IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

SUSAN A. MARTINEZ,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**C.A. No. 4128-VCP**
	)	
REGIONS FINANCIAL CORPORATION, a Delaware corporation, as successor in interest to AMSOUTH BANCORPORATION, a Delaware corporation,	)	
	)	
Defendant.	)	

DEFENDANT'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Joel Friedlander (#3163)
BOUCHARD MARGULES & FRIEDLANDER, P.A.
222 Delaware Avenue, Suite 1400
Wilmington, Delaware 19801
(302) 573-3500
Attorneys for Defendant Regions Financial Corporation

OF COUNSEL:

Jeffrey A. Lee
MAYNARD COOPER & GALE, PC
1901 Sixth Avenue North
2400 Regions/Harbert Plaza
Birmingham, Alabama 35203
(205)251-1000

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

PRELIMINARY STATEMENT

Be careful what you wish for, you just might get it.
-- Unknown.

Martinez asserts on page 1 of her answering brief that analysis of "the details" of her Employment Agreement will be determinative. Regions agrees. This brief explains how the details of the Employment Agreement nullify Martinez's claims, and how Martinez's answering brief repeatedly ignores the applicable details, and instead directs the Court to provisions of the Employment Agreement that are inapplicable to the case at bar.

For example, with respect to Martinez's date of termination for purposes of her claim for a larger 2007 bonus, Martinez, at page 7 of her brief, directs the Court to the Employment Agreement's general notice provision in Section 13(b) – which applies to a termination **for cause.** But since Martinez was terminated "**other than for cause**" the "**Date of Termination**" provision in Section 5(e) is directly applicable. Section 5(e) makes the "Date of Termination" the date "on which the Company notifies the Executive of such termination" which Martinez admits was October 12, 2007.

Martinez also seeks to distinguish the contract analyzed by the Seventh Circuit in *Gerow*, and asks the Court to follow instead the analysis of the Eight Circuit in *Deal*. But Martinez's claim for damages plus severance benefits must be rejected under the reasoning of both courts, given the details of Martinez's Employment Agreement, including its laundry list of specified benefits in the event of a termination "other than for cause." Regions is entitled to judgment as a matter of law on the remaining four counts of Martinez's complaint.[1]

[1] Martinez's answering brief withdrew Count V of the Complaint.

STATEMENT OF ADDITIONAL FACTS

In September 2007, Regions advised Martinez and other executives that their employment would be terminated if a new agreement was not executed by October 15, 2007. (Martinez's Affidavit of 11/26/08 at ¶¶ 4-6) On October 12, 2007 Regions notified Martinez that her employment was terminated with her last day of employment being November 30, 2007.[2] (*See id.* ¶ 8) Her last day of employment was subsequently extended to December 31, 2007. (S*ee id.* ¶ 9)

Section 5 of the Employment Agreement specifically identifies five different scenarios in which employment is terminated and the Employment Period is shortened: death; disability; termination by the company for "cause"; termination by the Executive for "good reason"; termination by the company "other than for cause."

If the Executive is terminated **for cause**, Section 5(d) requires a specific written "Notice of Termination" and sets out the required content of the Notice of Termination in detail:

> Any termination by the Company for Cause, or by the Executive for Good Reason, shall be communicated by Notice of Termination to the other party hereto in accordance with Section 13(d) of this Agreement. For purposes of this Agreement, a "Notice of Termination" means a written notice which (i) indicates the specific termination provision relied upon (ii) … sets forth in reasonable detail the facts and circumstances claimed to provide a basis for termination…(iii) if the Date of Termination (as defined below) is other than the date of receipt of notice, specifies the termination date (which date shall not be more than thirty days after the giving of such notice).

[2] Martinez alleges that she was terminated without cause by Regions, an allegation which Regions disputes as it was her option to remain employed. (Compl. ¶ 25; Ans. ¶ 25) That dispute is immaterial, since Section 6 of the Employment Agreement prescribes the same benefits regardless of whether "the Company shall terminate the Executive's employment other than for Cause or Disability or the Executive shall terminate employment for Good Reason." (Agmt. § 6) For purposes of its own motion for summary judgment, Regions assumes that Martinez was involuntarily terminated other than for cause, as she alleges.

Section 5(e) provides that the Date of Termination of a **for Cause** termination is the date that the written Notice of Termination is received and also allows the Notice of Termination to identify a later date (as long as the later date is not longer than 30 days after the Notice of Termination pursuant to 5(d)):

> "Date of Termination" means (i) if the Executive is terminated … for Cause … the date of receipt of the Notice of Termination or any later date specified therein…

If the Executive is terminated **other than for cause,** Sections 5(d) and 5(e) do not require a written "Notice of Termination." Instead, Section 5(e) provides that the "Date of Termination" is the date that the Company notifies the Executive of the termination (a date which cannot be extended):

> "Date of Termination" means … (ii) if the Executive's employment is terminated by the Company other than for Cause or Disability, the Date of Termination shall be the date on which the Company notifies the Executive of such termination….

Section 6 of the Employment Agreement expressly contemplates that Martinez's employment could be terminated without cause and provides for the payment of lucrative "Golden Parachute" severance benefits in the event that Martinez is terminated without "Cause":

> 6. Obligations of the Company upon Termination. (a) Good Reason; Other Than for Cause, Death or Disability. If, during the Employment Period, the company shall terminate the Executive's employment other than for Cause or Disability or the Executive shall terminate employment for Good Reason:
>
> (i) except as specifically provided below, the Company shall pay to the Executive in a lump sum in cash within 30 days after the Date of Termination the aggregate of the following amounts:
>
> A. the sum of (1) the Executive's Annual Base Salary through the Date of Termination to the extent not theretofore paid, (2) the product of (x) the higher of (I) the Recent Annual Bonus and (II) the Annual Bonus paid or payable …, for the most recently completed fiscal year during the Employment Period, if any (… the "Highest Annual Bonus") and (y) a fraction, the numerator of which is the number of days in the current fiscal year through the Date of Termination, and the denominator of which is 365 and (3) any compensation previously deferred … and any accrued vacation pay…

B. the amount equal to the product of (1) three and (2) the sum of (x) the Executive's Annual Bonus and (z) the value determined … to be a competitive annual long term incentive grant…

C. An amount equal to the actuarial present value equivalent of the aggregate benefits accrued by the Executive as of the Date of Termination under the terms of the Supplemental Retirement Plan…. For this purpose, the Executive's interest under the Supplemental Retirement Plan shall be fully vested and such benefits shall be calculated under the assumption that the Executive's employment continued following the date of termination for the number of years remaining in the term of this Agreement (**i.e., additional years of service credits shall be added**)….

…

E. An amount equal to three times the sum of: (i) the Executive's annual club dues bonus (if applicable); plus (ii) the Executive's annual automobile allowance (if applicable) for the year in which the Executive's Date of Termination occurs.

(ii) for three years **after the Executive's Date of Termination** … the Company shall continue benefits to the Executive … at least equal to those … described in Section 4(b)(iv) of this Agreement **if the Executive's Employment had not been terminated**….

(iii) the Company shall, at its sole expense as incurred, provide the Executive with outplacement services the scope and provider of which shall be selected by the Executive in his sole discretion.

…

(v) the Company shall pay or provide, as the case may be, relocation benefits under the relocation policy of the Company… which are requested by the Executive … within two years following the Date of Termination…

(vii) the Company shall continue officer and director liability insurance coverage … in the same amounts, as in effect immediately prior to the Date of Termination for the benefit of Executive until the expiration of all applicable statutes of limitations ….

(*Id.* at 8-10) (emphasis added).

ARGUMENT

I. PURSUANT TO THE EMPLOYMENT AGREEMENT'S EXPRESS TERMS, MARTINEZ IS NOT ENTITLED TO A LARGER 2007 BONUS BY VIRTUE OF THE DATE SHE CLAIMS SHE LAST WORKED.

Martinez argues that she is entitled to a larger bonus for 2007 because the last day she says she worked was December 31, 2007. However, the bonus component of Martinez's severance pay is specifically linked to her "Date of Termination," not to the last day she claims she worked. *See* Section 6(a)(i)(A) ("the product of … the Annual Bonus … for the most recently completed fiscal year during the Employment Period … and a fraction, the numerator of which is the number of days in the current fiscal year through the **Date of Termination**, and the denominator of which is 365…") (emphasis added).

Similarly, Section 4(b)(ii) of the Employment Agreement requires the payment of an Annual Bonus "for the fiscal year **ended during the Employment Period**" while section 4(b)(iii) requires incentive opportunities no less favorable than those available to other peer executives "[d]uring the Employment Period." By the end of 2007, Martinez's employment had already been terminated.

As noted above, Section 5(e) of the Employment Agreement provides that "(ii) if Executive's employment is terminated by the Company other than for Cause or disability, the Date of Termination **shall be** the date on which the Company **notifies** the Executive of such termination…." Section 5(e) (emphasis added). Martinez's affidavit makes clear she was notified she was terminated on October 12, 2007. Likewise, in her answering brief she states "it is clear from the Complaint that **Martinez was notified of her termination on October 12, 2007**…." (Ans. Br. n. 7) (emphasis added).

Nevertheless, Martinez argues that her Date of Termination should be the last day she says she worked. While the Employment Agreement specifically allows the "Date of Termination" to be extended for no more than 30 days in a "cause" termination, it does not allow for any such extension with an "other than for cause" termination and certainly not an eighty (80) day extension as Martinez seeks here (from October 12 to December 31). Section 5(e) of the Employment Agreement could have easily been drafted to state, "if the Executive's employment is terminated by the company other than for Cause or Disability, the Date of Termination shall be the date on which the Company notifies the Executive of such termination *or the date on which Executive last works whichever is later*." Instead, Section 5(e) does not include the italicized phrase above. Martinez is asking this court to re-write her Employment Agreement to add the italicized phrase.

Because the Employment Agreement clearly and specifically defines the Date of Termination, the Court should not re-write the Employment Agreement to extend Martinez's Date of Termination when the contract does not allow for such an extension. *See, Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1035 (Del. Ch. 2006) ("courts should be most chary about implying a contractual protection when the contract could easily have been drafted to expressly provide for it."); *Cargill v. JWH Special Circumstance LLC*, 959 A.2d 1096, 1110 (Del. Ch. 2008) (same). Martinez is asking this court to re-write her Employment Agreement to add the italicized phrase.

Based on the unambiguous applicable terms of the Employment Agreement, Martinez's employment, under and pursuant to her Employment Agreement, ended on October 12, 2007. While there is a factual dispute among the parties with respect to how much work Martinez actually performed after her October 12 termination, that dispute is immaterial because the

Employment Agreement is clear and the methodology for calculating Martinez's severance pay under her Employment Agreement is clear. As a result, Regions is entitled to summary judgment on Count I of the Complaint.[3] Martinez's contract "Employment Period" and all the requirements of Section 4 ended, pursuant to Section 5(e), on October 12, 2007, and gave way to the severance provisions of Section 6.

Section 6 requires the payment of the "Highest Annual Bonus" which is the larger of the "Recent Annual Bonus[4]" and the Annual Bonus paid "for the most recently completed fiscal year during the Employment Period." Because Martinez's contract and Employment Period was terminated on October 12, 2007, the most recently completed fiscal year was 2006. Martinez admits that her 2006 bonus amount was the amount used to calculate her severance benefits. (Ans. Br. at 11) Again, Martinez argues, without citing to the Employment Agreement, that the last day she worked determines the "most recently completed fiscal year during the Employment Period." (Ans. Br. at 12,15) As stated above, this argument flies in the face of the actual terms of the Employment Agreement under which her Employment Period ended as of October 12, 2007.

Nor can Martinez utilize extrinsic evidence to alter the contractual analysis. "[I]f the instrument is clear and unambiguous on its face, neither th[e] [Delaware Supreme] Court nor the trial court may consider parol evidence `to interpret it or search for the parties intentions.'" *Pellaton v. The Bank of New York*, 592 A.2d 473, 478 (Del. 1991); *Alliance Data Systems Corp. v. Blackstone Capital Partners V L.P.*, 963 A.2d 746, n. 43 (Del. Ch. 2009) ("If a contract is

[3] In her answering brief, Martinez criticizes Regions for not paying Martinez her severance benefits, including bonus, within 30 days after the "Date of Termination" as required by Section 6(a)(i) and argues that this fact indicates that the "Date of Termination" was not October 12, 2007. Martinez fails to mention that her contract was executed on February 1, 2004 eleven (11) months **before** IRS regulation 409(a) became effective. If Regions had paid the severance within 30 days, this 2005 regulation would have cost Martinez dearly.

[4] Recent Annual Bonus is defined in Section 3(b)(ii)as the largest bonus received in the three years prior to the change of control.

unambiguous, extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract or to create an ambiguity.") Because the Employment Agreement's provisions discussed above are clear and unambiguous, parol evidence may not be considered to determine Martinez's Date of Termination and her related bonus. As a result, summary judgment is due to be granted on Count I of the Complaint.

II. MARTINEZ'S CLAIM FOR BOTH THE PAY SHE WOULD HAVE RECEIVED HAD SHE REMAINED EMPLOYED AS WELL AS SEVERANCE BENEFITS IS UNSUPPORTED BY CONTRACT LANGUAGE OR CASE LAW.

"When interpreting a contract, a court's task is to satisfy the **reasonable expectations** of the parties at the time they entered into the contract." *Alliance Data Systems Corp*. 963 A.2d at 760 (internal quotation omitted). As discussed in the opening brief, the drafters of the Employment Agreement would not reasonably have expected that an other than for cause termination would require payment of all the consideration itemized in Section 6 plus damages based on the hypothetical remaining length of the contract. As Judge Easterbrook found in *Gerow*, where the plaintiff made the same argument Martinez makes here, "Gerow's reading of the contract, in other words, makes no business sense, while Rohm's reading is practical." *Gerow v. Rohm and Haas Company*, 308 F.3d 721, 725 (7th Cir. 2002)[5]. Pursuant to Delaware law, Martinez could not have had any reasonable expectation, on February 1, 2004, that upon termination she would receive both the pay she would have received had she not been terminated plus over seven million dollars in severance benefits (including three times the sum of her annual country club dues and automobile allowance, three years of medical, prescription, dental, life and

[5] The federal district court in the *Gerow* case specifically found Gerow's and Martinez's position to be "not reasonable." *Gerow*, 2001 WL 1159174 * 3 (N.D. Ill. 2001) ("In short, we believe that Gerow's interpretation of the Rohm Agreement that, post-termination, he is entitled to termination benefits and employment benefits is not reasonable, and therefore find as a matter of law that he is not entitled to additional compensation and benefits.").

long-term disability insurance, outplacement services, relocation services, etc.) because such an expectation simply is not reasonable.

Martinez makes various textual and legal arguments, none of which justify paying Martinez more than the amounts specified in Section 6 of the Employment Agreement.

A.. The Words "Without Further Obligations" Are Omitted from Section 6(a), Because Section 6(a) Contained Substantial Further Obligations.

Martinez argues that the drafters of the Employment Agreement knew how to make clear that Section 6 benefits were in lieu of Section 4 benefits because with respect to death, disability and cause terminations, the Employment Agreement specifically provided that the Agreement would terminate "without further obligations." Martinez argues that the drafters' failure to include the same language with other than for cause terminations establishes that the drafters intended the Executive to receive both the pay she would have received had she stayed plus severance benefits.

The plaintiff in *Gerow* made the identical argument which was rejected by the Court for the same reason this Court should reject it – there were further, substantial obligations in the event of an other than for cause termination that were not required for the other types of terminations. *Gerow*, 308 F.3d at 724. Specifically, the Seventh Circuit reasoned:

> Now take the absence of "without further obligations" in P5(d). Drawing inferences from omissions is risky in the best circumstances and untenable here, for the language "without further obligations" would have been out of place. There *were* further obligations – some of them detailed in P5(d) itself and others in P10, which dealt with restrictive covenants…. It would have been possible to reword P5(d) to add something like `without further obligations except to the extent this paragraph and P10 provide further obligations,' but this much was plain from the text and structure of the agreement. Why impute significance to the non-parallel phraseology when the underlying substance was not parallel?"
>
> *Id*.

Here, Section 6(a) contains 10 separate paragraphs of benefits either payable to Martinez or which must be continued on her behalf in a termination other than for cause. These further obligations alone account for two plus pages of the sixteen page contract. Section 6(b), 6(c) and 6(d) – dealing with death, disability and termination for cause -- each consist of one paragraph. Like the agreement in *Gerow*, Section 6(b) requires only the payment of unpaid accrued salary and bonus plus whatever death benefits are generally available for other executives. *Id*. at 723-24. Section 6(c) requires only the payment of unpaid accrued salary and bonus plus whatever disability benefits are generally available for other executives.

In contrast, Section 6(a) covers obligations ranging from outplacement services to country club dues to insurance. Some of the obligations outlined in Section 6(a) were to last for three years or longer (i.e. Section 6(a)(ii) – "for three years after the Executive's Date of Termination, or such longer period as may be provided by the terms of the appropriate plan, program, practice or policy, the Company shall continue benefits to the Executive and/or the Executive's family at least equal to those which would have been provided to them in accordance with the plans, programs, practices and policies described in Section 4(b)(iv) of this Agreement (dealing with welfare benefit plans) if the Executive's employment had not been terminated….; 6(a)(v) – requiring the repayment of relocation expenses for up to two years following the Date of Termination; 6(a)(vii) – requiring officer and director liability insurance coverage until the expiration of any applicable statutes of limitations). Other obligations include payments to the Executive pursuant to the AmSouth Supplemental Retirement Plan as well as the AmSouth Supplemental Thrift Plan. Unlike Sections 6(b), 6(c) and 6(d), the further obligations required under 6(a) were extensive and the obligations imposed by 6(a)(ii), 6(a)(v) and 6(a)(vii)

could not as a matter of fact terminate upon the Employment Agreement's termination because they stretched out over a period of years.

Put simply, the "without further obligations" argument should be rejected by this Court for the same reasons the *Gerow* Court rejected it. Regions has continuing obligations under Section 6 following a termination without cause. The phrase "without further obligations" in Section 6 hardly suggests that additional obligations exist under Section 4.

Indeed, the benefits in Section 6(a) overlap with the same benefits (but to a greater degree) that the Executive would have been entitled to under Section 4 had the executive remained employed. For example, 6(a)(ii) provides that the executive shall receive the benefits provided in Section 4(b)(iv), which include medical, prescription, dental, disability, employee life, group life, accidental death and travel insurance plans for three years after the "Date of Termination" as "if the Executive's employment had not been terminated…" 6(a)(i)(E) provides for the payment of "[a]n amount equal to three times the sum of: (i) the Executive's annual club dues bonus; plus (ii) the Executive's annual automobile allowance … while Section 4(b)(vi) provides that "During the Employment Period, the Executive shall be entitled to … payment of club dues, and, if applicable, use of any automobile…" With respect to the laundry list of welfare benefits, a simple reading of the language in 6(a)(ii), "if the Executive's employment had not been terminated," makes clear that a termination otherwise ended those benefits.

The absence of the phrase "without further obligations" in no way renders sensible the notion that the Executive would receive welfare benefits for the balance of the Employment Period under Section 4(b)(iv) plus the exact same benefits for three years after the "Date of Termination" under Section 6(a)(ii). Does the executive receive these identical benefits twice during the overlapping period between the Date of Termination and the end of the Employment

Period defined in Section 4? It also does not make sense that the Executive would continue to receive club dues and a car allowance under Section 4(b)(vi) for the balance of the two year employment period after already receiving a lump sum amount equal to three (3) times the Executive 's annual club dues and car allowance under 6(a)(i)(E).

B. The Non-Exclusivity Provision in Section 7 Inapplicable.

Martinez argues that the non-exclusivity provision in Section 7 of the Employment Agreement requires the payment of Section 4 benefits in addition to Section 6 benefits. Martinez's argument makes no logical sense.

The non-exclusivity provision is not a guide to interpreting the relationship between other sections of the Employment Agreement. Section 7 is concerned with the relationship between the Employment Agreement and any contract rights the Executive might have outside the Employment Agreement. It provided that "Nothing in this Agreement" shall limit the Executive's rights "under any contract or agreement with the Company." Contrary to Martinez's construction (Ans. Br. at 23), the Employment Agreement is not itself such a referenced "contract or agreement with the Company." It serves no purpose to state that the Employment Agreement does not limit the Executive's rights under the Employment Agreement. Nor can those words plausibly be construed to mean that the rights granted in one section of the Employment Agreement do not limit the rights conferred in another section of the Employment Agreement. The operative rule of construction is quite different -- "A contract must be construed as a whole, giving effect to all of its provisions," *Seabreak Homeowner's Ass'n v. Gresser*, 517 A.2d 263, 269 (Del. Ch. 1986), and each clause of any contract must be read in relation to each other to bring harmony, if possible, between all parts of the writing. *Troumouhis*

v. State, 2006 Del. Super. LEXIS 234 *14 (May 31, 2006). Section 7 does not affect or undercut the import of Section 6.

C. The Language in Gerow' is Nearly Identical.

Martinez contends that her contract and the contract in *Gerow* are written so differently that the *Gerow* Courts' analyses are inapplicable. The contracts are actually uncannily similar.

While Martinez notes three differences between her agreement and Gerow's agreement and argues that these differences compel a different result, Martinez does not address any of the identical or nearly identical provisions in the two agreements that the *Gerow* courts found compelling. A review of the two agreements and the Court's opinions suggests the outcome in this matter should be the same as the outcome in *Gerow*.

The district court's analysis focused on sections 3 and 5(d) of the Gerow agreement. The Court noted that Gerow, like Martinez here, urged the court to read section 3 in isolation because it did not specifically provide for the cessation of section 3 benefits upon termination. *Gerow*, 2001 U.S. Dist. Lexis 15698, at *11 (N.D. Ill. 2001). However, the Court found this position would be plausible only "if we were to completely ignore the existence of Section 5." *Id*. The Court then noted "Section 5(d) provides that `if, during the Employment Period' the Company terminates an Executive other than for cause, the Executive is to receive a clearly-defined laundry list of payments and benefits." *Id*. The Court then found "[t]he fact that Section 3 itself does not explicitly curtail the "Employment Period" in the event of termination is immaterial when, only a few pages later, the Agreement so clearly provides what happens in the event of a termination." *Id.* at *11-12. The provisions in the Gerow agreement that the Court pointed to and found determinative are the same as the provisions in Martinez's Employment Agreement.

The Seventh Circuit's analysis focused on 1) the purposes of Golden Parachutes; 2) the "without further obligations" provisions in Section 5(a), (b) and (c) but not (d); 3) Sections 2 and 3 and their modification by Section 5(d) and 4) the employee's right to quit without cause and still receive severance. Three of the four issues considered by the Seventh Circuit in affirming the dismissal of Gerow's claim and the underlying contractual language are virtually identical to the issues and contractual language involved in Martinez's Employment Agreement; in all three instances the contractual provisions in Martinez's agreement compel the same result.

The Court first examined the purposes behind Golden Parachutes, noted that "Gerow's understanding of his entitlements is novel" and determined that "[n]either of these purposes calls for compensating an Executive twice on a change of control, however – once through guaranteed salary, and a second time through guaranteed severance over the same period." *Gerow,* 308 F.3d at 723. Martinez asserts the same novel claim here which makes even less sense than Gerow's claim in light of the express purpose of her agreement, as stated in the lone recital, was to provide compensation and benefits "which are competitive with those of other corporations." This recital is not included in the Gerow agreement. Competitive compensation does not require compensating Martinez twice. Thus, the first factor considered by the Seventh Circuit compels the same result here, perhaps even more so, as in *Gerow.*

The Seventh Circuit next examined the "without further obligations" language in the agreement and rejected Gerow's argument because of the fact that there were further obligations under Gerow's contract following a termination other than for cause. A review of the two agreements demonstrates the "further obligations" required by the Gerow contract are few in comparison to the "further obligations" required by Martinez's contract. Gerow's contract provided him with just three separate lump sum payments and the continuation of welfare

benefits. *See* Ans. Br. Ex. 7 Section 5(d). As stated above, the "further obligations" in Martinez' agreement consisted of ten (10) paragraphs and two plus pages of details (more than 1/8th of the entire agreement). Because the further obligations in Martinez's agreement are more extensive than the further obligations in the Gerow agreement, the Court's reasoning is even more applicable in the case at bar and this factor compels the same result here, perhaps even more so, as in *Gerow*.

The Seventh Circuit next looked to Sections 2 and 3 of the agreement "which Gerow says give him an explicit right to be employed for three years, with the same salary, responsibilities, fringe benefits, office, furniture, and staff" and held "[t]his is an implausible understanding." *Id*. at 724. The Seventh Circuit drew an analogy to a football coach with a four year contract who "still may be fired." *Id*. The Court said the coach gets damages, the salary less what he makes elsewhere, but does not keep control of the team. *Id*. The Court then said "[a]nd if the contract contains a liquidated damages provision, then the coach gets that sum instead of the wages-less-other-income calculation. That is how Gerow's contract works too." *Id*.

The Court next asked the question "[w]hy would P5(d) provide severance benefits that assume lack of employment? (One of the severance benefits is three years' pension contributions in lieu of those that the employer would have made had Gerow remained employed. But on Gerow's reading, he receives those pension contributions twice: once as severance under P5(d) and again as damages for breach of PP 2 and 3.)" *Id*. at 725. Similarly, Martinez's agreement requires that Martinez's lump sum payment under the Supplemental Retirement Plan "shall be calculated under the assumption that the Executive's employment continued following the date of termination for the number of years remaining in the term of this Agreement." Section 6(a)(i)(C). Under Martinez's reading, she receives this benefit twice, once under Section

4(b)(iii) and twice under Section 6(a)(i)(C), as well as the sum of three times her annual club dues and car allowances under 6(a)(i)(E) plus the same annual club dues and car allowance for the balance of the Employment Period under Section 4(b)(vi). Under her reading, she also has double welfare benefits coverage, once under 4(b)(iv) for the entire Employment Period and twice under 6(a)(ii) for three years after the Date of Termination as "if the Executive's employment had not been terminated." Also, Martinez was entitled to outplacement services (Section 6(a)(iii)) and relocation expenses incurred "within two years following the Date of Termination" (Section 6(a)(v).

The Seventh Circuit asked the rhetorical question "[w]hy would P5(d) provide severance benefits that assume lack of employment" if Gerow could not be terminated? Could any severance benefit assume lack of employment more than outplacement services and relocation expenses? If Martinez could not be terminated, why would her contract provide for outplacement services (Section 6(a)(iii)) and relocation expenses incurred within two years of the Date of Termination (Section 6(a)(v))? The answer is that the contract specifically contemplated termination and explicitly outlined the benefits Martinez would receive upon termination. The fact that Section 6 benefits are in lieu of Section 4 benefits is demonstrated by these benefits that assume termination as well as the above, multiple benefits that would overlap and be paid twice under Martinez's novel interpretation of this contract. Again, this factor from the Seventh Circuit's opinion compels the same result.[6]

[6] Regions acknowledges that the Gerow agreement allowed the Executive to resign and receive severance benefits. Martinez's Employment Agreement does not afford her the unfettered right to resign and receive severance though it does allow her to resign for "good reason" and receive severance. "Good reason" is loosely defined to include "any diminution in [her] position, authority, duties or responsibilities." (Agmt § 5(c). Gerow's right to resign was not addressed at all in the district court's opinion and was considered by the Seventh Circuit only as a final issue that was not dispositive by itself. The at-will provision cited by Martinez is likewise without

There is one other distinction between the Gerow and Martinez agreement -- Martinez's agreement specifically conditions her Employment Period on being "subject to the terms and conditions of this Agreement" (Section 3(a)), which would specifically include the Employment Agreement's termination provisions, whereas Gerow's agreement failed to contain a similar condition. (Compare with Section 2 in Gerow's contract). This condition on the Employment Period makes it even more clear here that termination is not a breach of any obligation to keep Martinez employed for a certain period of time.

D. ***Deal* is No Aid to Martinez.**

Martinez points to *Deal v. Consumer Programs, Inc*., 470 F.3d 1225 (8th Cir. 2006) and argues that the Court should reach a similar conclusion without noting the following passage from *Deal*:

> The severance provision in Gerow explicitly identified an exclusive "laundry list" of amounts recoverable by Plaintiff in the event of termination: the plaintiff's "accrued obligations," which included the plaintiff's accrued salary through termination and certain bonuses; a lump sum severance payment; and lump sum pension enhancement. However, unlike Deal's Employment Agreement, the Gerow agreement did not include an "all remedies" provision entitling the plaintiff to pursue "all remedies available under this Agreement or at law in respect to damages suffered." **In the absence of such a provision, the Gerow plaintiff could recover only the items specified, which did not include damages for breach of contract.**
>
> *Deal*, 470 F.3d at 1231 (emphasis added)(citation omitted).

The "all remedies" provision was included in the same paragraph that set out Deal's severance and it specifically provided that the "all remedies" was "in addition to" the severance payment. Specifically it stated:

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significance in light of the clear right Regions had to terminate the agreement as long as it paid the required severance. The third distinction noted by Martinez, the non-exclusivity provision, is addressed in Section II.B., *supra,* of this brief.

> In addition to the payment pursuant to this Subsection 6(d)(2) … Deal shall be entitled to all remedies available under this Agreement or at law in respect of any damages suffered by Deal as a result of an involuntary termination of employment without cause.

Martinez's contract does not allow her the right to pursue all remedies "at law in respect of any damages suffered by [her]." Instead, it included a "laundry list of amounts recoverable by her in the event of termination." *Id*. at 1231. In the words of the *Deal* Court, due to the absence of such an "all remedies" provision, and the existence of a laundry list of benefits upon termination, Martinez could recover only the items specified, which do not include damages for breach of contract. *Deal* distinguished Gerow because of a clear provision that was not contained in the Gerow contract (or in the Martinez Employment Agreement) further demonstrating why Martinez's claim must fail.

III. REGIONS DID NOT BREACH THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING.

Martinez cites to *Caldera Properties v. Ridings Development, LLC*, 2008 WL 3323926 *16 (Del. Super. June 19, 2008) but neglects to mention that the Court in Caldera granted summary judgment on the breach of implied covenant claim because:

> To hold than Centex's actions breached the implied covenant of good faith and fair dealing would improperly allow the implied covenant to contravene the parties' express agreement beyond the scope of the written contract. Defendants are entitled to judgment on this issue.

Id. at *16. Regions is likewise entitled to summary judgment because the parties expressly contracted for how Martinez's bonus would be determined in the event she was terminated during the term of the Employment Period. The covenant cannot be used to re-write the agreement. *Kent County Equipment, Inc. v. Jones Motor Group, Inc.*,, 2009 WL 737782 * 5 (Del. Super. March 20, 2009) ("It goes without saying therefore that the implied terms cannot override the written terms of a contract.").

Martinez also cites to *Rizzitiello v. McDonald's Corp*., 868 A.2d 825 (Del. 2005) without mentioning that the trial court's grant of summary judgment on the implied covenant claim was affirmed by the Supreme Court. In so doing, the Court pointed to precedent holding that the implied covenant was limited "to narrowly defined categories wherein the employer's conduct constituted an aspect of fraud, deceit or misrepresentation." *Id.* at 831. Here, there is no allegation of fraud, deceit or misrepresentation.

Martinez also cites to *Nye v. University of Delaware*, 2003 WL 22176412 (Del. Super.), a case in which the implied covenant claim failed and was affirmed by the Delaware Supreme Court:

> Mrs. Nye must adduce some evidence of bad faith or ill will. Mrs. Nye has not. We conclude that the Superior Court properly granted summary judgment on the claim of breach of good faith and fair dealing.

Nye v. University of Delaware, 897 A.2d 768, 2006 WL 250003, at *3 (Del. 2006).

There is no allegation here of bad faith or ill will. In fact, even though Martinez's Date of Termination was October 12, 2007 and Section 6(a)(i)(A) clearly allowed Regions to pay Martinez a pro rata bonus ("the numerator of which is the number of days in the current fiscal year through the Date of Termination, and the denominator of which is 365"), it is undisputed Regions paid Martinez 365/365th of her Highest Annual Bonus.

Martinez cites *Nye*, for the proposition that the implied covenant may be breached when "an employer uses its superior bargaining power to deprive the employee of clearly identifiable compensation related to the employee's past service…." (Ans. Br. at 37) The *Nye* court did not elaborate on this point. However, in *E.I. Dupont de Nemours and Company v. Pressman*, 679 A.2d 436 (Del. 1996) the Supreme Court of Delaware decided that the plaintiff's claim did not fall into this specific category, noting that this type of implied covenant claims protects "an

employee from a discharge based on the employer's desire to avoid the payment of benefits already earned by the employee." *Id*. at 442. When Martinez was terminated, she had not "already earned" a 2007 bonus. The fiscal year was just 3/4s of the way complete when she made the decision not to execute a new agreement with complete awareness of the consequences of that decision. Regions could not, as a matter of fact, have been motivated by a desire to avoid the payment of benefits "already earned by the employee." Indeed, because of Regions' decision, Regions paid Martinez millions of dollars that it would not have otherwise had to pay.

"Although there is an implied covenant of good faith and fair dealing in every contract, the Courts of this state [Delaware] have been reluctant to impose obligations under that implied covenant." *Kent County Equipment, Inc. v. Jones Motor Group, Inc*., 2009 WL 737782 *5 (Del. Super. 2009) (quoting *Homan v. Turoczy*, 2005 Del. LEXIS 121 at *63 (Del Ch. Ct. 2005)("the Delaware Supreme Court has consistently held that obligations under the covenant of good faith and fair dealing should be implied only in rare cases.")). This certainly is not a case where additional obligations should be imposed under an implied covenant.

Because the Employment Agreement clearly provided for how Martinez's bonus would be calculated, there is no allegation of fraud, deceit, misrepresentation, bad faith or ill will, and Regions could not have been motivated by a desire to avoid paying benefits already owed, Regions is entitled to summary judgment on this claim.

CONCLUSION

For all the foregoing reasons, Regions respectfully requests that summary judgment be entered in its favor as to all claims asserted in this litigation by Martinez.

/s/ Joel Friedlander
Joel Friedlander (#3163)
BOUCHARD MARGULES & FRIEDLANDER, P.A.
222 Delaware Avenue, Suite 1400
Wilmington, Delaware 19801
(302) 573-3500
Attorneys for Defendant Regions Financial Corporation

OF COUNSEL:

Jeffrey A. Lee
MAYNARD, COOPER & GALE, P.C.
1901 Sixth Avenue North
2400 Regions Harbert Plaza
Birmingham, Alabama 35203
(205)254-1987

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