NOT FOR CITATION

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

WAYNE KNYAL, et al.,

Plaintiffs,

v.

OFFICE OF THE COMPTROLLER OF THE CURRENCY, et al.,

Defendants.
/

No. C 02-2851 PJH

ORDER

The parties' cross-motions for summary judgment came on for hearing on November 5, 2003. Plaintiffs Wayne Knyal, Carol Knyal, and Michael Matkins, Trustee of the Knyal Joint and Irrevocable Trust, appeared by their counsel Robert R. Moore and Canby C. Cohen; defendant Office of the Comptroller of the Currency ("OCC") appeared by its counsel Assistant United States Attorney Abraham A. Simmons; and defendant Federal Deposit Insurance Corporation ("FDIC") appeared by its counsel Larry L. Goodman. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court hereby rules as follows.

INTRODUCTION

This is an action brought under the Administrative Procedures Act, 5 U.S.C. §§ 701, et seq., seeking declaratory relief. Plaintiff Wayne Knyal ("Knyal") was terminated from his position with Bay View Capital Corporation, the holding company of Bay View Bank and Bay View Franchise Mortgage Investment Company, after the FDIC declared Bay View Bank to be a "troubled financial institution." After he was terminated, Knyal and

Bay View Bank asked the FDIC and the OCC to approve a severance payment and the payment of premiums on a life insurance policy.

The OCC denied the application for payment of the insurance premiums and the severance payment on the basis that they constituted impermissible "golden parachute" payments by a "troubled financial institution." Plaintiffs assert that the insurance policy premium payment is not a "golden parachute," and that the FDIC acted in excess of statutory authority in so deciding. Plaintiffs also allege that the OCC acted without observance of procedure when it denied payment of the golden parachute (both the severance and the insurance policy premium payments), and that the denial of the request for payment was arbitrary, capricious, and an abuse of discretion.

STATUTORY AND REGULATORY BACKGROUND

The Federal Depository Insurance Act ("the FDI Act" or "the Act") authorizes the FDIC to prescribe regulations to carry out the purposes of various provisions of the Act. Section 18 of the Act is entitled "Regulations governing insured depository institutions." See 12 U.S.C. § 1828. Subsection (k) of § 18 provides that the FDIC "may prohibit or limit, by regulation or order, any golden parachute payment." 12 U.S.C. § 1828(k)(1).[1]

Section 18(k) defines the term "golden parachute payment" as

> any payment (or any agreement to make any payment) in the nature of compensation by any insured depository institution or depository institution holding company for the benefit of any institution-affiliated party pursuant to an obligation of such institution or holding company that –
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> (i) is contingent on the termination of such party's affiliation with the institution or holding company; and
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> (ii) is received on or after the date on which –
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> * * * * *
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> (III) the institution's appropriate Federal banking agency determines that the insured depository institution is in a troubled condition (as defined in the regulations prescribed pursuant to [12 U.S.C. § 1831i(f)]).

12 U.S.C. § 1828(k)(4)(A).

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[1] Section 2523 of the Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990 amended the Federal Deposit Insurance Act by adding new section 18(k). Pub. L. No. 101-647, § 2523 (1990).

Section 18(k) provides further that the FDIC "shall prescribe, by regulation, the factors to be considered by the [FDIC] in taking any action [to prohibit or limit any golden parachute payment]." Id. § 1828(k)(2) (emphasis added). Section 18(k) includes a list of six factors that the FDIC "may" consider in prescribing any such regulation:

1. Whether there is a reasonable basis to believe that the "institution-affiliated party" or "IAP"[2] has committed any fraudulent act, any breach of trust or fiduciary duty, or any insider abuse with regard to the depository institution which has had a material effect on the financial condition of the institution;
2. whether there is a reasonable basis to believe that the IAP was responsible for the insolvency of, the appointment of a conservator or receiver for, or the troubled condition of, the depository institution;
3. whether there is a reasonable basis to believe that the IAP violated any state or federal banking law, with a material effect on the financial condition of the depository institution;
4. whether there is a reasonable basis to believe that the IAP to whom the payment is to be made has committed any fraudulent act, i.e., any violation of 18 U.S.C. §§ 215, 656, 657, 1005-1007, 1014, 1032, 1341,1343, or 1344;
5. whether the IAP was in a position of managerial or fiduciary responsibility; and
6. the length of time the IAP was affiliated with the depository institution, and the degree to which (a) the golden parachute payment reasonably reflects compensation earned over the period of employment, and (b) the compensation involves represents a reasonable payment for services rendered.

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[2] For purposes of the present action, an IAP, or "institution-affiliated party," is "any director, officer, [or] employee . . . of . . . an insured depositary institution or depository institution holding company," or "any other person as determined by the appropriate federal banking agency . . . who participates in the conduct of the affairs of an insured depository institution . . . ." 12 U.S.C. § 1813(u); see also 12 C.F.R. § 359.1(h).

12 U.S.C. § 1828(k)(2)(A)-(F). This list of factors is neither mandatory nor exclusive. The only mandatory language in the statute is the provision requiring the FDIC to prescribe whatever factors it will consider in any regulation it promulgates regarding the prohibitions or limits on golden parachute payments.

Following the enactment of the law that became § 18(k), the FDIC promulgated regulations relating to golden parachutes. These regulations are found at Part 359 of Title 12 of the Code of Federal Regulations. The regulations define the term "golden parachute" as

> any payment (or agreement to make a payment) in the nature of compensation by any insured depository institution or an affiliated depository institution holding company for the benefit of any current or former IAP pursuant to an obligation of such institution or holding company that
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> (i) Is contingent on, or by its terms is payable on or after, the termination of such party's primary employment or affiliation with the institution or holding company; and
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> (ii) Is received on or after, or is made in contemplation of, any of the following events:
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> * * * * *
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> (C) A determination by the insured depository institution's or depository institution holding company's appropriate federal banking agency, respectively, that the insured depository institution . . . is in a troubled condition, as defined in the applicable regulations of the appropriate federal banking agency (§ 303.14(a)(4) of this chapter);

and

> (iii) (A) Is payable to an IAP whose . . . affiliation with an insured depository institution is terminated at a time when the insured depository institution . . . with which the IAP is affiliated [is e.g., insolvent, in receivership, or in a troubled condition] or in contemplation of any of these conditions; or
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> (B) Is payable to an IAP whose . . . affiliation with an insured depository institution holding company is terminated at a time when the insured depository institution holding company . . . with which the IAP is affiliated [is, e.g., insolvent or in a troubled condition] or in contemplation of any of these conditions.

12 C.F.R. § 359.1(f)

Under the regulations, limitations on golden parachute payments apply to

1) troubled depository institutions seeking to enter into contracts to pay or to make golden parachute payments to their institution-affiliated parties;

2) troubled depository institution holding companies seeking to enter into contracts to pay or to make golden parachute payments to their institution-affiliated parties; and

3) healthy holding companies seeking to enter into contracts to pay or to make golden parachute payments to institution-affiliated parties of a troubled insured depository institution subsidiary.

12 C.F.R. § 369.0(b).

The regulations provide limited exceptions to the prohibition on the payment of golden parachutes by troubled or insolvent institutions, and also permit an institution or an IAP to request permission to make what would otherwise be a prohibited golden parachute payment. See 12 C.F.R. § 359.4. However, the regulations are clear that "[n]o insured depository institution or depository institution holding company shall make or agree to make any golden parachute payment, except as provided in [Part 359]." 12 C.F.R. § 359.2. Thus, the only permissible golden parachutes are those explicitly allowed under the regulations.

The regulations permit a troubled depository institution to make a golden parachute payment if and to the extent that

1. the appropriate federal banking agency, with the written concurrence of the FDIC, determines that such a payment or agreement is permissible; or
2. such an agreement is made in order to hire a person to become an IAP in order to prevent the institution from being placed in a receivership or conservatorship; or
3. such a payment is made pursuant to an agreement to pay a reasonable severance payment, not to exceed twelve months salary, to an IAP in the event of change of control of the depository institution, provided that the depository institution obtains the approval of the appropriate federal banking agency.

12 C.F.R. § 359.4(a)(1)-(3). The only one of these three instances of permissible golden

parachute payments that is applicable in the present case is (a)(1). That is, in Knyal's case, the payment is permissible only if the appropriate federal banking agency – here, the OCC – with the written concurrence of the FDIC, determines that it is permissible.[3]

The regulations incorporate the six factors listed in § 18(k) of the FDI Act, 12 U.S.C. § 1828(k)(2)(A)-(F), as follows. First, an institution or IAP making a request for payment under one of the exceptions set forth at § 359.4(a)(1)-(3) must demonstrate that it is not aware of any information, or documents or other evidence which would indicate that there is a reasonable basis to believe that, at the time that the payment is proposed to be made, the IAP (i) has committed any fraudulent act, breach of fiduciary duty, or insider abuse, with an adverse effect on the institution; (ii) is substantially responsible for insolvency or troubled condition of, or the appointment of a receiver or conservator for, the institution; (iii) has violated any state or federal banking law, with an adverse effect on the institution; or (iv) has violated federal laws prohibiting fraud, false statements in financial reporting, or embezzlement. 12 C.F.R. § 359.4(a)(4).

Second, in making its determination under § 359.4(a)(1)-(3), the appropriate federal banking agency and the FDIC "may consider"

1. whether and to what degree the IAP was in a position of managerial or fiduciary responsibility;
2. the length of time the IAP was affiliated with the depository institution, and the degree to which the proposed payment represents a reasonable payment for services rendered over the period of employment; and
3. any other factors or circumstances that would indicate that the proposed payment would be contrary to the intent of § 18(k) of the Federal Deposit Insurance Act.

12 C.F.R. § 359.4(b)(1)-(3).

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[3] The "appropriate federal banking agency" for Bay View Bank is the OCC. See 12 U.S.C. 1813(q). Thus, as the FDIC correctly points out, the OCC must approve golden parachute payments, before the FDIC can concur. See 12 C.F.R. § 359.4.

FACTUAL BACKGROUND

Plaintiff Wayne Knyal founded Franchise Mortgage Acceptance Company ("FMAC") in 1991, and served as FMAC's Chief Executive Officer from March 1991 to November 1999. FMAC was a specialty commercial financing company that engaged in lending and lease financing, primarily to franchised businesses such as fast food restaurants, retail energy licensees (service stations, convenience stores), and golf practice facilities. FMAC originated loans and leases, which it then sold through securitization or loan sales to institutional investors. FMAC was not subject to regulation by the OCC or the FDIC.

In June 1998, FMAC's Board of Directors approved a Split Dollar Agreement which obligated FMAC to make annual premium payments (the "insurance premiums"), for a period of ten years, on a term life insurance policy covering Wayne and Carol Knyal (the "insurance policy").[4] The insurance policy has a face value of $60,000,000, and the amount of the annual premium payments is approximately $1,075,000.

The owner and beneficiary of the insurance policy is the Knyal Joint and Survivor Irrevocable Trust (the "Trust"). Plaintiff Michael Matkins is trustee of the Trust. Under the terms of the insurance policy, the Trust is entitled to collect a death benefit of $60 million upon the death of the Knyals. On June 16, 2003, the Trust assigned the death benefits to FMAC. Pursuant to the Split Dollar Agreement, FMAC would be entitled to reimbursement of the insurance premiums advanced by FMAC together with the associated cost of funds.

In September 1998, Knyal retained Credit Suisse First Boston to "evaluate available

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[4] "Split dollar" life insurance is a device for having a corporation finance part of the premium cost to purchase a cash-value insurance policy on the life of an employee, generally an executive. On paper, the company and the executives split the premiums and the benefits. The executive bears the cost of the premium attributable to the term insurance element of the policy, and the company pays the portion of the premium attributable to the investment or cash-surrender-value element of the policy. The executive can pay his respective portion of the premiums or the company can pay the whole premium. The premiums grow tax-free over the life of the policy. If the company pays the premium, it is reimbursed – without interest – from the death benefits paid under the policy. In other words, the employer receives the cash surrender value of the policy and the balance is paid to the employee's beneficiaries. The employer retains the right to be repaid its investment in the policy from the death benefit payable under the policy or from the cash value of the policy if it is cashed prior to maturity. See Steven C. Alberty, Advising Small Businesses (2003) § 48:48; see also 67 FR 74199, 74201-02 (Dec. 9, 2002).

strategic alternatives" relating to the future of FMAC. See Bay View Capital Corp., Form S-4 Registration Statement, filed with the Securities and Exchange Commission on September 3, 1999, at 28. Credit Suisse First Boston recommended that FMAC be sold. On March 11, 1999, Bay View Capital Corporation ("BVCC"), the holding company for Bay View Bank, N.A. ("Bay View Bank" or "the Bank"), acquired FMAC by merger. Bay View Bank is an FDIC-insured depository institution. The Bank's primary regulator is the OCC.

As a result of the merger, FMAC became Bay View FMAC, an operating subsidiary of Bay View Bank. Knyal became president of Bay View FMAC, and was elected to the Board of Directors of BVCC. In connection with the merger, Knyal entered into an employment agreement with Bay View FMAC.

The new employment agreement, which became effective on November 1, 1999, stated that FMAC's obligations under the Split Dollar Agreement (payment of the insurance premiums) would be continued and assumed by Bay View FMAC. Paragraph 9 of the employment agreement, relating to "Termination of Employment," provided that in the event of Knyal's termination without cause, he would receive a lump sum payment equal to 1.5 times his annual salary of $400,000, plus an additional $600,000, for a total of $1,200,000 (the "severance payment"), and that Bay View FMAC would have no further obligation under the employment agreement, except "pursuant to the terms of any other applicable bonus plan, employee benefit plan or the Split Dollar Agreement . . . ."

After the merger, although Knyal held the title of President of Bay View FMAC, he did not have primary responsibility for the majority of its operations. He reported to the President and CEO of Bay View Bank and BVCC, and remained responsible only for the "insurance services" and "marketing services" of Bay View FMAC. At some point soon after the merger, problems developed in the loan portfolio and other business operations of Bay View FMAC. On August 11, 2000, because of losses resulting from these problems, the OCC informed Bay View Bank that it was in a "troubled condition" as defined under the applicable regulations. On September 11, 2000, Bay View shut down the franchise loan program operated by Bay View FMAC. As a result, Knyal resigned from the Board of

Directors of BVCC, and Bay View terminated his employment.

Because of its designation by the OCC as a "troubled institution," the Bank was prohibited from making any "golden parachute" payments to Knyal, an institution-affiliated party, without first seeking regulatory approval. See 12 C.F.R. 359.4(a)(1). Accordingly, on October 25, 2000, Knyal submitted an application to the FDIC and the OCC seeking approval of a severance payment of $1,200,000. Bay View Bank joined in the application. Knyal sought approval only for the severance payment, his application stating in effect that continuation of the $1,075,000 annual premium payments under the Split Dollar Agreement was not a golden parachute.[5]

In the application, Knyal asserted that he had an undisputed right to the severance payment under the terms of the employment agreement. He stated that although he had been affiliated with Bay View Bank for approximately one year, the employment agreement replaced an earlier agreement, and was actually a continuation of a long-term arrangement reflecting his contributions in the founding and development of a business that was assumed by Bay View Bank in the context of an acquisition. Knyal added that he did not believe, or have any documents or other evidence indicating, that there was a reasonable basis to believe that any of the factors specified in 12 C.F.R. § 359.4(a)(4) were applicable to the situation, and that he was unaware of any other reason that would make approval of the severance payment inappropriate.

With regard to the continuation of the payments of the insurance premiums under the Split Dollar Agreement, Knyal asserted that under the terms of the agreement, Bay View FMAC was obligated to make annual payments of $1,070,000 on a policy insuring the lives of Knyal and his wife; and that Bay View FMAC's payments were secured by a collateral assignment of the death benefit, providing that Bay View FMAC would be

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[5] Bay View Bank subsequently took the position in an August 2001 letter to OCC that continuation of the premium payments in excess of $1 million a year would be excessive in light of the short time that Knyal served Bay View and in light of the troubled status faced by the Bank. However, the Bank also took the position that it had no right to terminate the Split Dollar Agreement on its own.

reimbursed for the total amount of the premium payments upon either the termination of the split dollar agreement or the death of the Knyals. Knyal asserted, however, that the obligations of Bay View FMAC were not in any way "contingent on" the termination of his employment, and that the insurance premium payments were therefore not a golden parachute under the statutory definition.

On November 9, 2000, the FDIC's legal division issued a memorandum concluding that payment of the insurance policy premiums was a golden parachute requiring approval of both the OCC and the FDIC. In a letter dated November 17, 2000, the FDIC advised Knyal of this conclusion. The FDIC stated that the legal division had made the determination based, in part, on the fact that the Split Dollar Agreement was incorporated by reference into ¶ 9 of the employment agreement. The FDIC noted that by virtue of this language, the payments made pursuant to the Split Dollar Agreement were specifically payable on or after termination of Knyal's employment.

On November 27, 2000, Knyal wrote the FDIC, disputing that payment of the insurance premiums constituted a golden parachute. He pointed out that the definition of golden parachute payment is broader under the regulation, which refers to payment "contingent on" or "payable after" termination, than under the statute, which refers only to payment "contingent on" termination. He argued that the obligation to make "advances" under the Split Dollar Agreement began when the agreement was entered into in June 1998, prior to the sale of FMAC to Bay View Bank, and that the obligation continued unchanged throughout the period that Knyal was employed by Bay View, and up to the present.

On January 17, 2001, the FDIC responded with another letter of explanation, stating that the agency agreed that the implementing regulation was broader than the statute, and acknowledged a difference between an agreement providing for payment only on termination and the Split Dollar Agreement, which provides for ongoing payment following termination. The FDIC added, however, that Knyal's interpretation would render the regulation meaningless, as it would enable IAPs to circumvent the regulation by, for

example, providing for ongoing payment of salary regardless of whether the individual remained employed.

On January 29, 2001, the OCC issued an Order of Investigation relating to Bay View's acquisition of FMAC. One of the purposes of the Order of Investigation was to determine "whether circumstances exist that would authorize the OCC to deny permission to the Bank, pursuant to 12 C.F.R. § 359.4, to make golden parachute payments to some or all of six high level subsidiary officials."

On April 4, 2001, Knyal again wrote to the FDIC, asserting his belief that the insurance premium payments did not qualify as a golden parachute. He noted that the regulation applies to "any payment (or any agreement to make any payment) in the nature of compensation," 12 C.F.R. § 359.1(f), and argued that the insurance premiums were not "in the nature of compensation" and were not treated as compensation by Bay View or reported as taxable compensation to either state or federal tax authorities. He asserted that because the Bank had a legally enforceable right to be reimbursed for the principal amount of all premiums on the policy, the arrangement under the Split Dollar Agreement was more closely analogous to a loan or an investment than a payment to an employment as compensation for services.

On May 17, 2001, the FDIC responded to Knyal's April 4, 2001, letter. The FDIC noted that, contrary to Knyal's assertion in his letter of April 4, 2001, Bay View Bank had reported the premium payments to the tax authorities as taxable compensation. The FDIC reiterated its position that payment of the insurance premiums was a golden parachute, and stated that it would consider payment of those premiums as part of its consideration of Knyal's application for approval of the severance payment.

On September 1, 2001, OCC's counsel for Enforcement and Compliance completed a legal memorandum summarizing the results of the investigation undertaken pursuant to the January 29, 2001, Order of Investigation into, among other things, whether Knyal's request for payment of the golden parachute should be granted. The recommendation following the investigation was that the request be denied. The OCC's Washington

Supervision Review Committee met on September 6, 2001, to discuss the September 4 memorandum.

On October 2, 2001, having determined that both the severance payment of $1,200,000 and the payments under the Split Dollar Agreement were golden parachutes, the OCC notified Knyal that it was denying the application. The OCC stated that it had considered the discussion in Knyal's application for approval of payment, noting that he had addressed the factors set out at 12 C.F.R. § 359.4(a)(4) (that there is no reasonable basis to believe that the IAP has committed any fraudulent act or violated any banking law, or that the IAP is substantially responsible for the insolvency or troubled condition of the depository institution).

The OCC indicated that its decision was based on Knyal's submission, and that it had also considered the three factors in § 359.4(b) – the degree of managerial or fiduciary responsibility; the length of time of affiliation and the degree to which the golden parachute payment represents reasonable payment for services rendered over the period of employment; and other factors or circumstances contrary to the intent of the Federal Deposit Insurance Act. The OCC also noted that its decision was premised on the presumption that golden parachute payments were generally prohibited, except in certain narrow circumstances.

With regard to § 359.4(b)(1), the degree of managerial or fiduciary responsibility, the OCC found that Knyal's position as a member of the board of BVCC and president of Bay View FMAC from September 1999 until November 2000 placed him "in a sufficiently high degree of fiduciary responsibility to the Bank."

With regard to § 359.4(b)(2), the length of time of affiliation and the degree to which the golden parachute represents reasonable payment for services rendered over the period of employment, the OCC found that Knyal's tenure as an officer of the merged institution extended for only eleven months, and that the golden parachute payments were unreasonably excessive in view of the services he rendered. The OCC noted that unlike the position as president and chief administrative officer of the pre-merger FMAC, Knyal's

position at Bay View FMAC did not include any supervisory authority over its two main operating units. The OCC also found that the direct cash parachute payment amounted to three times Knyal's annual salary, and was therefore excessive, particularly in view of his diminished responsibilities post-merger.

The OCC rejected Knyal's argument that the amount of the parachute under the employment agreement was within the range of similar agreements involving founding executives of companies similar to the former FMAC, and the argument that the parachute represented a continuation of a previous long-term arrangement reflecting Knyal's contributions to the founding and development of the FMAC business. The OCC found these considerations not relevant to overcome the § 359.4(b)(2) standard, which presumes the intervention of an event – here, the troubled condition status – subsequent to any earlier determination of reasonableness by the parties to the employment agreement. The OCC indicated that upon the occurrence of such an event, and given the presumption against the payment of golden parachutes, the regulatory agencies should apply a more stringent standard.

In addition, the OCC also found relevant under § 359.4(b)(2) the fact that Knyal had withheld information from Bay View regarding an earlier criminal case involving an FMAC employee, Michael Saei, who ultimately pleaded guilty and was convicted of fraud.[6] The OCC noted that Knyal had stated that upon learning of a newspaper article about Saei in July 2000, he did not feel the need to discuss it with anyone other than Saei and another FMAC executive, based on his lack of management duties at Bay View Bank.[7] The OCC

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[6] In February 1999, Saei entered a guilty plea to an information charging him with bank fraud, in connection with activities that impacted Mechanics National Bank in Southern California. His sentencing was postponed and no press release was issued at that time, because the U.S. Attorney was using Saei to provide evidence against another target. A press release announcing the plea was finally issued in July 2000.

[7] The report of OCC's investigation suggested that Knyal suspected as early as 1987 that Saei had previously been involved in some criminal activity, but did not come to a definitive conclusion on that point. See OCC Administrative Record at 018. The only definitive conclusion was that Knyal knew about Saei's record at least three weeks before the Bank learned about it.

found Knyal should have reported this information to the Bank as part of his fiduciary duty, and that this failure to provide adequate services to the Bank reinforced the conclusion under § 359.4(b)(2) that the parachute payments represented excessive compensation for services rendered over the period of his employment.

The OCC also found that Knyal's handling of his knowledge of Saei's criminal case implicated the "other factors" provision of § 359.4(b)(3) of the regulations. The OCC indicated that although the Bank itself learned about the Saei matter approximately three weeks after Knyal stated that he was aware of it, this delay adversely impacted the Bank's ability to sell the Bay View FMAC unit to another buyer (GE Capital Corporation), resulting in an "adverse effect" on the Bank.[8] As a further factor under (b)(3), the OCC found that Knyal had failed to repay $164,000 due to the Bank,[9] and that the fact that the Bank had not made a demand on Knyal was irrelevant to the question whether Knyal had evaded his duty to make the payment.

On October 12, 2001, the FDIC responded to Knyal's payment approval application, stating that, based on the OCC's denial of payment approval, it would take no further action on the application. On June 13, 2002, plaintiffs filed this action, seeking judicial review of the decisions of the OCC and the FDIC, and also seeking declaratory and injunctive relief. Following the October 28, 2002, order dismissing BVCC and Bay View

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[8] Plaintiffs dispute the OCC's assertion that Knyal's failure to alert Bay View regarding Saei's criminal history affected Bay View's ability to sell Bay View FMAC to GE Capital. They include as Exh. 9 to their "Supplemental Administrative Record" an excerpt from the deposition of Gordon Olivant, whom plaintiffs claim was the GE Capital officer "in charge of the transaction" (presumably, GE Capital's consideration of whether to purchase Bay View FMAC). In his deposition, Olivant states that the Saei matter was not the deciding factor; rather, it was the fact that in the view of the GE Capital committee, Bay View FMAC's liabilities exceeded its value. Plaintiffs also note that the OCC's own investigation concluded that withholding the fact of Saei's conviction could not be shown to have had a material adverse effect on the Bank (citing the the OCC report, OCC Administrative Record at 028). However, the OCC indicated in the October 2, 2001, letter that it had not based its finding of "adverse material effect" wholly on the asserted failure of the sale to GE Capital. The OCC also found that the continued employment of a convicted felon, in itself, constituted an adverse material effect on Bay View Bank.

[9] This was the current outstanding balance of a note originally executed by Knyal in August 1997 in the principal amount of $410,000, to be repaid to FMAC in five annual installments of $82,000, without interest.

Bank from the case, the following claims remain.

Plaintiffs assert that the denial of payment under the Split Dollar Agreement was unlawful under 5 U.S.C. § 706(2)(C) because the FDIC and OCC ignored Congress' definition of "golden parachute" payment and applied the FDIC's expanded definition, thereby acting in excess of statutory authority. Plaintiffs also claim that the decision to deny the request for payment of the golden parachute (both the severance payment and the payment of insurance premiums) was unlawful under § 706(2)(D) because it was accomplished without observance of procedure required by law, and was unlawful under § 706(2)(A) because it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Each of the parties now moves for summary judgment.

DISCUSSION

A. Legal Standard

1. Motions for Summary Judgment

Summary judgment is appropriate when there is no genuine issue as to material facts and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. Material facts are those that might affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to a material fact is "genuine" if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. Id. The court may not weigh the evidence, and is required to view the evidence in the light most favorable to the nonmoving party. Id.

2. Review Under the Administrative Procedures Act

The Administrative Procedures Act ("APA") sets forth standards governing judicial review of decisions made by federal administrative agencies. Dickinson v. Zurko, 527 U.S. 150, 152 (1999). Under the APA, an agency's decision may be overturned if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law," or if it was taken in excess of statutory authority or jurisdiction, or without observance of procedure required by law. 5 U.S.C. § 706(2)(A), (C), (D).

B. The Parties' Motions

Plaintiffs argue that the court should set aside the decision by the OCC and the FDIC to deny his application for payment of the severance and the insurance policy premiums because the agencies' action was taken in excess of statutory authority and without observance of procedure required by law, and because it was arbitrary, capricious, and an abuse of discretion. Defendants contend that payment of the insurance premiums is a golden parachute because payment was contingent on Knyal's termination and because the premiums were payable after his termination. Defendants also assert that the severance payment was properly denied under the relevant factors.

The parties' motions raise three questions – first, whether the FDIC's determination that the insurance policy premiums were golden parachute payments was in accordance with the law and was a proper exercise of agency authority under the statute; second, which factors, if any, the OCC was required to consider in determining whether Knyal was entitled to the golden parachute, and which factors it actually did consider; and third, whether the OCC's decision to deny the application for payment of the severance and the insurance policy premiums was arbitrary, capricious, or an abuse of discretion.

1. Characterization of insurance policy payments as "golden parachute"

Plaintiffs contend that the court should act under § 706(2)(D) to reverse the FDIC's determination that payment of the insurance policy premiums constituted a golden parachute, on the ground that the FDIC exceeded its statutory authority. Specifically, plaintiffs argue that Congress did not authorize the FDIC to expand the definition of "golden parachute" – from "payment contingent on termination" to "payment either contingent on termination or payable after termination" – and that the FDIC nevertheless ignored the statutory definition and applied its own expanded definition.

Although an agency's interpretation or application of a statute is a question of law reviewed de novo, the court must give deference to the agency's construction of a statutory provision it is charged with administering. Brower v. Evans, 257 F.3d 1058, 1065 (9th Cir. 2001); Eisinger v F.L.R.A., 218 F.3d 1097, 1100-01 (9th Cir. 2000); see also Bear Lake

Watch, Inc. v. FERC, 324 F.3d 1071, 1073 (9th Cir. 2003) (noting "deference to an agency's reasonable interpretation of a statutory provision where Congress has left open the question of the agency's discretion"). When a statute is silent or ambiguous on a particular point, the court may defer to the agency's interpretation. See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984). Review is limited to whether the agency's conclusion is based on a permissible construction of the statute. Id.

However, in reviewing an agency's construction of a statute, the court must reject those constructions that are contrary to clear congressional intent or frustrate the policy that Congress sought to implement. Chevron, 467 U.S. at 842-44; see also Biodiversity Legal Found. v. Badgley, 309 F.3d 1166, 1173 (9th Cir. 2002). No deference is due to an agency when "Congress has directly spoken to the precise question at issue." Chevron, 467 U.S. at 842. In other words, courts are not required to defer to an agency's interpretations that are contrary to the plain and sensible meaning of the statute. Kankamalage v. INS, 335 F.3d 858, 862 (9th Cir. 2003).

The Ninth Circuit generally defers to an agency's interpretation of its own regulations. See Forest Guardians v. U.S. Forest Serv., 329 F.3d 1089, 1097 (9th Cir. 2003) (noting "substantial deference"); Wards Cove Packing Corp. v. Nat'l Marine Fisheries Serv., 307 F.3d 1214, 1218 (9th Cir. 2002) (noting "high degree of deference" if interpretation is not plainly erroneous or inconsistent with regulation). However, a federal regulation that conflicts with a federal statute is invalid as a matter of law, In re Watson, 161 F.3d 593, 598 (9th Cir. 1998), and is entitled to "no deference." Pub. Employees Ret. Sys. v. Betts, 492 U.S. 158, 171 (1989).

Plaintiffs contend that payment of the insurance premiums is not a golden parachute under the statutory definition because the payments were not "contingent on" Knyal's termination. They claim that the regulation, which defines "golden parachute" as a payment "contingent on" or "payable after" an IAP's termination, conflicts with the statute, which does not include the "payable after" provision. Plaintiffs assert that Congress did not delegate the authority to the FDIC to expand upon the statutory definition, and that the

FDIC and OCC improperly applied a regulation that conflicts with Congress's definition.

Plaintiffs also argue that the legislative history shows that Congress intended golden parachute payments to include only payments "contingent on termination." They point to the language in the House bills that eventually resulted in § 18(k) of the FDI Act, all of which contained the "contingent on termination" and "received on or after" language, and compare it with the language in the Senate bills, which did not require that the payments be contingent on termination, but only that they be "received on or after" a certain date. Plaintiffs submit that if the Senate version had been adopted, the FDIC's definition of "golden parachute" in the regulation would have been appropriate, but that because both the Senate and the House accepted the House version, the intent must have been to reject the "payable after" language that the FDIC inserted into the regulation.

Plaintiffs maintain that Congress considered the broader definition, and rejected it in favor of a narrower one, and that it must be presumed that Congress acted intentionally when it did so. Plaintiffs assert that the court's job is to follow the Chevron test: "The first step is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent." Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438, 450 (2002) (citations and quotations omitted).

Plaintiffs argue that a regulation may not serve to amend a statute, nor add to the statute something which is not there, citing Calif. Cosmetology Coalition v. Kilcy, 110 F.3d 1454, 1460 (9th Cir. 1997). They assert that § 18(k) provides that the FDIC may prohibit or limit, by regulation or order, any golden parachute payment, and that it also provides a specific definition of "golden parachute" – a payment that is "contingent on" termination. They claim that § 18(k) does not authorize the FDIC to broaden the definition of "golden parachute," but only to promulgate regulations relating to limitations on golden parachute payments. They argue that in promulgating a regulation that broadens the definition, the FDIC has acted in excess of the authority it was given by Congress, and that the statutory definition therefore must control.

The FDIC insists, however, that payment of the insurance policy premiums under the Split Dollar Agreement does fall under § 18(k)'s definition of a golden parachute as a payment that is "contingent on" termination, because Bay View FMAC agreed in the employment agreement to continue to make payments under the Split Dollar Agreement, and also to continue the payments in the event of Knyal's termination. The FDIC claims that the obligation to continue to make the payments while Knyal was employed is distinct from the obligation to make the payments after termination – that if this were not the case, it would not have been necessary for Bay View to incorporate the continuation of the insurance premium payments under the Split Dollar Agreement into the termination portion of the employment agreement.

The FDIC contends that because both the severance payment and the continuation of the insurance premium payments are referenced in the "Termination Without Cause" section of the employment agreement, both are payments that are "contingent on" termination and are therefore golden parachutes. The FDIC asserts that under Chevron, its interpretation of § 18(k) is entitled to deference, and contends that because the insurance policy payments are golden parachutes under the statute, there is no need to even consider the definition in the regulation.

Nevertheless, the FDIC also argues that the insurance premium payments constitute a golden parachute under the regulations because they are "contingent on" or pursuant to an agreement which "by its terms is payable on or after" the termination. The FDIC notes that the regulations were promulgated as a valid exercise of the FDIC's rule-making power, and that they are consistent with the intent of § 18(k). The FDIC contends that if the limitation was on payments that became payable only after termination, and did not preclude payments payable both before and after termination, an insured depository institution could evade the golden parachute provisions by, for example, entering into an agreement with an executive providing that, "Beginning next month (regardless of termination) employee X shall begin to receive annual payments of $1.075 million." The FDIC maintains that the language in the regulation represents a reasonable interpretation

of the statutory language when it is read in conjunction with the regulation's list of exceptions to the definition of a golden parachute payment.[10]

The FDIC disagrees with plaintiffs' assertion that the legislative history demonstrates that Congress intended that golden parachute payments be payments "contingent on" termination and did not intend that they also be "payable after" termination. The FDIC argues that the statute is ambiguous, to the extent that it defines the golden parachutes as "contingent on termination" but says nothing about whether golden parachutes could be "payable after" termination. The FDIC contends that its interpretation, as set forth in the regulation, falls within its legitimate rule-making authority, and also notes that Congress has done nothing to overturn this regulation, despite the fact that the initial notice of proposed rulemaking was issued in October, 1991, the final regulation was adopted in 1996, and Congress has enacted a number of statutes dealing with depository institutions in the interim.

The FDIC also asserts, in its own motion for summary judgment, that the enactment of the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (July 30, 2002) is relevant to the FDIC's conclusion that the Split Dollar Agreement is a golden parachute. Section 402 of the Sarbanes-Oxley Act amended § 13 of the Securities Exchange Act of 1934, 15 U.S.C. § 78m, to prohibit publicly-traded companies from making, or facilitating, loans to its directors and executive officers. The FDIC contends that payment of the insurance policy premiums constitutes compensation in the form of loans.

The court is not persuaded by this last argument, as the decision by the FDIC that the Split Dollar Agreement constituted a golden parachute was taken well before the enactment of Sarbanes-Oxley, and this case is limited to a review of the decisions taken by the FDIC and OCC in 2000 and 2001. However, with regard to the arguments raised by

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[10] In line with a similar provision in § 18(k), see 12 U.S.C. § 1828(k)(4)(C), the regulation does not prevent legitimate post-termination payments. Exceptions to the regulatory definition of "golden parachute" include payments made pursuant to a qualified pension or retirement plan, an employee welfare plan, a bona fide deferred compensation plan, or a nondiscriminatory severance pay plan or arrangement, or payments made by reason of death or termination caused by the disability of an IAP. 12 C.F.R. § 359.1(f)(2).

plaintiffs, the court finds that plaintiff's motion should be DENIED, and the FDIC's motion should be GRANTED, for several reasons.

First, the FDIC properly concluded that the insurance premium payments were "contingent on termination" because they were referenced, along with the severance payment, in the "Termination Without Cause" section of the employment agreement. Second, Congress authorized the FDIC to "prohibit or limit, by regulation or order, any golden parachute payment," and further authorized the FDIC to "prescribe regulations to carry out the purposes of various provisions of [the FDI Act]. 12 U.S.C. § 1828(k)(1), (2). Thus, the FDIC acted within the scope of its legitimate rule-making authority when it promulgated the golden parachute regulations.

Where, as here, Congress has given an agency authority to administer a statutory scheme and to promulgate regulations defining the nature and extent of that scheme, the court must give considerable weight and deference to that agency's interpretation and construction. Chevron, 467 U.S. at 844. In other words, courts must defer to an agency's reasonable interpretation of a statute it administers unless a contrary intent of Congress is clear. See id. at 842-44. Where a statute and an agency regulation regarding the same matters conflict, courts must defer to the statute. See e.g., K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988) (If the statute is clear and unambiguous the matter is over and the courts and agency must give effect to Congressional intent). If the statute is ambiguous as to the question at issue, however, the court defers to the governing agency's interpretation of the statutory language. Royal Foods Co., Inc. v. RJR Holdings Inc., 252 F.3d 1102, 1106 (9th Cir. 2001).

Here, while the statute defines "golden parachute" as a payment "contingent on termination," there is no clear intent from Congress that "golden parachute" refers only to payments that are "contingent on" termination and cannot also include payments that are "payable after" termination. While an argument could be made that the regulation broadens or expands upon the statutory definition, it is not clear that the regulation conflicts with the statute. Moreover, it is not entirely clear that there is any significant

distinction between "contingent on" and "payable after," such that the FDIC, in promulgating the regulation, can be said to have impermissibly broadened the Congressional definition of golden parachute.

"Contingent" is commonly defined as "possible, but not assured; doubtful or uncertain; conditioned upon the occurrence of some future event which is itself uncertain or questionable . . . an interest which depends for its effect upon an event which may not happen." Black's Law Dictionary (6th ed. 1990) at 321. Thus, payment that is "contingent on termination" is payment that is dependent or conditioned on the occurrence of the termination. "Payable" commonly means "capable of being paid; . . . justly due; legally enforceable." Id. at 1128. "A sum of money is said to be 'payable' when a person is under an obligation to pay it." Id. Thus, money that is "payable after termination" is money that a person is obligated to pay after termination has occurred.

"Contingent" emphasizes the conditional aspect – if the employee is terminated, then the payment will be made. "Payable" expresses a simple temporal relationship or sequence, without a conditional component – the payment will be made after the employee has been terminated. Put another way, "contingent" implies a cause-and-effect relationship, indicating that one event must occur before another can occur; while "payable" describes one event – payment of money – that will occur after another event – termination of affiliation. While it is true that "payable" says nothing about whether the second event – payment – can also occur prior to the first event – termination – while "contingent" suggests that the payment will occur only after termination, the pertinent question here is whether an agreement to pay "if terminated" is substantially distinct from an agreement to pay "after being terminated," given the purposes of § 18(k).

The purpose of the Banking Law Enforcement Act of 1990 was to "enhance the enforcement powers of Justice and the Federal financial institution regulatory agencies with respect to unlawful activities affecting federally insured depository institutions." 136 Cong. Rec. H20733 (daily ed. July 31, 1990). Title II of the legislation, "which is aimed at protecting assets from wrongful disposition, . . . expand[ed] the power of the Federal

Deposit Insurance Corporation to void fraudulent transfers; prohibit[ed] a financial institution that does not maintain its capital requirements from entering into golden parachute contracts without permission of the appropriate Federal banking agency and, in certain cases, Federal Deposit Insurance Corporation." Id.

New subsection (k) was "intended to prevent officers and directors of insured institutions of holding companies from voting themselves generous bonuses at the expense of the institution or company, and ultimately, perhaps, the Federal Deposit Insurance Corporation." Id. at H20736. In other words, § 18(k) was enacted to provide a means of preventing executives who have been terminated from troubled depository institutions from draining money from those institutions, to the detriment of shareholders and creditors, or in the case of failed institutions, to the detriment of the FDIC.

Congress granted the FDIC broad authority to approve or deny golden parachute payments. It was certainly within the spirit of § 18(k) for the FDIC to extend this protection to agreements to make payments that are "payable after" termination as well as to those that are "contingent on" termination. Particularly, as the FDIC pointed out, in view of the exceptions provided for legitimate post-termination payments, such as payments pursuant to an ERISA plan, see 12 U.S.C. § 1828(k)(4)(C); 12 C.F.R. § 359.1(f)(2), it is clear that the FDIC targeted the regulation toward the specific wrong that § 18(k) was intended to address. The FDIC did not exceed its statutory authority in determining that payment of the insurance policy premiums constituted a golden parachute.

2. Whether OCC acted without observance of procedure

Plaintiffs assert that the court should act under § 706(2)(D) to reverse the OCC's decision to deny payment of the golden parachute, on the basis that the OCC acted without observance of procedure. Plaintiffs claim that the OCC improperly failed to consider all six factors set forth in the statute, and that the agency failed to follow its own internal guidelines. A court may overturn agency action that was taken "without observance of procedure required by law." 5 U.S.C. § 706(2)(D). However, plaintiffs are wrong in their assertion that the OCC and the FDIC were obligated to follow their internal

procedures and to consider all six factors set forth in the statute.

As explained above, § 18(k) provides that the FDIC "shall" prescribe, by regulation, the factors to be considered in taking any action to prohibit or limit any golden parachute payment requested by an IAP of a troubled or insolvent depository institution. Section 18(k) then lists six factors that the FDIC "may" consider in promulgating any such regulation. The mandatory portion of § 18(k) is the requirement that the FDIC promulgate regulations in which the agency states which factors will be considered. The permissive part is the actual factors to be included in the regulations.

The regulations state that no golden parachute payments will be approved except under the conditions set forth in Part 359 of Title 12 of the Code of Federal Regulations. 12 C. F.R. § 359.2. Section 359.4 sets forth the three exceptions to the general rule that forecloses golden parachute payments to IAPs of troubled depository institutions. See 12 C.F.R. § 359.4(a). The only one of those three that is applicable in the present case is the exception for a request for payment that has been approved by the appropriate federal banking agency with the concurrence of the FDIC.

Section 359.4(a) also provides that any institution or IAP making a request for approval of a golden parachute payment must demonstrate that it is not aware that there is a reasonable basis to believe that the IAP committed any fraudulent act, violated any banking law, or was responsible for the institution being in an insolvent or troubled condition. This is the mandatory part of the regulation, and it imposes a duty on the IAP or depository institution, not on the agency.

Section 359.4 provides further, under subsection (b), that the appropriate federal banking institution and the FDIC "may" consider three additional factors – the degree of the IAP's managerial or fiduciary responsibility; the length of time the IAP was affiliated with the institution and the degree to which the requested payments represent a reasonable payment for services rendered over the period of affiliation or employment; and any other factors or circumstances that indicate that the payment would be contrary to the intent of § 18(k). 12 C.F.R. § 359.4(b). In other words, the OCC and the FDIC "may" consider one,

two, or all three of the remaining three factors. None of the factors is controlling, and there is no requirement that more or less weight be given to any of them.

Here, as stated above, Knyal submitted an application to the FDIC and the OCC, seeing approval of payment of the golden parachute, stating that there was no basis for any reasonable belief that he had committed any fraudulent act, had been responsible for the troubled financial condition of Bay View Bank, or had violated any banking law. The OCC disapproved the request, first noting that Knyal had referred in his application to the three factors that the applicant is required to address under § 354.4(a), and then analyzing the appropriateness of the request in light of the three factors in § 354.4(b).

Plaintiffs concede that § 18(k) does not mandate that agencies consider all six factors, but simply that the FDIC promulgate regulations indicating the factors that should be considered when an appropriate federal banking agency takes any action with regard to a request for a golden parachute payment. Plaintiffs claim that "[i]n response" to this directive in § 18(k), the FDIC promulgated certain internal guidelines. Plaintiffs quote from the FDIC's "Case Manager Procedures Manual," from a section headed "Golden Parachute and Severance Plan Payments," which provides that "[i]n granting or withholding consent [to a request for a golden parachute payment], the FDIC must consider and favorably resolve the following factors pursuant to § 18(k) of the FDI Act," and which lists all six of the § 18(k) factors. Plaintiffs also note that the OCC's "Golden Parachute and Severance Payment Procedures" states that "[i]n making the determination whether the OCC should recommend to the FDIC that a golden parachute payment be made, limited, or prohibited, [the OCC should] consider the following factors: [listing the six § 18(k) factors]."

This argument is without merit. First, it was the regulations, not the internal guidelines, which were promulgated in response to the directive in § 18(k). Second, it is clearly settled that internal procedures of federal agencies do not have the force of law. See Moore v. Apfel, 216 F.3d 864, 868-69 (9th Cir. 2000) (Social Security Administration's hearings, appeals, and litigation manual (HALLEX) was internal guidance tool providing policy and procedure guidelines to ALJs and other staff members, and was not binding on

Commissioner); James v. United States Parole Comm'n, 159 F.3d 1200, 1205-06 (9th Cir. 1998) (Parole Commission's internal policy manuals did not create enforceable right); Rank v. Nimmo, 677 F.2d 692, 698-99 (9th Cir. 1982) (lenders' handbook and circulars of Veterans Administration home loan program did not create enforceable duty); United States v. Fifty-Three (53) Eclectus Parrots, 685 F.2d 1131, 1136 (9th Cir. 1982) (provision in internal U.S. Customs manual did not have force of law and could not be asserted against government); see also Ward v. CIR, 784 F.2d 1424, 1430-31 (9th Cir. 1986) (holding that even published procedural rules are not enforceable, where they are statements of "policy").

For an agency pronouncement to have the force and effect of law, enforceable against the agency in federal court, the pronouncement

> must (1) prescribe substantive rules – not interpretive rules, general statements of policy or rules of agency organization, procedure or practice – and, (2) conform to certain procedural requirements. To satisfy the first requirement, the rule must be legislative in nature, affecting individual rights and obligations; to satisfy the second, it must have been promulgated pursuant to a specific statutory grant of authority and in conformance with the procedural requirements imposed by Congress.

Eclectus Parrots, 685 F.2d at 1136 (citations and quotations omitted); see also United States v. Alameda Gateway Ltd., 213 F.3d 1161, 1168 (9th Cir. 2000). Courts do not review allegations of noncompliance with agency statements that are not binding on the agency. Alameda Gateway, 213 F.3d at 1167; see also Western Radio Servs Co., Inc. v. Espy, 79 F.3d 896, 900 (9th Cir. 1996).

Here, both the FDIC manual and the OCC manual contain guidelines or rules of procedure or practice. They are not legislative in nature, and were not promulgated in response to a particular statutory grant of authority or under the procedural requirements imposed by Congress for the promulgation of official agency regulations. They are internal guidelines, providing interpretive rules of agency procedure. As such, they do not create an enforceable right of action against the agencies. The OCC and the FDIC did not act without observance of procedure.

3. Whether OCC's decision to deny request for payment was arbitrary or capricious, or constituted an abuse of discretion

Plaintiffs claim that the OCC and the FDIC abused their discretion in denying Knyal's request for the severance payment and payment of the insurance policy premiums, and that the decision was arbitrary and capricious.[11] Plaintiffs contend that the court should overturn this decision under § 706(2)(A).

The arbitrary and capricious standard is appropriate for resolutions of factual disputes implicating substantial agency expertise. Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 376-78 (1989). Review under the arbitrary and capricious standard is narrow, and the reviewing court may not substitute its judgment for that of the agency. Id. In considering whether an agency acted in an arbitrary and capricious manner, a court must determine whether the agency articulated a rational connection between the facts found and the decision made. Washington v. Daley, 173 F.3d 1158, 1169 (9th Cir. 1999); see also Public Citizen v. Dep't of Transp., 316 F.3d 1002, 1020 (9th Cir. 2003).

The reviewing court must determine whether the agency based its decision on a "reasoned evaluation of the relevant factors," and whether there has been a clear error of judgment. Marsh, 490 U.S. at 378. The court may reverse an agency's decision as arbitrary or capricious only if the agency relied on factors that Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, offered an explanation that ran counter to the evidence before the agency, or offered one that is so implausible that it could not be ascribed to difference in view or the product of agency expertise. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43

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[11] In some places plaintiffs refer to the OCC as having made the decision, and as having abused its discretion in failing to consider all six of the § 18(k) factors; while elsewhere, they claim that the OCC and the FDIC abused their discretion in, e.g., failing to consider all six of the § 18(k) factors. However, under the relevant provision of the regulation, a permissible golden parachute payment is one that the appropriate federal banking agency – here, the OCC – has determined to be permissible, provided that the FDIC subsequently gives its written concurrence. 12 C.F.R. § 359.4(a)(1). Thus, where, as here, the appropriate federal banking agency determines that the payment is not permissible, the FDIC has no further role to play.

(1983). Plaintiffs assert that the decision was arbitrary and capricious because the OCC did not adequately explain the reasons for its decision.

Specifically, plaintiffs argue that the OCC did not explain the significance of its finding that Knyal occupied a position of fiduciary or managerial responsibility; and did not explain how Knyal's severance payment can be considered "excessive," in view of the fact that the OCC approved severance payments to other executives which were based on the same formula (1.5 times annual salary plus "target bonus" amount). Plaintiffs also contend that Saei's conviction did not have a material adverse effect on the Bank; and that Knyal's failure to pay the $164,000 balance on the 1997 note was not significant because the Bank did not make a demand for payment, and since the terms of the note give the Bank the right of offset (e.g., against the severance payment).

The OCC responds while it was not obligated to consider all of the factors listed under § 18(k), the record reflects that it did actually consider all six factors, but concluded that only three of those were relevant. The OCC contends that Knyal's failure to report Saei's conviction was only one of the factors considered in its analysis; that the OCC's decision with regard to other applications for payment of golden parachutes is not significant, as the OCC had concluded that the other applications were qualitatively different.[12]

The court has reviewed the record, and finds that the OCC's October 2, 2001, letter adequately explained the reasons for its decision to deny the golden parachute payments. The OCC's decision was based on a six-month investigation, which included numerous depositions, review of thousands of pages of documents, and interviews of over a dozen witnesses. The OCC followed the applicable regulations, and analyzed the three relevant

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[12] The OCC found that, given the length of service of the other Bay View FMAC employees, the severance payments requested by those employees were reasonable for the services they had rendered. See OCC Administrative Record, at 026 n.29. The OCC argues that while Knyal continued to have fiduciary responsibilities until his termination, his managerial responsibilities substantially decreased following the merger of FMAC with Bay View. OCC determined that Knyal did not have the sort of managerial responsibility that would justify a large payout at the time of his termination.

factors set forth at 12 C.F.R. § 359.4(b) – the degree of managerial or fiduciary responsibility, the length of time of affiliation and the degree to which the golden parachute payment represents reasonable payment for services rendered over the period of employment, and other factors or circumstances contrary to the intent of the FDI Act. The OCC considered these three factors, and explained how each contributed to its decision.

The court's task, in reviewing an agency decision under the APA, is to determine whether the agency's decision was based on a "reasoned evaluation of the relevant factors," and whether there has been a clear error of judgment. Marsh, 490 U.S. at 378. The court must determine whether the agency articulated a rational connection between the facts found and the decision made. Washington, 173 F.3d at 1169.

Here, the OCC's decision was within the bounds of reasoned decisionmaking. The OCC considered the relevant factors, and the court finds no clear error of judgment. The OCC found that Knyal's position within the Bay View organization placed him in a sufficiently high degree of fiduciary responsibility to the Bank; and that in view of his diminished responsibilities and relatively brief tenure as an officer of the merged institution, the golden parachute payments were unreasonably excessive in view of the services he rendered. The OCC also found significant the fact that Knyal withheld from the Bank, if only for a short time, information regarding the prior criminal conviction of another Bank employee, and the fact that he failed to promptly repay money he owed to the Bank.

There is no indication that the OCC relied on factors that Congress did not intend it to consider, that it failed to consider an important aspect of the problem, that it offered an explanation that ran counter to the evidence before it, or that it offered one that was implausible. The court finds that the OCC's decision to deny Knyal's application for payment of the golden parachute was neither arbitrary nor capricious, and that it did not constitute an abuse of discretion.

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CONCLUSION

In accordance with the foregoing, the court DENIES plaintiffs' motion and GRANTS the motions of the OCC and the FDIC.

IT IS SO ORDERED.

Dated: November 25, 2003

PHYLLIS J. HAMILTON
United States District Judge

United States District Court
For the Northern District of California

UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF CALIFORNIA

WAYNE KNYAL,

Plaintiff,

v.

OFFICE OF THE COMPTROLLER,

Defendant.
_____/

Case Number: CV02-02851 PJH

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on November 25, 2003, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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Dated: November 25, 2003

Richard W. Wieking, Clerk
By: Lurline Moriyama, Deputy Clerk

NOT FOR CITATION

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

WAYNE KNYAL, et al.,

Plaintiffs,

v.

OFFICE OF THE COMPTROLLER OF THE CURRENCY, et al.,

Defendants.
/

No. C 02-2851 PJH

JUDGMENT

The court having granted summary judgment in favor of defendants Office of the Comptroller of the Currency and Federal Deposit Insurance Corporation,

It is Ordered and Adjudged

that plaintiffs Wayne Knyal, Carol Knyal, and Michael Matkins, Trustee of the Knyal Joint and Irrevocable Trust, take nothing, and that the action be dismissed on the merits.

Dated: November 25, 2003

PHYLLIS J. HAMILTON
United States District Judge

UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF CALIFORNIA

WAYNE KNYAL,

Plaintiff,

v.

OFFICE OF THE COMPTROLLER,

Defendant.

Case Number: CV02-02851 PJH

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That on November 25, 2003, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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