12-15878-EE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER OF INTEGRITY BANK OF ALPHARETTA, GEORGIA,

Plaintiff-Appellant,

v.

STEVEN M. SKOW, ALAN K. ARNOLD, DOUGLAS G. BALLARD, CLINTON M. DAY, JOSEPH J. ERNEST, DONALD C. HARTSFIELD, JACK S. MURPHY, AND GERALD O. REYNOLDS,

Defendants-Appellees.

On Interlocutory Appeal From The United States District Court For The Northern District Of Georgia in Case No. 11-cv-0111-SCJ

PRINCIPAL BRIEF FOR APPELLANT FDIC

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Date: February 15, 2013

**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1-1, Appellant, Federal Deposit Insurance Corporation ("FDIC"), as Receiver of Integrity Bank of Alpharetta, Georgia, submits the following Certificate of Interested Persons and Corporate Disclosure Statement.

1. Interested Persons

The name of each person, attorney, association of persons, firm, law firm, partnership, and corporation that has or may have an interest in the outcome of this action including subsidiaries, conglomerates, affiliates, parent corporations, public-traded companies that own 10% or more of a party's stock and any other identifiable entities related to any party in this case are as follows:

Ambler, Robert R. - counsel for Appellee

Arnall Golden Gregory, LLP - counsel for Appellee

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Simkins Hollis Law Group, P.C. - counsel for FDIC, Appellant

Skow, Steven M. - Appellee

Smith, Kirk D. - counsel for Appellee

Vancea, Minodora D. - counsel for FDIC, Appellant

Watson, J. Scott - counsel for FDIC, Appellant

Young, Frank M. - counsel for Appellee

2. Corporate Disclosure

Federal Deposit Insurance Corporation is a corporation established under 12 U.S.C. § 1811.

Date: February 15, 2013

Respectfully submitted,

/s/
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Counsel for the Federal Deposit Insurance Corporation, as Receiver of Integrity Bank

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STATEMENT REGARDING ORAL ARGUMENT

The Federal Deposit Insurance Corporation as Receiver for Integrity Bank ("FDIC") believes that oral argument would assist the Court in deciding the issues in this interlocutory appeal, which involve two issues of first impression in this Circuit.

STATEMENT OF RELATED CASES

FDIC is not aware of any cases related to this appeal pending before the Court.

STATEMENT OF JURISDICTION

The district court has jurisdiction over this case because FDIC is the plaintiff. Under 12 U.S.C. § 1819(b)(2), with exceptions not applicable here, all suits of a civil nature to which FDIC is a party are deemed to arise under the laws of the United States. Under 28 U.S.C. § 1331, the district court has original jurisdiction over all civil actions arising under the laws of the United States.

This Court has jurisdiction to hear this interlocutory appeal under 28 U.S.C. § 1292(b) because FDIC filed its petition for permission to appeal within ten days after the district court entered its August 14, 2012 Order certifying the orders under review for interlocutory appeal.[1] FDIC filed its petition on August 24, 2012. This Court granted the petition on November 19, 2012.

STATEMENT OF THE ISSUES

1. Did the district court err in holding that Georgia law categorically shields directors and officers from liability for ordinary negligence when the governing statute imposes liability for ordinary negligence and provides that to avoid liability, defendants must act both in good faith and without ordinary negligence?

2. Whether federal law bars the officers and directors of a failed financial institution from asserting against FDIC affirmative defenses related to the conduct

[1] Record Excerpts ("R.E.") 139, at 51.

of FDIC in liquidating and disposing of the assets of a failed financial institution (*e.g.*, mitigation of damages, contributory negligence, reliance, and estoppel).

STATEMENT OF THE CASE

This interlocutory appeal concerns two issues of first impression arising from an FDIC suit against Defendants for their negligent and grossly negligent management and supervision of Integrity Bank. The business judgment rule ("BJR") issue presented here arises in every FDIC director-and-officer-liability case involving Georgia banks, and the no duty question arises in almost every FDIC director-and-officer-liability case nationwide. This Court's resolution of these issues will guide (1) the courts within the Eleventh Circuit currently grappling with the same questions in existing suits, and (2) the FDIC as it determines whether and how to bring director-and-officer-liability suits with respect to numerous other failed banks. At least four other federal district court cases in Georgia have issued interlocutory decisions addressing the same business judgment questions as those at issue here.[2]

[2] The decisions were issued in *FDIC v. Blackwell*, 2012 WL 3230490 (N.D. Ga. Aug. 3, 2012); *FDIC v. Briscoe*, No. 1:11-CV-02303-SCJ (N.D. Ga. Aug. 14, 2012); *FDIC v. Whitley*, No. 2:12-CV-00170-WCO (N.D. Ga. Dec. 10, 2012); *FDIC v. Miller*, No. 2:12-CV-00042-WCO (N.D. Ga. Dec. 26, 2012). Another pending case involving these issues is *FDIC v. Bryan*, No. 1:11-cv-02790-JEC (N.D. Ga.).

A. STATEMENT OF FACTS, COURSE OF PROCEEDINGS, AND DISPOSITIONS BELOW

1. FDIC brought this lawsuit as receiver for Integrity to recover over $70 million in losses the Bank suffered on twenty-one commercial and residential acquisition, development, and construction loans Defendants approved between February 2005 and May 2007 ("Loss Loans"). The imprudent approval of the Loss Loans as well as numerous other acts of negligence, gross negligence, and breaches of fiduciary duties by Defendants directly and proximately caused the Bank's losses.[3]

Integrity was a Georgia state-chartered, non-member bank founded in November 2000. The Bank was headquartered in Alpharetta, Georgia and also had branches in Roswell, Smyrna, Duluth, and Cumming, Georgia. Integrity was a wholly-owned subsidiary of Integrity Bancshares, Inc. ("Bancshares), a single-bank holding company whose stock was officially listed on the NASDAQ Global Market in September 2006.[4]

In August 2008, the Georgia Department of Banking and Finance determined that Integrity was operating in an unsafe and unsound manner, and secured a court order appointing FDIC as receiver for Integrity.[5] Pursuant to the Financial

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[3] R.E. 1 at 1.

[4] *Id.* at 2.

[5] *Id.* at 2; ¶ 1.

Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), FDIC as receiver succeeded to all rights, titles, powers and privileges of Integrity.[6]

Defendants are eight former officers and/or directors of Integrity who were members of the Bank's Director Loan Committee ("DLC").[7] After Integrity was founded by Defendant Skow in November 2000, Defendants presided over the very significant expansion of the Bank without implementing credit risk management policies and procedures commensurate with its rate of growth and high-risk lending practices.[8]

The Bank's Loan Policy delegated authority and responsibility for the loan portfolio to the DLC, President, Senior Lender, and Lending Officers.[9] The DLC was specifically charged with maintaining responsibility for the overall credit function and was also given the duty to approve all loans and/or loan relationships in excess of $500,000.[10]

From the Bank's inception, Defendants pursued an ill-conceived and unsustainable growth strategy based on high-risk lending heavily concentrated in the speculative real estate ventures of a small number of preferred individual develop-

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[6] R.E. 1 at ¶ 1; 12 U.S.C. § 1821(d)(2)(A)(i).
[7] *Id.* at ¶¶ 2-9.
[8] *Id.* at ¶ 13.
[9] *Id.*
[10] *Id.*

ers.[11] In furtherance of that strategy, Defendants routinely circumvented lending limits established by Georgia law and bank policies by continuing to make more loans to these preferred individual borrowers through newly-formed, single purpose entities that generated cash flow solely through the sale of speculative single-family residential subdivisions, condominium construction, and other large-scale real estate projects.[12] As a result, industry and individual concentrations within the Bank's loan portfolio quickly grew to uncontrollable levels.[13]

Defendants further increased the Bank's high-risk exposure by implementing lending policies and procedures that lacked the most basic lending controls and by failing to adequately supervise lending personnel.[14] For example, Defendants set the Bank's lending limit at 35% of Tier One Capital, which was 10% higher than the Georgia statutory lending limit.[15] Defendants also improperly allowed loan officers to be primarily responsible for both the loan production (sales) and quality control (credit analysis/administration) functions.[16] The inherent conflict from combining these roles was exacerbated by the Bank's policy of compensating its Senior Lender, Defendant Ballard, and all loan officers based on the volume of

[11] *Id.* at ¶¶ 18-20.
[12] *Id.* at ¶ 18.
[13] *Id.* at ¶¶ 20, 37-38.
[14] *Id.* at ¶¶ 13, 29-34.
[15] *Id.* at ¶ 14.
[16] *Id.*

loan originations/renewals, with no consideration given to the quality of a loan or its ultimate performance.[17]

Not surprisingly, the Bank's flawed policies and procedures gave rise to unsound lending practices, which Defendants failed to correct after those deficiencies surfaced. Although Defendants were aware of these deficiencies in the Bank's lending policies and procedures, they neglected to increase their supervision of the lending function or to take other measures to inform themselves of the legality and prudence of loans presented to them for review.[18] Indeed, Defendants failed to take adequate corrective measures even after state and federal regulators and Bank auditors consistently raised concerns about the Bank's excessive growth rate and repeatedly identified risks and deficiencies in the Bank's Loan Policy and lending function.[19] Among the primary risks and deficiencies identified by bank regulators in the May 2003 Report of Examination ("RoE")—and which continued to escalate and were documented through the June 2007 RoE—were the Bank's excessive commercial and residential real estate project loan concentration, major lending limit violations, deficient underwriting, and negligent credit administration.[20]

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[17] *Id.* at ¶ 17.

[18] *Id.* at ¶¶ 15, 17, 82(e).

[19] *Id.* at ¶ 21.

[20] *Id.* at ¶ 23.

All Defendants other than Ballard signed RoEs in 2003, 2004, 2005, 2006 and 2007—Ballard signed them in 2006 and 2007—and stated that they personally reviewed the reports.[21] But even though Defendants therefore knew about the past regulatory criticisms and warnings and the need to take corrective actions, they did not do so, continuing instead to approve loans with the same types of deficiencies that were highlighted to them.[22] In fact, between April 2005 and June 2007, the Bank's concentration in high-risk real estate project loans increased as a percentage of Tier One Capital from 386% to 931% without any corresponding increase in monitoring and reporting.[23] For example, instead of taking measures to limit the Bank's aggregate exposure to certain individual borrowers in response to multiple lending limit violations raised in the April 2005 RoE, Defendants continued to approve additional loans to these same borrowers, purporting to waive the lending limits.[24] The DLC minutes indicate that Loan Policy and Georgia legal lending limits were affirmatively waived in connection with the approval of seven of the twenty-one Loss Loans.[25] Due to Defendants' indifference to the lending limits, regulators identified in their June 2007 RoE six individual borrowers that account-

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[21] *Id*. at ¶ 35.
[22] *Id*. at ¶ 36.
[23] *Id*. at ¶ 24.
[24] *Id*. at ¶ 25.
[25] *Id*. at ¶ 27.

ed for nearly one third of the Bank's total loan portfolio, with the four largest borrowers representing 289% of Tier One Capital.[26]

Collectively, the Defendants' acts and omissions led to their approval of the twenty-one Loss Loans that, at the time of their approvals, increased previously criticized loan concentrations,[27] exceeded the internal Loan Policy and/or Georgia legal lending limits,[28] violated the Loan Policy and applicable laws and regulations,[29] and lacked proper financial analysis and verification of the creditworthiness of borrowers and guarantors and the value of collateral securing loans.[30] The years of excess risk taking and lack of oversight by Defendants ultimately led to the Bank's failure on August 29, 2008.[31]

2. The district court dismissed FDIC's ordinary negligence count, holding that directors and officers can never be liable for ordinary negligence under Georgia's business judgment rule. R.E. 84 at 14-19. FDIC moved for reconsideration, arguing, *inter alia*, that the court-created business judgment rule cannot insulate defendants from liability for ordinary negligence where the applicable state statute imposes an ordinary negligence standard of care. R.E. 92. FDIC combined its re-

[26] *Id.*

[27] *Id.* at ¶¶ 43-68, 73-74, 76-77.

[28] *Id.* at ¶¶ 43-44, 73-74, 76-77.

[29] *Id.* at ¶¶ 40-42, 45, 72, 75.

[30] *Id.* at ¶¶ 40-77.

[31] *Id.* at ¶ 38.

consideration motion with a motion for summary judgment on the issue of whether federal law bars affirmative defenses related to the discretionary conduct of FDIC in disposing of the assets of the failed bank (the defenses are mitigation of damages, reliance, and estoppel). *Id*. The district court denied reconsideration and summary judgment, but granted FDIC's request to certify these two orders for interlocutory appeal, finding that the three criteria for such appeal were met. R.E. 139 at 51-52.

B. STANDARD OF REVIEW

As this Court recognized in granting interlocutory appeal, the two issues presented in this appeal are purely legal issues, and are therefore reviewed *de novo*. A summary judgment decision is reviewed *de novo*, utilizing the same standard as the district court. *In re Sublett*, 895 F.2d 1381, 1383-84 (11th Cir. 1990). If there are no material facts in dispute, and only a purely legal question remains to be decided by the court, then granting summary judgment is appropriate. *See, e.g., Neff v. Am. Dairy Queen Corp.*, 58 F.3d 1063 (5th Cir. 1995).

SUMMARY OF ARGUMENT

I. The district court erred in holding that Georgia law categorically shields bank directors and officers from liability for ordinary negligence.

First, the two intermediate appellate decisions on which the district court relied do not categorically bar ordinary negligence claims against bank directors and officers. They merely stand for the unremarkable proposition that in order to make a claim for a breach of fiduciary duty of good faith, one must show bad faith. Thus, the district court's reliance on these two decisions was inapposite. Indeed, another Georgia intermediate decision confirms that these two decisions do not change the ordinary negligence standard imposed by the statute, holding that "to avoid liability" under the statute, a defendant must avoid ordinary negligence in addition to acting in good faith.[32]

Second, even if these two intermediate state decisions did impose an absolute bar on ordinary negligence claims, there is compelling authority demonstrating that the Georgia Supreme Court would not follow them. The governing statute expressly imposes liability for ordinary negligence, providing that to avoid liability, directors and officers must exercise ordinary care and diligence in addition to good faith. By statute, the "absence of such diligence is termed ordinary negligence." O.C.G.A. § 51-1-2. Although the district court agreed that the statute imposes "an ordinary negligence standard,"[33] it nevertheless followed two decisions purportedly holding precisely the opposite: that directors and officers can never have any liability for ordinary negligence. But the district court should not have followed these decisions because the Georgia Supreme Court would never follow intermediate

[32] *Rosenfeld v. Rosenfeld*, 286 Ga. App. 61, 68-69; 648 S.E.2d 399, 406 (2007) (physical precedent only).
[33] R.E. 139 at 15-16.

decisions that effectively amend the ordinary negligence standard imposed by statute to one requiring more than mere negligence. That court ruled that courts cannot amend statutes, as the legislature alone has the power to do so. As this Court explained in *Stahl*, when the statutory standard is ordinary negligence, a "court-made" rule such as the business judgment rule cannot "elevate" the statutorily mandated ordinary negligence standard to one requiring more than mere negligence, whether it be gross negligence or bad faith. *FDIC v. Stahl*, 89 F.3d 1510, 1516-18 (11th Cir. 1996).

Just like this Court in *Stahl*, numerous other courts interpreting identical statutes have rejected the view purportedly espoused by the two Georgia intermediate decisions that directors and officers are protected from liability for ordinary negligence as long as they act in good faith. As the Tenth Circuit explained, good faith "alone was not sufficient to shield [defendants] from liability" where, as here, the "statute requires good faith *and* the diligence, care and skill of a prudent man." *Hoye v. Meek*, 795 F.2d 893, 896 (10th Cir.1986) (emphasis in original).

The other sources relied on by the district court—a law review article, commentary by the Georgia bar association, and Georgia's policy of judicial restraint—would be rejected by the Georgia Supreme Court for the same reasons as the two intermediate appellate decisions. No such extra-statutory sources can change the plain text of the statute imposing an ordinary negligence standard. In any event, these sources are incorrect under their own logic. For example, "judicial restraint" would, if anything, require courts to follow the plain text of the statute, not to create a new rule shielding defendants from the liability imposed by the statute.

Third, several Georgia Supreme Court decisions further confirm that the Georgia standard for directors and officers is ordinary negligence. These decisions also expressly reject the proposition supposedly adopted by the two intermediate decisions—that directors and officers are "only" liable for conduct that is more egregious than ordinary negligence.

Fourth, adhering to the ordinary negligence standard imposed by the statute will not interfere with the directors' and officers' ability to exercise their business judgment. If directors and officers select a particular course of action that is within the range of reasonable options that prudent bank directors and officers in like circumstances would select—*i.e.*, they act with ordinary care—they are protected by the business judgment rule even if that option ultimately results in a loss to the bank. What they are not protected from is liability when they choose a course of action that no reasonable or prudent bank director or officer would ever take—*e.g.*, actions that, as here, violate underwriting standards, the bank's loan policies, or banking regulations. One could hardly argue that such actions involve the use of any business judgment in the first place, since by definition these actions are outside the norm of acceptable business behavior. Thus, as this Court itself recognized in *Stahl*, an ordinary negligence standard is entirely consistent with the exercise of business judgment.

II. In concluding that federal common law barred "the officers and directors of a failed financial institution [from] assert[ing] the affirmative defenses of contributory negligence and mitigation of damages against the FDIC," the Tenth Circuit explained that "the clear majority rule is that these defenses are not available." *FDIC v. Oldenburg*, 38 F.3d 1119, 1121 (10th Cir.1994). The district court agreed that if this federal common-law rule predated FIRREA's enactment in 1989, the rule would survive the enactment of FIRREA. "[T]he evident purpose of FIRREA [is] to enhance the FDIC's ability to address the problems created by the increasing number of financial institutions in default," not to remove existing protections under the common law. *Motorcity of Jacksonville, Ltd. v. Southeast Bank, N.A.*, 83 F.3d 1317, 1333 (11th Cir. 1996).

Although FDIC cited numerous decisions applying the no-duty rule before the enactment of FIRREA, the district court was concerned that these decisions were insufficient to demonstrate that the no duty rule was established before FIRREA because the vast majority of them applied the rule to FDIC or other banking regulators in their *corporate capacity*, and only four of them applied the rule to FDIC *as receiver*. These concerns were unfounded, as the no duty rule makes no such "distinctions between the various capacities in which [FDIC] operates." *FDIC v. Bierman*, 2 F.3d 1424, 1439 (7th Cir.1993). Moreover, the courts applying the no duty rule to the receiver cite the cases applying it to FDIC in its corporate capacity and vice-versa, and talk only of one no duty rule. The unity of the doctrine belies Defendants' attempt to split the doctrine based on FDIC's capacities so as to make it appear less established.

In any event, the pre-FIRREA cases applying the no duty doctrine to the receiver merely refined the pre-existing no duty doctrine, they did not create a new doctrine. Refining preexisting common law is not the same as creating new federal common law. Indeed, *Motorcity* could not have been decided the way it was decided *if* a common law rule must have existed in its precise refinement before FIRREA, as *Motorcity* itself involved a refinement of the *D'Oench* doctrine after FIRREA. Thus, just as in *Motorcity*, the common law at issue here predated FIRREA.

In addition, the district court incorrectly predicted that even if the no duty rule predated FIRREA, this Court would decline to apply it. All three appellate courts presented with the issue have decided to follow the no duty rule, providing numerous reasons why such rule is necessary and appropriate. The affirmative defenses barred by the no duty rule involve precisely the same type of conflict with an agency's discretionary functions that the Supreme Court found to necessitate application of a rule of federal common law. As many circuit and district courts have recognized, the defenses of failure to mitigate damages and contributory negligence would require courts to scrutinize discretionary decisions made by the FDIC after assuming receivership of the Bank, and FIRREA specifically grants discretion to the FDIC in operating the institution and in liquidating its assets.

ARGUMENT

I. The District Court Erred In Holding That Georgia Law Categorically Shields Bank Directors And Officers From Liability For Ordinary Negligence

Because the governing statute imposes an ordinary negligence standard, the district court erred in holding that pursuant to the BJR, defendants can never have any liability for ordinary negligence. As this Court explained in *Stahl*, a "court-made" rule such as the business judgment rule cannot "elevate" a statutorily mandated ordinary negligence standard to one requiring more than mere negligence, whether it be gross negligence or bad faith. *FDIC v. Stahl*, 89 F.3d 1510, 1516-18 (11th Cir. 1996). Yet this is exactly what the district court did here.

A. The Governing Statute Expressly Imposes Liability For Ordinary Negligence

The plain text of the statute governing the conduct of bank directors and officers requires them to exercise good faith *and* the diligence, care, and skill of "ordinarily prudent men . . . under similar circumstances." O.C.G.A. § 7-1-490. The statute also provides that those who act in accordance with this standard "shall have no liability" for their conduct in running the bank. *Id*. Thus, under the plain terms of the statute, acting in good faith is not enough to shield conduct at the helm of the bank—rather, both good faith and due care are necessary to avoid liability.

The district court agreed that both good faith and due care are required under the plain text of the statute, and that this statutory standard is one of ordinary negligence. R.E. 139 at 15-16. Indeed, it is beyond dispute that this standard is one of ordinary negligence, as the language of the bank standard tracks the general ordinary negligence standard in O.C.G.A. § 51-1-2:

"Directors and officers of a bank or trust company shall discharge the duties of their respective positions in good faith **and** with that **diligence, care, and skill** which **ordinarily prudent men** would exercise **under similar circumstances in like positions**. . . . A director or officer **who so performs his duties shall have no liability** by reason of being or having been a director or officer of the bank or trust company." O.C.G.A. § 7-1-490.	"In general, ordinary diligence is that **degree of care** which is exercised by **ordinarily prudent persons under the same or similar circumstances**. … The absence of such diligence is **termed ordinary negligence**." O.C.G.A. § 51-1-2.

Like O.C.G.A. § 7-1-490, which governs here, O.C.G.A. § 51-1-2 requires "ordinary diligence," defined as "that degree of care which is exercised by ordinarily prudent persons under the same or similar circumstances." O.C.G.A. § 51-1-2. "The absence of such [ordinary] diligence is termed ordinary negligence." *Id*.

Moreover, in *Boddy v. Theiling*, the Georgia Court of Appeals confirmed that the language of the statute codifies the ordinary negligence standard imposed by the Georgia Supreme Court in *McEwen v. Kelly* and *Woodward v. Stewart*:

> the directors' [statutory] duties are spelled out in the first sentence which reads: 'Directors and officers shall discharge the duties of their respective positions in good faith and with that degree of diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in like positions.' Thus was established as a statutory standard that which had been previously imposed by the Supreme Court decisions of *McEwen v. Kelly*, 140 Ga. 720, 79 S.E. 777 (1913) and *Woodward v. Stewart*, 149 Ga. 620, 101 S.E. 749 (1919).

129 Ga. App. 273, 276, 199 S.E.2d 379, 382 (1973).

In *McEwen*, the Georgia Supreme Court held that "those who accept the position of directors impliedly undertake to exercise ordinary care and diligence in discharge of the duties thus committed to them," and that although "[s]ome courts have declared that they are only liable for gross negligence, . . . [in] probably most[] of the cases so declaring[] it will be found that the failure of directors to use ordinary care in supervision has been treated as amounting to gross negligence." 79 S.E. at 779. The court further underscored that judgments for damages are proper when directors "sat negligently by and looked wise." *Id*. The court reaffirmed these principles in *Woodward*, where it cited *McEwen* with approval and expressly distinguished cases from other jurisdictions utilizing a gross negligence standard by noting that "[w]hatever the rule is at common law or in other jurisdictions, the general rule in this state is that directors of a bank must exercise ordinary care and diligence in the administration of the affairs of the bank." 101 S.E. at 750-52.

B. If The Two Intermediate State Decisions On Which The District Court Relied Impose An Absolute Bar On Ordinary Negligence Claims, There Is Compelling Authority Demonstrating That The Georgia Supreme Court Would Not Follow Them

The district court agreed that the Georgia statute imposes "an ordinary negligence standard of care" for directors and officers and that the statute requires them to act both in good faith *and* with the care exercised by "ordinarily prudent men . . . under similar circumstances" in order to avoid liability. R.E. 139 at 15-16. Because the text of the statute is plain, that should be the end of the matter: if *either* of the two preconditions to avoiding liability is missing, directors and officers are liable under the statute. For example, if directors and officers do not exercise the care of ordinarily prudent men, they are liable for ordinary negligence even if they act in good faith. Conversely, even if directors and officers act with due care, they are liable if they act in bad faith (*e.g.*, they are liable for breach of fiduciary duty).

The district court held, however, that notwithstanding the statute, it was bound to absolutely shield directors and officers from liability for ordinary negligence, based on two Georgia intermediate decisions that it read as compelling that result. *See Brock Built, LLC v. Blake*, 686 S.E. 2d 425 (Ga. App. 2009); *Flexible*

Products, Inc. v. Ervast, 643 S.E.2d 560 (Ga. App. 2007). The district court felt bound by those intermediate decisions because such decisions must be followed "unless [the court] is convinced by other persuasive data that the highest court of the state would decide otherwise." R.E. 139 at 6 (citing *C.I.R. v. Bosch's Estate*, 387 U.S. 456 (1967)). This was error under the very standard applied by the district court, because there is persuasive—indeed, compelling—evidence that the Georgia Supreme Court would not follow these two intermediate decisions.

(1) The Georgia Supreme Court Would Flatly Reject Decisions That Categorically Insulate Defendants From The Ordinary Negligence Liability Imposed By Statute Because Such Decisions Effectively Amend The Statute, And That Court's Decisions Prohibit Such Judicial Amendments

Where, as here, there is compelling evidence that a state's highest court would not follow the existing intermediate appellate decisions because they are contrary to the governing statute and the fundamental principle that courts cannot amend statutes, it has long been recognized that those intermediate decisions are not binding on federal courts. *See Bosch's Estate*, 387 U.S. at 465 ("federal authority may not be bound even by an intermediate state appellate court ruling" if the federal court "is convinced by other persuasive data that the highest court of the state would decide otherwise"); *see also* R.E. 119 at 13.

Although the district court agreed that the Georgia statute imposes "an ordinary negligence standard" for directors and officers, R.E. 139 at 15-16, it nevertheless followed the two decisions purportedly holding precisely the opposite: that directors and officers can never have any liability for ordinary negligence. This was error. As this Court explained in rejecting such cases, courts cannot create rules that contravene standards established by statute, and in particular courts cannot adopt a business judgment rule that "elevates the simple negligence standard [imposed by a statute] to one of gross negligence." *Stahl*, 89 F.3d at 1517-18. "The *court-made* BJR does not change Florida's pre-1987 *statutory* simple negligence standard to a gross negligence standard; it merely protects directors who exercised reasonable diligence in the first instance from liability on the merits of their business judgment." *Id*. (emphasis added).

It is no answer to say that *Stahl* can be disregarded because it involved a Florida statute, not a Georgia statute, and that the Florida statute has since been amended. R.E. 139 at 18. The Georgia statute at issue here is materially identical to the Florida statute that was at issue in *Stahl*.[34] In any event, the question here is not about what the statutes provide, since both statutes plainly impose an ordinary negligence standard (*see* Part I.A, *supra*), but whether courts can create rules im-

[34] *Compare* O.C.G.A. § 7-1-490 (directors must perform their duties "in good faith and with that diligence, care, and skill which ordinarily prudent men would exercise under similar circumstances in like positions") *with* Fla. Stat. § 607.111(4) (pre-1987 version) (directors must perform their duties "in good faith, . . . and with such care as an ordinarily prudent person in a like position would use under similar circumstances").

posing a standard more favorable to defendants than the ordinary negligence standard imposed by statute. It is on this latter question that *Stahl* provides guidance.

The district court rejected *Stahl*'s guidance, reasoning that federal courts cannot ignore state intermediate decisions in favor of federal appellate decisions such as *Stahl*. R.E. 139 at 18. But *Stahl* did not involve a principle that was unique to Florida law. Rather, *Stahl* followed the fundamental principle, applied in Georgia and elsewhere, that "[a] court of law is not authorized to rewrite the statute . . . . Any [modification of a statute] must come from the legislature, as it *alone* is entrusted with the authority to amend existing laws." *Abdulkadir v. State*, 279 Ga. 122, 124, 610 S.E.2d 50 (2005) (emphasis added; citations omitted).

The district court responded that notwithstanding the teaching of *Stahl* and the plain text of the Georgia statute, it would still be required to follow the two intermediate Georgia decisions because courts must follow intermediate state decisions "whether or not the court agrees with the reasoning on which the state court's decision is based." R.E. 139 at 7. But the issue here is not whether federal courts agree with the reasoning of *Brock Built* and *Flexible Products*, the issue is whether there is compelling evidence that the Georgia Supreme Court would never agree with that reasoning because that Court would follow the plain text of the statute and its own prior holdings recognizing the same principle that was recognized in *Stahl*: that courts cannot change the standards and rules imposed by statute. *See*

Frazier v. Southern R. Co., 200 Ga. 590, 593, 37 S.E.2d 774 (1946) ("courts *may not substitute* by judicial interpretation language of their own for the clear, unambiguous language of the statute, *so as to change the meaning*") (emphasis added); *Abdulkadir*, 279 Ga. at 124 ("[a] court of law is not authorized to rewrite the statute . . . . Any [modification of a statute] must come from the legislature, as it *alone* is entrusted with the authority to amend existing laws.") (emphasis added; citations omitted); *Fidelity and Deposit Co. of Maryland v. Lafarge Bldg. Materials*, 312 Ga.App. 821, 823, 720 S.E.2d 288 (2011) (reaffirming "the fundamental principle of statutory construction that 'requires us to follow the literal language of the statute,'" and reiterating that when "the language of a statute is plain and unambiguous, judicial construction is not only unnecessary but forbidden") (citations omitted).

The district court believed that its decision was also supported by Georgia's court-created policy of "judicial restraint," a law review article, and comments on the statute by the Georgia state bar. But such legal commentary cannot amend the standard imposed by statute any more than the courts can, as the legislature "alone is entrusted with the authority to amend existing laws." *Abdulkadir*, 279 Ga. at 124. The district court reasoned that it was not rewriting the statute but was merely applying Georgia's court-created "policy" of judicial restraint embodied in the business judgment rule. Yet applying a court-created policy to shield defendants from liability imposed by the statute is the very definition of rewriting the statute. And of course, the irony is that "judicial restraint" would require precisely the opposite of what the district court and the two intermediate Georgia courts did: it requires courts to follow the statute, not create judicial rules that absolve defendants of the ordinary negligence liability imposed by the statute.

In any event, the comments in the law review article and those by the Georgia State Bar are unavailing for numerous other reasons. For example, the district court relied on the law review article's suggestion that the statute may be inapplicable because it only imposes an ordinary negligence standard of *care*, and does not impose an ordinary negligence standard of *liability*. R.E. 139 at 19. The article is wrong for several reasons.

First, the statute does impose a standard of liability: it provides that defendants shall have "no liability" *if* they comply with the standard of care, which requires both good faith and due care (absence of ordinary negligence). O.C.G.A. § 7-1-490(a); *see also* R.E. 139 at 15-16.

Second, the Georgia statute on ordinary negligence provides that the standard for liability is the same as the standard of care, as liability is defined simply as the absence of due care: "The absence of such [ordinary] diligence is termed ordinary negligence." *Id*.

Third, the Georgia appellate court treated the standard imposed by a materially identical statute as pertaining to liability, and not only to the standard of care. For example, the court held in *Boddy* that a person "who agrees to become a corporation director therefore undertakes to carry out the obligations of obedience to the law, loyalty as fiduciary to the stockholders, and *the diligence of an ordinarily prudent man*. As such he cannot argue that as a matter of law he is entitled to summary judgment [absolving him for liability for] nonparticipation and absence from meetings." 129 Ga. App. at 276-77, 199 S.E.2d at 382.

Similarly, in *Rosenfeld v. Rosenfeld*, the court rejected as "inaccurate" the argument that "*the standard of care is not ordinary diligence* and that an officer need only act in good faith to avoid liability." 286 Ga. App. 61, 68-69, 648 S.E. 2d 399 (2007) (physical precedent only; emphases added). The court explained that the statute (OCGA § 14-2-842(a)) "requires that *to avoid liability*, an officer must act in good faith . . . and with due care ('[w]ith the care an ordinarily prudent person in a like position would exercise under similar circumstances'). As we state in our opinion above, this due care is in all material respects identical to the ordinary diligence defined in OCGA § 51-1-2." *Id*. While *Rosenfeld* is not binding, it is certainly more authoritative than the law review article on which the district court relied for a contrary proposition. In any event, *Rosenfeld* merely underscores the point already made by *Boddy* that the statute imposes an ordinary negligence standard of liability.

Fourth, the idea that the standard of liability can be different than the standard of care is untenable, as it makes no sense for the legislature to provide a standard of care that could never be enforced in practice because it is different than the standard for liability. The standard of care is meaningless if it has no legal teeth, and courts cannot interpret statutes so as to render them meaningless.

The district court also noted that comments that the Georgia State Bar—*i.e.*, a group of legal commentators, not legislators—had made indicated that these commentators believed that the legislature did not intend to prevent courts from establishing standards of liability that are different than those described in the statute. R.E. 139 at 19-20. But this make no sense—by definition, the legislature must intend to prevent courts from absolving defendants from the liability imposed by the statute, otherwise why would they have bothered to impose such liability? And it is well-established that the statute, not the opinion of legal commentators, is the best evidence of the legislators' intent. *See Fidelity and Deposit*, 312 Ga.App. at 823 (reaffirming "the fundamental principle of statutory construction that 're-quires us to follow the literal language of the statute," and reiterating that when "the language of a statute is plain and unambiguous, judicial construction is not only unnecessary but forbidden") (citations omitted).

In sum, where, as here, there is compelling evidence that a state's highest court would not follow the existing intermediate appellate decisions because they are contrary to the governing statute and the fundamental principle that courts cannot amend statutes, it has long been recognized that those intermediate decisions are not binding on federal courts. *See Bosch's Estate*, 387 U.S. at 465 ("federal authority may not be bound even by an intermediate state appellate court ruling" if the federal court "is convinced by other persuasive data that the highest court of the state would decide otherwise"). Neither such intermediate state decisions, nor a law review article, nor comments on the statute by the Georgia state bar, nor the court-created-policy of judicial restraint—which comprise the entirety of the sources on which the district court relied—are sufficient to override the ordinary negligence standard imposed by the statute.

(2) The Georgia Supreme Court Has Already Rejected The Proposition That Directors And Officers Are "Only" Liable For Conduct That Is More Egregious Than Ordinary Negligence

The fact that these two intermediate appellate decisions conflict with the two decisions of the Georgia Supreme Court in *McEwen* and *Woodward* also is compelling evidence that the Georgia Supreme Court would not follow these decisions. The standard of liability for directors and officers established by the Georgia Supreme Court in *McEwen* and *Woodward* is ordinary negligence. *See* Part I.A, *supra*. If, as the district court believed, the two intermediate decisions hold precisely the opposite—*i.e.*, that directors and officers can never have any liability for ordinary negligence—then they are directly contrary to Georgia Supreme Court precedent and thus this Court cannot and should not follow them.

The district court had no answer to *Woodward* and *McEwen* and did not explain why it chose to follow intermediate appellate precedent that was directly contrary to Georgia Supreme Court precedent. These controlling decisions cannot be disregarded. *McEwen* and *Woodward* required directors and officers to act with ordinary care and diligence, and rejected the idea that directors and officers are "only liable for gross negligence." *McEwen*, 79 S.E. at 779 ([s]ome courts have declared that [directors] are only liable for gross negligence, . . . [in] probably most[] of the cases so declaring[] it will be found that the failure of directors to use ordinary care in supervision has been treated as amounting to gross negligence."). *Woodward* distinguished cases from other jurisdictions utilizing a gross negligence standard, explaining that "[w]hatever the rule is at common law or in other jurisdictions, the general rule in this state is that directors of a bank must exercise ordinary care and diligence in the administration of the affairs of the bank." 101 S.E. at 750-52.

Because the Georgia Supreme Court decisions in *McEwen* and *Woodward* expressly rejected the premise that mere negligence is not enough and that directors and officers are "only liable for gross negligence," they are the controlling

Georgia precedent on this issue—and not the contrary intermediate decisions on which the district court relied. The enactment of the statute at issue here did not lower the standard of liability imposed by *Woodward* and *McEwen*—if anything, it heightened it. As *Boddy* explained, the statute was an important step "in the direction of making directors and officers more accountable"—not less accountable—"for their actions." 129 Ga. App. at 276.

(3) The Georgia Supreme Court Would Also Reject These Decisions Because, As Held By All Courts That Have Considered The Issue, Including The Georgia Appellate Court, When The Governing Statute Requires Defendants To Act Both In Good Faith And With Due Care To Avoid Liability, Good Faith Alone Is Not Sufficient To Shield Defendants Of Liability

In addition, the Georgia Supreme Court would not follow the purported holding in *Brock Built* and *Flexible Products* that directors and officers can only be liable if they act without good faith,[35] because such holding is contrary to the plain language of the statute, other Georgia decisions, and the decisions of all other courts that have addressed a similar statute. Because the statute here expressly provides that directors "shall have no liability" only when they perform their duties "in good faith *and* with that diligence, care, and skill which ordinarily prudent men would exercise" (O.C.G.A. § 7-1-490) (emphasis added), courts cannot hold the opposite: that defendants "shall have no liability" even if defendants did not act "with that diligence, care, and skill which ordinarily prudent men would exercise."

[35] *See* R.E. 139 at 12-14.

Put differently, a holding that good faith alone is sufficient to avoid liability contravenes the plain text of the statute, and the fundamental principle that courts cannot amend the statute or otherwise eliminate one of the two statutory preconditions to avoiding liability, namely due care. *Abdulkadir*, 279 Ga. at 124.

As *Stahl* explained in criticizing courts that have disregarded the "due care" element of a materially indistinguishable statute,[36] because the statute requires defendants to act both with due care and in good faith, defendants cannot be protected from errors in business judgment unless *both* of these statutory prerequisites are met: Only "[1] [i]f due care was in fact exercised as required under [the statute], directors are protected by the BJR, no matter how poor their business judgment, [2] unless they acted fraudulently, illegally, . . . or in bad faith." 89 F.3d at 1517 (bracketed numerals added); *see also id.* (defendants "must have acted with ordinary care for the BJR to apply").

Indeed, even the Georgia Court of Appeals has rejected as "inaccurate" the theory that under the BJR (as applied in *Flexible Products*), good faith alone is sufficient to avoid liability. The Court explained that both good faith and due care are required under the statute, and thus that directors and officers must exercise both in order "to avoid liability":

> Citing *Flexible Products Co. v. Ervast*, the wife argues that the standard of care is not ordinary diligence *and that an officer need only act in good faith to avoid liability*. . . . This is inaccurate. OCGA § 14-2-842(a), which gov-

[36] *See supra* note 34 (comparing Georgia and Florida states).

> erns, requires that to avoid liability, an officer must act in good faith . . . *and with due care* ("[w]ith the care an ordinarily prudent person in a like position would exercise under similar circumstances"). As we state in our opinion above, *this due care is in all material respects identical to the ordinary diligence* defined in OCGA § 51-1-2 . . . . *Flexible Products, supra*, is distinguishable on its facts and is inapplicable.

Rosenfeld, 286 Ga. App. at 68-69 (emphases added). That *Rosenfeld* is only physical precedent under the Georgia rules is immaterial, as the statute itself imposes the due care requirement; *Rosenfeld* merely confirms that the statute means what it says.

Defendants nonetheless argue that the statute cannot possibly mean what it says because unless defendants can escape liability if they act in good faith yet without ordinary care, the BJR presumption would be "meaningless." Opp. at 11, 6. But Defendants have it exactly backwards: it is the court-created BJR that must be interpreted to conform to the statute, not vice-versa.

The due care statutory pre-condition to avoiding liability is meaningless under *Brock Built* and *Flexible Products*' view that defendants can escape liability if they acted in good faith but without due care. Because *Brock Built* and *Flexible Products*' interpretation renders an element of the statute meaningless, that interpretation of the statute must be avoided. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, on the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, *void*, or insignificant") (emphasis added).

Defendants' idea that giving effect to the due care requirement of the statute would render the BJR meaningless is further belied by the numerous courts that have given effect to similar statutory due care requirements in statutes that are materially identical to that here. These courts rejected the view espoused by *Brock Built* and *Flexible Products* that good faith alone is sufficient to protect defendants from liability. As the Tenth Circuit explained, good faith "alone was not sufficient to shield [defendants] from liability" where, as here, the "statute requires good faith *and* the diligence, care and skill of a prudent man." *Hoye v. Meek*, 795 F.2d 893, 896 (10th Cir.1986) (emphasis in original).

Similarly, this Court in *Stahl* held that Defendants "must have acted with ordinary care for the BJR to apply" and that only "[i]f due care was in fact exercised as required under [the statute], directors are protected by the BJR, no matter how poor their business judgment." *Stahl*, 89 F.3d at 1517. *See also Shields v. Cape Fox Corp*., 42 P.3d 1083, 1091-92 (Alaska 2002) (because the statute "requires a director to use 'the care . . . that an ordinarily prudent person in a like position would use under similar circumstances,'" "liability under the business judgment rule does not differ appreciably from negligence liability."); 3A Fletcher, Cyclopedia Corporations, § 1039, at 45 (1986) ("In order to come within the ambit of the [BJR], directors must be diligent and careful in performing the duties they have undertaken").

(4) Adhering To The Ordinary Negligence Standard Imposed By The Statute Will Not Interfere With Directors' And Officers' Ability To Exercise Business Judgment

In any event, the policy reasons advanced by Defendants and the district court do not justify, much less require, a shield from the ordinary negligence liability imposed by the statute. Contrary to what the district court believed, imposing liability for ordinary negligence would not interfere with the directors' and officers' ability to exercise business judgment. If directors and officers select a particular course of action that is within the range of reasonable options that prudent bank directors and officers in like circumstances would select—*i.e.*, they act with ordinary care—they are protected by the BJR even if that option ultimately results in a loss to the bank. What they are not protected from is liability when they choose a course of action that no reasonable or prudent bank director or officer would ever take—*e.g.*, actions that, as here, violate underwriting standards, the bank's loan policies, or banking regulations. One could hardly argue that such actions involve the use of any business judgment in the first place, since by definition these actions are outside the norm of acceptable business behavior. Thus, an ordinary negligence standard is entirely consistent with the exercise of business judgment.

This Court in *Stahl* similarly explained that an ordinary negligence standard of liability is not incompatible with the business judgment rule:

> The question is frequently asked, how does the operation of the so-called "business judgment rule" tie in with the concept of negligence? There is no

> conflict between the two. When courts say that they will not interfere in matters of business judgment, it is presupposed that judgment — reasonable diligence — has in fact been exercised. A d[i]rector cannot close his eyes to what is going on about him in the conduct of the business of the corporation and have it said that he is exercising business judgment. Courts have properly decided to give directors a wide latitude in the management of the affairs of a corporation provided always that judgment, and that means an honest, unbiased judgment, is reasonabl[y] exercised by them.

89 F.3d at 1517 (citation omitted).

For the same reasons, Defendants are wrong that the BJR would be meaningless if it does not protect against ordinary negligence. For example, the BJR does protect defendants against liability for losses they cause when they are unable to accurately predict the risk or profitability of certain decisions *despite acting with due care*.

Indeed, the very name of the rule makes clear that it protects against errors in the exercise of business *judgment* (*e.g.*, selecting among several reasonable courses of action), not issues that involve no use of judgment or only one course of action, as is the case with ordinary negligence actions, where plaintiffs must show that no prudent or careful person would have done what defendants did. For example, there is no judgment in adding two plus two, as the only choice is four. If a defendant negligently (but in good faith) calculated that two plus two equals five, there is no "judgment" that the business judgment rule could protect. Similarly, bank directors and officers sitting on the loan committee have to follow many internal and industry-wide underwriting standards, as well as applicable statutory and regulatory requirements. Following these objective standards often involves no use of judgment as they allow only one course of action, namely, following these standards. Thus, allowing ordinary negligence claims would not amount to second guessing the directors' business judgment, as there is no exercise of judgment involved in the first place.

C. In Any Event, The Two Georgia Cases On Which The District Court Relied Do Not Impose An Absolute Bar On Ordinary Negligence Claims

Even assuming, *arguendo*, that there were no persuasive evidence that the Georgia Supreme Court would reject the two intermediate cases cited by the district court, those cases still do not require dismissal of FDIC's ordinary negligence count as they did not impose an absolute bar on ordinary negligence claims.

1. First, *Brock Built* did not involve an ordinary negligence claim, and thus by definition cannot have held that ordinary negligence claims are categorically barred by the BJR. Rather, the only claims at issue there were for breach of contract, breach of good faith, and breach of fiduciary duty. The case merely held that in order to show a breach of fiduciary duty, the plaintiff must show a lack of good faith, such as bad faith or abuse of discretion, and determined that in that case, "Brock Built has not alleged conduct that rises to the level of fraud, bad faith or an abuse of discretion *sufficient to establish a claim for breach of fiduciary duty*." 686 S.E. 2d at 431 (emphasis added). Thus, *Brock Built* stands for the unremarka-

ble proposition that a plaintiff must prove *bad faith* to establish a breach of the *fiduciary duty of good faith*. Because such bad faith is needed, mere negligence is not enough to show a breach of the fiduciary duty of good faith. Indeed, ordinary diligence and good faith are two separate requirements of the statute, and the presence of negligence does not necessarily show lack of good faith (*e.g.*, one can mean well but fail to act as an ordinarily prudent person would), just as the presence of bad faith does not necessarily show negligence (*e.g.*, one can be bad but careful). Of course, some directors can act both negligently and in bad faith, as in this case.

If the allegations in *Brock Built* did give rise to an inference of negligence, then the plaintiff there simply chose the wrong cause of action—it sued for breach of the fiduciary duty of good faith when it should have sued for negligence.

It should be noted that the sole Georgia ruling that *Brock Built* cites in support of its application of the business judgment rule is *Flexible Products*, and as we have seen, that case is "distinguishable on its facts" and does not stand for the proposition that the BJR protects defendants as long as they act in good faith, even if they act negligently:

> Citing *Flexible Products Co. v. Ervast*, the wife *argues that the standard of care is not ordinary diligence and that an officer need only act in good faith to avoid liability*. . . . This is inaccurate. OCGA § 14-2-842(a), which governs, requires that to avoid liability, an officer must act in good faith . . . *and with due care* ("[w]ith the care an ordinarily prudent person in a like position would exercise under similar circumstances"). As we state in our opinion above, *this due care is in all material respects identical to the ordinary dili-*

> *gence* defined in OCGA § 51-1-2 . . . . *Flexible Products, supra*, is distinguishable on its facts and is inapplicable.

Rosenfeld, 286 Ga. App. at 68-69 (emphases added).

Moreover, the judge who wrote *Brock Built* was also on the *Rosenfeld* panel, and he concurred in full with the *Rosenfeld* opinion (not only in the judgment), thus demonstrating that *Rosenfeld* correctly read *Flexible Products*. The author of *Brock Built* would not have agreed with *Rosenfeld*'s reasoning in full if *Rosenfeld* were at odds with *Brock Built* and *Flexible Products*. Thus, if there was any disagreement among the panel in *Rosenfeld*, it was certainly not about this issue.

2. At the very least, the operative test these cases announce requires an analysis into whether plaintiff has established bad faith or abuse of discretion—the very analysis that the district court did not perform here: "The business judgment rule affords an officer the presumption that he or she acted in good faith, . . . unless it is established that he or she engaged in fraud, bad faith or an abuse of discretion." *Brock Built*, 300 Ga. App. at 821-22, 686 S.E. 2d at 432. Under this operative test, FDIC has rebutted the business judgment rule's presumption of "good faith" because its allegations give rise to an inference of bad faith or abuse of discretion. As FDIC has shown in its motions below, its allegations with respect to "Defendants' decision to disregard the bank's underwriting policies and a Georgia statute that set strict limits on the amount of loans that could be given to the same person or entity gives rise to an inference of bad faith. One cannot in 'good faith'

decide to disregard the bank's lending policies by allowing loans exceeding the lending limits by several orders of magnitude. The allegations also support an inference that Defendants abused their discretion, since they had no discretion to violate the Georgia statute." R.E. No. 92 at 10. Thus, the FDIC's complaint includes not only allegations supporting claims of negligence and gross negligence (the district court held that FDIC adequately alleged gross negligence), but also allegations that give rise to an inference that Defendants acted in bad faith and abused their discretion.

II. The No Duty Rule Bars Defendants' Affirmative Defenses

A. Under *Motorcity*, The No Duty Rule Is Unaffected By *O'Melveny* If It Predated FIRREA

Unaware of this Court's decisions in *Motorcity*, the district court initially held that that the Supreme Court's decision in *O'Melveny* foreclosed application of any common law, including the federal common law no duty rule, after the passage of FIRREA. On reconsideration, the district court agreed, however, that "[i]n light of *Motorcity*, it appears to the Court that if the no duty rule is determined to be a matter of existing federal common law [before FIRREA], in the absence of a statutory purpose to the contrary, said rule would survive the *O'Melveny* holding." R.E. 139 at 33.

In *Motorcity I*, this Court unequivocally held that *O'Melveny* governed only the *creation* of *new* federal common law, not the *retention* of *pre-existing* common law: "The question presented in *O'Melveny* was whether the federal courts should *create a new* federal common-law doctrine. . . . In this case, the question presented is not whether a *new* rule should be invented, but whether Congress *intended to abrogate the previously-established federal common-law D'Oench* doctrine . . . . The *O'Melveny* analysis does not apply to this question." *Motorcity of Jacksonville, Ltd. v. Southeast Bank, N.A.* (*Motorcity I*), 83 F.3d 1317, 1330 (11th Cir. 1996) (en banc) (first two emphases in original; third emphasis added). The en banc Court explicitly held that preexisting federal common law in place when FIRREA was enacted survived and should be applied. And upon revisiting the issue in *Motorcity II*, the en banc court was again unequivocal: "we conclude that the appropriate analysis for the statutory abrogation issue presented in this case is that articulated in *United States v. Texas*, and not that articulated in *Atherton* and *O'Melveny*." *Motorcity II*, 120 F.3d 1140, 1144 (11th Cir. 1997) (en banc) (holding that *Atherton v. FDIC*, 519 U.S. 213 (1997) and *O'Melveny* applied solely to the *creation* of new federal common law, not to preexisting common law).

Defendants make much ado about the statement in *O'Melveny* that there is no general federal common law. R.E. 110 at 20. But clearly this isolated statement in *O'Melveny* cannot be read literally, otherwise neither the Supreme Court in *United States v. Texas*, 507 U.S. 529 (1993), nor this Court in *Motorcity*, would have applied federal common law. Indeed, *Motorcity* rejected the argument that after *O'Melveny*, federal common law no longer applies. "Congress legislates against the background of the existing common law, and [] Congress has legislated with an expectation that that law will apply" *unless* Congress purposely intended to change that law. *Motorcity I*, 83 F.3d at 1331.

B. There Is Only One No Duty Rule, And It Predated The Enactment Of FIRREA

As the district court agreed, the no duty rule is unaffected by *O'Melveny* if it predates FIRREA. R.E. 139 at 33. It does. In fact, it has been the law for almost a century that banking regulators have no duty to bank directors, officers, or shareholders, but only a duty to protect the integrity of the banking system and the public good.[37] As the Ninth Circuit held, by 1978, the application of this rule was al-

[37] *Harmsen v. Smith*, 586 F.2d 156, 157-8 (9th Cir. 1978) ("the federal scheme of bank regulation creates no duty from the [regulator] to shareholders and directors of national banks"); *First State Bank of Hudson County v. United States*, 599 F.2d 558, 562-66 (3d Cir. 1979) (holding that the FDIC's duty is to safeguard the deposit-insurance system and owes no duties to the bank or its directors and officers); *State of North Dakota v. Merchants Nat'l Bank & Trust Co*., 634 F.2d 368, 379 n. 20 (8th Cir.1980) (in regulating banks pursuant to the National Bank Act, the Comptroller of the Currency has no duty to a bank or its shareholders); *In re Franklin Nat'l Bank Sec. Litig.*, 445 F. Supp. 723, 731 (E.D.N.Y. 1978) (bank examination is primarily for the benefit of the government and gives rise to no duty extending to the bank or its officers, directors, or shareholders); *FDIC v. Dempster*, 637 F. Supp. 362, 367 (E.D. Tenn. 1986) (FDIC has no duty to the officers and directors of a bank; bank examinations, although incidentally benefiting the bank, are intended primarily for the protection of the insurance fund); *FDIC v. Jennings*, 615 F. Supp. 465, 470 (W.D. Okla. 1985) (FDIC has no duty arising from regulation which runs to a bank's privately retained auditors); *FSLIC v. Alexander*, 590 F. Supp. 834, 838 (D. Haw. 1984) (FSLIC has no duty arising from regulation which extends to directors of a savings and loan); *FDIC v. Butcher*, 660 F. Supp. 1274,

ready well-established: "[w]e agree with every other court that has considered the issue that the federal scheme of bank regulation creates no duty from the [regulator] to shareholders and directors of national banks." *Harmsen v. Smith*, 586 F.2d 156, 157-8 (9th Cir. 1978). The rule has been applied to FDIC as early as 1979, and consistently thereafter. *See First State Bank of Hudson County v. United States*, 599 F.2d 558, 562-66 (3d Cir. 1979) (holding that the FDIC's duty is to safeguard the deposit-insurance system and owes no duties to the bank or its directors and officers).[38]

This rule was applied equally pre-FIRREA to bar defenses such as failure to mitigate and contributory negligence asserted by directors and officers against the receiver, because just as with bank regulators, Congress created the receiver to

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1282 (E.D. Tenn. 1987) (FDIC has no duty to discover or report fraud or weakness to a bank); *Social Security Adm. Baltimore Fed. Credit Union v. United States*, 138 F. Supp. 639, 647 (D. Md. 1956) (purpose of examination is to supply government with information, not to verify accounts and discover defalcations); *FSLIC v. Roy*, 1988 WL 96570 (D. Md. 1988) (receiver owes no duty to directors and officers); *FDIC v. Carlson*, 698 F. Supp. 178 (D. Minn. 1988) (same); *FSLIC v. Burdette*, 718 F. Supp. 649 (E.D. Tenn. 1988) (same); *FDIC v. Renda*, 692 F. Supp. 128, 135-36 (D. Kan. 1988) (same); *FDIC v. Berry*, 659 F. Supp. 1475 (E.D. Tenn. 1987) (examinations are for the sole benefit of FDIC and insurance fund).

Indeed, as early as 1928 courts recognized that Congress did not intend for regulators to have a duty to others in regulating a bank. *Jarvis v. Kepp*, (E.D. Ill., Wham, J., 1928) (unreported), *cited and discussed in Social Security Adm.*, 138 F. Supp. at 647 (bank examinations were intended for the benefit of the examining authority and were not intended by Congress as a direct protection of others).

[38] *See supra* note 37 (citing at least eleven pre-FIRREA decisions applying the no duty rule to FDIC).

"promot[e] the stability of and confidence in the nation's banking system," *Gunter v. Hutcheson*, 674 F.2d 862, 870 (11th Cir. 1982), not to safeguard the rights of bank directors and shareholders. *See FDIC v. Carlson*, 698 F. Supp. 178 (D. Minn. 1988); *FSLIC v. Burdette*, 718 F. Supp. 649 (E.D. Tenn. 1988); *FDIC v. Renda*, 692 F. Supp. 128, 135-36 (D. Kan. 1988); *FSLIC v. Roy*, 1988 WL 96570 (D. Md. 1988).

1. Although FDIC cited numerous decisions applying the no-duty rule before the enactment of FIRREA (including three pre-FIRREA appellate decisions dating as far back as 1979),[39] the district court was concerned that these decisions were insufficient to demonstrate that the no duty rule was established before FIRREA because the vast majority of them applied the rule to FDIC or other banking regulators in their *corporate capacity*, and only four of them applied the rule to FDIC *as receiver*. These concerns were unfounded, as the no duty rule makes no such "distinctions between the various capacities in which [FDIC] operates." *FDIC v. Bierman*, 2 F.3d 1424, 1439 (7th Cir.1993).

First, the cases have found that the no duty rule applies regardless of whether the affirmative defenses at issue challenge the disposition of the assets of the failed bank by FDIC as receiver, or by FDIC in its corporate capacity, which sometimes purchases the assets of the failed bank from the receiver. For example, in

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[39] *See supra* note 37.

adopting as to FDIC in its corporate capacity the no-duty-to-mitigate rule that was first established with respect to FDIC as receiver, the Seventh Circuit rejected "distinctions between the various capacities in which [FSLIC/FDIC/RTC] operates or the spheres of activity in which it has been engaged" for purposes of the no duty rule. *Bierman*, 2 F.3d at 1439 (citing other cases rejecting such distinctions).

Second, the courts applying the no duty rule to the receiver cite the cases applying it to FDIC in its corporate capacity and vice-versa, and talk only of one no duty rule. The unity of the doctrine belies Defendants' attempt to split the doctrine based on FDIC's capacities so as to make it appear less established.

Similarly, the common law *D'Oench* doctrine that this Court continued to apply and refine in *Motorcity* was created by the Supreme Court with respect to FDIC *in its corporate capacity*, but that did not make the doctrine any less established when applied *to the receiver* as in *Motorcity*. Just like there is only one *D'Oench* doctrine regardless of the capacity in which FDIC acts, there is only one no duty rule regardless of the capacity in which FDIC acts. Moreover, the district court's attempt to distinguish the numerous pre-FIRREA cases that involved FDIC-Corporate or other banking agencies fails because these cases do not apply a different rule—they simply apply the same no duty rule to different facts.

Third, the fact that the refinement of an existing common law doctrine happens only a few years before FIRREA, or even after FIRREA, does not mean that the doctrine does not predate FIRREA. Here, the pre-FIRREA cases applying the no duty doctrine to the receiver merely refined the pre-existing no duty doctrine, they did not create a new doctrine. Refining preexisting common law is not the same as creating new federal common law.

Indeed, *Motorcity* could not have been decided the way it was decided *if* a common law rule must have existed in its precise refinement before FIRREA. *Motorcity* itself involved a refinement of the *D'Oench* doctrine after FIRREA. *Motorcity* relied on *no* pre-FIRREA cases involving the particular application/refinement of the *D'Oench* doctrine that was at issue there.[40]

Fourth, *Motorcity* held that the applicable presumption is that pre-existing common law is retained unless Congress indicated to the contrary in FIRREA; it is not, as the district court intimated, that common law is abrogated unless it was "well-established" (R.E. 139 at 33-34). *See Motorcity I*, 83 F.3d at 1331 ("Congress legislates against the background of the existing common law, and [] Congress has legislated with an expectation that that law will apply" *unless* Congress purposely intended to change that law). And here, this Court has already held that

[40] Specifically, the *D'Oench* doctrine bars claims based on agreements that are not recorded in the bank's records (*e.g.*, oral agreements). *Motorcity* considered whether the repayment by a borrower of the underlying loan prior to filing a tort claim precluded the FDIC from invoking the *D'Oench* doctrine because no specific asset was diminished by Motorcity's claim. 83 F.3d at 1334-5. Relying solely on *post*-FIRREA decisions from a number of circuits, *Motorcity* applied the *D'Oench* doctrine to bar the borrower's tort claims. *Id.* at 1336.

FDIC benefits from this presumption, as Congress evidenced no intent in FIRREA to displace existing federal common law involving FDIC as receiver (whether related to *D'Oench* or to other issues). Rather, Congress intended "to give the FDIC power to take all actions necessary to resolve the problems posed by a financial institution in default." *Id.* at 1332. "[T]he evident purpose of FIRREA [is] to enhance the FDIC's ability to address the problems created by the increasing number of financial institutions in default," not to remove existing protections under the common law. *Id.* at 1333.

2. The district court also suggested that *Motorcity* and *Texas* may be distinguishable because in those cases the common law was established by a Supreme Court decision, whereas there is no such Supreme Court decision on point here. R.E. 139 at 34. But the test announced by *Motorcity* and *Texas* is whether the common law at issue predated FIRREA, not whether it was established by the Supreme Court. While those cases happened to involve common law adopted by the Supreme Court, they did not require it to be so adopted—nor could they reasonably be expected to have so required given the scarcity of Supreme Court review.

In any event, whether there is a Supreme Court decision addressing the no duty rule only goes to the question of whether the no duty rule is binding on this Court, not to whether it existed pre-FIRREA. As discussed below, because there is no Supreme Court precedent on this issue, this Court is not bound to follow the common law decisions of other jurisdictions. Yet at the same time there is also "no reason to depart from the majority rule" applying the no duty rule in this context. *FDIC v. Oldenburg*, 38 F.3d 1119, 1121 (10th Cir.1994).

The district court also appears to have suggested that the cases applying the rule to the receiver were not sufficiently old, even if they did predate FIRREA. R.E. 139 at 34. But there is no support for the proposition that a rule can only be well-established if it was adopted decades ago, like the *D'Oench* doctrine at issue in *Motorcity*. In any event, even if that proposition were correct, it is certainly met here, where FDIC has cited cases applying the no duty rule as early as 1928, 1956, and 1978-79.[41] While these decades-old cases did not involve the same particular application of the rule as here, neither was the particular application of the *D'Oench* doctrine that was at issue in *Motorcity* applied when that doctrine was crafted in 1942. If anything, this case is even stronger than that in *Motorcity*: There were no pre-FIRREA cases involving the particular application of the *D'Oench* doctrine that was at issue in *Motorcity*, whereas here there are at least four cases applying the no duty rule to bar affirmative defenses against the receiver pre-FIRREA.

3. Finally, the district court remarked that the FDIC has also cited a number of decisions in *O'Melveny*, but the Supreme Court did not deem them sufficient to

[41] *See supra* note 37.

warrant the creation of federal common law. R.E. 139 at 33-34. Presumably the district court meant that the decisions FDIC cited here must be insufficient as well. But FDIC in *O'Melveny* did not cite federal court decisions applying federal common law pre-FIRREA. Rather, it cited state court decisions applying, under state law, the rule that FDIC wanted the Supreme Court to adopt as a matter of federal common law. It is these state court decisions that the Supreme Court deemed insufficient to support creation of federal common law.[42] Thus, this part of *O'Melveny* is inapposite here as well, because the decisions FDIC cites here are federal, not state, and in any event, FDIC is citing them not in support of creating new federal common law, but in support of showing that the federal common law no duty rule predated FIRREA. As shown above, it did.

C. There Is No Reason To Depart From The "Clear Majority" Rule On This Issue

1. Finally, the district court incorrectly predicted that even if the no duty rule predated FIRREA, this Court would decline to apply it. All three appellate courts presented with the issue have decided to follow the no duty rule, providing

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[42] *O'Melveny*, 512 U.S. at 84 (FDIC "attempts to show that nonattribution to the corporation of dishonest officers' knowledge is the rule applied in the vast bulk of decisions from 43 jurisdictions, ranging from Rhode Island to Wyoming. . . . The supposed relevance of this is set forth in a footnote: 'It is our position that federal common law does govern this issue, but that the content of the federal common law rule corresponds to the rule that would independently be adopted by most jurisdictions.' Brief for Respondent 15, n. 3. If there were a federal common law on such a generalized issue (which there is not), we see no reason why it would necessarily conform to that 'independently . . . adopted by most jurisdictions.'").

numerous reasons why such rule is necessary and appropriate. Departure from the "clear majority" rule (*FDIC v. Oldenburg*, 38 F.3d 1119, 1121 (10th Cir.1994)) is unwarranted in this case as well.

As the Tenth Circuit explained, although "[t]here is some debate over whether the officers and directors of a failed financial institution can assert the affirmative defenses of contributory negligence and mitigation of damages against the FDIC," "the clear majority rule is that these defenses are not available." *Id*.[43]

The Tenth Circuit "s[aw] no reason to depart from the majority rule," pointing out that the reasoning of the majority rule was "sound" and "[i]ndeed . . . noth-

[43] In addition to the pre-FIRREA cases cited above, the no duty rule continued to have widespread application following enactment of FIRREA. *See*, *e.g.*, *RTC v. Kerr*, 804 F. Supp. 1091 (W.D. Ark. 1992); *RTC v. Greenwood*, 798 F. Supp. 1391 (D. Minn. 1992); *FSLIC v. Shelton*, 789 F. Supp. 1367 (M.D. La. 1992); *FDIC v. Isham*, 782 F. Supp. 524 (D. Colo. 1992); *FDIC v. Crosby*, 774 F. Supp. 584 (W.D. Wash. 1991); *FDIC v. Stanley*, 770 F. Supp. 1281 (N.D. Ind. 1991); *FDIC v. Stuart*, 761 F. Supp. 31 (W.D. La. 1991); *FDIC v. Baker*, 739 F. Supp. 1401 (C.D. Cal. 1990). Of particular relevance here, an overwhelming number of decisions explicitly hold that *O'Melveny* does not affect that pre-existing rule, which continues to apply. *See*, *e.g.*, *FDIC v. Healey*, 991 F. Supp. 53, 60 (D. Conn. 1998) ("*O'Melveny* never addressed the issue presented in the instant case"); *FDIC v. Raffa*, 935 F. Supp. 119, 125 (D. Conn. 1995) ("The *O'Melveny* Court did not consider, nor address, whether state law affirmative defenses implicating discretionary actions of the FDIC could be raised against the FDIC"); *RTC v. Williams*, No. 93-cv-2018-GTV, 1995 WL 261588 at *1 (D. Kan. April 25, 1995) ("The *O'Melveny* court did not address the issue of whether defenses based upon the post-closing activities of the RTC could be asserted as affirmative defenses"); *RTC v. Abraham*, No. 93-cv-536, slip op. at 2 (M.D. La. Oct. 25, 1994) ("the opinion does not apply to defenses based on government conduct"); *RTC v. Alshuler*, No. 93-cv-992, slip op. at 5 (S.D. Cal. Oct. 16, 1994) ("[U]nlike in *O'Melveny*, an identifiable federal interest and policy exists with respect to the conduct of the RTC in its management and disposition of the assets of a failed institution: the public policy implicit in the provisions of FIRREA with respect to the RTC's conduct and the vesting of discretion in the RTC"); *RTC v. Edie*, No. 94-cv-772, 1994 WL 744672 at *3 (D. N.J. Oct. 4, 1994) ("*O'Melveny*'s narrow holding leaves the no duty rule undisturbed"); *RTC v. Moskowitz*, No. 93-cv-2028, 1994 WL 16190856 at *6 (D.N.J. Aug. 12, 1994) ("The [*O'Melveny*] Court did not address defenses implicating the actions of the RTC, either pre- or post-receivership.").

ing 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 [FDIC] officials in attempting to save a failing institution—a risk which would never have been created but for defendants' wrongdoing in the first instance." *Id*. (citation omitted).

All three appellate courts to consider the issue have followed this majority rule. These appellate cases rejected affirmative defenses such as those here "that the losses suffered by the bank . . . were proximately caused not by any wrongdoing on the part of the directors but rather by the FDIC's failure to mitigate losses by shirking collection efforts on the accounts." *FDIC v. Bierman*, 2 F.3d 1424, 1438-40 (7th Cir.1993); *see also FDIC v. Mijalis*, 15 F.3d 1314, 1323-24 (5th Cir. 1994); *Oldenburg*, 38 F.3d at 1121. The appellate cases deemed these affirmative defenses barred because of "the discretionary function exception to the Federal Tort Claims Act and the lack of a duty to the wrongdoers [under federal common law]." *Mijalis*, 15 F.3d at 1323 (citing *Bierman*, 2 F.3d 1424, 1438-41).

2. The district court nevertheless predicted that given the opportunity to address the no duty rule, this Court would decline to follow the majority rule because it has previously declined to apply federal common law to FDIC in four instances. This contention is easily disposed of, as this Court has never indicated that it would foreclose across the board federal common law with respect to FDIC's conduct in disposing of the assets of the failed bank—indeed, it has created such federal

common law in *Gunter v. Hutcheson*, 674 F.2d 862 (11th Cir. 1982), and it has also extended/applied to FDIC and FSLIC as receiver the common law *D'Oench* doctrine created for FDIC in its corporate capacity. *FSLIC v. Two Rivers Assocs., Inc.*, 880 F.2d 1267, 1274, 1276-77 (11th Cir. 1989).

In *Two Rivers*, this Court expressly rejected the proposition also espoused by the district court here that adoption of federal common law is inappropriate with respect to FDIC as receiver because federal policy only protects FDIC in its corporate, not receivership capacity (R.E. 139 at 37). This Court explained that the statement in *Gunter* "that federal policy is not strong when the FDIC is acting in its receivership capacity" has been undercut by the Supreme Court's intervening decision in *Langley v. FDIC*, 484 U.S. 86 (1988), which demonstrates "that such a conclusion is unwarranted." *Two Rivers*, 880 F.2d at n.15.

Moreover, the four cases cited by the district court are completely inapposite:

Gibson v. RTC, 51 F.3d 1016, 1025 (11th Cir.1995), actually undercuts the district court's argument, as it held that a federal common law doctrine (the bar on equitable estoppel claims against the government) is applicable to FDIC as receiver. This Court expressly referred to the receiver as the "government," and distinguished *O'Melveny* in detail, belying the district court's reliance here on the out-of-context statement in *O'Melveny* that the receiver is not the government.[44]

The 1984 decision in *FDIC v. Harrison*, 735 F.2d 408, 411 (11th Cir.1984), is similarly distinguishable because it relied on the erroneous pre-1988 proposition that there is no federal policy protecting FDIC when it is acting in its receivership capacity. As this Court later explained, the pre-*Langley* idea "that federal policy is not strong when the FDIC is acting in its receivership capacity" has been undercut by the Supreme Court's intervening decision in *Langley*, which demonstrates "that such a conclusion is unwarranted." *Two Rivers*, 880 F.2d at n.15. *Gibson*, which bars equitable estoppel claims against FDIC receiver absent extreme circumstances, also undercuts *Harrison*'s conclusion that such claims are permissible against the receiver.

RTC v. Artley, 28 F.3d 1099 (11th Cir.1994) did not reject application of a federal common law rule applied by a majority of jurisdictions as the district court did here. Rather, *Artley* followed the majority rule that "[w]here Congress has provided no limitations period for a federal claim . . . a court must borrow the applicable limitations period and tolling rules from the state." *Id*. at 1102-03.

Finally, *FDIC v. Jenkins*, 888 F.2d 1537, 1546 (11th Cir. 1989) is inapposite because the Court found that there was no conflict with federal policy in that case

[44] FDIC is a government corporation established under 12 U.S.C. § 1811.

that necessitated the creation of a federal common law rule. But simply because there was no significant conflict with federal policies that justified the creation or application of federal common law in *Jenkins* or in *Artley* does not mean that such conflict does not exist in this case.

Rather, as another court explained, the state affirmative defenses at issue here present precisely the type of significant conflict with *discretionary* governmental functions that the Supreme Court has found sufficient to warrant application of a federal common law rule in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). "Just as in *Boyle* (as recognized by *Atherton*), the potential for a 'significant conflict' exists in this case" because "[t]he defenses of failure to mitigate damages and contributory negligence would require the Court to scrutinize discretionary decisions made by the FDIC after assuming receivership of the Bank" and "FIRREA specifically grants discretion to the FDIC in operating the institution and in liquidating its assets. *See* 12 U.S.C. § 1821(d)." *Healey*, 991 F. Supp. at 61.

As the Seventh Circuit explained in *Bierman*, the decisions involved in selling and disposing of the assets of the failed bank are discretionary and should not be subject to judicial second-guessing about whether FDIC obtained the highest possible value for the assets in question. *See Bierman*, 2 F.3d at 1441 ("we think it clear that the FDIC was performing a discretionary function" because of "[t]he responsibilities that devolve onto the FDIC when a bank has failed require quick and complex decision-making").

This is not only because how best to maximize value of a failed institution's assets itself involves discretionary, policy-making functions, but also because value maximization is only one of the considerations that Congress charged FDIC with balancing. For example, the same statutory provision that requires FDIC to maximize value also requires FDIC to ensure that the sale of the failed bank's assets "maximizes the preservation of the availability and affordability of residential real property for low- and moderate-income individuals" (12 U.S.C. § 1821 (d)(13)(E)) (quoted in full in R.E. 139 at 49-50). FDIC balances these and many other factors in deciding what prices to accept, and when and how to structure the sale of a bank's assets.

Moreover, contrary to the district court's belief that imposing a duty to mitigate is fully consistent with FDIC's value maximization objectives (R.E. 139 at 49-50), such a duty to mitigate would actually be an obstacle to FDIC's accomplishment of its statutory objectives. The statute does not require FDIC to minimize losses on *each individual* asset such as the Loss Loans at issue in this litigation. The statute only requires FDIC to minimize *overall* losses in a particular receivership.

Mitigating losses on individual assets such as the Loss Loans at issue here could impede the FDIC's ability to maximize value for all assets in the aggregate. What price is better for the part (here the Loss Loans) is not necessarily better for the whole (here, the entire receivership). For example, FDIC may be able to obtain the best price only by bundling the assets in question with non-performing assets that it could not sell otherwise, and discounting them. Imposing a duty to mitigate losses on individual loans would thus interfere with the FDIC's ability to bundle loans and to otherwise effectuate the purchase and assumption transactions that have helped safeguard the stability of the banking system for the past decades.

That the district court rejected FDIC's distinction between aggregate and individual losses without any explanation (R.E. 139 at 49) further underscores that courts are ill-suited to second-guess the complex economic, administrative, and policy considerations involved in setting the price for a failed bank's assets.

CONCLUSION

For the foregoing reasons, the district court's rulings on the questions presented on appeal should be reversed.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). This brief contains 13,415 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Fed. Cir. R. 32(b). Microsoft Word 2003 was used to calculate the word count.

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