



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.	:	

**AFFIDAVIT OF PATRICIA L. ENERIO  
PURSUANT TO CHANCERY COURT RULE 56(f)**

STATE OF DELAWARE    )  
                                  )   SS.  
NEW CASTLE COUNTY    )

Patricia L. Enerio, being duly sworn, deposes and says as follows:

1. I am counsel to Susan Martinez (“Martinez”) in this action. I make this affidavit pursuant to Chancery Court Rule 56(f), and in response to Regions Financial Corporation’s (“Regions”) motion for summary judgment (the “Motion”).

2. On October 30, 2008, Martinez filed her Verified Complaint (the “Complaint”) against Regions for breach of the Employment Agreement between Martinez and Regions (the “Employment Agreement”) (Counts I and II), breach of the implied covenant of good faith and fair dealing (Count III), specific performance, or in the alternative, advancement (Count IV) and breach of the LTIP (Count V).

3. On November 26, 2008, Martinez filed a motion for partial summary judgment on her advancement claim (Count IV). The parties entered into a briefing schedule on that motion, which was approved by the Court on December 4, 2008.

4. On December 12, 2008, Martinez served Document Requests and Interrogatories relating to Counts I-III and V of the Complaint. (Exs. A & B hereto). These discovery requests relate directly to issues addressed by Regions' Motion, and as set forth below, the discovery requests seek information that would assist Martinez in responding to the Motion.

5. On January 14, 2009, Regions filed its Motion for summary judgment on all counts of the Complaint and a motion for protective order staying discovery.

6. On January 28, 2009, Martinez filed her reply brief in support of her motion for partial summary judgment on the advancement claim.

7. Martinez is filing her answering brief in opposition to Regions' Motion (the "Answering Brief") along with this Affidavit.

8. As set forth in the Answering Brief, Regions' Motion cannot be resolved without discovery regarding at least the following issues:

(a) **The actual date of Martinez's termination by Regions.** Resolution of this factual question is critical to a determination of whether Martinez was paid the full amount of the bonus for 2007 to which she was entitled under the Employment Agreement. As set forth more fully in the Answering Brief, Regions has taken the position in this litigation -- for the first time -- that Martinez was terminated effective October 12, 2007, and that for that reason she is not entitled to a full year's bonus for 2007 -- even though she undisputedly worked for the entirety of 2007, and also undisputedly did not receive a written notice of termination on October 12 (or any other date) as required by the Employment Agreement. Indeed, Regions now claims for the first time that it actually "overpaid" Martinez's bonus based on its fabricated termination date. Numerous actions and statements by Regions detailed in the Answering Brief contradict its newly-minted position, including but not limited to Regions' stance in August 2008 that Martinez had "retired" (as opposed to being terminated), direct statements by Regions' Senior

Vice President of Compensation and Benefits to Martinez that she would receive a bonus for the full 2007 year, and the apparent fact that other Regions executives who left Regions shortly after Martinez did received their full 2007 bonuses. Martinez should be permitted to take discovery regarding the foregoing facts and this issue in general. While Martinez did not know -- and could not have known -- that Regions would take the position that she was terminated on October 12, 2007, at the time that she propounded her discovery requests, discovery regarding this issue is fairly sought by Interrogatories 9, 10, 13-16, 21 and 23 and Document Requests 6, 9-11 and 17. To the extent that those requests do not adequately cover the issue, Martinez should not be precluded from propounding additional discovery in light of the fact that Regions' position is entirely new and could not have been anticipated at the time that she propounded her discovery requests.

(b) **2007 bonuses paid to other executives in Martinez's peer group.** As set forth more fully in the Answering Brief, the Employment Agreement provides that Martinez is entitled to a bonus that is no less favorable than the bonuses received by her peer group of executives. Martinez believes that other executives in her peer group who left shortly after she did not only received their full 2007 bonuses, but also received far more favorable bonuses than she did. Martinez is entitled to take discovery regarding this issue in order to establish not only her entitlement to a full 2007 bonus, but also to establish what that bonus should have been. There is literally no way of calculating the bonus to which she was entitled under the Employment Agreement without information regarding what bonuses the other executives in her peer group received. Discovery regarding this issue is sought by Interrogatories 13-15 and 23 and Document Requests 1, 9-11, 14 and 21.

(c) **The timing of Martinez's termination by Regions.** In the alternative to her express contractual claim relating to the 2007 bonus, Martinez has alleged that the failure to

pay her full 2007 bonus breached the implied covenant of good faith and fair dealing. As discussed above, Regions takes the position that Martinez was terminated on October 12, 2007, notwithstanding the fact that she worked for the entire year in 2007. Assuming *arguendo* that Martinez's claim is not expressly addressed by the Employment Agreement, and assuming that the Court finds that her termination date was October 12, 2007, to the extent that Regions deliberately timed Martinez's termination in order to avoid paying her full 2007 bonus notwithstanding the agreement of the parties that she would work until the end of the year, that would constitute a breach of the implied covenant of good faith and fair dealing under the authorities cited in the Answering Brief. Martinez should be permitted to take discovery regarding whether such improper timing of Martinez's termination occurred. Such discovery is sought by Interrogatories 6-7, 10, 12-13, 21 and 23 and Document Requests 7-10, 12, 19 and 21.

(d) **Regions' reasons for terminating Martinez.** While parties' motivations for their actions are not always relevant to a contractual analysis, this case is different. Ignoring the actual language of the Employment Agreement, Regions relies heavily on the proposition (supported by a Seventh Circuit decision, but not by an Eighth Circuit decision) that Martinez's position that, upon termination without Cause, she was entitled to both severance and salary for the remainder of her Employment Period must be incorrect because it would be "irrational" and would "make no business sense." According to Regions, under that construction, an employer would never fire the employee if the consequences of doing so would be to pay both severance and salary. As Martinez points out in her Answering Brief, however, there could be many "rational" reasons that make perfect "business sense" for Regions to fire an executive notwithstanding the consequences of having to pay the executive both severance and salary. We know here that Regions wished to free itself of the burden of the employment agreements entered into by AmSouth with its senior executives in favor of new, less generous agreements,

and that it told the executives they would be terminated if they did not sign the new agreements. We also know that Martinez told Regions' management that she was not inclined to sign the new agreement. Regions could have, quite rationally, determined that it wished to "make an example" of Martinez to the other executives by carrying out on its threat to terminate her for refusing to sign the new agreement. This would have made perfect business sense for Regions, notwithstanding the need to pay Martinez both severance and salary, given the substantial savings that could be achieved if the other executives were successfully pressured into signing the new agreements. Or, perhaps less sinisterly, Regions could have determined it was in its best interests to give Martinez a graceful and generous exit from the company so that she would go quietly and not encourage other executives to refuse to sign the new agreements. We do not know at this point whether either of these scenarios actually occurred, since no discovery has taken place. To the extent that the Court agrees with Martinez that the Employment Agreement requires Regions to pay her both severance and salary upon termination without Cause, no discovery on this issue would be necessary. To the extent, however, that the Court finds the Employment Agreement ambiguous on this point, Martinez should be permitted to take discovery regarding Regions' reasons for terminating her and whether it engaged in the type of cost/benefit analysis described above before summary judgment is granted based on the canard that it would have made no business sense to do so if Regions had to pay both severance and salary -- particularly where the applicable language of the agreement at issue in the authority relied upon by Regions materially differs from Martinez's Employment Agreement in ways that favor Martinez for the reasons detailed in the Answering Brief. Discovery regarding this issue is sought by Interrogatories 6-7, 10, 12 and 21 and Document Requests 6-9, 12 and 19.

(e) **Regions' alteration of a key provision of the Employment Agreement in its proposed Revised Change in Control Agreement.** Martinez's position that she was

entitled to both severance and salary for the remainder of her Employment Period upon termination without Cause relies, in part, on the fact that Section 3(a) of her Employment Agreement sets up a protected two year Employment Period:

The Company hereby agrees to continue the Executive in its employ, and the Executive hereby agrees to remain in the employ of the Company subject to the terms and conditions of this Agreement, for the period commencing on the [date of the change in control] and ending on the second anniversary of such date (the "Employment Period").

(Employment Agreement § 3(a)). In Regions' proposed Revised Change in Control Agreement, which would have replaced the Employment Agreement, and which Regions demanded that Martinez and other executives sign, the following underscored language was added to the above provision:

If a Change in Control occurs during the term of this Agreement, a "*Protected Employment Period*" will begin and the following employment terms will be effective. Your Protected Employment Period will end on the second anniversary of the Change in Control or your separation of service from the Company if earlier.

(Revised Change in Control Agreement § 4(a) (emphasis added)). The wording underscored above demonstrates that Regions realized in September 2007 that it would need to change the wording of its change of control agreement from that used in the Employment Agreement if it wished to be able to terminate the agreements before the end of the employment period and avoid liability for continued payment of salary for the remainder of the employment period (in addition to severance) upon a termination without Cause. To the extent that the Court agrees with Martinez that the Employment Agreement requires Regions to pay her both severance and salary upon termination without Cause during the Employment Period, no discovery on this issue would be necessary. To the extent, however, that the Court finds the Employment Agreement ambiguous on this point, Martinez should be permitted to take discovery regarding Regions' addition of the language underscored above to its proposed Revised Change in Control

Agreement, which addition contradicts its current position that the Employment Agreement should be read as containing such a limitation on its liability. Such discovery is sought by Interrogatories 6-8, 13 and 20-21 and Document Requests 7-9, 12, and 21-22.

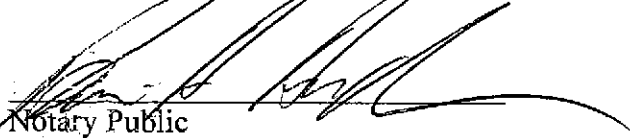
9. Martinez needs the information set forth above in order to adequately respond to the Motion, and this information cannot be set forth in affidavits because the information is solely within the knowledge of Regions or third parties.



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SWORN AND SUBSCRIBED before  
me this 23rd day of March, 2009.



Notary Public

**DENISE A. ANDREWS**  
**NOTARY PUBLIC**  
**STATE OF DELAWARE**  
My commission expires Jan. 5, 2012