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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE 30TH JUDICIAL CIRCUIT
INGHAM COUNTY

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

Petitioner,

vs.

AMERICAN COMMUNITY MUTUAL INSURANCE COMPANY,

Respondent.

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

____/

CHRISTOPHER L. KERR (P57131)
JASON R. EVANS (P61567)
ASSISTANT ATTORNEYS GENERAL
Attorneys for the OFIR Commissioner, as Rehabilitator of American Community
Corporate Oversight Division
P.O. Box 30755
Lansing, MI 48909
(517) 373-1160

PHILLIP L. STERNBERG (P28435)
COUZENS, LANSKY, FEALK, ELLIS, ROEDER & LAZAR, P.C.
Attorneys for American Community Former Officers M. Tobin, E. Downey, F. Dempsey, M. McCollom, B. McCrohan and L. Gola
39395 W. Twelve Mile Road, Suite 200
Farmington Hills, MI 48331
(248) 489-8600

LORI McALLISTER (P28435)
DYKEMA GOSSETT PLLC
Attorneys for Surplus Noteholders Trapeza CDO IX, Ltd. and CDO X, Ltd.
Capital View
201 Townsend Street, Suite 900
Lansing, MI 48933
(517) 374-9150

DANIEL R. BROWN *(Pro hac vice pend)*
BROWN LEGAL ADVISORS, LLC
JOHN L. NOUD (P18349)
NOUD AND NOUD
Attorneys for HoldCo Advisors, L.P. on behalf of Surplus Noteholder Fin. Restructuring Partners, Ltd.
155 West Maple Street
Mason, MI 48854
(517) 676-6010

____/

BRIEF IN SUPPORT OF FORMER OFFICERS' CLAIMS FOR SEVERANCE AND/OR OTHER BENEFITS PURSUANT TO THE TERMS OF THEIR EXECUTIVE EMPLOYMENT AGREEMENTS

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INTRODUCTION

On April 8, 2010, this Court entered the Stipulated Order Placing American Community Mutual Insurance Company Into Rehabilitation, Approving Appointment and Compensation of Special Deputy Rehabilitators, and Providing Injunctive Relief ("Rehabilitation Order") which, as the Attorney General has admitted in the very first paragraph of his Brief, changed control of the company.[1] The Attorney General, having admitted the Rehabilitation constitutes a Change in Control, along with the Surplus Noteholders erect two strawmen to stand in the way of compensation to which the Former Officers ("Petitioners") are entitled due to the Change in Control. As will be demonstrated herein, both strawmen, as the name implies, lack substance factually, legally or equitably.

The first strawman they set up is the claim that these Petitioners should not receive their contracted for benefits, because somehow *they* were responsible for American Community's demise. However, although not relevant to these proceedings, that claim is baseless. This ship was heading for the shoals long before these executives came on board. And, by the time they came aboard, there was simply too little time to turn it around.

The institution of the Rehabilitation was based exclusively on the financial troubles of the company, rather than its operational performance. Thus, Francis Dempsey, Michael McCollom, Ellen Downey, Beth McCrohan and Leslie Gola can hardly be held for blame. Clearly, the fact that

[1]"Due to the deteriorating financial condition, this Court ordered American Community Mutual Insurance Company (American Community) into rehabilitation on a April 8, 2010. **American Community's then-management** reviewed and stipulated to both the Rehabilitation Petition and Order, **voluntarily relinguishing control of the company to be operated as the Court and the Rehabilitator deemed appropriate."** [Emphasis added.] Although Petitioners dispute that they personally stipulated to anything, there is no dispute that entry of the Order constituted a transfer and change of control over to the Rehabilitator.

all of those operational individuals, except Downey, were not only retained after the Rehabilitation, but offered retention bonuses to induce them to remain, speaks to their competence.

Michael Tobin was appointed to the Board of Directors in April of 2004. He became the CEO of the company in January of 2007. Contrary to the portrayal by Respondents, the company had been in serious financial trouble by that time and Tobin was brought on as CEO, because he had previously successfully turned around another health insurance company. The Board hoped that he might be able to do the same for American Community. Faced with the daunting task of attempting to right the ship, he was offered his Executive Employment Agreement four months later, on April 5, 2007.

As noted, Tobin did not become CEO until 2007; however, American Community's problems began all the way back in the 1980s. In the 1980s, American Community's competitors achieved favorable agreements with providers limiting charges. Rather than doing so itself, American Community simply began to rent the provider networks its competitors had established. American Community was paying over $8 Million per year to rent networks when its entire budget was only about $50 Million. Furthermore, despite renting the networks, American Community was not getting the same favorable pricing from providers as its competitors.

Unfortunately, there simply was not enough time for Tobin to turn the ship around. Tobin had come into a company that had failed to control its cost of doing business for too long. Of course, the contemporaneous overall collapse of the economy played a role as well.

The second strawman which the Attorney General and the Surplus Noteholders attempt to erect is that the Petitioners are seeking benefits for which services were not rendered. To the contrary, faced with financial crisis, Tobin and the other executives did exactly what was contemplated when they were granted their Change in Control stay benefits in their Executive Employment Agreements. They stayed, continued to render services and did what they believed was in the company's best interest, despite how that might negatively impact their personal finances and careers. American Community offered all the Petitioners contracts to induce them to continue to render services on behalf the company without concerning themselves with decisions which could negatively impact them as individuals. "... the Company believes that it is in the best interest of the Company and its members for such executives to be in a position, free from personal, financial and employment considerations, to be able to assess objectively and pursue aggressively the interests of the Company's members." Upon execution of the Agreements, those services were rendered, objectively and aggressively, and, acting in the best interest of American Community and its members, free from their own personal, financial and employment considerations. And, rather than seeking new, more lucrative and/or secure employment, each worked faithfully up until the Change in Control took place by way of the Rehabilitation Order. All that the Petitioners seek now is to be provided the compensation which they were promised for services they provided prior to the Rehabilitation, without regard to their own professional futures, as their contracts envisioned.

ARGUMENT

I. The Petitioners' claims are superior in class than those of the Surplus Noteholders.

The Attorney General and the Surplus Noteholders go to great lengths arguing that, pursuant to statute, these claims are neither Class 1 nor Class 4 claims. However, Petitioners have never claimed that they are either of those priorities. They are, however, clearly Class 5 claims, which are claims of general creditors or, at minimum, Class 7 claims which is the catchall Class just above Surplus Noteholders: "Claims filed late or *any other claims other than claims under subsections (h) and (I).* MCLA 500.8142(1)(g)." [Emphasis added.]

Here, the Petitioners do not seek to have their claims granted administrative claim status. They provided their consideration, pre-rehabilitation, by remaining within the employ of American Community and rendering services up until the Change in Control. The consideration was provided prior to the Rehabilitation. Entry of the Rehabilitation Order constituting a Change in Control was simply the trigger.

As will be discussed more fully below, the statutory scheme sets the Surplus Noteholders at the lowest rung of the ladder, Class 8 priority, other than shareholders, which do not exist in this case. Petitioners have legitimate claims as pre-rehabilitation creditors of American Community and as such are entitled to payment prior to the Surplus Noteholders.

II. The Petitioners' claims are for payment for services rendered prior to issuance of the Rehabilitation Order, and therefore are not prohibited by statute.

MCLA 500.8137(4) provides:

> "Claims made under employment contracts by directors, principal officers, or persons in fact performing similar functions or having similar powers are limited to payment for services rendered prior to the issuance of an order of rehabilitation or liquidation under section 8113 or 8118."

That these claims are claims for payments for services rendered prior to issuance of the Rehabilitation Order is so well grounded in Michigan law that it is perplexing that the Attorney General would go so out of his way to parse and dissect the term in order to argue otherwise. Each Petitioner is seeking compensation for having continued to perform services under the direction and control of American Community until the Change in Control. The Petitioners were all presented with Employment Agreements which were intended to induce them to remain with American Community at a time when its future was in question, along with each of their own future employment positions. The Agreements recite this purpose without equivocation:

> "WHEREAS, the Company desires to provide inducement to retain the Company's executive management, recognizing that retention to said executives provides greater stability and security to the Company and its members;
>
> . . .
>
> WHEREAS, the Company recognizes that its executives may be involved in evaluating or negotiating any offers, proposals or other transactions which could result in Changes in Control of the Company and believes that it is in the best interest of the Company and its members for such executives to be in a position, free from personal, financial and employment considerations, to be able to assess objectively and pursue aggressively the interests of the Company's members; and" ...

That these are payments for services rendered prior to the Rehabilitation Order is beyond dispute. First, as the Agreements provide, the company benefits from retention of the Petitioners, because it provides stability and security to the company and the members. Second, the Petitioners were specifically asked in the Agreement to stay on and continue to render services in the face of a potential Change in Control which would likely adversely affect each one. In return for continuing to perform, i.e. rendering services, each was promised additional compensation in the event of the occurrence of a Change in Control. Thus, the payments which they seek are simply compensation which they were promised for continuing to render services at a time when it may have otherwise been in their own personal best interests to leave. The Petitioners were made an offer and each rendered services in response to that offer by staying on through the entry of the Rehabilitation Order and, thus, they have earned the Change in Control benefits. Being that in the event the Change in Control would be a rehabilitation and/or liquidation, their right to collect that benefit would be no greater than that of a general creditor. There remained significant risk to them that they would never receive payment of that benefit earned if enough money were not available to payoff the claims of general creditors.

This type of provision has long been recognized under Michigan law and is a classic example of a unilateral contract – a promise of compensation in return for performance. American Community put forth a promise which required no return promise from the Petitioners. Only performance satisfies the terms. In essence, the contracts provide, "If you continue to work for American Community until a Change in Control event occurs and your employment terminates without cause within a specified period of time, you will receive the following compensation. . ." *The Petitioners are only entitled to the Change in Control bonus because they continued to render services until the Change in Control occurred!* The Change in Control triggers the payment only if the Petitioners have stayed on the job and rendered services until that event. It is the classic law school unilateral contract scenario: "A" says to "B," "If you paint my house, I will pay you one hundred dollars." A is not asking for a return promise from B to paint his house. B is under no obligation to paint A's house. But, once B renders the service and paints A's house, A is liable to pay B the hundred dollars. Thus, the payments sought are clearly in consideration for services rendered prior to the Rehabilitation Order.

Employment contracts *are* typically unilateral contracts. The employer promises to pay the employee if the employ works. Once the employee renders the services, he or she is entitled to the promised consideration. As the Federal District Court explained in Holland v Earl G. Graves Publishing Co., Inc., 46 F. Supp. 2d 681 (Eastern District, Southern Division Michigan, 1998); 1998 U.S. Dist. LEXIS 22318 (Exhibit 1):

"Corbin on Contracts sets forth the following discussion of unilateral contracts with regard to bonus programs offered by employers, which is particularly relevant in this case.

> **The same unilateral contract analysis is applicable to the employer's promise to pay a bonus or pension to an employee in case the latter continues to serve for a stated period.** It is now recognized that ***these are not pure gratuities but compensation for services rendered***. The employer's promise is not enforceable when made, but the employee can accept the offer by continuing to serve as requested, even though the employee makes no promise ***There is no mutuality of obligation, <u>but there is consideration in the form of service rendered. The employee's one consideration, rendition of services, supports all of the employer's promises, to pay the salary and to pay the bonus</u>***. Indeed, although the bonus is not fully earned until the service has continued for the full time, after a substantial part of the service has been rendered the offer of the bonus cannot be withdrawn without a breach of contract.

2 Corbin, Contracts § 6.2 (rev. ed. 1995)." Supra, pp. 685-686. [Emphasis added.]

In a Michigan Supreme Court case, also cited in the above case, <u>Cain</u> v <u>Allen Electric & Equipment Co.</u>, 346 Mich 568, 78 N.W.2d 296 (1956), the issue was payment of severance. Despite the defendant's protestations that the severance policy was "gratuitous" and that its written personnel policy reserved the right to discontinue or change the plan at any time prior to termination of an employee's services, the Supreme Court held:

> "In short, the adoption of the described policies by the company [regarding severance pay] constituted an offer of a contract. **This offer, as the trial court correctly held, 'the plaintiff accepted * * * by continuing its employment** beyond the 5-year period specified in exhibit B (the termination pay policy).' The offer having thus been accepted it was not within defendant's powers to withdraw it when called upon to perform. **The 'change or amendment' to which the company policy was said, in**

> **its preamble, to be subject, could not encompass denial of a contract right gained through acceptance of an offer.**" Supra, pp. 579-580. [Emphasis added.]

Citing Cain approvingly, the Court of Appeals in Gaydos v White Motor Co., 54 Mich App 143, 220 N.W. 2d 697 (1974)[2], stated in regard to an employer's attempt to renege on a severance pay policy:

> ". . .We cannot agree that the severance pay provision was merely a 'unilateral promulgated policy' or a gratuity. **The adoption of the described policy by defendant constituted an offer of a contract** [cite to Cain herein omitted]. **As the employees continued to work thereafter, consideration was supplied for a unilateral contract, upon which the employees had a right to rely.**" Supra, p. 148. [Emphasis added.]

Whereas, Petitioners herein rely upon well settled Michigan law, the Attorney General relies upon inapplicable federal law and then misapplies it to boot. For instance, the Attorney General cites the case of Howell v FDIC, 986 F.2d 569 (CA 1, 1993) (Exhibit 2), as supporting his contention that the Change in Control benefits here should be construed as being other than in return for services rendered. A clear reading of the case demonstrates just the opposite. In fact, in Howell, there was never a question as to whether or not the claimants provided services which should have entitled them to payments. As the court explained:

> "**The power of a receiver to repudiate prior executory contracts made by the debtor, a familiar incident of bankruptcy law**, see *11 U.S.C. § 365* (executory contracts and unexpired leases), means something less than might appear. By repudiating the contract the receiver is freed from having to comply with the contract, *e.g., American Medical Supply, Inc.* v. *FTC, 1990 U.S. Dist. LEXIS 5355 (D. Kan. 1990)* (specific enforcement), but the repudiation is treated as a breach of contract that gives rise to an ordinary contract claim for damages, if any." Supra, p. 571. [Emphasis in original.]

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[2] Also cited in the Holland case, supra at p.686.

In Howell, rather than having to deal with whether services had been rendered, the court had to deal with a quirky statute which only allowed for payment of **actual direct compensatory damages** for contract breaches.[3] The Michigan Rehabilitation statute has no similar restriction.

Furthermore, the Federal Courts are split as whether to treat severance as liquidated or actual damages. And, the better rule recognizes, as does traditional Michigan law, that the entitlement to the compensation as actual damages are for consideration having been rendered. In Erwin v FDIC, 2012 U.S. Dist. LEXIS 99451 (Exhibit 3), the court explained :

> "Conversely, The Court of Appeals for the District of Columbia Circuit declined to follow *Howell* when it considered this issue. In *Office & Professional Employees Int'l Union, Local 2 v. FDIC* ("*OPEIU*"), the Court concluded that the First Circuit had overlooked the fact that severance payments were not liquidated damages, but part of consideration for employment contracts. The bank did not breach the contract when it terminated the employees, but rather when it refused to pay severance, and therefore the damages were properly considered a modification of the at will employment relationship. **The Court thus concluded that 'severance payments are properly characterized as consideration for entering into (or continuing under) the employment contract and therefore are compensable as actual damages under FIRREA when the contract is repudiated.'** *27 F.3d 598, 603-04, 307 U.S. App. D.C. 148 (D.C. Cir. 1994)*. The Ninth and Eleventh Circuits have concurred with *OPEIU's* reasoning. See *Monrad v. FDIC, 62 F.3d 1169, 1174 (9th Cir. 1995)*; *McMillian v. FDIC, 81 F.3d 1041, 1055 (11th Cir. 1996)*." Supra, p. 6. [Emphasis added.]

The cited case of Matson v Alarcon, 651 F.3d 404 (CA 4, 2011) (Exhibit 4), is similarly inapplicable. Matson was a bankruptcy case out of Virginia dealing with whether a specific claim

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[3] "A stranger to FIRREA might think it apparent that breach of a contract to make severance payments inflicts damages on a discharged employee in the amount of the promised payments. The hitch is that in FIRREA Congress adopted restrictive rules that limit the damages permitted for repudiated contracts. *12 U.S.C. § 1821(e)*. In a general provision subject to certain exceptions, *12 U.S.C. § 1821(e)(3)(A)(i)* provides that the receiver's liability for a repudiated contract is 'limited to actual direct compensatory damages . . . .'" Howell, p. 572.

for severance under a specific severance plan was a priority under 11 U.S.C. § 507(a)(4) of the Bankruptcy Code or a general unsecured claim. That case turned on an issue of whether the benefit was earned over the period while the employee was rendering service to his employer and, thus, apportionable between priority and general claim or fully earned at the time of termination. There, the court simply found that the "triggering event," termination, occurred within the 180 days prior to the filing and, therefore, the entire severance was owed as priority over general creditors.

Additional support for the fact that these bonuses are in consideration for services rendered can be found in the Bankruptcy Code where, under Section 11 U.S.C. § 503(c)(1)(A)-(C) of the Bankruptcy Code, certain key employees can be offered special benefits as inducement to stay on. Under that section, a court may award a stay bonus to an insider if, upon the evidence, it finds: (1) the stay bonus is essential because the employee has a bona fide offer from another employer, (2) the services provided by the employee are essential, and (3) the bonus is within a certain ratio of payments made to non-management employees or to the insider himself.

Thus, the Bankruptcy Code recognizes there are times where it is necessary to provide key employees consideration in addition to their normal compensation in order to induce them to continue to render services. Ironically, even the Rehabilitator recognized the importance of inducing certain individuals to stay on by offering a "Retention Bonus Plan." (Exhibit 5) As the Memo setting forth the "Plan" explained, "As was announced previously, a Retention Bonus Plan is being developed for those employees holding positions necessary to the continued operations of the business during the Rehabilitation." It is not only ironic, but disingenuous that on the one hand the Attorney General argues that the Change in Control provisions were not in consideration for services rendered, yet on the other hand offers the Deputy Rehabilitators' own Retention Bonus

Plan to induce employees to continue to render services through the Rehabilitation. In other words, why is it ok to pay these individuals a premium for continuing to render services after the Change in Control, because they are key to success of the Rehabilitation, but not for staying on until the Change in Control? The answer, of course, is self evident.

III. Entry of the Rehabilitation Order and appointment of the Rehabilitator constitutes a Change in Control and triggers the Change in Control benefit.

The Attorney General pronounces without foundation that the intent of the Change in Control provision was not intended to protect against "financial collapse and resulting takeover by the State." However, when one reads the recitals in the Executive Employment Agreement, that is exactly within the intent of the Change in Control provision. The Rehabilitator has been ushered in vested with title to all the assets and granted absolutely the right to control the voting power formerly granted to the members, all with the assistance of these individuals, who knew they would, ultimately, if not immediately, lose their jobs, but continued to loyally render services, nonetheless. It was to no small degree their efforts which has allowed for payment of claims so deep as to provide almost complete recompense of the face value of the Surplus Notes.

The Executive Employment Agreements provide three events which would trigger a Change in Control. A Change in Control occurs on the first day any one or more of the following occurs:

> "(i) demutualization, reorganization, consolidation, merger, combination, sale of all or substantially all of the assets of the Company, <u>or similar transaction involving the Company</u>, unless the members of the Company owning 50% or more of the combined voting power of the Company immediately prior to the commencement of such transaction remain the holders of 50% or more of the combined voting power in the acquiring or surviving entity; or

(ii) on or after the date of execution of the Agreement, *any person* (which, for all purposes hereof, will include, *without limitation*, an individual, sole proprietorship, partnership, unincorporated association, unincorporated syndicate, unincorporated organization, trust, body corporate, a trustee, executor, administrator or other legal representative) (a "Person"), or any group of two or more Persons acting in concert, acquires the right to direct or control, including by proxy, 10% or more of the combined voting power of the members, unless the person or persons are an officer(s) or Board member(s) of American Community Mutual Insurance Company; or

(iii) the Board of Directors adopts a resolution to the effect that, for purposes of this Agreement, a Change in Control has occurred." [Emphasis added.]

Both the first and the second provision defining a Change in Control are satisfied by the entry of the Rehabilitation Order. Although Rehabilitation is not specifically enumerated, the first provision provides also for a "similar transaction involving the Company, unless the members of the Company owning 50% or more of the combined voting power of the Company immediately prior to the commencement of such transaction remain the holders of 50% or more of the combined voting power in the acquiring or surviving entity." Although there is no definition of "similar transaction," guidance can be had by the limitation contained in the provision as to when one of those transactions *does not* constitute a Change in Control. Regardless of whether it is any of the enumerated events, none constitute a Change in Control if those holding 50% or more voting control of the original entity, continue to do so. It follows, then, that a similar transaction would be one that divests at least 50% of the voting power. That is exactly what the Rehabilitation Order did. It resulted in divesting *all* of the voting power from those who held it prior to the transaction.

Additionally, although this is not a sale of all of the assets of American Community, the Rehabilitation Order resulted in a *transfer of title* of all the assets to the Rehabilitator:

"4. Pursuant to MCL 500.8113(1), this Order shall by operation of law vest legal title to all assets, accounts, and moneys of American Community in the Rehabilitator. The filing or recording of this Order with the Clerk of the Circuit Court or the Register of Deeds for the county in which the principal office or place of business of American Community is located shall impart the same notice as a deed, bill of sale, or other evidence of title duly filed or recorded with that Register of Deeds would have imparted."

And, after the transfer of the assets to the Rehabilitator, none of the voting power was retained by those holding the voting power prior to the Rehabilitation Order. By the very nature of the transfer and the result of the transfer, the Rehabilitation clearly falls within the definition of a "similar transaction."

Section two of the provision is perhaps even more applicable. That section provides that a Change in Control occurs if *any person* (without limitation in the definition of "person") or any group of two or more persons acting in concert, acquires the right to direct or control voting power of the members. Specifically at page 5, sections 7 and 8 of the Rehabilitation Order provide in pertinent part:

"7. Pursuant to MCL 500.8114(2), upon entry of this Order , all powers of the current directors, officers, and managers of American Community are suspended in their entirety, and the Rehabilitator shall have and exercise the full and complete power of such directors, officers, and managers. . . ."

"8. Among his plenary powers provided by law, the Rehabilitator shall have full power and authority to direct and manage American Community, to hire and discharge American Community's officers, managers, and employees *subject to any contract rights that they may have,* and to deal in totality with the property and business of American Community. . . ." [Emphasis added.]

Although there appears to be no specific case on point where a court was required to determine whether the installation of a Rehabilitator constitutes a Change in Control, courts dealing with analogous situations have found it so. In Fix v Quantum Industrial Partners LDC, 374 F.3d 549 (CA 7, 2004) (Exhibit 6), plaintiff was hired to save defendant's business. As part of the terms of his employment, plaintiff and defendant agreed that plaintiff would be compensated upon a Change in Control of the business and he would be paid $5 Million in cash (less the exercise value of options). Subsequently, the business was unable to be turned around and it entered Chapter 11 bankruptcy, wherein plaintiff was hired to sell substantially all of the assets of the company, which the bankruptcy court approved. Plaintiff requested the "Change in Control" payment and defendant refused. There, the defendant's arguments against there having been a Change in Control were similar to these. They argued that a sale of the company's assets affected through the bankruptcy was not within the definition of Fix's Change in Control provision. Similarly in this case, the Attorney General argues this type of "takeover" was not within contemplation of the instant Change in Control provisions. In ruling that the sale out of bankruptcy triggered the Change in Control provision, the court in Fix stated:

> "This case turns on the interpretation of the 'Change in Control' definitions in the employment agreement. Initially, we must ask whether the language of the contract is clear and unambiguous. If it is, Delaware law dictates that we may not look to extrinsic evidence to interpret the contract. . . . ('Extrinsic evidence is not used to interpret contract language where the language is "plain and clear on its face"'); *Citadel Holding Corp. v Roven*, 603 A.2d 818, 822 (Del. 1992) ('It is an elementary canon of contract construction that the intent of the parties must be ascertained from the language of the contract.').
>
> Reviewing the employment agreement, we agree with the district court that the 'Change in Control' language is clear and unambiguous. . . . **Moreover, the language contains no exclusion or limitation that might exclude a sale of assets in connection with bankruptcy liquidation. Absent such a limitation, we will not read one into Fix's employment agreement.** *See Rhone-Poulenc Basic Chems. Co. v American Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992) ('Courts will not torture contractual

terms to impart ambiguity where ordinary meaning leaves no room for uncertainty')." Supra, p. 552. [Emphasis added.]

Michigan law is similar to Delaware law when interpreting contracts. A contract must be interpreted according to its plain and ordinary meaning. Holmes v Holmes, 281 Mich App 575, 593; 760 N.W.2d 300 (2008). "The fundamental goal of contract interpretation is to determine and enforce the parties' intent by reading the agreement as a whole and applying the plain language used by the parties to reach their agreement." Dobbelaere v Auto–Owners Ins. Co., 275 Mich App 527, 529; 740 N.W.2d 503 (2007). If contractual language is clear and unambiguous, its meaning is a question of law, and courts must interpret and enforce the contract as written. Frankenmuth Mutual Insurance Company v Masters, 460 Mich105, 111; 595 N.W.2d 832 (1999).

As in Fix, the Executive Employment Agreements contain no limitations. In Fix, there was no exclusion or limitation that the sale could not be in connection with bankruptcy liquidation. Here, there is no limitation or exclusion that the *Person* taking over control of American Community might be the Rehabilitator. Additionally, title to all assets of American Community vesting in the Rehabilitator has the same effect as a sale of assets and, therefore, the first trigger of the Change in Control provision is satisfied.

IV. The Stipulated Rehabilitation Order is between American Community and the Office of Financial and Insurance Regulation (OFIR) and the Petitioners, as former executives of American Community, did not personally stipulate to it in any manner nor are they parties to it, and, rather than prohibiting the Petitioners' claims, the Rehabilitation Order specifically preserves their "contractual rights" to the Change in Control benefits.

The Attorney General's declaration that the Petitioners somehow individually stipulated to the Rehabilitation Order and are expressly bound to it, is completely without basis and totally unsupportable. The parties to the Rehabilitation Order are the OFIR and American Community. All signatures are provided within the representative capacity of the individuals signing. The Attorney General provides absolutely no law in support of his proposition, because there is none. Of all the Petitioners, only Tobin as CEO and Dempsey as Corporate Counsel, would even have had anything to do with reviewing the terms of the Stipulated Rehabilitation Order and that would have been solely in their corporate capacity rather than as individuals. Gola was the Vice President of Human Resources, Downey was Vice President of Corporate Communications, McCollom was Vice President of Underwriting and McCrohan was the Information Officer. Though key to the operation of the company, none of these individuals would have had any input whatsoever in the entry of the Rehabilitation Order.

Paragraph 8 of the Rehabilitation Order terminated the Petitioners' employment contracts, prospectively, as of the date of the entry, "subject to any contractual rights." The Executive Employment Agreements provide the following:

> "**Change in Control.** If (1) a Change in Control occurs during the term of the Employee's employment under this Agreement, and (2) either Employee terminates employment with the Company or its successor for any reason, or the Company or its successor terminates Employee's employment without Cause, both within two years after the Change in Control, Employee will receive benefits described in "Benefits Upon Termination Within the Protection Period" upon the execution of an Employment Severance Agreement and Release of Liability ("Release") (substantially in the form and substance as set forth in Exhibit 1, and attached hereto and the Release has become effective). The Company may withhold from such payments all federal, state, city and other taxes to the extent such taxes are required to be withheld by applicable law."

The Change in Control benefits become payable if, during the protection period, the employee's employment status was terminated other than for death, permanent incapacity, or cause.

It is indisputable that each Petitioner's employment pursuant to their Executive Employment Agreement was terminated as of the entry of the Rehabilitation Order.[4] Although five of the six petitioner's services were continued after the Rehabilitation Order (Exhibit 7) was entered, they were retained pursuant to completely different terms, essentially new employment. Thus, although *prospectively*, the Petitioners could no longer rely upon the terms of their Executive Employment Agreements, the terminations remained subject to the contractual rights to which they had already vested, namely the Change in Control benefits.

As mentioned above, the Rehabilitation Order cancelled all employment contract rights of the Former Officers, *subject to any contractual right and applicable law.*

> "Subject to any contractual rights and applicable law, upon entry of this Order all employment contracts of American Community's officers, managers, and employees are terminated. Notwithstanding the termination of their employment contracts, the officers, managers and employees of American Community shall remain employed as at-will employees until such time as they are notified by the Rehabilitator or Special Deputy Rehabilitators that they have been discharged." [Emphasis added.]

Clearly, "subject to" is qualifying language in regard to the termination of the employment or employment agreement between the parties. The clear intent of the language in the Order is to recognize that, although the employment contracts were terminated going forward, vested rights would be protected. The words "Subject to" are defined primarily in *Black's Law Dictionary* as: "Liable, subordinate, subservient, inferior, obedient to; governed or affected by; provided that;

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[4]"Subject to any contractual rights and applicable law, upon entry of this Order all employment contracts of American Community's officers, managers, and employees are terminated. . ."(Exhibit 7, p. 5, section 8.)

Under any circumstances, each Petitioner's employment terminated either on the date of entry of the Order or otherwise by firing or voluntary resignation within the Protection Period.

provided; answerable for. Homan v. Employers Reinsurance Corp., 345 Mo. 650, 136 S.W.2d 289, 302." *Black's Law Dictionary*, p. 1425 (6th Ed, 1990).

One of the contractual rights to which the Rehabilitation Order was subject was the notice provision set forth in Paragraph 1 of the Executive Employment Agreements:

> "**Operation and Term of Agreement**. The Agreement will be effective immediately upon its execution. The Agreement may be terminated by the Company upon two year's advance written notice to the Employee; provided however, **that after a Change in Control of the Company during the term of this Agreement, this Agreement will remain in effect until all of the obligations of the parties hereunder are satisfied and the Protection Period has** expired." [Emphasis added.]

Thus, although the Rehabilitation Order prescribed that the Petitioners' employment contracts were terminated, in that the Rehabilitation constitutes a Change in Control, the terms of the Employment Agreements survived "until all the obligations of the parties hereunder are satisfied and the Protection Period has expired."

In arguing that the Rehabilitation Order actually prohibits payment, once again, the Attorney General is guilty of parsing and misconstruing. The section of the Order which the Attorney General erroneously relies upon is section 14, at page 7 (Exhibit 7) of the Order. The quote as parsed in the argument is as follows:

> "[T]he Rehabilitator shall pay: . . .(b) all Creditor claims for wages of American Community's officers, managers, and employees that were earned but unpaid as of the date of this Order. This provision requiring payment of pre-Rehabilitation employee wages does not apply to, and the Rehabilitator shall not pay, any severance or other non-wage payments otherwise due to an American Community officer, manager, or employee upon the termination of his or her employment contract entered into prior to the date of this Order."

The problem with the Attorney General's parsing is that it changes the context of the provision entirely. Conveniently, the Attorney General left out the first sentence of paragraph 14:

> "Except as provided in this paragraph 14, the Rehabilitator shall not pay any claims for goods or services provided prior to the date of this Order *until further order of the court.*" [Emphasis added.]

The following sentence then goes on to describe which payments could be made without further order of the Court. "In order to ensure the continuity of health care services to American Community's policyholders, and to minimize disruption to American Community's business operations, the Rehabilitator shall pay: . . . (b) all Creditor claims for wages of American Community's officers, managers and employees that were earned but unpaid as of the date of this Order."

Clearly, when put in the proper context, the provision referenced by the Attorney General does not bar the claims. Rather, claims for regular wages could be paid within the ordinary course without further order. However, claims other than for wages, i.e. severance and/or Change in Control benefits, were stayed until further order of the Court. The provision is not a prohibition, it merely controls the timing for making and paying claims other than for weekly compensation in order to provide for the continued operation of American Community. Matters other than ordinary wages would require separate attention by the Court and further order. Considering these claims are a class 5 or 7 priority, it simply makes sense that they not be paid until higher priority payments are satisfied. For the Attorney General to argue otherwise is disingenuous and ignores the clear intent of the provision which is to assure the day to day operation of American Community with minimum disruption by paying regular wages which had been earned up until the Rehabilitation.

Moreover, the Attorney General's argument goes beyond merely the prioritizing of claims. The argument would seek to allow for the Attorney General and the insurer to agree between themselves, that a particular class of creditor should not be paid, regardless of the assets available for distribution. The Attorney General and American Community, through their stipulation, had no more right to bar the legitimate claims of these Petitioners than they would have had the right to proclaim that the Rehabilitator shall not pay Surplus Noteholders. If, as Petitioners herein argue, these claims are statutorily permissible, they could not be barred by a stipulation between the Attorney General and American Community, even if the language means what the Respondents claim it means, which it unambiguously does not. Respondents' interpretation of the provision is tantamount to a usurpation of this Court's authority and an unconstitutional impairment on existing contracts. See Robinson v People's Bank of Leslie, 266 Mich 178 at pp.187-188 (1934).

V. There is no public policy basis for disallowing the claims.

The public policy arguments of the Attorney General and Surplus Noteholders (hereinafter "Respondents") are without factual basis or legal support. As set forth above, it is to the credit of the Petitioners that American Community is in a position to payout claims as far down as Class 8 priorities, the Surplus Noteholders. Moreover, even after the Petitioners receive their Change in Control benefits, the amount paid on the Surplus Notes will total almost the entire principal invested.[5]

In essence, the Respondents are asking this Court to rule that severance agreements, Change in Control agreements, and stay and retention bonuses should be struck down as being violative of public policy. This, of course, is despite the fact that the Rehabilitator offered all but two of the Petitioners Retention Bonuses in order to induce them to stay on and run the company after the Rehabilitation Order was entered.

[5]As is detailed in the Responses to the Surplus Noteholders' Briefs, neither of the current holders are the original investors, and most assuredly, even after the Petitioners receive their rightful compensation, these Surplus Noteholders will likely cash out with significant profits based upon deep discount purchases of distressed debt.

Obviously, insurance is a highly regulated industry. Had the legislature wished to ban the use of the sort of contracts being reviewed in this action, it easily could have. However, there is nothing in the law which outlaws or otherwise bars insurance companies from using bonuses to induce executives to remain on in troubled times (or for that matter anytime, troubled or not). Moreover, it is not the place of this Court to, on its own, legislate. In Terrien v Zwit, 467 Mich. 56, 66-67 (Mich 2002), the Supreme Court explained:

> "In identifying the boundaries of public policy, we believe that the focus of the judiciary must ultimately be upon the policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in our state and federal constitutions, our statutes, and the common law. See *Twin City Pipe Line Co v Harding Glass Co*, 283 U.S. 353, 357; 51 S Ct 476; 75 L Ed 1112 (1931). The public policy of Michigan is *not* merely the equivalent of the personal preferences of a majority of this Court; rather, such a policy must ultimately be clearly rooted in the law. There is no other proper means of ascertaining what constitutes our public policy. As this Court has said previously:
>
>> '**As a general rule, making social policy is a job for the Legislature, not the courts. This is especially true when the determination or resolution requires placing a premium on one societal interest at the expense of another: "The responsibility for drawing lines in a society as complex as ours – of identifying priorities, weighing the relevant considerations and choosing between competing alternatives – is the Legislature's, not the judiciary's."'** [*Van v Zahorik*, 460 Mich 320, 327; 597 NW2d 15 (1999) (citations omitted).]" Supra, p.67. [Emphasis added.]

In contrast, the Respondents cannot point to a single case in Michigan or nationally which even comes close to granting the relief sought here. Even in the sole case which they reference, Howell, discussed above, the court rejected the FDIC's policy argument and said that was a matter best left to legislation and regulation rather than the courts. See Howell, supra, p. 574. There, the court allowed the claims as unsecured creditor claims, exactly what is being sought here. That, ultimately the claimant could not prove their damages was, as the court noted, a basis of a quirk in the federal statute, as opposed to any public policy arguments which were specifically rejected by the court.

Finally, one can hardly sympathize with the Surplus Noteholders who had the sophistication and financial wherewithal to perform all the due diligence necessary to make an informed decision before investing. The very Note attached to the Brief of Respondent Trapeza states, "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." That is the bottom rung, other than Class 9 Priority which are claims of shareholders, and, in this case, there are none.

Even the case cited by the Attorney General contradicts the argument that these Petitioners are not properly general creditors of American Community. There is no basis for this Court ignoring the statutory scheme and creating another level of priority not included within the existing law. Had the legislators wished to do so, they surely had the opportunity.

Overall, the Rehabilitation of American Community has been successful. American Community has held sufficient funds to pay policyholder claims and general creditors. All future liabilities have been reserved for. The only remaining creditors are these Petitioners and the Surplus Noteholders, who have Class 8 priority.

According to the Rehabilitator's Brief, there remains approximately $16.1 Million to pay the remaining creditors. If the Petitioners' claims are paid as requested, the Surplus Noteholders will receive \$13.3 Million. They have already received approximately \$15 Million in quarterly payouts, for a total of approximately \$28.3 Million, which is a recovery of 94% of the Surplus Noteholders' principal investments. Both Surplus Noteholders purchased the Note from the original Surplus Noteholders and one would assume it was purchased for a significant discount, perhaps pennies on the dollar.

VI. Assuming, arguendo, that neither the Rehabilitation nor the appointment of the Rehabilitator constitute a Change in Control, all the Petitioners would be eligible for severance pay.

As is alleged in the Petitions, pursuant to the request of the Rehabilitator, in its Order of December 11, 2011, this Court ordered the payment of severance to Jeffery Erickson and Cathleen Walker (Exhibit 8). Both of those employees were terminated shortly before the Rehabilitation Order was entered. And the Attorney General has essentially conceded that, based upon the fact that Tobin and Downey were each terminated without cause, each qualified for Severance Pay:

> ". . . Moreover, the two Former Officers who were involuntarily terminated – Michael Tobin and Ellen Downey – are entitled to severance totaling at most one year's salary (depending on years of service) under Paragraph 5(c)(i) of their Agreements. . ." Attorney General's Brief, p. 18.

However, a close reading of Paragraph 5(c)(i) of the Executive Employment Agreement demonstrates that, at minimum, all of the Petitioners would qualify for Severance Pay, if the Rehabilitation Order did not constitute a Change in Control. The Rehabilitation Order provides, upon its entry: ". . .Subject to any contractual rights and applicable law, upon entry of this Order all ***employment contracts*** of American Community's officers, managers, and employees are terminated. Notwithstanding termination of their ***employment contracts***, the officers, managers, and employees of American Community shall remain employed as at-will employees until such time as they are notified by the Rehabilitator or Special Deputy Rehabilitators that they have been discharged." [Emphasis added.] Thus, although the Petitioners, other than Tobin and Downey, remained employees of American Community, all their contracts of employment were terminated going forward from that date.

Paragraph (5)(c) on page 3 of the Executive Employment Agreements state unambiguously:

> "**<u>Termination by the Company Other than for Cause</u>: In the event that *this Agreement is terminated*** for any reason by the Company (except for a termination for 'Cause', for death or permanent incapacity, or a Change in Control), upon execution of an Employment Severance Agreement and Release of Liability ('Release') (substantially in the form and substance as set forth in Exhibit 1, attached hereto and the Release has become effective):
>
> (1) Employee shall be entitled to receive an amount equal to a minimum of 26 weeks' pay plus one weeks' pay for each year of fully completed service, not to exceed 52 weeks' pay. Payment is subject to applicable taxes and deductions and is paid in bi-weekly installments, in accordance with the Company's regular payroll procedures." [Emphasis added.]

The Executive Employment Agreements do not speak to termination of employment as the trigger for the vesting of severance, but instead, termination of the Agreement itself: "***In the event, that this Agreement is terminated*** for any reason by the Company. . ." Thus, notwithstanding the other Petitioners remaining within the employ of American Community, each one's rights to severance vested when the Executive Employment Agreement terminated. The terms could not be clearer; the Executive Employment Agreements provide for payment of the severance benefits in the event the Agreements are terminated. The Rehabilitation Order provides unambiguously that the Employment Agreements are terminated.

As argued above, the Rehabilitation Order itself acknowledges that it is subject to the contractual rights of the Petitioners. Thus, although the Order terminates the Executive Employment Agreements prospectively, it is careful not to take away those rights which have ripened. Upon the termination of the Agreements, the respective rights of the parties post termination of the Executive

Employment Agreements were vested. At minimum, even if this Court were to find that the Rehabilitation Order or the appointment of the Rehabilitator did not constitute a Change in Control, the clear and unambiguous language of the Executive Employment Agreements, and the Order, entitle all of the Petitioners the right to their severance benefits. And, to do so is only fair, because with entry of the Rehabilitation Order, although the services of all but Tobin were retained (Downey was only retained for a short time by the Rehabilitator, before being terminated), the terms of their employments were completely different and finite as the business was being wound down. In essence, it was in effect that their original employment with American Community had been terminated and new employment altogether was commenced with the entry of the Rehabilitation Order. Moreover, as the Rehabilitation wound down, there was a finite end to American Community and the employment of the Petitioners, other than Downey and Tobin, which in and of itself would constitute a constructive termination.

CONCLUSION AND RELIEF REQUEST

The Attorney General asserts in his conclusion and request for relief three dispositive reasons to deny the relief sought by Petitioners. Each one has been thoroughly addressed and rebutted herein. First, it is beyond dispute that Michigan law recognizes severance agreements, and Change in Control benefit agreements are enforceable and based upon services having been rendered in reliance of the promise to provide such a benefit. Second, the Petitioners are not individually parties to the Rehabilitation Order. Also, the Rehabilitation Order preserves payment of benefits, because those benefits had been earned by services rendered prior to the Order, and actions taken in regard to the Petitioners' employment and Executive Employment Agreements in the Order were all "subject to contract." Third, there is no basis for the Attorney General's public policy argument.

The Petitioners are legitimate creditors who agreed to remain employed by American Community, despite the fact that it could result in severe consequences to them. They all were induced to stay with the promises contained in their Executive Employment Agreements. Nonetheless, they all knew there was a risk that they would never see a penny if American Community failed completely. They all stayed at American Community until, and five Petitioners beyond, the Change in Control. Finally, through no small part of the Petitioners' efforts and continuing to render services until the Change in Control, American Community is in a position to pay them their benefits as well as a majority of the Surplus Noteholders' claims. It is both factually and legally right that their claims for Change in Control benefits be allowed in their entirety.

Respectfully submitted,

COUZENS, LANSKY, FEALK, ELLIS,
ROEDER & LAZAR, P.C.

By: ______________________
PHILLIP L. STERNBERG (P28435)
Attorney for Petitioners Michael
Tobin, Ellen Downey, Francis
Dempsey, Michael McCollom, Beth
McCrohan and Leslie Gola
39395 W. Twelve Mile, Suite 200
Farmington Hills, MI 48331
(248) 489-8600

Dated: July 30, 2012

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EXHIBIT 1

SHARON YVONNE HOLLAND, Plaintiff, v. EARL G. GRAVES PUBLISHING CO., INC., Defendant.

CIVIL ACTION NO. 97-40083

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

46 F. Supp. 2d 681*; *1998 U.S. Dist. LEXIS 22318

August 5, 1998, Decided
August 5, 1998, Filed

DISPOSITION: **[**1]** Plaintiff's renewed motion for summary judgment on Count I GRANTED. Judgment entered for the plaintiff Sharon Yvonne Holland on Count I in the amount of $ 54,500, as well as post-judgment interest. Count II dismissed with prejudice. Judgment entered for the defendant Earl G. Graves Publishing Co., Inc. on Count III and that plaintiff takes nothing on this Count.

COUNSEL: For SHARON YVONNE HOLLAND, plaintiff: Randall J. Gillary, Randall J. Gillary, P.C., Troy, MI.

For EARL G. GRAVES PUBLISHING COMPANY, INCORPORATED, defendant: Randolph D. Phifer, Eugene M. Holmes, Patterson, Phifer, Detroit, MI.

JUDGES: HON. PAUL V. GADOLA, U.S. DISTRICT JUDGE.

OPINION BY: PAUL V. GADOLA

OPINION

[*682] MEMORANDUM OPINION AND ORDER GRANTING PLAINTIFF'S RENEWED MOTION FOR SUMMARY JUDGMENT

On September 19, 1997, plaintiff Sharon Yvonne Holland filed the instant three-count action against her former employer, Earl G. Graves Publishing Co., Inc. alleging breach of contract (Count I) and violations of the Michigan Sales Commission Act, *M.C.L.A. § 600.2961* (Counts II and III). Subject-matter jurisdiction is premised upon *28 U.S.C. § 1332*, diversity of citizenship.

[2]** Previously, both parties filed motions for summary judgment on Counts I and III. [1] In a memorandum opinion and order dated May 6, 1998, this court denied both parties' motions for summary judgment on Count I without prejudice, denied plaintiffs' motion for summary judgment on Count III and granted defendant's motion for summary judgment on the same.

1 Count II was settled by the parties.

Presently before the court is plaintiff's renewed motion for summary judgment on

Count I. For the following reasons that motion will be granted.

FACTS

The facts were fully set forth in this court's May 6, 1998 opinion and order. Nevertheless, this court once again will provide a full recitation to aid in the understanding of this opinion and order.

By letter dated February 19, 1992, defendant Earl G. Graves Publishing Company, Incorporated, the publisher of Black Enterprise magazine, extended an offer of employment to plaintiff Sharon Holland. On or about March 2, 1992, plaintiff commenced employment as an **[**3]** at-will employee in the position of Account Executive in defendant's Chicago, Illinois office. She was promoted to Senior Account Executive on or about July 1, 1994.

While employed by the defendant, plaintiff's principal job responsibility was to obtain advertising accounts for Black Enterprise. Plaintiff spent a substantial portion of her time each year in Michigan calling on automotive customers in the Detroit area, and in particular General Motors Corporation ("GM").

At the beginning of each fiscal year, [2] defendant provided plaintiff with a compensation package. The compensation package for the 1994/1995 fiscal year is at issue here.

2 The defendant's fiscal year runs from August 1 through July 31.

The 1994/1995 compensation package was 12 pages (excluding the cover page), and set forth in detail how plaintiff was to be compensated for the year. Pursuant to the 1994/1995 compensation package, plaintiff was to be paid a base salary of $ 50,000, and she was eligible to earn monthly commissions dependent **[**4]** upon the revenues she generated. In addition to a base salary and monthly commissions, the 1994/1995 compensation package afforded plaintiff an opportunity to earn a "fiscal year end volume incentive award" (a.k.a. "year end bonus") if her actual net revenue dollars for the year exceeded her annual net revenue dollar quota. The schedule for calculating plaintiff's year-end bonus was depicted in the 1994/1995 compensation package as follows:

Percentage Above Annual Net Revenue Quota	% Payout
0-5%	5%
6-15%	10%
16-25%	15%
26% and Above	20%

[*683] Thus, under this schedule, if plaintiff's annual net revenue goal was $ 900,000 and she generated $ 1,000,000 in actual net revenue for the year, then she would have exceeded her goal by $ 100,000 (11.1%) and her year-end bonus would be $ 10,000 ($ 100,000 x 10%).

The 1994/1995 compensation package established an annual net revenue goal of $ 1,342,000 for plaintiff. That goal was subsequently increased by $ 207,000. The evidence is conflicting as to exactly *when* plaintiff's revenue goal (a.k.a. "quota") was changed. Defendant contends that plaintiff's quota was modified in February 1995, at the approximate **[**5]** mid-point of the fiscal year, after a contract between Black Enterprise and GM Mediaworks [3] was signed. (Graves Aff. at P16). [4] In its Answer to plaintiff's first discovery request, defendant states:

> Under the relevant compensation package, management reserved the right to make final quota assignments and to make goal adjustments. An adjustment was required with respect to Plaintiff's quota so as to protect the integrity and purpose of the commission compensation program. . . . Due to the activity and effort of others, advertising revenue from the automotive industry [GM] realized a net increase. Plaintiff was not entitled to enjoy commissions on the net increase in advertising revenue attributed to the activity or effort of other individuals, and thus, an appropriate adjustment was made with respect to Plaintiff's quota so as to avoid an unearned windfall for Plaintiff. [5]

In his affidavit, Earl Graves Jr. avers:

> After I negotiated the new contract with General Motors Mediaworks, plaintiff was informed that it would result in an adjustment in her personal revenue goals and the revenue goal for the entire Chicago office was likewise adjusted.

(Graves **[**6]** Aff. P16).

3 GM Mediaworks is the agency which sets rates for GM media.

4 According to Earl Graves, Jr., the Chief Operating Officer of defendant corporation, the GM Mediaworks account boosted advertising dollars thirty pages.

5 Earl G. Graves, Jr. similarly testified at his deposition as follows:

> If I believe that there have been economic trends that are either positive or negative that will impact upon the business, I will adjust the quota. If there is a - and that could be as much as the tobacco industry said that there's going to be no more advertising and, therefore, a person who has a tobacco category will be impacted upon that. I will adjust the quota. . . . If in fact a new contract is signed that would increase the overall business that we would receive from a current company or industry, we would adjust the quota upwards. If there was a judgment for a particular company that they were going to spend an additional amount of money in targeted ethnic media, which 'Black Enterprise' would fall under, that was not presumed to be happening in the beginning of the fiscal year or calendar year, that would be a reason. If there was an insert where an insert is a multiple page unit that was not anticipated when the quota was set originally and came in because of, you know, the

> sales of someone to bring in a quota - not a quota but an increased amount of ad pages that were beyond what was originally anticipated that would be a change.

(Graves Dep. at 71-72).

[7]** Plaintiff insists that her quota was not adjusted in February, 1995. According to plaintiff, her annual net revenue dollar goal was raised retroactively *after* the close of the 1994/1995 fiscal year. At her deposition, plaintiff testified that after the close of the fiscal year and after she had already generated $ 1,836,987 in net revenue, she was summoned to a meeting in New York with Earl G. Graves, Jr., the Chief Operating Officer of Earl G. Graves **[*684]** Publishing, Inc. It was at that meeting when she first learned of her quota adjustment:

> He [Butch Graves] said that he was adjusting my quota because they [defendant Earl G. Graves Publishing, Inc.] did not anticipate me to perform at that level [$ 1,836,987] and that he could do that and that that's what they were doing. They didn't expect some of the business that came in to come in and that he was adjusting the quota to reflect that. He also told me that I could not benefit from the work that he and his father put into the last 25 years. He said that Black Enterprise magazine has been doing business with these companies for over 25 years and you [plaintiff] can't benefit from it and I think we've **[**8]** been more than fair to you.

(Plaintiff Dep. at 106).

Plaintiff contends that the $ 207,000 increase in quota negatively impacted her year-end bonus by approximately $ 55,000. [6] Indeed, plaintiff "got upset" upon being informed of the quota increase and concomitant decrease in her year-end bonus.

> 6 As stated supra, the 1994/1995 compensation agreement provided that if plaintiff exceeded her quota by more than 26%, she would be paid a year-end bonus equivalent to 20% of the total amount of net revenue which exceeded her quota, but if she exceeded her quota by 16-25%, she would be paid a year-end bonus equivalent to only 15% of the total amount of net revenue which exceeded her bonus. Therefore, if the $ 1,342,000 quota set forth in the 1994/1995 compensation agreement is used to calculate plaintiff's year-end bonus, plaintiff, who generated $ 1,836,987 in revenue for the year, would earn a bonus after all the appropriate adjustments were made, of $ 98,285. On the other hand, based on the quota $ 207,000 higher than the quota contained in the compensation agreement, plaintiff was paid a year-end bonus after adjustments of only $ 43,735. Therefore, by increasing plaintiff's quota by approximately $ 200,000, defendant decreased plaintiff's year-end bonus by $ 54,500.

[9]** After the meeting between plaintiff and Butch Graves in New York, plaintiff was paid (by electronic deposit) a year-end bonus based on the increased quota. Thereafter, she began to search for a new job. In August, 1996, [7] at the conclusion of fiscal year 1995-1996, [8] plaintiff resigned from defendant corporation after securing a job with GM.

> 7 Plaintiff testified that she resigned on August 9, 1996, while Earl Graves, Jr. avers that plaintiff resigned on August 6, 1996.
>
> 8 Plaintiff's quota for 1995/1996 was $ 1,655,586 and plaintiff fell $ 33,244

short of it.

In September, 1997, approximately one year after resigning from defendant corporation, plaintiff commenced this three-count action. Counts I and II allege breach of contract, and more specifically, breach of the 1994/1995 and 1995/1996 compensation agreements. Count III alleges violations of *M.C.L.A. § 600.2961*, a provision which provides for damages to "sales representatives" when "principals" intentionally fail to pay commissions when due.

[10]** In October, 1997, the parties settled Count II of this lawsuit [9] and on May 6, 1998, this court dismissed Count III. Therefore, the only Count that remains is Count I. Plaintiff is now before the court seeking summary judgment on that count.

9 Defendant paid plaintiff $ 8,203.99 on October 24, 1997 in settlement of Count II.

Summary Judgment

Federal Rule of Civil Procedure 56(c) empowers the court to render summary judgment "forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. There is no genuine issue of material fact when the "record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348* **[*685]** *(1986)*. **[**11]** The court must decide "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *In re Dollar Corp., 25 F.3d 1320, 1323 (6th Cir. 1994)* (quoting *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986))*. "The mere existence of some alleged factual dispute between the parties will not defeat the otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson, 477 U.S. at 247-48*. In deciding a motion for summary judgment, the court must consider all evidence together with all inferences to be drawn therefrom "in a light most favorable to the party opposing the motion." *Watkins v. Northwestern Ohio Tractor Pullers Ass'n., Inc., 630 F.2d 1155, 1158 (6th Cir. 1980)*.

If the movant meets the standard specified at *Rule 56(c)*, then the opposing party must come forth with "specific facts showing that there is a genuine issue for trial." *First National Bank v. Cities Serv. Co., 391 U.S. 253, 270, 20 L. Ed. 2d 569, 88 S. Ct. 1575 (1968)*; **[**12]** *Fed. R. Civ. P. 56(e)*. The non-moving party "is not entitled to a trial merely on the basis of allegations; significant probative evidence must be presented to support the complaint." *Kraft v. United States, 991 F.2d 292, 296 (6th Cir. 1993)*, cert. denied, *510 U.S. 976, 114 S. Ct. 467, 126 L. Ed. 2d 419 (1993)*; *Gregg v. Allen-Bradley Co., 801 F.2d 859, 861 (6th Cir. 1986)*. And, "if the adverse party does not respond, summary judgment, if appropriate shall be entered against the adverse party." *Fed. R. Civ. P. 56(e)*; *Rizzo v. Goode, 423 U.S. 362, 370-71, 46 L. Ed. 2d 561, 96 S. Ct. 598 (1976)*; *O'Hara v. Wigginton, 24 F.3d 823, 826-27 (6th Cir. 1994)*.

Plaintiff's Motion for Summary Judgment on Count I

In Count I, plaintiff alleges that defendant breached the 1994/1995 compensation agreement when it "retroactively" increased her quota by $ 207,000, thereby decreasing her year-end bonus by approximately $ 55,000. Specifically, plaintiff argues that the 1994/1995 compensation agreement was an "offer" for a unilateral contract, which she accepted when she undertook efforts to solicit ad **[**13]** revenue during the 1994/1995 fiscal year. Once the offer was accepted, so plaintiff asserts, it became irrevocable and could not be modified or withdrawn absent mutual assent. Plaintiff asserts that she at no time gave her assent to a modification of the terms of the 1994/1995 compensation agreement, and thus when defendant attempted to change the terms of the same (i.e., increase her quota), it breached the contract.

The formation of a unilateral contract typically involves a case in which an offer is made by a party which invites acceptance by performance rather than by a promise to perform. *Restatement (Second) of Contracts, § 45, cmt. a* (1979). See also A. Farnsworth, Contracts § 3.4 (2d ed. 1990); 1 Arthur L. Corbin, Corbin on Contracts § 70 (1963). Once an offer for a unilateral contract is made, and part of the requested performance has been rendered by the offeree, the offer cannot be unilaterally revoked or modified. *Restatement (Second) of Contracts §§ 25, 45 & cmt. d* (1981); 1 Corbin, Contracts § 63 (1952); 1 Williston on Contracts (rev. ed. 1990), § 5:13, 691-692.

Corbin on Contracts sets forth the following discussion of unilateral contracts **[**14]** with regard to bonus programs offered by employers, which is particularly relevant in this case.

> The same unilateral contract analysis is applicable to the employer's promise to pay a bonus or pension to an employee in case the latter continues to serve for a stated period. It is now recognized that these are not pure gratuities but compensation for services rendered. The employer's promise is not enforceable when made, but the employee can accept **[*686]** the offer by continuing to serve as requested, even though the employee makes no promise. There is no mutuality of obligation, but there is consideration in the form of service rendered. The employee's one consideration, rendition of services, supports all of the employer's promises, to pay the salary and to pay the bonus. Indeed, although the bonus is not fully earned until the service has continued for the full time, after a substantial part of the service has been rendered the offer of the bonus cannot be withdrawn without a breach of contract.

2 Corbin, Contracts § 6.2 (rev. ed. 1995).

Michigan courts have applied the theory of "unilateral contracts" in a number of cases involving job benefits. For instance, **[**15]** in *Cain v. Allen Electric & Equipment Co., 346 Mich. 568, 78 N.W.2d 296 (1956)*, the court found that a personnel policy containing a severance pay provision presented an offer for a unilateral contract. The court stated, "the essence of the announcement was precisely that the company would conduct itself in a certain way with the stated objective of achieving fairness, and we would be reluctant to hold under such circumstances that an employee might not reasonably rely on the expression made and conduct himself accordingly." *Id. at 579*. The court further stated:

> In short, the adoption of the described policies by the company [regarding severance pay] constituted an offer of contract. This offer, as the trial court correctly held, 'the plaintiff accepted * * * by continuing in its employment beyond the 5-year period specified in exhibit B (the termination pay policy).' The offer having thus been accepted it was not within defendant's power to

> withdraw it when called upon to perform. The 'change or amendment to which the company policy was said, in its preamble, to be subject, could not encompass denial of a contract right gained through **[**16]** acceptance of an offer.

Id. at 579-80.

Likewise, in *Gaydos v. White Motor Co., 54 Mich. App. 143, 220 N.W.2d 697 (1974)*, the Michigan Court of Appeals found a severance pay policy constituted an offer of contract and not a mere gratuity. *Id. at 148.* The court stated that "as the employees continued to work [after the policy was established], consideration was supplied for a unilateral contract, upon which the employees had the right to rely." Id. See also *Clarke v. Brunswick Corp., 48 Mich. App. 667, 211 N.W.2d 101 (1973)* (holding that a severance pay policy was a unilateral contract); *Couch v. Difco Lab, Inc., 44 Mich. App. 44, 205 N.W.2d 24 (1972)* (finding that by establishing a profit-sharing plan, defendant-company offered to make certain payments for the benefit of its salaried employees who continued to render their services).

This court finds that, similar to the severance pay policies in Cain and Gaydos, the 1994/1995 compensation agreement was an offer for a unilateral contract. It was an announcement as to the way the company would conduct itself, and it could be **[**17]** accepted only by the plaintiff's performance. *Cain, 346 Mich. at 579.* The 1994/1995 compensation agreement stated in part:

> This Fiscal Year End Volume Incentive Plan will reward you if you generate net revenue above your annual quota, and will be paid based on an escalating percentage of net revenue above your annual quota. The percentage breakdown is as follows:

* Above Annual Net Revenue Quota	% Payout
...	
26% and Above	20%

[*687] Defendant contends that the 1994/1995 compensation agreement was not an offer for a unilateral contract. Defendant contends that unilateral contract theory is inapplicable where there is a subjective element to the performance required to effectuate the offer. There was a subjective element here, so defendant asserts, because it had discretion to assign plaintiff any amount of revenue credit that it desired and that determination affected the amount of plaintiff's year-end incentive award. This court is unpersuaded by defendant's argument for the simple reason that defendant cites absolutely no authority to support it. In fact, authority runs contrary to the argument advanced by the defendants. **[**18]** For instance, *Illustration 6 to Section 45 of the Restatement (Second) of Contracts* demonstrates that a unilateral contract can arise even if the requested performance is as "subjective" as "caring for" another person:

> A writes to her daughter B,

> living in another state, an offer to leave A's farm to B if B gives up her home and cares for A during A's life, B remaining free to terminate the arrangement at any time. B gives up her home, moves to A's farm, and begins caring for A. A is bound by an option contract.

Having found that an offer for a unilateral contract was made in the 1994/1995 compensation package, the question thus becomes whether defendant could modify it without the mutual assent of both parties after plaintiff began substantially performing under the 1994/1995 compensation package. This court finds that it could not. Cain and Gaydos make that clear. [10]

> 10 Defendant contends that it could modify the contract any time prior to acceptance, or in other words, any time prior to the end of the fiscal year after plaintiff's total revenue for that year was determined. Yet, this is an erroneous statement of the law. Unilateral contracts cannot be modified once performance is begun.

[19] Was the Quota Increase A Modification?**

The alteration to plaintiff's quota was most certainly a modification. There is no provision in the 1994/1995 compensation agreement which provides for such a modification.

Defendant contends that the quota adjustment was not a "modification" to the offer contained in the 1994/1995 compensation package regarding plaintiff's volume incentive award. Defendant argues that Paragraph 12 of the 1994/1995 compensation package cloaks it with the authority to unilaterally change plaintiff's quota at any time. That Paragraph states:

> Settling disputes on the proper credit of revenue ad pages is the sole responsibility of management.

This court is not persuaded by defendant's argument and finds Paragraph 12 completely irrelevant here. That provision only becomes applicable when a dispute arises regarding the proper amount of revenue ad page credit that should be attributed to a given employee. In this case, there was no such dispute. Defendant credited plaintiff with 159.48 in revenue ad pages ($ 1,835,987 in ad revenue) for the 1994/1995 fiscal year. See Exhibits E and H to plaintiff's renewed motion for summary judgment.

[20]** Defendant argues that plaintiff should not have received credit for 159.48 pages since she did not sell all of those pages herself. Defendant contends that some of those pages were sold by others, such as Earl G. Graves, Jr. Defendant requests that this court allow a jury to assess plaintiff's performance, determine if plaintiff sold 159.48 pages and determine if she should be compensated based on that amount of sales. This court will not allow a trial to proceed on such issues. It is entirely too late for the defendant to argue that plaintiff was not responsible for generating such sales. While the defendant at an earlier time may have had discretion under Paragraph 12 to credit plaintiff with generating less than 159.48 pages ($ 1,835,987), the fact of the matter is that defendant **[*688]** did not exercise that discretion. It is uncontroverted that at the end of fiscal year 1994/1995, the defendant credited plaintiff with selling 159.48 pages and generating $ 1,835,987 in revenue. Exhibits E and H to plaintiff's renewed motion for summary judgment show this. Moreover, plaintiff earned and was paid monthly commissions based on ad pages totaling 159.48 and revenue totaling **[**21]** $ 1,835,987. Therefore, the question may be asked, why did defendant credit plaintiff with such sales for purposes of calculating her monthly commissions if plaintiff was not responsible for them? The question answers itself. Certainly, defendant would not have credited plaintiff for the increased General Motors sales activity if she was not responsible for it. In fact, it would have been contrary to the plain language of the 1994/1995 compensation agreement for defendant to do so. The 1994/1995 compensation agreement provides that plaintiff is to be paid a monthly commission based on the actual net revenue dollars she generated in that particular month. [11]

> 11 When asked at the hearing why defendant chose to assign plaintiff with 159.48 pages in ad credit when plaintiff purportedly was not responsible for such sales, defense counsel had no answer. Defense counsel stated that, in hindsight, it should not have increased plaintiff's quota, but rather it should have given her less credit for sales than it did. As this court sees it, an entirely different question would be before this court if defendant had not increased plaintiff's quota but rather given her less ad revenue credit.

[22]** In addition to Paragraph 12, defendant relies on *In re Certified Question v. Storer Broad Casting Co., 432 Mich. 438, 443 N.W.2d 112 (1989)*, asserting that this provides it authority to unilaterally modify plaintiff's quota at any time. Yet, this court does not find Storer on point. In Storer, the court held that an employer may unilaterally change a written discharge for cause policy to an employment at-will policy even though the right to make such a change was not expressly reserved at the outset, provided that the employer provides the employee reasonable notice of the change. The court in Storer recognized that the case would be altogether different if it involved a benefit "already accrued or 'vested'" such as a pension and death benefit or severance pay. *Id. at 457, n.17.* As this court sees it, the case sub judice does involve a "vested right." Once plaintiff sold a certain amount of revenue, she expected to be paid a certain amount of incentive. Moreover, Storer is distinguishable on another level. The decision in Storer was based on the "legitimate expectations" analysis employed in *Toussaint v. Blue Cross & Blue Shield of Michigan, 408 Mich. 579, 292 N.W.2d 880 (1980)*. **[**23]** This case does not rest on such a doctrine, instead, this case is predicated upon an express agreement, and more specifically a unilateral contract.

Having found that defendant clearly modified the unilateral offer when it changed her quota, the follow up question is whether plaintiff assented to the modification. There is no evidence in the record that plaintiff ever assented to such a modification. Assuming for the sake of argument that plaintiff was presented with her quota change in February 1995, the fact that she remained at the defendant company for over one year after learning of the quota change is not, in this court's eyes, evidence of her assent. *Farrell v. Automobile Club of Michigan, 187 Mich. App. 220, 228, 466 N.W.2d 298 (1990)* (rejecting the argument that acceptance of an offer for a modification to an employment contract can be presumed from the mere fact of continued employment and noting that such an offer could never be rejected absent one leaving employment).

In sum, the 1994/1995 compensation agreement contained a unilateral offer that plaintiff would receive a fiscal year end volume incentive award of 20% of the amount her net revenue exceeded **[**24]** her net revenue quota of $ 1,342,000. Once plaintiff began substantially performing, that offer could not be modified without plaintiff's **[*689]** assent. Here, the uncontroverted evidence is that plaintiff's quota was changed without any assent by her to the same. Thus, as a matter of law this court finds that defendant breached a contract with the plaintiff. Judgment should be entered in favor of the plaintiff for $ 54,550, the difference between the amount she was paid as a year-end volume incentive award and the amount she should have been paid under the terms of the 1994/1995 compensation package as originally presented to her. Plaintiff is also entitled to interest at the statutory rate.

ORDER

IT IS HEREBY ORDERED that plaintiff's renewed motion for summary judgment on Count I is GRANTED.

IT IS FURTHER ORDERED that the parties submit a proposed judgment as to all Counts in plaintiff's complaint no later than August 14, 1998.

SO ORDERED.

Dated: 8/5/98

PAUL V. GADOLA

UNITED STATES DISTRICT JUDGE

JUDGMENT

This action came before the court, Honorable Paul V. Gadola, District Judge, presiding, and the issues having been duly **[**25]** reviewed and a decision having been duly rendered.

IT IS ORDERED AND ADJUDGED that judgment be entered for the plaintiff Sharon Yvonne Holland on Count I in the amount of $ 54,500, as well as post-judgment interest calculated in accordance with *28 U.S.C. § 1961*.

IT IS FURTHER ORDERED AND ADJUDGED that Count II is dismissed with prejudice as it has been settled by the parties.

IT IS FURTHER ORDERED AND ADJUDGED that judgment be entered for the defendant Earl G. Graves Publishing Co., Inc. on Count III and that plaintiff takes nothing on this Count.

It is further **ORDERED** that the clerk serve a copy of the judgment by United States mail on the counsel for plaintiffs and on counsel for defendants.

Dated at Flint, Michigan, this 5TH day of AUGUST, 1998.

APPROVED:

PAUL V. GADOLA

UNITED STATES DISTRICT JUDGE

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BRUCE A. HOWELL, ET AL., Plaintiffs, Appellants, v. FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER FOR ELIOT SAVINGS BANK, Defendant, Appellee.

No. 92-1542

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

986 F.2d 569; *1993 U.S. App. LEXIS 2358*

February 17, 1993, Decided

SUBSEQUENT HISTORY: [**1] As Amended March 11, 1993.

PRIOR HISTORY: APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. Hon. William G. Young, U.S. District Judge

DISPOSITION: The judgment of the district court is affirmed.

COUNSEL: Edwin A. McCabe with whom Karen Chinn Lyons, Joseph P. Davis, III, The McCabe Group, and Lawrence Sager were on brief for appellant.

Lawrence H. Richmond, Counsel, Federal Deposit Insurance Corporation, with whom Ann S. DuRoss, Assistant General Counsel, Federal Deposit Insurance Corporation, Colleen B. Bombardier, Senior Counsel, Federal Deposit Insurance Corporation, John C. Foskett, Michael P. Ridulfo and Deutsch Williams Brooks DeRensis Holland & Drachman, P.C. were on brief for appellee.

JUDGES: Before Breyer, Chief Judge, Higginbotham, Senior Circuit Judge, * and Boudin, Circuit Judge.

* of the Third Circuit, sitting by designation.

OPINION BY: BOUDIN

OPINION

[*570] BOUDIN, *Circuit Judge.*

Appellants in this case are former officers of a failed bank. They sued the FDIC as the bank's receiver when the FDIC disallowed their claims for severance pay under their contracts with the bank. The district court sustained the FDIC, reasoning that Congress had restricted such claims. Although the statute in question is not easily construed and the [**2] result is a severe one, we believe that the officers' claims fail, and we sustain the district court.

The facts, shorn of flourishes added by the parties, are simple. In 1988 and 1989, the four appellants in this case were officers of Eliot Savings Bank ("Eliot") in Massachusetts. In

November 1988, when Eliot was undergoing financial strain, Eliot made an agreement with Charles Noble, its executive vice president, committing the bank to make severance payments (computed under a formula but apparently equivalent to three years' salary) if his employment were terminated. In August 1989, the bank entered into letter agreements with three other officers--appellants Bruce Howell, Patricia McSweeney, and Laurence Richard--promising them each a year's salary as severance in the event of termination. Finally, in December 1989 a further letter agreement was made with Noble, reaffirming the earlier agreement with him while modifying it in certain respects.

The agreements make clear that they were not intended to alter the "at will" employment relationship between Eliot and the officers. The bank remained free to terminate the officers, subject to severance payments, and (so far as appears) **[**3]** the officers were not bound to remain for any fixed term. The letter agreements with the three officers other than Noble state that the severance payments were promised in consideration of the officers' "willingness to remain" in the bank's employ; and the same intent can be gleaned from the two agreements with Noble. The weakened financial condition of the bank is adverted to in each of the four 1989 agreements.

At some point in 1989 the FDIC began to scrutinize closely Eliot's affairs. The officers allege, on information and belief, that the FDIC and the bank agreed that Eliot **[*571]** would take steps to retain its qualified management; and the complaint states that the FDIC "knew and approved" of the four letter agreements made in 1989. The officers also contend that they were advised by experienced counsel at a respected law firm that the severance agreements were valid and would withstand an FDIC receivership if one ensued. It is further alleged that, in December 1989, the FDIC and the bank entered into a consent order that provided that the bank would continue to retain qualified management.

Eliot failed and was closed on June 29, 1990. The FDIC was appointed its receiver. Within two **[**4]** months, the officers were terminated. The officers then made administrative claims for their severance benefits pursuant to applicable provisions of FIRREA, *12 U.S.C. §§ 1821(d)(3), (5)*, the statute enacted in 1989 to cope with the torrent of bank failures. [1] In October 1990, the FDIC disallowed the claims, stating that the claims violated public policy. Although the FDIC letter is not before us, it apparently is based upon the FDIC's general opposition to what are sometimes called "golden parachute payments," a subject to which we will return. Following the disallowance, the officers pursued their option, expressly provided by FIRREA, to bring an original action in federal district court. *12 U.S.C. § 1821(d)(6).*

1 FIRREA is the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 103 Stat. 183, codified in various sections of 12 and 18 U.S.C. Among other changes, FIRREA amended pre-existing provisions specifying the FDIC's powers as receiver and the claims provisions governing claims against failed banks.

[5]** In their district court complaint, the officers asserted claims against the FDIC for breach of contract, for breach of the contracts' implied covenant of fair dealing, and for detrimental reliance. The FDIC moved to dismiss or for summary judgment. Thereafter, the officers sought to amend their complaint by adding a promissory estoppel claim and by explicitly naming the FDIC in its "corporate capacity" as well as in its capacity as receiver. In a bench decision, the district judge ruled that the FDIC had lawfully repudiated the contracts between Eliot and the officers and that under FIRREA there were no compensable damages for the resulting breach. As for the promissory estoppel claim, the court deemed it "futile" and refused to allow the amendment; the court referred to the general principle that estoppel does not operate against the government and to the FDIC's broad grant of authority under FIRREA. The officers then sought review in this court.

The first claim made on appeal, taken in order of logic, is that the FDIC's repudiation of the severance agreements was itself invalid. At this point we need to explain briefly the structure of the statute. ***Section 1821* governs, among other [**6] matters, the powers of the FDIC as receiver, *12 U.S.C. § 1821(d)*, the procedure for processing claims against the failed bank, *12 U.S.C. §§ 1821(d)(3)*, *(5)*, and substantive rules for contracts entered into prior to the receivership. *12 U.S.C. § 1821(e)*. *Section 1821(e)(1)* gives the receiver the right to disaffirm or repudiate any contract that the bank may have made before receivership if the FDIC decides "in its discretion" that performance will be "burdensome" and that disavowal will "promote the orderly administration" of the failed bank's affairs.** 12 U.S.C. § 821(e)(1).

The power of a receiver to repudiate prior executory contracts made by the debtor, a familiar incident of bankruptcy law, see *11 U.S.C. § 365* (executory contracts and unexpired leases), means something less than might appear. By repudiating the contract the receiver is freed from having to comply with the contract, *e.g.*, *American Medical Supply, Inc.* v. *FTC, 1990 U.S. Dist. LEXIS 5355 (D. Kan. 1990)* [**7] (specific enforcement), but the repudiation is treated as a breach of contract that gives rise to an ordinary contract claim for damages, if any. Whether that claim is then "allowed" by the receiver and if so whether there are assets to satisfy it, are distinct questions; at this point we are concerned only with the receiver's authority to affirm or disaffirm. In this case the officers do not dispute that the [*572] FDIC did repudiate the severance agreements. Rather the officers argue that the repudiation is ineffective, and the agreements remain enforceable, because the FDIC did not make the statutory findings, or abused its discretion, or both.

Interesting questions are posed by such a challenge, but the questions need not be resolved in this case. The claim was not made in the district court and, accordingly, it is waived. *Clauson v. Smith, 823 F.2d 660, 666 (1st Cir. 1987)*. The complaint makes only the barest reference to abuse of discretion by the FDIC, mentioning it not as a separate claim but in the prefatory description of facts; and there is no reference whatever to this line of argument, or to lack of required FDIC findings, in the opposition [**8] filed by the officers to the FDIC's motion to dismiss. A litigant would normally have an uphill battle in overturning an FDIC finding of "burden," if the FDIC made one, but in all events the issue has not been preserved in this case.

The second ground of appeal raises the central question before us, namely, whether a damage claim based on a repudiated severance contract is allowed under FIRREA. A stranger to FIRREA might think it apparent that breach of a contract to make severance payments inflicts damages on a discharged employee in the amount of the promised payments. **The hitch is that in FIRREA Congress adopted restrictive rules that limit the damages permitted for repudiated contracts. *12 U.S.C. § 1821(e)*. In a general provision subject to certain exceptions, *12 U.S.C. § 1821(e)(3)(A)(i)* provides that the receiver's liability for a repudiated contract is "limited to actual direct compensatory damages . . . ."** Additionally, *section 1821(e)(3)(B)* provides:

> **For purposes of subparagraph (A), the term 'actual direct compensatory damages' does not include--**
>
> **(i) punitive or exemplary**

damages;

(ii) damages [9] for lost profits or opportunities; or**

(iii) damages for pain and suffering.

The question thus framed is whether, or to what extent, the statute's limitation to "actual direct compensatory damages" bars the contractual severance claims made in this case. [2] The question is easy to state but less easy to answer. Although FIRREA's concept of limiting allowable claims for contract damages echoes the approach of the Bankruptcy Code, *11 U.S.C. 502*, that statute is more specific and informative. **In particular, *section 502(b)(7)* limits claims by a terminated employee for future compensation to one year's pay. So far as appears from the parties' briefs, FIRREA's broad exclusionary language ("actual direct compensatory damages") has been plucked out of the air by Congress, although the general purpose is obvious enough. If there is any illuminating legislative history or precedent, it has not been called to our attention by the parties and we have been unable to locate anything very helpful.**

2 We do not reach the FDIC's alternative argument that the severance pay would be barred as representing "lost profits or opportunity."

[10]** It is fair to guess that Congress, faced with mountainous bank failures, determined to pare back damage claims founded on repudiated contracts. In all likelihood, the legislators knew that many uninsured depositors and other unsecured creditors would recover little from failed banks; and the government's own liability (to insured depositors) would be effectively increased to the extent that remaining assets went to contract-claim creditors of the bank rather than to the government (as the subrogee for the insured depositors whom the FDIC compensated directly). It is thus not surprising that Congress might wish to disallow certain damage claims deemed less worthy than other claims. This assessment casts some light on Congress' approach and provides a predicate for considering the severance contract claims posed in this case.

We conclude, not without some misgivings, that the officers' claims do not comprise allowable claims under FIRREA. [*573] The amounts stipulated by the Eliot contracts are easily determined--a formula payment for Noble and a year's pay for the others. But the statute calls upon the courts to determine the *nature* of the damages stipulated by the contract or sought **[**11]** by the claimant in order to rule out any but those permitted by Congress. In this case, analysis persuades us that the damages provided by Eliot's repudiated severance contracts with its officers, and sought by the appellants for their breach in this case, are not "actual direct compensatory damages" under *12 U.S.C. § 1821(e)(1)(A)(i)*.

Severance payments, stipulated in advance, are at best an estimate of likely harm made at a time when only prediction is possible. When discharge actually occurs, the employee may have no way to prove the loss from alternative employments foregone, not to mention possible disputes about the discharged employee's ability to mitigate damages by finding new employment. A severance agreement properly protects against these uncertainties by liquidating the liability. Such payments comprise or are analogous to "liquidated damages," at least when the amount is not so large as to constitute an unenforceable penalty. *See generally* E. Allan Farnsworth, *Contracts* § 12.18 (2d ed. 1990); Charles McCormick, *Damages* § 146 (1935). [3]

3 Of course, the other office of a severance agreement may be to provide a cause of action for an at will employee

who otherwise has no contractual claim at all. *E.g., Pearson v. John Hancock Mutual Life Ins. Co., 979 F.2d 254, 258 (1st Cir. 1992)*. In this case, the at will status of the appellants is not decisive; they did have contracts and our task is to see whether the promised payments fit into FIRREA's compensable-damage pigeonhole.

[12]** Unfortunately for the appellants, the statutory language--"actual direct compensatory damages"--does not quite embrace the payments promised by the officers' severance agreements. Eliot's officers may, or may not, have suffered injury by remaining at the bank, depending on what options they had in the past that are not available now. Conceivably, they suffered no damage at all; conceivably, their actual damages from staying at Eliot exceed the amounts stipulated in the agreements. The point is that severance payments of this class do not comprise actual damages. Thus, based on statutory language alone, the starting point for statutory construction, the FDIC appears to have the better case.

One might argue that, although the severance payments are not actual damages, they are often a good-faith effort to estimate such damages and should in such cases be permitted as consistent with the spirit of the statute, if not its language. But the spirit of the statute is quite otherwise. The statute actually excludes (see *12 U.S.C. § 1821(e)(3)(B)*) two less-favored categories of what are indisputably actual damages (lost profits, pain and suffering), reinforcing **[**13]** the impression that Congress intended strictly to limit allowable claims for repudiated contracts. The treatment of leases in the next subsection is yet further evidence of Congress' temper. *12 U.S.C. § 1821(e)(4)* provides that, if the receiver disaffirms a lease to which the bank was lessee, the lessor's damages are limited to past rent and loss of future rent is not compensable. Yet the lessor may have accepted a lower monthly rent in exchange for a long-term lease and protection against the risk of an empty building. As with severance pay, the lessor may have foregone other opportunities but the loss is not to be recompensed.

Each side has offered in its favor still broader policy arguments. The officers claim that the disallowance of promised severance pay will mean that a troubled bank cannot effectively contract to retain able officers who may rescue it. The FDIC, by contrast, implies that the present arrangements may be "golden parachutes" by which insiders take advantage of the crisis to assure themselves of a handsome farewell gift from a failing bank. The FDIC also points to regulations it has proposed, but not yet adopted, to curtail **[**14]** severely such arrangements; its new rules would disallow severance contracts for bank officials except in narrowly defined conditions, such as where an officer is induced to *leave* another post to help a troubled **[*574]** thrift. [4] The FDIC claims that the regulations and their authorizing statute reflect public policy.

4 The regulations were proposed on October 7, 1991, *56 FR 50529* , pursuant to the Comprehensive Thrift and Bank Fraud Prosection and Taxpayer Recovery Act of 1990, 104 Stat. 4859, adding *12 U.S.C. § 1828(k)* (FDIC "may prohibit or limit, by regulation or order, any golden parachute payment. . . .").

The policy arguments of the officers and the FDIC may each have some force, to some extent they offset each other, and neither set is decisive in this case. In answer to the officers, it may be said that their argument presents a fact and policy question best left to Congress and to expert bank regulators; those bodies in turn have ample incentives **[**15]** to make the right adjustment in delimiting severance agreements. As to the FDIC's argument, Congress has not declared severance payments unlawful but merely authorized the FDIC to do so, and the latter's proposed regulations are not yet in force. Further, this case arises on a motion to dismiss, so there is no basis whatever for considering any imputation of bad motive or misconduct on the part of Eliot's officers.

The officers' last argument in support of their contract claims is that the "actual damage" restriction, if read as the FDIC urges, is an unconstitutional taking. Alternatively, they say that the statute is so close to the line that it should be read favorably to them to avoid a constitutional question. These arguments were not made in the district court and we decline to consider them. Litigation is a winnowing process and, except in criminal cases where the stakes are different, only in extraordinary circumstances will we take up a contention that has not been made in the district court. We note that arguments that the FDIC might itself have made, but did not, have been similarly ignored, including a possible claim that its *order* disallowing the severance claims is **[**16]** a currently effective "order" under the golden parachute statute, *12 U.S.C. § 1828(k)*.

What remains to be considered are the detrimental reliance claim in the original complaint and the related promissory estoppel claim advanced by the attempted amendment. In substance, the officers argue that the FDIC, acting in its supervisory or "corporate" capacity prior to Eliot's failure, was so closely associated with the bank's severance promises that their repudiation by the FDIC as receiver violates estoppel doctrine or gives rise to a new claim against the FDIC. That the FDIC was implicated in forming the severance contracts is a factual proposition, apparently denied by the FDIC, but we must accept the proposition as true for purposes of reviewing the motion to dismiss.

The FDIC seeks to answer the officers' estoppel and reliance argument by citing to cases that say that the FDIC is treated as two separate persons when acting in its "corporate" capacity as a regulator and when acting in its capacity as receiver. *E.g., FDIC v. Roldan Fonseca, 795 F.2d 1102, 1109 (1st Cir. 1986)*. On this theory, the FDIC is not liable **[**17]** in this case as regulator, even if it affiliated itself with the promise of severance pay, since "it" (the FDIC as regulator) did not break the promise; and as receiver, the FDIC was free to disavow the contracts because "it" (the FDIC as receiver) made no promises.

The officers argue that this "separate capacities" doctrine was designed for a different purpose and should not be applied in the present context to produce an unjust result. But the Eighth Circuit applied this doctrine without much hesitation to a case in which the FDIC as receiver sought to repudiate a lease it had previously accepted in its capacity as "conservator," conservator being yet another incarnation in which the FDIC sometimes appears. *RTC v. CedarMinn Building Limited Partnership, 956 F.2d 1446* (8th Cir.), *cert. denied, 113 S. Ct. 94 (1992)*. As for the claimed injustice, it is not clear that any apparent inequity worked in this case is greater than occurs in the usual case in which the separate-capacities doctrine is invoked. *FDIC v. Roldon Fonseca, 795 F.2d at 1109*.

[*575] There is another answer to the officers' **[**18]** claim that rests more solidly on visible policy. Putting to one side the separate capacities defense, courts are for obvious reasons reluctant to permit estoppels against the United States, *e.g., Heckler v. Services of Crawford County, 467 U.S. 51, 60 (1984)*, although exceptions may be found. *United States v. Pennsylvania Industrial Chemical Corp., 411 U.S. 655, 670-675, 36 L. Ed. 2d 567, 93 S. Ct. 1804 (1973)*. There are many reasons for the reluctance, including a concern for the public purse and a recognition that the government--unlike the normal actor--is an enterprise so vast and complex as to preclude perfect consistency. *See generally Hansen v. Harris, 619 F.2d 942, 649-58 (2d Cir. 1980)* (Friendly, J., dissenting), *rev'd sub nom. Schweiker v. Hansen, 450 U.S. 785, 67 L. Ed. 2d 685, 101 S. Ct. 1468 (1981)*. While leaving many questions unanswered, the Supreme Court has made clear that an estoppel against the United States is not measured by the rules used for ordinary litigants. *Heckler, 467 U.S. at 62*.

In the present case, even the most liberal reading of the reliance **[**19]** and estoppel counts leaves the FDIC in the position of one who encouraged or invited the bank's promise of severance pay. Yet (as we construe the actual damages clause), Congress has decided that, in parceling out fairly the limited assets of a failed bank, contract damages reflecting severance pay are not permitted. "To permit [the claim] . . . would be judicially to admit at the back door that which has been legislatively turned away at the front door." *FDIC v. Cobblestone Corp., 1992 U.S. Dist. LEXIS 17024 (D. Mass. 1992)*. It is hard to imagine a less attractive case for creating a new judicial exception to the general rule against estoppel of the government.

The judgment of the district court is *affirmed*.

E X H I B I T 3

PAUL V. ERWIN, Plaintiff, v. FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for USA BANK, Defendant.

10 CV 9467 (VB)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2012 U.S. Dist. LEXIS 99451

June 6, 2012, Decided
June 6, 2012, Filed

COUNSEL: [*1] Paul V. Erwin, Plaintiff, Pro se, Orange, CT.

For Federal Deposit Insurance Corporation, as receiver for USA Bank, Defendant: Thomas M. Clark, LEAD ATTORNEY, Federal Deposit Insurance Company (NYC), New York, NY.

JUDGES: Vincent L. Briccetti, United States District Judge.

OPINION BY: Vincent L. Briccetti

OPINION

MEMORANDUM DECISION

Briccetti, J.:

Plaintiff Paul V. Erwin, proceeding pro se, brings this breach of contract action. Now pending is defendant Federal Deposit Insurance Corporation's ("FDIC") motion to dismiss the complaint. (Doc. #10). For the following reasons, defendant's motion is GRANTED in part and DENIED in part.

The Court has subject matter jurisdiction pursuant to *28 U.S.C. § 1331*.

BACKGROUND

For purposes of ruling on a motion to dismiss pursuant to *Rule 12(b)(6)*, the Court accepts all factual allegations of the amended complaint as true.

On July 26, 2005, plaintiff entered into an employment agreement with USA Bank. The agreement entitled plaintiff to a severance payment of $200,000 if he were to lose his position as a result of a change of control of the bank at any time within seven years from the plaintiff's start date of August 16, 2005. USA Bank also had a severance policy in its Employee Policies [*2] and Procedures Manual that entitled all employees in good standing to two weeks of severance payments for each year of service or portion thereof.

On July 9, 2010, USA Bank was closed by the New York State Banking Department, and the FDIC was appointed as receiver. On July 10, 2010, USA Bank was opened as a division of Customers First Bank. On the same day, plaintiff was informed by the FDIC that he would be terminated. At the FDIC's request, plaintiff continued to work through July 12,

2010. He submitted his employment agreement to the FDIC and requested they pay the severance fee.

On July 12, 2010, the FDIC informed plaintiff it was disaffirming his employment contract and advised him of his right to file a claim against the receivership estate.

Plaintiff filed a proof of claim form with the FDIC on October 7, 2010. On October 19, 2010, the FDIC responded with a notice of disallowance of claim, stating that plaintiff's employment agreement was repudiated and his request for severance was denied. Plaintiff commenced this action on December 15, 2010.

DISCUSSION

I. Legal Standards

Defendant moves to dismiss the complaint pursuant to *Rule 12(b)(6)*. When deciding such a motion, the Court must **[*3]** accept all well-pleaded allegations as true and draw all reasonable inferences in favor of the pleader. *Hishon v. King, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984)*. The complaint must contain the grounds upon which the claim rests through factual allegations sufficient "to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*.

To determine which allegations it may consider, the Court first identifies conclusory pleadings that are not entitled to the assumption of truth. *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.") (citing *Bell Atl. Corp. v. Twombly, 550 U.S. at 555*). Once it has identified well-pleaded factual allegations, the Court should "assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal, 556 U.S. at 679*. The Supreme Court has determined that "a claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a 'probability **[*4]** requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id. at 678* (quoting *Twombly, 550 U.S. at 556-57*).

Because plaintiff brings this action pro se, the Court construes his complaint "broadly," raising "the strongest argument that it suggests." *Weixel v. Bd. of Educ. of City of N.Y., 287 F.3d 138, 146 (2d Cir. 2002)*.

II. Plaintiff's Claim for Severance Under His Employment Contract

Plaintiff seeks damages for defendant's disallowance of his claim for severance pursuant to his employment agreement. The Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA") allows the FDIC to repudiate contracts it deems burdensome, so long as the repudiation of the contract will promote the orderly administration of the financial institution's affairs. See *12 U.S.C. § 1821(e)(1)*. Once a contract is repudiated, the FDIC's action is treated as a breach of contract that gives rise to a claim for damages. See *Howell v. FDIC, 986 F.2d 569, 571 (1st Cir. 1993)*; *Fresca v. FDIC, 818 F. Supp. 664, 670 (S.D.N.Y. 1993)*.

Such damages are "limited to actual direct compensatory damages" incurred as of the date of the appointment of the receiver. See **[*5]** *12 U.S.C. §§ 1821(e)(3)(A)*. The statute explicitly provides that actual direct compensatory damages do not include "punitive or exemplary damages," "damages for lost profits or opportunity," or "damages for pain and suffering." *12 U.S.C. § 1821(e)(3)(B)*.

The Courts of Appeals are divided on the issue whether the FDIC is liable for damages when it lawfully repudiates a severance agreement.[1] In *Howell v. FDIC*, the First

Circuit held that severance payments do not constitute "actual direct compensatory damages" under *Section 1821(e)* because those payment amounts are speculative. The Court concluded that severance agreements were estimates of potential damages from lost employment opportunity, and because the employee could be either better or worse off for having remained with the employer, the severance amounts were more properly considered analogous to liquidated damages rather than actual damages. Therefore, they were precluded by the statute. See *986 F.2d at 573*. The Third Circuit followed this reasoning. See *Hennessy v. FDIC, 58 F.3d 908, 921 (3d Cir. 1995)*; *McCarron v. FDIC, 111 F.3d 1089, 1095 (3d Cir. 1997)*.

1 The parties do not cite, and the Court is not aware of, a case in the **[*6]** Second Circuit that decides this issue.

Conversely, The Court of Appeals for the District of Columbia Circuit declined to follow *Howell* when it considered this issue. In *Office & Professional Employees Int'l Union, Local 2 v. FDIC* ("*OPEIU*"), the Court concluded that the First Circuit had overlooked the fact that severance payments were not liquidated damages, but part of consideration for employment contracts. The bank did not breach the contract when it terminated the employees, but rather when it refused to pay severance, and therefore the damages were properly considered a modification of the at will employment relationship. The Court thus concluded that "severance payments are properly characterized as consideration for entering into (or continuing under) the employment contract and therefore are compensable as actual damages under FIRREA when the contract is repudiated." *27 F.3d 598, 603-04, 307 U.S. App. D.C. 148 (D.C. Cir. 1994)*. The Ninth and Eleventh Circuits have concurred with *OPEIU's* reasoning. See *Monrad v. FDIC, 62 F.3d 1169, 1174 (9th Cir. 1995)*; *McMillian v. FDIC, 81 F.3d 1041, 1055 (11th Cir. 1996)*.

Defendant urges the Court to follow *Howell* and conclude that severance pay agreements are not **[*7]** considered actual direct compensatory damages under *Section 1821(e)*. Defendant further argues that, because plaintiff was still employed as of the date the FDIC was appointed receiver, his damages were not fixed and certain at that time and therefore it has no liability for plaintiff's severance pay. The Court in *OPEIU* rejected this argument, concluding that "[t]he employees had a right to severance pay as of the date of the appointment -- albeit a contingent one -- and that right should be treated essentially the same as the right to accrued vacation pay or health benefits." *OPEIU, 27 F.3d at 601*.

The Court agrees with the reasoning in *OPEIU*. Severance provisions are included in "actual direct compensatory damages" under *12 U.S.C. § 1821(e)(3)*, and are properly compensable under FIRREA when the contract is repudiated. *OPEIU, 27 F.3d at 603-04*.[2]

2 Defendant's argument characterizing plaintiff's severance agreement as a golden parachute payment is premature at the motion to dismiss stage.

III. Plaintiff's Claim for Severance Pursuant to the Employee Manual

Plaintiff seeks, in the alternative, severance that he would have been owed pursuant to the policies set forth in the employee manual. **[*8]** Defendants argue that because plaintiff did not submit this claim through the receivership claims process, the Court lacks subject-matter jurisdiction over the claim.

FIRREA limits subject-matter jurisdiction over claims against a failed bank for which the FDIC has been appointed receiver. FIRREA creates a mandatory receivership claims process for all claims relating to any act or omission of a failed bank for which the FDIC has been appointed receiver. The FDIC has the power to determine such claims and disallow claims not proven to its satisfaction. See *12 U.S.C. §§1821(d)(3)(A), (d)(5)(D)*.

FIRREA mandates exhaustion of the administrative claims process before pursuing a claim in federal court. See *12 U.S.C. §§ 1821(d)(5), (d)(13)(D)*; *Carlyle Towers Condominium Ass'n, Inc. v. F.D.I.C., 170 F.3d 301, 305 (2d Cir. 1999)*; *Augienello v. FDIC, 310 F. Supp. 2d 582, 588 (S.D.N.Y. 2004)*. If a claimant properly files his claim with the FDIC and receives a disallowance of the claim, he may obtain judicial review if he files suit in federal court within 60 days of the disallowance. See *12 U.S.C. §§ 1821(d)(5)(A), (d)(6)(A)*. In this case, the FDIC notified plaintiff that the bar date for his claims **[*9]** was October 13, 2010. Because plaintiff did not submit his claim for severance under the employee manual pursuant to the receivership claims process, this claim is dismissed.

CONCLUSION

Defendant's motion to dismiss the complaint is GRANTED in part and DENIED in part. (Doc. #10.)

The Clerk is instructed to terminate the pending motion.

Plaintiff and counsel for defendant are directed to appear for a case management conference on June 26, 2012 at 11:00 am.

Dated: June 6, 2012

White Plains, NY

SO ORDERED:

/s/ Vincent L. Briccetti

Vincent L. Briccetti

United States District Judge

EXHIBIT 4

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BRUCE H. MATSON, Trustee of the LandAmerica Financial Group, Incorporated Liquidated Trust, Trustee-Appellant, v. DIEGO ALARCON; EMILY E. ANDERS; BRUCE A. AVILA; ANNELISE J. BRADDOCK; STEVEN P. BAKER; MICKEY J. BARKER; MICHAEL BARLOW; DIANNE F. BIGBIE; FRANK E. BILLINGS, JR.; RHONDA L. BITTERMAN; JOHN C. BOMMARITO; NANCY BOYER; KIMBERLY L. CODAY; SHAWN D. COSMAN; NANCY DEANGELO; BELINDA DURON; TAMMY J. ELLEY; LAWRENCE M. FURLONG; MICKEY GARCIA; RICHARD GRAB; JOANNE S. GUNN; PAMALA M. HARVEY; ELIZABETH HAYNES; MELINDA S. HURD; JUDITH A. V. KANE; LINDA A. KEAN; DENISE KING; KEIKO LAM; MONIQUE LAUFAU; LEA L. LAUTENSCHLAGER; JOHN A. MAASS; FRANK P. MARCARIO; KATHLEEN A. MCADAMS; REGINA M. MORRISON; JENNY NORTHCUTT; GAIL M. O'HANLEY; VANAH G. RAFANELLI; KELLY S. ROBBINS; LACEY M. ROBBINS; JULIE A. ROBERTS; CHARI ROBINSON; LOREE A. RUSSO; SVEN M. RUTH; SHARON MARIE SAYRE; CHARLENE SCHUH; JENNIFER F. SIEM; J. ALAN SMELKO; MICHAEL S. SMITH; DAWN M. SMITH; JANICE SPARROW; ROBERT M. STILLWAGON; MARY TAMMINGA; JERRI THURMAN; NOEL M. TOWNES; JINXIE WEIDMARK; WENDY L. WELCH; BETTY WHELAN; ROBERT M. WILSON; ELIZABETH S. WOODROOF; PAUL YAO; EDWARD R. ZAVAL; STEPHEN D. BROOKS; DEANNA B. BRUCE; NAOMI L. CAMPANALE; MARTHA A. CARTLEDGE; THOMAS N. CATANESI; STEVEN A. COLVIN; BRIAN W. CRESS; JENNIFER L. DANSER; MELINDA CRYSTAL DAVIS; BRIAN K. DREW; GARY EVERITT; STEVEN L. FAHRENKROG, II; KIM FANUCCHI; SHARON M. FOX; KAMILA GRIGAR; EDUARDO GUEVARA; FAITH HANE; SYDNIE HARMAN; KEVIN W. HARRIS; ARLENE L. HAWLEY; WADE HERMAN; TRACEY HUNTINGTON; SARA E. JONES; MARY KENNEDY; DANA KLIMA; RICHARD T. KNAPICK; REBECCA LAWSON; STEPHANIE LAWSON; GREGORY LEE; MICHELE E. LEFEVER; MARIVEL LEON; CHRISTOPHER LESEURE; DAVID L. LINGERFELT; GREGG H . C. LUM; PAMELA S. MANNIA; PETER F. MASELLI; SARAH A. MCBRIDE; CATHERINE JEAN MILLS; MIKE D. MURRAY; DONNA M. O'DELL; ALINA A. OPREA; BEVERLEY J. PACKARD; MICHAEL SAWCHAK; DEBORAH J. SMITH; PAULA M. SMITH; SUZANNE M. SMITH; NATALIE ST. CROIX; CHRISTOPHER H. STAMEY; LINDA TAAFFE; MARVIN CLIFTON TAYLOR; SAMUEL E. TAYLOR; GLADYS D. TERRIER; ROBERT L. THOMAS, JR.; TANGALIA TIMBERLAKE; GEORGE N. VIDACOVICH, JR.; VERNA VISCIGLIA; SHERRI WEISS; STEPHANIE R. WIGGINS; JOSEPH B. WYKEL; LONNIE J. YETT; TRAVIS BARDEN; CHARLES C. CAIN; ERIK G. IVERSON; DONALD E. JONES, JR.; LAURA A. MUTRUX; WENDY R. HEVENER, Claimants-Appellees.

No. 10-2352

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

651 F.3d 404; *2011 U.S. App. LEXIS 13729*; *51 Employee Benefits Cas. (BNA) 2574*; *17 Wage & Hour Cas. 2d (BNA) 1713*; *Bankr. L. Rep. (CCH) P82,034*; *55 Bankr. Ct. Dec. 23*

May 10, 2011, Argued
July 6, 2011, Decided

PRIOR HISTORY: [**1]

Appeal from the United States Bankruptcy Court for the Eastern District of Virginia, at Richmond. (3:08-bk-35994). Kevin R. Huennekens, Bankruptcy Judge.
In re Landamerica Fin. Group, Inc., 435 B.R. 343, 2010 Bankr. LEXIS 2346 (Bankr. E.D. Va., 2010)

DISPOSITION: AFFIRMED.

COUNSEL: ARGUED: Christopher Lawrence Perkins, LECLAIRRYAN, PC, Richmond, Virginia, for Appellant.

Joshua David McKarcher, COVINGTON & BURLING, LLP, Washington, D.C., for Appellees.

ON BRIEF: Christian K. Vogel, LECLAIRRYAN, PC, Richmond, Virginia, for Appellant.

Michael St. Patrick Baxter, COVINGTON & BURLING, LLP, Washington, D.C., for Appellees.

JUDGES: Before NIEMEYER, KING, and KEENAN, Circuit Judges. Judge Keenan wrote the opinion, in which Judge Niemeyer and Judge King joined.

OPINION BY: KEENAN

OPINION

[*406] KEENAN, Circuit Judge:

In this case, a trustee of a bankruptcy estate filed objections in the bankruptcy court to the **requested priority treatment of a portion of severance compensation claims filed by the debtor's former employees (the claimants).** The bankruptcy court overruled the trustee's objections and, under *28 U.S.C. § 158(d)(2)(A)(i)*, certified an appeal to this Court.

On appeal, the trustee contends that the claimants "earned" their severance compensation over the entire course of their employment. **The trustee asserts that, therefore, under *11 U.S.C. § 507(a)(4)*, [**2] only a pro-rated portion of the claims was "earned" within 180 days preceding the bankruptcy petition and was entitled to priority treatment.** We disagree with the trustee's position, and conclude that the claimants "earned" their severance compensation on the date they became participants in the debtor's severance plan immediately after their termination from employment. Accordingly, we affirm the bankruptcy court's order.

I.

In April 2004, LandAmerica Financial Group, Inc. (Land America) established a "Severance Benefits Plan" (the plan), which stated a purpose "to assist eligible Employees upon termination" of employment. The plan provided "severance benefits to eligible Employees who become Participants" in the plan. **An employee qualified as a participant in the plan when the employee 1) was terminated without cause, 2) signed a severance agreement and release, and 3) certain other exempting circumstances were not present.** Those circumstances included that the employee was not rehired within 30 days of termination, the employee was not offered an "equal" [**3] position with LandAmerica within a 50-mile radius, and the termination action was not due to the employee's death or resignation.

Once employees became participants in the plan, they were entitled to receive compensation equal to their weekly salary **[*407]** for a certain number of weeks. The number of weeks of compensation to which a participant was entitled was based on the employee's length of service to LandAmerica. For example, under the plan established in 2004, an eligible participant who worked for more than one year but less than two years would receive severance compensation equal to two weeks of pay, while an employee who worked at least eight years but less than ten years would receive severance compensation equal to six weeks of pay.

The plan also provided that a participant would receive this severance compensation either in a single sum or in monthly installments over a defined period of time. LandAmerica's board of directors (the board) retained the unilateral right to "modify, alter, or amend the Plan, in whole or in part," or to eliminate the plan entirely. In 2008, the board slightly amended the plan by decreasing the number of weeks of salary that an eligible participant could **[**4]** receive based on the employee's years of service.[1]

1 The amendments to the plan in 2008 also required that an employee must work at least one year before being eligible to receive any severance pay. The plan as it existed before these amendments permitted an employee who had worked at least six months to receive severance pay. The substance of these amendments, however, does not affect the issue presented in this appeal.

Between August 2008 and November 2008, within the last 180 days before LandAmerica filed its bankruptcy petition, LandAmerica terminated the employment of the claimants, Diego Alarcon and 124 other employees. Based on their termination and the fact that the other conditions of the plan were satisfied, the claimants became participants in the plan. However, LandAmerica did not pay the claimants any amount of the severance compensation due.

After LandAmerica filed its bankruptcy petition on November 26, 2008, the claimants filed proofs of claims against the bankruptcy estate for the severance compensation they were due under the terms of the plan, as amended in 2008. **The claimants asserted that their severance claims were entitled to priority treatment up to the statutory [**5] maximum amount provided in *11 U.S.C. § 507(a)(4)*.**

Bruce H. Matson, Trustee of the LandAmerica Financial Group, Inc. Liquidation Trust (the trustee), did not object to the amounts of the severance claims. **However, he contended that the claimants "earned" severance compensation over the entire course of their employment and that, therefore, only the portion of those claims "earned" within the 180-day period before LandAmerica filed for bankruptcy (the pre-petition period) was entitled to priority treatment under *11 U.S.C. § 507(a)(4)*.** To calculate the amount of severance compensation "earned" during the pre-petition period, the trustee proposed a formula that computed an employee's daily rate of severance compensation. The trustee provided an example of the application of his proposed formula to one of the claims at issue during a hearing held by the bankruptcy court.

In that example, the employee worked for LandAmerica for a total of 437 weeks, a period exceeding eight years, and was entitled under the plan to receive $8,500 in severance compensation. Before being terminated from employment, the employee worked 22 weeks during the pre-petition period. Because the period of 22 weeks represented **[**6]** 5.03% of the employee's 437 total weeks of employment, the trustee contended that the employee "earned" 5.03% of $8,500 during the pre-petition period, or $429.31. **Thus, the trustee [*408] contended that only this portion of**

the employee's severance claim was entitled to priority treatment under *11 U.S.C. § 507(a)(4)*, while the remaining amount, $8,070.69, should be classified as an unsecured general claim. After the hearing, the bankruptcy court issued a memorandum opinion overruling the trustee's objections, and entered an order in favor of the claimants on this issue.

II.

A.

The question raised in this appeal presents an issue of law, requiring this Court to apply a de novo standard of review. *In re Bateman, 515 F.3d 272, 277 (4th Cir. 2008)*.

B.

Section 507 of the Bankruptcy Code sets forth the categories of expenses and claims that are entitled to priority treatment in the distribution of a debtor's estate. *11 U.S.C. § 507*. In the enumerated list provided in the statute, a fourth priority is given to "allowed unsecured claims, but only to the extent of $10,950 for each individual . . . *earned within 180 days* before the date of the filing of the petition. . . for (A) wages, salaries, or commissions, **[**7]** including vacation, severance, and sick leave pay *earned* by an individual."[2] *11 U.S.C. § 507(a)(4)* (emphasis added). Therefore, we must determine the method by which an individual "earns" "severance pay," within the meaning of this statute, to decide whether the claimants "earned" their full severance pay or only a pro-rated portion of that pay during the pre-petition period.

2 Effective April 1, 2010, and applicable to cases commenced on or after that date, the statutory maximum in *11 U.S.C. § 507(a)(4)* was increased to *$11,725. 75 Fed. Reg. 8747-48 (Feb. 25, 2010)*.

Under established principles of statutory interpretation, we consider the disputed statutory terms in the context in which they are employed. *United States v. Groce, 398 F.3d 679, 681 (4th Cir. 2005)*. When the terms at issue are not defined in the statute, we apply their plain and ordinary meaning. *Scrimgeour v. Internal Revenue, 149 F.3d 318, 327 (4th Cir. 1998)*. This plain and ordinary meaning provides the "most reliable indicator of Congressional intent." *Soliman v. Gonzales, 419 F.3d 276, 281-82 (4th Cir. 2005)*.

The interpretation of the word "earned," as it appears in *11 U.S.C. § 507(a)(4)*, presents an issue of first **[**8]** impression in this Court. While the statute does not define the word "earned," we observe that to "earn" generally means to "receive as equitable return for work done or services rendered," or "to come to be duly worthy of or entitled." *Webster's Third New International Dictionary* 714 (2002). The first of these definitions plainly encompasses the common understanding of the manner in which employees "earn" wages, salaries, and commissions, the three general types of compensation listed in *11 U.S.C. § 507(a)(4)(A)*. Employees typically receive such compensation in exchange for their employment performance. *See, e.g., In re Public Ledger, 161 F.2d 762, 770 n.7 (3d Cir. 1947)* (wages are agreed-upon compensation received for services rendered); *In re Gurewitz, 121 F. 982, 983 (2d Cir. 1903)* (same). **The triggering events permitting employees to receive wages, salaries, and commissions generally lie within the employees' control upon performance of their work, subject to the terms of the employment agreement.**

The word "earned," as used in *11 U.S.C. § 507(a)(4)(A)*, applies not only to wages, [*409] salaries, and commissions, but also to several other types of compensation, including "severance pay." **[**9]** The term "severance pay" is not defined in the statute. However, that term generally is defined as "an allowance usually based on length of service that is payable to an employee" upon termination without cause. *See Webster's Third New International Dictionary* 2081 (2002). The purpose of such severance compensation is to "alleviate the consequent need for economic readjustment" and "to recompense [the employee] for certain losses attributable to the dismissal." *Straus-Duparquet, Inc. v. Local Union No. 3, Int'l B'hood of Elec. Workers, 386 F.2d 649, 651 (2d Cir. 1967).*

In contrast to wages, salaries, and commissions, the triggering events allowing employees to receive "severance pay" lie within the employer's control and its decision both to provide severance compensation and to terminate the employment relationship. Thus, employees do not "earn" "severance pay" in exchange for services rendered as they do when they "earn" wages, salaries, and commissions. **Rather, employees receive "severance pay" as compensation for the injury and losses resulting from the employer's decision to terminate the employment relationship. This ordinary understanding of the term "severance pay" is consistent [**10] with the stated purpose of the plan in the present case, namely, to assist employees upon termination.**

In view of the meaning and the purpose of severance compensation, we conclude that the second definition of "earn" described above, to become entitled, represents the ordinary meaning of the manner in which employees "earn" "severance pay," within the intendment of Congress in *11 U.S.C. § 507(a)(4)(A)*. **We therefore hold that an employee "earns" the full amount of "severance pay" on the date the employee becomes entitled to receive such compensation, subject to satisfaction of the contingencies provided in the applicable severance compensation plan.[3] *See id. at 651* (explaining that severance pay is not earned from day to day and does not accrue over time).**

3 We find no merit in the trustee's argument in favor of pro-ration based on the statute's legislative history when Congress lengthened the pre-petition period from 90 days to 180 days. During that legislative process, the House of Representatives' Report explained that the effect of this change was that a "greater portion" of unpaid vacation, severance, and sick leave pay would be entitled to priority payment. H.R. Rep. No. 109-31, [**11] pt. 1 at 1401 (2005). The use of the phrase "greater portion," however, did not clearly express a legislative intent that employees "earn" "severance pay" over the entire course of their employment. *See Holland v. Big River Minerals Corp., 181 F.3d 597, 603 n.2 (4th Cir. 1999)* (explaining that courts look beyond the plain meaning of a statute only in the rare instance in which Congress has clearly expressed a contrary legislative intent). **An alternative conclusion that could be drawn from this legislative history is that Congress intended to provide employees with a greater window of eligibility for priority regarding such vacation, severance, and sick leave pay "earned" during the 180-day period.**

In the present case, when the claimants became participants in the plan upon their termination from employment and their signing a severance agreement and release, the claimants earned severance compensation. While the amounts of the severance compensation to which the claimants were entitled under the plan were based on their length of service to Land America, this method of calculation did not, as the trustee contends, dictate that those employees earned severance compensation over the entire [**12] course of their employment. **The trustee's position in this regard conflicts both with the purpose [*410] of severance compensation and the plain terms of the plan at issue.**

Our conclusion is supported by the fact

that the board implemented the plan and retained the right to amend the plan or to eliminate it entirely. If we were to hold that employees earned severance compensation over the entire course of their employment, an employee who began working for LandAmerica before the plan was established in 2004 necessarily would have earned severance compensation before LandAmerica had even adopted a severance benefits plan. Moreover, if the board had eliminated the plan before an employee was terminated, then, under the trustee's position, that employee would have earned severance compensation for a period of time but would never receive that compensation.

Finally, our conclusion is not altered by decisions of our sister circuits addressing the priority treatment of severance compensation in the context of administrative expense claims permitted under *11 U.S.C. § 503(b)(1)(A)*. Many of those courts have held that severance compensation based on length of employment has priority as an administrative **[**13]** expense of the bankruptcy estate only to the extent that the compensation is based on services provided to the bankruptcy estate after the debtor files for bankruptcy. *See In re Roth Am., Inc., 975 F.2d 949, 957 (3d Cir. 1992)*; *In re Mammoth Mart, Inc., 536 F.2d 950, 953 (1st Cir. 1976)*; *In re Health Main. Found., 680 F.2d 619, 621 (9th Cir. 1982)*; *but see Straus-Duparquet, 386 F.2d at 651.*

As the bankruptcy court explained in its memorandum opinion in this case, however, *11 U.S.C. § 503(b)(1)(A)*, the current codification of the statute at issue in those other cases, and *11 U.S.C. § 507(a)(4)*, the statute at issue in this case, are materially different. *Section 503(b)(1)(A)* does not use the word "earned" or specifically include "severance pay" as a form of wages, salaries, and commissions. Instead, *§ 503(b)(1)(A)* requires a calculation of the value of "services rendered" in a period of time after a debtor files its bankruptcy petition. ***See In re Pittston Stevedoring Corp., 40 B.R. 424, 427-28 (Bankr. S.D.N.Y. 1984)*** **(stating that "earned within" is distinct from "service rendered within" and that "earned" "allows for some variation according to agreement between employers and employees" [**14] while "services rendered" does not). Therefore, we remain of the opinion that under *11 U.S.C. § 507(a)(4)*, an employee "earns" the entirety of his or her severance compensation on the date that the employee becomes entitled to receive such compensation under the applicable severance compensation plan.**

III.

Accordingly, we affirm the bankruptcy court's holding that the severance claims at issue are entitled to priority treatment under *11 U.S.C. § 507(a)(4)* in amounts no greater than the maximum amount provided by statute.

AFFIRMED

E X H I B I T 5

AMERICAN COMMUNITY
MUTUAL INSURANCE COMPANY®

Memo

To: All Employees

From: Deputy Rehabilitators Jim Gerber and Mike Hogan

Date: May 19, 2010

Re: Retention Bonus Plan

As was announced previously, a Retention Bonus Plan is being developed for those employees holding positions necessary to the continued operations of the business during Rehabilitation. Below is an outline of the plan.

Employees who remain employed with American Community for a specified period of time will be eligible to receive a bonus payment based on a percent of base salary according to the following **tentative** schedule (please note: layoffs may occur more frequently than the tentative schedule below):

WARN Notification Date	60-day WARN Notice Period	Bonus %	Bonus Pay Date
Within first 60 days following Rehabilitation Order: April 8 – June 8:			
April 15	April 15 – June 13	0%	Not Applicable
May 13	May 13 – July 11	0%	Not Applicable
60-90 days following Rehabilitation Order: June 8 – July 8:			
June 10	June 10 – August 8	2.5%	August 12
July 8	July 8 – September 5	2.5%	September 9
90-180 days following Rehabilitation Order: July 9 – October 8:			
August 5	August 5 – October 3	4.0%	October 7
September 2	September 2 – October 31	4.0%	November 4
September 30	September 30 – November 28	4.0%	December 2
180+ days following Rehabilitation Order: October 8 and beyond:			
October 28	October 28 – December 26	7.0%	December 30

Plan Guidelines:

1. This schedule may be altered by the Deputy Rehabilitators based on changing business conditions and individual employee workloads. If this schedule is altered, you will receive the change notice as soon as practicable.
2. As you are actively working, you will accrue the Retention Bonus until your designated layoff date, at which point the Retention Bonus will be paid in full (meaning that the accrued portion of your Retention Bonus will not be paid early). For example: If you are working until December, you will accrue 2.5% of your 7.0% Retention Bonus on July 8th; however, you will not receive your 7.0% lump sum Bonus until December. Calculation example: If your base pay is $50,000, then $50,000 x 7.0% = $3,500.
3. Retention Bonuses will be paid following completion of the 60-day Notification Period in a lump sum through our normal payroll processing schedule with all applicable withholdings.
4. If you voluntarily resign during your Retention Bonus period, you will receive a pro-rated Bonus amount. For example: If your layoff date is September 2 and you voluntarily resign August 13, you will receive a 4.0% Retention Bonus calculated based on 8½ months of base pay. Calculation example: If your base pay is $50,000, then $50,000 x 4.0% / 12 * 8.5 = $1,417.
5. If your performance or behavior makes it necessary to involuntarily terminate your employment during your Retention Bonus period, the Retention Bonus will be forfeited in its entirety.
6. During the 60-day Notification Period, you may be released from work immediately or asked to work a portion or all of your Notification Period. If released immediately, you may be recalled from 'layoff' status to 'active' status based on changing business needs. If you do not return to active status as requested, the Retention Bonus will be forfeited.
7. Receipt of a Retention Bonus will not preclude or delay collection of unemployment benefits following your change in status from 'layoff' to 'terminated'.

If you have any questions, please contact Leslie J. Gola.

I have read and understand the above.

ELLEN DOWNEY

Name (please print)

Ellen Downey

Signature

5-21-10

Date

Please sign and return a copy to Human Resources by May 26, 2010. Thank you.

Plan Guidelines:

1. This schedule may be altered by the Deputy Rehabilitators based on changing business conditions and individual employee workloads. If this schedule is altered, you will receive the change notice as soon as practicable.
2. As you are actively working, you will accrue the Retention Bonus until your designated layoff date, at which point the Retention Bonus will be paid in full (meaning that the accrued portion of your Retention Bonus will not be paid early). For example: If you are working until December, you will accrue 2.5% of your 7.0% Retention Bonus on July 8th; however, you will not receive your 7.0% lump sum Bonus until December. Calculation example: If your base pay is $50,000, then $50,000 x 7.0% = $3,500.
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7. Receipt of a Retention Bonus will not preclude or delay collection of unemployment benefits following your change in status from 'layoff' to 'terminated'.

If you have any questions, please contact Leslie J. Gola.

I have read and understand the above.

Frank Dempsey

Name (please print)

Signature

5/20/10

Date

Please sign and return a copy to Human Resources by May 26, 2010. Thank you.

Plan Guidelines:

1. This schedule may be altered by the Deputy Rehabilitators based on changing business conditions and individual employee workloads. If this schedule is altered, you will receive the change notice as soon as practicable.

2. As you are actively working, you will accrue the Retention Bonus until your designated layoff date, at which point the Retention Bonus will be paid in full (meaning that the accrued portion of your Retention Bonus will not be paid early). For example: If you are working until December, you will accrue 2.5% of your 7.0% Retention Bonus on July 8th; however, you will not receive your 7.0% lump sum Bonus until December. Calculation example: If your base pay is $50,000, then $50,000 x 7.0% = $3,500.

3. Retention Bonuses will be paid following completion of the 60-day Notification Period in a lump sum through our normal payroll processing schedule with all applicable withholdings.

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5. If your performance or behavior makes it necessary to involuntarily terminate your employment during your Retention Bonus period, the Retention Bonus will be forfeited in its entirety.

6. During the 60-day Notification Period, you may be released from work immediately or asked to work a portion or all of your Notification Period. If released immediately, you may be recalled from 'layoff' status to 'active' status based on changing business needs. If you do not return to active status as requested, the Retention Bonus will be forfeited.

7. Receipt of a Retention Bonus will not preclude or delay collection of unemployment benefits following your change in status from 'layoff' to 'terminated'.

If you have any questions, please contact Leslie J. Gola.

I have read and understand the above.

Beth McCrohan

Name (please print)

Beth J McCrohan

Signature

6-2-2010

Date

Please sign and return a copy to Human Resources by May 26, 2010. Thank you.

Plan Guidelines:

1. This schedule may be altered by the Deputy Rehabilitators based on changing business conditions and individual employee workloads. If this schedule is altered, you will receive the change notice as soon as practicable.

2. As you are actively working, you will accrue the Retention Bonus until your designated layoff date, at which point the Retention Bonus will be paid in full (meaning that the accrued portion of your Retention Bonus will not be paid early). For example: If you are working until December, you will accrue 2.5% of your 7.0% Retention Bonus on July 8th; however, you will not receive your 7.0% lump sum Bonus until December. Calculation example: If your base pay is $50,000, then $50,000 x 7.0% = $3,500.

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7. Receipt of a Retention Bonus will not preclude or delay collection of unemployment benefits following your change in status from 'layoff' to 'terminated'.

If you have any questions, please contact Leslie J. Gola.

I have read and understand the above.

Michael McCollom

Name (please print)

Signature

5/19/10

Date

Please sign and return a copy to Human Resources by May 26, 2010. Thank you.

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United States Court of Appeals,
Seventh Circuit.
Roger L. FIX, Plaintiff-Appellee,
v.
QUANTUM INDUSTRIAL PARTNERS LDC, Defendant-Appellant.

No. 03-3967.
Argued May 24, 2004.
Decided July 6, 2004.

Background: Employee brought diversity action against employer alleging breach of contract. The United States District Court for the Northern District of Illinois, Amy J. St. Eve, J., granted summary judgment for employee, 2003 WL 21439982. Employer appealed.

Holdings: The Court of Appeals, Terence T. Evans, Circuit Judge, held that:
(1) liquidation of corporate assets in bankruptcy was "change in control" of corporation, and
(2) executive was entitled to $5 million under employment contract.

Affirmed.

West Headnotes

[1] Corporations and Business Organizations 101 ⚷1815

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(D) Rights, Duties, and Liabilities as to Corporation and Its Shareholders or Members
101k1812 Compensation and Benefits
101k1815 k. Contracts or resolutions providing therefor in general. Most Cited Cases
(Formerly 101k308(3))

Liquidation of corporate assets in bankruptcy was "change in control" of corporation under Delaware law, for purpose of executive's compensation under employment contract, where agreement stated that "change in control" occurred if board of directors approved sale of all or substantially all of assets of corporation, which they did, "change in control" payment was triggered after "any sale" of more than 50 percent of assets of corporation, which occurred when bankruptcy court approved sale of assets, and contract did not contain any exclusion or limitation that might have excluded sale of assets in connection with bankruptcy liquidation.

[2] Evidence 157 ⚷448

157 Evidence
157XI Parol or Extrinsic Evidence Affecting Writings
157XI(D) Construction or Application of Language of Written Instrument
157k448 k. Grounds for admission of extrinsic evidence. Most Cited Cases

If the language of a contract is clear and unambiguous, Delaware law dictates that a court may not look to extrinsic evidence to interpret the contract.

[3] Contracts 95 ⚷175(1)

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k175 Evidence to Aid Construction
95k175(1) k. Presumptions and burden of proof. Most Cited Cases

There is a strong presumption under Delaware law against reading into contracts provisions that easily could have been included but were not.

[4] Corporations and Business Organizations 101 ⚷1817(4)

101 Corporations and Business Organizations
101VII Directors, Officers, and Agents
101VII(D) Rights, Duties, and Liabilities as to Corporation and Its Shareholders or Members
101k1812 Compensation and Benefits
101k1817 Stock Options

101k1817(4) k. Operation and effect; exercise. Most Cited Cases

(Formerly 101k308(3))

Under Delaware law, executive was entitled to $5 million under employment contract, where exercise value of his options was zero due to bankruptcy, and contract stated that executive was entitled to immediate vesting of all of his stock options and difference, "if any," of $5 million less "Exercise Value of [his] Options."

***550** Caesar A. Tabet (argued), Tabet, Divito & Rothstein, Chicago, IL, for Plaintiff-Appellee.

Peter B. Bensinger, Jr. (argued), Bartlit, Beck, Herman, Palenchar & Scott, Chicago, IL, for Defendant-Appellant.

Before RIPPLE, MANION, and EVANS, Circuit Judges.

TERENCE T. EVANS, Circuit Judge.

As his name implies, Roger Fix had the reputation of a man who could fix things. In this case, Outboard Marine Corporation (OMC) (of which the defendant Quantum was controlling investor) hired Fix in an effort to save its fledgling business. Fix could not, however, turn the company around. Shortly after Fix began, Quantum discontinued its investment, and OMC declared bankruptcy. After its assets were sold, OMC fired Fix. In response, Fix filed suit in the Northern District of Illinois seeking payment under a clause in his employment agreement which requires Quantum to pay him $5 million in the event of a "Change in Control of the Company." Quantum refused, contending that the sale in connection with a bankruptcy does not trigger the clause. The district court granted Fix summary judgment, 2003 WL 21439982 (N.D.Ill. June 18, 2003), and Quantum appeals.

OMC is a manufacturer of boats and boat engines. Quantum, a private equity fund managed by Soros Private Equity Partners, L.L.C., owned a controlling interest in OMC. At the beginning of 2000, Quantum had invested over $200 million in OMC. By May 2000, the company had pumped an additional $85 million into OMC. *See* Gregory Zuckerman, *Capsizing of Outboard Marine Shows How Soros Took a Bath in Private Equity,* Wall St. J., Jan 12, 2001, at C1. Nevertheless, OMC ***551** continued to lose hundreds of millions of dollars.

Beginning in February 2000, OMC recruited Fix to try to save the company. Fix was chief executive of John Crane Inc., where he had been since 1996 and where he had pension benefits, stock options, long-term deferred compensation benefits, and long-term security. In March or April, Frank Sica, a Quantum representative and a member of OMC's board of directors, met with Fix to discuss potential employment. Over the next several months, OMC, Fix, Quantum, and their lawyers [FN1] negotiated details of an employment agreement. On May 26, 2000, OMC, Quantum, and Fix finalized and executed the agreement. Fix began work as the company's chief operating officer in June 2000; about 2 months later he gained the title of chief executive officer.

FN1. Matkov Salzman Madoff & Gunn represented Fix. OMC was represented by its general counsel and by attorneys from the law firm of Kirkland & Ellis. Quantum was represented by its corporate counsel.

Relevant to this appeal, Fix's employment agreement requires OMC to make certain financial payments to him in the event of a "Change in Control of the Company." Section 7(b) provides:

> Upon the occurrence of a "Change in Control" (as defined under PROP [The Personal Rewards and Opportunities Program], but also including any sale to a person who is not otherwise an affiliate of the Company of more than 50% of the property, assets or business of the Company and its subsidiaries and affiliates, taken as a whole) (i) all Fix Options which have not theretofore vested shall immediately vest and (ii) the Company will make a cash payment (the "Make-up

Payment") to Employee in an amount equal to the positive difference, if any, of (A) $5 million, less (B) the "Exercise Value of the Fix Options."

As the above provision states, the clause incorporates the "Change in Control" definition under PROP. PROP states:

[A] "Change in Control of the Company" occurs if:

(3) the Board of Directors approves the sale of all or substantially all of the property or assets of the Company;

* * * * * *

provided, however, that (i) a Change in Control of the Company shall not include an initial public offering of the Company and (ii) the occurrence of any specific event as described in this paragraph shall not constitute a Change in Control of the Company if during the 30-day period immediately preceding the date of the Change in Control of the Company the Board of Directors, by a majority vote, deems that the occurrence of such specific event does not constitute a Change in Control of the Company.

Finally, as part of the agreement, Quantum guaranteed the payment of Fix's salary, bonuses, and benefits, including any payments in the event of a "Change in Control."

Quantum decided, in November 2000, not to provide any further financial support to OMC. As a result, it became almost impossible for the company to turn around. Thus, in December 2000, the board of directors approved the "sale of all or substantially all of the assets of [OMC]." That approval expressly included the approval of a sale in or outside of bankruptcy. The board of directors did not, however, pass a resolution indicating that its approval of the sale would not constitute a "Change in Control."

***552** On December 22, 2000, OMC filed for Chapter 11 bankruptcy in the bankruptcy court for the Northern District of Illinois. Before and after the filing, Fix worked to sell substantially all of the assets of OMC as approved and directed by the board of directors. By February 5, 2001, he negotiated the sale of substantially all assets for approximately $90 million, which the bankruptcy court approved on February 9, 2001. One week later, on February 16, the board of directors fired him.

Fix requested that Quantum pay his severance, vacation pay, and "Change in Control" payment pursuant to the guarantee under the employment agreement. Quantum refused and this litigation followed.[FN2] We review the district court's grant of summary judgment for Fix *de novo.* This is a diversity case, and because the agreement contains a Delaware choice-of-law provision, we apply Delaware law.

FN2. Prior to the district court's summary judgment decision, Quantum agreed to pay the vacation and severance pay to Fix. As for the $5 million, if the payment obligation is triggered, Quantum does not dispute the amount owed.

[1][2] This case turns on the interpretation of the "Change in Control" definitions in the employment agreement. Initially, we must ask whether the language of the contract is clear and unambiguous. If it is, Delaware law dictates that we may not look to extrinsic evidence to interpret the contract. *See, e.g., O'Brien v. Progressive Northern Ins. Co.,* 785 A.2d 281, 289 (Del.2001) ("Delaware courts are obligated to confine themselves to the language of the document and not to look to extrinsic evidence to find ambiguity."); *E.I. du Pont de Nemours & Co. v. Allstate Ins. Co.,* 693 A.2d 1059, 1061 (Del.1997) ("Extrinsic evidence is not used to interpret contract language where that language is 'plain and clear on its face.' "); *Citadel Holding Corp. v. Roven,* 603 A.2d 818, 822 (Del.1992) ("It is an elementary canon of contract construction that the intent of the parties must be ascertained from the language of the contract.").

Reviewing the employment agreement, we agree with the district court that the "Change in Control" language is clear and unambiguous. The agreement states that a "Change in Control" occurs if "the Board of Directors approves the sale of all or substantially all of the assets of [OMC]." That occurred in December 2000. The agreement also declares that a "Change in Control" payment is triggered after "any sale" of more than 50 percent of the assets of OMC. That occurred on February 9, 2001, when the bankruptcy court approved the sale of assets. Contrary to Quantum's argument, the language of the contract is not susceptible to different interpretations. Moreover, the language contains no exclusion or limitation that might exclude a sale of assets in connection with bankruptcy liquidation. Absent such a limitation, we will not read one into Fix's employment agreement. *See Rhone-Poulenc Basic Chems. Co. v. American Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del.1992) ("Courts will not torture contractual terms to impart ambiguity where ordinary meaning leaves no room for uncertainty.").

[3] In making this conclusion, we emphasize that the parties, which were all represented by accomplished legal counsel, easily could have included specific language excluding any sale of assets in connection with bankruptcy from the definition of a "Change in Control" (indeed, it is somewhat remarkable that before the agreement was executed neither party considered the issue, considering that Fix was brought in specifically to save a sinking ship). Moreover, when the parties wanted to limit the definition of "Change *553 in Control," they certainly knew how to do so. Indeed, the PROP definition for "Change in Control" includes an exclusion for an initial public offering and for any event that the board of directors deems does not constitute a "Change of Control." There is a strong presumption against reading into contracts provisions that easily could have been included but were not. Courts will not, absent circumstances not present here, insert a contract term when the agreement itself is silent. *See In re Marriage of Sweders*, 296 Ill.App.3d 919, 231 Ill.Dec. 9, 695 N.E.2d 526, 529 (1998) ("A strong presumption exists against provisions that could easily have been included in the agreement but were not."), and *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 141 (Del.Ch.2003) ("If the parties had agreed that the defendants should warrant the unaudited financials statements through November 30, 2000, ... they could easily have done so. They did not.").

Nevertheless, Quantum argues that the agreement is ambiguous. First, it contends that the definition of "Change in Control" incorporates the purpose and intent of PROP-which is to create an incentive to build value in OMC. [FN3] By incorporating this purpose into the definition of "Change and Control," Quantum argues, Fix is entitled to payment only if the company grows and succeeds.

FN3. PROP specifically states that it is an "exciting, new partnership between the Company's key employees and shareholders to ambitiously and dramatically grow and develop the value of the underlying businesses of the Company, and to mutually share in the success of those efforts."

The "Change in Control" provision, however, expressly incorporates *only* the PROP definition of "Change in Control." It does not incorporate the alleged purpose and intent. And we will not read such an incorporation into the contract. As the Supreme Court has noted, "a reference by the contracting parties to an extraneous writing for a particular purpose makes it a part of their agreement only for the purpose specified." *Guerini Stone Co. v. P.J. Carlin Constr. Co.*, 240 U.S. 264, 277, 36 S.Ct. 300, 60 L.Ed. 636 (1916). *See also State ex rel. Hirst v. Black*, 83 A.2d 678, 681 (Del.Super.Ct.1951) ("[A]n agreement will not be deemed to incorporate matter in some other instrument or writing except to the extent that the same is specifically set forth or identified by reference."); 11 *Williston on Contracts* § 30.25, p. 238 (4th ed. 2003) ("[I]t is important to note that where incorporated matter is referred to for a specific purpose only, it becomes a part of the contract for such purpose only, and should be treated as irrelevant for all other purposes."). Finally, although the language of the agreement is clear and we therefore do not examine extrinsic evidence, we note that OMC's general counsel, who drafted, negotiated, and finalized the employment agreement, admitted that OMC did not intend to incorporate PROP's purpose into the "Change in Control" provision.

[4] Next, Quantum argues that the definitions for a "Change in Control" does not include a sale in bankruptcy because the formula for determining the amount of the "Change in Control" payment assumes that the OMC stock have value. This argument ignores the plain language of the agreement. Fix is entitled to the immediate vesting of all his stock options and the difference, "*if any,*" of $5 million less the "Exercise Value of the Fix Options." If the exercise value of Fix's options is zero, as here, Fix is entitled to $5 million.

Because the language of the employment agreement is clear and unambiguous, there is no need for us to examine any *554 extrinsic evidence. Finally, we have considered Quantum's remaining arguments and deem them without merit.

The judgment of the district court is AFFIRMED.

C.A.7 (Ill.),2004.
Fix v. Quantum Indus. Partners LDC
374 F.3d 549

END OF DOCUMENT

EXHIBIT 7

STATE OF MICHIGAN
CIRCUIT COURT FOR THE 30TH JUDICIAL CIRCUIT
INGHAM COUNTY

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

Petitioner,

Case No. 10 - 397 -CR

v

Hon. William E. Collette

AMERICAN COMMUNITY MUTUAL
INSURANCE COMPANY,

Respondent.

_______________________________________/

STIPULATED ORDER
PLACING AMERICAN COMMUNITY MUTUAL INSURANCE COMPANY INTO
REHABILITATION, APPROVING APPOINTMENT AND COMPENSATION OF
SPECIAL DEPUTY REHABILITATORS, AND PROVIDING INJUNCTIVE RELIEF

At a session of said Court
held in the Circuit Courtrooms
in the City of Lansing, Michigan on the
8th day of April, 2010

PRESENT: HONORABLE ______________________
Circuit Court Judge

WHEREAS, Petitioner Ken Ross, Commissioner of the Office of Financial and Insurance Regulation (the "Commissioner"), has filed a Petition seeking an Order Placing American Community Mutual Insurance Company into Rehabilitation, Approving the Appointment and Compensation of Special Deputy Rehabilitators, and Providing Injunctive Relief (the "Rehabilitation Petition"); and

WHEREAS, Respondent American Community Mutual Insurance Company ("American Community"), by and through its Board of Directors, has consented to being placed into

Rehabilitation under Chapter 81 of the Michigan Insurance Code of 1956, MCL 500.8101 – 500.8159 ("Chapter 81"), under the terms and conditions determined by the Commissioner to be appropriate; and

WHEREAS, American Community, by and through its legal counsel, has stipulated to the relief sought in the Rehabilitation Petition and to the entry of this Order; and

WHEREAS, the Court has reviewed the Rehabilitation Petition and the terms of this Order, and being otherwise fully advised, finds as follows:

1. MCL 500.8102 provides that a proceeding under Chapter 81, including a rehabilitation proceeding, may be applied to an insurer who: (a) is or has been transacting insurance business in this state and against whom claims arising from that business may exist now or in the future; or (b) who has insureds resident in this state. American Community satisfies both criteria and is therefore subject to rehabilitation or any other proceeding authorized by Chapter 81.

2. MCL 500.8112 vests this Court with jurisdiction to consider the Commissioner's Rehabilitation Petition and to enter this Order.

3. MCL 500.8112 authorizes the Commissioner to petition this Court for an Order authorizing the Commissioner to rehabilitate American Community based on one or more of thirteen (13) listed grounds. These grounds include:

> (a) The insurer is in such condition that the further transaction of business would be hazardous financially to its policyholders, creditors, or the public.
>
> *　　*　　*
>
> (*l*) The board of directors . . . request[s] or consent[s] to rehabilitation under this chapter.

4. Pursuant to MCL 500.8112(a), this Order authorizing the Commissioner to rehabilitate American Community is proper and should be entered because the Court finds that American Community's financial condition is such that further transaction of business would be hazardous financially to its policyholders, creditors, or the public.

5. Pursuant to MCL 500.8112(*l*), this Order authorizing the Commissioner to rehabilitate American Community is also proper and should be entered because American Community's Board of Directors has consented to rehabilitation under Chapter 81.

6. American Community, by and through its legal counsel, has stipulated to the relief sought in the Rehabilitation Petition and to the entry of this Order.

7. As defined by MCL 500.8103(b), a "Creditor" is a person having a claim against American Community, whether matured or unmatured, liquidated or unliquidated, secured or unsecured, absolute, fixed, or contingent.

8. Based upon MCL 500.8105(1), the Court is authorized to enter this Order including terms that the Court considers necessary and proper to prevent:

(a) Interference with the Rehabilitator or with the Rehabilitation proceedings;

(b) The institution or further prosecution of any actions or proceedings against American Community, its assets, or its policyholders;

(c) The obtaining of preferences, judgments, attachments, garnishments, or liens against American Community, its assets, or its policyholders;

(d) The levying of execution against American Community, its assets, or its policyholders; and

(e) Any other threatened or contemplated action that might lessen the value of American Community's assets or prejudice the rights of its policyholders, creditors, or the administration of this rehabilitation proceeding.

9. All Creditor claims against American Community are within the jurisdiction of this Court and will be determined, resolved, paid, and/or discharged, in whole or in part, according to the terms and conditions approved by the Court.

10. MCL 500.8114(2), in conjunction with MCL 500.8121(1)(m), authorizes the Rehabilitator "[t]o prosecute an action that may exist on behalf of the creditors, members, policyholders, or shareholders of the insurer against an officer of the insurer or another person."

11. Immediate action placing American Community into rehabilitation is necessary to protect the interest of American Community's policyholders, creditors, and the public.

THEREFORE, IT IS HEREBY ORDERED that:

1. Pursuant to MCL 500.8112 and MCL 500.8113, the Commissioner's Rehabilitation Petition is GRANTED, and American Community is placed into Rehabilitation pursuant to Chapter 81.

2. Pursuant to MCL 500.8113(1), the Commissioner is appointed Rehabilitator of American Community, and is further authorized to appoint one or more Special Deputy Rehabilitator(s) pursuant to MCL 500.8114(1). Hereafter, the Commissioner shall be referred to as the "Rehabilitator."

3. Pursuant to MCL 500.8113(1), the Rehabilitator shall take immediate possession of all the assets of American Community and administer those assets under the Court's general supervision.

4. Pursuant to MCL 500.8113(1), this Order shall by operation of law vest legal title to all assets, accounts, and moneys of American Community in the Rehabilitator. The filing or recording of this Order with the Clerk of the Circuit Court or the Register of Deeds for the county in which the principal office or place of business of American Community is located shall

impart the same notice as a deed, bill of sale, or other evidence of title duly filed or recorded with that Register of Deeds would have imparted.

5. Pursuant to MCL 500.8115(1) and paragraph 22(a) of this Order, all actions or proceedings in which American Community is a plaintiff that are pending as of the date this Order is entered are STAYED for ninety (90) days and such additional time as is necessary for the Rehabilitator to obtain proper representation and prepare for further proceedings. Pursuant to paragraph 22(a) of this Order, the institution or continuation of any actions or proceedings in which American Community is a defendant, or is obligated to defend another party, is prohibited and enjoined.

6. The Rehabilitator, without being specifically set forth in this Order, shall have: (a) all the powers contained in MCL 500.8114 and 500.8115; (b) all applicable powers set forth in Chapter 81; and (c) such additional powers as the Court shall grant from time to time upon petition of the Rehabilitator.

7. Pursuant to MCL 500.8114(2), upon entry of this Order, all powers of the current directors, officers, and managers of American Community are suspended in their entirety, and the Rehabilitator shall have and exercise the full and complete power of such directors, officers, and managers. In his sole discretion, the Rehabilitator may redelegate, in writing, some or all of his authority to a former director, officer, or manager of American Community.

8. Among his plenary powers provided by law, the Rehabilitator shall have full power and authority to direct and manage American Community, to hire and discharge American Community's officers, managers, and employees subject to any contract rights that they may have, and to deal in totality with the property and business of American Community. Subject to any contractual rights and applicable law, upon entry of this Order all employment contracts of

American Community's officers, managers, and employees are terminated. Notwithstanding the termination of their employment contracts, the officers, managers, and employees of American Community shall remain employed as at-will employees until such time as they are notified by the Rehabilitator or Special Deputy Rehabilitators that they have been discharged. Within their sole discretion, the Rehabilitator and Special Deputy Rehabilitators may re-contract with any officers, managers, or employees of American Community whose employment contracts are terminated pursuant to this paragraph 8 upon terms agreeable to the parties.

9. Any director, manager, officer, employee, or agent of American Community and any other person shall, at the Rehabilitator's direction, vacate any building, office, or other premise of American Community.

10. Pursuant to MCL 500.8114(2) and (4), the Rehabilitator may take such action as he considers necessary or appropriate to reform or revitalize American Community, and is empowered to pursue all avenues of reorganization, consolidation, conversion, reinsurance, merger, or other transformation of American Community to effectuate rehabilitation and maintain, to the greatest extent possible, a continuity of health care services.

11. Pursuant to MCL 500.8114(4), if the Rehabilitator determines that reorganization, consolidation, conversion, reinsurance, merger, or other transformation of American Community is appropriate, he shall prepare a plan to effect those changes and shall apply to the Court for approval of such plan.

12. Pursuant to MCL 500.8116(1), if the Rehabilitator believes that further attempts to rehabilitate American Community would be futile or would substantially increase the risk of loss to creditors, policyholders, or the public, he may petition the Court for an order of liquidation.

13. Pursuant to MCL 500.8116(2), the Rehabilitator may petition the Court at any time for an order terminating the rehabilitation of American Community.

14. Except as provided in this paragraph 14, the Rehabilitator shall not pay any Creditor claims for goods or services provided prior to the date of this Order until further order of the Court. In order to ensure the continuity of health care services to American Community's policyholders, and to minimize disruptions to American Community's business operations, the Rehabilitator shall pay: (a) all Creditor claims for health care services provided to American Community's policyholders prior to the date of this Order according to normal claims processing procedures; and (b) all Creditor claims for wages of American Community's officers, managers, and employees that were earned but unpaid as of the date of this Order. This provision requiring payment of pre-Rehabilitation employee wages does not apply to, and the Rehabilitator shall not pay, any severance or other non-wage payments otherwise due to an American Community officer, manager, or employee upon the termination of his or her employment contract entered into prior to the date of this Order.

15. The Rehabilitator shall pay all Creditor claims for goods or services provided on or after the date of this Order as they become due in the ordinary course of business.

16. The Rehabilitator shall pay any other normal administrative expenses incurred on or after the date of this Order that are necessary for the continued operation and/or rehabilitation of American Community as they become due in the ordinary course of business.

17. Pursuant to MCL 500.8113(3), entry of this Order shall not constitute an anticipatory breach of any contracts or relationships between American Community and any other persons or entities. Except for employment contracts terminated under paragraph 8 of this Order, and pursuant to MCL 500.8105(1)(k), during the pendency of this rehabilitation, all

persons or entities that are not American Community policyholders and that have contractual or other relationships with American Community as of the date of this Order are hereby enjoined and restrained from terminating or attempting to terminate such contracts or relationships on the basis of the entry of this Order or American Community's financial condition. This injunction against terminating existing contracts or relationships applies, without limitation, to any contracts or relationships between American Community and health care providers or provider networks. Notwithstanding the foregoing, the Rehabilitator shall review the necessity of any contracts subject to this Paragraph 17 during the pendency of this rehabilitation and, upon determining that any such contract is unnecessary to American Community's rehabilitation, shall petition the Court to withdraw the injunctive relief provided herein and/or for termination of the contract.

18. Pursuant to MCL 500.8106, all officers, managers, directors, trustees, owners, employees, or agents of American Community, or any other persons or entities having authority over or in charge of any segment of the affairs of American Community, shall fully cooperate with the Rehabilitator and any Special Deputy Rehabilitators that he appoints. Among other things, "full cooperation" requires a person or entity described in this paragraph to:

(a) Promptly reply to any inquiry by the Rehabilitator, including a written reply when requested;

(b) Provide the Rehabilitator with immediate, full, and complete possession, control, access to, and use of all books, accounts, documents, and other records, information, or property of or pertaining to American Community in his, her, or its possession, custody, or control as may be necessary to enable the Rehabilitator and Special Deputy Rehabilitator to operate the business and to maintain the continuity of health care services being provided to all subscribers;

(c) Provide the Rehabilitator with full and complete access and control of all assets, documents, data, computer systems, security systems, buildings, leaseholds, and property of or pertaining to American Community; and

(d) Provide the Rehabilitator with full and complete access to all legal opinions, memoranda, letters, documents, information, correspondence, legal advice, and any other attorney-client privileged and/or attorney work product materials relating to American Community or the operation of American Community and its business, provided to or from American Community's in-house or outside counsel by or to American Community, its officers, managers, directors, trustees, owners, employees, or agents.

In addition, no person shall obstruct or interfere with the Rehabilitator or Special Deputy Rehabilitators in the conduct of this rehabilitation proceeding.

19. As provided by MCL 500.8106(4), any failure to cooperate with the Rehabilitator or Special Deputy Rehabilitators, any obstruction or interference with the Rehabilitator or Special Deputy Rehabilitators in the conduct of this rehabilitation proceeding, or any violation of an order of the Commissioner validly entered under Chapter 81, may result in:

(a) A sentence requiring the payment of a fine not exceeding $10,000.00, or imprisonment for a term of not more than one year, or both; and

(b) After a hearing, the imposition by the Commissioner of a civil penalty not to exceed $10,000.00, or the revocation or suspension of any insurance licenses issued by the Commissioner, or both.

20. Any person or entity with possession, custody, or control of assets, documents, data, accounts, moneys, books, records, information, or property of or pertaining to American Community, shall <u>immediately</u>:

(a) Provide the Rehabilitator with notice that such assets, documents, data, accounts, moneys, books, records, information, or property are in his, her, or its possession, custody or control, together with a description of the assets, documents, data, accounts, books, records, information, or property in his, her, or its possession, custody or control.

(b) Tender possession, custody, and control of such assets, documents, data, accounts, moneys, books, records, information, or property to the Rehabilitator.

(c) Take all necessary steps to safeguard, preserve, and retain the assets, documents, data, accounts, moneys, books, records, information, or property.

21. Pursuant to MCL 500.8105(1)(g) and (k), all non-contracted and contracted health care providers are hereby enjoined and restrained from pursuing collection against, obtaining

judgments against, and/or balance billing of American Community's policyholders, enrollees, or members for health care goods provided or services rendered prior to the date of this Order. All non-contracted and contracted health care providers that provided such goods or rendered such services prior to the date of this Order shall seek payment solely from American Community as an American Community Creditor, as defined in this Order and MCL 500.8103(b). The foregoing prohibition does not apply to any applicable co-payments, deductibles, cost sharing, or fees for medical goods or services that are not covered by and remain the policyholder's, enrollee's, or member's responsibility under his or her American Community insurance policy.

22. Pursuant to MCL 500.8105(1) and MCL 500.8114(2), and except as provided in paragraphs 21, 24, 25, and 26 of this Order, all Creditors of American Community are <u>enjoined from</u>:

(a) Instituting or continuing to prosecute any actions or proceedings to determine, enforce, collect, or assert any claims against American Community, its assets, policyholders, enrollees, members, officers, directors, or employees;

(b) Instituting or continuing to prosecute any actions or proceedings to determine, enforce, collect, or assert any claims against the Rehabilitator or Special Deputy Rehabilitators, their agents, attorneys, employees, or representatives, or the State of Michigan and its officers, agencies, or departments for claims or causes of action arising out of or relating to American Community or any proceedings under Chapter 81;

(c) Obtaining preferences, judgments, attachments, garnishments, or liens against American Community, its assets, policyholders, enrollees, members, officers, directors, or employees;

(d) Levying of execution against American Community, its assets, policyholders, enrollees, members, officers, directors, or employees; and

(e) Threatening or taking any other action that may lessen the value of American Community's assets or prejudice the rights of American Community's creditors as a whole, its policyholders, enrollees, or members, or the administration of this rehabilitation proceeding.

23. Any person who violates an injunction issued in this matter shall be liable to the Rehabilitator, the policyholder, or both, for the reasonable costs and attorney fees incurred in enforcing the injunction or any court orders related thereto and any reasonably foreseeable damages.

24. All Creditor claims against American Community are within the exclusive jurisdiction of this Court and will be determined, resolved, paid, and/or discharged, in whole or in part, according to the terms and conditions approved by the Court.

25. Any and all claims by Creditors against American Community must be raised or asserted within the rehabilitation proceeding before this Court and are subject to this Court's orders regarding the submission and determination of claims.

26. At the appropriate time, the Rehabilitator shall 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 this Order.

27. Pursuant to MCL 500.8114(1), the Court approves the Rehabilitator's appointment of James Gerber, the Director of Receiverships at OFIR, as a Special Deputy Rehabilitator for American Community. The Court also approves the Rehabilitator's appointment of Michael Hogan, the Auditor-In-Charge at OFIR, as a Special Deputy Rehabilitator for American Community, who will work under Mr. Gerber's direction and supervision. Mr. Gerber and Mr. Hogan shall serve at the pleasure of the Rehabilitator, who reserves the right to appoint other Special Deputy Rehabilitator(s) to replace and/or serve with Mr. Gerber and Mr. Hogan in the future as the need arises. Subject to the supervision and direction of the Rehabilitator and this

Court, Mr. Gerber and Mr. Hogan shall have all the powers and responsibilities of the Rehabilitator granted under MCL 500.8114.

28. Pursuant to MCL 500.8114(1), the Rehabilitator has fixed the compensation of Mr. Gerber and Mr. Hogan as follows, which this Court approves: Mr. Gerber and Mr. Hogan shall be compensated as salaried employees of OFIR and shall not receive any additional salary in their capacity as Special Deputy Rehabilitators for American Community. However, Mr. Gerber's and Mr. Hogan's expenses for travel, lodging, meals, and other expenses incurred in connection with their appointment as Special Deputy Rehabilitators shall be paid out of the funds or assets of American Community as normal administrative expenses pursuant to paragraph 16 of this Order. Mr. Gerber and Mr. Hogan will separately invoice and submit these expenses, which shall be reimbursed subject to State of Michigan reimbursement rates. If the Rehabilitator so elects in the future, he may allocate to American Community the pro rata portion of Mr. Gerber's and Mr. Hogan's salaries, at the rates of $62.09 an hour and $52.14 an hour, respectively, attributable to the performance of their duties as Special Deputy Rehabilitators, which compensation shall be paid out of the funds or assets of American Community pursuant to MCL 500.8114(1). In the event that American Community does not possess sufficient cash or liquid assets to pay Mr. Gerber's and Mr. Hogan's expenses, or their salaries if the Commissioner makes the allocation election permitted by this paragraph, the Rehabilitator may advance the necessary funds, which shall be repaid out of the first available money of American Community pursuant to MCL 500.8114(1).

29. If American Community remains in rehabilitation, the Rehabilitator and Special Deputy Rehabilitators shall make an accounting to the Court of American Community's financial condition and progress towards rehabilitation on or before October 15, 2010. Thereafter, the

Rehabilitator and Special Deputy Rehabilitators shall make a similar accounting to the Court each succeeding six-month period during which American Community remains in rehabilitation.

30. The Court reserves jurisdiction to amend this Order of Rehabilitation or issue such further orders as it deems just, necessary, and appropriate.

Circuit Court Judge

Stipulated and Agreed:

Christopher L. Kerr (P57131)
David W. Silver (P24781)
Attorneys for Petitioner

4/8/10
Date

John D. Pirich (P23204)
Attorney for Respondent

4.8.10
Date

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STATE OF MICHIGAN
CIRCUIT COURT FOR THE 30TH JUDICIAL CIRCUIT
INGHAM COUNTY

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

Petitioner,

No. 10-397-CR

v

HON. WILLIAM E. COLLETTE

AMERICAN COMMUNITY MUTUAL INSURANCE COMPANY,

Respondent.

Christopher L. Kerr (P57131)
Jason R. Evans (P61567)
Assistant Attorneys General
Attorneys for Petitioner
Corporate Oversight Division
P. O. Box 30755
Lansing, MI 48909
(517) 373-1160

PETITION FOR APPROVAL TO PAY VENDOR CLAIMS, AGENT COMMISSIONS, BENEFITS EQUALIZATION PAYMENTS, AND SEVERANCE PAYMENTS

R. Kevin Clinton, Commissioner of the Michigan Office of Financial and Insurance Regulation, as Rehabilitator of American Community Mutual Insurance Company (the "Rehabilitator"), by and through his attorneys, Bill Schuette, Attorney General, and Christopher L. Kerr and Jason R. Evans, Assistant Attorneys General, petitions this Court for approval to pay: (1) pre-Rehabilitation vendor claims; (2) accrued but unpaid insurance agent commissions; and (3) settlement amounts resolving the benefits equalization and severance agreements of five former American Community executives. In support of this Petition, the Rehabilitator states as follows:

1. On April 8, 2010, this Court entered a Stipulated Order Placing American Community into Rehabilitation, Approving Appointment and Compensation of Special Deputy Rehabilitators, and Providing Injunctive Relief (the "Rehabilitation Order"). Pursuant to MCL 500.8113(1), the Rehabilitation Order appointed the Commissioner as the Rehabilitator of American Community.

2. As required by MCL 500.8113(1), the Rehabilitation Order directed the Rehabilitator to "take immediate possession of all the assets of American Community and administer those assets under the Court's general supervision." Rehabilitation Order, p 4, ¶ 3.

3. The Rehabilitation Order provided that "[a]mong his plenary powers provided by law, the Rehabilitator shall have full power ... to deal in totality with the property and business of American Community." Rehabilitation Order, p 5, ¶ 8.

4. Additionally, the Rehabilitation Order provided that "[p]ursuant to MCL 500.8114(2) and (4), the Rehabilitator may take such action as he considers necessary or appropriate to reform or revitalize American Community...." Rehabilitation Order, p 6, ¶ 10.

5. Pursuant to the Rehabilitation Order, "[a]ll Creditor claims against American Community are within the exclusive jurisdiction of this Court and will be determined, resolved, paid, and/or discharged, in whole or in part, according to the terms and conditions approved by the Court." Rehabilitation Order, p 6, ¶ 11.

6. With limited exceptions for employee wages and health care provider claims, the Rehabilitation Order prohibits the Rehabilitator from paying pre-Rehabilitation Creditor claims until further order of the Court. Rehabilitation Order, p. 7, ¶ 14.

EXHIBIT D

American Community Mutual Insurance Company
Severance Payments
For Service Performed Prior to April 8, 2010
As of October 31, 2011

Cathleen Walker	$ 76,000.00
Jeffery Erickson	28,000.00
	$ 104,000.00