UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MEMORANDUM

Case No.	CV 10-4915 DSF (SHx)	Date	10/5/12
Title	Federal Deposit Insurance Corp. v. Scott Van Dellen, et al.		

Present: The Honorable	DALE S. FISCHER, United States District Judge

Debra Plato	Not Present
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 Motions for Partial Summary Judgment (Docket Nos. 188, 189, 193, 199, 216)

I. FACTUAL AND PROCEDURAL BACKGROUND

IndyMac Bank, F.S.B. (Bank), a wholly owned subsidiary of IndyMac Bankcorp, Inc. (Bankcorp) (Pl.'s Shellem and Koon SGD[1] ¶ 16), was a federally insured and chartered bank with a home office in Pasadena, California. (Defs.' SGD[2] ¶ 1.) Bankcorp was incorporated in Delaware. (Pl.'s Shellem and Koon SGD ¶ 17.) The Bank originated mortgages in all 50 states. (Id. ¶ 18.)

The Bank had a Homebuilder Division (HBD) that originated certain types of loans to homebuilders in selected markets throughout the United States. (Compl. ¶ 4; Shellem Ans. ¶ 4.[3]) HBD provided land, acquisition, and development (A&D), construction and combined acquisition, development, and construction (AD&C) loans to homebuilders in selected markets throughout the United States. (Id.) HBD's primary focus was on non-

[1] FDIC-R's Statement of Genuine Disputes in Response to Defendants Shellem's and Koon's Statement of [Proposed] Uncontroverted Facts and Conclusions of Law. (Docket No. 243.)

[2] Defendants' Statement of Genuine Disputes of Material Facts and Additional Material Facts in Support of Opposition to Plaintiff's Motion for Partial Summary Judgment. (Docket No. 229.)

[3] Docket No. 18.

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public regional builders. (Id.) Kenneth Shellem was the Chief Credit Officer of HBD from early 2002 through some time between November 9 and 15, 2006. (Pl.'s Shellem and Koon SGD ¶¶ 1, 3.) Shellem remained a Bank employee until March 31, 2007. (Id. ¶ 4.) Richard Koon was HBD's Chief Lending Officer (CLO) from July 2001 until his retirement on July 15, 2006. (Id. ¶ 5.) Scott Van Dellen was president of HBD between mid-2002 and July 2008. (Compl. ¶ 13; Van Dellen Ans.[4] ¶ 13.) William Rothman became HBD's CLO in July 2006. (Compl. ¶ 16; Rothman Ans.[5] ¶ 16.)

The Office of Thrift Supervision (OTS)[6] closed the Bank on July 11, 2008. (Pl.'s Shellem and Koon SGD ¶ 19.) The Federal Deposit Insurance Corporation (FDIC) was appointed receiver of the Bank on July 17, 2008. (Id. ¶ 20.) On July 2, 2010, the FDIC, as receiver, brought suit pursuant to 12 U.S.C. § 1821(d)(2) against Van Dellen, Koon, Shellem, and Rothman as former officers of the Bank. The FDIC claims Defendants were negligent and breached their fiduciary duties in approving certain HBD loans.

The loans at issue were approved between July 2005 and January 2007. (Pl.'s Van Dellen and Rothman SGD[7] ¶ 4.) Two loan approval committees were involved. First, the HBD Management Loan Committee, also known as the Junior Loan Committee (JLC), had authority to approve loans below 30 million dollars in value. (Pl.'s Shellem and Koon SGD ¶ 7, 11.) Second, the HBD Executive Loan Committee, also known as the Senior Loan Committee (SLC), had to approve loans in excess of 30 million dollars after the JLC approved them for recommendation. (Id. ¶ 12.) In order to approve a loan within its authority or to recommend a loan to the SLC, the JLC vote had to be unanimous. (Id. ¶ 13.) If the majority of the JLC members were in favor of a loan within their approval authority but the vote was not unanimous, the loan would be submitted to the SLC. (Id. ¶ 14.) The SLC consisted of non-party Bank President Richard Wohl, non-party Bank CEO Michael Perry, and Van Dellen. (Id. ¶ 14.) Koon was a voting member of the JLC. (Defs.' SGD ¶¶ 6-7.) Van Dellen was a member of both the JLC and SLC. (Id. ¶ 5.) Shellem was a voting member of the JLC. (Id. ¶ 8-9.) Rothman was a voting

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[4] Docket No. 33.

[5] Docket No. 34.

[6] As a federal savings bank, the Bank was regulated and chartered primarily by OTS and secondarily by the FDIC. See Jeffrey L. Hare & Christopher N. Steelman, When Private-Equity Meets Banks: The Impact of Banking Regulations on Private-Equity Investment, 125 Banking L.J. 487 (2008).

[7] FDIC-R's Statement of Genuine Disputes in Response to Defendants Van Dellen's and Rothman's Statement of Uncontroverted Facts and Conclusions of Law.

member of the JLC after July 2006. (Id. ¶ 11.)

On August 22, 2012, the FDIC moved for partial summary judgment as to certain of Defendants' affirmative defenses. (Docket No. 188.) Shellem moves separately for summary judgment. (Docket No. 189.) Van Dellen and Rothman move for partial summary judgment and join in the partial summary judgment motion of Koon and Shellem. (Docket No. 193.) Koon and Shellem move for partial summary judgment and join in the partial summary judgment motion of Van Dellen and Rothman. (Docket No. 199, 216.)

II. LEGAL STANDARD

The standard and procedures for a motion for partial summary judgment are the same as for summary judgment of a claim. Delta Sav. Bank v. United States, 265 F.3d 1017, 1021 (9th Cir. 2001); Fed. R. Civ. P. 56(a). A movant is entitled to summary judgment on a showing that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The moving party need not disprove the opposing party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Rather, if the moving party satisfies this burden, the party opposing the motion must set forth specific facts, through affidavits or admissible discovery materials, showing that there exists a genuine issue for trial. Id. at 323-24; Fed. R. Civ. P. 56(c)(1). "This burden is not a light one." In re Oracle Corp. Sec. Litig., 627 F.3d 376, 387 (9th Cir. 2010). If the moving party's showing is insufficient, no defense is required. Harper v. Wallingford, 877 F.2d 728, 731 (9th Cir. 1989). In ruling on a summary judgment motion, the Court must construe the evidence in the light most favorable to the non-moving party. Nolan v. Heald College, 551 F.3d 1148, 1154 (9th Cir. 2009).

A non-moving party who bears the burden of proof at trial as to an element essential to its case must make a showing sufficient to establish a genuine dispute of fact with respect to the existence of that element of the case or be subject to summary judgment. See Celotex Corp., 477 U.S. at 322. If the moving party's showing is insufficient, no defense is required. Harper v. Wallingford, 877 F.2d 728, 731 (9th Cir. 1989). "[A] district court is not entitled to weigh the evidence and resolve disputed underlying factual issues." Chevron Corp. v. Pennzoil Co., 974 F.2d 1156, 1161 (9th Cir. 1992). Rather, "the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (internal quotation marks and ellipsis omitted).

III. DISCUSSION

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A. Choice of Law

Plaintiff contends California law applies here; Defendants argue for Delaware law. The Ninth Circuit has not directly addressed the choice of law issue under the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), which provides this Court with jurisdiction over this action. It has, however, determined that federal common law applies in an analogous context. Huynh v. Chase Manhattan Bank, 465 F.3d 992 (2006). The particular choice of law mechanism is irrelevant here because California law governs under each test – the "internal affairs doctrine," the Lidow v. Super. Ct., 206 Cal. App. 4th 351 (2012) choice of law test, and federal common law.

1. Internal Affairs Doctrine

California courts generally follow the internal affairs doctrine. Vaughn v. LJ Int'l, Inc., 174 Cal. App. 4th 213, 223 (2009). The doctrine is "a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs." Edgar v. MITE Corp., 457 U.S. 624, 645 (1982). Generally, the internal affairs of a corporation involve "relations inter se of the corporation, its shareholders, directors, officers or agents." Restatement (Second) Conflicts of Law § 302(1) cmt. a (1971). In determining the applicable state law under the doctrine, the Court is informed by the Supreme Court's decision in Atherton v. FDIC, 519 U.S. 213 (1997). Atherton tacitly approved the application of the internal affairs doctrine in suits by the FDIC as receiver for a federally chartered bank against former officers and directors for negligence and breach of fiduciary duty. Id. at 223-24. The Supreme Court suggested:

> In the absence of a governing federal common law, courts applying the internal affairs doctrine could find (we do not say what they will find) that the State closest analogically to the State of incorporation of an ordinary business is the State in which the federally chartered bank has its main office or maintains its principal place of business.

Atherton, 519 U.S. at 224 (citations omitted).

Defendants argue at length about Bankcorp's incorporation in Delaware, its conducting business substantially through the Bank, and its structural arrangement of having joint directors of Bankcorp and the Bank. (Defs.' SGD ¶¶ 99-103.)[8]

[8] Plaintiff objects to two documents that form the basis for Defendants' claims about the joint directors and corporate structure of the Bank and Bankcorp, (Docket No. 265 at 1): "IndyMac

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The FDIC argues that California law should apply because California is the state "closest analogically to the State of incorporation." The Bank selected California for its main office and principal place of business[9], (Defs.' SGD ¶ 1), wrote its Bylaws to place all emergency alternative home offices in California, and required that all annual and special shareholder meetings take place at the Bank's home office in California, (id. ¶¶ 3-4). Moreover, even with respect to documents directly at issue in this litigation, the Bank chose to avail itself of California law. In Shellem's severance agreement, the Bank selected California law to govern the "rights and obligations" of the parties. (Shellem's UF ¶ 27; Docket No. 192.) The mere incorporation status of Bankcorp does not override the Bank's repeated governance choices to be subject to, and take advantage of, California law.

Defendants cite no precedent indicating that the state of incorporation of a parent should dictate the choice of law analysis for a federally chartered bank[10], but they assert a regulation adopted by OTS, the Bank's primary regulator, bolsters their claim that Delaware law governs. The regulation states:

> Corporate governance procedures. A Federal stock association may elect to follow the corporate governance procedures of: The laws of the state where the main office of the association is located; the laws of the state where the

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Bancorp Organizational Chart" and "Meeting of the Boards of Directors Meeting Handout" offered as part of the Declaration of Igor V. Timofeyev. The objections are SUSTAINED as these documents have not been properly authenticated and defense counsel has not established personal knowledge sufficient to authenticate the exhibits. The Court's ruling would be the same even if these documents were considered.

[9] Defendants attempt to dispute that the Bank had a "main office and principal place of business in Pasadena, California," arguing "Plaintiff's evidence demonstrates only that IndyMac's home office was in Pasadena, California, but does not indicate its 'main' office or 'principal place of business.'" (Defs.' SGD ¶ 1.) This is a distinction without a difference and falls well short of raising a genuine dispute of material fact. Defendants have failed to provide any evidence indicating a different home office or principal place of business.

[10] Defendants point to a District of Connecticut decision, which involved a breach of contract action brought by the Bank against two individuals. The district court, in a footnote and without conflict of law or any corporate governance analysis, identified IndyMac as "a Delaware corporation with its principal place of business in California." IndyMac Bank, F.S.B. v. Reyad, Civil Action No. 3:00CV835(CFD), 2006 WL 2092621, at *1 n.1 (D. Conn. July 26, 2006). This decision is not on point and there is no argument here that the Bank is a corporation at all.

> association's holding company, if any, is incorporated or chartered; Delaware General Corporation law; or The Model Business Corporation Act, provided that such procedures may be elected to the extent not inconsistent with applicable Federal statutes and regulations and safety and soundness, and such procedures are not of the type described in paragraph (b)(1) of this section. If this election is selected, a Federal stock association shall designate in its bylaws the provision or provisions from the body or bodies of law selected for its corporate governance procedures, and shall file a copy of such bylaws, which are effective upon adoption, within 30 days after adoption.

12 C.F.R. § 552.5(b)(3). A final rule enacting this new corporate governance option was issued on December 3, 1996, long before the 2008 closing of the Bank and the FDIC's receivership. Corporate Governance, 61 Fed. Reg. 64,007, 64,019 (Dec. 3, 1996) (to be codified at 12 C.F.R. § 552.5). At any time in the twelve years between December 1996 and July 2008, the Bank could have made clear it was subject to Delaware corporate governance law by complying with the provisions of this regulation, but did not do so.[11] The Court finds that California law applies under an internal affairs analysis.

2. Action Outside the Scope of the Internal Affairs Doctrine

Even if the internal affairs doctrine does not apply, California law applies under Lidow v. Super. Ct. Lidow considered the proper substantive law to apply to a Delaware corporation based in California for a claim brought by an officer for wrongful termination in violation of California's public policy. 206 Cal. App. 4th at 354. Lidow held that "a claim for wrongful termination of public policy brought by an officer of a foreign corporation falls outside the scope of the internal affairs doctrine, and thus is governed by California law." Id. at 356-57. The court applied "a vital limitation to the internal affairs doctrine" and explained that the internal affairs doctrine will be applied "except where, with respect to the particular issue, some other state has a more significant relationship [under the principles stated in § 6][12] to the parties and the transaction." Id. at

[11] Defendants' claim that "IndyMac's Board relied on section 141(c) of the Delaware General Corporation Law, 8 Del. C. § 141(c), when appointing several IndyMac directors as members of IndyMac's Enterprise Risk Management Committee," and other similar claims (Defs. Shellem and Koon's Opp. 9-10), do not change this Court's analysis. These scattered corporate governance actions are heavily outweighed by the factors noted above.

[12] Section 6 of the Restatement does not compel a different conclusion as to the governing law. As explained below, section 6 mandates the conclusion that California law applies.

359 (citing Restatement (Second) Conflicts of Law § 309 (1971)). "[C]ourts are less apt to apply the internal affairs doctrine when vital statewide interests are at stake, such as maintaining the integrity of California security markets and protecting its citizens from harmful conduct." Id. at 362. California has a significant interest in regulating the conduct and setting the standard of care for corporate officers where the corporation's main offices and principal places of businesses are located in California and the corporation chooses California law in its contractual choice of law provisions. This is in contrast to Delaware's more distant interest and the scattered occurrences where the Bank and Bankcorp purported to look to Delaware law in governance decisions. Even if the duty of care owed by corporate officers falls outside the scope of the internal affairs test, California law is applicable under Lidow.

3. Federal Common Law

Even under a federal common law choice of law analysis, California law governs. The Ninth Circuit addressed an analogous choice of law issue Huynh v. Chase Manhattan Bank. Huynh was an Edge Act case removed "to federal court pursuant to 12 U.S.C. § 632, which invests in the federal courts original jurisdiction over cases arising out of foreign banking transactions to which a U.S. corporation is a party." 465 F.3d at 997. In considering the proper state statute of limitations to apply, the Ninth Circuit concluded:

> [J]urisdiction is not based on diversity of citizenship. In this context, federal common law choice-of-law rules apply. Federal common law follows the approach outlined in the Restatement (Second) of Conflicts of Laws [Restatement Factors for statute of limitations determinations] . . . . The formulation of this rule is intended to reflect the general choice-of-law principles stated in Restatement (Second) Conflicts of Law § 6.

Id. (citations omitted); see also Edelmann v. Chase Manhattan Bank, N.A., 861 F.2d 1291, 1294 (1st Cir. 1988) (applying federal common law choice of law provisions to an Edge Act case); but see A.I. Trade Fin., Inc. v. Petra Int'l Banking Corp., 62 F.3d 1454, 1463 (D.C. Cir. 1995) (applying state choice-of-law rules to an Edge Act suit where "the 'federal question' giving rise to federal jurisdiction need not appear upon the face of a well-pleaded complaint"). The specific Restatement choice of law principles for corporate powers and liabilities applicable here are provided in sections 302 and 309.

Section 302 deals "with issues involving matters that are peculiar to corporations . . . . Many of the matters that fall within the scope of the rule of this Section involve the 'internal affairs' of a corporation." Restatement (Second) Conflicts of Law, cmt. a. Section 302 reads:

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> (1) Issues involving the rights and liabilities of a corporation, other than those dealt with in § 301, are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.
>
> (2) The local law of the state of incorporation will be applied to determine such issues, except in the unusual case where, with respect to the particular issue, some other state has a more significant relationship to the occurrence and the parties, in which event the local law of the other state will be applied.

For the reasons discussed in the Lidow analysis above, the Court finds California has the most significant relationship to the particular issue and the parties (all Defendants are residents of California) under section 302(1) and that Delaware does not have a more significant relationship to the occurrences and the parties under section 302(2).

Section 309 covers the choice of law used in "determin[ing] the liability of a[n] . . . officer to the corporation." Restatement (Second) Conflicts of Law, cmt. a. For the reasons discussed in the Lidow analysis above, which directly incorporated this section into its choice of law analysis, the Court finds that California law applies.

Finally, California law applies even under the general choice of law principles in section 6 of the Restatement. Section 6 states:

> (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
>
> (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
> (a) the needs of the interstate and international systems,
> (b) the relevant policies of the forum,
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
> (d) the protection of justified expectations,
> (e) the basic policies underlying the particular field of law,
> (f) certainty, predictability and uniformity of result, and
> (g) ease in the determination and application of the law to be applied

In addition to the reasons explained in the Atherton and Lidow analyses above that directly address factors (2)(a)-(c) and (e), the Court finds that factors 2(d) and (f) weigh in favor of applying California law as, for example, the Bank chose California law to control Shellem's severance agreement. The Court finds that the federal common law choice of law test favors the application of substantive California law.

B. Business Judgment Rule

1. Present State of California Law

As California substantive law applies, California's business judgment rule applies. The rule "has two components– immunization from liability that is codified at Corporations Code Section 309 and a judicial policy of deference to the exercise of good-faith business judgment in management decisions." Berg & Berg Enters., LLC v. Boyle, 178 Cal. App. 4th 1020, 1048 (2009). It "requires directors to perform their duties in good faith and as an ordinarily prudent person in a like circumstance would." FDIC v. Castetter, 184 F.3d 1040, 1044 (9th Cir. 1999). The first component, "which immunizes directors from personal liability if they act in accordance with its requirements," is codified at Section 309. Berg, 178 Cal. App. 4th at 1045. Defendants concede section 309 does not apply to them. The only question then is whether the common law element of the business judgment rule applies.

That element has been described as "insulat[ing] from court intervention those management decisions which are made by *directors* in good faith in what the *directors* believe is the organization's best interest." Id. (emphasis added) (citing Lee v. Interinsurance Exch. of the Auto. Club of S. Cal., 50 Cal. App. 4th 694, 714 (1996); Lamden v. La Jolla Shores Clubdominium Homeowners Ass'n, 21 Cal. 4th 249, 257 (1999)); see also Barnes v. State Farm Mut. Auto. Ins. Co., 16 Cal. App. 4th 365, 378 (1993) (describing "a judicial policy of deference to the business judgment of *corporate directors* in the exercise of their broad discretion in making corporate decisions"). Defendants argue that the Court should extend the California common law business judgment rule by finding that officers, in addition to directors and officer-directors, are entitled to its protections. California courts have not extended the rule to officers[13], and this Court declines to do so.

2. Biren

The case on which Defendants primarily rely is easily distinguishable.[14] In Biren v. Equal. Emergency Med. Grp., Inc., 102 Cal. App. 4th 125, 132 (2002), the court of appeal held that the business judgment rule "may protect a director who acts in a mistaken but good faith belief on behalf of the corporation without obtaining required shareholder approval." Biren involved two corporations created to provide emergency room services to hospitals under contract. Each corporation had five physician owners, each of whom was a corporate officer, director, and twenty percent shareholder. A written agreement among them required the consent of a majority of the shareholders for such things as contracting for billing services. Biren terminated the corporation's billing company and contracted with another company without the required consent and failed to

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[13] The most straightforward discussion of the scope of the business judgment rule is found in Gaillard v. Natomas Co., 208 Cal. App. 3d 1250 (1989). While it is unclear whether Gaillard concluded section 309 had codified the entire business judgment rule or merely part of it, the court discussed its view of the scope of and rationale behind the rule:

> The judicial deference afforded under the business judgment rule therefore should not apply [to individuals not "perform[ing] the duties of a director"]. As stated by Marsh in his discussion of section 309: "[Section 309, subdivision (a)] does not relate to officers of the corporation, but only to directors. . . . [A]n officer-director might be liable for particular conduct because of his capacity of an officer, whereas the other directors would not. . . . This result is in accord with the premise of the business judgment rule that courts should defer to the business judgment of *disinterested* directors who presumably are acting in the best interests of the corporation.

Id. at 1265-66 (initial brackets added; internal citation omitted). While Gaillard is not dispositive on the instant issue, it provides insight into how California courts view the business judgment rule.

[14] Defendants also cite without explanation PMC, Inc. v. Kadisha, 78 Cal. App. 4th 1368 (2000). Their reliance on this case is misplaced. Kadisha addressed an officer's or director's liability for a tort against a third party. The portion of the decision discussing the business judgment rule referred only to directors. Id. at 1386-87.

make certain pension contributions. The other shareholders contended she was liable for breach of contract, breach of fiduciary duty, and negligence.

Defendants seize on the appellate court's reference to the fact that Biren herself had a "mistaken belief that as an officer and director she had authority to act" on behalf of the corporation, and her own explanation that she had a fiduciary responsibility "as CFO," to argue that the court determined that the business judgment rule protects officers.[15] Not so. The court did not adopt Biren's apparent view that she was protected as an officer as well as a director. Indeed, Biren's analysis begins with a quote from the Ninth Circuit's Castetter decision: "[T]he [business judgment] rule . . . protect[s] well-meaning directors who are misinformed, misguided, and honestly mistaken." 102 Cal. App. 4th at 137 (quoting Castetter, 184 F.3d at 1046). All of the precedent cited by the court mentions only directors, never officers, in discussing the business judgment rule. Id. at 137 (citing Barnes, 16 Cal. App. 4th at 378, Lee, 50 Cal. App. 4th at 715, Castetter, 184 F.3d at 1046, and FDIC v. Benson, 867 F. Supp. 512, 522 (S.D. Tex. 1994)).

Had the court in Biren intended to extend the California common law business judgment rule to protect officers, it would have said so more forthrightly. Biren does not change California law as to the scope of the business judgment rule.

3. The California Law Revision Commission

The California Law Revision Commission also views the common law and statutory portions of the business judgment rule as extending only to directors. To accomplish its mission of substantive review of California statutory and decisional law, the Commission: (1) holds meetings, (2) conducts background studies, (3) prepares staff memoranda, (4) issues tentative recommendations, and (5) issues a final recommendation to the legislature. Commission Procedure, http://www.clrc.ca.gov/Mbg-history.html (last visited Sept. 19, 2012). In an early 1996 tentative recommendation, the Commission, in recommending the business judgment rule be applied to officers by statute, recognized that "[a]pplication of the business judgment rule to officers overrules the statement in Gaillard [], that the judicial deference afforded under the business judgment rule should

[15] Defendants' arguments also take other portions of Biren's analysis out of context. Biren cites a treatise explaining that "[t]he practice of allowing officers to approve contracts is so prevalent in some close corporations, for example, that they bind the entity even though the officer should have obtained board approval." Id. at 137 (citing 2 Fletcher, Cyclopedia of the Law of Private Corporations § 394.10, at 246-47 (1998)). The treatise is relevant only as to the corporation's closely held nature and informal governance structure; its citation does not indicate the court concluded plaintiff deserved protection for her status as an officer.

not apply to officers."[16] Tentative Recommendation, #B-601, Business Judgment Rule Study B-601, (April 1996), http://www.clrc.ca.gov/pub/1996/M96-24.pdf, at 12.

In its final recommendation to the California Legislature in 1998, the Commission ultimately did not suggest overruling Gaillard. The Commission made this decision clear in a heading titled "Codification Inapplicable to Officers." Business Judgment Rule, 28 Cal. L. Revision Comm'n Reports 1 (1998), http://clrc.ca.gov/pub/Printed-Reports/Pub197.pdf, at 17. The Commission concluded "that the codification of the business judgment rule should be limited to directors, and that its possible application to officers be made the subject of a separate study. Codification of the business judgment rule for directors should not affect the common law and existing statutory protection of officers and employees." Id. at 17-18. The Commission explicitly recognized the lack of California decisional law including officers within the scope of the business judgment rule – and chose not to recommend extending its protections. The Court is left with only one reasonable conclusion[17] as to California substantive law — the state's business judgment rule does not protect officers. Defendants may not use the business judgment rule as an affirmative defense. Plaintiff's motion for summary judgment on this issue is GRANTED. Defendants' motion for summary judgment as to all counts on the basis of the protections of the business judgment rule is DENIED.

C. Reliance on Employees/Experts, Reasonable Grounds, Reliance on Experts and Good Faith

Defendants do not appear to argue that these affirmative defenses are distinct from the business judgment rule. For the reasons stated above, Plaintiff's motion is GRANTED.

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[16] Defendants once again offer a quotation entirely out of context. They claim the Commission "endorsed" the view that "[t]he business judgment rule *does* apply to officers." This quotation is from an early tentative draft and was never forwarded to the California legislature. It is immediately preceded by the Commission's recognition that California decisional law was to the contrary and that "[a]pplication of the business judgment rule to officers overrules the statement in Gaillard." Tentative Recommendation, #B-601, at 12.

[17] Where the California Supreme Court has not decided a state law "question or one analogous to it, [the Court] must 'predict how the highest state court would decide the issue,' using any relevant material as guidance." Jerry Beeman & Pharmacy Servs., Inc. v. Anthem Prescription Mgmt., LLC, 652 F.3d 1085, 1106 (9th Cir. 2011) (quoting Vestar Dev. II, LLC v. Gen. Dynamics Corp, 249 F.3d 958, 960 (9th Cir. 2001)).

D. Statute of Limitations

The FDIC alleges both breach of fiduciary duty and negligence. (Compl. ¶ 7.) Defendants concede that to determine the statute of limitations under California law, the Court must identify the nature, i.e. the gravamen, of the cause of action. (Defs. Shellem and Koon's Opp. at 24; Van Dellen 7-8.) Plaintiff contends a four-year limitations period applies under California law because the gravamen of its claims is breach of fiduciary duty. Defendants argue for a two-year statute of limitations, asserting the gravamen of the claims is professional negligence.

"Under [FIRREA], the FDIC has at least three years after a failed thrift goes into receivership to file tort claims against former officers or directors; any longer period under state law controls." FDIC v. McSweeney, 976 F.2d 532, 534 (9th Cir. 1992). The parties agree[18] that the FDIC may not "revive claims for which the state limitations period has expired before the date of federal receivership." Id. at 534. However, this is not an issue as the Court concludes that the relevant statute of limitations is four years under California law and thus none of the claims expired before the date of federal receivership.

The Ninth Circuit's decision in McSweeney is binding and conclusively resolves the dispute. The gravamen of the complaint here is breach of fiduciary duty, not professional or other negligence. 976 F.2d at 535-36. See also 1st Valley Credit Union v. Bland, No. CV 10-1597-GW (MANx), 2010 WL 8757250, at *10 (C.D. Cal. Dec. 20, 2010) ("Although the [federal credit union] Director Defendants first argue that a two-year statute of limitations should apply to a fiduciary breach claim, they admit that such an argument is foreclosed by controlling Ninth Circuit authority, which sets the statute of limitations as four years"). There have been no intervening California court or Ninth Circuit decisions to the contrary.

Because the applicable statute of limitations is four years, the FDIC may bring claims that accrued on or after July 17, 2004, which is four years before the FDIC was appointed as receiver. As there is no dispute that all claims accrued after that date, Defendants' statute of limitations defense fails as a matter of law. Plaintiff's summary judgment motion on this affirmative defense is GRANTED.

E. Laches

Defendants do not oppose Plaintiff's motion on the affirmative defense of laches. In any event, "[u]nder California law, laches is available as a defense only to claims

[18] Pl.'s Mot. for Partial Summary Judgment at 12; Defs.' Van Dellen and Rothman Opposition to Pl.'s Mot. for Partial Summary Judgment at 6.

sounding in equity, not to claims at law." Wyler Summit P'ship v. Turner Broad. Sys., Inc., 235 F.3d 1184, 1193 (9th Cir. 2000) (citing Wells Fargo Bank, N.A. v. Bank of America NT & SA, 32 Cal. App. 4th 424 (1995)). Plaintiff's motion on this affirmative defense is GRANTED.

F. Estoppel and Claim Preclusion

Defendants assert that "Plaintiff's claims are barred in whole or in part because liability has been found and damages have been awarded in collateral litigation, including Order on Stipulation for Entry of Judgment, *IndyMac Venture, LLC v. Richard K. Ashby*, CV 08-6694-RGK-CW (C.D. Cal. Jan. 15, 2010)." Defendants have titled this affirmative defense "Estoppel-Claim Preclusion," but the title is not dispositive.

To the extent Defendants claim they are not "liable" for negligence or breach of fiduciary duty relating to the Count 3 loan because of the settlement in Ashby, they are simply wrong. See Boeken v. Philip Morris USA, Inc., 48 Cal. 4th 788, 797 (2010) (holding claim preclusion requires: a claim or issue in the present action identical to a claim or issue in a prior proceeding; a final judgment on the merits in the prior proceeding; and the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding.) Plaintiff in Ashby sought to enforce Ashby's guarantee of the Count 3 loan; the original viability of the loan was not at issue. However, the Court agrees with Defendants that any recovery obtained by the FDIC as a result of the Ashby litigation should properly be considered when assessing the FDIC's damages.

With the exception of the Shellem estoppel defense, which was not raised in Plaintiff's partial summary judgment motion, Defendants do not assert that claim preclusion would apply to any other count. To the extent the affirmative defense seeks to bar the FDIC from pursuing any of its claims, the Plaintiff's motion for summary judgment is GRANTED.

G. Failure to Mitigate, Unclean Hands, and Ratification

The Court previously concluded that "Defendants are barred from raising the failure to mitigate, unclean hands, and ratification 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." (Docket No. 75 at 6.) The Court also noted that under California law, equitable defenses good against the Bank could not be raised against the FDIC as receiver, id. at 6, n.6, citing FDIC v. O'Melveny & Myers, 61 F.3d 17, 19 (9th Cir. 1995) (holding "equitable defenses good against the bank should not be available against the receiver"). Because the Court now concludes California law governs this case, the failure to mitigate, unclean hands, and ratification defenses are unavailable. Plaintiff's motion on this issue is GRANTED.

H. Apportionment - Proportionate Liability - Comparative Negligence

Defendants seek to limit their liability for damages by raising - as separate affirmative defenses - three related concepts, which they have titled "apportionment," "proportionate liability," and "comparative negligence."[19] The affirmative defense of apportionment is unavailable to Defendants with respect to economic damages because it is well-settled under California law that "[t]he general rule is that, [c]ontributory wrongdoers, whether joint tortfeasors or concurrent or successive tortfeasors are ordinarily jointly and severally liable." Apodaca v. Haworth, 206 Cal. App. 2d 209, 213 (1962) (citations and internal quotation marks omitted). Thus, "each may be held liable for the entire loss." Id. (citations omitted). Defendants may file separate partial indemnity claims in a subsequent action but, given that joint and several liability applies, apportionment is not available as an affirmative defense. See Mullin Lumber Co. v. Chandler, 185 Cal. App. 3d 1127 (1986) (noting important public policies of maximizing recovery to the injured party, encouraging settlements, and apportioning liability in subsequent actions for equitable indemnity). For the same reasons, proportional liability also fails as an affirmative defense.

For the reasons explained above, Defendants may not impute the Bank's pre-receivership conduct to the FDIC as receiver as a defense to liability. The FDIC took over as receiver on July 17, 2008. Thus, the only reason Defendants would attempt to offer evidence of comparative negligence is to impute the conduct of the Bank to the FDIC as receiver. Defendants claim they "can assert conduct of IndyMac's other officers or entities prior to receivership to demonstrate their comparative negligence." (Defs. Shellem and Koon's Opp. to FDIC Mot. 22.) They cannot.

Plaintiff's partial summary judgment motion on these issues is GRANTED.

I. Intervening or Superseding Cause

A defendant in a tort action is not liable under California law if there is a superseding cause breaking the causal chain between the defendant's act and plaintiff's injury. Powell v. Standard Brands Paint Co., 166 Cal. App. 3d 357, 364 (1985). "[T]he

[19] These affirmative defenses are broadly and vaguely worded, and it is not clear to whom or what Defendants seek to shift some portion of their alleged responsibility for the damages claimed by Plaintiff.

term 'superseding cause' means an independent event [that] intervenes in the chain of causation, producing harm of a kind and degree so far beyond the risk the original [wrongdoer] should have foreseen that the law deems it unfair to hold him responsible." In re Ethan C., 54 Cal. 4th 610, 641 (2012) (citations and internal quotation marks omitted). The superseding cause inquiry "revolves around a determination of whether the later cause of independent origin, commonly referred to as an intervening cause, was foreseeable by the defendant or, if not foreseeable, whether it caused injury of a type which was foreseeable." Akins v. Cnty. of Sonoma, 67 Cal. 2d 185, 199 (1967); see also Restatement (Second) of Torts § 442 (1965). "If either of these questions is answered in the affirmative," the defendant remains liable. Akins, 67 Cal. 2d at 199. Generally, "foreseeability is a question for the jury unless undisputed facts leave no room for a reasonable difference of opinion." Chavez v. Glock, Inc., 207 Cal. App. 4th 1283, 1308 (2012) (quotation marks omitted).

While evidence on the subject of the economic downturn is admissible, the downturn is not a "superseding cause." The focus of this action is Defendants' conduct at the time the loans were made. For the reasons stated in the moving papers, Plaintiff's motion on this issue is GRANTED.

J. Defendant Shellem's Severance Agreement

Under California law, a release is an affirmative defense that must be specially pleaded. Hildebrand v. Stonecrest Corp., 174 Cal. App. 2d 158, 165 (1959). The defendant "bears the burden of raising the defense and establishing the validity of a release as applied to the case at hand." City of Santa Barbara v. Super. Ct., 41 Cal. 4th 747, 780 n.58 (2007). Shellem attempts to raise the affirmative defense of release for the first time in his motion for summary judgment. Substantial questions remain as to the effectiveness of the release as to claims of negligence and breach of fiduciary duty and whether the release was properly executed by individuals with the authority to bind the Bank. The Court declines to rule at this time on the authenticity of the release and the effect, if any, of the release. The Court also declines to rule at this time on Plaintiff's objections to Shellem's declaration. (Docket No. 297.)

K. Office of Thrift Supervision's Previous Examination and Approval of Loans' Underwriting

Van Dellen and Rothman move to dismiss Count 15, the Villas Development and House/Anastasia Loan, and Count 37, the Neumann Homes line of credit. Defendants contend that during its 2006-2007 examination, the OTS, as the Bank's regulator, reviewed the loans, concluded they were properly underwritten, and, as such, met the proper standard of care necessary for underwriting and approving the loans.

Summary judgment is not appropriate "[i]f reasonable minds could differ as to the import of the evidence." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986) (citing Wilkerson v. McCarthy, 336 U.S. 53, 62 (1949)); see also Beard v. Banks, 548 U.S. 521, 547 (2006). "[S]ummary judgment is generally an inappropriate way to decide questions of reasonableness because 'the jury's unique competence in applying the 'reasonable man' standard is thought ordinarily to preclude summary judgment.'" In re Software Toolworks Inc., 50 F.3d 615, 621 (9th Cir. 1994) (quoting TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 450 n.12 (1976)). "Summary judgment is not precluded altogether on questions of reasonableness. It is appropriate 'when only one conclusion about the conduct's reasonableness is possible.'" Gorman v. Wolpoff & Abramson, LLP, 584 F.3d 1147, 1157 (9th Cir. 2009) (quoting In re Software Toolworks Inc., 50 F.3d at 622).

Thomas Constantine testified that as an OTS examiner, he had little to no help during the 2006-2007 examination of HBD's underwriting. (Pl.'s Opp. to Van Dellen and Rothman 4; Docket No. 239, Long Decl., Exh. 9, Constantine Deposition, 33:15-35:2, 186:2-22). Plaintiff asserts this testimony creates a genuine dispute of material fact. Defendants counter that the "FDIC draws a sweeping conclusion about Mr. Constantine's testimony when in fact a more reasonable inference of the testimony is that if OTS had more resources, additional loans might have been reviewed, and there were only sufficient resources to review the certain loans (including Counts 15 and 37) covered in the work papers." (Defs.' Van Dellen and Rothman Reply Mem. 1.) Defendants correctly assert "a more reasonable inference" may exist, but a summary judgment motion may be not be granted unless "only one conclusion about the conduct's reasonableness is possible." Gorman, 584 F.3d at 1157. More than one conclusion is reasonable here, particularly when viewing the facts and evidence in the light most favorable to Plaintiff as a non-moving party. Matsushita, 475 U.S. at 587-88. A rational trier of fact could determine that Constantine's testimony indicates that the examination conducted by OTS carries little weight or should be disregarded. A jury could also find that the OTS examination standards did not constitute the applicable standard of care. A genuine dispute of material fact remains.

In any event, this issue is particularly well-suited for a jury as the weight to be given Constantine's testimony is influenced by his credibility and other factors. See Anderson, 477 U.S. at 255 ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict"). Defendants' motion is DENIED.

L. Loans Representing Subsequent Project Phases

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MEMORANDUM

Defendants move for partial summary judgment as to subsequent phases of the multi-phased projects at issue in Counts 12, 13, 28, and 29. For the reasons stated in the FDIC's Opposition, Defendants have not shown that there are no genuine issues of material fact. Defendants' motion is DENIED.

M. Causation - Counts 54 and 55

Defendants essentially argue that because the loans underlying these Counts were still "good" and not "under water" when the FDIC assumed control of the Bank, "the causal nexus is broken by the intervening act of FDIC running the loan portfolio, including this loan" and "[w]hatever happened to the property after Defendants 'passed the baton' to FDIC is not Defendants['] fault." (Defs.' Van Dellen and Rothman Mot. 23; Docket No. 193.)

As noted in the FDIC's Opposition, Defendants have not shown that there are no genuine issues of material fact. Defendants' motion as to these loans is DENIED.

N. Approval of Loans in Counts 12 and 55

Defendants move for summary judgment, summarizing in their Reply that "the undisputed record shows the allegedly negligent acts for Counts 12 and 55 were the signature of Richard Wohl as sole approver on behalf of HBD." The FDIC correctly notes that it is Defendants' burden to cite to evidence. Defendants' suggestion that the FDIC knows the facts is unhelpful. The FDIC has provided admissible evidence, undisputed by Defendants, that the CAM for the loan in Count 12 shows that defendants Shellem, Koon, and Koon on behalf of Van Dellen, signed the CAM as voting members of the JLC and recommended the loan's approval to Wohl. (Defs.' Resp. to Pl.'s Van Dellen and Rothman SGD[20] ¶ 138.) It is also undisputed that Van Dellen testified that he was involved in the approval of the loan in Count 55 and authorized Koon to sign the CAM for the loan in Count 12 on his behalf. (Defs.' Resp. to Pl.'s Van Dellen and Rothman SGD ¶ 140.) Even if defendants had met their initial burden, these two undisputed facts standing alone represent genuine issues of material fact sufficient to defeat Defendants' motion for summary judgment. The motion is DENIED.

O. Loan Disbursements After FDIC Appointed Receiver

[20] Defendants Scott Van Dellen's and William Rothman's Reply Memorandum to Their Motion for Partial Summary Judgment: Response to FDIC's Statement of Genuine Disputes (Docket No. 270).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MEMORANDUM

Defendants claim they cannot be held liable for loan disbursements made by the FDIC as receiver after it assumed control of the Bank. The Court agrees that this argument is (or at least may be) different from the "failure to mitigate damages" affirmative defense. Nevertheless, Defendants have not satisfied their burden on summary judgment, as a jury could find Defendants' conduct in originally approving the loans - along with any requirements of loan advances - breached their fiduciary duties. Defendants' motion on this issue is DENIED.

P. Claims Related to Twenty-One Million Dollar Neumann Loan Advance

Defendants assert the FDIC's damages expert, Scott Carnahan, calculated a 21 million dollar loss as to Count 37 based solely on assumptions made pursuant to instructions from FDIC's counsel. They also claim the FDIC has failed to present evidence that the 21 million dollar loss is appropriate. Even assuming this request to reduce the damages claim is appropriate on summary judgment, the FDIC has provided sufficient evidence to create a genuine dispute of material fact on this issue. Defendants' motion on this issue is DENIED.

Q. Loans Koon and Shellem Did Not Approve

Koon alleges he is not responsible for approving the Count 15 loan because he did not sign the related CAM as a member of the JLC. Defendants admit that "Koon did sign the CAM for the loan in Count 15 in his capacity as the CLO, but in a different section, where he only *recommended* that the loan be approved." (Defs. Shellem and Koon's Mot. 14.) Plaintiff has offered undisputed evidence that Koon was a member of the JLC at the time the loan was approved, though Defendants reply that the loan committee minutes indicate Koon was not present at the meeting. (Defs.' Resp. to Pl.'s Koon and Shellem SGD ¶ 385.) A rational jury could find that Koon approved the loan at issue in Count 15 based on his signature and committee membership at the time of approval. A genuine dispute of material fact remains. Defendants' motion on this issue is DENIED.

Shellem asserts that because he did not sign the CAM/Project Request Memorandum (PRM) documents for the loans in Counts 14, 22, 28, and 31[21], he cannot be held liable for their approval. The FDIC offers Koon's deposition testimony taken on April 9, 2012 as to the loan in Count 28. Koon was asked: "Do you know – the signature page on this project request memorandum does not show Mr. Shellem's signature. Do you know if he participated in the loan committee's consideration of this loan?" Koon

[21] The FDIC conceded at oral argument that partial summary judgment should be granted as to Count 29. That portion of the motion is GRANTED, and the Court does not discuss Count 29.

replied: "I am sure he did. Why his signature is here – isn't here, I don't know." (Defs.' Resp. to Pl.'s Koon and Shellem SGD ¶ 388.) This testimony clearly creates a genuine dispute of material fact as to whether Shellem may be held responsible for approval of the loan.

As to Count 31, the FDIC alleges that the JLC meeting minutes may have been created after the fact, noting that non-party Todd Camp was shown as present at that JLC meeting but did not have loan approval authority until nearly a year and a half after the approval of the relevant PRM. (Defs.' Resp. to Pl.'s Koon and Shellem SGD ¶ 388.) Defendants do not directly deny or explain this variance between the date on the PRM and the date the meeting actually took place. (Defs.' Resp. to Pl.'s Koon and Shellem SGD ¶ 388.) The FDIC has raised a triable issue of fact. Defendants' motion as to Counts 28 and 31 is DENIED.

As to Counts 14 and 22, the FDIC asserts that summary judgment should not be granted because discovery has not been completed with respect to those Counts as a result of the bifurcation of this action. Pursuant to Federal Rule of Civil Procedure 56(d), the Court defers considering this aspect of the motion until discovery on this issue is complete.

R. Portions of Counts Alleging Actions Taken After Koon and Shellem Left HBD

The FDIC agrees that neither Koon nor Shellem may be held liable for loan approval decisions made after each left HBD. (Pl.'s Opp. to Shellem and Koon 14.) Therefore, Koon is not liable for decisions made on or after July 16, 2006 and Shellem is not liable for decisions made on or after November 16, 2006. (Pl.'s Opp. to Shellem and Koon 14-15.) The Court GRANTS Defendants' summary judgment motion as to Koon's liability for loans approved on or after July 16, 2006, and Shellem's liability for loans approved on or after November 16, 2006. The Court otherwise DENIES the motion.

S. Koon's and Shellem's Liability as to Certain Additional Loans

Pursuant to Federal Rule of Civil Procedure 56(d), the Court defers considering Defendants' motions on the Non-Phase 1 Loans, as discovery is not yet complete on these issues.

IV. CONCLUSION

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MEMORANDUM

For the reasons stated above, Plaintiff's partial summary judgment motion is GRANTED in part and DENIED in part. Defendants' partial summary judgment motions are GRANTED in part and DENIED in part.

IT IS SO ORDERED.