

STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE 30<sup>TH</sup> JUDICIAL CIRCUIT  
INGHAM COUNTY

KEN ROSS, COMMISSIONER OF  
THE OFFICE OF FINANCIAL AND  
INSURANCE REGULATION,

Case No. 10-397-CR  
Hon. William E. Collette

Petitioner,

vs.

AMERICAN COMMUNITY MUTUAL  
INSURANCE COMPANY,

Respondent.

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**FORMER OFFICERS' BRIEF IN RESPONSE TO**  
**BRIEF OF HOLDCO ADVISORS, L.P. ON BEHALF OF SURPLUS NOTEHOLDER**  
**FINANCIALS RESTRUCTURING PARTNERS, LTD. IN SUPPORT OF**  
**REHABILITATOR'S DENIAL OF FORMER OFFICERS' CLAIMS FOR**  
**SEVERANCE AND OTHER BENEFITS UNDER PRE-REHABILITATION**  
**EXECUTIVE EMPLOYMENT AGREEMENTS**

TABLE OF CONTENTS

	<u>Page No.</u>
INDEX OF AUTHORITIES .....	ii
INTRODUCTION .....	1
ARGUMENT .....	2
I.    Although the Petitioners deny American Community failed as a result of their management, the quality of the management prior to the Rehabilitation Order is not a relevant consideration in regard to whether they are to receive their benefits .....	2
II.   That Petitioners' claims for Change in Control benefits and/or Severance are enforceable claims for payment for services rendered prior to the Rehabilitation Order has been thoroughly briefed in the companion Briefs and are incorporated herein by reference .....	3
CONCLUSION .....	4

INDEX OF AUTHORITIES

Page No.

STATUTES

MCR 2.115(B)..... 2

## INTRODUCTION

The facts leading up to the entry of the Stipulated Order Placing American Community Mutual Insurance Company Into Rehabilitation, Approving Appointment and Compensation of Special Deputy Rehabilitators, and Providing Injunctive Relief are set forth in detail in the Brief in Support of Former Officers' Claims for Severance and/or Other Benefits Pursuant to the Terms of Their Executive Employment Agreements. They are herein incorporated by reference.

Holdco is clearly not the original Surplus Noteholders in this matter. As explained in attached Exhibit 1, "The company buys financial holding company debt in the secondary market and holds the debt until it receives distribution. It manages a portfolio in distressed debt with a face value of \$1.5 Billion." It buys the debt of failed and severely distressed banks and other institutions, such as American Community in the secondary market. Whoever was the original Surplus Noteholder, clearly sold the note to Holdco a long while ago at a significant discount, likely pennies on the dollar. No doubt, whether Holdco receives 44% or 54% of the original principal (that does not include the interest paid out over the years) it will be making a sweet profit.

Clearly any claimed public policy argument that payment to the Petitioners of the money they are owed for services rendered having a potential "chilling effect" on the ability of insurance companies to obtain investment through surplus notes, is even less realistic here. Whoever originally purchased this surplus note, long ago cashed out.

## ARGUMENT

- I. Although the Petitioners deny American Community failed as a result of their management, the quality of the management prior to the Rehabilitation Order is not a relevant consideration in regard to whether they are to receive their benefits.**

Truly, any reference by the Respondents to alleged mismanagement by these Petitioners should be stricken pursuant to MCR 2.115(B), because it is, at minimum, immaterial and impertinent to the Court's determination. None of the Petitioners were terminated for cause which is defined in section 5(b) of their Executive Employment Agreements. Michael Tobin and Ellen Downey were officially terminated "without cause" shortly after the Court's April 8, 2010 Rehabilitation Order was entered. Francis Dempsey, Michael McCollom, Leslie Gola and Beth McCrohan all resigned after the Change in Control, within the protection period defined in their Agreements. Thus, there are no genuine issues of material fact and all the issues to be determined are all legal issues.

Holdco's argument adds nothing new to what has already been said by the Attorney General and Trapeza in their respective Briefs. It is, however, somewhat more strident in tone and feigned righteous indignation. Apparently, Holdco is outraged that the Petitioners who stayed on after the Rehabilitation Order was entered received salaries. And, if they were such horrible managers, why were they kept on and given "raises" and "retention bonuses"?

The balance of Holdco's first argument is little more than a shrill screed bootstrapping of the Attorney General's flawed arguments, and arguing equities in its favor which, in reality, do not exist and which in law are irrelevant. The argument that it relied on the Stipulated Order as an agreement by these Petitioners to not pursue payment of the benefits they earned by rendering

services prior to the Order is beyond comprehension. None of the Respondents have or can present law to support the contention. Moreover, other than Dempsey as Corporate Counsel and Michael Tobin as CEO acting strictly within their corporate status, would have had any input whatsoever in drafting the Rehabilitation Order.

Holdco's threat of a counterclaim for breach of fiduciary duties is wholly unsupported and unsupportable. Besides there being no facts to back up the claim, even if Holdco had standing to assert a counterclaim, which it does not, both Surplus Notes contain the following nonrecourse language:

"No recourse under this Surplus Note shall be had against any member, officer or director of the Company, either directly or through the Company, by virtue of any statutes, by enforcement of any assessment or otherwise. By acceptance of this Surplus Note, the Note Holder waives and releases any liability of or claims against such members, officers and directors under this Surplus Note."  
(Exhibit 2, p. 4.)

Finally, there is no issue in regard to the timing of these claims. The Rehabilitation Order provides at Paragraph 26, that at the appropriate time, the Rehabilitator was to develop a method for the submission, evaluation, and resolution of any unpaid Creditor claims for goods and services provided to American Community and its policyholders, enrollees, or members prior to the date of the Order. Notwithstanding Paragraph 26 of the Order, no such claims' procedure was developed by the Rehabilitator. Thus, upon seeing that American Community was being finally wound down, with the assets liquidated and pre-rehabilitation claims being paid (see the Rehabilitator's Petition of December, 2011), these Petitioners found it to be an appropriate time to assert their claims for payment in return for the services rendered prior to the Rehabilitation. There is no limitation of action or other time bar to Petitioners' claims.

Holdco's last argument in this section requires no response. Clearly, it is an unvarnished attempt to sway the Court with unrelated, irrelevant prejudicial matters. Quite frankly, American

Community is less akin to AIG and the likes than either of these Surplus Noteholders; one consists of two offshore limited liability companies securitizing debt, which pretty much let to the economic crash, and the other one's stock in trade is buying up severely distressed debt for deep discounts and picking over the bones for scraps of flesh. It is the old lawyer cliché, "When the facts are against you, argue the law. When the law is against you, argue the facts. When the law and the facts are against you, pound on the lectern and scream like hell."

**II. That Petitioners' claims for Change in Control benefits and/or Severance are enforceable claims for payment for services rendered prior to the Rehabilitation Order has been thoroughly briefed in the companion Briefs and are incorporated herein by reference.**

**CONCLUSION**

For all those reasons set forth herein and in the companion Briefs filed in response to the Attorney General's and Trapeza CDO IX's and CDO X's Briefs, Petitioners seek this Honorable Court grant them the relief sought in their Petitions.

Respectfully submitted,

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ROEDER & LAZAR, P.C.

By:



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Dated: July 30, 2012

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## Bankruptcy

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### HoldCo takes distressed-debt activism to different level

By [Jamie Mason](#) Updated 05:13 PM, Feb-16-2012 ET

A distressed-debt fund that holds the paper of about 70 different financial holding companies that have failed is now embarking on a novel approach to reorganize two bankrupt bank holding companies, namely by remaking them into vehicles that can use the debtors' remaining cash to pursue litigation against various parties that can reap substantial awards.

New York-based HoldCo Advisors LP, founded in July by former Tricadia Capital portfolio manager Vik Ghei and analyst Misha Zaitzeff, wants to recraft [AmericanWest Bancorp.](#) and [FirstFed Financial Corp.](#) into litigating bodies that can pursue anything, from claims against directors and officers to fighting over tax refunds with the [Federal Deposit Insurance Corp.](#), to battling with creditors regarding the enforcement of contractual subordination provisions in indenture contracts.

"The real value in the reorganized company is the litigation that would be the primary and singular focus of the company post-confirmation," Ghei explained. "While reorganization would allow all options to be on the table, in these institutions the real assets lie in dispute with the Federal Deposit Insurance Corp. and other litigations. These entities would pursue these claims with vigor."

AmericanWest and FirstFed would be activists executing a legal strategy that HoldCo would design.

"Understanding how to value the current and potential assets in an estate and fully map out the liability capital structure of each entity is critical, but understanding how to navigate the bankruptcy process is equally important to our strategy," Ghei said. "Too often, we believe, distressed investors are passive and do not undertake to influence their fates."

HoldCo manages \$1.5 billion in distressed debt issued by bankrupt or distressed financial holding companies. The company buys financial holding company debt in the secondary market and is a "buy and hold investor," Ghei said, adding that HoldCo holds the debt until it receives a distribution.

HoldCo tends to get involved only after the banks have failed or are in severe distress, he explained. He

wouldn't disclose what HoldCo buys the debt for in the secondary market.

Besides holding debt in many financial holding companies that are in Chapter 11 or Chapter 7, HoldCo is also a creditor of bankrupt companies such as Washington Mutual Inc. and Guaranty Financial Group Inc. While the company invests across all industries, at the present moment it is seeing the best opportunities in the financial services space, Ghei said.

A lot of other distressed-debt investors tend to look at very large situations and don't look at smaller ones, he said.

"When a situation involves digging into legal complexities and other complexities where the value isn't obvious, other investors don't want to do their own work and develop a view that can't be checked by a third party," Ghei related. "Others may not be programmed to be an activist investor."

In the Chapter 11 case of Imperial Capital Bancorp Inc., HoldCo, which holds a substantial portion of the bank holding company's trust-originated preferred securities, filed a joint reorganization plan with the debtor. But in the AmericanWest and FirstFed cases, HoldCo is looking to go it alone.

In its reorganization plan for FirstFed, HoldCo also lays out a plan for the reorganized company to invest in financially distressed asset securitization vehicles and real estate trusts — with its cash on hand — as it unwinds its operations and pursues litigation. The reorganized company would also originate and purchase real estate loans, accept customer deposits and engage in other financial services. (See "Bondholder seeks to resume FirstFed operations," Jan. 31, page 5.)

According to the disclosure statement, the reorganized FirstFed would mostly invest in highly speculative, illiquid assets, including tax refunds derived from insolvency-related litigation; distressed debt; equity securities dependent on claim litigation; bankruptcy trade claims; nonperforming real estate assets; underserved company loans; and other "special situation" investments.

HoldCo said in documents that it believes FirstFed could benefit from the proposed investments and also could benefit from go-forward tax attributes in the form of net operating loss carryforwards. Under the plan, HoldCo would appoint a board for FirstFed that would decide which investment lines to pursue.

Judge Ernest M. Robles of the U.S. Bankruptcy Court for the Central District of California in Los Angeles will consider approving the disclosure statement outlining the plan on March 14. If the judge approves the disclosure statement, the plan would go to its creditors for voting and then on to a confirmation hearing.

According to FirstFed debtor counsel Jon Dalberg at Landau Gottfried & Berger LLP, the debtor's own plan was rejected by its creditors and isn't going forward at the moment.

FirstFed and HoldCo have had initial discussions and the debtor is still looking at the proposal and remains in talks with the distressed debt manager, Dalberg said.

Before HoldCo filed the competing plan, it didn't have a great deal of involvement in the FirstFed case, though Dalberg does think the firm may have been instrumental in getting creditors to reject the debtor's liquidation plan.

Ghei wouldn't comment on what kind of debt or how much debt HoldCo holds in FirstFed, saying only that it is "material."

In the AmericanWest bankruptcy, HoldCo is arousing even more skepticism. HoldCo also filed a plan to reorganize AmericanWest after its creditors voted to reject the bank holding company's liquidation plan, but the debtor claims that HoldCo lacks standing to file a reorganization plan and "has not provided the most basic information that is included in virtually every motion filed in every bankruptcy case in this country: the identity of the moving party."

Judge Patricia C. Williams of the U.S. Bankruptcy Court for the Eastern District of Washington in Spokane/Yakima will determine if HoldCo has standing in the case at a March 23 hearing.

AmericanWest debtor counsel Christopher M. Alston and Dillon Jackson at Foster Pepper PLLC didn't return calls for comment.

"Our adversaries in these cases don't like it when a sophisticated and aggressive opponent enters the case, especially in a case where there has been a sleepy creditor body, where there haven't been a lot of people standing up for the creditors in the case," Ghei said.

Its adversaries range in the different cases, from the debtor to other creditors to directors and officers to the FDIC, which is losing money in almost every bank failure and tries to get the assets of the bank holding company to make up for its loss, Ghei said.

"We are much less likely to stand for a poor recovery for creditors and we don't stand for a waste of estate resources," he asserted. "Sometimes the recoveries we pursue are claims against directors and officers, so that doesn't sit well with them. We are willing to take aggressive action in the case, and these actions are often met with great resistance."

He points to the Guaranty Financial Group case as an example. When HoldCo entered the case, there was already a settlement struck between the debtor and the FDIC, which was good for everyone but the creditors. HoldCo objected to the settlement and the debtor's liquidation plan, which resulted in a more favorable settlement.

The liquidating estate of Guaranty Financial Group is now suing its former parent company, Temple-Inland Inc., for upward of \$2 billion in damages. The estate is claiming that the companies' directors participated in a scheme to fraudulently loot the bank and Guaranty Financial Group of assets exceeding \$1 billion, causing the bank's failure. HoldCo, which holds more than \$60 million in debt issued by Guaranty Financial Group, is supporting the lawsuit.

The distressed debt manager will also seek to convert the Harrington West Financial Group Inc. case to a Chapter 7 proceeding on April 4, after the bank holding company failed to confirm its liquidation plan and has no prospects of reorganization. In the Chapter 11 case of AmFin Financial Corp., HoldCo objected to the debtor's disclosure statement, claiming that it didn't provide adequate information. But its objection was overruled, and AmFin has since emerged from bankruptcy and plans to dispose of its remaining assets and distribute the proceeds to its creditors.

So HoldCo has become an activist on many bankruptcy fronts, but it believes it brings a fresh approach, especially with its plans for FirstFed and AmericanWest.

"We usually make bets on liquidations, bankruptcies and insolvencies," Ghel said. "In those complicated spaces, we know the process very well and often the assets we are going after are cash, tax refunds or litigations. If we prevail and win, it will be a function of our legal arguments, not a function of how the economy does. Our investments are driven by the strength of our arguments. We avoid investments driven by earnings and macro factors."

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No. 1

\$10,000,000

## SURPLUS NOTE

Issued: December 1, 2005

American Community Mutual Insurance Company, a Michigan mutual insurance company (the "Company"), for value received, hereby promises to pay to Cede & Co. or registered assigns (the "Note Holder"), the principal amount of \$10,000,000 on April 15, 2026 and to pay interest on the outstanding principal amount at the rate of 8.95% percent per annum from the date of issuance until the principal amount is paid in full. Interest which accrues between January 1 through March 31 of a calendar year shall be paid on July 15 of such calendar year; interest which accrues between April 1 and June 30 of a calendar year shall be paid on October 15 of such calendar year; interest which accrues between July 1 and September 30 of a calendar year shall be paid on January 15 of the following calendar year; interest which accrues between October 1 and December 31 of a calendar year shall be paid on April 15 of the following calendar year. Each January 15, April 15, July 15 and October 15 shall be an "Interest Payment" date. All accrued but unpaid interest on the amount of principal which is paid at maturity shall be paid on the date such principal payment is made. Payment shall be on the terms and subject to the conditions set forth in this Surplus Note. Interest shall not compound and shall be computed on the basis of a year of twelve thirty-day months. Notwithstanding the foregoing or anything to the contrary herein contained or implied, principal of and any interest on this Surplus Note shall be (i) payable solely from "surplus earnings" (as such term is defined by the Michigan Office of Financial and Insurance Services, hereinafter "OFIS"), (ii) subject to the prior approval of the Board of Directors of the Company and the OFIS therefor, and (iii) subject to any other restrictions set forth under the applicable insurance laws of the State of Michigan (the foregoing, collectively, the "Payment Restrictions"). Subject to satisfaction of the Payment Restrictions, payment of principal and any interest then due shall be made to the Trustee for the benefit of the Note Holders at the place and in the manner set forth in the Indenture.

This Surplus Note shall not be a liability or claim against the Company or any of its assets, except as provided in this Surplus Note. This Surplus Note does not confer any rights upon the Note Holder other than the right to receive payment of principal and interest on the terms and subject to the conditions set forth in this Surplus Note, including the Payment Restrictions.

This Surplus Note is one of a duly authorized issue of surplus notes of the Company (collectively, the "Surplus Notes") issued under the Indenture, dated as of December 1, 2005 (the "Indenture"), between the Company and JPMorgan Chase Bank, National Association, as Trustee (in such capacity, the "Trustee," which term includes any successor trustee under the Indenture), to which Indenture and all indentures supplemental thereto reference is hereby made for a statement of the respective rights, limitations of rights, duties and immunities thereunder of

the Company, the Trustee, the holders of Senior Obligations (as defined below) and the Note Holders and of the terms upon which the Surplus Notes are, and are to be, authenticated and delivered.

Subject to the Payment Restrictions, the Company at its option, may repay all or any part of this Surplus Note on any Interest Payment Date on or after April 15, 2016 at the outstanding principal amount plus the interest accrued thereon to the date of repayment fixed by the Company in accordance with the Indenture. All partial payments of principal and interest shall be made by the Company to the Note Holder without presentment of this Surplus Note or endorsement of such payment. The final payment of principal and interest shall be made only on surrender of this Surplus Note at the office of the Trustee. If the Company gives notice to the Note Holder setting forth a date and place for such final payment and surrender of the Surplus Note, this Surplus Note shall not bear interest after such date. All payments and notices shall be mailed to the Note Holder as provided in the Indenture.

By acceptance of this Surplus Note, the Note Holder agrees that the payment of principal and interest hereunder is expressly subordinated to claims of creditors and members of the Company and any other priority claims provided by Chapter 81 of the Insurance Code (the "Senior Obligations") which provides that surplus notes are at the eighth level of priority. If the Company is dissolved and there are insufficient assets to pay in full the principal and interest due on all outstanding Surplus Notes, then the Company shall pay on the Surplus Notes pro rata on the basis of the outstanding principal amount of each Surplus Note and the interest accrued thereon. Regardless of the issuance date of this Surplus Note or any other surplus note of the Company this Surplus Note shall be of equal rank with any other surplus note, unless such other surplus note is expressly subordinated to this Surplus Note. Each Note Holder (a) agrees to be bound by such provisions, (b) authorizes and directs the Trustee on his or her behalf to take such actions as may be necessary or appropriate to effectuate the subordination so provided and (c) appoints the Trustee his or her attorney-in-fact for any and all such purposes.

No recourse under this Surplus Note shall be had against any member, officer or director of the Company, either directly or through the Company, by virtue of any statutes, by enforcement of any assessment or otherwise. By acceptance of this Surplus Note, the Note Holder waives and releases any liability of or claims against such members, officers, and directors under this Surplus Note.

The Company, the Trustee and any agent of the Company or the Trustee may treat the person in whose name this Surplus Note is issued as the owner of this Surplus Note for all purposes including payment of principal and interest. No transfer of this Surplus Note shall be valid for any purpose until all transfer restrictions have been satisfied and such transfer shall have been recorded as provided in the Indenture.

Unless the Certificate of Authentication hereon has been executed by the Trustee by manual signature, this Surplus Note shall not be entitled to any benefit under the Indenture or be valid or obligatory for any purpose.

The Company and, by its acceptance of this Surplus Note or a beneficial interest herein, the Note Holder of, and any Person that acquires a beneficial interest in, this Surplus Note agree

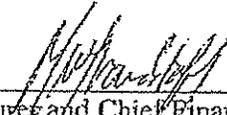
that, for United States federal, state and local tax purposes, it is intended that this Surplus Note constitute indebtedness.

This Surplus Note, insofar as the terms and provisions relate to the payment of principal of and any premium, if any, and interest, or any monetary remedy or collection attempt associated therewith, shall be construed and enforced in accordance with and governed by the laws of the State of Michigan, without reference to its conflict of laws provisions. All other terms shall be construed and enforced in accordance with and governed by the laws of the State of New York, without reference to its conflict of laws provisions (other than Section 5-1401 of the General Obligations Law).

IN WITNESS WHEREOF, American Community Mutual Insurance Company has caused the Surplus Note to be executed by its duly authorized officer as of this 1<sup>st</sup> day of December, 2005.

Attest

AMERICAN COMMUNITY MUTUAL  
INSURANCE COMPANY

By   
Its Treasurer and Chief Financial Officer

By:   
Its: Chief Executive Officer