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United States District Court,
C.D. California.

GTS 900F, LLC
v.
FEDERAL DEPOSIT INSURANCE CORPORATION, et al.

No. LA CV11–06607 JAK (JCx).
|
June 1, 2012.

Attorneys and Law Firms

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Proceedings: (IN CHAMBERS) ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (Dkt.19) JS–6

JOHN A. KRONSTADT, District Judge.

I. *Introduction*

***1** In this action, Plaintiff GTS 900F, LLC ("GTS") challenges the determination of the Federal Deposit Insurance Corporation ("FDIC") and its Executive Secretary, Robert Feldman (collectively, "Defendants"), that there were insufficient funds to satisfy GTS's claims against the FDIC, as receiver for Corus Bank. GTS brings this challenge under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* ("APA"). The claims that GTS brings against the FDIC arise from those that GTS once held against Corus Bank. After Corus Bank filed for bankruptcy, it was placed in receivership by the FDIC. Accordingly, the challenged determination has the effect of extinguishing the claims. GTS contends that the FDIC's determination as to the limited value of Corus Bank assets was arbitrary, capricious, and an abuse of discretion, in violation of Section 706 of the APA, 5 U.S.C. § 706.

Defendants moved for summary judgment, and to supplement the administrative record. Dkt. 19, 32. The Court held a hearing on Defendants' motions on January 9, 2012, and granted Defendants' motions to supplement and further supplement the administrative record. Dkt. 45. The Court allowed the parties to file supplemental briefing on Defendants' motion for summary judgment. After this briefing was completed, the Court heard further oral argument on April 23, 2012, and took the matter under submission. Dkt. 58. For the reasons set forth in this Order, the Court GRANTS Defendants' motion for summary judgment.

II. *Factual Background*

GTS was organized to acquire and develop property in downtown Los Angeles, California. On September 4, 2009, GTS filed a lawsuit against Corus Bank in connection with a loan agreement between the parties. Later that month, Corus Bank filed for bankruptcy, and was placed into receivership with the FDIC. In November 2009, GTS and the FDIC stipulated to substitute the FDIC as defendant in GTS's lawsuit.

As part of its receivership of Corus Bank, the FDIC created a limited liability company, Corus Construction Venture ("CCV"), and transferred to it most of Corus Bank's real estate loan and property portfolio, including the loan agreement between Corus Bank and GTS. The FDIC subsequently sold 40% of CCV to a private equity consortium, Northwest Investments, and retained the remaining 60%, along with a security interest in CCV's assets. Corus Bank assets were also placed in three other LLCs (2010–2 SFR Venture LLC, 2010–1 CRE Venture LLC, and 2010–3 SFR Venture LLC), although none of these entities had assets that were comprised only of those previously held by Corus Bank. The FDIC retained an approximately 1% interest in the three other LLCs.

In May 2011, the FDIC published a Determination of Insufficient Assets to Satisfy Claims Against Financial Institution in Receivership ("Determination"), which stated that the value of the assets held by the FDIC as receiver was approximately $1.5 billion, but that administrative expenses and depositor liabilities, both of which, under the terms of the receivership, were to be paid before paying an unsecured claim such as that of GTS, were approximately $2 .6 billion. Thus, the FDIC concluded that there was a shortfall of approximately $1.1 billion. Administrative Record ("AR") 14, Mot., Exh. 4, Dkt. 19–4. The FDIC also determined that, given this shortfall, there would be no funds available to pay the claims of GTS. That $1.5 billion valuation was based on the FDIC's interest in an income tax refund, the FDIC's interest in liability claims against Corus Bank's officers and directors, and the value of the FDIC's interest in the four LLCs. In valuing these interests, the FDIC calculated that the book value of its 60% interest in CCV was approximately $1.8 billion. AR 8. The FDIC also determined that its combined interest in the three other LLCs—in which the FDIC held less than a 1% ownership interest—had a book value of approximately $1.3 million. *Id.* The FDIC determined that the value of the tax refund was approximately $261 million. AR 10. The FDIC estimated that the value of the claims against Corus Bank's officers and directors was, at most, $15 million. AR 09.

***2** The FDIC also determined the present value of its ownership interest in CCV and other LLCs. This present valuation—as opposed to the book value—was determined through the use of cash flow projections provided by the Managing Members of the LLCs. These projections were then discounted to present value. Through this approach, the FDIC was thus able to estimate the value of its ownership interest in the LLCs. First Raburn Decl. ¶ 6, Dkt. 19–3. The FDIC determined that the present value of its ownership interest in CCV was $1,094,354,889, which represented 59.6% of the $1.8 billion book value of its ownership in CCV.

Based on the foregoing calculations, the FDIC determined that Plaintiff's claims and those similar ones held by others had no value. Consequently, the FDIC determined that Plaintiff could not recover from the FDIC based on its claims against Corus Bank. *See* "Determination of Insufficient Assets to Satisfy Claims Against Financial Institution in Receivership," 76 Fed.Reg. 28225–28226 (May 16, 2011) (Vol.76, No. 94).

III. *Analysis*

A. The Legal Standard For Review Under the APA

A "determination of worthlessness is a final agency action, which is reviewable under the provisions of the Administrative Procedure Act." *Adams v. Resolution Trust Corp.,* 927 F.2d 348, 355 n. 15 (8th Cir.1991). "[O]nce an agency has taken final agency action under the APA, a reviewing court analyzes that decision under the 'arbitrary and capricious' standard of review." *Mt. St. Helens Mining & Recovery Ltd. P'ship v. United States,* 384 F.3d 721, 727 (9th Cir.2004). The court "must determine whether the agency considered the relevant factors and articulated a rational connection between the facts found and the choices made." *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. USDA,* 499 F.3d 1108, 1115 (9th Cir.2007). "This standard of review is highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision." *Id.* An agency action will be

> arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983). A "reviewing court should not attempt itself to make up for" deficiencies in the agency's reasoning and may "not supply a reasoned basis for the agency's action that the agency itself has not given." *Id.* A court must, however, "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Id.* Where the agency decision involves "a high level of technical expertise," a court must be particularly deferential. *Sierra Club v. U.S. EPA,* 346 F.3d 955, 961 (9th Cir.2003).

***3** "Generally, judicial review of an agency decision is limited to the administrative record on which the agency based the challenged decision." *Fence Creek Cattle Co. v. U.S. Forest Serv.,* 602 F.3d 1125, 1131 (9th Cir.2010). A court may consider allowing supplementation of the administrative record in "four narrowly construed circumstances":

> (1) supplementation is necessary to determine if the agency has considered all factors and explained its decision; (2) the agency relied on documents not in the record; (3) supplementation is needed to explain technical terms or complex subjects; or (4) plaintiffs have shown bad faith on the part of the agency.

Id. With respect to highly technical areas, a court may consider "substantive evidence going to the merits of the agency's action where such evidence is necessary as background to determine the sufficiency of the agency's consideration." *Love v. Thomas,* 858 F.2d 1347, 1356 (9th Cir.1988). This is because "it will often be impossible, especially when highly technical matters are involved, for the court to determine whether the agency took into consideration all relevant factors unless it looks outside the record to determine what matters the agency should have considered but did not." *ASARCO, Inc. v. U.S. EPA,* 616 F.2d 1153, 1160 (9th Cir.1980). Nonetheless, "[p]ost hoc explanations of agency action by appellate counsel cannot substitute for the agency's own articulation of the basis for its decision." *Arrington v. Daniels,* 516 F.3d 1106, 1113 (9th Cir.2008).

When a court reviews an agency determination, "there are no disputed facts that the district court must resolve." *Occidental Eng'g Co. v. INS,* 753 F.2d 766, 769 (9th Cir.1985). "[T]he function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Id.* Thus, a motion for summary judgment serves a different function in a standard civil action than it does in the APA context:

> In the former case, summary judgment is appropriate only when the court finds there are no factual issues requiring resolution by trial. In the latter [APA] case, summary judgment is an appropriate mechanism for deciding the legal question of whether the agency could reasonably have found the facts as it did.

Id. at 770. Discovery is generally not allowed under APA review, as review is limited "to the administrative record, except when there has been a strong showing of bad faith or improper behavior or when the record is so bare that it prevents effective judicial review." *Commercial Drapery Contractors, Inc. v. United States,* 133 F.3d 1, 7 (D.C.Cir.1998).

B. Application of the APA Review Standard

In its initial opposition to the FDIC's motion for summary judgment, GTS challenged the Determination on eight grounds. In responding to these challenges, the FDIC relied in part on evidence it produced only in its reply brief. As noted above, as a result of this proffer of new evidence, the Court permitted GTS to present supplemental briefing in which it could address this evidence. In its supplemental opposition, GTS refined its eight original arguments, and presented an additional argument. These arguments are considered in order.

1. *Book Value of $1.8 Billion*

***4** The FDIC calculated that the Receiver's interest in CCV had a book value of approximately $1.8 billion. GTS argues that the FDIC provides no support for this calculation. However, the FDIC provided evidence in its reply brief regarding the calculation of this $1.8 billion book value. The FDIC calculated this amount based on financial data submitted by the CCV Managing Member, also referred to as the Private Owner. *See* Second Raburn Decl. ¶¶ 3, 8–10, Dkt. 31–6. These calculations are detailed in Exhibits F through I of the Second Raburn Declaration. *Id.,* Exh. F–I, Dkt. 31–6, 39, 43. Because the FDIC relied on these documents in making the Determination, the Court considers them in reviewing the FDIC's action. *See Fence Creek Cattle Co.,* 602 F.3d at 1131.

GTS does not challenge the calculations presented in the Second Raburn Declaration. Instead, GTS argues in its supplemental opposition that CCV's book value numbers are internally inconsistent. GTS argues that Exhibit F to the Second Raburn Declaration shows the total book value at $3,055,789,516—which would be consistent with the FDIC's 60% interest being approximately $1.8 billion—but that Exhibit A to the Newbury Declaration, Dkt. 31–4, shows the CCV's "remaining assets" as of December 31, 2010 valued at $3,958,395,128. GTS also points out that the FDIC's unaudited financials value the "assets in liquidation" at $1,849,913,601. First Edwards Decl., Exh. D, Dkt. 19–3. GTS then cites the declaration of its accountant, David Tang, who states the conclusion that such numbers cannot be reconciled. Tang Decl. ¶ 7, Dkt. 49.

The FDIC has adequately explained these figures and has shown that they are not contradictory. The figure of $3,958,395,128 in the Newbury Declaration represents the remaining assets that CCV holds. Newbury Decl., Exh. A, Dkt. 31–4. These assets comprise real estate and loans held by CCV; they are broken down by state and project type in the Newbury Declaration. Tellingly, the $3,958,395,128 figure *is* reflected in the Second Raburn Declaration as the sum of the unpaid principal on loans CCV holds ($2,348,552,525) and the carrying value of CCV-owned real estate ($1,106,842,603). *See* Second Raburn Decl., Exh. F, Dkt. 43. For these reasons, contrary to the position of GTS, the two declarations are consistent in evaluating CCV's assets: the Newbury Declaration calculated this number valuing the assets by state and project type, and the Second Raburn Declaration calculated this number by adding the value of real estate owned to the amount of loans receivable. The figure of $3,055,789,516 in the Second Raburn Declaration is a distinct figure—it is CCV's net LLC assets. *See id.* It was calculated by taking the total asset figure of $3,958,395,128, adding the value of cash held by CCV, and then subtracting certain loan adjustments and notes payable. It is, therefore, a *net* calculation, unlike the figure from the Newbury Declaration. For these reasons, the numbers are consistent, not contradictory.

***5** Nor is there is any inconsistency between the $1,833,473,170 figure, which represents the FDIC's 60% interest in CCV, as calculated in the Second Raburn Declaration, Exh. F, Dkt. 43, and the $1,840,156,493 figure, which represents the assets in liquidation that the FDIC holds in receivership, as represented in the First Edwards Declaration, Exh. D, Dkt. 19–3. The calculation of assets in liquidation by Edwards includes the FDIC's assets from the failed Corus Bank; these are held not just in the CCV LLC, but in all four LLCs. *See* Third Raburn Decl. ¶¶ 6–7, Exh. C, Dkt. 51. For these reasons, the $1,840,156,493 assets in liquidation figure includes not only the $1,833,473,170, which represents the FDIC's interest in the CCV LLC alone, but the FDIC's interest in other Corus Bank assets not held in CCV. *See id.*

For these reasons, GTS has failed to show that the FDIC calculated the $1.8 billion book value in a manner that was arbitrary and capricious.

2. *59.6% Expected Rate of Recovery*

The FDIC determined the present value of the CCV book value amount of $1.8 billion to be approximately $1.1 billion; this represents an estimated rate of recovery of 59.6%. GTS argues that the FDIC failed to explain how it calculated this estimated 59.6% expected rate of recovery. However, in its reply brief, the FDIC explained that it calculated this rate of return based on cash flow data submitted by the CCV Managing Member. *See* Second Raburn Decl. ¶¶ 11–13, Dkt. 31–6. These projections were calculated as of December 31, 2010. *See id.*, Exh. F, H, I, Dkt. 31–6, 33, 39.

In its supplemental opposition, GTS argues that, for several reasons, the calculation of the 59.6% expected rate of recovery was arbitrary and capricious. First, GTS argues that "cash flow projections are merely 'projections'; they change," and thus the expected rate of recovery cannot be based on such projections. Supp. Opp'n, p. 8:7, Dkt. 49. This argument fails. It was plainly rational to rely on cash flow projections; without relying on such projections, it would not be possible for the FDIC to make financial determinations and predictions. Taken to its logical conclusion, GTS's argument would require the FDIC perpetually to reanalyze the assets held in receivership to determine if additional funds would be available to pay unsecured creditors. Such a requirement would interfere with the FDIC's mandate to conserve and preserve the assets of a failed institution:

> Congress granted the FDIC broad powers in conserving and disposing of the assets of the failed institution. To enable the FDIC to move quickly and without undue interruption to preserve and consolidate the assets of the failed institution, Congress enacted a broad limit on the power of courts to interfere with the FDIC's efforts.

Sharpe v. FDIC, 126 F.3d 1147, 1154 (9th Cir.1997). Certainly it was rational to rely on the cash flow projections from a business plan—even one completed in December 2010—prepared by the CCV Managing Member. If such projections could not be relied upon, there would be no way to estimate CCV's funds, and no way to make an insufficient asset determination. GTS's argument that projections "change" does not show that it was irrational for the FDIC to rely on such projections.

***6** Second, GTS suggests that the FDIC "very likely" improperly applied the 59.6% rate of recovery to the value of CCV's real estate portfolio, because that portfolio would already have been valued at distressed amounts. Supp. Opp'n, p. 9:7, Dkt. 49. However, Bret Edwards, who is the FDIC Director of the Division of Receiverships and Resolutions and who made the insufficient asset determination, has declared that neither the calculation of the book value of the LLCs nor the measurement of the Receiver's interest in those LLCs took into account the distressed nature of the properties; it was for that reason that the FDIC calculated the present value of the cash flow projections of the LLCs, *i.e.*, it applied the 59.6% expected rate of recovery. First Edwards Decl. ¶ 14, Dkt. 19–3. Thus, it was not improper for the FDIC to apply the 59.6% expected rate of recovery to the book value of the assets.

Third, GTS argues that the FDIC should not have discounted its cash flow projections to present value. GTS asserts without explanation that such discounting to present value "would only have made sense if the liabilities all needed to be paid as of that date, which is not the case." Supp. Opp'n, pp. 9:22–10:1, Dkt. 49. This argument fails. Future cash flows had to be discounted to present value in order to determine the estimated *present* value of the FDIC's ownership interest in the LLCs, as opposed to future values of all cash to be distributed over the LLCs' lifetimes to the FDIC. First Raburn Decl. ¶ 6, Dkt. 19–3. This is an accepted method to determine the value of one's ownership in another entity under Generally Accepted Accounting Principles ("GAAP"). *Id.* at ¶ 8; *see also* Second Raburn Decl. ¶ 13, Dkt. 31–6.

Fourth, GTS argues that the FDIC has offered no explanation for how CCV determined its cash flow projections. From this GTS argues that it was arbitrary and capricious for the FDIC to have relied on those cash flow projections. However, it was not unreasonable for the FDIC to rely on the cash flow projections determined by the Managing Members of the LLCs. As explained by Thomas Raburn, whose entity Raburn & Williams, PLC was contracted with by the FDIC to value the FDIC's interest in the four LLCs,

> The Managing Members of each LLC are responsible for management and disposition of the assets to maximize recovery, and they have the most detailed knowledge of the borrowers, collateral, disposition strategies and expected recoveries. Accordingly, reliance on the cash flows they provide for purposes of the valuation is reasonable.

First Raburn Decl. ¶ 8, Dkt. 19–3. These cash flow projections have been provided. Second Raburn Decl., Exh. I, Dkt. 39. Thus, it was not arbitrary or capricious for the FDIC to rely on cash flow projections generated by the LLCs themselves.

3. *10 Year Lifetime*

GTS next contends that the FDIC did not explain its estimate that CCV would have a lifetime of 10 years, and would have a corresponding 10–year cash flow. The evidence in the administrative record is to the contrary. Thus, the FDIC has presented evidence that CCV will dispose of all its assets by 2016. *See* Second Raburn Decl., Exh. I & I–2, Dkt. 31–6, 39. The FDIC based its estimate of a 10–year lifetime for the CCV on its cash flow projections, *see* Second Raburn Decl., Exh. I–1 & I–2, Dkt. 31–6, 39, which show that CCV's assets will be depleted by 2016. Further, the Managing Member has the right, if certain conditions are met, to liquidate CCV after 10 years. Second Raburn Decl., Exh. A § 12.15, Dkt. 31–6. In its supplemental opposition, GTS did not challenge this rationale and explanation as to why the FDIC estimated a 10–year CCV lifetime.

4. *36% Blended Rate of Recovery*

***7** GTS argues that it was error for the FDIC to apply a 36% blended rate of recovery to the CCV, because it contained assets only from the Corus Bank receivership; instead, Plaintiff argues, the FDIC should have applied the 59.6% expected rate of recovery. In its original discounting of the book value of $1.8 billion, the FDIC applied the 36% blended rate, which was based on "the weighted average of the estimated loss rates for" all four LLCs; this rate was calculated "by dividing (a) the aggregate estimated recovery value on the equity interest held by the receiverships in all LLCs by (b) the aggregate book value of the equity interest held by the receiverships in all LLCs." Green Decl. ¶ 13, Dkt. 19–3. This calculation determined that the FDIC's ownership interest in the four LLCs was approximately $662 million. *Id.*

The FDIC argued in its initial motion for summary judgment that, even if the FDIC had used a 59.6% expected rate of recovery, it would not have changed the Determination, because there still would have been insufficient funds to satisfy liabilities with priority over GTS. *See* Mot., pp. 15–16, Dkt. 19–1; First Edwards Decl. ¶¶ 12–17, Dkt. 19–3. This is because the higher rate of return would have yielded only an extra $500 million, which would have been insufficient to meet the approximately $1.1 billion by which liabilities exceeded assets. *See id.*

The FDIC's argument is that the Determination's use of a 36% rate instead of a 59.6% rate was harmless error. In reviewing agency decisions under the APA, "due account shall be taken of the rule of prejudicial error." 5 U.S.C. § 706. Thus, unless GTS can establish that use of the 36% instead of the 59.6% prejudiced GTS, the Court may not overturn the FDIC's decision. GTS, as the party challenging the administrative decision, carries the burden to establish that the FDIC's error was not harmless. *See Cal. Wilderness Coal. v. U.S. Dep't of Energy,* 631 F.3d 1072, 1108 (9th Cir.2011). The FDIC has presented evidence that the use of the 36% rate was harmless because even under GTS's proposed rate of recovery, there would still be a $600 million shortfall. GTS has presented no evidence that the Determination's use of the 36% rate was not harmless. Thus, GTS's objection to the use of the 36% rate of blended recovery fails.

5. *Increase in Ownership Interest*

GTS next argues that the FDIC failed to consider the possibility that, under certain conditions, the FDIC's interest in CCV may increase from 60% to 70%, in what is called an "equity kicker." *See* Second Raburn Decl., Exh. A §§ 2.3(c), 6.6(b)(iii)-(iv), Dkt. 36–1. An agency decision is arbitrary and capricious if it "entirely failed to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n.,* 463 U.S. at 43.

The FDIC argues that the possibility of equity kicker occurring was so remote that it did not constitute a relevant factor that the FDIC needed to consider. The FDIC has presented evidence that neither condition precedent to trigger the equity kicker would occur. *See* Second Edwards Decl. ¶¶ 4–6, Dkt. 31–6. Thus, it was extremely unlikely that the Private Owner of CCV would receive distributions of $1.1 billion, given that by the end of 2010 he had received no distributions at all. It was also extremely unlikely that the Private Owner of CCV would receive a return on its initial cash investment of 1.87% per month. *See id.* The calculations underlying these predictions are contained in Exhibit C to the Second Raburn Declaration. Dkt. 43. GTS has not challenged these calculations or otherwise argued that, in light of the remote possibility of the equity kicker being triggered, the possibility of the FDIC's equity interest rising to 70% is an "important aspect of the problem." Indeed, GTS did not address the equity kicker in its supplemental opposition.

6. *Extra Documents*

***8** GTS argues that the FDIC may have failed to consider documents referred to in Sections 7.3 and 7.4 of the CCV Operating Agreement, *see* Second Raburn Decl., Exh. A, §§ 7.3, 7.4, Dkt. 31–6, which address certain financial statements and other reporting and notice requirements that the Private Owner of the CCV was required to prepare. This argument is vague as to what documents these might be, what they might reveal, and why such documents might be relevant. GTS failed, in its supplemental opposition, to respond to the FDIC's response that "there is no way to answer" GTS's "broad and open-ended question." Reply, p. 11:11–13, Dkt. 31. Thus, GTS has failed to establish that the FDIC improperly failed to consider such documents, and that any failure to do so would constitute an arbitrary and capricious agency action.

7. *Determination That There Will Never Be Sufficient Assets*

GTS argues that the FDIC has not presented evidence that it considered the question whether, even if there presently are insufficient assets to pay subordinate liabilities like those owed to GTS, in the future there could be sufficient assets to pay such liabilities. This might happen, for instance, as a result of appreciation of the assets.

The FDIC has presented evidence that it considered the possibility of such appreciation too remote, given its predictions of a slow recovery in the housing market, especially in Florida, California, Georgia, Nevada, and Arizona, where 56% of CCV's assets are held, *see* Newbury Decl. ¶¶ 3–8, Exh. A–C, Dkt. 31–4, and given its cash flow projections, *see* Second Raburn Decl. ¶ 12, Exh. I, Dkt. 31–6, 39. In response to this argument, GTS asserts that "no one can possibly know with any degree of certainty how the real estate markets will perform," Supp. Opp'n, p. 10:17–18, from which it argues that the FDIC's Determination was arbitrary and capricious.

The cases that GTS cites in support of this argument, *PPL Wallingford Energy LLC v. FERC,* 419 F.3d 1194, 1198 (D.C.Cir.2005); *Horsehead Res. Dev. Co., Inc. v. Browner,* 16 F.3d 1246, 1269 (D.C.Cir.1994), stand only for the proposition that an agency must examine relevant data and articulate an explanation for its action, and that there must be a rational connection between facts found and the action taken. The cases do not establish that the impossibility of perfect prognostication renders all agency action arbitrary and capricious. The FDIC has established that it looked at relevant data, including the cash flow projections and analyses of the real estate market, and thereby took rational action: Finding that the FDIC's Corus Bank assets would not sufficiently appreciate to pay subordinate liabilities. GTS has provided three newspaper articles that purport to show that Starwood Capital, a private sector entity that belongs to the Northwest Investments consortium that owns 40% of CCV, *see* First Edwards Decl. ¶ 12, Dkt. 19–3, has begun developing certain real estate holdings, Ganchrow Decl., Exh. 2, 3, 5, Dkt. 49. Even assuming that such hearsay evidence can form the basis for a challenge of the FDIC's actions, these newspaper articles do not show that the real estate market is recovering, that the FDIC's assets will appreciate sufficiently to pay liabilities to GTS, or that the FDIC was arbitrary and capricious in relying on other data regarding the real estate market and CCV cash flows. Rather, at most they show that some real estate development, which may not ultimately be profitable, is possible despite an economic downturn. Even if the FDIC's assumption regarding the housing recovery turns out to be incorrect, that does not render its Determination arbitrary and capricious. *See J & G Sales Ltd. v. Truscott,* 473 F.3d 1043, 1052 (9th Cir.2007).

8. *When FDIC Will Divest*

***9** In its final argument, GTS broadly asks, "Did the FDIC consider how and when it plans to divest itself of its ownership interest in CCV and the other LLC's?" Opp'n, p. 10:6–7, Dkt. 27. GTS makes no argument as to why consideration of divestment would be material to the Determination. GTS does not argue that failure to consider this was arbitrary and capricious, nor that it was contrary to law. GTS's argument appears in just one sentence in its opposition brief. Gary Ganchrow, GTS's attorney, states in his declaration that the answer to this question "is necessary to explain whether the FDIC considered all relevant factors and explained its Determination." Ganchrow Decl. ¶ 7, Dkt. 27. Nonetheless, this statement by an attorney in a declaration does not constitute relevant evidence to support this argument. Defendants did not explicitly address this issue in their reply brief. However, the FDIC's determination that the LLCs will dispose of all their assets by 2016 answers GTS's argument. Thus, GTS has failed to carry its burden of proof that the Determination was arbitrary and capricious in failing to consider when the FDIC would divest itself of its interest in CCV and the other LLCs. *See United States v. Snoring Relief Labs Inc.,* 210 F.3d 1081, 1086 (9th Cir.2000).

9. *Use of Unaudited Financial Records*

In its supplemental opposition, GTS presents an additional argument as to why the Determination was arbitrary and capricious: That in determining CCV's book value and cash flow projections, the FDIC relied on unaudited internal financial records. As stated above, the use of internal financial records prepared by the Managing Members of CCV was not arbitrary and capricious. Further, it was not arbitrary and capricious for the FDIC to rely on unaudited financial records. GTS cites to no requirement that the FDIC rely solely on audited financial records, and identifies no authority stating that use of unaudited financial records is arbitrary and capricious. Further, GTS has identified no error in the unaudited data; its argument is essentially that use of unaudited financial records is *per se* arbitrary and capricious. *See* Supp. Opp'n, p. 6:5–8, Dkt. 49 ("That it is based, apparently, on CCV's *unaudited* financial statements ... renders the Determination arbitrary and capricious on its face.") (italics in original). GTS has cited no case in which a court has applied such a *per se* rule. That CCV's Operating Agreement required the Managing Member to prepare and submit audited financial data to the FDIC, Second Raburn Decl., Exh. A. § 7.3(a), Dkt. 31–6, does not make it arbitrary and capricious for the FDIC to rely on unaudited data.

The authority that GTS cites does not create a *per se* rule that it is arbitrary and capricious to rely on unaudited financial data. Regulation S–X, 17 C.F.R. §§ 210.2–01–210.2–05 merely establishes the guidelines for private companies to submit audited financial data to the Securities and Exchange Commission; it does not dictate whether the FDIC may rely on unaudited financials. Although the cases GTS cites, *In re WorldCom, Inc. Securities Litigation,* 346 F.Supp.2d 628, 665–66 (S.D.N.Y.2004); *Bily v. Arthur Young & Co.,* 3 Cal.4th 370, 382–83, 11 Cal.Rptr.2d 51, 834 P.2d 745 (1992), do refer to the reliability of audited financial statements, they do not establish that unaudited financial data is *per se* unreliable or that it would be arbitrary and capricious for the FDIC to rely on such data. In addition, *Jerry's Famous Deli, Inc. v. Papanicolaou,* 383 F.3d 998, 1001 (9th Cir.2004), noted only that a district court rejected as "unreliable" the unaudited profits accounting submitted by a defendant in response to a disgorgement order; the Ninth Circuit did not hold that unaudited data are always unreliable. Further, the party who prepared the unaudited accounting in *Jerry's Famous Deli* had a clear motive to deceive because he had been ordered to disgorge profits; the unaudited data he submitted purported to disclose his profits. No such motive to deceive has been established here. The internal financial records relied upon were created by the Managing Member of CCV, who owns in part the 40% of CCV held privately. GTS has not established that the Managing Member had any motive to underestimate CCV's book value or cash flow projections. Thus, GTS has not shown that any such underestimation, which would allow the FDIC to make the determination that it would not have to pay out from its 60% interest in CCV's Corus Bank liabilities to subordinate interest-holders such as GTS, would in any way affect the Managing Members of the private parties, who hold a 40% interest in CCV, such that those Members would have a motive to misrepresent data.

***10** GTS cites *Tex Tin Corp. v. U.S. EPA,* 992 F.2d 353, 355 (D.C.Cir.1993), to support its argument that it is arbitrary and capricious to rely on "generic studies" when "detailed and specific scientific evidence to the contrary [is] available." Supp. Opp'n, p. 6:11–13, Dkt. 49. However, *Tex Tin Corp.* does not apply to the present case, because GTS has presented no "evidence to the contrary," i.e., evidence to contradict the unaudited financial data. Nor does *Tex Tin Corp.* stand for the related proposition advanced by GTS, namely, that it is arbitrary and capricious to rely on unaudited data when audited data exists, whether or not the two are inconsistent.

GTS cites *Darrell Andrews Trucking, Inc. v. Federal Motor Carrier Safety Administration,* 296 F.3d 1120, 1134–35 (D.C.Cir.2002), but this case also fails to support GTS's argument. In *Darrell Andrews Trucking,* the D.C. Circuit held that it "might well be arbitrary and capricious" for the agency to have considered certain records, when those records were so unreliable as to be "worthless," given that the agency did not explain why it relied on such records, and given that the court could not determine whether the data contained in the records were incorrect. *Id.* The present case is distinguishable. GTS has not established that the unaudited data is unreliable and worthless. And, unlike in *Darrell Andrews,* the FDIC has explained why it relied upon internal financial information: The FDIC has developed its own "unique receivership accounting standards and procedures," which, although based in GAAP, diverge from GAAP principles, because while GAAP assumes that entities are going concerns, the FDIC's unique standards are based on the contrary principle that FDIC receiverships are liquidating entities. *See* Third Raburn Decl. ¶ 4, Dkt. 55. Additionally, as explained below, the FDIC has established that use of the unaudited financial data was harmless. Therefore, it can be determined that no error arose from its use.[1]

The FDIC has presented evidence that any error resulting from use of the unaudited data was harmless. The audited financial statements of CCV showed net assets of $1,859,003,000. Third Raburn Decl., Exh. A, Dkt. 55. The Receiver's 60% interest in that amount is $1,115,401,800. *Id.* at Exh. B. The analysis of the present value of the Receiver's 60% interest in CCV, as determined from the unaudited financial data concerning cash flows, was $1,094,354,889. This is only $21 million less than the amount determined from the audited financial data. Third Raburn Decl. ¶ 3, Dkt. 55. An increase of $21 million in the evaluation of the FDIC's interest in CCV is immaterial and cannot make up for the estimated $1.1 billion shortfall—or $600 million shortfall, depending on the rate of recovery used—that would have to be made up before paying GTS's subordinate liability. Thus, any use of the unaudited data did not harm GTS, *see Cal. Wilderness Coal.,* 631 F.3d at 1108, and is not grounds to reject the findings at issue here.

C. Further Discovery

***11** In its supplemental brief, GTS asks the Court to allow additional discovery into the FDIC's decision-making process regarding the Determination. The APA generally disallows such discovery. In testing an administrative decision under the APA, a court's review is limited to the Administrative Record. *See Fence Creek Cattle Co.,* 602 F.3d at 1125. The Court allowed supplementation of the administrative record for two purposes: (i) to permit the FDIC to submit additional documentation that it relied upon in making the Determination; and (ii) to permit testimony as to highly technical questions regarding whether the FDIC's accounting techniques were proper. At oral argument, counsel for Defendants represented that the complete record relied upon by the FDIC was before the Court. Tr. 11:34:02–11:34:54. GTS was given the opportunity, in its supplemental brief, to address this record and identify any aspects of the Determination that it contends reflect arbitrary and capricious actions. For the reasons explained in this Order, GTS has failed to do so. Although the FDIC did include certain evidence with its supplemental brief, this evidence was not part of the documentation that the FDIC relied on in making the determinations that are at issue. Instead, the evidence was submitted because it was needed to explain technical terms and complex subjects. Thus, the submission of this evidence only in the supplemental brief did not deprive GTS of the opportunity to examine the record with respect to how the FDIC made its Determination or to argue that this decision was arbitrary and capricious. Further, GTS has not shown any bad faith or improper conduct, about which discovery should be permitted, nor has GTS shown that the administrative record is so bare as to prevent effective judicial review. *See Commercial Drapery Contractors,* 133 F.3d at 7. Thus, the Court denies the request for discovery.

IV. *Conclusion*

For these reasons, GTS has failed to establish that the Determination was arbitrary and capricious. Thus, the Court GRANTS Defendants' motion for summary judgment. Counsel shall submit a proposed judgment within 10 days.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2012 WL 2086305

Footnotes

1 On April 18, 2012, over two weeks after its supplemental briefing was due and five days before oral argument, GTS filed a Request for Judicial Notice. Dkt. 56. The documents presented in this request are an FDIC Financial Institution Letter regarding real estate accounting, an American Institute of Certified Public Accountants document regarding accounting standards, and a Financial Accounting Standards Board document regarding accounting standards. Although certain sections of these documents are highlighted, there is no explanation as to their importance or their relationship to GTS's arguments. On their face, these documents do not establish that the FDIC's accounting methodology was arbitrary and capricious.

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