

THE UNITED STATES DISTRICT COURT
 FOR THE EASTERN DISTRICT OF NORTH CAROLINA
 WESTERN DIVISION
 NO. 5:14-cv-00014-BO

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	DEFENDANTS’ MEMORANDUM IN
	:	SUPPORT OF MOTION TO ENTER
	:	PROPOSED CONSENT ORDER
FOUR OAKS FINCORP, INC., and	:	
FOUR OAKS BANK AND TRUST	:	
COMPANY,	:	
	:	
Defendants.	:	
	:	

Defendants Four Oaks Fincorp, Inc. and Four Oaks Bank & Trust Company (collectively the “Bank”) respectfully submit this memorandum in support of their Motion to Enter Proposed Consent Order. The parties’ proposed settlement is fair, adequate, and reasonable and is in the public interest. This settlement is the product of months-long, arms-length negotiations between the government and the Bank, and is strongly supported by public policy and consumer protection considerations as well as the safety and soundness principles governing regulated financial institutions such as the Bank. For these reasons, the Bank respectfully urges the Court to enter the parties’ proposed Consent Order.

ARGUMENT

A. Settlement Of This Matter Is Critical To The Bank’s Well-Being

Founded over 100 years ago, the Bank has deep roots in the Four Oaks, North Carolina community. The Bank’s core business is the provision of banking services to its local

community. Many of the Bank's shareholders live in eastern and central North Carolina, and the Bank is one of the Town of Four Oaks' largest employers.

Settlement of this matter, as contemplated by the proposed Consent Order, is critical to the Bank's well-being. If the proposed Consent Order is not entered, then the Bank may be forced to bear the significant costs associated with a lengthy legal dispute. As discussed below, such an outlay of funds would cause the Bank financial hardship. The proposed settlement, however, allows the Bank to focus its resources on its core business, without the distractions created by an ongoing government investigation and potential litigation. These reasons alone militate in favor of entering the proposed Consent Order. *See, e.g., United States v. Bank of America, N.A.*, 2012 WL 4808737, *2 (W.D.N.C. October 10, 2012). Moreover, "[b]oth the parties and the general public benefit from the saving of time and money that results from the voluntary settlement of litigation." *Id.*

Entry of the proposed Consent Order also will significantly enhance the Bank's ability to raise capital for its continued success. The Great Recession significantly impacted many community banks in this region, and while the Bank has fared better than many, it has not been unaffected by this historic downturn's impact on the economy and financial sectors. In May 2011, the Bank entered into a written agreement with its regulators stating that, among other things, the Bank will "maintain sufficient capital" going forward. To this end, the Bank is committed to improving its financial position and target capital levels to maintain a "well capitalized" status under federal banking agencies' guidelines. Management continues to evaluate various alternatives to increase tangible common equity and regulatory capital through the issuance of additional equity. The Bank is also working to manage its balance sheet to improve capital ratios and is actively evaluating a number of capital sources, asset reductions,

and other balance sheet management strategies to ensure that the projected level of regulatory capital can support its balance sheet long-term. However, the onset of the government's investigation has substantially impeded these efforts. And although the Bank might otherwise maintain certain defenses to this action, in agreeing to the Consent Order the Bank hopes to eliminate the cloud of a government lawsuit and improve the Bank's prospects of raising capital. But if the proposed Consent Order is not entered, then the Bank's ability to raise capital may be hampered substantially.

B. The Proposed Consent Order Is Fair, Adequate, Reasonable and in the Public Interest

While the Bank believes it has defenses to the allegations and claims in the complaint, the proposed Consent Order settles those allegations and claims, which the Bank neither admits nor denies. The underlying facts averred in the complaint are alleged to give rise to a violation of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), 12 U.S.C. § 1833a. That statute provides that the United States may bring a "civil action to recover a civil penalty" for a violation of one of 14 predicate criminal offenses, including wire fraud, when wire fraud and certain other offenses "affect a federally insured financial institution." 12 U.S.C. § 1833a(c). Under FIRREA, the United States "must establish a right to recovery by a preponderance of the evidence." 12 U.S.C. § 1833a(f). The proposed Consent Order provides that the Bank will pay a \$1 million civil money penalty under FIRREA and a \$200,000 penalty to United States Postal Inspection Service's Consumer Fraud Fund. *See* Proposed Consent Order at 12, Dkt. No. 1-1. The proposed Consent Order also includes a number of injunctive provisions designed to address the conduct alleged in the complaint, and the Bank is willing to undertake these additional obligations – some of which comport with new standards recently issued by other industry groups.

This “settlement is a product of substantial negotiations involving experienced counsel” for both parties. *United States v. Bank of America*, 2012 WL 4808737 at *3. These negotiations spanned several months during which time the parties conducted numerous conversations about the proposed Consent Order. The Bank’s Board of Directors reviewed and ratified the Consent Order, which the Bank’s president subsequently signed. Similarly, senior leadership at the Department of Justice also reviewed the Consent Order’s language and subsequently signed it. The good faith bargaining here between the parties is an indication that the proposed consent order is procedurally fair. *See United States v. Bank of America, N.A.*, 2012 WL 4808737 at *3.¹

The scope of the proposed Consent Order and the remedies it seeks to impose present a reasonable compromise for the claims asserted. The proposed injunctive provisions of the Consent Order specifically address the conduct alleged in the complaint. They are “carefully tailored to end[] the policies and practices that allegedly led” to the conduct described in the complaint. *Id.* at *4.

Similarly, the parties agree that the proposed civil money penalties of \$1.2 million, while substantial, accord with what the Bank is able to pay without disrupting its operations, which is a guiding principle in FIRREA settlements. *See U.S. v. Menendez*, 2013 WL 828926, *8-*9 (C.D. Cal., March 6, 2013). Under FIRREA, a court may impose a civil penalty that is \$1 million for each violation, or in the case of continuing violations, a civil money penalty may not exceed the lesser of \$1 million per day or a total of \$5 million. 12 U.S.C. §§ 1833a(b)(1),(2). If the United States is able to show that the alleged conduct gave rise to “pecuniary gain” for the defendant or that there was consumer injury, then the government can pursue civil money penalties that

¹ “Unlike a class action settlement where the possibility of collusion between the defendant and class counsel demands significant judicial scrutiny, a suit brought by the United States . . . does not pose such potential conflicts of interest.” *United States v. Bank of America*, 2012 WL 4808737 at *3.

exceed \$5 million. *Id.* Here, the complaint alleges that the Bank received approximately \$850,000 in gross fees from the alleged misconduct over a four-year period. *See* Compl., ¶37, Dkt. No. 1. Moreover, the United States has not monetized any alleged consumer injury, which may be a difficult showing that varies by customer, but which would be necessary under the FIRREA provision that allows the government to recover alleged consumer injury that exceeds \$5 million. The proposed civil money penalty of \$1.2 million is appropriate and for this reason, as well, the proposed Consent Order should be entered.

CONCLUSION

For all of the foregoing reasons, the Bank respectfully requests that the Court enter the proposed Consent Order.

This the 15th day of January, 2014.

SMITH, ANDERSON, BLOUNT, DORSETT,
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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of January, 2014, a copy of the foregoing document was electronically filed with the court and served via CM/ECF, on all parties listed on the Court's Electronic Mail Notice List.

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