UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

**MEMORANDUM**

| Case No. | CV 10-4915 DSF (SHx) | Date | 9/27/11 |
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| Title | Federal Deposit Insurance Corp. v. Scott Van Dellen, et al. | | |

| Present: The Honorable | DALE S. FISCHER, United States District Judge |
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| Debra Plato | Not Present |
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| Deputy Clerk | Court Reporter |
| Attorneys Present for Plaintiffs: | Attorneys Present for Defendants: |
| Not Present | Not Present |

**Proceedings:** (In Chambers) Order GRANTING in part and DENYING in part Plaintiff's Motion for Partial Judgment on the Pleadings (Docket No. 65)

The Court deems this matter appropriate for decision without oral argument. See Fed. R. Civ. P. 78; Local Rule 7-15.

## I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Federal Deposit Insurance Corporation ("FDIC"), as receiver for IndyMac Bank, F.S.B. ("IndyMac"), brought suit pursuant to 12 U.S.C. § 1821(d)(2) against Defendants Scott Van Dellen, Richard Koon, Kenneth Shellem, and William Rothman, who are former officers of IndyMac. The FDIC claims that Defendants were negligent and breached fiduciary duties in approving loans made by IndyMac's Homebuilder Division. Each Defendant filed an Answer raising affirmative defenses. (Docket Nos. 17, 18, 33, 34.)

The FDIC moves for partial judgment on the pleadings pursuant to Federal Rule of Procedure 12(c) as to some of Defendants' affirmative defenses. (Docket No. 65.)

## II. LEGAL STANDARD

Rule 12(c) of the Federal Rules of Civil Procedure permits a party to move for judgment on the pleadings "[a]fter the pleadings are closed – but early enough not to delay trial." Fed. R. Civ. P. 12(c). "Judgment on the pleadings is proper when, taking all allegations in the pleading as true, the moving party is entitled to judgment as a matter of

law." Stanley v. Trs. of Cal. State Univ., 433 F.3d 1129, 1133 (9th Cir. 2006). Because a motion for judgment on the pleadings is "functionally identical" to a motion to dismiss, the standard for a Rule 12(c) judgment on the pleadings is essentially the same as for a Rule 12(b)(6) motion. Dworkin v. Hustler Magazine Inc., 867 F.2d 1188, 1192 (9th Cir. 1989). "[A] plaintiff is not entitled to judgment on the pleadings when the answer raises issues of fact that, if proved, would defeat recovery. Similarly, if the defendant raises an affirmative defense in his answer it will usually bar judgment on the pleadings." Gen. Conference Corp. of Seventh-Day Adventists v. Seventh-Day Adventist Congregational Church, 887 F.2d 228, 230 (9th Cir. 1989). A party may move for partial judgment as to certain claims or affirmative defenses. See Bingue v. Prunchak, 512 F.3d 1169 (9th Cir. 2008).

## III. DISCUSSION

The FDIC brought suit pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. § 1821(d)(2)(A)(I). It seeks judgment as to the following affirmative defenses: (1) business judgment rule, (2) exercise of due care, (3) reliance on employees, (4) reasonable grounds, (5) reliance on experts, (6) good faith/no culpable participation, (7) failure to mitigate, (8) unclean hands, (9) ratification, (10) vague and uncertain claims, (11) discharge in bankruptcy, and (12) reservation of rights under Federal Rule of Civil Procedure 14.

### A. Business Judgment Rule

The FDIC argues that the California business judgment rule does not apply to Defendants' conduct. The FDIC contends that the California rule applies only to directors, not officers. Defendants contend that the Delaware business judgment rule applies in this case because IndyMac was incorporated in Delaware. They also argue that the scope of California's rule is unsettled, and that even if California's statutory rule does not apply to officers, the common law component of California's business judgment rule may apply.

It is unclear whether the California business judgment rule applies to the conduct of officers as well as directors. In Gaillard v. Natomas Co., 208 Cal. App. 3d 1250 (1989), the California Court of Appeal held that California Corporations Code § 309, which codifies the business judgment rule, did not apply to the actions of inside directors in securing golden parachute agreements because the inside directors were "acting as officer employees" and not "performing the duties of a director" as required by § 309(a). Id. at 1265 (alteration omitted). The court stated that § 309 "does not relate to officers of the corporation, but only to directors" and that an "officer-director might be liable for

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particular conduct because of his capacity [as] an officer, whereas the other directors would not." Id. (citation omitted). However, the Court of Appeal has also affirmed the application of the business judgment rule when a director-officer approved a contract without board approval. Biren v. Equal. Emergency Med. Grp., Inc., 102 Cal. App. 4th 125, 137 (2002); see also PMC, Inc. v. Kadisha, 78 Cal. App. 4th 1368, 1386-87 (2000) ("Generally, an officer or director who commits a tort because he or she reasonably relied on expert advice or other information cannot be held personally liable for the resulting harm."). In addition, California has recognized that "[t]he common law business judgment rule has two components" and "[o]nly the first component is embodied in Corporations Code section 309." Lee v. Interinsurance Exch., 50 Cal. App. 4th 694, 714 (1996); see also Barnes v. State Farm Mut. Auto. Ins. Co., 16 Cal. App. 4th 365, 378-79 (1993). Because most California cases discussing § 309 involve directors and not officers, and because the common law component of the business judgment rule may apply to officers even if § 309 does not, the FDIC has not established that the California business judgment rule is inapplicable as a matter of law.

In any event, it appears that the Delaware business judgment rule may apply to this case. Under the "internal affairs" doctrine, "States normally look to the State of a business' incorporation for the law that provides the relevant corporate governance general standard of care." Atherton v. FDIC, 519 U.S. 213, 224 (1997). California courts follow this practice.[1] State Farm Mut. Auto. Ins. Co. v. Superior Ct., 114 Cal. App. 4th 434, 443-44 (2003) (citing Atherton, 519 U.S. at 224; Nedlloyd Lines B.V. v. Superior Ct., 3 Cal. 4th 459, 471 (1992)). Although Defendants failed to raise the Delaware rule as an affirmative defense in their Answers, "absent prejudice to the plaintiff an affirmative defense may be plead for the first time" in later motions. Ledo Fin. Corp. v. Summers, 122 F.3d 825, 827 (9th Cir. 1997) (allowing the defendant to raise an affirmative defense for the first time in a motion for summary judgment); see also Rivera v. Anaya, 726 F.2d 564, 566 (9th Cir. 1984) ("Our circuit liberalized the requirement that affirmative defenses be raised in a defendant's initial pleading in Healy Tibbitts Constr. Co. v. Ins. Co. of N. Am., 679 F.2d 803 (9th Cir. 1982)."). The FDIC does not claim prejudice from Defendants' failure to raise the Delaware rule in their Answers (Reply at 3), nor does the Court discern any, given that discovery in this case is in its early stages, and the trial is set to begin in September 2012.

The Delaware Supreme Court has impliedly held that officers' conduct is subject to the business judgment rule. See Gantler v. Stephens, 965 A.2d 695, 708-09 (Del. 2009)

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[1] FDIC v. Castetter, 184 F.3d 1040 (9th Cir. 1999) is not to the contrary. In Castetter, which involved the liability of directors, the parties did not dispute the applicable state law, and the court did not identify the bank's state of incorporation.

(holding that the Court of Chancery erred in dismissing the plaintiffs' complaint because the plaintiffs sufficiently alleged that corporate officers breached their fiduciary duties such that the business judgment rule would not apply). Because the FDIC fails to demonstrate that either the California or the Delaware business judgment rule is inapplicable as a matter of law, its motion as to this affirmative defense is DENIED.

### B. Due Care, Reliance on Employees/Experts, Reasonable Grounds and Good Faith

To the extent that these affirmative defenses restate the business judgment rule, the FDIC has failed to show that they are insufficient as a matter of law for the reasons stated above. To the extent they simply rebut the FDIC's prima facie negligence case, they are not affirmative defenses.[2] The motion as to these defenses is DENIED.

### C. Failure to Mitigate, Unclean Hands, and Ratification

The FDIC contends that the federal "no duty" rule precludes affirmative defenses challenging the FDIC's conduct as a receiver or regulator of IndyMac. The FDIC notes that this rule is consistent with the principle of insulating policy-based government conduct from judicial review, as reflected by the discretionary function exception to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2680(a), and the principle espoused in Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988), that federal common law applies where there is a "significant conflict" between state law and federal policy in an area of "uniquely federal interests." Defendants assert that the "no duty" rule did not survive the Supreme Court's decision in O'Melveny & Meyers v. FDIC, 512 U.S. 79 (1994).

FIRREA authorizes the FDIC to take "any action authorized by this chapter, which [it] determines is in the best interests of the depository institution, its depositors, or [itself]." 12 U.S.C. § 1821(d)(2)(J)(ii). As the Tenth Circuit has explained, in exercising its discretion under FIRREA, the FDIC "owes no duty to the failed financial institution or to the wrongdoers who contributed to its failure, but rather to the public at large." FDIC v. Oldenburg, 38 F.3d 1119, 1121 (10th Cir. 1994). Three circuits, and the majority of district courts, have held that this "no duty" rule bars the affirmative defenses of contributory negligence and failure to mitigate when the FDIC brings a FIRREA suit

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[2] Defendants appear to acknowledge that defenses such as the exercise of due care are not affirmative defenses. (See Defs.' Opp. at 13 (stating that Defendants should be permitted to argue at trial the exercise of due care "[w]hether properly styled as an affirmative defense, or simply a defense to the elements of the negligence")).

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against directors and officers of a financial institution. See id. at 1122; FDIC v. Mijalis, 15 F.3d 1314, 1324 (5th Cir. 1994); FDIC v. Bierman, 2 F.3d 1424, 1439 (7th Cir. 1993); see also FSLIC v. Roy, 1988 U.S. Dist. LEXIS 6840, at *5 (D. Md. June 28, 1988) ("FSLIC owes no duty to those institutions or to those whose negligence has brought them to the brink of disaster. . . . Thus nothing could be more paradoxical or contrary to sound policy than to hold that it is the public which must bear the risk of errors of judgment made by its officials in attempting to save a failing institution – a risk which would never have been created but for defendants' wrongdoing in the first instance.").[3]

The Supreme Court's opinion in O'Melveny has caused some district courts to question the "no duty" rule. See, e.g., RTC v. Mass. Mut. Life Ins. Co., 93 F. Supp. 2d 300 (W.D.N.Y. 2000) (concluding that the rule did not survive O'Melveny); FDIC v. Ornstein, 73 F. Supp. 2d 277 (E.D.N.Y. 1999) (same); FDIC v. Gladstone, 44 F. Supp. 2d 81 (D. Mass. 1999) (same); RTC v. Liebert, 871 F. Supp. 370 (C.D. Cal. 1994) (same).[4] But see FDIC v. Healey, 991 F. Supp. 53 (D. Conn. 1998) (concluding that affirmative defenses based on the FDIC's receivership conduct are barred); FDIC v. Schreiner, 892 F. Supp. 848 (W.D. 1995) (same); RTC v. Edie, 1994 WL 744672 (D.N.J. Oct. 4, 1994) (same). In O'Melveny, the FDIC sued a law firm alleging that the firm had breached its fiduciary duty in real estate transactions performed for a federal savings and loan ("S&L"). The firm asserted the state law affirmative defense that knowledge of negligent

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[3] The majority approach is consistent with principles underlying the discretionary function exception to the FTCA. See, e.g., Bierman, 2 F.3d at 1441 (citing United States v. Gaubert, 499 U.S. 315 (1991)). The discretionary function exception bars tort suits against the United States arising from discretionary government conduct that involves policy considerations. 28 U.S.C. § 2680(a). "[T]he purpose of the exception is to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." Gaubert, 499 U.S. at 323 (internal quotation marks and citation omitted). In Gaubert, where a former chairman of the board sued federal regulators alleging that they had negligently supervised a federal savings and loan association, the Supreme Court held that the suit was barred by the discretionary function exception. Relying on Gaubert, the Seventh Circuit concluded that the FDIC's decisions in managing a failed banking institution would clearly fall under the discretionary function exception, and therefore that barring affirmative defenses based on those decisions was "consonant" with the FTCA. Bierman, 2 F.3d at 1441.

[4] Defendants appear to assume that a district court case from the Central District of California is binding on the Court. (See Defs.' Opp. at 15-18 (repeatedly referring the Court to what "this District" has "held").) District court decisions are not "holdings" of the district, and district court decisions from the Central District are no more inherently persuasive than decisions from other federal districts.

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conduct must be imputed to the S&L, and thus to the FDIC, limiting its ability to recover. O'Melveny, 512 U.S. at 82. The Supreme Court rejected the FDIC's argument that federal common law barred this affirmative defense. Assuming FIRREA applied, it placed the FDIC "in the shoes" of the S&L, subjecting it to the same claims and defenses, "except where some provision in the extensive framework of FIRREA provides otherwise." Id. at 87. The Court explained that creating a federal common-law exception not listed in the detailed statute "is not to 'supplement' this scheme, but to alter it."[5] Id.

The district courts rejecting the no duty rule insist that O'Melveny establishes that state law applies to all aspects of FIRREA suits unless FIRREA expressly provides otherwise. See, e.g., Ornstein, 73 F. Supp. 2d at 284-86. However, O'Melveny relied on the FIRREA provision that "the [FDIC] shall . . . by operation of law, succeed to all rights, titles, powers, and privileges of the insured depository institution." O'Melveny, 512 U.S. at 86 (quoting 12 U.S.C. § 1821(d)(2)(A)(I)). The Court construed this language to mean that when the FDIC asserts the claims of a failed institution, "any defense good against the original party is good against the receiver." Id. (citation omitted).

The Court concludes that Defendants are barred from raising the failure to mitigate, unclean hands, and ratification affirmative defenses to the extent they are based on the FDIC's post-receivership conduct in managing IndyMac, or its pre-receivership conduct as a regulator, because the defenses could not have been asserted against IndyMac.[6] The FDIC, standing in IndyMac's shoes, therefore is not subject to them. See

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[5] The Supreme Court went on to explain that, even absent the extensive FIRREA framework, the case did not present circumstances in which the creation of a federal common-law rule was appropriate. O'Melveny, 512 U.S. at 87. In Boyle, the Court explained that courts may create federal common law preempting state law where there is a "significant conflict" between federal policy and state law in an area of particular federal interest. Boyle, 487 U.S. at 504. In O'Melveny, no significant conflict existed because the state law affirmative defense did not involve the government's "primary conduct," but rather the government's right to recover based on the primary conduct of private actors. O'Melveny, 512 U.S. at 88. Moreover, the degree to which a state insulates negligent attorneys from recovery is not an area of particular federal interest. Id. at 89.

[6] The FDIC cites FDIC v. O'Melveny & Myers, 61 F.3d 17 (9th Cir. 1995), claiming that equitable defenses based on IndyMac's conduct cannot be raised against the FDIC as receiver. (Pl.'s Mot. at 16-17.) The Ninth Circuit's holding was based on an exception existing in California law. See O'Melveny, 61 F.3d at 19 (looking to state law to determine whether equitable defenses could be asserted, and citing Camerer v. Cal. Sav. & Commercial Bank, 4 Cal. 2d 159, 170-71 (1935) for the proposition that they could not be). Because the parties dispute whether California or Delaware law applies to this case, they are directed, in the

Schreiner, 892 F. Supp. at 857 (concluding that when the FDIC brings suit as receiver for a failed bank, it is subject "only to those affirmative defenses that would have been available to the defendants against the bank *if the bank had brought suit*" and that this excluded post-receivership conduct); Edie, 1994 WL 744672, at *4 ("Defendants can only assert defenses that were complete against the institution before the RTC assumed control."). The FDIC's motion as to these affirmative defenses is GRANTED.

### D. Vague and Uncertain

The FDIC's claims are not vague and uncertain. The Complaint identifies more than 60 individual loans approved by Defendants and it provides particularized information regarding each loan. (See, e.g., Compl. ¶¶ 84-93.) Although the Complaint recites the same legal basis for its claims regarding each loan, the factual allegations provide "more than labels and conclusions[] and a formulaic recitation of the elements of a cause of action." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). In any event, this is not an affirmative defense. The FDIC's motion is GRANTED.

### E. Discharge in Bankruptcy

Because Defendants have agreed to abandon this defense (Long Decl. Ex. P, at 346), the FDIC's motion is GRANTED.

### F. Reservation of Rule 14 Rights

"The decision to allow a third-party defendant to be impleaded under rule 14 is entrusted to the sound discretion of the trial court." United States v. One 1977 Mercedes Benz, 708 F.2d 444, 452 (9th Cir. 1983). In its Order re Jury Trial, the Court established June 22, 2011 as the deadline for adding parties. (Docket No. 47.) The Court's order stated that "[a]ll motions to add parties . . . must be noticed to be heard on or before the cut-off date." (Id. at 2.) The Court denied Defendants' motion to amend this deadline. (Docket No. 62.) In any event, this is not an affirmative defense. The FDIC's motion is GRANTED.

## IV. CONCLUSION

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Court's separate order, to provide supplemental briefing. The Court declines to rule at this time on the availability of equitable defenses based on IndyMac's conduct.

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For the reasons stated above, the FDIC's motion for judgment on the pleadings is GRANTED as to Defendants' assertions based on the failure to mitigate, unclean hands, ratification, vague and uncertain claims, discharge in bankruptcy, and reservation of impleader rights. In all other respects, the motion is DENIED.

IT IS SO ORDERED.