

IN THE UNITED STATES COURT OF FEDERAL CLAIMS  
No. 91-1550 C

(Filed: June 17, 2005)

---

THE GLOBE SAVINGS BANK, F.S.B.,	)
and PHOENIX CAPITAL GROUP, INC.,	)
	)
Plaintiffs,	)
	)
v.	)
	)
THE UNITED STATES,	)
	)
Defendant.	)

---

ORDER FOR ENTRY OF FINAL JUDGMENT

In this *Winstar*-related case, on April 29, 2005, this court entered a decision resolving disputed issues addressed at a nineteen-day trial held in Kansas City, Kansas and Washington, D.C. See *Globe Sav. Bank, F.S.B. v. United States*, 65 Fed. Cl. 330, 332-33 (2005). Plaintiff (“Globe”) was a thrift savings bank that operated in Oklahoma in the late 1980s and early 1990s, before it shrank to the point of voluntary liquidation due to the removal of the regulatory underpinnings of its capital structure. *Id.* at 332. In its decision of April 2005, the court held that Globe had established by a preponderance of the evidence that its claimed expectancy damages were the direct and proximate result of the government’s breach of contract, that expectancy damages in the form of lost profits were foreseeable, and that lost profits had been established with reasonable certainty. *Id.* at 346-48, 350-361. The court split its consideration of lost profits into two segments, one covering the time from 1990 through 1999 and another for the post-1999 period. The court resolved the amount of lost profits for the post-1999 period as \$13,061,260. *Id.* at 357-61. The court also determined that incidental losses amounting to \$9,821,505 should be awarded as damages. *Id.* at 361-63. However, the court did not order the entry of a final judgment at the time it issued its decision in April 2005, because it asked the parties to perform a calculation essential to the determination of lost profits during the 1990s, using parameters specified by the court. *Id.* at 364.

By submissions filed on May 27, 2005 by Globe and June 13, 2005 by the government, the parties have submitted the requisite calculations with attendant commentary, and it is now appropriate to order entry of final judgment. The parties have no dispute about the result of the

calculations. They do, however, sharply contest factual elements associated with the calculations, just as they have disputed aspects of this case throughout its pendency in the court. This order first addresses the proffered calculations and then the ancillary disputes.

### *The Calculations*

As the April decision indicates, in connection with the transaction by which Globe acquired an insolvent thrift from the Federal Savings and Loan Insurance Corporation (“FSLIC”), Globe sought and obtained approval for a highly unusual business strategy. Globe would use thrift branches as a platform for a risk-controlled arbitrage program, highly leveraging the capital credit and supervisory goodwill generated by the acquisition to invest almost entirely in mortgage-backed securities funded principally by wholesale borrowings and to a lesser extent by deposits. *Globe*, 65 Fed. Cl. at 333-34. Globe successfully implemented that strategy, closely monitored by the Federal Home Loan Bank Board (“FHLBB” or “Bank Board”) through required reports and examinations, and Globe built a very substantial portfolio of approximately \$735 million of such securities. *Id.* at 335-38, 356. This court looked to that existing portfolio as a foundation for an award of lost-profits damages.

The net interest to be derived from the existing portfolio was determinable based on the actual experience with the mortgage-backed securities in that portfolio over the 1990s. However, those securities would “run off” over time as principal was paid on the underlying mortgages. The runoff would be invested in similar securities to earn additional income, and the court determined that the portfolio also would increase in overall amount by approximately 14 percent such that the average size of the portfolio would be \$835 million over the 1990s. Offset against this revenue would be Globe’s costs of operating its branch network and associated headquarters.

The evidence at trial established satisfactorily the net revenue generated by the existing portfolio and the costs and expenses of the thrift’s operations. *Globe*, 65 Fed. Cl. at 353-55. And, one of the plaintiffs’ experts, Mr. Andrew Davidson, had also calculated the net earnings to be generated by a reinvestment portfolio. *Id.* However, the court did not accept all of the parameters used by Mr. Davidson in considering the reinvestment portfolio but rather made specific findings concerning different parameters for the portfolio. *Id.* at 354-57. The court requested that the parties employ those parameters in calculating the net earnings from such a reinvestment portfolio, such that lost profits could then be calculated. *Id.* at 357, 364.

In response, Globe submitted supplemental damage calculations performed by Mr. Davidson that showed such a reinvestment portfolio would generate net revenues of \$42,305,887 from 1990 through 1999. *See* Plaintiffs’ Supplemental Damages Calculations Pursuant To The Court’s Order And Opinion Of April 29, 2005 (“Pls.’ Supp. Calcs.”) at 4 and App. 1 (Supplemental Declaration of Andrew S. Davidson (May 27, 2005)) at 2. The government accepts that calculation. *See* Defendant’s Suggested Corrections Or Alterations To The Calculation Provided By Globe And Memorandum In Opposition To Plaintiffs’ Supplemental Damages Calculations (“Def.’s Mem.”) at 2 (“We have examined the materials

produced by plaintiffs and have not located any material disagreement with their calculation of that amount [of assumed reinvestment portfolio earnings].”). The court also has examined Mr. Davidson’s supporting computer spreadsheets and concurs that his proffered calculations were performed in accord with the parameters specified by the court in its April decision.

Accordingly, the court finds that Globe’s portfolio (existing and reinvestment) would have generated \$65,290,446 in net revenue over the period from January 1, 1990 through August 31, 1999 (*i.e.*, \$22,984,559 plus \$42,305,887). *See Globe*, 65 Fed. Cl. at 352, 357. Against this revenue must be offset \$44,388,000 in operational expenses, *see Globe*, 65 Fed. Cl. at 353, resulting in net lost profits for the period of \$20,902,446.

### *The Parties’ Proffered Adjustments*

Not content with simply responding to the court’s request for calculations, the parties have also each proposed adjustments to the court’s damages findings. The proffered adjustments in part would extend and expand the court’s findings to reach areas not expressly addressed at the trial and in post-trial briefing, and otherwise would revisit and revise findings already made by the court. These proffered adjustments are each addressed in turn.

#### *A. Globe’s Proposed Adjustments*

##### *1. Operating expenses.*

Globe contends that the court’s findings that net branch and operating expenses would be \$44.388 million was too high by \$423,000. *Pls.’ Supp. Calcs.* at 4-5. Globe points out that it had put forward two expense projections at trial and that the court had adopted the higher of the two projections. Globe contends that the higher projection reflected an overall asset size of \$1.5 billion and the lower projection was for an asset size of \$1.0 billion. As Globe would have it, the court’s adoption of an average asset size of \$835 million should be accompanied by concomitant use of the slightly lower expense figure. *See id.* at 5-6.

The government responds that the expense amount should not be changed. *See Def.’s Mem.* at 8-10. Among other things, the government “assume[s]” that the court adopted the higher expense figure merely to be “conservative.” *Id.* at 10 n.4.

Both Globe and the government are wrong. The court accepted the testimony of Mr. W. Douglas Williams, Globe’s chief executive officer, that a very small staff was involved with the operation of the risk-controlled arbitrage program and that the resulting overhead expenses of that program were small, even taking into account the consulting fees Globe paid Smith Breeden Associates. *Tr.* 191-94, 890-92, 1268-75 (Test. of Williams). However, Globe planned to employ the risk-controlled arbitrage plan only for a transitional period after which, assuming the eventual recovery of the Oklahoma economy, it would begin to operate as a more typical banking institution, making secured loans at higher spreads. *See Globe*, 65 Fed. Cl. at 334. The court

adopted the higher expense amount because Globe would have had to extend its branch operations to add loan officers and other staff to begin this transition. This contention by Globe is accordingly rejected.

## 2. *Options expenses.*

Globe also asks the court to increase the damages award by \$4.06 million based upon the premise that the damages calculation improperly double-counted hedging costs attributable to purchased options. Pls.' Supp. Calcs. at 6-15. To support this requested adjustment, Globe undertakes an elaborate analysis of particular expenses embedded in the operating cost figures put forward by Mr. Williams and the expenses attributed by Mr. Davidson to a reinvestment portfolio. *See id.* at 7-13. The government objects that the evidence at trial does not address the options expense in the detail necessary to establish the extent of any duplication. Def.'s Mem. at 10.

The court is satisfied that there is some overlap and thus some double-counting of options expense. But, the court is equally satisfied that Globe has failed to prove the extent of such duplication. Mr. Williams's operating expense figures include costs for options, and Mr. Davidson's analysis of runoff over time of the existing portfolio necessarily also took account of options expenses. However, it is not possible from the evidence to tease out the details with the precision necessary for increasing the award of damages. Moreover, Mr. Davidson's calculations for a reinvestment portfolio also do not separately and distinctly account for option costs. Thus, Globe's request is denied based upon a failure of proof.

## B. *The Government's Proffered Adjustments*

### 1. *Asset size.*

The government in effect seeks reconsideration of the court's finding that Globe's asset size would have averaged \$835 million over the relevant period. Def.'s Mem. at 15-16. It contends that "Globe's total assets, as of June 30, 1989, w[ere] only \$709 million, not the \$735 million figure which plaintiff asserted as of a later date." *Id.* at 16. And, the government claims that the court should reduce the asset size because Globe held "[u]nusual financial instruments such as residual interests in CMOs [collateralized mortgage obligations] and interest-only strips" plus some whole loans and non-performing assets acquired in the purchase from FSLIC of the failed thrift institution. *Id.*

The court does not accept the government's critique. First, Globe's portfolio did reach approximately \$735 million. Second, Globe did hold in its portfolio relatively small amounts of residuals and "IOs" (interest-only obligations), but those financial instruments are mortgage-backed obligations, albeit specialized varieties of such obligations. Those instruments were held by Globe primarily for hedging purposes and to balance the portfolio. Third, the amount of whole loans and non-performing assets acquired by Globe from FSLIC and still held in the latter

half of 1989 was small. Globe had previously undertaken a program to sell non-performing loans with the purpose of recouping as much cash as possible from such loans, which cash might then be put to a revenue-generating use. *See Globe*, 65 Fed. Cl. at 336 (Globe also received an additional payment from the government under the acquisition agreement because the amount of realized loss on non-performing loans exceeded projections.).

## 2. *A special assessment in 1996.*

The government also claims that the award of damages should be reduced by approximately \$1.314 million to account for a special assessment made in 1996 for the Savings Association Insurance Fund (“SAIF”) of 65.7 basis points against all SAIF-assessable deposits held as of March 31, 1995. Def.’s Mem. at 17. According to the government, if Globe had held approximately \$200 million in deposits at that time, the special assessment would have amounted to the figure the government claims. *Id.*

This contention was not addressed in any respect by evidence presented at trial, nor was it presented to the court in the parties’ post-trial briefing. The court will not now reopen the proceedings to take account of this new, late contention. Just as Globe has to bear the results of its failure of proof respecting alleged double-counting of option expense, the government must bear the consequences of its failure timely to raise this contention.

## 3. *Other claims.*

The government raises several other miscellaneous claims regarding Mr. Williams’s expense calculations. First, it acknowledges the court’s observation in its April decision that the government “did not ‘strongly contest’” Mr. Williams’s expense figures. *See* Def.’s Mem. at 6 (quoting *Globe*, 65 Fed. Cl. at 353). As the government puts it, “the [c]ourt’s statement fairly characterizes our trial strategy.” *Id.* Nonetheless, the government now would raise questions about the court’s finding that Mr. Williams “b[rought] forward Globe’s expenses at year-end 1989 with an adjustment for inflation for each year.” Def.’s Mem. at 18 (quoting *Globe*, 65 Fed. Cl. at 353). The government now avers that Mr. Williams adjusted most expense items for inflation but failed to do so for other items such as “[l]egal expense,” “[m]arketing and professional expenses,” “[d]irector fees,” etc. *Id.* The government notes that some of these items were adjusted for some years, both upwards and downwards, while others were not. *Id.* at 18 n.11. No evidence was adduced at trial to contest these expense figures, and as a result the court has no basis now to revise its factual findings.

Finally, the government asserts that the court erred in mixing an *ex ante* with an *ex post* analysis of various damage elements. Def.’s Mem. at 7-8. This argument is unavailing. It artificially draws a sharp line at the date of breach and would use that line to constrain consideration of evidence of actual events occurring after the breach. By contrast, the court sought to base its decision on real facts, not hypothetical postulates, and in that regard focused on

performance of Globe's actual portfolio over time, *i.e.*, how the particular securities in the portfolio fared over the years following the breach. The performance of that portfolio could be traced, as could the performance of a reinvestment portfolio comprised of similar securities.

*Synopsis*

The resulting elements of an award of damage in Globe's favor are lost profits amounting to \$20,902,446 for the period from January 1, 1990 through August 31, 1999, plus \$13,061,260 for lost profits after 1999 measured by the residual value of Globe's branch network, less \$9,821,505 in incidental losses, *see Globe*, 65 Fed. Cl. at 364 (to avoid double-counting), plus \$9,821,505 in incidental losses, *see id.*, for a total award of \$33,963,706.

CONCLUSION

The clerk shall enter judgment in favor of Globe and against the United States in the amount of \$33,963,706.

Costs shall also be awarded to Globe pursuant to 28 U.S.C. § 2412(a) and RCFC 54(d).

It is so ORDERED.

---

Charles F. Lettow  
Judge