No. 13-3595

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

VERNON W. HILL, II,

Plaintiff-Appellant,

v.

TD BANK, N.A., COMMERCE BANCORP, LLC,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR DEFENDANTS-APPELLEES TD BANK, N.A., AND COMMERCE BANCORP, LLC

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April 21, 2014

CORPORATE DISCLOSURE STATEMENT

TD Bank, N.A., is a wholly owned indirect subsidiary of The Toronto-Dominion Bank, a publicly traded company in Canada and the United States (NYSE: TD). TD Bank, N.A. is a wholly owned subsidiary of TD Bank US Holding Company, which is, in turn, a wholly owned subsidiary of TD US P&C Holdings, ULC. TD US P&C Holdings, ULC is a wholly owned subsidiary of The Toronto-Dominion Bank.

Commerce Bancorp, LLC, is a wholly owned indirect subsidiary of The Toronto-Dominion Bank, a publicly traded company in Canada and the United States (NYSE: TD). Commerce Bancorp, LLC, is a wholly owned subsidiary of TD Bank US Holding Company, which is, in turn, a wholly owned subsidiary of TD US P&C Holdings, ULC. TD US P&C Holdings, ULC is a wholly owned subsidiary of The Toronto-Dominion Bank.

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PRELIMINARY STATEMENT

A bank is prohibited by law from making a "golden parachute" payment to a departing executive unless the bank—or the executive—certifies under oath that it has no reason to believe that the executive engaged in certain conduct. More particularly, the signatory must certify that it "is not aware of any information, evidence, documents or other materials which would indicate that there is a reasonable basis to believe" that the departing executive:

- "has committed any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse with regard to [the bank] that has had or is likely to have a material adverse effect on [the bank]," *or*
- "is substantially responsible for . . . the troubled condition, as defined by applicable regulations of the appropriate federal banking agency, of [the bank]."

12 C.F.R. § 359.4(a)(4).

This case arises from a claim by Vernon W. Hill, II, the former Chairman and CEO of Commerce Bank, that Commerce breached an employment agreement that triggered certain "golden parachute" payments when Hill was removed from his positions. The terms of the agreement are not in dispute; the contract obligated Commerce to pay Hill roughly $11 million upon his departure. Commerce informed Hill, however, that it could not make the "golden parachute" payment because (a) Commerce could not truthfully make the certification described above, and (b) Hill refused to do so himself.

Hill's departure from Commerce was the consequence of a lengthy investigation by one of the bank's regulators, the Office of the Comptroller of the Currency. The OCC found that Hill "engaged in unsafe and unsound practices and breaches of fiduciary duties" and required the bank to sign a consent decree imposing various conditions designed to remedy Hill's misconduct and to prevent future transgressions. Not the least of these conditions was that the bank terminate Hill's employment; for this and other reasons, the bank promptly did so. Hill himself later signed a consent decree that—while neither admitting nor denying the OCC's allegations—stated that Hill had committed acts of misconduct during his tenure at Commerce.

In the wake of these events, Commerce determined that it could not make the certification to the regulators, because it had ample evidence—far more than was necessary—to "indicate that there is a reasonable basis to believe" that Hill engaged in the conduct specified in the regulation. Commerce repeatedly invited Hill to make the certification, but he refused. In the absence of an approved certification, Commerce was legally prohibited from making Hill's "golden parachute" payment.

Hill nonetheless sued the bank for breach of contract, claiming that Commerce did not actually possess information that would prevent it from making the certification to the regulators. The bank's sole defense was that it did, in fact,

possess such information and therefore it was legally impossible to make the "golden parachute" payment. The jury heard nine days of evidence about Hill's years of related-party transactions, federal regulators' investigations of this and other misconduct, and the bank's good-faith efforts to determine whether there was a lawful way to pay Hill. The jury concluded that it was legally impossible for the bank to comply with its contractual obligations to Hill. Accordingly, it returned a verdict in the bank's favor.

On appeal, Hill raises four arguments for a new trial. None has merit.

- Hill claims that the district court abused its discretion in responding to a jury question during deliberations. But the jury's question was itself triggered by a misstatement of the law by Hill's counsel during closing arguments, and the court's response was accurate and fully consistent with the jury's charge.

- Hill argues that the district court abused its discretion by allowing the bank to call certain witnesses at trial. Hill acknowledges that he was permitted to (and did) depose those witnesses before trial, but he (erroneously) objects to *when* he was given such permission.

- Hill contends that the district court abused its discretion in denying his request to amend the final pretrial order to call those same witnesses in his case in chief. But Hill concedes that his request was untimely, and he cannot begin to show that he suffered "manifest injustice"—particularly since he was allowed to present their deposition testimony during his case and cross-examine these witnesses live during the bank's case.

- Finally, Hill claims that the district court incorrectly concluded that Commerce was in a "troubled" condition, and that the golden parachute regulations therefore were not triggered. But Hill looks to the wrong regulation for his definition of "troubled," and his claim would fail even under his erroneous standard.

In short, Hill was fully able to make his case to the jury. The jury did not believe Hill's story, but that is no reason to order a new trial.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1367. The operative complaint included a federal-law cause of action, which was resolved before trial. The district court retained jurisdiction over the remaining state-law causes of action under 28 U.S.C. § 1367(c). This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES

1. Does this Court lack appellate jurisdiction because the judgment names only one defendant, when the district court previously had resolved all claims against the other defendant?

2. Did the district court abuse its discretion by issuing a supplemental instruction that correctly restated the law and remedied a contrary position that Hill's counsel seemed to suggest during summations?

3. Did the district court abuse its discretion by permitting the bank to call its former directors as witnesses, so long as Hill had an opportunity to depose them before trial started?

4. Did the district court abuse its discretion by denying Hill's third motion to amend the final pretrial order because there were no new circumstances that would create a "manifest injustice"?

5. Did the district court abuse its discretion by determining that "unsafe or unsound practices" necessarily render the bank "troubled" and therefore trigger the "golden parachute" regulations?

RELATED CASES AND PROCEEDINGS

This case has not previously been before this Court. A related dispute between these parties is pending in the District Court for the District of New Jersey. *See TD Bank, N.A. v. Hill*, No. 12-cv-7188 (D.N.J.).

STATEMENT

A. Hill's Tenure At Commerce

By most measures, Hill was a very successful banker. He founded Commerce[1] in 1973 with one branch in Marlton, New Jersey. SA92:10-12.[2] Over the next thirty-four years, he built Commerce into a large and profitable regional bank. SA92:12-14. That success came, in part, because Hill immersed himself completely in Commerce. As one member of the Commerce Board testified, Hill and his

[1] "Commerce" refers to both Commerce Bancorp, Inc., and Commerce Bank, N.A.

[2] "SA" refers to the supplemental appendix filed herewith. A supplemental appendix is necessary because Hill did not consult TD regarding the appendix, as Fed. R. App. P. 30(b)(1) requires. "A" refers to the appendix filed with Hill's brief.

wife "worked 24 7 for Commerce"; "their home [was] like another office of Commerce because it was always something going on at that house relative to the business of Commerce Bank." SA191:13-17.

The blurry line between Hill's personal and professional lives, however, gave rise to a host of issues that came to concern bank regulators. For example, as Hill stipulated, "Commerce utilized real estate developers . . . in which Mr. Hill had financial interest [for] the development of Bank branches." SA93:6-8. For example, through 2002, Hill owned roughly half of an entity called Site Development, which provided various real estate-related services to Commerce. SA58. Although Hill ceased personal involvement in 2002 with Site Development activities that involved Commerce (SA59), he remained Chairman of Site Development through 2007 (SA185:16-17). And Commerce, under Hill's leadership, did not disclose certain aspects of Hill's financial interest in these transactions. *E.g.*, SA220:11-19 (real estate commissions); SA40 (disclosures on OCC branch applications). Hill admitted in 2007 that it was "true" (albeit, he contended, "in an extremely limited number of isolated cases") that Commerce had "submitt[ed] materially false branch information" to the government when seeking regulatory approvals. SA77.[3]

[3] This discussion is only the beginning of the story. Vast swaths of the trial concerned these issues. *E.g.*, SA110, SA169, SA181, SA193-202, SA210, SA218.

Likewise, Hill's wife, Shirley, was perennially on the other side of transactions with Commerce. Shirley Hill was the sole owner (SA45) of InterArch, a company that designed and furnished Commerce branches (SA153). InterArch had done work for Commerce since 1973 (SA3) and, by 2004, its "primar[y]" client was Commerce (SA4). Although Commerce disclosed its payments to InterArch, some aspects of the companies' relationship were not at arm's length. After InterArch lost a contract dispute with a construction company in 2001, for instance, InterArch's lawyer (who, notably, represented Commerce in other matters) demanded that Commerce indemnify InterArch for its liability. SA20-21. And the Commerce Board of Directors, led by its Chairman Hill, voted to approve the $1.6 million indemnification. SA24. A Special Litigation Committee formed years later to investigate Hill's conduct (discussed below at page 12) would find that this indemnification sprang from an "inherent conflict of interest" (SA21) and was "improper" (SA25).[4]

Hill also hired Commerce contractors to work on his home, "Villa Collina." SA28. The Special Litigation Committee investigated allegations that "perform[ing] discounted work at Villa Collina [w]as the price of continuing to do

[4] State courts ultimately denied a challenge to the indemnification, holding that TD could not object to it years later under a certain provision of New Jersey law. A259. Hill's relationship with InterArch, like Hill's real estate dealings, was a prominent issue at trial. *E.g.*, SA100-102, SA112, SA207, SA209.

extensive work at the Bank branches." SA28. Hill refused to cooperate with the investigation of these allegations (and certain contractors with invoices outstanding were paid by the Hills shortly before meeting with bank investigators). SA28-29; SA111:10-16. Based on the limited information available to it, the Committee was not able to establish these claims. SA30.

The jury likewise heard evidence that, under Hill's leadership, Commerce was implicated in the Philadelphia "Pay to Play" scandal. Two Commerce executives were convicted of honest services fraud for, among other things, seeking the city's business by offering its treasurer favorable mortgages. 5/13/13 Tr. (Dkt. 469) 90-91; *see generally* SA63-64.[5] And, although prosecutors did not indict Hill, they cited his acts as "Chief Executive Officer of Commerce Bancorp, Inc." in twelve paragraphs of the indictment. SA65-73. Among other evidence, the jury heard a wiretapped call in which Hill told a political operative that "I have to take care of this"—*i.e.*, the allegedly corrupt dealings—"myself." SA159.

B. The Investigations

In December 2006, the OCC and other federal agencies launched wide-ranging investigations of these and similar issues. These investigations yielded consent orders against both Commerce and Hill himself. Hill's order set forth the

[5] "Dkt." refers to entries on the trial docket, No. 09-cv-3685 (D.N.J.).

OCC's "find[ing]"—which Hill neither admitted nor denied—that Hill "engaged in unsafe and unsound practices and breaches of fiduciary duties." A194.

The OCC made plain that its investigation of Commerce was, in large part, an investigation of Hill. Its notice to Commerce stated that it was investigating "(1) transactions related to Bank officers and directors . . . and their relatives, in-laws and business associates, and (2) transactions related to Bank premises." A151. Hill boiled this down for the jury: "[O]bviously, they were looking at related-party transactions, and that's me." SA154:12-13. Early meetings between Commerce representatives and the regulators confirmed this impression. Commerce's CFO, for example, reported, "[T]hey were clearly concerned about the relationships between the Bank and, well, the insider relationships I discussed earlier, including InterArch. Including some of the real estate transactions that had occurred and those types of things." SA182:12-16; *accord, e.g.*, SA167:15-25, SA190-192, SA206:9-15.

Commerce representatives who dealt with the regulators testified that the regulators "investigated pretty deeply down to the individual" (SA195:24) and "interviewed people outside of Commerce Bank" (SA168:8). Commerce provided the regulators millions of pages of documents. SA118:11-12. The investigation was so thorough that, as one Commerce director commented, the regulators "had most of the facts involving these transactions that we"—the Board—"were not

aware of." SA219:24-25. Commerce retained Rodgin Cohen, referred to throughout trial as "the Dean of the American Banking Bar" (SA177:13), and involved him deeply in the investigation. It also retained the former general counsel of the FDIC, who had authored the golden parachute regulation that is the crux of this case. SA164:9-12.

As the investigation progressed, the regulators made clear that they did not like what they were finding. In April 2007, the OCC suspended processing of new branch applications (SA74-75), which "had a devastating effect" on Commerce's growth (SA189:21). And, on June 7, 2007, the OCC proposed that Commerce sign a document admitting to extensive wrongdoing. *E.g.*, SA183:18-20 ("[O]ur Board members . . . probably would have been admitting to some kind of criminal act."); SA217:2-3 ("broad-based admissions that the bank had conducted its business in unsafe and unsound ways"). Hill nonetheless told Commerce's directors to sign the document, but some refused and negotiations with regulators continued. SA215-217.

The investigation's denouement came on June 28, 2007. The OCC had made clear that it "wanted the Board to fire Mr. Hill." SA170:21; *accord, e.g.*, SA113:19-21, SA183:25-184:3, SA192:16-19, SA221:16-19. Commerce agreed and, at the Board's direction, terminated Hill from his position at Commerce Bancorp and allowed Hill to resign from his position at Commerce Bank, N.A.

SA92:14-19. Also on June 28, Commerce and the OCC stipulated to the entry of a revised consent order (the "June 2007 Order"). *See* A170-184.[6] That Order, among other terms, limited Commerce's ability to do business with "Insiders or Insider-Related Parties," defined to include Hill, his associates, and his family. A171, A179.

In November 2008, Hill entered into a consent order with the OCC in his personal capacity (the "November 2008 Order"). This Order stated, in relevant part:

> WHEREAS, *the Comptroller finds, and Respondent [Hill] neither admits nor denies, that Respondent engaged in unsafe and unsound practices and breaches of fiduciary duties* by failing to comply with sound corporate governance principles in connection with real estate purchases, leases and joint real estate development transactions involving the Bank which resulted in financial gain to Respondent; and without an adjudication on the merits and solely for purposes of this settlement, and pursuant to Rule 408 of the Federal Rules of Evidence and equivalent state provisions; and in the interest of cooperation and to avoid the costs associated with future investigative, administrative and judicial proceedings with respect to this matter, the Comptroller and Respondent desire to enter into this Stipulation and Consent Order ("Order") and conclude this matter.

A194 (emphasis added). The Order also constrained Hill's banking activities in the United States by, for example, requiring him to seek written approval from auditors before undertaking certain transactions. A195-197.

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[6] The OCC regulated Commerce Bank, N.A. At the same time, the Federal Reserve, which regulated Commerce Bancorp, Inc., entered into a parallel Memorandum of Understanding with that entity. SA93:15-16.

Simultaneously with the federal regulators' investigation, Commerce conducted an internal investigation of the same issues. It convened a Special Litigation Committee, comprising three Commerce directors who had joined the Board relatively recently, and charged it with investigating allegations related to the regulatory issues. *See* SA6-10 (describing background and purpose of this Committee). The Committee issued a lengthy report on February 12, 2008, detailing its conclusions. Notably, it lacked the regulators' subpoena power, and the OCC refused to share its documents with the Committee. SA16. Nonetheless, the Committee concluded that the InterArch indemnification was improper and questioned Commerce's disclosures to regulators on its branch application forms. SA25, SA44.

C. Hill's Contract And The Golden Parachute Regulation

The "golden parachute" regulation at the center of this case is set forth at 12 C.F.R. § 359. To make Hill's "golden parachute" payment, Commerce (and, by succession, TD[7]) or Hill himself must certify

> that it does not possess and is not aware of any information, evidence, documents or other materials which would indicate that there is a reasonable basis to believe, at the time such payment is proposed to be made, that:
>
> > (i) [Hill] has committed any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse with regard to

[7] "TD" refers to both defendants.

> [Commerce] that has had or is likely to have a material adverse effect on [Commerce]; [and]
>
> (ii) [Hill] is substantially responsible for . . . the troubled condition, as defined by applicable regulations of the appropriate federal banking agency, of [Commerce.]

12 C.F.R. § 359.4(a)(4). In other words, a signatory cannot make the required certification if it is aware of information providing a reasonable basis to believe that Hill did any of these things. Were it to submit a materially false certification, the signatory could face criminal penalties. *See* 18 U.S.C. §§ 1001, 1007.

From the minute Commerce terminated Hill, its directors and officers knew that this golden parachute regulation was an obstacle to paying Hill. Hill's employment contract obliged Commerce to pay him millions of dollars if it terminated him under certain circumstances. *See* SA94-96. But, as Hill recognized on the morning of his termination, "the [F]ederal [R]eserve, the FDIC, any or all of the above agencies, would be required to approve his termination agreement and severance contract." SA222:17-20. Commerce's Board of Directors also recognized that the regulation might bar Commerce from making the promised payments. On June 28, 2007, "[t]he Board unanimously agreed that it was their intent to fully honor the terms and conditions of Mr. Hill's Employment Agreement, *subject, however*, to the requirements of all applicable laws, rules and regulations." A149 (emphasis added).

To be sure, most people at Commerce were willing to pay Hill according to the terms of his contract. *E.g.*, SA99:5-8, SA107:11-14, SA203:1, SA224:8-10. But the Board recognized that it would be difficult or impossible for Commerce to make the certification that the regulation required. *E.g.*, SA108:17-18 ("[W]e had great difficulty with some of the legal issues because of the certification."); SA120:11-13 ("I interviewed most of the Board of Directors and asked them those questions and they said they could not provide that certification."); SA225:15-16 ("[W]e were not in a position nor were we prepared to sign any such certification."). This recognition was based, in part, on the advice of counsel. *See* SA165, SA171-173, SA203:2-5, SA208:20-23. Richard Alexander, a former OCC official and managing partner at Arnold & Porter LLP, testified that he told the Board "[t]hat we couldn't make the certification." SA171:25. Rodgin Cohen told the board the same thing. SA173:1-7.

In an effort to negotiate this difficult situation, Commerce sought to secure regulatory approval for the payment without making the certification. In November 2007, the Board "approved a motion authorizing a request to be made to the Federal Reserve Board and FDIC for authorization of any separation payments to Vernon Hill." A239. It approved a similar motion in December 2007. SA109:6-9. Commerce's outside counsel took steps to implement these resolutions. One lawyer testified that he "had meetings with regulators, and I know that there [were]

extensive communications between me and regulatory authorities with respect to these issues." SA166:18-20. Commerce's corporate representative testified that he "reviewed a host of documents, probably about a foot tall, I remember there were a number of emails back and forth to the regulators . . . about trying to get . . . approval from the regulators to pay Mr. Hill." SA119:5-9. The Board's minutes reflect that it was informed about these meetings. A239.

Commerce also tried, but failed, to work things out with Hill. The regulation permits Hill to make the certification on his own (*see* 12 C.F.R. § 359.4(a)(4)), and Commerce encouraged him to do so (SA166:2-4, SA223:14-22). But Hill refused—and continues to do so—even though he maintains that he satisfies all of the criteria. SA160-162. Commerce's counsel negotiated at length with Hill's counsel, but to no avail. SA48-54, SA60-62, SA178:8-14. Commerce offered to put the funds in escrow pending a resolution, but Hill refused that as well. SA95:25-96:2.

These efforts ground to a halt when, in January 2008, Hill filed this lawsuit. *See* SA166:13-14 ("[A]round the time of the lawsuit, I think the activity lessened."); SA211:11-12 ("[T]he lawsuit was a bit of a show stopper."). Shortly thereafter, effective March 31, 2008, The Toronto-Dominion Bank closed on its acquisition of Commerce (SA93:21-24), and TD entities assumed the rights and liabilities of Commerce entities. The purchase price of $42.50 per share was over

the market price (SA155:21-23); Commerce shareholders profited. Hill, the Board's largest shareholder, made $400 million on the sale. SA157:18-25.

D. This Case

Hill filed this suit on January 14, 2008, in the District Court for the District of Columbia. Dkt. 1. He sued the Commerce entities as well as certain of its directors, asserting, *inter alia*, claims based on *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The case was transferred to the District of New Jersey (Dkt. 69), and Hill filed an amended complaint dropping the directors and the *Bivens* claims (Dkt. 79).

Nine of the eleven counts in Hill's amended complaint were resolved before the jury rendered its verdict. The district court dismissed some counts (Dkt. 132) and entered summary judgment against Hill on others (Dkts. 194, 248). Still other counts settled. Dkt. 364. And the district court dismissed one of the three remaining counts at trial. SA226.

The two remaining counts, for breach of contract and contractual indemnification, went to trial before a jury on May 6, 2013. Dkt. 457. TD stipulated that the elements of breach of contract were satisfied. However, it raised the affirmative defense of legal impossibility, contending that the regulation made it impossible to pay Hill his "golden parachute" payment. The jury heard evidence regarding this affirmative defense over nine days of trial proceedings. On May 21, 2013, the jury

rendered a verdict for TD, finding that performance of the contract was legally impossible. A147. Hill moved for a new trial (Dkt. 485), and, on August 1, 2013, the district court denied his motion (Dkt. 498). Hill filed a timely notice of appeal on August 22, 2013. Dkt. 499.

SUMMARY OF ARGUMENT

I. This court has appellate jurisdiction. All of Hill's claims against TD Bank, N.A., were resolved before trial. All of Hill's claims against Commerce Bancorp, LLC, were resolved either before trial or by the judgment entered after trial. Therefore, the district court resolved all claims with respect to all parties.

II. The district court's supplemental instruction in response to the jury's question appropriately corrected potentially misleading comments Hill's counsel made at summation.

A. The golden parachute regulations require both the certification *and* regulatory approval before a payment may be made. Hill's counsel suggested during summation that the latter requirement did not apply if the jury were to determine that the bank could have made the certification. That was wrong as a matter of law and contrary to everything the jury heard at trial and in the judge's original instructions. In response to the jury's question, the district court properly issued the supplemental instruction to eliminate this misunderstanding of the law. It did not invite the jury to consider the consequences of its verdict.

B. Viewing the instruction in the context of the charge as a whole makes its propriety clearer still. The district court repeatedly had told the jury to apply the law to the facts and to consider nothing else. And it already had told the jury that regulatory approval must precede any payment to Hill, which Hill does not claim was error. The supplemental instruction merely reiterated that indisputably correct statement of the law.

C. Even if the supplemental instruction was erroneous, any error was harmless. As the district court held, "[t]here was an enormous amount of evidence to support the verdict," not least of which was Hill's admission that he had submitted misleading information to regulators and the OCC's consent order finding—after a lengthy investigation—that Hill had engaged in misconduct.

D. The ancillary points that Hill raises to support his main argument are meritless. They rely on mischaracterization of out-of-circuit precedent and TD's arguments, and ultimately resort to simple name-calling.

III. The district court did not abuse its discretion by allowing TD to call certain former directors as witnesses. Hill was permitted to depose these witnesses before trial, and the compromise struck by the magistrate and district court was sound.

A. TD did not "play fast and loose with the trial court" by presenting witnesses whose testimony conflicted. The testimony of its witnesses was perfect-

ly consistent. Hill's contrary assertion rests on a misunderstanding of the record and the golden parachute regulation.

B. The district court's compromise—allowing the witnesses to testify, but requiring TD to produce them for depositions—was a sound exercise of its discretion, rooted in its experience with the case and guided by this Court's precedent.

IV. The district court likewise did not abuse its discretion by barring Hill from calling these same witnesses in his case in chief. Hill could not demonstrate that, without these witnesses, he would suffer a "manifest injustice." Hill had all the facts necessary to list those witnesses when it was timely, and their absence from his case in chief did not prejudice him. Indeed, Hill presented their deposition testimony and cross-examined the witnesses live during TD's defense case.

V. The district court did not err in holding that the June 2007 Order put Commerce in a "troubled condition." This holding rendered the testimony of Hill's purported expert witnesses irrelevant.

A. Hill relies on the wrong regulatory definition of "troubled condition." In the golden parachute statute, Congress borrowed a definition of "troubled condition" from a statute about changes in directors and senior executive officers. That definition does not involve a bank's financial condition. Thus, Hill's contentions about Commerce's financial condition are beside the point.

B. Even under Hill's preferred definition, the June 2007 Order established a "troubled condition." The OCC entered that Order pursuant to its authority to prevent "unsafe or unsound practices." And, under this Court's precedent, "unsafe and unsound practices" necessarily threaten a bank's financial condition. The Order, therefore, required "action to improve the financial condition" of Commerce.

ARGUMENT

I. THIS COURT HAS APPELLATE JURISDICTION BECAUSE THE DISTRICT COURT DISPOSED OF ALL CLAIMS WITH RESPECT TO ALL PARTIES

Standard of Review: This Court "exercise[s] *de novo* review over an argument alleging a lack of appellate jurisdiction." *Montanez v. Thompson*, 603 F.3d 243, 248 (3d Cir. 2010).

When Hill filed his appeal to this Court, the Clerk noted a potential jurisdictional defect. The caption of the notice of appeal, like the caption in the district court, lists both TD Bank, N.A., and Commerce Bancorp, LLC, as defendants. The district court's judgment, however, lists only Commerce Bancorp, LLC. SA1. Because the judgment appeared not to be final with respect to TD Bank, N.A., the Clerk ordered the parties to address in writing whether this Court has jurisdiction. Both parties submitted responses explaining that jurisdiction exists. The Clerk

then referred those responses to the merits panel and ordered the parties "to address this Court's jurisdiction in their briefs."

Assuming that Hill's position remains the same,[8] the parties agree that this Court has jurisdiction. As explained more fully in TD's response to the Clerk, jurisdiction exists under 28 U.S.C. § 1291 if the district court has "disposed of all claims with respect to all parties." *Selkridge v. United of Omaha Life Ins. Co.*, 360 F.3d 155, 160 (3d Cir. 2004). And the district court has done so. Hill and his co-plaintiffs asserted seven claims against TD Bank, N.A. *See* Am. Compl., A115-124.[9] But all of those claims were finally disposed of before trial—one on a motion to dismiss (Dkt. 132), three on motions for summary judgment (Dkts. 194, 248), and the remaining three by settlement (Dkt. 364). Therefore, the only claims that reached trial (and the only claims resolved by the district court judgment appealed here) were claims against Commerce Bancorp, LLC. The district court has resolved all claims against both Commerce Bancorp, LLC, and TD Bank, N.A., so its judgment is final under 28 U.S.C. § 1291.

[8] Despite the Clerk's direction, Hill's opening brief did not address the jurisdictional question.

[9] The Amended Complaint names TD Bank, N.A., as the defendant, but it states causes of action against Commerce Bank, N.A. TD Bank, N.A., has succeeded to all rights and liabilities of Commerce Bank, N.A.

II. THE DISTRICT COURT'S SUPPLEMENTAL INSTRUCTION PROPERLY CLEARED UP CONFUSING STATEMENTS BY HILL'S COUNSEL, AND ANY ERROR WAS HARMLESS

Standard of Review: This Court reviews the supplemental instruction for abuse of discretion. *United States v. Jackson*, 443 F.3d 293, 297 (3d Cir. 2006). "Under that standard," Hill "must show that the [district court's] action was arbitrary, fanciful or clearly unreasonable." *Id.* (quotation marks omitted).

As relevant here, the golden parachute regulation requires two things: a determination by "[t]he appropriate federal banking agency" that a golden parachute payment "is permissible," 12 C.F.R. § 359.4(a)(1); *and* the certification by the bank or the departing executive, 12 C.F.R. § 359.4(a)(4). The regulation contains no exception to either requirement. Hill's counsel, however, told the jury in summation that a verdict for Hill would completely "reliev[e] [TD] of the problem that they say stops the payment" (SA232:18)—suggesting that if the jury rejected TD's claim that it could not make the certification, then all barriers to payment—including the regulatory approval requirement—would be removed.

Evidently confused, the jury asked the district court whether an award for Hill would "bypass federal approval." A146. As explained below, the court responded simply by reiterating what the regulation says, on which it had already charged the jury. The district court denied Hill's motion seeking a new trial based

on objections to this supplemental instruction. SA239-242. It did not abuse its discretion either in giving the instruction or in denying Hill's motion for a new trial on this ground. Even if it did err, any error was undoubtedly harmless, as the overwhelming balance of the evidence demonstrated that it was impossible for TD to pay Hill.

A. The Supplemental Instruction Cured A Confusing Statement By Hill's Counsel; It Did Not Invite The Jury To Consider The Effect Of Its Verdict

Hill's main argument against the supplemental instruction—that it directed the jury to consider the consequences of its verdict—rests on a demonstrably incorrect characterization of the record. More particularly, his scattered recitation of the events leading to the jury's question (Hill Br. 17-28) obscures the context in which the supplemental instruction was given. *See Jackson*, 443 F.3d at 297 (whether a supplemental charge is permissible "depends heavily on the context in which the statement was made"). Indeed, the supplemental instruction merely ensured that a statement by counsel that "could have been misinterpreted by the jurors" (SA241:5-6) did not lead the jury astray.

The supplemental instruction concerned 12 C.F.R. § 359.4, which was discussed at length before the jury during trial. SA239:18-19 ("[E]verybody talked about Section 359."). And "everybody" explained that it "prevented the Bank from making these payments . . . without Regulatory approval." SA239:19-23. That

sums up what the jury heard over and over. *E.g.*, SA97-98, SA151, SA163, SA203-204. And the court's primary instructions to the jury—to which Hill does not object—made that clear: Under Section 359.4, "Commerce Bancorp . . . may make a Golden Parachute payment to plaintiff, Vernon Hill, . . . *only if the applicable Federal banking agencies determine that the payment is permissible*." SA229:9-14 (emphasis added).

The final minute of Hill's summation (SA231-232), however, could well have confused the jury. Hill's counsel said: "If the Bank is being honest, . . . the only thing that's stopping them [from paying Hill] is . . . this impossibility claim." SA231:21-24. In other words, TD is "saying they want to pay him but they can't." SA232:5-6. Thus, counsel concluded, "[e]verybody can be happy if you untie the hands of the Bank." SA232:9-10. And he told the jurors that they could do that "if you find they haven't proven this impossibility claim." SA232:10-11. By finding for Hill, "you"—the jury—"[wi]ll be relieving them of the problem that they say stops the payment." SA232:17-18. Perhaps fifteen seconds later, counsel left the podium.

The jury could well have understood these remarks to suggest that Hill could be paid if a jury determines that the bank could have made the certification—without regard to whether regulators actually approved the payment. In other words, Hill's comments may have suggested to the jury that Section 359.4's regu-

latory approval requirement could be ignored if the jury were to find that the bank did not possess information sufficient to satisfy Section 359.4. That is not the law; Section 359.4 contains no exception to the regulatory approval requirement, so the bank would not, in fact, be able to pay Hill based solely on a jury's verdict that it could have made the certification. 12 C.F.R. § 359.4(a).

Accordingly, after Hill's counsel finished his summation, the bank promptly objected to these remarks. SA233:2-5 ("MR. TAMBUSSI: On the jury charge it's wrong as a matter of law to suggest that to this jury. THE COURT: I'm going to tell the jury the ability or inability of the defendant to honor a judgment is not for them to worry about."). And, as TD requested, the district court gave a curative instruction, reminding the jury that it should not consider whether the judgment was collectible: "Ladies and gentlemen, the ability or inability of any defendant to pay a judgment that's entered against them is really not for you to be worried about. Just put that out of your mind." SA233:8-11.

But the district court's curative instruction apparently did not fully relieve the jury of its confusion. More than an hour into its deliberations (SA234:10-15), the jury returned with a question: "If we award for the plaintiff does this bypass federal approval?" A146. The plainest reading of this question is that the jurors had interpreted counsel's comments to contradict what they had heard throughout

trial—*i.e.*, that regulatory approval was required. Was there an exception if they entered a verdict for Hill, as counsel had suggested?

The district court gave a modest answer, simply restating the law. The court explained to counsel that "[t]he regulation prohibits the payment without permission period." SA235:11-12. And that is what it told the jury: "The best way to answer that question is to tell you Section 359 of which you're all experts now, states that the Bank cannot pay money to Mr. Hill without approval of the Federal regulators. I hope that answers your question." SA236:9-13. The jury then returned for another hour and eight minutes of deliberation (SA237:20-25) before announcing its verdict for the bank.[10]

Particularly viewed in its context, there was no defect in the court's supplemental instruction. District courts may issue supplemental instructions to correct any misimpressions that counsel might have introduced during summations. *E.g.*, *United States v. Buishas*, 791 F.2d 1310, 1316 (7th Cir. 1986); *United States v. Clarke*, 468 F.2d 890, 892 (5th Cir. 1972). And that is what the district court did here in response to counsel's misleading comments. The court did nothing more than remind the jury that Section 359 requires regulatory approval—which is indisputably a correct statement of the law—echoing the evidence and the jury

[10] Hill states that the question came at "the infancy" of the jury's deliberations. Br. 26. But, as cited in the text, the jury deliberated for about an hour before asking its question and about an hour thereafter.

charge. It did not tell the jury that it "should consider the legal effect of any judgment it renders." *But see* Hill Br. 18.

B. The Supplemental Instruction Was Proper In Light Of The Totality Of The Jury Charge

Even if, viewed in isolation, there was something amiss with the supplemental instruction, that does not give rise to reversible error. A supplemental instruction is but a part of the district court's overall instructions. It is part of "the charge as a whole," *J.I. Hass Co. v. Gilbane Bldg. Co.*, 881 F.2d 89, 92 (3d Cir. 1989) (quotation marks omitted), and "[a] trial judge's instructions to a jury must be considered as a whole," *Bhaya v. Westinghouse Elec. Corp.*, 922 F.2d 184, 191 (3d Cir. 1990) (quotation marks omitted). In other words, this Court reviews "the supplemental instruction given not in artificial isolation, but . . . in the context of the overall charge." *Jackson*, 443 F.3d at 297 (alteration in original) (quotation marks omitted).

Two aspects of the district court's charge—to which Hill does not object and which go unmentioned in his brief—are particularly relevant. First, the charge emphasized that the jury should render its verdict based on the evidence in the case, not on the consequences of its verdict. The court cautioned that "[y]ou are to consider *only* the evidence in this case" (SA228:4-5 (emphasis added)), and it expressly told the jurors not to consider "the ability or inability of any defendant to pay a judgment that's entered." SA233:8-10. None of these instructions invited

the jurors to think about whether Hill ultimately would receive any damages it awarded.

Second, the charge informed the jury that regulators would need to approve any payment to Hill, regardless of its verdict. The court read 12 C.F.R. § 359.4 to the jury in relevant part: A bank "may make a Golden Parachute payment if and to the extent that" a regulatory agency authorized it. SA229:5-6. Hence, the court summarized, "Commerce Bancorp . . . may make a Golden Parachute payment to plaintiff, Vernon Hill, of the monies owed Mr. Hill . . . only if the applicable Federal banking agencies determine that the payment is permissible." SA229:9-14. Hill did not object at trial, and does not object on appeal, to this instruction. The challenged supplemental instruction merely reiterated these points.

These instructions eliminated any conceivable prejudice from the supplemental instruction, inasmuch as (i) the jury was told not to consider the consequences of its verdict, and (ii) the supplemental instruction told the jury nothing new. This Court, of course, "generally must assume that the jury understood and followed the court's instructions." *Jama v. Esmor Corr. Servs., Inc.*, 577 F.3d 169, 174 (3d Cir. 2009) (quotation marks omitted). Thus, the supplemental instruction, viewed in the context of the charge as a whole, did not taint the verdict.

C. The Voluminous Evidence Favoring TD Shows That Any Error In The Supplemental Instruction Was Harmless

Even if the district court's supplemental instruction—viewed in the context of the entire jury charge—was erroneous, the great weight of evidence at trial rendered any error harmless. The Court may affirm a judgment despite an instructional error if, "in light of the total record," it is "satisfied that no jury would have" entered the verdict "solely on the basis of the [erroneous] instruction." *Pivirotto v. Innovative Sys., Inc.*, 191 F.3d 344, 357 (3d Cir. 1999) (alteration in original) (quotation marks omitted). Such an error "do[es] not prejudice the complaining party" and is, for that reason, harmless. *Armstrong v. Burdette Tomlin Mem'l Hosp.*, 438 F.3d 240, 246 (3d Cir. 2006).

The district court correctly held that any error here was harmless because "[t]here was an enormous amount of evidence to support the verdict." SA242:5-6. It elaborated that "[w]itness after witness testified as to why the Bank could not make the certification and the reasons therefor[]." SA242:6-8. Even Hill's witnesses, it explained, concurred and were "alarmed by what the Regulators were telling the Bank about Vernon Hill and his conduct." SA242:10-12.

The district court was correct. To prove that it was impossible to perform the contract, TD needed to show that it "that it could not truthfully make" the required certification. SA230:19-20. And, to prove that, TD needed to show that it was aware of "information, evidence, documents or other materials which would

indicate that there is a reasonable basis to believe" one of two things: (i) that Hill "committed any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse" that harmed or likely would harm Commerce; or (ii) that Hill was "substantially responsible for" Commerce's troubled condition (that is, the June 2007 Order; *see* part V, *infra*). 12 C.F.R. § 359.4(a)(4).

The jury saw a pile of documents, and heard days of evidence, establishing that Hill did both of those things. First and foremost, the November 2008 Order stated that the OCC "finds" that Hill "engaged in unsafe and unsound practices and breaches of fiduciary duties." A194. Thus, the bank's own regulator had already plowed this ground and concluded that Hill engaged in the very misconduct that prevented the bank from making the certification under Section 359.4. The jury could have ended its task there—surely the bank had a reasonable basis to believe that Hill had committed misconduct when it was staring at a finding to that effect rendered by federal regulators after a lengthy investigation. Hill's claim that the bank could have issued a certification that conflicted with regulators' findings simply ignores reality.

But that is not all. Hill had admitted in writing that Commerce, on his watch, had "submitt[ed] materially false branch information" to regulators with respect to insider transactions. SA77. He had recommended that his Board sign a document admitting to a wide array of wrongdoing. SA215:22-23. He involved

Commerce in transactions in which he or his family had an interest. *See* pages 6-8, *supra*. In light of these issues, as TD's corporate representative testified, "I interviewed most of the Board of Directors . . . and they said they could not provide that certification." SA120:11-13.

All of this evidence surely established that Hill, in fact, engaged in misconduct. But that was not the question. Rather, the question was whether TD was aware of documents or other evidence giving it a reasonable basis to believe that he did. The answer—"yes"—was so plain that no supplemental instruction merely restating the law could have prejudiced the outcome. Certifying to the contrary, despite the November 2008 Order, potentially could have exposed the bank to serious liability. *See, e.g.*, 18 U.S.C. §§ 1001, 1007.

D. Hill's Remaining Arguments About The Supplemental Instruction Are Unpersuasive

Hill raises three ancillary arguments regarding the supplemental instruction. None of these has merit.

First, contrary to Hill's suggestion (Br. 20), *Conley v. Very*, 450 F.3d 786 (8th Cir. 2006), is not "[e]erily similar" to this case. As explained above in section II.A, the jury's question did not suggest that it was focused on the "irrelevant matter" (*Conley*, 450 F.3d at 788) of the consequences of its verdict. And, as the district court explained in distinguishing *Conley*, the question and answer in that case involved an issue on which "[t]here had been no evidence at all." SA239:7-8;

accord Conley, 450 F.3d at 787-88. Here, by contrast, the jury asked about the central issue of regulatory approval. And the court responded by summarizing the legal requirement—amply supported by record evidence—most relevant to that issue: Section 359.

Second, the district court's ruling did not, as Hill contends, "ignore the fact that the jury had already been specifically instructed on the law controlling impossibility." *But see* Hill Br. 23. As explained above (*supra* section II.B), the fact that the court had already instructed the jury on Section 359 helps TD, not Hill. It confirms that the supplemental instruction added little, if anything, that the jury did not already know via other instructions (to which Hill does not object). Thus, the supplemental instruction introduced no new issues and did not prejudice Hill.

Third, Hill insists that the comments of his counsel at summation did not "suggest[] jury nullification." Br. 28. That was not TD's quarrel with those comments. As TD's counsel made clear when objecting at trial, these statements erroneously suggested that regulatory approval was not required—a clear mistake of law that it was well within the district court's discretion to correct.

In sum, the district court's supplemental instruction was an appropriate response to a potentially misleading comment by counsel. As the context of the jury charge and the trial as a whole makes manifest, the instruction did not encourage the jury to consider the effect of its verdict. The instruction was therefore far

from "arbitrary, fanciful or clearly unreasonable." *Jackson*, 443 F.3d at 297 (quotation marks omitted) (stating standard of review). And, to the extent there was error, it was harmless in view of the considerable evidence supporting the verdict.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING FORMER COMMERCE DIRECTORS TO TESTIFY

Standard of Review: This Court reviews decisions to admit or exclude testimony for abuse of discretion. *Stecyk v. Bell Helicopter Textron, Inc.*, 295 F.3d 408, 412 (3d Cir. 2002).

The district court allowed TD to call three former directors of Commerce at trial, provided that Hill was able to depose them first. According to Hill, this holding constituted an abuse of discretion and enabled TD to bamboozle the district court. Not so. Contrary to Hill's assertion, TD did not enlist the former directors to contradict the testimony of its corporate representative; to the contrary, their testimony was consistent. And the district court did not abuse its discretion by carefully weighing the factors this Court has prescribed and resolving the dispute with a compromise that gave neither side all it sought.

A. TD's Witnesses Did Not Give Inconsistent Testimony

In contending that the district court abused its discretion, Hill levels a grave accusation: that TD "played fast and loose with the trial court." Br. 29; *see also* Br. 35 (alleging that TD's "gamesmanship" effected a "trial by ambush"). That charge

is utterly unfounded. More importantly, it exposes a basic misapprehension of what the golden parachute regulation says.

The basis for Hill's accusation is that TD's corporate representative, John Fisher, said one thing, and the former directors TD called as witnesses said another. Specifically, Hill asserts that Fisher "testified that defendants do not believe Hill committed any 12 C.F.R. 359.4 disqualifying act." Br. 32. Fisher, in Hill's view, merely "accumulate[d]" a "stack of documents." Br. 10. The former directors, according to Hill, told a different story—namely, that they "[c]ouldn't and wouldn't" provide the certification that the golden parachute regulation required. Br. 34. In Hill's view, this testimony "contradict[ed] the testimony of the very F.R.C.P. 30(b)(6) witness"—i.e., Fisher—"offered in [the directors'] stead." Br. 35.

But Fisher's testimony is perfectly consistent with the directors' testimony. To make a golden parachute payment, a bank must certify that "it does not possess and is not aware of any information, evidence, documents or other materials which would indicate that there is a reasonable basis to believe" that the recipient (here, Hill) has done certain things. 12 C.F.R. § 359.4(a)(4). Fisher "introduce[d] a stack of documents, purportedly demonstrating that the bank had documents, evidence and information on the issue of misconduct by Hill." Hill Br. 10; *see also* SA121-151 (Fisher's trial testimony). And, by testifying that they could not make this

certification, the former directors meant that they *were* aware of such "information, evidence, documents or other materials." *See* 12 C.F.R. § 359.4(a)(4). So, Fisher testified that he was aware of these documents. The former directors testified that they were aware of these documents. Their testimony was in accord. And the consequence was that Commerce could not make the certification.

Hill appears to believe that the testimony was inconsistent because Fisher testified that the bank did not "ma[k]e a determination that there is a reasonable basis to believe that Vernon Hill did any of these things wrong." Br. 33; *see also* Br. 10 ("[N]o one, whether employed by Commerce or TD, had ever evaluated the documents and made a qualitative decision on whether there was any reasonable basis for any director to refuse execution of a certification."). But the golden parachute regulation says nothing about a "determination" or a "qualitative decision." Commerce did not have to decide for itself, much less prove to the jury, that Hill committed some disqualifying act. It just had to show that it "possess[ed]," or was "aware of," "information, evidence, documents, or other materials" indicating that there was a "reasonable basis to believe" that Hill had done so. *See* 12 C.F.R. § 359.4(a)(4). The jury believed that the bank had such information.

B. The District Court Appropriately Exercised Its Discretion When It Resolved This Issue With A Compromise

Hill's legal contention is that the district court abused its discretion by permitting TD to call three former Commerce directors as witnesses. But the court

did not simply allow TD to call any witnesses it wanted. To avoid any prejudice to Hill, it permitted TD to call those witnesses only if TD furnished them for depositions before trial began. This is the sort of give and take that trial judges require every day when they resolve evidentiary disputes. It is not an abuse of discretion.

Before discovery closed, TD opposed Hill's effort to depose these former directors for two reasons. First, their testimony on impossibility, given the facts as they stood, appeared as though it might be unnecessary. TD believed that the November 2008 Order—in which the OCC found that Hill "engaged in unsafe and unsound practices and breaches of fiduciary duties" (A194)—established impossibility as a matter of law. *See* SA79 (2/10/2011 Hr'g Tr.). Second, TD objected to "hauling in directors and members of the board from all over the country." SA80:25-81:1. Since leaving Commerce, certain of the former directors had assumed important and time-consuming roles elsewhere. At the time of trial, one was on the board of two other public companies (SA187:21-188:2), another was the CEO of a large health system in New Jersey (SA205:4-7), and the third was the chairman of a national insurance brokerage, the chairman of a hospital, and managing partner of the company that owned the Philadelphia *Inquirer* (SA213:16-20).

The magistrate judge, who supervised this case for four years, agreed that the depositions were unwarranted. As he explained, Hill was "asking for the knowledge of the bank." SA82:20-21. And the usual way to get evidence of a

corporation's knowledge is not to ask its directors and top executives. *See* SA83:1-3 ("If you want to depose Ford Motors or General Motors, you don't depose everyone on the board of directors and you don't depose all the officers."). Rather, the usual way is for the corporation to designate a corporate representative. *See* Fed. R. Civ. P. 30(b)(6). That is what TD did when it designated John Fisher. When the magistrate judge denied Hill's request for the depositions, however, he reserved decision on whether TD could call the former directors at trial. *See* SA84:23-24 ("[W]e'll cross that bridge when we come to it.").

After discovery closed, and the facts of the case were clearer, TD sought to call the former directors as trial witnesses. TD explained that it had identified those former directors in its initial disclosures, *see* Fed. R. Civ. P. 26(a)(1), and that Hill had named them as defendants when he first filed his complaint. SA86:2-6. Moreover, when TD had deposed Hill, he had "testified as to what knowledge he knew that they [the former directors] had." SA86:7. Thus, the former directors' testimony would be no surprise. Hill objected to TD's request.

The magistrate judge carefully considered this Court's precedent and resolved this dispute with a compromise. He "agree[d]" that it would be "unfair and prejudicial" for the former directors to take the stand without Hill deposing them. A7. But he also recognized that "[t]he Third Circuit has . . . manifested a distinct aversion to the exclusion of important testimony." A9 (first alteration in original)

(quotation marks omitted). Thus, he reviewed the five factors that govern "exclusion of proffered evidence." *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 298 (3d Cir. 2012). Namely:

> (1) the prejudice or surprise to a party against whom the evidence is offered; (2) the ability of the injured party to cure the prejudice; (3) the likelihood the admission of the late evidence would disrupt the orderly and efficient trial of the case or of other cases in the court; (4) bad faith or willfulness in failing to comply with the Court's Orders; and (5) the importance of the evidence to the proffering party.

A8-A9 (citing *Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894, 905 (3d Cir. 1977), *overruled on other grounds by Goodman v. Lukens Steel Co.*, 777 F.2d 113 (3d Cir. 1985)).

Applying this Court's factors, the magistrate judge held that TD could call the former directors at trial, but only if Hill could depose them first. Those two-hour depositions, he found, would eliminate any possible prejudice to Hill. A9. "The depositions will prevent any unfair surprise and will permit [Hill] to adequately prepare for cross-examination." A9. The other *Meyers* factors also supported this compromise, as TD "did not act in bad faith," and the testimony would not delay trial. A10.

The district court affirmed the magistrate judge's ruling. The magistrate judge, the court recognized, had "been deeply involved in discovery matters for years in this case." SA87:6-7. And, here, the magistrate judge had reached "an appropriate reasonable solution to a problem." SA87:8-9.

At trial, Hill presented excerpts of the former director depositions (via read-ins and video) and presented two of the former directors as live witnesses to the jury in his case in chief. He also asked the former directors, when presented as live witnesses in TD's case, two and a half hours' worth of questions on cross-examination. 5/15/13 Tr. (Dkt. 473) 28-63, 89-106; 5/16/13 Tr. (Dkt. 476) 35-82. Tellingly, not one question was about John Fisher or his supposedly contradictory statements. Hill thus suffered no conceivable prejudice by virtue of the directors' appearance as witnesses for TD.

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DENYING HILL'S THIRD MOTION TO AMEND THE FINAL PRETRIAL ORDER

Standard of Review: "The trial court's exclusion of testimony because of the failure of counsel to adhere to a pretrial order will not be disturbed on appeal absent a clear abuse of discretion." *Fashauer v. N.J. Transit Rail Operations, Inc.*, 57 F.3d 1269, 1287 (3d Cir. 1995) (quotation marks omitted).

Hill's next argument is the flip side of the same coin. He asserts that, if TD was able to call the former directors at trial, he should have been able to do so as well. Br. 36-39. But this issue, like the previous issue, is an evidentiary matter firmly within the discretion of the district court. And, as with the previous issue,

the district court exercised its discretion carefully and in full accord with Circuit precedent.

The standard for leave to amend the final pretrial order is strict; courts may grant such permission "only to prevent manifest injustice." Fed. R. Civ. P. 16(e). This rigorous standard affords the parties some measure of finality as they prepare for trial. *See Ely v. Reading Co.*, 424 F.2d 758, 763 (3d Cir. 1970) ("One of the main purposes of the pretrial conference is to formulate the issues to be litigated to aid the parties in preparation for trial. If counsel are permitted to change the positions taken at pretrial obviously the effectiveness of this procedure is destroyed." (footnote omitted)). And, because "manifest injustice" depends on the facts of each case, application of this standard "is within the discretion of the trial judge. Appellate interference with this discretion should be kept at a minimum." *Id.* (footnote omitted).

The district court properly applied this standard when it denied Hill leave to add the former directors as plaintiff's witnesses. The magistrate judge held that Hill could have and should have added the former directors earlier. What the former directors said in their depositions was "not a surprise"; it was "just cumulative evidence." SA90:5-7. "Everybody knew these issues about the board . . . and it's not something that came as a surprise to" Hill when he deposed the former directors. SA89:2-7. The district court agreed and affirmed. It had been "clear"

that Hill had known "for years that these members of the Board would say that they wanted the bank to pay Mr. Hill." SA104:16-19. The district court added that Hill's quandary was of his own making. This was his third motion to amend the final pretrial order (SA104:23-105:5), and he waited until just before trial to depose the former directors and only then sought to add them to his witness list (SA104:19-22).

Hill nonetheless tenders three reasons why the district court abused its discretion. None has merit.

First, Hill suggests that the district court should have allowed him to add the former directors for the same reasons that it allowed him to add certain documents TD used at the depositions. Br. 36-37. But the reasoning that applied to the documents does not apply to the witnesses. Whereas TD had "never disclosed" the documents (Br. 36), it had "identified" the witnesses "in [its] Rule 26 disclosures" (SA103:23). And, whereas the significance of the documents "did not crystallize until the depositions were taken" (A320), the "testimony" at the depositions was "not a surprise" (SA90:5). That the magistrate judge allowed Hill to amend the order once did not compel him to do so again under different circumstances.

Second, Hill asserts that having to read the former directors' testimony into the record, instead of being able to call them live, prejudiced him. Br. 37-38. That claim, however, could be made any time a deposition is read in lieu of live testi-

mony, and it is well settled that "a jury can regard [deposition testimony] as equivalent to testimony delivered inside the courtroom under oath." *Windsor Shirt Co. v. N.J. Nat'l Bank*, 793 F. Supp. 589, 606 (E.D. Pa. 1992), *aff'd*, 989 F.2d 490 (3d Cir. 1993). Moreover, Hill fails to mention that he presented two of the depositions by video, which is not so "mundane and flat" (Br. 38) as reading a transcript (*see* SA114-115; SA117), and nothing prevented Hill from presenting *all* of the depositions in that format. What is more, the former directors appeared live during TD's case, and the jury could observe their "demeanor" and "body language" (Br. 38) during Hill's extended cross-examination. The form of the testimony thus did not conceivably prejudice Hill.

Third, Hill resorts again to simple name-calling, claiming that TD's alleged "bait and switch" and "gamesmanship" entitles him to a new trial. Br. 38. But, as explained above (section III.A, *supra*), TD's litigation conduct was entirely proper. And the testimony of the former directors did not "contradict [TD's] F.R.C.P. 30(b)(6) representative," John Fisher. *But see* Hill Br. 39. There was no "manifest injustice." *See* Fed. R. Civ. P. 16(e). This Court should affirm the district court's denial of leave to amend the final pretrial order.

V. THE JUNE 2007 ORDER LEFT COMMERCE IN A "TROUBLED CONDITION"

Standard of Review: Hill's argument on this issue rests first on an alleged error of law in the legal definition of a "troubled condition,"

which this Court reviews *de novo*. Hill also appears to contend that the court erred in excluding certain related expert testimony, which this Court review for abuse of discretion. *Stecyk*, 295 F.3d at 412.

The golden parachute regulations apply in this case only if Commerce was in a "troubled condition." Hill conceded at trial that the June 2007 Order placed Commerce in a "troubled condition" SA158:15-25, and another witness testified that Hill had said the same thing in 2007 SA222:8-22. He nonetheless asks this Court to hold that the Order did no such thing, claiming that Commerce was not troubled unless its financial condition was threatened. Br. 39-43. The Court should decline that invitation for two reasons. First, the underlying statute points to a regulatory definition of "troubled condition" that squarely covers the June 2007 Order. Second, even if this Court applies the different definition on which Hill relies, that definition would cover the June 2007 Order.

A. The June 2007 Order Put Commerce In A "Troubled Condition"

For starters, Hill is shooting at the wrong target. The relevant definition of "troubled condition" is found in 12 C.F.R. § 5.51, which, Hill concedes, has nothing to do with a bank's financial condition. Thus, even if Hill is correct that the June 2007 Order did not involve Commerce's financial condition, the Order put Commerce in a "troubled condition."

The statute governing golden parachute payments, 12 U.S.C. § 1828(k), identifies the relevant regulatory definition of "troubled condition." According to that statute, the term "troubled condition" is "defined in the regulations prescribed pursuant to section 1831i(f) of this title." 12 U.S.C. § 1828(k)(4)(A)(ii)(III). And 12 U.S.C. § 1831i(f), in turn, states that "[e]ach appropriate Federal banking agency shall prescribe by regulation a definition for the term[] 'troubled condition.'" The "appropriate Federal banking agency" for Commerce Bank, N.A., as Hill concedes, was the OCC. Hill Br. 40 (citing 12 U.S.C. § 1813(q)(1)).[11]

Thus, under this statutory scheme, the relevant definition of "troubled condition" is the definition that the OCC has promulgated under 12 U.S.C. § 1831i(f). Rather than looking at *OCC* regulations, however, Hill seeks to define "troubled condition" with *FDIC* regulations. Hill Br. 40-41 (citing 12 C.F.R. §§ 303.101 and 359.1).[12] And the FDIC regulations on which Hill relies do not even cite 12 U.S.C. § 1831i. Those regulations are therefore inapposite.

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[11] The other Commerce entity, Commerce Bancorp, was regulated by the Federal Reserve. But neither entity could make a golden parachute payment to Hill so long as Commerce Bank, N.A., was in a "troubled condition." That is because the golden parachute regulations apply to "healthy holding companies [such as Commerce Bancorp] which seek to enter into contracts to pay or to make golden parachute payments to [persons affiliated with] a troubled insured depository institution subsidiary [such as Commerce Bank, N.A.]" 12 C.F.R. § 359.0(b).

[12] The FDIC promulgated both of these regulations. *See* 67 Fed. Reg. 79,246 (Dec. 27, 2002) (§ 303.101); 61 Fed. Reg. 5926 (Feb. 15, 1996) (§ 359.1).

The OCC has promulgated one and only one definition of "troubled condition" pursuant to 12 U.S.C. § 1831i(f)—the definition in 12 C.F.R. § 5.51. *See* 12 C.F.R. § 5.51(a) (citing 12 U.S.C. § 1831i as the regulation's authority); 61 Fed. Reg. 60,342 (Nov. 27, 1996) (initial rule by OCC). Under that definition, a bank is in "troubled condition" if it is "subject to a cease and desist order, a consent order, or a formal written agreement, unless otherwise informed in writing by the OCC." 12 C.F.R. § 5.51(c)(6)(ii). Hill does not contest that the June 2007 Order was such an order. Thus, under the appropriate definition, the June 2007 Order caused Commerce Bank, N.A., to be in "troubled condition."

Hill contends that 12 C.F.R. § 5.51 is inapplicable because that section concerns changes in directors and senior executive officers. Hill Br. 42-43. But that is precisely the framework that Congress thought was relevant. As explained above, the golden parachute statute (12 U.S.C. § 1828(k)) borrows its definition of "troubled condition" from a different statute, 12 U.S.C. § 1831i. And the latter statute is directly concerned with changes in directors and senior executive officers. It is not uncommon for Congress to borrow a concept or definition from one context for use in a different context. *E.g.*, *W. Air Lines, Inc. v. Criswell*, 472 U.S. 400, 411 (1985). That is precisely what happened here. That the June 2007 Order

did not, on its face, direct a change in directors or senior executive officers is of no moment.[13]

B. Even Under Non-OCC Regulations, The June 2007 Order Necessarily Placed Commerce In A "Troubled Condition"

Even if Hill were correct that FDIC regulations, not OCC regulations, furnish the appropriate definition of "troubled condition," that would not change the result. Like Hill, the district court looked to FDIC regulations—specifically, 12 C.F.R. § 303.101(c)(3) ("Subsection (c)(3)")—to define that term.[14] Unlike Hill, however, the district court determined that the June 2007 Order triggered the FDIC's definition. Hill's arguments on appeal do not undermine the district court's holding.

Hill argues that the June 2007 Order did not trigger Subsection (c)(3) because that Order was not related to Commerce's financial condition. He reasons that Subsection (c)(3) applies only when a cease-and-desist order "requires action to improve the financial condition of the bank" or is related to an administrative action "which contemplates the issuance of an order that requires action to improve

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[13] In any event, the June 2007 Order undoubtedly was directly related to a change in a senior executive officer at Commerce—*i.e.*, Hill. As explained above (*supra* 8-10), the OCC had made clear when negotiating the June 2007 Order that Hill's termination was necessary.

[14] Although the district court declined to address TD's argument that 12 C.F.R. § 5.51 was the governing regulation, A285 n.4, this Court can affirm on any ground supported by the record.

the financial condition of the bank." 12 C.F.R. § 303.101(c)(3); *see* Hill Br. 41. Hill cites evidence that Commerce was in sound financial condition when the June 2007 Order issued, and that Order does not expressly address Commerce's financial condition. Thus, Hill argues, the June 2007 Order could not have triggered Subsection (c)(3).

Hill's argument fails to acknowledge, much less grapple with, the district court's holding (A285-286), which boils down to two propositions. First, the OCC issued the June 2007 Order "to ensure that . . . unsafe or unsound practices . . . do not occur in the future." A170. This language mirrors that of 12 U.S.C. § 1818(b), the source of the OCC's authority to enter the Order. A170; 12 U.S.C. § 1818(b)(1) (authorizing regulators to enter such orders if they believe a bank or a related party "is about to engage[] in an unsafe or unsound practice"). Second, as this Court has held, "unsafe or unsound practices" (within the meaning of 12 U.S.C. § 1818) necessarily implicate a bank's financial condition. *In re Seidman*, 37 F.3d 911, 932 (3d Cir. 1994) (defining "an unsafe or unsound practice" as "(1) an imprudent act (2) that places *an abnormal risk of financial loss or damage* on a banking institution" (emphasis added)). Thus, tying it together, the June 2007 Order was related to improving Commerce's financial position because it was entered pursuant to the OCC's authority to prevent "unsafe and unsound practices."

Any suggestion to the contrary would have this Court depart not only from its own precedent in *Seidman* but also from the law of its sister circuits. The courts of appeals universally recognize that "unsafe or unsound practices" entail a risk to the bank's financial condition. *Michael v. FDIC*, 687 F.3d 337, 352 (7th Cir. 2012); *de la Fuente v. FDIC*, 332 F.3d 1208, 1222 (9th Cir. 2003); *Landry v. FDIC*, 204 F.3d 1125, 1138 (D.C. Cir. 2000). The June 2007 Order served to prevent precisely such a risk—the risk that, in the regulators' view, Hill's actions posed to Commerce.

In any event, if there is any ambiguity in Subsection (c)(3), the FDIC has resolved it in TD's favor. In a 2007 letter to Commerce's lawyers, the FDIC recognized that Hill was "terminated while Commerce Bank, N.A., . . . has been designated as an institution *in 'troubled condition'* under applicable regulations." SA55 (emphasis added); *see also* SA57 (FDIC concurring in Federal Reserve's conclusion). An agency's interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quotation marks omitted). That is especially true where, as here, "there is no indication that its current view is a change from prior practice or a *post hoc* justification adopted in response to litigation." *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1337 (2013). The agency that promulgated Subsection (c)(3)

concluded in this very case that Commerce was in "troubled condition." Hill has presented this Court with no reason to take a different view.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the district court.

Dated: April 21, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel certifies as follows:

1. This brief complies with the type-volume requirement of Fed. R. App. P. 32(a)(7)(B)(i) because this brief contains 11,352 words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

3. Pursuant to 3d Cir. LAR 28.3(d), I am a member of the bar of this Court.

4. Pursuant to 3d Cir. LAR 31.1(c), the text in the electronic copy of this brief is identical to the text in the paper copies of the brief filed with the Court.

5. Pursuant to 3d Cir. LAR 31.1(c), the electronic copy of this brief was scanned by Trend Micro OfficeScan, version 10.6.3205 Service Pack 2, and found to contain no viruses.

Dated: April 21, 2014

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ADDENDUM: Text of 12 C.F.R. § 359.4

12 C.F.R. § 359.4. Permissible golden parachute payments.

(a) An insured depository institution or depository institution holding company may agree to make or may make a golden parachute payment if and to the extent that:

(1) The appropriate federal banking agency, with the written concurrence of the Corporation, 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 either at a time when the insured depository institution or depository institution holding company satisfies or in an effort to prevent it from imminently satisfying any of the criteria set forth in § 359.1(f)(1)(ii), and the institution's appropriate federal banking agency and the Corporation consent in writing to the amount and terms of the golden parachute payment. Such consent by the FDIC and the institution's appropriate federal banking agency shall not improve the IAP's position in the event of the insolvency of the institution since such consent can neither bind a receiver nor affect the provability of receivership claims. In the event that the institution is placed into receivership or conservatorship, the FDIC and/or the institution's appropriate federal banking agency shall not be obligated to pay the promised golden parachute and the IAP shall not be accorded preferential treatment on the basis of such prior approval; or

(3) Such a payment is made pursuant to an agreement which provides for a reasonable severance payment, not to exceed twelve months salary, to an IAP in the event of a change in control of the insured depository institution; provided, however, that an insured depository institution or depository institution holding company shall obtain the consent of the appropriate federal banking agency prior to making such a payment and this paragraph (a)(3) shall not apply to any change in control of an insured depository institution which results from an assisted transaction as described in section 13 of the Act (12 U.S.C. 1823) or the insured depository institution being placed into conservatorship or receivership; and

(4) An insured depository institution, depository institution holding company or IAP making a request pursuant to paragraphs (a)(1) through (3) of this section shall demonstrate that it does not possess and is not aware of any information, evidence, documents or other materials which would indicate that there is a reasonable basis to believe, at the time such payment is proposed to be made, that:

(i) The IAP has committed any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse with regard to the depository institution or depository institution holding company that has had or is likely to have a material adverse effect on the institution or holding company;

(ii) The IAP is substantially responsible for the insolvency of, the appointment of a conservator or receiver for, or the troubled condition, as defined by applicable regulations of the appropriate federal banking agency, of the insured depository institution, depository institution holding company or any insured depository institution subsidiary of such holding company;

(iii) The IAP has materially violated any applicable federal or state banking law or regulation that has had or is likely to have a material effect on the insured depository institution or depository institution holding company; and

(iv) The IAP has violated or conspired to violate section 215, 656, 657, 1005, 1006, 1007, 1014, 1032, or 1344 of title 18 of the United States Code, or section 1341 or 1343 of such title affecting a federally insured financial institution as defined in title 18 of the United States Code.

(b) In making a determination under paragraphs (a)(1) through (3) of this section, the appropriate federal banking agency and the Corporation 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 insured depository institution or depository institution holding company, 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 which would indicate that the proposed payment would be contrary to the intent of section 18(k) of the Act or this part.

CERTIFICATE OF SERVICE

I hereby certify that, on April 21, 2014, I caused a true and correct copy of the foregoing to be filed with the Court by CM/ECF. Appellant is a Filing User and is served electronically by the Notice of Docket Activity generated by CM/ECF.

Dated: April 21, 2014

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