IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VERN MCKINLEY,	)	
	)	
Plaintiff,	)	Civil Action No. 09-01263 (ESH)
	)	
v.	)	
	)	
FEDERAL DEPOSIT INSURANCE	)	
CORPORATION, et al.,	)	
	)	
Defendants.	)	
	)	

PLAINTIFF'S OPPOSITION TO DEFENDANT FEDERAL DEPOSIT INSURANCE CORPORATION'S MOTION TO SEVER

Plaintiff Vern McKinley, by counsel, respectfully submits this opposition to the motion to sever filed by Defendant Federal Deposition Insurance Corporation ("FDIC").

MEMORANDUM OF LAW

At issue in this Freedom of Information Act ("FOIA") lawsuit are FOIA requests served on Defendant FDIC and Defendant Board of Governors of the Federal Reserve System ("FRB"). Plaintiff, a banking expert and former FDIC and FRB employee, seeks records regarding Defendant FDIC's September 2008 involvement in a proposed purchase of Wachovia Bank, N.A. by Citigroup, Inc. Plaintiff also seeks records regarding Defendant FRB's involvement in the merger of the Bear Sterns Companies, Inc. and JP Morgan Chase & Co.

Unfortunately for Plaintiff and the general public, both entities stonewalled. Defendant FDIC disingenuously informed Plaintiff that his request would be most efficiently satisfied by providing him with copies of the minutes of a September 29, 2009 meeting of Defendant FDIC's Board of Directors. Defendant FDIC provided the minutes, but redacted them almost in their

entirety. The propriety of these redactions, along with Defendant FDIC's erroneous and unsubstantiated claim that Plaintiff agreed to narrow the scope of his request, are issues that will have to be addressed in this litigation.[1]

Defendant FRB simply ignored Plaintiff's request. It made a partial production of previously available public records on August 11, 2009, the day before its response to Plaintiff's Complaint was due, then claimed it had "responded to the request." *See* Answer of Defendant Board of Governors of the Federal Reserve System to Plaintiff's Complaint for Declaratory and Injunctive Relief, filed August 12, 20009, at para. 20. An additional production is expected September 30, 2009.

The records to which Plaintiff seeks access undoubtedly are of substantial public interest. *See*, *e.g.*, "Who's Too Big to Fail? Regulators today won't define 'systemic risk,' unlike 25 years ago," *The Wall Street Journal*, September 13, 2009, attached hereto as Exhibit 1.

Defendant FDIC now seeks to sever Plaintiff's FOIA claim against it from Plaintiff's FOIA claim against Defendant FRB. Defendant FDIC argues that allowing the two claims to proceed in the same lawsuit will "promote inconvenience and delay." Defendant FDIC's Motion to Sever ("Def's Mot.") at 4. Plaintiff respectfully submits that the opposite is the case; severing the two cases will promote inconvenience and delay.

As Defendant FDIC notes in its motion, the decision whether to sever claims or parties is committed to the sound discretion of the trial court. Def's Mot. at 3, *citing M.K. v. Tenet*, 216

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[1] It is ironic that Defendant FDIC would seek to sever Plaintiff's claims to "promote convenience and expedite resolution" of this matter when Defendant FDIC apparently intends to litigate whether Plaintiff agreed to narrow his request. Plaintiff will assert that he did not agree to limit his request. Choosing to litigate such an issue rather than simply processing what already is a fairly simple request is hardly consistent with promoting an efficient, expeditious resolution.

F.R.D. 133, 137 (D.D.C. 2002). While the Court may order the severance of claims or parties if the claims or parties are improperly joined, the Court is not required to do so. The Court may decide whether severance is appropriate based on a variety of factors. Besides the requirements for joinder under Rule 20 of the Federal Rules of Civil Procedure, "the court should consider whether an order [to sever] under Rule 21 would prejudice any party, or would result in undue delay." *M.K.*, 216 F.R.D. at 138 (internal quotation marks and citations omitted). Defendant FDIC's motion to sever should be denied because an order severing the claims or parties in this case would cause inefficiencies and likely result in undue delay.

Plaintiff's claims against Defendant FDIC and Defendant FRB are proceeding efficiently and expeditiously. Plaintiff and Defendant FDIC have agreed on a schedule for the filing of dispositive motions by which cross-motions for summary judgment would be fully briefed by the end of the year. *See* Joint Status Report and Proposed Briefing Schedule of Plaintiff and Defendant Federal Deposit Insurance Corporation, filed September 9, 2009 (Docket Entry #11). Plaintiff and Defendant FRB have agreed to a September 30, 2009 deadline for Defendant FRB to complete its production of responsive documents. *See* Joint Status Report of Plaintiff and Defendant Board of Governors of the Federal Reserve System, filed September 10, 2009 (Docket Entry #12. Plaintiff and Defendant FRB have further agreed that Defendant FRB shall have until November 15, 2009 to produce a draft *Vaughn* Index of withheld records and that the parties will submit a further status report by December 1, 2009. *Id.*

If the Court were to sever the claims at this point, it is likely that the progress made by the parties to date will be undone. If the claims are severed, a new case number will have to be assigned to the claim severed from the original action, and, presumably, the new case will be sent

to the Calendar and Case Management Committee for assignment. A new judge will be assigned either by the Calendar and Case Management Committee or by random assignment, and the new judge may have his or her own views on how the severed claim should proceed. The parties and the Court would effectively have to start the severed case anew. In other words, severing the claims at this point would be contrary to, not consistent with, Rule 20, which seeks "to promote trial convenience and expedite the final resolution of disputes, thereby preventing multiple lawsuits, extra expense to the parties, and loss of time to the court as well as to the litigants appearing before it." *M.K.*, 216 F.R.D. at 137.

In addition, Defendant FDIC has not argued, much less demonstrated, that it will suffer any prejudice should Plaintiff's two FOIA claims continue to proceed in the same action. As this case will not be decided by a jury, Defendant FDIC cannot claim it will be prejudiced by any juror confusion. The Court undoubtedly can and will consider Plaintiff's claims against the two defendants separately. Nor can Defendant FDIC argue that allowing Plaintiff's claim against it to proceed in the same lawsuit as Plaintiff's claim against Defendant FRB will delay adjudication of either claim; the two claims already are proceeding on their own schedules. Consequently, neither Defendant FDIC nor Defendant FRB will suffer any prejudice if the two claims are allowed to continue in the same lawsuit. By contrast, severing Plaintiff's claims will likely delay the ultimate resolution of the matter and thus harm Plaintiff's ability to obtain the information he seeks in a timely manner.

CONCLUSION

Allowing Plaintiff's FOIA claims against Defendant FDIC and Defendant FRB to proceed in the same lawsuit will promote, not hinder, judicial economy and the efficient and

expeditious resolution of this litigation. Consequently, Plaintiff respectfully requests that the Court exercise its discretion by denying Defendant FDIC's motion to sever.

Dated: September 28, 2009

Respectfully submitted,

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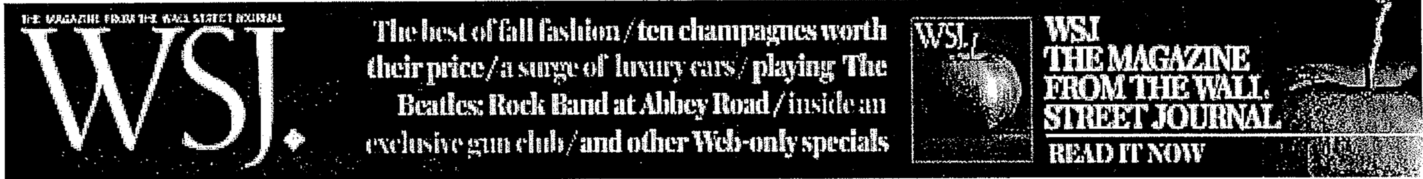
EXHIBIT 1



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REVIEW & OUTLOOK | SEPTEMBER 13, 2009, 7:05 P.M. ET

Who's Too Big to Fail?

Regulators today won't define 'systemic risk,' unlike 25 years ago.

With Congress back in session and the anniversary of the Lehman Brothers failure upon us, the Obama Administration is resuming its quest for greatly expanded authority to bail out American businesses. Under the Treasury reform blueprint, any financial company, whether a regulated bank or not, could be rescued or seized by the Federal Deposit Insurance Corporation if regulators believe it poses a systemic risk.

If recent history is any guide, when the feds stage their next intervention, they will not define "systemic risk" and they will refuse to release the data underlying their decision. To this day, taxpayers can only guess at the specific reasons behind the ad hoc rescues that began with Bear Stearns in March of 2008. Now Team Obama seeks to codify the bailout policies of the last 18 months.

Before receiving authority for new adventures across U.S. commerce, financial regulators should explain their current interventions. The basic questions: How exactly does the government measure systemic risk, and how do regulators know tha the U.S. economy can't live without a particular firm? Americans still don't know why Bear, Citigroup and AIG were saved, bu Lehman wasn't.

A recently-filed federal lawsuit seeks answers. Plaintiff Vern McKinley worked at the FDIC in the 1980s and is now suing his old employer, as well as the Federal Reserve. The two agencies have been stiff-arming his Freedom of Information Act requests on last year's bailouts.

Last December, Mr. McKinley sent a FOIA request to the Fed to find out what Fed governors meant when they said a Bear Stearns failure would cause a "contagion." This term was used in the publicly-released minutes of the Fed meeting at which the central bank discussed plans by the Federal Reserve Bank of New York to finance Bear's sale to J.P. Morgan Chase. The minutes contained only the vague warning of doom, without any detail on how exactly the fall of Bear would destroy America. Mr. McKinley's request sought the supporting documents for this conclusion.

He also requested minutes of the autumn FDIC board meeting at which regulators approved financing for a Citigroup takeover of Wachovia. To provide this assistance, the board had to invoke the "systemic risk" exception in the Federal Deposit Insurance Act, and therefore had to assert that such assistance was necessary for the health of the financial system. Yet days later, Wachovia cut a better deal to sell itself to Wells Fargo, instead of Citi. So how necessary was the FDIC's offer of assistance?

After Mr. McKinley sued the agency this summer, the FDIC coughed up a previously undisclosed staff memo to the FDIC board. Again, the agency redacted the substance, providing roughly two pages of text from the nine-page original. The section of the memo titled "Systemic Risk" was entirely erased. As for the Fed, it blew off Mr. McKinely's initial request and has since

responded mainly with some highly uninformative letters from the Fed staff to Congress.

For rescues of institutions deemed "too big to fail," this lack of disclosure is striking. Twenty-five years ago this month, Congress began hearings on Continental Illinois National Bank and Trust, which had received a government rescue of creditors and uninsured depositors just four months earlier. Rather than vague warnings of "severe" consequences for "fragile" markets offered by Bush and Obama regulators, the public received detailed information on Continental Illinois and its relation to other institutions.

By early October, the alleged "systemic risk" was being defined—and debated—very precisely. The FDIC held that 179 smaller banks would have been at high risk of failure due to their Continental Illinois exposures if the bank had been allowed to collapse. Combing through the data, the staff of the House Banking Committee and the General Accounting Office countered that only 28 banks would have been at high risk.

In contrast, the counterparties that benefited from the AIG bailout last year were only formally disclosed in 2009 after months of public pressure and after the Journal's reporting had already revealed most of the details. A public debate on which banks really needed a bailout via the government's AIG conduit has hardly taken place. And did all of Bear Stearns' creditors, including hedge funds, need to be made whole to ensure the survival of American capitalism?

A year after the epic meltdown, this is the debate Congress needs to undertake before legislating any new federal authority. Regulators should not receive a blank check to prevent systemic risk without even defining what that term means.

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	)	
Defendants.	)	
	)	

[PROPOSED] ORDER

Upon consideration of Defendant Federal Deposition Insurance Corporation's motion to sever, Plaintiff's opposition thereto, and the entire record herein, it is hereby ORDERED that:

1. The motion is denied.

Dated: September 24, 2009

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The Hon. Ellen S. Huvelle, U.S.D.J.

Copies To: All Counsel of Record