No. 99-655

In the Supreme Court of the United States

WALLACE R. NOEL, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR WESTERN GULF SAVINGS AND LOAN ASSOCIATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514–2217

WILLIAM F. KROENER, III
General Counsel

ANN S. DUROSS
Assistant General Counsel

COLLEEN J. BOLES
Senior Counsel

MARIA BEATRICE VALDEZ
Counsel
Federal Deposit Insurance Corporation
Washington, D.C. 20429

QUESTION PRESENTED

Whether the court of appeals correctly applied the common law doctrine first enunciated in *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), to reject petitioner's defenses to liability on a promissory note held by a failed financial institution, where there was no dispute regarding the contents of the institution's records, and those records raised no genuine factual issue concerning application of the *D'Oench* doctrine.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 19-42) is reported at 177 F.3d 911. The opinion of the district court (App., *infra*, 1a-9a) is unreported.[1]

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1999. A petition for rehearing was denied on July 14, 1999 (Pet. App. 54-55). The petition for a writ

[1] The appendix to the petition does not include a copy of the pertinent district court order. For the Court's convenience, we have reprinted the order as an appendix to this brief.

of certiorari was filed on October 12, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1982, petitioner bought a parcel of undeveloped land in Fort Collins, Colorado. Pet. App. 21. Soon thereafter he met Ray Pogue, who represented himself as a developer who could help arrange financing to develop petitioner's land. Petitioner and Pogue arranged the formation of University Courts Partnership Ltd. (University Courts), in which petitioner held a 25% limited partnership interest. Other limited partners held an additional 25% of the partnership interests, and the general partner, Mile High Mortgage and Investment Company of Colorado, Inc. (Mile High), owned the remaining 50%. Pogue owned 49% of Mile High, while the other 51% was owned by Western Gulf Service Corporation (WGSC), a subsidiary of Western Gulf Savings and Loan Association (Western Gulf). *Ibid.*

In May 1983, Western Gulf loaned University Courts $2.5 million to fund the partnership's acquisition and development of petitioner's land. Pet. App. 22. The documents provided to Western Gulf to support the loan application included a financial statement for petitioner, showing a net worth of more than $5 million. Pogue signed the promissory note (the Note) on behalf of Mile High, acting in its capacity as general partner of University Courts, while petitioner signed it both as a limited partner and in his individual capacity. Pogue and petitioner also executed a side agreement, under which Pogue agreed to indemnify petitioner for any liability petitioner might incur on the Note. Western Gulf was not a party to that agreement, and it never released petitioner from his individual liability on the

Note. *Ibid.* Out of the proceeds of the loan, University Courts paid petitioner $610,000 for his land (which had an appraised value of $580,000). *Id.* at 22, 47, 49. In October 1983, WGSC acquired Pogue's interest in Mile High, making Western Gulf in effect the owner of Mile High, as well as the holder of the partnership's Note. *Id.* at 22.

University Courts defaulted on the Note in May 1985. Pet. App. 22-23. Western Gulf then took control of the property and terminated the operations of WGSC and Mile High. In March 1990, Western Gulf foreclosed on the property. Its bid of $863,655.90 at the foreclosure sale left a deficiency on the Note of $2,552,799.13.

2. In November 1990, the Resolution Trust Corporation (RTC) was appointed to serve as receiver for Western Gulf. Pet. App. 23. On November 21, the RTC sued petitioner for the amount of the deficiency on the Note. *Ibid.* Petitioner denied liability and raised several affirmative defenses and counterclaims, including that he was entitled to indemnification from Western Gulf, which he claimed had acted as the "alter ego" of Mile High and had breached duties owed to him by Mile High as the general partner of the University Courts partnership. *Id.* at 23-24; see *id.* at 48-51; App., *infra*, 6a. The RTC later amended its complaint to add additional claims based on false representation, nondisclosure, and concealment, after petitioner testified at his deposition that at the time he signed the note he did not intend ever to make payments on it. Pet. App. 23.

The district court initially granted petitioner summary judgment on his alter ego/fiduciary claim. See Pet. App. 23-24. The court of appeals reversed, holding (among other things) that genuine issues of material fact precluded summary judgment on that claim. See *id.* at 43-53. In that decision, the court of appeals noted

that the district court had not addressed the RTC's contention that petitioner's claims were barred by the doctrine first articulated in *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942). See Pet. App. 51-52.

On remand, the district court granted partial summary judgment in favor of the Federal Deposit Insurance Corporation (FDIC), which had succeeded to the RTC's position as receiver for Western Gulf. App., *infra*, 1a-9a. The court held that petitioner's affirmative defenses and counterclaims with respect to the Note were barred by the *D'Oench* doctrine and by 12 U.S.C. 1823(e). App., *infra*, 5a-9a. Even if Mile High was merely an alter ego of Western Gulf, the court reasoned, the FDIC was not responsible for alleged breaches of the University Courts partnership agreement. Rather, the equities favored the interests of innocent depositors; and "[b]ecause the partnership agreement was not signed by Western [Gulf], it cannot be used to diminish the FDIC's interest in the promissory note." App., *infra*, 7a-8a. The FDIC's further claims for deceit, civil conspiracy to commit deceit, and concealment were tried to a jury, which found in favor of the FDIC. See Pet. App. 25. The district court accordingly entered judgment against petitioner for $2,552,779.13. *Ibid.*

3. The court of appeals affirmed. Pet. App. 19-42. With respect to the issues properly raised, the court sustained petitioner's objection to the district court's reliance on 12 U.S.C. 1823(e), noting that before the 1989 enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, § 101, 103 Stat. 183, that provision applied only where the FDIC was acting in its corporate capacity (rather than, as here, as receiver for a failed financial institution). Pet. App. 30-31. The

court nonetheless agreed with the district court that Section 1823(e)'s "common law counterpart," the *D'Oench* doctrine, precluded petitioner from avoiding liability on the University Courts Note. Pet. App. 31.[2]

Observing that the *D'Oench* doctrine was intended to protect regulators' ability to evaluate a financial institution's assets and liabilities quickly and accurately on the basis of the institution's official records, the court explained that the doctrine precludes the recognition of possible defenses to liability that regulators could have recognized only by "scour[ing] a failed institution's documents for inferences and hidden duties * * * that might prevent [it] from collecting the full value of an otherwise facially valid instrument," such as petitioner's Note. Pet. App. 33-34. In this case, the court "carefully reviewed" the documents from Western Gulf's records that petitioner claimed should have made the FDIC aware that it would not be able to enforce the Note against petitioner. *Id.* at 36; see *id.* at 34-37. The court concluded, however, that the "vague, scattered references [in] various unrelated writings" on which petitioner relied were insufficient to raise a genuine issue of fact about the proper application of the *D'Oench* doctrine. *Id.* at 34, 37.[3]

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[2] The court held that petitioner had waived any argument that the *D'Oench* doctrine did not apply because the FDIC had sued him only in its capacity as receiver. Pet. App. 26-29.

[3] The court of appeals also rejected petitioner's contention that *D'Oench* should not apply because "federal regulators instigated, or at least condoned, Western Gulf's breaches of the partnership agreement." Pet. App. 37. Among other reasons, the court "refuse[d] to impute Western Gulf's actions to [regulators] when the language of [the regulatory] agreement with Western Gulf explicitly state[d] that Western Gulf should not breach any agreements in an effort to comply with the regulations." *Id.* at 39.

ARGUMENT

Petitioner contends (Pet. 9-17) that by applying the *D'Oench* doctrine to sustain a summary judgment, rather than remanding so that the question of its application could be submitted to a jury, the court of appeals "went beyond the well established boundaries" of the doctrine (Pet. 10). That fact-bound claim would not merit review by this Court even if *D'Oench* were still routinely applied by the lower courts. As we have previously informed the Court, however, the FDIC has made clear that it will not assert the common-law *D'Oench* doctrine in cases involving transactions that took place after the enactment of FIRREA in 1989. See FDIC, *Statement of Policy Regarding Federal Common Law and Statutory Provisions Protecting FDIC, as Receiver or Corporate Liquidator, Against Unrecorded Agreements or Arrangements of a Depository Institution Prior to Receivership*, 62 Fed. Reg. 5984, 5985 (1997), *reprinted in part*, Br. for the FDIC in Opp. at 1a-8a, *Hess* v. *FDIC*, No. 97-1025 (cert. denied, 523 U.S. 1093 (1998)).[4] The question petitioner seeks to

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Thus, "even assuming that the FDIC could not assert the *D'Oench* doctrine if it were instrumentally involved in the actions of the financial institution, [the court found] no evidence here that the FDIC instructed Western Gulf to breach any fiduciary duties that may have been owed to [petitioner]." *Id.* at 40.

[4] We have provided petitioner with a copy of the brief in opposition in *Hess*. As the cited policy statement explains, with respect to post-FIRREA transactions, the FDIC relies solely on the statutory provisions now found at 12 U.S.C. 1823(e) and 12 U.S.C. 1821(d)(9)(A). In this case, the court of appeals correctly held that Section 1823(e), as amended by FIRREA, could not be applied to determine the enforceability against petitioner of the pre-FIRREA University Courts Note. Pet. App. 30-31. Although petitioner argued in the court of appeals that the common-law

raise, which involves only the application of *D'Oench* to a pre-FIRREA transaction, is therefore of little general or continuing importance.

In any event, petitioner's argument lacks merit. After carefully reviewing the record in this case (see Pet. App. 34-37), including those portions on which petitioner specifically relied, the court of appeals found no written agreement "indicating any possibility" that Western Gulf might have liabilities to petitioner, under the University Courts partnership agreement, that would preclude the FDIC from "recover[ing] the full value of [petitioner's] facially valid note." *Id.* at 35. The court noted that "even when the documents were neatly presented to [the court] in the record, [it] had difficulty piecing together a legal theory" that might justify excusing petitioner from liability; and it emphasized that "[p]lacing an affirmative duty on bank regulators to engage in a similar tortured analysis," based only on "vague, scattered references [in] various unrelated writings" in the bank's records, would "run[] counter to the purpose of the *D'Oench* doctrine—to allow examiners to accurately and quickly appraise a bank's assets." *Id.* at 37. The court accordingly held that "as a matter of law, * * * [the] scattered evidence [cited by petitioner was] insufficient to prevent the *D'Oench* doctrine's application." *Ibid.*

Contrary to petitioner's submission (see Pet. 11, 13-14), no principle precluded the court of appeals from affirming a grant of partial summary judgment against

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D'Oench doctrine could not be applied to his pre-FIRREA case where the FDIC was acting in its capacity as receiver, the court held that he had waived that argument in the district court (*id.* at 26-29), and petitioner does not contest that ruling in this Court (see *id.* at 10).

petitioner, once it had determined that petitioner's evidence was legally insufficient to support his "alter ego" and fiduciary duty defenses to the enforcement of liability on his Note. Indeed, cases on which petitioner himself relies make clear that summary judgment may be granted on *D'Oench* issues, where the material facts concerning the documents in the bank's records are not in dispute, and the court is able to determine the legal effect of those documents as a matter of law. See *Young* v. *FDIC*, 103 F.3d 1180, 1186-1190 (4th Cir.) (affirming grant of summary judgment solely on the basis that *D'Oench* doctrine barred fraud and wrongful dishonor claims), cert. denied, 522 U.S. 928 (1997); *Motorcity of Jacksonville, Ltd.* v. *Southeast Bank*, 83 F.3d 1317, 1323, 1338-1345 (11th Cir. 1996) (en banc) (affirming summary disposition where court determined, as a matter of law, that documents did not create a fiduciary duty), vacated *sub nom. Hess* v. *FDIC*, 519 U.S. 1087, reinstated, 120 F.3d 1140 (11th Cir. 1997), cert. denied, 523 U.S. 1093 (1998). The decision below accordingly involves only the routine application, not any "impermissib[le] expan[sion]" (Pet. 10), of the *D'Oench* doctrine in a pre-FIRREA case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

WILLIAM F. KROENER, III
General Counsel

ANN S. DUROSS
Assistant General Counsel

COLLEEN J. BOLES
Senior Counsel

MARIA BEATRICE VALDEZ
Counsel
Federal Deposit Insurance Corporation

DECEMBER 1999

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Lewis T. Babcock, Judge

Civil Action No. 90-B-2066

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR WESTERN GULF SAVINGS AND LOAN ASSOCIATION, A TEXAS SAVINGS AND LOAN ASSOCIATION, PLAINTIFF

v.

WALLACE R. NOEL, DEFENDANT

[Filed: June, 17, 1996]

ORDER

Plaintiff Federal Deposit Insurance Corporation (FDIC) moves pursuant to Fed.R.Civ.P. 56 for summary judgment on defendant Wallace R. Noel's (Noel) affirmative defenses and counterclaims to claim one based on the promissory note. The FDIC asserts that Noel's affirmative defenses and counterclaims are barred by the doctrine of D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 460 (1942) and 12 U.S.C. § 1823(e). As such, the FDIC asserts entitlement to summary judgment on the promissory note claim. For the reasons set forth in this order, I grant the motion for summary judgment.

I.

In May of 1983, Noel became a limited partner of University Courts, Ltd. (University Courts), a Colorado limited partnership. Mile High Mortgage and Investment Company of Colorado, Inc. (Mile High), a Colorado corporation, acted as general partner. When University Courts was formed, Roy Pogue held a 49% interest in Mile High and Western Gulf Service Corporation (WGSC) held the remaining 51% ownership interest. Western Gulf Service Corporation is a subsidiary of Western Gulf Savings and Loan Association (Western Savings).

Noel and Mile High formed the University Courts partnership to construct condominium units on land located near Colorado State University. On May 25, 1983 University Courts obtained a $2,500,000 construction loan line of credit from Mile High. In consideration for the line of credit, University Courts executed a promissory note in the amount of $2,500,000, secured by a first deed of trust on the property in question, payable to Mile High. Mile High signed the promissory note for University Courts as a maker. Noel executed this promissory [note] in both his individual capacity and as the sole limited partner of University Courts. Mile High assigned the promissory note to its parent entity, Western Savings. University Courts acquired undeveloped land in Larimer County from Noel, its limited partner, in exchange for $610,000. In October of 1983, WGSC bought out Pogue's interest in Mile High.

The promissory note became due in May of 1984. On June 12, 1984, Allen Hamilton sent a letter to Noel requesting that he sign a "Renewal and Extension

Agreement" extending the term of the promissory note. Noel refused to sign the document asserting that he was no longer liable on the note. On July 23, 1984, Noel received a letter from Alan D. Laff, attorney for Mile High, giving him notice that the promissory note would be extended regardless of his objections. On November 25, 1984 a extension agreement was executed by Western Savings and Mile High for University Courts. Noel did not sign or agree to the extension. However, pursuant to the terms of the promissory note, Noel had already consented to such extension.

University Courts defaulted on the promissory note in 1985. Western Savings transferred the University Courts' property to itself through a process called an "in substance foreclosure." University Courts' property was carried on Western Savings books as Real Estate Owned (REO). Western Savings formally foreclosed on the property and purchased the property at a Public Trustee's sale for $863,655.90 on March 8, 1990. Before the foreclosure sale, Western commissioned two independent appraisals which set the value of the property at $882,001 and $865,000, respectively.

The Resolution Trust Corporation (RTC), standing in the shoes of Western Savings, brought this claim against Noel seeking a deficiency in the amount of $2,552,799.13. The FDIC acts as the RTC's successor in interest.

On December 10, 1991, Noel filed counterclaims against the FDIC. Noel's counterclaims: (1) demand an accounting and dissolution of University Courts; (2) allege that Mile High acted as the "alter ego" of Western Savings, and that Western Savings breached a

fiduciary duty owed to Noel and; (3) argue that the foreclosure sale should be set aside due to Western Savings' failure to bid the full amount of the note at the foreclosure sale.

On October 17, 1991, FDIC's predecessor in interest, Resolution Trust Company (RTC) filed a motion for summary judgment arguing that Noel's counter-claims and defenses were barred under the D'Oench, Duhme doctrine and 12 U.S.C. § 1823(e). On June 1, 1992 Judge Matsch summarily denied the motion on the record. FDIC renewed its motion for summary judgment on March 25, 1994 which again was denied by Judge Matsch on April 1, 1994.

II.

Summary judgment shall enter where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). If a movant establishes entitlement to judgment as a matter of law given uncontroverted, operative facts contained in the documentary evidence, summary judgment will lie. *Mares v. ConAgra Poultry Co., Inc.*, 971 F.2d 492, 494 (10th Cir. 1992). The operative inquiry is whether, based on all the documents submitted, a reasonable trier of fact could find by a preponderance of evidence that the plaintiff is entitled to a verdict. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Mares*, 971 F.2d at 494. Summary judgment should not enter if, viewing the evidence in a light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor, a

reasonable jury could return a verdict for that party. *Anderson*, 477 U.S. at 252; *Mares*, 971 F.2d at 494.

III.

The FDIC argues that Noel's counterclaims and affirmative defenses are barred under the doctrine of *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 460 (1942) and 12 U.S.C. § 1823(e). In *D'Oench* the Supreme Court held that where a "maker lent himself to a scheme or arrangement whereby the banking authority on which respondent relied in insuring the bank was or was likely to misled," the maker cannot assert an unwritten agreement to escape liability. *Id.* This doctrine was codified in 12 U.S.C. § 1823(3) which provides:

> No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement—
>
> (1) is in writing,
>
> (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (3) was approved by the board of directors of the depository institution or its loan committee,

> which approval shall be reflected in the minutes of said board or committee, and
>
> (4) has been, continuously, from the time of its execution, an official record of the depository institution.

The FDIC argues that the *D'Oench Duhme* doctrine and § 1823(e) bar the admission of agreements which Noel asserts alters his liability under the promissory note because these agreements do not meet the requirements of § 1823(e).

Noel bears the burden of establishing that an agreement meets the requirements of § 1823(e). *FDIC v. Oldenburg*, 34 F.3d 1529, 1551 (10th Cir. 1994). Noel contends that Mile High, the general partner of University Courts, was merely the instrumentality of Western Savings and, therefore, its alter ego. As Mile High's alter ego, Western Savings was bound by the terms of the University Courts partnership agreement. Noel asserts that Western Savings breached this agreement when it failed to provide appropriate documentation and accounting to Noel as the limited partner, treated the property as if it had been foreclosed, and failed to effectuate a proper dissolution of the partnership.

The starting point of the analysis is the purpose of the *D'Oench Duhme* doctrine and § 1823(e). The *D'Oench Duhme* doctrine is designed "to protect [the FDIC] and the public funds which it administers against misrepresentations as to the securities or other assets in the portfolios of the banks which the [FDIC] insures or to which it makes loans." *D'Oench Duhme*, 315 U.S. at 457. "While the borrower who has relied

upon an erroneous or even fraudulent unrecorded representation has some claim to consideration, so do those who are harmed by this failure to protect himself by assuring that his agreement is approved and recorded in accordance with the statute." *Langley v. FDIC*, 484 U.S. 86, 94 (1987).

Here, Noel seeks to enforce an agreement against the FDIC which was signed by the "depository institution's" wholly owned subsidiary. He argues that Western Savings ignored corporate formalities and treated Mile High as its alter ego. Thus, Western Savings executed the partnership agreement through Mile High and assumed the liabilities of Mile High.

In *FDIC v. Oldenburg*, 34 F.3d 1529, 1555 (10th Cir. 1994), the Tenth Circuit addressed the application of the alter ego doctrine to claims against the FDIC. The Tenth Circuit noted that "A critical element required for the application of the alter ego defense is injustice or inequity." *Id.* This injustice or inequity is the result of a shareholder using the corporate fiction to shield himself from liability where he fails to maintain the corporation's separate identity and uses the corporate form as a mere instrumentality for his own purposes. Thus, the corporate veil is pierced to hold the individual or entity who is morally culpable or responsible for the injustice liable. *See NLRB v. Greater Kansas City Roofing*, 2 F.2d 1047, 1053 (10th Cir. 1993). Because the FDIC was not culpable for its predecessor's behavior, the Tenth Circuit determined there was no inequity in allowing the FDIC to recover under the bonds at issue.

The present facts are indistinguishable from *Oldenburg*. Assuming that Western Savings is the alter ego

of Mile High, there are no grounds to pierce the corporate veil to hold the FDIC liable for the acts of Western Savings. The FDIC is not culpable for the alleged breaches of the partnership agreement by Western Savings as the alter ego of Mile High. Noel could have protected himself by making sure that any agreement to extend the promissory note required his approval to be valid. Furthermore, he could have memorialized the alleged agreement to release him from liability after a year and recorded it in accordance with the statute. The equities favor the depositors who are harmed by Noel's failure to protect himself. *See Langley v. FDIC*, 484 U.S. at 94. Because the partnership agreement was not signed by Western Savings, it cannot be used to diminish the FDIC's interest in the promissory note.

Next Noel argues that a bank regulator reviewing the University Courts loan file would have been on notice that Noel may have legal claims against Western Savings. Defendant's Exh. N., ¶ 38. The Supreme Court addressed this issue in *Langley*. Trying to circumvent the application of § 1823(e) to his counterclaims, defendant argued that § 1823(e) does not apply where the FDIC had knowledge of the asserted defense at the time it acquired the note. The Supreme Court disagreed stating: "The short of the matter is that Congress opted for the certainty of the requirements set forth in § 1823(e). An agreement that meets them prevails even if the FDIC did not know of it; and an agreement that does not meet them fails even if the FDIC knew. It would be rewriting the statute to hold otherwise." *Langley*, 484 U.S. at 95. Section 1823(e) sets forth strict requirements which must be met before a defendant can assert the existence of an agree-

ment contrary to the interests of the FDIC. None of the documents proffered by Noel meet these requirements. Consequently, I conclude that the *D'Oench Duhme* doctrine bars Noel's counterclaims and defenses to the promissory note claim. Accordingly, I grant summary judgment in favor of the FDIC on the promissory note.

Accordingly it is ORDERED that:

Plaintiff's motion for summary judgment is GRANTED on claim one. Judgment shall enter in favor of plaintiff against defendant on claim one.

Dated: June 17, 1996 in Denver, Colorado.

BY THE COURT:

/s/ LEWIS T. BABCOCK
LEWIS T. BABCOCK, JUDGE