") (internal quotation marks omitted); *United States v. Webb*, 655 F.2d 977, 980 (9th Cir. 1981) ("The mere fact that an amendment is offered late in the case is . . . not enough to bar it.") (internal quotation marks omitted).

Dilatory Motive

23. The Additional Defenses are not asserted as a mechanism for delaying the discovery process or any other aspect of the Hearing schedule pursuant to the Amended Scheduling Order. Indeed, there is no reason why WMILT would want to delay the litigation on the employee claims beyond what is absolutely necessary to resolve them. WMILT would like to have these matters heard in a diligent manner so that it may distribute funds from the trust and reduce the amount of outstanding claims against the Debtors' estates. In fact, the Additional Defenses may represent the quickest and most expedient way to conclude these litigations because they raise legal issues that require little, if any, factual analysis, and certainly would not require additional discovery beyond the hundreds of written discovery requests that have already been served on WMILT. **As noted above, WMILT would welcome an expedited hearing on the merits of the Regulations, even one in advance of the Hearing.**

Bad Faith

24. There are no indicia whatsoever that WMILT asserted the Amended Objections in bad faith. WMILT believes that the Additional Defenses appropriately deal with the claims and the Court should be allowed to hear such defenses in order to fairly decide the issues related to the employee claims. Contrary to the Objecting Claimants' argument, asserting an amendment

to a substantive objection is not indicia of bad faith. Not only do the Local Rules anticipate the necessity of amending substantive objections and expressly provide that Bankruptcy Rule 7015 applies to any substantive objection, but the Court also recently ordered that WMILT be allowed to amend its Omnibus Objections to address certain claimants' amended proofs of claim. *See* Local Rule 3007-1(f)(iv) ("[Bankruptcy Rule] 7015 shall apply to any substantive Objection and upon the filing of a response to such substantive Objection, the objector may only amend such Objection upon leave of court or written consent of the claimant."). After continued discovery, WMILT was alerted to the Additional Defenses and, immediately thereafter, sought leave from the Court to amend the Omnibus Objections. It is precisely this type of oversight that Bankruptcy Rule 7015 and Local Rule 3007-1(f)(iv) are intended to address. Importantly, this Court has previously heard and ruled on this very issue:

> [T]he harm that Local Rule 3007 was meant to avoid was the seriatim omnibus objections to claims where various substantive objections would be made to each claim and a creditor would have to come back in here to Court three, four, five, enumerable times to address an objection to their claim and I think that was the reason to require all substantive claims to be included in one. But similar to the procedure when a Complaint is filed, I think the Courts should be liberal in allowing amendments to Complaints, as well as to objections to claim where there's no showing of prejudice to the other side and there's no showing that it's been done in bad faith or for dilatory or other improper reasons . . . ."

Hr'g Tr. at 18:7-20, *In re Magna Entertainment Corp.*, Apr. 11, 2011 (No. 09-10720-MFW) [D.I. 3066].

II. THE AMENDED OBJECTIONS ARE NOT FUTILE

25. WMILT's Amended Objections are not futile.[11] First, WMILT has standing to assert the Additional Defenses, and the Objecting Claimants have failed to demonstrate

[11] As an initial matter, the Responding Claimants are misconstruing the futility factor. Courts in the Third Circuit have reviewed amendments for futility based on a motion to dismiss or Rule 12(b)(6) standard. *See Adams*, 739 F.2d at 865 (applying a Rule 12(b)(6) standard to determine whether amending a complaint would be futile). Futility means that "the complaint, as amended, would fail to state a claim upon which relief could be granted."

otherwise. In support of their position, the Objecting Claimants misleadingly cite 12 U.S.C. § 1828(k), the statute that empowers the FDIC to promulgate regulations that prohibit golden parachute payments.[12] This statute does not speak to standing to "enforce" the regulations. Notably, WMILT is not seeking to enforce the Regulations. Rather, WMILT is seeking to assert the Regulations as a defense to WMILT's alleged obligations pursuant to the various contracts and benefits plans. And, more importantly, WMILT is seeking to assert the Regulations to comply with applicable federal law and public policy against rewarding employees of failed financial institutions at the expense of the institution's depositors and creditors. Indeed, entities other than the FDIC have raised and litigated Section 359 as a defense to claims for severance and other termination payments, similar to the claims at issue here. *See, e.g., Hill v. Commerce Bancorp, Inc.*, No. 09-3685 (RBK/JS), 2012 WL 694639 (D.N.J. Mar. 1, 2012) (defendants Commerce Bancorp, Inc., Commerce Bank, N.A., and TD Bank, N.A. moved for summary judgment with respect to former employee's claim for severance pay pursuant to an employment agreement and argued that the severance would constitute an "golden parachute" prohibited under the FDIA); *In re Netbank, Inc.*, No. 07-ck-04295, 2010 WL 5296952 (Bankr. M.D. Fl. Mar. 11. 2010) (Liquidating Supervisor and CRO of debtor, a former

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Great W. Mining & Mineral Co. v. Fox Rothschild LLP, 615 F.3d 159, 175 (3d Cir. 2010) (internal quotation marks omitted). In other words, the court "determines futility by taking all pleaded allegations as true and viewing them in light most favorable to the plaintiff." *Great*, 615 F.3d at 175 (quoting *Winer Family Trust v. Queen*, 503 F.3d 319, 330-31 (3d Cir. 2007)). A motion to dismiss under Rule 12(b)(6) tests the sufficiency of a pleading's factual allegations. *Twombly*, 550 U.S. at 555. To survive a motion to dismiss under Rule 12(b)(6), the Court must first separate the factual and legal elements of a claim, accepting the facts and disregarding the legal conclusions. *See Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009). Second, the Court should determine whether the remaining well-pled facts demonstrate that the non-moving party has stated "a plausible claim for relief." *Id.* at 211 (quoting *Iqbal*, 556 U.S. at 679). A complaint is "plausible on its face," *Twombly*, 550 U.S. at 570, if it "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Aschroft*, 556 U.S. at 678. Thus, a party need only put forth "'enough fact[ ] to raise a reasonable expectation that discovery will reveal evidence of' the necessary element[s]." *Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2007) (quoting *Twombly*, 550 U.S. at 1965)). Accordingly, an amendment is futile if there is no set of facts which plaintiffs could prove that would entitle them to recover under the theory asserted. *See Adams*, 7396 F.2d at 865. Here, that is clearly not the case.

[12] Conveniently, the Joint Objection ignores Section 163 altogether.

financial holding company, objected to proof of claim for termination payments pursuant to an employment agreement, arguing that that claim was unenforceable against the estate pursuant to section 502(b)(1) of the Bankruptcy Code and 12 C.F.R. § 359).

26. Moreover, the Objecting Claimants' attempt to refute the applicability of the Regulations is absurd. The Objecting Claimants argue that, as of the Petition Date, WMI was no longer a "depository institution holding company" ("DIHC") within the meaning of Section 359 and, therefore, Section 359 does not apply here.[13] But, this interpretation of Section 359 renders the regulation absurd and is contrary to the plain language of the statute and the FDIC's own interpretation of federal law. Importantly, one of the five enumerated Distress Events is the "bankruptcy or insolvency (or similar event)" of the DIHC. A second ground for triggering the regulatory restrictions is the receivership of the insured depository institution. Nevertheless, according to the Claimants, these very events that trigger the prohibition of golden parachute payments are what render the regulations inapplicable here because, as a result of these events, WMI lost its status as a "DIHC." This nonsensical and strained reading of the regulation must be rejected. *Long v. Tommy Hilfiger U.S.A., Inc.*, 671 F.3d 371, 375 (3d Cir. 2012) (noting that principles governing statutory construction require that the court consider the "overall object and policy of the statute, and avoid constructions that produce odd or absurd results or that are inconsistent with common sense") (internal quotation marks omitted); *Barrios v. Att'y Gen.,* 399 F.3d 272, 277 n. 11 (3d Cir. 2005) ("It is the obligation of the court to construe a statute to avoid

[13] In support of this argument, the claimants cite *Faigin*, a California state court decision. Importantly, this Court is not bound by the *Faigin* decision and should instead rely on federal case law to guide its ruling on issues related to interpretation of the Regulations. *See United States v. Bedford,* 519 F.2d 650, 653 n.3 (3d Cir. 1975), *cert. denied*, 424 U.S. 917 (1976) ("It is a recognized principle that a federal court is not bound by a state court's interpretation of federal laws or of a state statute under misapprehension of federal law."); *Staten v. Hous. Auth. of Pittsburgh*, 638 F.2d 599, 603 (3d Cir. 1980) (same); *see also In re Washington Mut., Inc.*, 485 B.R. 510 (Bankr. D. Del. 2012) (citing cases). Interestingly, the Objecting Claimants fail to mention relevant caselaw that is clearly contrary to their position.

absurd results, if alternative interpretations are available and consistent with the legislative purpose.") (internal quotation marks omitted); *Fogleman v. Mercy Hosp., Inc.,* 283 F.3d 561, 569 (3d Cir. 2002) ("[A] blind adherence to the literal meaning of a statute [could] lead to a patently absurd result that no rational legislature could have intended. Following the letter, rather than the spirit, of the law in such cases would go against the court's role of construing statutes to effectuate the legislature's intent."). In this case, application of the letter as well as the spirit of the law requires the conclusion that Section 359 is applicable to the Responding Claimants' claims.

27. Moreover, by its terms, the statute prohibits payments made *"on or after the date on which"* a bank or holding company is deemed to be in a troubled condition. 12 U.S.C. § 1828(k)(4)(A)(ii) (emphasis added). If a troubled bank fails and loses its status as an insured depository institution, or a holding company loses its status as a DIHC, any later payment necessarily will be made "after the date on which" the bank or holding company was deemed to be in a troubled condition and, by the statute's plain terms, would be a proscribed golden parachute payment.

28. The Objecting Claimants' interpretation of the regulation is also squarely at odds with the interpretation given the regulation by the FDIC and federal courts. In connection with the adoption of its Final Rule concerning golden parachute payments (the Second Proposal), the FDIC stated that a prohibited golden parachute payment remains prohibited regardless of a later change in the institution's status:

> The FDIC specified in the preamble to the Second Proposal that a golden parachute payment which is prohibited from being paid at the time of an IAP's termination due to the troubled condition of the insured depository institution or holding company cannot be paid to that IAP at some later point in time once the institution or holding company is no longer troubled. Several commenters requested that the FDIC reconsider its position on this point. The FDIC believes the position taken in the Second Proposal is consistent

> with the language and spirit of the statute. The language of section 18[28] (k)(4)(A)(ii) of the FDI Act provides that any payment which is contingent on the termination of an IAP's employment and is received on or after an institution or holding company becomes troubled is a prohibited golden parachute. ***If this payment is prohibited under the prescribed circumstances, it is prohibited forever.***

Regulation of Golden Parachutes and Other Benefits Which May Be Subject to Misuse, Final Rule, 61 Fed. Reg. 5926, 5928 (Feb. 15, 1996) (emphasis added).

29. The FDIC's interpretation of its own regulation on this point is entitled to "great weight." *Inv. Co. Institute v. Camp*, 401 U.S. 617, 626-27 (1971) ("[C]ourts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute."); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *see also Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

30. In *Hill v. Commerce Bancorp*, the United States District Court for the District of New Jersey recently reached the same conclusion as the FDIC. There, the court held a former bank executive could not collect a severance package because it would be an improper golden parachute payment. 2012 WL 694639 at *7. In so ruling, the court rejected as "untenable" the executive's argument that the payment was valid because the bank was no longer "troubled" since it had been acquired by another entity *and then ceased to function as a bank. Id.* at *5. The district court explained, "[a]n interpretation according to which an entity's 'troubled' status is destroyed by its acquisition would eviscerate the FDIA's restrictions by providing a safe harbor to officers and directors seeking to activate their golden parachutes through acquisition by another institution." *Id.* Here, it strains credulity (and logic) to think that filing for bankruptcy protection or having a receiver appointed would provide a safe harbor to protect officers and

executives from federal regulations expressly designed to prohibit payments to such individuals when their employer files for bankruptcy or enters a receivership.

III. THE ADDITIONAL DEFENSES RELATE BACK TO THE OMNIBUS OBJECTIONS

31. The Additional Defenses relate back to the Omnibus Objections. Federal Rule 15(c) provides in pertinent part:

> An amendment to a pleading relates back to the date of the original pleading when . . . (B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out - or attempted to be set out - in the original pleading . . . .

Fed. R. Civ. P. 15(c).

32. As noted in the Motion, relation back is generally appropriate when an amended pleading deals with the same conduct, transaction, or occurrence as the original pleading. *Berkshire Fashions, Inc. v. M.V. Hakusan II*, 954 F.2d 874, 887 (3d Cir. 1992) (finding that relation back is appropriate when the defense asserted arose out of the conduct, transaction or occurrence set forth in the initial pleading).

33. The agreements and benefit plans that are the subject of the Additional Defenses are clearly set forth in the claims and the original Omnibus Objections. Thus, the Amended Objections are based on the same "conduct, transaction or occurrence" as the Omnibus Objections. This same issue was recently raised by certain of the Responding Claimants who sought to amend their proofs of claims, and the Court allowed such amendments. *See* D.I. 11136; 11063; 11062; 11061. Indeed, the Court found that such amendments were "based on the employment relationship" and that the amendments were also related to the "terms of employment." 03/07/13 Hr'g Tr. 30:4-5; 14.

34. Similarly, the Additional Defenses relate to those agreements and benefit plans that are set forth in the proofs of claims and the Omnibus Objections. Therefore, as the Responding Claimants' amendments to their proofs of claim were allowed to relate back on the basis of the employment relationship and terms of employment between the claimants and Washington Mutual, the Additional Defenses as set forth in the Amended Objections should also be allowed to relate back to the Omnibus Objections, and WMILT should be allowed to pursue its objection to the claims in this Court. Moreover, the Additional Defenses relate to issues that will already be litigated in connection with the interpretation of the "change in control" agreements and the seizure of WMB by the OTS. Thus, the same nucleus of facts give rise to both the Original Objections and the Additional Defenses.

IV. THE ADDITIONAL DEFENSES WERE PLEADED ADEQUATELY

35. Lastly, the Additional Defenses were pleaded adequately. WMILT believes that the Regulations apply to virtually all of the remaining disputed components of the Responding Claimants' claims. Indeed, almost all components of the remaining claims should be disallowed pursuant to section 502(b)(1) of the Bankruptcy Code because one or both of the Regulations prohibits the enforcement of such claims against WMILT.

Section 359

36. Section 359 prohibits the enforcement of the following claim components against WMILT:[14]

- Individual WMI Agreements
- ETRIP (CIC) Components
- WMI Retention Bonus Components (CIC and Non-CIC)
- Cash LTI Awards
- WaMu Severance Plan (CIC and Non-CIC Provisions)
- Executive Severance Plan

[14] Each as defined in the Amended Scheduling Order or each Omnibus Objection, as applicable.

- Stephen Rotella's Individual WMI Agreement
- WaMu CIC Agreements
- WaMu Retention Bonus Agreements (CIC and Non-CIC)
- Providian Agreements
- 2008 Leadership Bonus Awards
- Equity Incentive Plan

37. With respect to former employees of WMI (the "WMI Claimants"), each such Claimant was IAP of both WMI and WMB within the meaning of Section 359. Thus, with respect to each WMI Claimant, the payments sought pursuant to each of the foregoing claim components, as applicable, constitute impermissible "golden parachute payments" within the meaning of Section 359 because:

- Each payment is contingent on, or by its terms payable on or after, the termination of the respective claimant's employment or affiliation with WMI or WMB;
- Each payment would be received on or after, or was made in contemplation of, the bankruptcy or insolvency (or similar event) of WMI, the appointment of a receiver for WMB, a determination by the OTS that WMB was in "troubled condition", and/or WMI or WMB receiving a composite rating of "4" or "5"; and
- Each Claimant's employment by WMI and/or affiliation with WMB was terminated at a time when WMI and/or WMB satisfied at least one of the five enumerated Distress Events.

38. Furthermore, even if WMI did not satisfy one of the five enumerated Distress Events—which WMILT submits that it did—the Regulations expressly provide that the golden parachute limitations apply even to "healthy holding companies which seek to . . . make golden parachute payments to IAP's of troubled insured depository institution subsidiaries." 12 C.F.R. § 359.0(b).

39. With respect to former employees of WMB (the "WMB Claimants"), each such Claimant was an IAP of WMB by virtue of his or her employment with WMB.[15] The

[15] To the extent the WMB Claimants assert that they are not employees of WMB but, rather, are employees of WMI—which WMILT contends is not the case—WMILT submits that, if the Claimants are deemed to have been

Regulations specifically prohibit WMB from making golden parachute payments to its IAPs to the extent WMB satisfied one of the Distress Events at the time the IAP was terminated. Thus, to the extent the WMB Claimants seek to hold WMI derivatively liable for the obligations of WMB, WMILT submits that WMB is prohibited from making these payments to its employees in the first instance, so any attempt to assert derivative liability fails. Moreover, as discussed above, the Regulation expressly prohibits WMI from making golden parachute payments to IAPs of WMB by virtue of WMB's financial distress. 12 C.F.R. § 359.0(b). Accordingly, to the extent the WMB Claimants seek to hold WMI directly liable, WMI is still prohibited from paying the WMB Claimants on their claims.

40. Here, with respect to each WMB Claimant, the payments sought pursuant to each of the foregoing components, as applicable, constitute impermissible "golden parachute payments" within the meaning of Section 359 because:

- Each payment is contingent on, or by its terms payable on or after, the termination of the respective claimant's employment with WMB;
- Each payment would be received on or after, or was made in contemplation of the appointment of a receiver for WMB, a determination by the OTS that WMB was in "troubled condition", and/or WMB receiving a composite rating of "4" or "5"; and
- Each Claimant's employment by WMB was terminated at a time when WMB satisfied at least one of the five enumerated Distress Events.

41. Moreover, with respect to both the WMI Claimants and WMB Claimants and each of the foregoing components, WMILT submits that no exceptions to the golden parachute regulations are applicable. Accordingly, the Claims are unenforceable against WMILT pursuant to applicable non-bankruptcy law.

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employed by WMI, they were terminated from WMI at a time when WMI satisfied one of the Distress Events and, therefore, the payments sought constitute prohibited "golden parachute payments" within the meaning of Section 359.

Section 163

42. In addition, Section 163 prohibits the enforcement of the following claim components against WMILT:[16]

- WaMu Severance Plan (CIC and Non-CIC Provisions)
- WaMu CIC Agreements
- WaMu Retention Bonus Agreements (CIC and Non-CIC)
- Providian Agreements
- 2008 Leadership Bonus Awards

These components were asserted solely by WMB Claimants. Each component alleges that the Claimant is entitled to payment of certain employment benefits that, under certain circumstances, became payable under the respective employment contracts. As is well known in the record of these chapter 11 cases, WMB was a federally chartered thrift that was overseen by the OTS, and was subject to OTS regulation. As a result, each of the contracts between WMB and the WMB Claimants contained (or was deemed to contain) a provision providing for the automatic termination of such contract upon a determination by the OTS director that WMB was in "default." It is not disputed that, on September 25, 2008, the OTS determined that WMB was in "unsafe or unsound condition" and, as a result, appointed the FDIC as receiver for WMB. This constitutes a "default" pursuant to the FDIA. *See* 12 U.S.C. § 1813(x)(1) ("The term 'default' means, with respect to an insured depository institution, any adjudication or other official determination by . . . the appropriate Federal banking agency . . . pursuant to which a conservator, receiver, or other legal custodian is appointed for an insured depository institution. . . . ."). At such time, all of WMB's obligations pursuant to the WMB Agreements automatically terminated pursuant to Section 163. Accordingly, the contracts are void and cannot be enforced against WMILT.

[16] Each as defined in the Amended Scheduling Order or each Omnibus Objection, as applicable.

WHEREFORE WMILT respectfully requests that the Court enter an order (a) granting WMILT leave to amend the Omnibus Objections, and (b) granting WMILT such other and further relief as is just.

Dated: March 20, 2013
Wilmington, Delaware

/s/ Amanda R. Steele

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Exhibit A

12 C.F.R. § 163.39 (formerly 12 C.F.R. § 563.39)

Code of Federal Regulations
Title 12. Banks and Banking
Chapter I. Comptroller of the Currency, Department of the Treasury
Part 163. Savings Associations--Operations (Refs & Annos)
Subpart B. Operation and Structure

12 C.F.R. § 163.39

§ 163.39 Employment contracts.

Effective: July 21, 2011
Currentness

(a) General. A Federal savings association may enter into an employment contract with its officers and other employees only in accordance with the requirements of this section. All employment contracts shall be in writing and shall be approved specifically by an association's board of directors. An association shall not enter into an employment contract with any of its officers or other employees if such contract would constitute an unsafe or unsound practice. The making of such an employment contract would be an unsafe or unsound practice if such contract could lead to material financial loss or damage to the association or could interfere materially with the exercise by the members of its board of directors of their duty or discretion provided by law, charter, bylaw or regulation as to the employment or termination of employment of an officer or employee of the association. This may occur, depending upon the circumstances of the case, where an employment contract provides for an excessive term.

(b) Required provisions. Each employment contract shall provide that:

(1) The Federal savings association's board of directors may terminate the officer or employee's employment at any time, but any termination by the association's board of directors other than termination for cause, shall not prejudice the officer or employee's right to compensation or other benefits under the contract. The officer or employee shall have no right to receive compensation or other benefits for any period after termination for cause. Termination for cause shall include termination because of the officer or employee's personal dishonesty, incompetence, willful misconduct, breach of fiduciary duty involving personal profit, intentional failure to perform stated duties, willful violation of any law, rule, or regulation (other than traffic violations or similar offenses) or final cease-and-desist order, or material breach of any provision of the contract.

(2) If the officer or employee is suspended and/or temporarily prohibited from participating in the conduct of the association's affairs by a notice served under section 8(e)(3) or (g)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1818(e)(3) and (g)(1)), the association's obligations under the contract shall be suspended as of the date of service unless stayed by appropriate proceedings. If the charges in the notice are dismissed, the association may in its discretion (i) pay the officer or employee all or part of the compensation withheld while its contract obligations were suspended, and (ii) reinstate (in whole or in part) any of its obligations which were suspended.

(3) If the officer or employee is removed and/or permanently prohibited from participating in the conduct of the association's affairs by an order issued under section 8(e)(4) or (g)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1818(e)(4) or (g)(1)), all obligations of the association under the contract shall terminate as of the effective date of the order, but vested rights of the contracting parties shall not be affected.

(4) If the savings association is in default (as defined in section 3(x)(1) of the Federal Deposit Insurance Act), all obligations under the contract shall terminate as of the date of default, but this paragraph (b)(4) shall not affect any vested rights of the contracting parties: Provided, that this paragraph (b)(4) need not be included in an employment contract if prior written approval is secured from the Comptroller or his or her designee.

(5) All obligations under the contract shall be terminated, except to the extent determined that continuation of the contract is necessary for the continued operation of the association;

(i) By the Comptroller, or his or her designee, at the time the Federal Deposit Insurance Corporation enters into an agreement to provide assistance to or on behalf of the association under the authority contained in 13(c) of the Federal Deposit Insurance Act; or

(ii)(A) By the Comptroller or his or her designee, at the time the Comptroller, or his or her designee approves a supervisory merger to resolve problems related to operation of the association or when the association is determined by the Comptroller to be in an unsafe or unsound condition.

(B) Any rights of the parties that have already vested, however, shall not be affected by such action.

<Part added by 76 FR 48955, retroactively effective July 21, 2011.>

SOURCE: 76 FR 48955, 49047, Aug. 9, 2011, unless otherwise noted.

AUTHORITY: 12 U.S.C. 1462, 1462a, 1463, 1464, 1467a, 1817, 1820, 1828, 1831***o***, 3806, 5101 et seq.,5412(b)(2)(B); 31 U.S.C. 5318; 42 U.S.C. 4106.

Current through March 14, 2013; 78 FR 16391

End of Document

Exhibit B

12 C.F.R.§ 359

Code of Federal Regulations
Title 12. Banks and Banking
Chapter III. Federal Deposit Insurance Corporation (Refs & Annos)
Subchapter B. Regulations and Statements of General Policy
Part 359. Golden Parachute and Indemnification Payments (Refs & Annos)

12 C.F.R. § 359.0

§ 359.0 Scope.

Currentness

(a) This part limits and/or prohibits, in certain circumstances, the ability of insured depository institutions, their subsidiaries and affiliated depository institution holding companies to enter into contracts to pay and to make golden parachute and indemnification payments to institution-affiliated parties (IAPs).

(b) The limitations on golden parachute payments apply to troubled insured depository institutions which seek to enter into contracts to pay or to make golden parachute payments to their IAPs. The limitations also apply to depository institution holding companies which are troubled and seek to enter into contracts to pay or to make golden parachute payments to their IAPs as well as healthy holding companies which seek to enter into contracts to pay or to make golden parachute payments to IAPs of a troubled insured depository institution subsidiary. A “golden parachute payment” is generally considered to be any payment to an IAP which is contingent on the termination of that person's employment and is received when the insured depository institution making the payment is troubled or, if the payment is being made by an affiliated holding company, either the holding company itself or the insured depository institution employing the IAP, is troubled. The definition of golden parachute payment does not include payments pursuant to qualified retirement plans, nonqualified bona fide deferred compensation plans, nondiscriminatory severance pay plans, other types of common benefit plans, state statutes and death benefits. Certain limited exceptions to the golden parachute payment prohibition are provided for in cases involving the hiring of a white knight and unassisted changes in control. A procedure is also set forth whereby an institution or IAP can request permission to make what would otherwise be a prohibited golden parachute payment.

(c) The limitations on indemnification payments apply to all insured depository institutions, their subsidiaries and affiliated depository institution holding companies regardless of their financial health. Generally, this part prohibits insured depository institutions, their subsidiaries and affiliated holding companies from indemnifying an IAP for that portion of the costs sustained with regard to an administrative or civil enforcement action commenced by any federal banking agency which results in a final order or settlement pursuant to which the IAP is assessed a civil money penalty, removed from office, prohibited from participating in the affairs of an insured depository institution or required to cease and desist from or take an affirmative action described in section 8(b) (12 U.S.C. 1818(b)) of the Federal Deposit Insurance Act (FDI Act). However, there are exceptions to this general prohibition. First, an institution or holding company may purchase commercial insurance to cover such expenses, except judgments and penalties. Second, the institution or holding company may advance legal and other professional expenses to an IAP directly (except for judgments and penalties) if its board of directors makes certain specific findings and the IAP agrees in writing to reimburse the institution if it is ultimately determined that the IAP violated a law, regulation or other fiduciary duty.

SOURCE: 61 FR 5930, Feb. 15, 1996, unless otherwise noted.

AUTHORITY: 12 U.S.C. 1828(k).

Notes of Decisions (3)

Current through March 14, 2013; 78 FR 16391

End of Document

Code of Federal Regulations
Title 12. Banks and Banking
Chapter III. Federal Deposit Insurance Corporation (Refs & Annos)
Subchapter B. Regulations and Statements of General Policy
Part 359. Golden Parachute and Indemnification Payments (Refs & Annos)

12 C.F.R. § 359.1

§ 359.1 Definitions.

Currentness

(a) Act means the Federal Deposit Insurance Act, as amended (12 U.S.C. 1811, et seq.).

(b) Appropriate federal banking agency, bank holding company, depository institution holding company and savings and loan holding company have the meanings given to such terms in section 3 of the Act.

(c) Benefit plan means any plan, contract, agreement or other arrangement which is an "employee welfare benefit plan" as that term is defined in section 3(1) of the Employee Retirement Income Security Act of 1974, as amended (29 U.S.C. 1002(1)), or other usual and customary plans such as dependent care, tuition reimbursement, group legal services or cafeteria plans; provided however, that such term shall not include any plan intended to be subject to paragraphs (f)(2)(iii) and (v) of this section.

(d) Bona fide deferred compensation plan or arrangement means any plan, contract, agreement or other arrangement whereby:

(1) An IAP voluntarily elects to defer all or a portion of the reasonable compensation, wages or fees paid for services rendered which otherwise would have been paid to such party at the time the services were rendered (including a plan that provides for the crediting of a reasonable investment return on such elective deferrals) and the insured depository institution or depository institution holding company either:

(i) Recognizes compensation expense and accrues a liability for the benefit payments according to generally accepted accounting principles (GAAP); or

(ii) Segregates or otherwise sets aside assets in a trust which may only be used to pay plan and other benefits, except that the assets of such trust may be available to satisfy claims of the institution's or holding company's creditors in the case of insolvency; or

(2) An insured depository institution or depository institution holding company establishes a nonqualified deferred compensation or supplemental retirement plan, other than an elective deferral plan described in paragraph (e)(1) of this section:

(i) Primarily for the purpose of providing benefits for certain IAPs in excess of the limitations on contributions and benefits imposed by sections 415, 401(a)(17), 402(g) or any other applicable provision of the Internal Revenue Code of 1986 (26 U.S.C. 415, 401(a)(17), 402(g)); or

(ii) Primarily for the purpose of providing supplemental retirement benefits or other deferred compensation for a select group of directors, management or highly compensated employees (excluding severance payments described in paragraph (f)(2)(v) of this section and permissible golden parachute payments described in § 359.4); and

(3) In the case of any nonqualified deferred compensation or supplemental retirement plans as described in paragraphs (d)(1) and (2) of this section, the following requirements shall apply:

(i) The plan was in effect at least one year prior to any of the events described in paragraph (f)(1)(ii) of this section;

(ii) Any payment made pursuant to such plan is made in accordance with the terms of the plan as in effect no later than one year prior to any of the events described in paragraph (f)(1)(ii) of this section and in accordance with any amendments to such plan during such one year period that do not increase the benefits payable thereunder;

(iii) The IAP has a vested right, as defined under the applicable plan document, at the time of termination of employment to payments under such plan;

(iv) Benefits under such plan are accrued each period only for current or prior service rendered to the employer (except that an allowance may be made for service with a predecessor employer);

(v) Any payment made pursuant to such plan is not based on any discretionary acceleration of vesting or accrual of benefits which occurs at any time later than one year prior to any of the events described in paragraph (f)(1)(ii) of this section;

(vi) The insured depository institution or depository institution holding company has previously recognized compensation expense and accrued a liability for the benefit payments according to GAAP or segregated or otherwise set aside assets in a trust which may only be used to pay plan benefits, except that the assets of such trust may be available to satisfy claims of the institution's or holding company's creditors in the case of insolvency; and

(vii) Payments pursuant to such plans shall not be in excess of the accrued liability computed in accordance with GAAP.

(e) Corporation means the Federal Deposit Insurance Corporation, in its corporate capacity.

(f) Golden parachute payment.

(1) The term golden parachute payment means any payment (or any agreement to make any payment) in the nature of compensation by any insured depository institution or an affiliated depository institution holding company for the benefit of any current or former IAP pursuant to an obligation of such institution or holding company that:

(i) Is contingent on, or by its terms is payable on or after, the termination of such party's primary employment or affiliation with the institution or holding company; and

(ii) Is received on or after, or is made in contemplation of, any of the following events:

(A) The insolvency (or similar event) of the insured depository institution which is making the payment or bankruptcy or insolvency (or similar event) of the depository institution holding company which is making the payment; or

(B) The appointment of any conservator or receiver for such insured depository institution; or

(C) A determination by the insured depository institution's or depository institution holding company's appropriate federal banking agency, respectively, that the insured depository institution or depository institution holding company is in a troubled condition, as defined in the applicable regulations of the appropriate federal banking agency (§ 303.101(c) of this chapter); or

(D) The insured depository institution is assigned a composite rating of 4 or 5 by the appropriate federal banking agency or informed in writing by the Corporation that it is rated a 4 or 5 under the Uniform Financial Institutions Rating System of the Federal Financial Institutions Examination Council, or the depository institution holding company is assigned a composite rating of 4 or 5 or unsatisfactory by its appropriate federal banking agency; or

(E) The insured depository institution is subject to a proceeding to terminate or suspend deposit insurance for such institution; and

(iii)(A) Is payable to an IAP whose employment by or affiliation with an insured depository institution is terminated at a time when the insured depository institution by which the IAP is employed or with which the IAP is affiliated satisfies any of the conditions enumerated in paragraphs (f)(1)(ii)(A) through (E) of this section, or in contemplation of any of these conditions; or

(B) Is payable to an IAP whose employment by or affiliation with an insured depository institution holding company is terminated at a time when the insured depository institution holding company by which the IAP is employed or with which the IAP is affiliated satisfies any of the conditions enumerated in paragraphs (f)(1)(ii)(A), (C) or (D) of this section, or in contemplation of any of these conditions.

(2) Exceptions. The term golden parachute payment shall not include:

(i) Any payment made pursuant to a pension or retirement plan which is qualified (or is intended within a reasonable period of time to be qualified) under section 401 of the Internal Revenue Code of 1986 (26 U.S.C. 401) or pursuant to a pension or other retirement plan which is governed by the laws of any foreign country; or

(ii) Any payment made pursuant to a benefit plan as that term is defined in paragraph (c) of this section; or

(iii) Any payment made pursuant to a bona fide deferred compensation plan or arrangement as defined in paragraph (d) of this section; or

(iv) Any payment made by reason of death or by reason of termination caused by the disability of an institution-affiliated party; or

(v) Any payment made pursuant to a nondiscriminatory severance pay plan or arrangement which provides for payment of severance benefits to all eligible employees upon involuntary termination other than for cause, voluntary resignation, or early retirement; provided, however, that no employee shall receive any such payment which exceeds the base compensation paid to such employee during the twelve months (or such longer period or greater benefit as the Corporation shall consent to) immediately preceding termination of employment, resignation or early retirement, and such severance pay plan or arrangement shall not have been adopted or modified to increase the amount or scope of severance benefits at a time when the insured depository institution or depository institution holding company was in a condition specified in paragraph (f)(1)(ii) of this section or in contemplation of such a condition without the prior written consent of the appropriate federal banking agency; or

(vi) Any severance or similar payment which is required to be made pursuant to a state statute or foreign law which is applicable to all employers within the appropriate jurisdiction (with the exception of employers that may be exempt due to their small number of employees or other similar criteria); or

(vii) Any other payment which the Corporation determines to be permissible in accordance with § 359.4.

(g) Insured depository institution means any bank or savings association the deposits of which are insured by the Corporation pursuant to the Act, or any subsidiary thereof.

(h) Institution-affiliated party (IAP) means:

(1) Any director, officer, employee, or controlling stockholder (other than a depository institution holding company) of, or agent for, an insured depository institution or depository institution holding company;

(2) Any other person who has filed or is required to file a change-in-control notice with the appropriate federal banking agency under section 7(j) of the Act (12 U.S.C. 1817(j));

(3) Any shareholder (other than a depository institution holding company), consultant, joint venture partner, and any other person as determined by the appropriate federal banking agency (by regulation or case-by-case) who participates in the conduct of the affairs of an insured depository institution or depository institution holding company; and

(4) Any independent contractor (including any attorney, appraiser, or accountant) who knowingly or recklessly participates in: Any violation of any law or regulation, any breach of fiduciary duty, or any unsafe or unsound practice, which caused or

is likely to cause more than a minimal financial loss to, or a significant adverse effect on, the insured depository institution or depository institution holding company.

(i) Liability or legal expense means:

(1) Any legal or other professional fees and expenses incurred in connection with any claim, proceeding, or action;

(2) The amount of, and any cost incurred in connection with, any settlement of any claim, proceeding, or action; and

(3) The amount of, and any cost incurred in connection with, any judgment or penalty imposed with respect to any claim, proceeding, or action.

(j) Nondiscriminatory means that the plan, contract or arrangement in question applies to all employees of an insured depository institution or depository institution holding company who meet reasonable and customary eligibility requirements applicable to all employees, such as minimum length of service requirements. A nondiscriminatory plan, contract or arrangement may provide different benefits based only on objective criteria such as salary, total compensation, length of service, job grade or classification, which are applied on a proportionate basis (with a variance in severance benefits relating to any criterion of plus or minus ten percent) to groups of employees consisting of not less than the lesser of 33 percent of employees or 1,000 employees.

(k) Payment means:

(1) Any direct or indirect transfer of any funds or any asset;

(2) Any forgiveness of any debt or other obligation;

(3) The conferring of any benefit, including but not limited to stock options and stock appreciation rights; and

(4) Any segregation of any funds or assets, the establishment or funding of any trust or the purchase of or arrangement for any letter of credit or other instrument, for the purpose of making, or pursuant to any agreement to make, any payment on or after the date on which such funds or assets are segregated, or at the time of or after such trust is established or letter of credit or other instrument is made available, without regard to whether the obligation to make such payment is contingent on:

(i) The determination, after such date, of the liability for the payment of such amount; or

(ii) The liquidation, after such date, of the amount of such payment.

(l) Prohibited indemnification payment.

(1) The term prohibited indemnification payment means any payment (or any agreement or arrangement to make any payment) by any insured depository institution or an affiliated depository institution holding company for the benefit of any person who is or was an IAP of such insured depository institution or holding company, to pay or reimburse such person for any civil money penalty or judgment resulting from any administrative or civil action instituted by any federal banking agency, or any other liability or legal expense with regard to any administrative proceeding or civil action instituted by any federal banking agency which results in a final order or settlement pursuant to which such person:

(i) Is assessed a civil money penalty;

(ii) Is removed from office or prohibited from participating in the conduct of the affairs of the insured depository institution; or

(iii) Is required to cease and desist from or take any affirmative action described in section 8(b) of the Act with respect to such institution.

(2) Exceptions.

(i) The term prohibited indemnification payment shall not include any reasonable payment by an insured depository institution or depository institution holding company which is used to purchase any commercial insurance policy or fidelity bond, provided that such insurance policy or bond shall not be used to pay or reimburse an IAP for the cost of any judgment or civil money penalty assessed against such person in an administrative proceeding or civil action commenced by any federal banking agency, but may pay any legal or professional expenses incurred in connection with such proceeding or action or the amount of any restitution to the insured depository institution, depository institution holding company or receiver.

(ii) The term prohibited indemnification payment shall not include any reasonable payment by an insured depository institution or depository institution holding company that represents partial indemnification for legal or professional expenses specifically attributable to particular charges for which there has been a formal and final adjudication or finding in connection with a settlement that the IAP has not violated certain banking laws or regulations or has not engaged in certain unsafe or unsound banking practices or breaches of fiduciary duty, unless the administrative action or civil proceeding has resulted in a final prohibition order against the IAP.

Credits

[68 FR 50461, Aug. 21, 2003]

SOURCE: 61 FR 5930, Feb. 15, 1996, unless otherwise noted.

AUTHORITY: 12 U.S.C. 1828(k).

Notes of Decisions (11)

Current through March 14, 2013; 78 FR 16391

End of Document

Code of Federal Regulations
Title 12. Banks and Banking
Chapter III. Federal Deposit Insurance Corporation (Refs & Annos)
Subchapter B. Regulations and Statements of General Policy
Part 359. Golden Parachute and Indemnification Payments (Refs & Annos)

12 C.F.R. § 359.2

§ 359.2 Golden parachute payments prohibited.

Currentness

No insured depository institution or depository institution holding company shall make or agree to make any golden parachute payment, except as provided in this part.

SOURCE: 61 FR 5930, Feb. 15, 1996, unless otherwise noted.

AUTHORITY: 12 U.S.C. 1828(k).

Current through March 14, 2013; 78 FR 16391

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Part 359. Golden Parachute and Indemnification Payments (Refs & Annos)

12 C.F.R. § 359.3

§ 359.3 Prohibited indemnification payments.

Currentness

No insured depository institution or depository institution holding company shall make or agree to make any prohibited indemnification payment, except as provided in this part.

SOURCE: 61 FR 5930, Feb. 15, 1996, unless otherwise noted.

AUTHORITY: 12 U.S.C. 1828(k).

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Part 359. Golden Parachute and Indemnification Payments (Refs & Annos)

12 C.F.R. § 359.4

§ 359.4 Permissible golden parachute payments.

Currentness

(a) An insured depository institution or depository institution holding company may agree to make or may make a golden parachute payment if and to the extent that:

(1) The appropriate federal banking agency, with the written concurrence of the Corporation, determines that such a payment or agreement is permissible; or

(2) Such an agreement is made in order to hire a person to become an IAP either at a time when the insured depository institution or depository institution holding company satisfies or in an effort to prevent it from imminently satisfying any of the criteria set forth in § 359.1(f)(1)(ii), and the institution's appropriate federal banking agency and the Corporation consent in writing to the amount and terms of the golden parachute payment. Such consent by the FDIC and the institution's appropriate federal banking agency shall not improve the IAP's position in the event of the insolvency of the institution since such consent can neither bind a receiver nor affect the provability of receivership claims. In the event that the institution is placed into receivership or conservatorship, the FDIC and/or the institution's appropriate federal banking agency shall not be obligated to pay the promised golden parachute and the IAP shall not be accorded preferential treatment on the basis of such prior approval; or

(3) Such a payment is made pursuant to an agreement which provides for a reasonable severance payment, not to exceed twelve months salary, to an IAP in the event of a change in control of the insured depository institution; provided, however, that an insured depository institution or depository institution holding company shall obtain the consent of the appropriate federal banking agency prior to making such a payment and this paragraph (a)(3) shall not apply to any change in control of an insured depository institution which results from an assisted transaction as described in section 13 of the Act (12 U.S.C. 1823) or the insured depository institution being placed into conservatorship or receivership; and

(4) An insured depository institution, depository institution holding company or IAP making a request pursuant to paragraphs (a)(1) through (3) of this section shall demonstrate that it does not possess and is not aware of any information, evidence, documents or other materials which would indicate that there is a reasonable basis to believe, at the time such payment is proposed to be made, that:

(i) The IAP has committed any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse with regard to the depository institution or depository institution holding company that has had or is likely to have a material adverse effect on the institution or holding company;

(ii) The IAP is substantially responsible for the insolvency of, the appointment of a conservator or receiver for, or the troubled condition, as defined by applicable regulations of the appropriate federal banking agency, of the insured depository institution, depository institution holding company or any insured depository institution subsidiary of such holding company;

(iii) The IAP has materially violated any applicable federal or state banking law or regulation that has had or is likely to have a material effect on the insured depository institution or depository institution holding company; and

(iv) The IAP has violated or conspired to violate section 215, 656, 657, 1005, 1006, 1007, 1014, 1032, or 1344 of title 18 of the United States Code, or section 1341 or 1343 of such title affecting a federally insured financial institution as defined in title 18 of the United States Code.

(b) In making a determination under paragraphs (a)(1) through (3) of this section, the appropriate federal banking agency and the Corporation may consider:

(1) Whether, and to what degree, the IAP was in a position of managerial or fiduciary responsibility;

(2) The length of time the IAP was affiliated with the insured depository institution or depository institution holding company, and the degree to which the proposed payment represents a reasonable payment for services rendered over the period of employment; and

(3) Any other factors or circumstances which would indicate that the proposed payment would be contrary to the intent of section 18(k) of the Act or this part.

SOURCE: 61 FR 5930, Feb. 15, 1996, unless otherwise noted.

AUTHORITY: 12 U.S.C. 1828(k).

Notes of Decisions (6)

Current through March 14, 2013; 78 FR 16391

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Part 359. Golden Parachute and Indemnification Payments (Refs & Annos)

12 C.F.R. § 359.5

§ 359.5 Permissible indemnification payments.

Currentness

(a) An insured depository institution or depository institution holding company may make or agree to make reasonable indemnification payments to an IAP with respect to an administrative proceeding or civil action initiated by any federal banking agency if:

(1) The insured depository institution's or depository institution holding company's board of directors, in good faith, determines in writing after due investigation and consideration that the institution-affiliated party acted in good faith and in a manner he/she believed to be in the best interests of the institution;

(2) The insured depository institution's or depository institution holding company's board of directors, respectively, in good faith, determines in writing after due investigation and consideration that the payment of such expenses will not materially adversely affect the institution's or holding company's safety and soundness;

(3) The indemnification payments do not constitute prohibited indemnification payments as that term is defined in § 359.1(l); and

(4) The IAP agrees in writing to reimburse the insured depository institution or depository institution holding company, to the extent not covered by payments from insurance or bonds purchased pursuant to § 359.1(l)(2), for that portion of the advanced indemnification payments which subsequently become prohibited indemnification payments, as defined in § 359.1(l).

(b) An IAP requesting indemnification payments shall not participate in any way in the board's discussion and approval of such payments; provided, however, that such IAP may present his/her request to the board and respond to any inquiries from the board concerning his/her involvement in the circumstances giving rise to the administrative proceeding or civil action.

(c) In the event that a majority of the members of the board of directors are named as respondents in an administrative proceeding or civil action and request indemnification, the remaining members of the board may authorize independent legal counsel to review the indemnification request and provide the remaining members of the board with a written opinion of counsel as to whether the conditions delineated in paragraph (a) of this section have been met. If independent legal counsel opines that said conditions have been met, the remaining members of the board of directors may rely on such opinion in authorizing the requested indemnification.

(d) In the event that all of the members of the board of directors are named as respondents in an administrative proceeding or civil action and request indemnification, the board shall authorize independent legal counsel to review the indemnification request and provide the board with a written opinion of counsel as to whether the conditions delineated in paragraph (a) of this section have been met. If independent legal counsel opines that said conditions have been met, the board of directors may rely on such opinion in authorizing the requested indemnification.

SOURCE: 61 FR 5930, Feb. 15, 1996, unless otherwise noted.

AUTHORITY: 12 U.S.C. 1828(k).

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12 C.F.R. § 359.6

§ 359.6 Filing instructions.

Currentness

Requests to make excess nondiscriminatory severance plan payments pursuant to § 359.1(f)(2)(v) and golden parachute payments permitted by § 359.4 shall be submitted in writing to the appropriate regional director (DSC). For filing requirements, consult 12 CFR 303.244. In the event that the consent of the institution's primary federal regulator is required in addition to that of the FDIC, the requesting party shall submit a copy of its letter to the FDIC to the institution's primary federal regulator. In the case of national banks, such written requests shall be submitted to the OCC. In the case of state member banks and bank holding companies, such written requests shall be submitted to the Federal Reserve district bank where the institution or holding company, respectively, is located. In the case of savings associations and savings association holding companies, such written requests shall be submitted to the OTS regional office where the institution or holding company, respectively, is located. In cases where only the prior consent of the institution's primary federal regulator is required and that agency is not the FDIC, a written request satisfying the requirements of this section shall be submitted to the primary federal regulator as described in this section.

Credits
[63 FR 44751, Aug. 20, 1998]

SOURCE: 61 FR 5930, Feb. 15, 1996, unless otherwise noted.

AUTHORITY: 12 U.S.C. 1828(k).

Current through March 14, 2013; 78 FR 16391

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12 C.F.R. § 359.7

§ 359.7 Applicability in the event of receivership.

Currentness

The provisions of this part, or any consent or approval granted under the provisions of this part by the FDIC (in its corporate capacity), shall not in any way bind any receiver of a failed insured depository institution. Any consent or approval granted under the provisions of this part by the FDIC or any other federal banking agency shall not in any way obligate such agency or receiver to pay any claim or obligation pursuant to any golden parachute, severance, indemnification or other agreement. Claims for employee welfare benefits or other benefits which are contingent, even if otherwise vested, when the FDIC is appointed as receiver for any depository institution, including any contingency for termination of employment, are not provable claims or actual, direct compensatory damage claims against such receiver. Nothing in this part may be construed to permit the payment of salary or any liability or legal expense of any IAP contrary to 12 U.S.C. 1828(k)(3).

SOURCE: 61 FR 5930, Feb. 15, 1996, unless otherwise noted.

AUTHORITY: 12 U.S.C. 1828(k).

Notes of Decisions (7)

Current through March 14, 2013; 78 FR 16391

End of Document

Exhibit C

District Court Decision in District Court Litigation

THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DAVID WILLIAMS, et al.,

Plaintiffs,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, et al.,

Defendants.

Master File No. 09-504RAJ

ORDER

I. INTRODUCTION

This matter comes before the court on a motion to dismiss (Dkt. # 107) filed by Defendant Federal Deposit Insurance Corporation (in its receiver capacity). The court has considered the parties' briefing and supporting evidence, and has heard from the parties at oral argument. For the reasons explained below, the court GRANTS the Defendant's motion (Dkt. # 107).

II. BACKGROUND

The Plaintiffs are former employees of Washington Mutual Bank ("WMB"), a thrift institution that was owned by Washington Mutual, Inc. ("WMI"). The Plaintiffs entered into employment agreements with WMB that fell into one of three categories

— change-in-control agreements, severance plan agreements, or retention agreements — and, in some cases, the Plaintiffs entered into more than one of these contracts. *See* Keehnel Decl. (Dkt. # 107), Ex. B (a chart summarizing each Plaintiff and his or her contract(s)). Each of these contracts provided that if certain triggering events[1] occurred, the Plaintiff would be entitled to a payment. For example, one version of the change-in-control agreement provides:

> If . . . Employee's employment is terminated by Washington Mutual or its successor without "cause" (as defined below) upon or within two years after a Change in Control (as defined below) . . . , then Employee shall be entitled to receive, within five business days after the effective date of such termination or resignation, from Washington Mutual or its successor, a lump sum equal to two times Employee's annual compensation.

Keehnel Decl. (Dkt. # 108), Ex. C at § 5(c). Other versions and types of contracts set out different triggering events and different amounts of payment, but the parties do not dispute that the employment agreements are materially the same for purposes of this motion. *See* Def.'s Mot. (Dkt. # 107) at 8; Pltfs.' Opp'n at 1 (referring to the employment agreements collectively as "additional compensation agreements"). Thus, for purposes of this Order, the court will collectively refer to the Plaintiffs' contracts with WMB as "employment agreements." Some of the Plaintiffs also participated in

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[1] One of the "change in control" agreements defines five "change in control" events, including these in relevant part:

(1) The acquisition of ownership, directly or indirectly, beneficially or of record, by any Person or group . . . other than [WMI], a Subsidiary or any employee benefit plan of [WMI] or its Subsidiaries, of shares representing more than 25% of (i) the common stock of [WMI], (ii) the aggregate voting power of [WMI's] voting securities or (iii) the total market value of [WMI's] voting securities;

. . .

(5) The sale or transfer (in one transaction or a series of related transactions) of all or substantially all of [WMI's] assets to another Person (other than a Subsidiary) whether assisted or unassisted, voluntary or involuntary.

Keehnel Decl. (Dkt. # 108), Ex. C at § 5(g).

WMI's Supplemental Executive Retirement Accumulation Plan ("SERAP"), and were, under that program, entitled to receive additional retirement benefits.

On September 25, 2008, the Office of Thrift Supervision ("OTS") found WMB to be in an unsafe or unsound condition to transact business, seized WMB, and appointed the Federal Deposit Insurance Corporation as the receiver ("the Receiver"). *See* Keehnel Decl. (Dkt. # 108), Ex. A. On that same day, the Receiver sold most of the assets of WMB to JPMorgan Chase, N.A., under a purchase and assumption agreement. Most of the Plaintiffs continued working for JPMorgan Chase, but in the months that followed the sale, each of the Plaintiffs' employment was terminated.

After they were terminated, the Plaintiffs filed administrative claims with the Receiver, contending that they were owed payments under their employment agreements with WMB. The Receiver denied[2] the claims, and Plaintiffs then filed this lawsuit against both the Receiver and the Federal Deposit Insurance Corporation in its corporate capacity ("FDIC-Corporate"). FDIC-Corporate moved to dismiss for failure to state a claim, and that motion was previously granted. *See* Order (Dkt. # 140). The court now considers the Receiver's motion to dismiss.

III. ANALYSIS

[2] Though Plaintiffs attach significance to the fact that the Receiver did not reference 12 C.F.R. § 563.39 in its denial letters, they ignore the fact that the FDIC is not precluded from arguing additional defenses in a lawsuit that were not noted in a notice of disallowance. Requiring the FDIC to list every basis for disallowing a claim "could force the agency to divert scarce resources to this process, thereby undermining the streamlined administrative process which Congress intended to create." *In re NBW Commercial Paper Litig.*, 826 F. Supp. 1448, 1472-73 (D.D.C. 1992) (citing 12 U.S.C. § 1821.(d)(5)(A)(iv)). Thus, the court does not find the language used in the FDIC's notices of disallowances to be relevant to the issues currently before the court.

Likewise, the court also finds the Receiver's April 2009 disaffirmance of the Plaintiffs' contracts to be irrelevant. None of Plaintiffs' claims are based on the efficacy or timeliness of the disaffirmance letters, and thus the court will not address the disaffirmance-related allegations any further.

A. Legal Standards.

The Receiver's motion is brought under Federal Rules of Civil Procedure 12(b)(6) and 12(c), and the standards applied to motions under either rule are the same. *See Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989). When considering a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), "the court is to take all well-pleaded factual allegations as true and to draw all reasonable inferences therefrom in favor of the plaintiff." *Wyler Summit P'ship v. Turner Broadcasting Sys., Inc.*, 135 F.3d 658, 663 (9th Cir. 1998). Facts alleged in the complaint are assumed to be true. *See Lipton v. Pathogenesis Corp.*, 284 F.3d 1027, 1030 n.1 (9th Cir. 2002). The issue to be resolved on a motion to dismiss is whether the plaintiff is entitled to continue the lawsuit to establish the facts alleged, not whether the plaintiff is likely to succeed on the merits. *See Marksman Partners L.P. v. Chantal Pharm. Corp.*, 927 F. Supp. 1297, 1304 (C.D. Cal. 1996).

A complaint must provide more than a formulaic recitation of the elements of a cause of action, and must assert facts that "raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007). The Ninth Circuit has summarized *Twombly*'s plausibility standard to require that a complaint's "non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009) (citing *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 129 S. Ct. at 1949.

Though typically a court's review on a motion to dismiss is limited to the pleadings, if a complaint refers to another document or its claims are predicated on another document, the court may consider that document even if it is not attached to

the complaint. *See Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001); *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998).

B. The Court Grants the Receiver's Motion as to the Employment Agreements.

The court will first consider the Receiver's motion to dismiss Plaintiffs' claims for payments allegedly owed under Plaintiffs' employment agreements with WMB. The Receiver argues that 12 C.F.R. § 563.39, a regulation promulgated by the OTS, operates to extinguish Plaintiffs' employment agreements upon a thrift failure. Plaintiffs argue that their contracts are not "employment contracts" for purposes of Section 563.39, and also argue that even if they are employment contracts, Section 563.39 does not apply for a variety of alternative reasons. The court will consider each of Plaintiffs' arguments in turn.

1. The Agreements at Issue are Employment Contracts for Purposes of 12 C.F.R. § 563.39.

In their Opposition, Plaintiffs argue that the employment agreements are not "employment contracts" for purposes of 12 C.F.R. § 563.39(b).[3] In its Reply, the Receiver contends that Plaintiffs' counsel conceded at oral argument in January 2010 that the employment agreements are "employment contracts." *See* Keehnel Decl. (Dkt. # 129), Ex. A at 46. Though the transcript is not entirely clear as to what counsel was conceding, the court nonetheless rejects Plaintiffs' argument and finds that the employment agreements are "employment contracts" because they materially affect

[3] Plaintiffs also argue in the alternative that even if the employment agreements were "employment contracts," they are unenforceable because they do not comply with 12 C.F.R. § 563.39(a)'s requirement that all employment contracts be approved specifically by the thrift's board of directors. *See* Pltfs.' Opp'n (Dkt. # 114) at 14. It is undisputed that none of Plaintiffs' agreements were specifically approved by WMB's board of directors. Yet if Plaintiffs' argument is taken to its logical conclusion, then Plaintiffs are certainly not entitled to payments under those agreements because the agreements are not enforceable in the first place. *See infra*, note 5. Because this alternative argument undercuts Plaintiffs' entire theory of recovery as to the payments, the court will focus instead on Plaintiffs' other arguments for the non-applicability of 12 C.F.R. § 563.39.

the terms and conditions of Plaintiffs' employment. *See* Keehnel Decl. (Dkt. 129), Ex. B (the OTS Examination Handbook) at § 310.44 (defining an "employment contract" for purposes of Section 563.39 as "any agreement, intended to be legally enforceable, that materially affects the terms and conditions of a person's employment").

The change-in-control contracts provide, by their own terms, that the Plaintiffs were employed upon the terms as provided in the contracts. *See, e.g.*, Keehnel Decl. (Dkt. # 108), Ex. C (one Plaintiff's change-in-control agreement) § 1 ("Washington Mutual hereby employs Employee, and Employee hereby accepts employment, on the terms in this Agreement."). All of the contracts also set forth many material terms and conditions of Plaintiffs' employment, including the employees' duties, compensation and benefits, conditions for termination, confidentiality obligations, and intellectual property obligations. *See id.*; *see also* Keehnel Decl. (Dkt. # 108), Ex. G (one Plaintiff's retention agreement, which *inter alia* obligates the employee to forgo earlier bonus opportunities, sets forth mandatory performance ratings, and imposes non-compete requirements) & Ex. D (one Plaintiff's severance plan agreement, which sets forth *inter alia* limitations on benefit entitlement, provisions regarding termination, and rights in the event of death). All of these provisions are material terms and conditions of employment, and the employment agreements therefore qualify as "employment contracts" for purposes of 12 C.F.R. § 563.39.

In reaching this conclusion, the court rejects Plaintiffs' contention that an "employment contract" must contain *all* the terms and conditions of employment in order to be considered an "employment contract," as none of the Plaintiffs' cases cited to support that proposition actually support that proposition. Instead, Plaintiffs' cases support the proposition that *termination* or *retirement* agreements are not employment contracts. *See Majeski v. Resolution Trust Corp.*, 1995 WL 115953 (D.D.C Feb. 28,

1995); *Marsa v. Metrobank Fin. Group*, 825 F. Supp. 658, 663 (D.N.J. 1993); *Fresca v. FDIC*, 818 F. Supp. 664, 667 (S.D. N.Y. 1993). While it may be true that retirement agreements are not employment contracts because they only set forth termination provisions and are premised on terminating employment (rather than continuing employment), these cases do not hold that an "employment contract" must contain all terms related to employment in one document. Thus, because the Plaintiffs' contracts set forth material terms and conditions of their employment, the court finds that the employment agreements are "employment contracts" for purposes of OTS regulations.

2. The Claims for Payments Under the Employment Agreements Fail as a Matter of Law.

As mentioned above, WMB was a thrift institution (also known as a savings association). As such, WMB was subject to OTS regulations, including 12 C.F.R. § 563.39, which provides that once a thrift institution is in default (as defined in the Federal Deposit Insurance Act[4]), the institution's employment contracts with employees "shall terminate as of the date of default," but that termination "shall not affect any vested rights of the contracting parties." 12 C.F.R. § 563.39(b)(4). That regulation also provides that when "the association is determined by the [OTS] Director to be in an unsafe or unsound condition," "all obligations under [employment] contracts shall be terminated, except to the extent determined that continuation of the contract is necessary of the continued operation of the association" by the OTS Director. 12 C.F.R. § 563.39(b)(5)(ii). But again, a determination of "unsafe or unsound condition" does not affect "[a]ny rights of the parties that have already vested." 12 C.F.R. § 563.39(b). Section 563.39's provisions need not be

[4] "Default" is defined to mean "with respect to an insured depository institution, any adjudication or other official determination by any court of competent jurisdiction, the appropriate Federal banking agency, or other public authority pursuant to which a conservator, receiver, or other legal custodian is appointed for an insured depository institution . . ." 12 U.S.C. § 1813(x)(1).

stated explicitly in employment contracts, but are read into contracts as implied terms.[5] *See Modzelewski v. Resolution Trust Corp.*, 14 F.3d 1374, 1380 (9th Cir. 1994) (Thompson, J., concurring) (citing *Rush v. FDIC*, 747 F. Supp. 575, 577 (N.D. Cal. 1990)).

The Receiver argues that the OTS's September 25, 2008 order ("the Order") immediately terminated Plaintiffs' employment agreements in two ways: (1) Because the Order found WMB to be in default, so the agreements were terminated under Section 563.39(b)(4); and (2) Because the Order found WMB to be in an "unsafe or unsound condition," so the contract obligations were terminated under Section 563.39(b)(5)(ii).

The Plaintiffs do not dispute that these OTS provisions address employment contract termination upon a determination that a thrift institution is in default or in an "unsafe or unsound condition," but argue that these sections do not apply because the Plaintiffs' rights had vested before the Order was entered. According to Plaintiffs, their rights to payments vested either upon execution or at the same time that the Order was entered.

Both of Plaintiffs' arguments are squarely contradicted by binding Ninth Circuit authority, however. In *Modzelewski v. Resolution Trust Corp.*, the Ninth Circuit held that, for purposes of 12 C.F.R. § 563.39(b), "a right is vested when the employee holding the right is entitled to claim immediate payment." 14 F.3d at 1378. Because the Plaintiffs are not entitled to a payment under employment agreements until there is

[5] It is unclear what Plaintiffs are attempting to argue when they claim that "[t]he government, including FDIC, is treated just like a private party in its contractual dealings." Pltfs.' Opp'n (Dkt. # 114) at 8. To whatever degree that may be true, it is not relevant here because the Receiver did not contract with Plaintiffs. The issues in this case relate to whether the Receiver has any liability as to Plaintiffs' contracts with WMB or WMI.

a change in control or the occurrence of some other triggering event(s), the court rejects Plaintiffs' contention that the rights to payment vested upon execution.

The *Modzelewski* court also rejected Plaintiffs' second argument: that they are entitled to payment because their rights vested simultaneously with the Order. Relying on the terms of the regulation itself, which only excepts rights that have "already vested," *Modezelewski* holds that change-in-control benefits cannot be "already vested" at the time of a change-in-control event because it is the change in control[6] itself that triggers the benefits. 14 F.3d at 1379.

Plaintiffs attempt, to no avail, to escape the applicability of *Modzelewski* by citing *Monrad v. FDIC*, 62 F.3d 1169 (9th Cir. 1995), which finds that the rights of employees of a failed bank to severance payments vested upon receivership. But *Monrad* concerns a bank and therefore does not address OTS regulations; it does not, understandably, overrule or modify *Modzelewski* (but instead cites it with approval, see 62 F.3d at 1175), because the facts of the two cases are distinguishable. Thus, because *Modzelewski* directly addresses the OTS regulation at issue in this case, and is factually analogous to this case, the court will apply *Modzelewski* to hold that Plaintiffs' rights for payment are barred by 12 C.F.R. § 563.39(b) and were not already vested[7] at the time the Order was entered.[8]

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[6] Plaintiffs argue that, in addition to the "change in control" that occurred upon the entry of the Order, a "change in control" event occurred in April 2008 "pursuant to a private equity transaction for $7 billion, which triggered payment months prior to the FDIC's seizure of WMB." Pltfs.' Opp'n (Dkt. # 114) at 3. Plaintiffs do not identify how such a transaction qualifies as a "change in control" event; assuming Plaintiffs are contending it would qualify as the first type of event (when an entity acquires shares constituting more than 25% of WMI's common stock), that contention is not supported by the publicly available (and undisputed) evidence. The April 2008 transaction resulted in the purchase of 19.9% of WMI's common stock, not 25%. *See* Keehnel Decl. (Dkt. # 108), Ex. S.

[7] Because the court finds that Plaintiffs did not have any vested rights in payment, the court need not address Plaintiffs' takings argument; there was no existing property right that was taken from Plaintiffs. *See* Def.'s Reply (Dkt. # 128) at 20-22.

C. The Court Grants the Receiver's Motion as to the SERAP Claims.

The SERAP Plaintiffs also assert claims for payments under the terms of that plan. The Receiver does not dispute that Plaintiffs may be entitled to SERAP payments, but argues that because WMB was not a party to SERAP agreements, the Receiver has no liability. Plaintiffs argue in opposition that "Even if SERAP is administered by WMI, Plaintiffs' employer WMB had the funding obligation and should have paid funds accrued and vested in SERAP into the WMI bankruptcy for disbursement to the SERAP plaintiffs through the ongoing bankruptcy process." Pltfs.' Opp'n (Dkt. # 114) at 21:6-9.

Plaintiffs' argument contradicts the language of the SERAP documents, which state: "All Plan benefits are payable solely from the general assets of [WMI]. Participants and Beneficiaries shall have no legal or equitable rights, interest or claims in any specific collateral, property or assets of [WMI], but shall be general creditors of [WMI] until benefits are paid hereunder . . ." Keehnel Decl. (Dkt. # 108), Ex. Q ¶¶ 1.1 & 1.3.

Accordingly, because Plaintiffs' conclusory allegation that WMB had a funding obligation regarding SERAP benefits is contradicted by the plain language of the SERAP documents, the court concludes that Plaintiffs have failed to state a valid claim for SERAP benefits against the Receiver. Accordingly, dismissal of the SERAP claims is appropriate.

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[8] Because the court finds that Plaintiffs are not entitled to payment due to the operation of 12 C.F.R. § 563.39, the court will not address the Receiver's alternative argument: that the employment agreements are unenforceable under *Aronson v. Resolution Trust Corp.*, 38 F. 3d 1110 (9th Cir. 1994), because the agreements were not approved by WMB's board of directors. For purposes of this motion, the court assumes without deciding that the agreements are enforceable.

IV. CONCLUSION

For the reasons explained above, the Defendant's motion (Dkt. # 107) is GRANTED.

DATED this 30th day of August, 2011.

The Honorable Richard A. Jones
United States District Judge