No. 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
U.S. District Court for the Northern District of Georgia,
Case No. 11-cv-0111-SCJ (Jones, J.)

BRIEF OF APPELLEES

David L. Balser
Tracy Klingler
Merritt E. McAlister
E. Claire Carothers
David M. Barnes
KING & SPALDING LLP
1180 Peachtree Street, NE
Atlanta, Georgia 30309
(404) 572-4600

Jeffrey S. Bucholtz
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006
(202) 737-0500

Counsel for Defendant-Appellee Jack S. Murphy

Dated: April 17, 2013

*additional counsel listed inside cover

James B. Manley, Jr.
Jill Kuhn
Jeffrey Ronald Baxter
MCKENNA LONG & ALDRIDGE
303 Peachtree Street, NE
One Peachtree Center, Suite 5300
Atlanta, Georgia 30308

Attorneys for Defendants Joseph J. Ernest, Donald C. Hartsfield, and Gerald O. Reynolds

Randy Edwards
Paul A. Piland
COCHRAN & EDWARDS, LLC
2950 Atlanta Road SE
Smyrna, GA 30080

Attorneys for Defendant Steven M. Skow

Frank M. Young, III
Kirk D. Smith
HASKELL SLAUGHTER YOUNG & REDIKER
2001 Park Place North
1400 Park Place Tower
Birmingham, AL 35203

Attorneys for Defendant Clinton M. Day

Richard A. Mitchell
Edward A. Marshall
ARNALL GOLDEN GREGORY LLP
171 17th Street, NW
Suite 2100
Atlanta, Georgia 30363

Attorneys for Defendant Douglas G. Ballard, II

Robert R. Ambler, Jr.
James E. Connelly
John G. Perry
WOMBLE CARLYLE SANDRIDGE & RICE, LLC
271 17th Street, NW, Suite 2400
Atlanta, GA 30363

Attorneys for Defendant Alan K. Arnold

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The undersigned counsel of record for 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 ("Directors"), in compliance with Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1, certifies that the certificated of interested persons and corporate disclosure statement submitted with the opening brief for the Federal Deposit Insurance Corporation ("FDIC") is accurate, but incomplete. The following persons should be added as interested persons in this matter:

Barnes, David M., counsel for Appellee Jack S. Murphy

Bucholtz, Jeffrey S., counsel for Appellee Jack S. Murphy

McAlister, Merritt E., counsel for Appellee Jack S. Murphy

/s/ Jeffrey S. Bucholtz
Jeffrey S. Bucholtz

Counsel for Defendant-Appellee Jack S. Murphy

STATEMENT REGARDING ORAL ARGUMENT

This is an interlocutory appeal arising out of an action that Appellant Federal Deposit Insurance Corporation, acting as receiver of Integrity Bank of Alpharetta, Georgia, brought against Appellees, who are former directors and officers of the Bank. There are two issues on appeal. The first issue involves the proper interpretation and application of Georgia's business judgment rule. That state-law issue is controlled by two recent Georgia Court of Appeals decisions. The second issue involves the FDIC's request to create a federal common-law rule to defeat Georgia's requirement that a tort plaintiff take reasonable steps to mitigate the damages that it demands. That issue is also governed by controlling precedent: the Supreme Court's decision in *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994), and this Court's decision in *Motorcity of Jacksonville, Ltd. v. Southeast Bank N.A.*, 120 F.3d 1140 (11th Cir. 1997) (en banc), which together hold that the FDIC's claims must proceed under state law unless a particular federal common-law rule was "previously established and long-standing" before Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183. As a result, Appellees respectfully submit that the Court may find that oral argument is unnecessary.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

* Authorities upon which we chiefly rely are marked with asterisks

Statutes

Rules

Other Authorities

TABLE OF RECORD EXCERPTS

STATEMENT OF THE ISSUES

1. Whether Georgia's business judgment rule, which Georgia's courts have held insulates a corporate director from liability except where he has acted in bad faith, perpetrated a fraud, or abused his discretion, bars ordinary negligence claims. *See Brock Built, LLC v. Blake*, 300 Ga. App. 816, 686 S.E.2d 425 (2009); *Flexible Prods. Co. v. Ervast*, 284 Ga. App. 178, 643 S.E.2d 560 (2007).

2. Whether the FDIC is exempt from Georgia's requirement that a tort plaintiff take reasonable steps to mitigate its losses, on the theory that such an exemption was "previously established and long-standing" as a matter of federal common law when Congress enacted FIRREA in 1989. *Motorcity of Jacksonville, Ltd. v. SE Bank N.A.*, 120 F.3d 1140, 1143 (11th Cir. 1997) (en banc); *see O'Melveny & Myers v. FDIC*, 512 U.S. 79, 114 S. Ct. 2048 (1994).

STATEMENT OF THE CASE

This action involves the failure of Integrity Bank of Alpharetta, Georgia, one of the many casualties of the worst economic crisis to hit this country in decades. Before the economic crisis, the FDIC consistently rated the Bank's asset quality and composite strength very highly. In June 2007, the FDIC reversed course and downgraded the Bank, and it later assumed control of the Bank and brought this action against Appellees, the Bank's former inside and outside directors.[1] The FDIC seeks to hold the Directors liable for the Bank's losses on certain loans on theories of negligence and gross negligence (Count I) and breach of fiduciary duty (Count II).

This interlocutory appeal involves two narrow issues. The first is whether Georgia's business judgment rule—a rule that "affords an officer [or director] the presumption that he or she acted in good faith, and absolves the officer [or director] of personal liability unless 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 430—bars the FDIC's claims to the extent they allege only ordinary negligence. The second is whether the FDIC is exempt from Georgia's requirement that tort plaintiffs mitigate their losses before trying to recover those losses from others.

The district court agreed with the Directors on both issues. Two Georgia Court of Appeals decisions hold that "[a]llegations amounting to mere negligence, carelessness, or 'lackadaisical performance' are insufficient as a matter of law" to overcome the business judgment rule. *Id.* at 822, 686 S.E.2d at 430-31; *accord Flexible Prods.*, 284 Ga. App. at 182, 643 S.E.2d at 645-65. Accordingly, the district court dismissed the FDIC's claims to the extent they sound only in ordinary

[1] The defendants ("the Directors") are Steven Skow, Alan Arnold, Douglas Ballard, Clinton Day, Joseph Ernest, Donald Hartsfield, Jack Murphy, and Gerald Reynolds.

negligence. R.E. 84 at 18-19. It also refused to grant the FDIC summary judgment on the Directors' state-law failure-to-mitigate affirmative defense, holding that no such exemption was established as a matter of federal common law before Congress enacted FIRREA and thus the FDIC must, as the Supreme Court instructed in *O'Melveny*, "work out its claims under state law." 512 U.S. at 87, 114 S. Ct. at 2054; *see* R.E. 139 at 48-51. At the FDIC's request, the district court certified its rulings for interlocutory appeal under 28 U.S.C. § 1292(b), and this Court granted the FDIC's petition for permission to appeal.

A. Directors' Liability Under Georgia Law and the Business Judgment Rule.

The first issue in this appeal involves the application of the business judgment rule—a fundamental corporate law doctrine that operates as both a procedural guide for litigants and a substantive "protect[ion]" for corporate officers and directors. *Brock Built*, 300 Ga. App. at 822, 686 S.E.2d at 430 (citation omitted). The business judgment rule is a standard of judicial review that shields a director from liability unless a plaintiff can overcome the presumption that the director acted on an informed basis, in good faith, and in the honest belief that his actions were taken in the best interests of the company. *Id.* The rule works in connection with the limited duties that a corporate fiduciary owes to the corporation to insulate a director from liability for ordinary negligence.

Under Georgia law, which generally tracks the leading authority on corporate law, Delaware,[2] a corporate fiduciary owes three principal obligations to the corporation and its shareholders. *See Milton Frank Allen Publ'ns v. Ga Ass'n of Petroleum Retailers*, 224 Ga. 518, 527-28, 162 S.E.2d 724, 730 (1968). The first and most basic duty is the director's "duty of obedience," which requires that a director not knowingly exceed the bounds of the corporate charter and the other legal documents establishing his authority. *See id.* As the FDIC does not allege that the Directors engaged in *ultra vires* conduct, this duty is not at issue here.

The other two duties—the "duty of loyalty" (sometimes referred to as the "duty of good faith") and the "duty of care"—are the core duties regulating the conduct of corporate fiduciaries. The duty of loyalty requires a director's "undivided good faith" as a "fiduciar[y] and trustee[]" as he works to advance the corporate interest. *Milton Frank*, 224 Ga. at 528, 162 S.E.2d at 730; *see also SIPCA Holdings S.A. v. Optical Coating Lab., Inc.*, No. 15129, 1997 WL 10263, at *4 (Del. Ch. Jan. 6, 1997). A director breaches the duty of loyalty by acting in a manner he knows is not in the corporate interest or by consciously failing to act in

[2] When deciding issues of Georgia corporate law, Georgia courts—including the Georgia Supreme Court—routinely look to the courts of Delaware for guidance. *See, e.g.*, *Grace Bros. v. Farley Indus.*, 264 Ga. 817, 818–19, 450 S.E.2d 814, 816 (1994); *Phoenix Airline Servs. v. Metro Airlines, Inc.*, 260 Ga. 584, 284–85, 397 S.E.2d 699, 701 (1990); *Millsap v. Am. Family Corp.*, 208 Ga. App. 230, 231–32, 430 S.E.2d 385, 387 (1993).

a manner he knows would be in the corporate interest—*e.g.*, self-dealing or a conscious abdication of duty. *See, e.g., In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 67 (Del. 2006); *Hilb, Rogal & Hamilton Co. of Atl., Inc. v. Holley*, 295 Ga. App. 54, 57-58, 670 S.E.2d 874, 877 (2008); *Parks v. Multimedia Tech.*, 239 Ga. App. 282, 289, 520 S.E.2d 517, 521 (1999).

By contrast, the duty of care covers every aspect of a director or officer's conduct, including actions taken in good faith. In Georgia, the duty of care requires directors to "discharge their duties … with the care of an ordinarily prudent person in a like position." *Brock Built,* 300 Ga. App at 821, 686 S.E.2d at 430 (citing O.C.G.A. §§ 14-2-830(a), 14-2-842(a)).[3] Delaware employs a nearly identical standard: "The … duty of care requires that directors … 'use that amount of care which ordinarily careful and prudent men would use in similar circumstances.'" *In re Walt Disney Co.*, 907 A.2d 693, 749 (Del. Ch. 2005).

Despite the seemingly expansive scope of this language, the duty of care is litigated far less often than the duty of loyalty. This is due in large part to the fact that both Georgia and Delaware have adopted the business judgment rule to protect

[3] The provisions of the Georgia Business Corporation Code cited by *Brock Built*, which apply to directors and officers of Georgia corporations as a general matter, are, as the district court noted, "essentially identical" to the provision at issue here (O.C.G.A. § 7-1-490), which applies to directors and officers of Georgia's banks. R.E. 139 at 5 n.6; *see* O.C.G.A. § 7-1-490 (defining the standard of care as that "diligence, care, and skill which ordinarily prudent men would exercise under similar circumstances").

directors from lawsuits challenging their business decisions. *See, e.g.*, *TSG Water Res. v. D'Alba & Donovan Cert. Pub. Accountants*, 260 F. App'x 191, 197 (11th Cir. 2007) (applying Georgia law); *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984). The rule imposes a legal "presumption that [directors] have acted on an informed basis, in good faith and in honest belief that the action taken was in the best interests of the company," and insulates their actions from judicial review unless the plaintiff alleges facts to overcome the presumption. *Brock Built*, 300 Ga. App. at 820-21, 686 S.E.2d at 430 (quoting *TSG Water*, 260 F. App'x at 197).[4]

In this sense, the rule "operates as both a procedural guide for litigants and a substantive rule of law." *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1162 (Del. 1995) (citation omitted). As a "procedural guide," the rule emphasizes that the burden falls squarely on the plaintiff to overcome the rule's presumption. *Id.* When a plaintiff is challenging the *substance* of a business decision (as opposed to the process by which it was reached), the plaintiff must show that the decision was "egregious," lacked "any rational business purpose," constituted a "gross abuse of discretion," or was so thoroughly defective that it carries a "badge of fraud." *In re*

[4] Delaware is the source of the modern incarnation of the business judgment rule, and Delaware's rule is virtually identical to Georgia's. *See Aronson*, 473 A.2d at 812 ("The business judgment rule … is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.").

J.P. Stevens & Co., 542 A.2d 770, 780-81 n.5 (Del. Ch. 1988). The decision must be "so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith." *Id.*

It may appear easier for a plaintiff to overcome the business judgment rule's presumption by challenging the *process* by which a particular decision was reached. But post-hoc review of the adequacy of the decisionmaking process would itself enmesh courts in second-guessing directors' business judgment, as such judgment is necessarily brought to bear on how to make decisions about the corporation's activity as well as on what decisions to make. As a result, "[i]n order to prevent second-guessing on what might be close questions concerning the appropriateness of the process by which a business decision was made," courts have required the plaintiff to show that the process was "grossly negligent." *Solash v. Telex Corp.*, 1988 WL 3587, at *8 (Del. Ch. 1999); *see Brehm v. Eisner*, 746 A.2d 244, 259 (Del. 2000) ("[The] directors' process is only actionable if grossly negligent.").

Georgia courts have not yet drawn this distinction between challenges to a business decision itself and challenges to the process that led to a decision. Instead, Georgia courts have held more generally that a plaintiff must allege facts that rise to the level of "fraud, bad faith, or an abuse of discretion" to overcome the business judgment rule. *Brock Built*, 300 Ga. App. at 822, 686 S.E.2d at 430; *see* *also TSG Water*, 260 F. App'x at 196 (holding that plaintiff "must allege specific facts that show a genuine issue of material fact concerning fraud, bad faith or abuse of discretion" to survive summary judgment under Georgia's business judgment rule). The upshot is thus largely the same under Georgia and Delaware law, as both Georgia and Delaware courts have held that allegations amounting to ordinary negligence fail as a matter of law. *See Brock Built*, 300 Ga. App. at 822, 686 S.E.2d at 430-31; *Flexible Prods.*, 284 Ga. App. at 180-82, 643 S.E.2d at 564-65; *Werner v. Miller Tech. Mgmt.*, 831 A.2d 318, 331 (Del. Ch. 2003); *In re Limited, Inc.*, No. 17148-NC, 2002 WL 537692, at *10 (Del. Ch. Mar. 27, 2002).

If no facts are alleged to overcome the presumption—*i.e.*, the plaintiff alleges ordinary negligence—the rule provides the director with substantive protection from liability. Specifically, the rule "converts what would otherwise be a question of fact—whether the financially disinterested directors who authorized this money-losing transaction exercised the same care as would a reasonable person in similar circumstances—into a question of law for the court to decide." Allen, Kraakman & Subramanian, Commentaries and Cases on the Law of Business Organizations 231 (4th ed. 2012);[5] *see also Cinerama*, 663 A.2d at 1162. This enables the court to serve a gatekeeping function and "encourages the

[5] The lead author of this treatise is former Chancellor William Allen, who authored some of the Delaware Chancery Court's leading decisions in this area. *See, e.g.*, *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996).

dismissal of some claims before trial and allows judicial resolution of the remaining case-based claims that go to trial." *See* Allen, *et al.*, *supra*, at 231; *see* Stephen Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 87 (2004) (business judgment rule is a "doctrine of abstention pursuant to which courts in fact refrain from reviewing board decisions unless exacting preconditions for review are satisfied"); *In re Lear Corp. S'holder Litig.*, 967 A.2d 640, 652 (Del. Ch. 2008) (relying upon Professor Bainbridge's formulation).

The rule's procedural and immunizing functions serve important policy goals. First, courts have long acknowledged that they lack the "institutional competence" to second-guess the reasonableness of business decisions. *See AC Acquisitions Corp. v. Anderson, Clayton & Co.*, 519 A.2d 103, 111 (Del. Ch. 1986); *Brock Built*, 300 Ga. App. at 823, 686 S.E.2d at 431. Second, subjecting a director to liability (or even protracted litigation) for an allegedly negligent business decision would decrease the number of qualified persons willing to serve on corporate boards, to the detriment of shareholders. *Cf. Sun-Times Media Grp. v. Black*, 954 A.2d 380, 405 (Del. Ch. 2008).

Additionally, the rule helps to encourage socially efficient risk taking. As explained by Chancellor Allen in *Gagliardi v. TriFoods Int'l, Inc.*, "shareholders can diversify the risks of their corporate investments" and thus "don't want (or shouldn't rationally want) directors to be risk adverse." 683 A.2d 1049, 1052 (Del. Ch. 1996). It is, therefore, "in a shareholder's economic interest to offer sufficient protection … from liability for negligence, etc., to allow directors to conclude that, as a practical matter, there is no risk that, if they act in good faith and meet minimal proceduralist standards of attention, they can face liability as a result of business loss." *Id.*; *see also Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P.*, 906 A.2d 168, 193 (Del. Ch. 2006) ("The business judgment rule exists precisely to ensure that directors and managers acting in good faith may pursue risky strategies that seem to promise great profit.").

B. The FDIC's Claims Against the Directors

After assuming control of Integrity Bank in 2008, the FDIC brought this action on behalf of the Bank in January 2011 in the Northern District of Georgia. The FDIC contends that the Bank's former Directors are personally liable for over $70 million in losses that the Bank suffered on 21 real-estate loans authorized between February 2005 and May 2007. R.E. 1 at 1. The Directors were members of the Bank's Director Loan Committee and responsible for overseeing and maintaining the Bank's credit function. R.E. 84 at 2.

The Complaint includes two counts: Count I, entitled "Negligence and Gross Negligence," and Count II, entitled "Breach of Fiduciary Duties." R.E. 1 at ¶¶ 80, 86. Count I includes a laundry list of acts and omissions allegedly evidencing

Defendants' "failures to exercise reasonable care, skill, diligence, loyalty and good faith in the discharge of their responsibilities," without identifying which "failures" were supposedly grossly negligent and which were merely negligent. R.E. 1 at ¶¶ 82-83. Count II is similarly structured. It refers to a general standard care, and generally alleges that Defendants breached their fiduciary duties, but it does not clarify whether the alleged breach consisted of ordinary or gross negligence. *Id.* ¶¶ 89-90. The Complaint does not contain a claim for self-dealing, fraud, or any other form of intentional misconduct, and it does not identify anything that any of the Directors allegedly did or failed to do in bad faith.

The district court held that the FDIC adequately pleaded gross negligence (whether under Count I or Count II, in the form of a breach of fiduciary duty). R.E. 84 at 12-13. That ruling is not before this Court on this interlocutory appeal, which concerns the sufficiency of the FDIC's ordinary negligence claims, measured under the business judgment rule's yardstick.

At its core, the FDIC's Complaint alleges that the Directors' strategy for growth was unwise and unduly risky. The FDIC faults the Directors' decisions to "concentrate[the Bank's] lending in higher risk, speculative" loans, R.E. 1 at ¶ 18, and to "offer[] floating rate, interest-only loans secured almost entirely by the … project being financed," *id.* ¶ 19. Similarly, the FDIC criticizes the Directors for "heavily committ[ing] the Bank" to certain types of lending "assuming that the real estate bubble … would continue to expand indefinitely." *Id.* ¶ 20.[6] The FDIC also generally accuses the Directors of failing "[t]o review carefully" reports from regulatory authorities, R.E. 1 at ¶ 81(d); failing "[t]o exercise reasonable control and supervision over the officers and employees of Integrity," *id.* ¶ 81(b), and failing to "[t]o perform … diligently their duties as members of Integrity's Board committees," *id.* ¶ 81(j).

C. Statement of Facts

Integrity Bank was a Georgia state-chartered institution regulated by the FDIC and the Georgia Department of Banking and Finance. R.E. 1 at 2-3. As is true for any bank, Integrity Bank was heavily regulated and overseen by both federal and state authorities. When it was founded in November 2000, *id.* ¶ 13, the Bank submitted a business plan to regulators for approval. Over the course of the Bank's life, the FDIC and the Georgia Department of Banking and Finance routinely reviewed the business plan and examined the Bank's performance in six areas: capital adequacy, asset quality, management practices, earnings performance, liquidity position, and sensitivity to market risk. R.E. 29 at 3.

[6] The FDIC's hindsight view that the Bank's strategy was too risky ignores that even the nation's leaders could not "forecast a significant decline [in the housing market]" back when the FDIC contends that the Directors should have done so, "because [the market] had never had a significant decline in prices." Alan Greenspan, Testimony Before House Committee on Government Oversight and Reform, 110th Cong. 209 (Oct. 23, 2008).

At the conclusion of these examinations, the FDIC issued a rating for each component and an overall composite score. A rating of "1" was the most favorable rating, and "5" was the least favorable. *Id.* In 2004, after less than four years of operation, the Bank's asset quality was rated "2," and in 2005 and 2006, the regulators recognized the Bank's improved loan portfolio by increasing its asset-quality rating to "1." *Id.*

But then the worst economic crisis since the Great Depression hit the nation. Banking regulators like the FDIC faced pressure to justify their failure to predict and prepare for the crisis. Without explanation, the FDIC radically reversed its prior approval of capital levels, asset quality, management, equity, liability, and sensitivity to risk for many community banks, including Integrity Bank. R.E. 29 at 4. Thus, in July 2007, the FDIC announced that it was downgrading the Bank's asset quality and composite strength ratings from "1" to "4." *Id.* at 3. As a result of the downgrade, the FDIC imposed additional regulatory constraints and demands that limited Defendants' ability to save the Bank. *Id.* at 4. These measures, including write-downs of almost $100 million in performing loans, depleted the Bank's capital and led to the regulators' declaration that the Bank was "unsafe and unsound" by 2008. *Id.* at 4-5. Unable to secure additional investment, the Bank was forced into receivership in August 2008. *Id.*

D. Proceedings Below

On January 14, 2011, the FDIC brought this action to recover from the Directors the amount due on the 21 loans the Bank owned when it entered receivership. R.E. 1. Several of the independent Directors (Ernest, Hartsfield, Reynolds, and Murphy) answered the Complaint and raised several affirmative defenses under Georgia law. R.E. 29. Among these defenses was the FDIC's failure to mitigate its losses. *Id.* at 6. Georgia law imposes mitigation requirements on every tort plaintiff "to reduce [its] damages 'as far as is practicable by the use of ordinary care and diligence.'" *See Wachovia Bank of Ga v. Namik*, 275 Ga. App. 229, 232, 620 S.E.2d 470, 473 (2005) (quoting O.C.G.A. § 53-12-192(a)). The Directors alleged that the FDIC's own conduct as receiver contributed to the Bank's losses with respect to the 21 loans. *See* R.E. 1 at ¶¶ 39-92. The Directors also asserted the affirmative defenses of reliance and estoppel, based on their reliance on the FDIC's oversight, approval, and ratings when it was acting as regulator. R.E. 29 at 4-7.

The FDIC moved to strike the failure-to-mitigate, reliance, and estoppel affirmative defenses, contending that such defenses could not be maintained against the FDIC in its receivership capacity, the only capacity in which the FDIC is a party in this case. R.E. 45. The district court ultimately struck those affirmative defenses to the extent they were based on the conduct of the FDIC *as* *regulator* because defenses based on the conduct of the FDIC acting as regulator, it held, cannot be maintained against the FDIC in its receivership capacity. R.E. 84 at 25-26. The court reserved ruling on whether those affirmative defenses could be asserted against the FDIC based on its conduct *as receiver*. *Id.* at 29-30.

Defendants Skow, Arnold, Ballard, and Day moved to dismiss this action pursuant to Rule 12(b)(6), R.E. 30, and defendants Ernest, Hartsfield, Reynolds, and Murphy moved for judgment on the pleadings, R.E. 33. Both motions sought dismissal of the FDIC's negligence claim based on, among other grounds, the application of Georgia's business judgment rule. R.E. 30-1 at 12-16, R.E. 33-1 at 7-16. The district court concluded that the FDIC's negligence claim was not viable as a matter of law under Georgia law, and ordered it dismissed on February 27, 2012. R.E. 84.

The FDIC moved for reconsideration of the dismissal of its negligence claim, R.E. 92-1 at 1-12, and combined that request with a motion for summary judgment urging the district court to hold, as a matter of law, that federal common law bars Defendants' affirmative defenses based on the FDIC's conduct as receiver. In the alternative, the FDIC asked the district court to certify its orders on both issues for interlocutory appeal under 28 U.S.C. § 1292(b). R.E. 92-1 at 22.

On August 14, 2012, the district court denied the FDIC's motions for reconsideration and summary judgment and certified its order for interlocutory review. R.E. 139. This Court granted permission to appeal on November 19, 2012.

STANDARD OF REVIEW

Although the FDIC is correct (Br. 9) that this Court reviews de novo the district court's decisions on the two questions of law presented in this appeal, the business judgment rule imposes important limitations on the scope and nature of the Court's review. The rule embodies "a policy of judicial restraint born of the recognition that directors are, in most cases, more qualified to make business decisions than are judges." *Int'l Ins. Co. v. Johns*, 874 F.2d 1447, 1458 n.20 (11th Cir. 1989). As to the application of Georgia's business judgment rule, this Court is "bound by decisions" of Georgia's "intermediate appellate courts unless there is persuasive evidence that the highest state court would rule otherwise." *Pendergast v. Sprint Nextel Corp.*, 592 F.3d 1119, 1133 (11th Cir. 2010).

SUMMARY OF ARGUMENT

I. The district court correctly held that allegations of mere negligence do not overcome the procedural and substantive protections of Georgia's business judgment rule. The Georgia Court of Appeals has so held in two recent precedential decisions: "[a]llegations amounting to mere negligence, carelessness, or 'lackadaisical performance' are insufficient as a matter of law" to overcome the business judgment rule and state a duty of care claim. *Brock Built*, 300 Ga. App. at

822, 686 S.E.2d at 430-31; *accord Flexible Prods.*, 284 Ga. App. at 182, 643 S.E.2d at 564-65. Those decisions are as on point as they are unequivocal, and the FDIC has failed to provide any evidence, much less "persuasive evidence," that the Georgia Supreme Court would reject them. *Pendergast*, 592 F.3d at 1133 .

First, Georgia's statutory standard of care does not justify disregarding these two precedential Georgia decisions. As noted by the district court, while a director is charged to exercise the care of an "ordinary prudent person in like position," the business judgment rule operates as a standard of review to shield directors from liability for claims based on ordinary negligence. *See Brock Built*, 300 Ga. App. at 822, 686 S.E.2d at 430-31. This application of the business judgment rule is clear as a matter of Georgia law under *Brock Built* and *Flexible Products*, and—far from being anomalous as suggested by the FDIC—tracks Delaware law to the letter.

Second, the FDIC's reliance on selective dicta in two century-old Georgia Supreme Court cases and this Court's interpretation of Florida law is misplaced. The Georgia cases cited by the FDIC do not hold that a director can be liable for mere negligence and thus cannot overcome the Georgia Court of Appeals' repeated and emphatic holdings that mere negligence is insufficient. And where the Georgia courts have spoken clearly on an issue of Georgia law, this Court's interpretation of Florida law is beside the point.

Third, after conceding that the business judgment rule applies, the FDIC proposes a construction that renders it a nullity. The FDIC would have Georgia's business judgment rule protect a director from negligence liability only if the director acted with "ordinary care." Br. 32. But if a director acts with ordinary care, he acts non-negligently and thus cannot be liable for negligence. If the business judgment rule merely "protects" directors from negligence liability where they act non-negligently, it serves no purpose. The district court rightly declined to accept the FDIC's invitation to disregard clear Georgia precedent and to read the business judgment rule out of Georgia law.

II. The second issue in this appeal is likewise governed by controlling precedent. The FDIC seeks an exemption from an obligation imposed on every tort plaintiff under Georgia law: to mitigate losses before trying to recover those losses from others. The FDIC does not dispute that Georgia law imposes such an obligation. Nor does it argue that FIRREA confers the exemption it seeks. Instead, the FDIC contends that such an exemption was "previously established and long-standing" as a matter of federal common law before FIRREA. *Motorcity II*, 120 F.3d at 1143.

But the only way the FDIC can contend that the exemption it seeks was already established and long-standing before FIRREA is to conflate it with the "no-duty rule" in an effort to improve its pedigree. The no-duty rule provides that banking regulators have "no duty" to bank directors, officers, and shareholders, as their only obligation is to the integrity of the banking system. That rule may have been well-established when Congress enacted FIRREA, but the Directors' mitigation defense does not implicate that rule: Georgia's requirement to mitigate tort damages rests on every tort plaintiff *qua* tort plaintiff and has nothing to do with whether the plaintiff owes the defendant a duty.

The FDIC's proposed exemption had been adopted by a total of four district courts and zero appellate courts before FIRREA's enactment. These four non-precedential decisions did not "establish" anything, and it blinks reality to suggest that Congress had them in mind when enacting FIRREA. Because the special federal common-law exemption that the FDIC seeks was not well-established before FIRREA, the district court correctly followed *O'Melveny* and *Motorcity* and held that the FDIC must "work out its claims under state law." *O'Melveny*, 512 U.S. at 87.

I. GEORGIA'S BUSINESS JUDGMENT RULE BARS ORDINARY NEGLIGENCE CLAIMS.

The FDIC concedes that, when assessing whether directors are liable for an alleged breach of their duty of care, Georgia courts apply the business judgment rule. Br. 32-34. The proper construction and application of the Georgia business judgment rule is for the Georgia courts to decide. Yet the FDIC asks this Court to cast aside the Georgia Court of Appeals' decisions in *Brock Built* and *Flexible*

Products in favor of this Court's construction of Florida law in *FDIC v. Stahl*, 89 F.3d 1510 (11th Cir. 1996), and century-old Georgia cases that long predate the development of the business judgment rule. The FDIC's reliance on the old Georgia cases fails on its own terms because those cases do not hold that a director is liable for mere negligence and the language that the FDIC selectively quotes cannot overcome the Georgia Court of Appeals' recent, precedential articulations of Georgia's business judgment rule. And the FDIC's reliance on Florida law betrays the weakness of its argument as a matter of Georgia law. Where the Georgia courts have spoken clearly on an issue of Georgia law, how statutes in other jurisdictions are construed is beside the point. This Court is "bound by decisions of a state's intermediate appellate courts unless there is persuasive evidence that the highest state court would rule otherwise." *Pendergast*, 592 F.3d at 1133. Suing in federal court is not an appropriate way to get around the Georgia courts' construction of Georgia law.

A. Georgia's Business Judgment Rule Shields Directors from Liability Based on Ordinary Negligence.

The Georgia Court of Appeals has now twice held that Georgia's business judgment rule "forecloses liability in officers and directors for ordinary negligence." *Flexible Prods.*, 284 Ga. App. at 182, 643 S.E.2d at 564; *see Brock Built*, 300 Ga. App. at 822, 686 S.E.2d at 430 ("[a]llegations amounting to mere negligence … are insufficient as a matter of law"). This limitation reflects

Georgia's long-held public policy that courts should not second-guess business decisions (even arguably negligent ones) made by a disinterested officer or director in managing corporate affairs. *See Regenstein v. J. Regenstein Co.*, 213 Ga. 157, 159-60, 97 S.E.2d 693, 695 (1957). Thus, while a director may be liable for (i) acting beyond his corporate powers; (ii) fraud; (iii) self-dealing, *id.*; (iv) or, in some circumstances, gross negligence, *Solash v. Telex Corp.*, 1988 WL 3587, at *8 (Del. Ch. Jan. 19, 1988), he is immunized from claims based on ordinary negligence, *Flexible Products*, 284 Ga. App. at 182, 643 S.E.2d at 564.

Despite the unequivocal language of both *Brock Built* and *Flexible Products*, which closely track the formulation of the business judgment rule in Delaware, *see supra* at 4-10, the FDIC's lead argument in this appeal is that these decisions do not mean what they say—*i.e.*, they "do not categorically bar ordinary negligence claims." Br. 9. According to the FDIC, *Brock Built* "did not involve an ordinary negligence claim" and instead involved claims for "breach of contract, breach of good faith, and breach of fiduciary duty" only. *Id.* at 34. The FDIC thus argues that the court in *Brock Built* upheld the dismissal of the plaintiff's breach of fiduciary duty claim, not because of the business judgment rule, but because the "plaintiff in [*Brock Built*] 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." *Id.*

How the FDIC can read *Brock Built* in this manner is a mystery. In *Brock Built*, the company (Brock Built) claimed that its former officer (Blake) breached his fiduciary duty, relying on both his duty of loyalty (*i.e.*, good faith) *and* his duty of care. 300 Ga. App. 822-23, 686 S.E.2d at 431. First, Brock Built alleged that Blake had violated his duty of loyalty by "accelerating the construction of houses [in 2005 and] … delaying the payment of invoices and bonuses until 2006" out of the "improper motive of increasing his [2005] incentive compensation." *Id.* at 821, 686 S.E.2d at 430. The court of appeals upheld the dismissal of this part of Brock Built's claim, not because such disloyalty claims are barred by the business judgment rule (they are not, *see supra* at 4-5), but because Brock Built failed to present "competent evidence" to survive summary judgment. *See id.* at 822, 686 S.E.2d at 431.

That was not the only claim at issue in *Brock Built*, however, as the company also alleged that Blake had breached his duty of *care*. Just as the FDIC alleges in Count II that the Directors' alleged negligence amounted to a breach of fiduciary duty, Brock Built alleged that Blake had breached his fiduciary duty by being negligent: he "neglected to properly oversee the affairs of Brock Built by failing to adequately manage the purchase order system, failing to budget engineering features in the sale prices of certain specific homes, and failing to use proper building materials for noise abatement in other specific homes." *Id.* The court dismissed this portion of Brock Built's claim, not based on the insufficiency of the evidence, but because a claim of ordinary negligence fails as a matter of law.

The court's language could not be clearer. First, the court concluded an extensive discussion of Georgia's business judgment rule by stating flatly that "[a]llegations amounting to mere negligence, carelessness, or 'lackadaisical performance' are insufficient as a matter of law." *Id.* Then, in discussing the evidence offered to support Brock Built's claim for breach of fiduciary duty through negligence, the court stated that "Brock Built's allegations regarding the deficiencies in Blake's management and budgeting amounted at best to a showing of negligent or careless performance of Blake's duties," which the court reiterated "is insufficient to show breach of fiduciary duty as a matter of law." *Id.* at 823, 686 S.E.2d at 431.

The FDIC's attempt to distinguish *Flexible Products* is similarly misguided. Rather than engage directly with *Flexible Products*, the FDIC seeks support from *Rosenfeld v. Rosenfeld*, 286 Ga. App. 61, 648 S.E.2d 399 (2007), a non-precedential decision of the Georgia Court of Appeals decided after *Flexible Products* but *before* the same court decided *Brock Built*.[7] Perceiving conflict

[7] Rosenfeld is only "physical precedent" because only two of the three panel judges joined in the opinion. Ga. Ct. App. R. 33(a). Like unpublished dispositions of this Court, "physical precedent" of the Court of Appeals is binding only on the

between *Rosenfeld* and *Flexible Products* and *Brock Built*, the FDIC contends that *Flexible Products* is "distinguishable on the facts" and does not stand for the proposition that the business judgment rule protects defendants against ordinary negligence claims. FDIC Br. 35-36. Even if *Rosenfeld* conflicted with *Brock Built* and *Flexible Products*, Georgia courts are bound to follow the precedential decisions of *Brock Built* and *Flexible Products* whenever a non-precedential decision conflicts with precedential authority. *See, e.g.*, *State Dep't of Transp. v. Douglas Asphalt Co.*, 297 Ga. App. 511, 677 S.E.2d 728 (2009). The FDIC's attempt to rely on *Rosenfeld* fails at the threshold.

Moreover, the FDIC does not provide any explanation of how *Flexible Products* is "distinguishable" on its facts. That is because it is not. In *Flexible Products*, a shareholder alleged that the company's directors had been negligent in deciding when to disclose an event to shareholders. The Georgia Court of Appeals held that the business judgment rule barred such a negligence claim as a matter of law. Its opinion was crystal clear:

> Such rule [the business judgment rule] forecloses liability in officers and directors for ordinary negligence in discharging their duties … Given that officers and directors thus are protected from liability for ordinary negligence, the trial court erred in refusing to direct a

---

parties and is not precedent for any other case. *S. Elec. Supply v. Trend Constr.*, 259 Ga. App. 666, 578 S.E.2d 279 (2003).

> verdict for Flexible on Ervast's ordinary negligence claim.

284 Ga. App at 182,643 S.E.2d at 564-65 (citations omitted).

In light of this clear holding, the Court of Appeals was correct to cite *Flexible Products* two years later in *Brock Built* for the proposition that "Georgia's business judgment rule relieves officers and directors for liability … for ordinary negligence in discharging their duties." 300 Ga. App. at 823, 686 S.E.2d at 431 (alteration in original; citation omitted).[8]

In short, *Brock Built* and *Flexible Products* are on all fours with this case. "[P]rinciples of federalism" demand "respect for state courts' interpretation of their own laws" and "counsel against ignoring the rulings of those [intermediate appellate] courts that have taken up [an] issue." *Castellano v. Young & Rubicam, Inc.*, 257 F.3d 171, 190 (2d Cir. 2001). But the FDIC invites this Court to do just that, to disregard two on-point decisions from Georgia's appellate court construing Georgia law. The Court is not free to disregard an intermediate state appellate court's decision and "apply a different rule … even though it may think that the state Supreme Court may establish a different rule in some future litigation."

[8] Contrary to the FDIC's position, the decision that is plainly distinguishable from this case is *Rosenfeld*. There, the wife claimed that the husband breached his duty of loyalty by "cut[ting] the wife off from the corporate assets, which they had both used for personal expenses before [he filed for divorce], and that he continued to use those assets for his personal use thereafter to her exclusion." 286 Ga. App. at 64, 648 S.E.2d at 403. The case had nothing to do with a director's duty of care.

Watson v. Dugger, 945 F.2d 367, 369-70 (11th Cir. 1991) (citation omitted). Rather, it is "the duty" of this Court, "where the state law supplies the rule of decision, to ascertain and apply that law even though it has not been expounded by the highest court of the state." *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 177, 61 S. Ct. 176, 178 (1940). This Court thus has emphasized that it is "bound by decisions of a state's intermediate appellate courts unless there is persuasive evidence that the highest state court would rule otherwise." *Pendergast*, 592 F.3d at 1133 (citation omitted). The FDIC has identified no such "persuasive evidence," and the district court's decision therefore must be upheld.

B. Georgia's Statutory Standard of Care Is Not Inconsistent With the Georgia Courts' Application of the Business Judgment Rule.

The FDIC next argues that even if the Georgia Court of Appeals believes that claims for ordinary negligence are foreclosed by the business judgment rule, it is wrong because the statutory language providing the standard of care for Georgia officers and directors requires a different result. *See* O.C.G.A. § 7-1-490. The FDIC urges this Court to reject *Brock Built* and *Flexible Products* because the "Georgia Supreme Court would never follow intermediate decisions that effectively amend the ordinary negligence standard imposed by statute to one requiring more than mere negligence." Br. 9-10.

In addition to overlooking the respect that a federal court owes to state courts' construction of state statutes, the FDIC's statutory construction misses the point. The FDIC has conceded that, when determining whether an officer or director is liable for a breach of the duty of care, Georgia courts apply the business judgment rule. *Id.* at 32-33. The rule is a standard of review through which courts evaluate claims that the standard of care has been breached; it "operates as both a procedural guide for litigants *and* as a substantive rule of law." *Cinerama*, 663 A.2d at 1162 (emphasis added). The Georgia Court of Appeals did not ignore the statutory standard of care; rather, it correctly noted that O.C.G.A. §§ 14-2-830(a) and 14-2-842(a) require "the care of an ordinarily prudent person" and then correctly explained that "[i]n determining whether a corporate officer has fulfilled his or her statutory duty, Georgia courts apply the business judgment rule." *Brock Built*, 300 Ga. App. at 821, 686 S.E.2d at 430. As noted by the district court, which twice considered the meaning of the statutory language, *see* R.E. 84 at 15 and R.E. 139 at 15, under Georgia law "there is a difference between the standard of care, which is the standard of conduct expected of directors in their decision making, and the business judgment rule, which is the standard of review that determines whether directors will be held liable for a poor decision." R.E. 139 at 19 (citation omitted).

The FDIC derides the Georgia Court of Appeals for holding that the business judgment rule shields directors from liability for ordinary negligence where the statute speaks of ordinary care, but there is nothing anomalous about the

Georgia business judgment rule. Delaware has long employed an identical standard of care to the one articulated by the Georgia legislature, while simultaneously applying a business judgment rule that bars liability for ordinary negligence. *See supra* at 5-7.

Georgia's statutory standard of care does not mandate a different result. Regardless of whether the business judgment rule applies, a director who "performs his duties" in accordance with the statutory standard "shall have no liability by reason of being or having been a director … of the bank or trust company." O.C.G.A. § 7-1-490. As noted in the Comments to the materially identical general standard of care in Georgia's Business Corporation Code, O.C.G.A. § 14-2-830, by drafting the sentence in the negative—a director "shall have no liability …."—the legislature "left to the courts" the question of how the business judgment rule affected a director's liability under that general standard. *See* O.C.G.A. § 14-2-830 cmt. (1988).[9] Specifically, the Comments recognized that the "business judgment rule and the circumstances for its application are continuing to be developed by the courts," and, "[i]n view of that continuing judicial development," the legislature did "not try to codify the business judgment

[9] Moreover, elsewhere, the legislature has expressly provided, with respect to state-law banking regulations, that the "underlying objective" of such laws is "to provide … [an o]pportunity for management of financial institutions to exercise their business judgment." O.C.G.A. § 7-1-3.

rule or to delineate the differences, if any, between that rule and the standards of director conduct set forth in this section." *Id.* That task, again, the legislature "left to the courts." *Id.*

Although the FDIC dismisses these Comments because they were drafted by the Georgia State Bar and not the legislature, Br. 23, Georgia courts routinely look to these Official Comments of the Revised Model Business Corporations Act ("Model Act") when interpreting provisions of Georgia's version of the Model Act. *See, e.g.*, *Blitch v. Peoples Bank*, 246 Ga. App. 453, 457, 540 S.E.2d 667, 670 (2000) ("we … are guided by the Model Act's … official comments in interpreting the meaning of fair value under our Code"); *Riddle-Bradley, Inc. v. Riddle*, 217 Ga. App. 725, 725, 459 S.E.2d 576, 578 (1995). Because Georgia's courts accord these Comments weight, this Court should do so as well.

The Georgia legislature was free to refrain from codifying the business judgment rule and to rely instead on "continuing judicial development." That the FDIC disagrees with how Georgia's courts have taken up the task that the General Assembly left them does not give the federal courts a warrant to disregard their clear holdings.

C. The FDIC's Reliance on Outdated and Foreign Precedent is Misplaced.

The FDIC's next attempt to show that the Georgia Court of Appeals has so badly botched its task of construing Georgia law that this Court need not defer to its decisions is to rely on two century-old cases decided well before even Delaware first articulated the business judgment rule: *Woodward v. Stewart*, 149 Ga. 620, 101 S.E. 749 (1919), and *McEwen v. Kelly*, 140 Ga. 720, 79 S.E. 777 (1913). The FDIC also looks for support in a decision of this Court construing Florida law that is at odds with the on-point Georgia authority discussed above: *FDIC v. Stahl*, 89 F.3d 1510 (11th Cir. 1996). None of these decisions justifies disregarding the Georgia Court of Appeals' unequivocal holding in *Flexible Products*, which it reiterated just as unequivocally in *Brock Built*.

In fact, *Woodward* demonstrates that, even as early as 1919, the Georgia Supreme Court was already beginning to embrace the policy underlying the business judgment rule. The Court quoted with approval Chief Justice Fuller's admonition that liability "should not lightly be imposed, in the absence of any element of positive misfeasance, and solely upon the ground of passive negligence." 101 S.E. at 750 (quoting *Briggs v. Spaulding*, 141 U.S. 132, 150, 11 S. Ct. 924, 930 (1891)). While in certain places the Georgia Supreme Court appeared to suggest that a failure to exercise ordinary care could give rise to liability, *see id.* at 749-50, in other places the Court suggested that more was required, *see id.* at 750 (referring to liability for "gross inattention," "reckless inattention," or "gross negligence"). In all events, the Court ultimately upheld the trial court's *dismissal* of a negligence claim against a bank director in connection with a bad loan, so the opinion cannot be read as holding that liability may be imposed for mere negligence. *See id.* at 752.

McEwen, the 1913 Georgia Supreme Court decision on which the FDIC relies, is similarly unilluminating. The Court recognized that "[s]ome courts have declared that [directors] are only liable for gross negligence or breach of duty," but suggested that "in some, 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 did not elaborate on this dictum, perhaps because (as in *Woodward*) the allegations were too vague and generalized "to charge [the defendants] with any specific breach of duty." *Id.* *McEwen* thus does not answer the question before this Court—*Brock Built* and *Flexible Products* do.

Moreover, since *Woodward* and *McEwen*, the Georgia Supreme Court has made plain that to plead a claim against a director the plaintiff must plead something more than mere negligence. In *Regenstein v. J. Regenstein Co.*, 213 Ga. at 158, 97 S.E.2d at 694, for example, a case relied upon by *Brock Built*, the Court noted that a plaintiff generally must allege some conduct that breaches a director's duty of loyalty or obedience—both of which require proof of intentional, and not merely negligent, conduct, *see supra* at 4-5. As noted by the district court, while *Regenstein* did not articulate the business judgment rule in so many words, its treatment of the issue in 1957 is consistent with the Georgia Court of Appeals' recent holdings in *Flexible Products* and *Brock Built*. *See* R.E. 139 at 9.

The FDIC also turns to a decision of this Court construing Florida law: *FDIC v. Stahl*, 89 F.3d 1510. *Stahl* held that Florida's business judgment rule does not bar ordinary negligence claims; rather, "under pre-1987 Florida law, directors must have acted with ordinary care for the [business judgment rule] to apply." *Id.* at 1517. The Court reasoned that when "due care was in fact exercised as required under Fla. Stat. § 607.111(4), directors are protected by the [business judgment rule], no matter how poor their business judgment, unless they acted fraudulently, illegally, … or in bad faith." *Id.* It may be, as the district court observed, that *Stahl*, *Flexible Products*, and *Brock Built* cannot "be completely reconciled." R.E. 139 at 18. That is because Florida and Georgia have adopted different variations of the business judgment rule, as different states are of course free to do.

Stahl recognized that in other jurisdictions, including Delaware, the business judgment rule *does* bar ordinary negligence claims. *See Stahl*, 89 F.3d at 1518 n.14. The old Fifth Circuit explained that the common-law business judgment rule imposes a liability standard "somewhere between simple negligence and willful misconduct or fraud with the intent to deceive." *Mansfield Hardwood Lumber Co. v. Johnson*, 268 F.2d 317, 319 (5th Cir. 1959). This was not, however, the rule in Florida when *Stahl* was decided. Under Florida law, "[t]he 'business judgment rule' will protect a corporation's board of directors' business judgment as long as the board acted in a 'reasonable' manner in passing the [decision]." *Farrington v. Casa Solana Condo. Ass'n*, 517 So.2d 70, 72 (Fla. App. 1987). Unlike Georgia law, which this Court has recognized requires a plaintiff to prove that the director acted with "fraud, bad faith or abuse of discretion" to defeat the business judgment rule, *TSG Water*, 260 F. App'x at 196, in Florida a director could be liable for ordinary negligence when the director merely proceeded unreasonably, *see Farrington*, 517 So. 2d at 72.

Although the Georgia statute is similar to the Florida statute at issue in *Stahl*, Georgia's courts have been tasked with interpreting and construing that standard of care consistent with the business judgment rule. *See supra* at 5-9; 28-30. When they did so, both the *Brock Built* and *Flexible Products* courts had the benefit of this Court's decision in *Stahl*, which had been issued a decade earlier. Instead of following *Stahl*, the Georgia Court of Appeals followed this Court's decisions in *Int'l Ins. Co. v. Johns*, 874 F.2d 1447, 1461 (11th Cir. 1989) ("court will not call upon a director to account for his action in the absence of a showing of abuse of discretion, fraud, bad faith, or illegality"), and *Cottle v. Storer Commc'ns,* 849 F.2d 570, 575 (11th Cir. 1988) ("the plaintiff must allege specific facts that show a genuine issue of material fact concerning fraud, bad faith or abuse of discretion" to overcome business judgment rule). *See Brock Built*, 300 Ga. App. at 820-23, 686

S.E.2d at 430-31. Whether the Georgia courts could choose to adopt *Stahl*'s interpretation of Florida law as their own interpretation of Georgia law, the Georgia courts were in no way obligated to do so. The Georgia Court of Appeals was free to choose, as it did, to look to Delaware case law and other decisions of this Court as it refined Georgia's business judgment rule. Because *Stahl* is inconsistent with Georgia law as construed by the Georgia courts, it is beside the point.

D. The FDIC's Proposed Formulation of the Business Judgment Rule Renders it Meaningless.

The FDIC's explanation of how the business judgment rule should work reduces to a tautology that writes the rule out of the law. It contends that "[i]f 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." Br. 12. But if directors "act with ordinary care," they are not liable for the simple reason that they have acted non-negligently. *See Thurman v. Applebrook Country Dayschool, Inc.*, 278 Ga. 784, 785-86, 604 S.E.2d 832, 835 (2004). The FDIC's construction of the business judgment rule renders it a dead letter. A director who "act[s] with ordinary care" in selecting a "reasonable option[]" is not, contrary to the FDIC's suggestion, "protected by the business judgment rule." Rather, such a director is protected by the fact that he acted non-negligently. On the FDIC's construction, the business judgment rule never gets off the bench. Nor is this tautological formulation a mistake: the FDIC repeats the same sentence, verbatim except for substituting "BJR" for "business judgment rule," on page 32 of its brief, suggesting that this formulation represents its considered view.[10]

Finally, the FDIC is wrong in its contention that it can hold the Directors liable for ordinary negligence by "rebutting" the business judgment rule. The FDIC argues that it has made allegations that give rise to an inference of an abuse of discretion and that the district court erred in not considering whether these allegations were sufficient to rebut the business judgment rule. Br. 36. As an initial matter, the FDIC is simply wrong to suggest that the district court did not consider whether the allegations rose to the level of fraud, bad faith, or an abuse of discretion. The court expressly held that certain allegations in the Complaint could be sufficient to allege a duty of care claim under Georgia law. R.E. 84 at 13.

[10] In fact, for all the FDIC's protestations that requiring gross negligence sets the bar too high, the standard that the FDIC advocates appears to require gross negligence. The FDIC contrasts a hypothetical non-negligent director with a director who "choose[s] a course of action that *no reasonable or prudent bank director or officer would ever take* …." Br. 12 (emphasis added). This formulation—also repeated verbatim on page 32—echoes the standard for gross negligence, not ordinary negligence. *See* O.C.G.A. § 51-1-4 (gross negligence is absence of "that degree of care which *every man of common sense*, however inattentive he may be, exercises under the same or similar circumstances") (emphasis added).

Indeed, the court relied on the very allegations the FDIC says it ignored. R.E. 84 at 13; Br. 36.

More fundamentally, the FDIC's argument makes no sense. The FDIC is effectively asking this Court to allow its *ordinary* negligence claims to proceed because it has alleged *gross* negligence. But if a plaintiff pleads a valid claim for gross negligence, that means he can proceed on his claim for gross negligence. It does not mean that the plaintiff can proceed on an invalid claim for ordinary negligence. Pleading a claim that the business judgment rule does not bar cannot change the reality that the Georgia business judgment rule does bar claims for ordinary negligence.

* * *

The Georgia courts tasked with interpreting and construing Georgia law have twice held that claims amounting to "mere negligence, carelessness, or 'lackadaisical performance' are insufficient as a matter of law" to overcome the business judgment rule. *Brock Built*, 300 Ga. App. at 822, 686 S.E.2d at 430-31; *accord Flexible Prods.*, 284 Ga. App. at 182, 643 S.E.2d at 564-65. The district court dismissed the FDIC's ordinary negligence claims based on a straightforward application of this binding Georgia precedent. This Court is likewise bound by principles of federalism to respect these clear and on-point decisions and should affirm the district court's ruling.

II. THERE IS NO FEDERAL COMMON-LAW RULE THAT BARS THE DIRECTORS' MITIGATION AFFIRMATIVE DEFENSE.

The Directors pleaded an affirmative defense against the FDIC based on the obligation that Georgia imposes on every tort plaintiff to mitigate his "damages 'as far as is practicable by the use of ordinary care and diligence.'" *Wachovia Bank*, 275 Ga. App. at 232, 620 S.E.2d at 473 (quoting O.C.G.A. § 51-12-11). Consistent with this state-law defense, the Directors allege that the FDIC as receiver has failed to mitigate the Bank's loan losses that it seeks to recover in a personal money judgment against the Directors.

The FDIC moved for summary judgment on this defense, contending that it is exempt from this Georgia rule. Notably, the FDIC does not dispute that Georgia law in fact imposes this rule. Nor does the FDIC argue that anything in FIRREA confers the exemption it desires. Instead, the FDIC argues that a federal common-law rule confers such an exemption.

There is, of course, no general federal common law. And the Supreme Court has specifically held that FIRREA did not give the federal courts a license to create federal common law. *O'Melveny*, 512 U.S. at 87. Rather, where a provision of FIRREA applies, FIRREA governs, but state law governs on issues not addressed by FIRREA. *Id.* Courts can create federal common law only in extraordinary circumstances, *see id.* at 83, 87, and far from trying to shoulder the heavy burden of showing that this is one of those "few and restricted" situations, *id.*, the FDIC denies that it is seeking the creation of any federal common law.

Instead, the FDIC pins its hopes on the notion that its desired rule already had been created before FIRREA, so that it can invert the analysis to argue that FIRREA's silence on the issue means that it wins. Where a federal common-law rule was "previously established and long-standing" before a statute's enactment, courts presume that Congress did not intend the statute to silently or ambiguously *abrogate* the pre-existing rule. *United States v. Texas*, 507 U.S. 529, 534, 113 S. Ct. 1631, 1634 (1993); *see also Motorcity II*, 120 F.3d at 1143.

The FDIC labels the exemption it seeks "the no duty" rule, trying to piggyback on the pedigree of the rule that a bank's directors cannot sue the FDIC for tort damages because the FDIC owes them no duty. Br. 39. That rule may have been so well-established when Congress enacted FIRREA in 1989 that FIRREA should be interpreted not to abrogate it. But that is not the rule that the FDIC is pressing in this case. The obligation to mitigate damages under Georgia law rests on every tort plaintiff *qua* tort plaintiff and has nothing to do with whether the plaintiff owes the defendant a duty. The point is simply that before a plaintiff can force someone else to pay for a loss, the plaintiff must take reasonable steps to avoid or minimize the loss. No exemption from this universal obligation could remotely be described as "previously established and long-standing" as of

1989. To the contrary, such a notion made its first appearance in 1988, and had been embraced by zero appellate decisions and only four district court decisions at the time FIRREA was enacted. Because the FDIC's desired exemption was not so "long-established and familiar" in 1989 that Congress should be deemed to have known about it and intended to preserve it, *Texas*, 507 U.S. at 534, FIRREA requires the FDIC to "work out its claims under state law." *O'Melveny*, 512 U.S. at 87.[11]

A. State Law, and Not Federal Common Law, Applies Where No Provision of FIRREA Governs.

Georgia law, not federal law, provides the rule of decision for the FDIC's claims against the Directors. And under Georgia law, when the plaintiff "fails to exercise ordinary care" to "reduce as far as is practicable" his damages, his "damages are limited to those he would have suffered had damages been properly mitigated." *Wachovia Bank*, 275 Ga. App. at 473, 620 S.E.2d at 232. There is a single exception to this rule—for "positive and continuous torts"—that is

[11] The FDIC moved for summary judgment on three of the Directors' affirmative defenses based on its purported "no duty" rule: the failure to mitigate, reliance, and estoppel. *See* R.E. 92-1 at 13 n.3. The failure-to-mitigate defense relates to the FDIC's conduct *as receiver*, and it is therefore the only defense relevant for purposes of this appeal. The district court previously struck the reliance and estoppel defenses based on conduct of the FDIC *as regulator*, reasoning that conduct of the FDIC as regulator could not be raised as a defense here because the FDIC is a party only in its capacity as receiver. See R.E. 84 at 26. That ruling is not at issue in this appeal.

inapplicable here. *See* O.C.G.A. § 51-12-11; *Wachovia Bank*, 275 Ga. App. at 473, 620 S.E.2d at 232 ("positive and continuous torts" include only fraud, ongoing violations of property rights, and intentional torts). Indeed, "a party is under a duty to mitigate damages even when harmed by reckless acts." *Wachovia Bank*, 275 Ga. App. at 474, 620 S.E.2d at 232. The FDIC does not dispute that Georgia law imposes this rule.

As settled state law, this rule applies to the FDIC just as it would apply to any other plaintiff who invoked Georgia law to sue for tort damages. The Supreme Court has made clear that "except where some provision in the extensive framework of FIRREA provides otherwise," the FDIC as receiver must "work out its claims under state law" when it pursues a state-law action on behalf of an insolvent bank. *O'Melveny*, 512 U.S. at 87, 114 S. Ct. at 2054. Although FIRREA "specifically create[s] special federal rules of decision regarding claims by, and defenses against, the FDIC as receiver" as to certain issues, where Congress has not legislated specific rules of decision it is "hard to avoid the conclusion" that Congress intended state law to govern. *Id.* at 86-87, 88, 114 S. Ct. at 2054-55. "What Congress chose to put in [FIRREA] is to be enforced, and what it left out is not to be added by judicial fiat." *FDIC v. Ornstein*, 73 F. Supp. 2d 282, 284 (E.D.N.Y. 1999); *see also O'Melveny*, 512 U.S. at 87, 114 S. Ct. at 2054-55. This is because "[t]here is no federal general common law" and the creation of federal common law must be limited to those "few and restricted … situations where there is a significant conflict between some federal policy or interest and the use of state law." *Id.* at 83, 87, 114 S. Ct. at 2053, 2055 (quotation marks omitted).[12]

The FDIC does not contend that anything in FIRREA speaks to the Directors' affirmative defense that the receiver's failure to mitigate the bank's losses should diminish the FDIC's recovery. *See also* R.E. 139 at 31 n.18. Under *O'Melveny*, therefore, Georgia law would normally govern as to the validity and contours of this defense. The FDIC contends, however, that the issue is governed by federal common law. *O'Melveny* preserved a very narrow authority for courts to create federal common law under "few and restricted" circumstances, but the FDIC does not argue that that narrow authority applies here.

Instead, the FDIC contends that Georgia's affirmative defense was already precluded by a federal common-law rule before Congress enacted FIRREA. Creating such a federal common-law rule now would contravene *O'Melveny*, but if the FDIC's desired rule was established before FIRREA, the argument goes, there would be no need to "create" it and thus the FDIC could escape Georgia law

[12] Consistent with this admonition, this Court has repeatedly refused to create federal common law in cases involving the FDIC and its predecessor, as demonstrated by the cases the FDIC attempts to distinguish. *See, e.g., FDIC v. Harrison*, 735 F.2d 408 (11th Cir. 1984); *RTC v. Artley*, 28 F.3d 1099 (11th Cir. 1994); *FDIC v. Jenkins*, 888 F.2d 1537 (11th Cir. 1989); Br. 50–51.

without running afoul of *O'Melveny*. The FDIC is attempting to shoehorn its claim within the *Motorcity* framework, but this case is nothing like that one.

B. The FDIC's Proposed Rule is Not a "No Duty" Rule and Was Not "Existing Federal Common Law" At the Time of FIRREA.

This Court explained in *Motorcity* that it will recognize a federal common-law rule under FIRREA, notwithstanding *O'Melveny*, if the rule was "previously established and long-standing" when FIRREA was enacted. *Motorcity II*, 120 F.3d at 1143; *Motorcity of Jacksonville, Ltd. v. Se. Bank N.A.*, 83 F.3d 1317, 1330 (11th Cir. 1996) ("*Motorcity I*"). When Congress legislates against the backdrop of such a well-established common-law rule, courts presume that Congress did not intend to abrogate that "existing common law." *Motorcity II*, 120 F.3d at 1143; *Motorcity I*, 83 F.3d at 1330; *Texas*, 507 U.S. at 534, 113 S. Ct. at 1634. This common-sense approach applies where a particular rule is so "long-established and familiar" that it is unlikely that Congress would have intended to displace it without saying so. *Texas*, 507 U.S. at 534, 113 S. Ct. at 1634; *cf., e.g., Henderson v. Shinseki*, 562 U.S. ___, 131 S. Ct. 1197, 1203 (2011) ("When 'a long line of this Court's decisions left undisturbed by Congress' [has adopted a particular interpretation], we will presume that Congress intended to follow that course.") (internal citations omitted). But where a purported rule is not "well-established and familiar," there is no reason to think that Congress knows about it or intends to preserve it.

In *Motorcity*, the federal common-law rule at issue was the *D'Oench* doctrine, which enables the FDIC to rely on a bank's regular business records by barring claims of oral agreements. *See Motorcity I*, 83 F.3d at 1324. As a rule adopted by the Supreme Court itself—and adopted after *Erie*, so that there could be no question about whether *Erie* undermined it—*D'Oench* epitomizes "previously established and long-standing" federal common law. And there is no indication in the legislative history that Congress intended to abrogate *D'Oench* in enacting FIRREA. *See id.* at 1332-33. Not surprisingly, therefore, this Court held that *D'Oench* retained its vitality after FIRREA. Where a federal common-law rule was explicitly created by the Supreme Court and the Court has reaffirmed it repeatedly over the decades, there is no occasion for a lower court to consider whether to "create" it. The Supreme Court's own decisions adopting and applying the *D'Oench* doctrine made clear that it was "previously established and long-standing" before 1989, and this Court had no authority to second-guess the Supreme Court. *See Motorcity II*, 120 F.3d at 1143.

The FDIC's proposed federal common-law exemption from Georgia's mitigation-of-damages requirement is at the opposite end of the "previously established and long-standing" spectrum from *D'Oench*. Rather than having been created by the Supreme Court a half-century before FIRREA, the FDIC's proposed rule was barely a gleam in the FDIC's eye before FIRREA.

1. The FDIC's Proposed Exemption From Georgia's Mitigation Requirement Is Not the "No Duty" Rule.

The "existing federal common law" that the FDIC identifies—the so-called "no duty" rule—is not the same rule that it seeks to apply here. Instead, the FDIC asks the Court to bar affirmative defenses that are not based on a duty the FDIC owes to the defendants at all. The FDIC's special federal common-law exemption from Georgia law concerning mitigation was first seen in 1988 and had been recognized by only four court decisions by the time of FIRREA, all non-precedential district court decisions. The Court thus cannot apply the FDIC's proposed rule unless the Court first creates it—a request the FDIC does not make and *O'Melveny* would forbid.

The true "no duty" rule—"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"—has, to be sure, "been the law for almost a century." FDIC Br. 39. That rule may well be the kind of "previously established and long-standing" doctrine that *Motorcity II* contemplates. But that rule is not what the FDIC is pressing for here.

The "no duty" rule is a misnomer for the rule the FDIC seeks. The FDIC's argument "rests on a mistaken premise," because "[a] plaintiff's duty to mitigate damages is not, literally speaking, a duty to any other party." *FDIC v. Gladstone*, 44 F. Supp. 2d 81, 87 (D. Mass. 1999). The Directors' failure-to-mitigate defense does not depend on whether the FDIC owed any duty to the Directors at all. R.E. 139 at 48. Instead, the defense imposes a "disability [on the plaintiff] to recover for avoidable loss." *Id.* (quoting Charles McCormack, Handbook on the Law of Damages § 33, at 128 (1935)); *see also FDIC v. Ashley*, 749 F. Supp. 1065, 1068-69 (D. Kan. 1990) ("the defense of failure to mitigate damages is still available to the … defendants because the legal requirement to mitigate damages is not actually a 'duty,' but a limitation on the amount of damages recoverable by the plaintiff"); Dan B. Dobbs, The Law of Torts § 203, at 510 (2000) ("mitigation of damages rule" is related to comparative negligence doctrine and "denies the plaintiff a recovery for negligently inflicted damages that she could have avoided or minimized by reasonable care or expenditure").

Georgia law follows these fundamental tort principles. A Georgia tort plaintiff must exercise "ordinary care and diligence" to mitigate his damages. O.C.G.A. § 51-12-11; *Wachovia Bank*, 275 Ga. App. at 232, 620 S.E.2d at 473. Thus, "[i]in every case, whether in suits for personal injuries or injury to property, it will be for the jury to determine whether the plaintiff as a prudent man ought to have taken steps to avoid the damage." *Anderson v. Sears Roebuck & Co.*, 292 Ga. App. 603, 608, 664 S.E.2d 911, 915 (2008) (quoting *Mansfield v. Richardson*, 118 Ga. 250, 252, 45 S.E. 269, 270 (1903)). This "duty to mitigate" is not a "duty" owed to another party at all, but a "general duty to lessen damages as far as is practicable by the use of ordinary care and diligence." *Butler v. Anderson*, 163 Ga. App. 547, 547, 295 S.E.2d 216, 217 (1982). Equally as basic, every plaintiff under Georgia law must prove "that it is more likely than not that the conduct of the defendant"—and not the conduct of someone else, including the plaintiff—"was a cause in fact of the result." *Hobday v. Galardi*, 266 Ga. App. 780, 782, 598 S.E.2d 350, 352 (2004).

2. Only Four Federal District Court Decisions Applied the FDIC's Proposed Rule at the Time of FIRREA.

It was not until 1988 that any court held that the FDIC as receiver was insulated from a state-law mitigation affirmative defense. *See Gladstone*, 44 F. Supp. 2d at 85 (tracing origins of FDIC's proposed rule to *FSLIC v. Roy*, No. CIV JFM-87-1227, 1988 WL 96570 (D. Md. June 28, 1988)). The FDIC admits as much, acknowledging that only four district court decisions had applied its proposed rule before FIRREA: *FDIC v. Carlson*, 698 F. Supp. 178 (D. Minn. 1988); *FSLIC v. Burdette*, 718 F. Supp. 649 (E.D. Tenn. 1989); *FDIC v. Renda*, 692 F. Supp. 128 (D. Kan. 1988); and *Roy*, 1988 WL 96570. *See* Br. 41. At least one district court recognized that a mitigation defense could lie. *FDIC v. Blackburn*, 109 F.R.D. 66, 74 (E.D. Tenn. 1985). And not a single appellate court had considered the issue.

It is fanciful to think that Congress had these four decisions (or, for that matter, the contrary district court decision) in mind when it crafted FIRREA.

These district court decisions were non-precedential, like all district court decisions; they did not establish anything even in their own districts, let alone for the nation as a whole. *Fox v. Acadia State Bank*, 937 F.2d 1566, 1570 (11th Cir. 1991) ("A district court is not bound by another district court's decision, or even an opinion by another judge of the same district court[.]"). As the *Gladstone* court explained, in a remarkable understatement:

> [T]here is a significant difference between the *D'Oench* doctrine upheld in [*Motorcity*] (relied on by the FDIC), and the freedom from affirmative defenses based on FDIC action. The *D'Oench* doctrine was articulated by the Supreme Court in 1942; the doctrine the FDIC relies on here was at most the majority rule in the early 1990's, growing as it has from an unpublished district court opinion in 1988.

44 F. Supp. 2d at 86 n.8.

Indeed, it was not until nearly four years after FIRREA that the first appellate court would consider the question raised here. *See FDIC v. Bierman*, 2 F.3d 1424, 1439 (7th Cir. 1993). Although the Seventh Circuit, and later the Fifth Circuit and the Tenth Circuit, in *FDIC v. Mijalis*, 15 F.3d 1314 (5th Cir. 1994), and *FDIC v. Oldenburg*, 38 F.3d 1119 (10th Cir. 1994), agreed with the FDIC that federal common law bars an affirmative defense based on the FDIC's failure to mitigate a failed bank's losses, those decisions were issued without the benefit of

O'Melveny.[13] Even if the FDIC's position was the "clear majority" rule near the end of the brief period between the birth of that position in 1988 and *O'Melveny*'s admonition in 1994 to apply state law. FDIC Br. 47 (quoting *Oldenburg*, 38 F.3d at 1121), that "rule" did not and cannot survive *O'Melveny*.[14] As *Motorcity* makes clear, the FDIC's position could survive *O'Melveny* only if it was a "previously established and long-standing" federal common-law rule before FIRREA. *Motorcity II*, 120 F.3d at 1143. It was not.[15]

---

[13] *Oldenburg* was briefed and argued before *O'Melveny* was decided, and although *Oldenburg* was decided after *O'Melveny*, there is no mention of *O'Melveny* in the Tenth Circuit's decision. Similarly, many of the district court decisions that the FDIC footnotes (Br. 47 n.13) predate *O'Melveny*. Others add nothing to the analysis because they merely followed binding circuit precedent. And some undercut the FDIC's argument here because they opted to *create* federal common law to benefit the FDIC, which the FDIC has forsworn here. In all events, none of these decisions applies the *Motorcity* test of whether a proposed federal common-law rule was "previously established and long-standing" before FIRREA.

[14] In a lengthy footnote, the FDIC relies on a host of district court decisions that it contends demonstrate the "widespread application" of its special federal rule after FIRREA. Br. 47, n.43. Some of these cases, the FDIC acknowledges were decided before *O'Melveny*. The rest are inapposite—whether because the district court believed it was bound by circuit precedent or because the court decided it could *create* federal common law to protect the FDIC. In other words, none involves the application of this Court's *Motorcity* test. And, again, the FDIC does not ask the Court to create new common law, only to recognize that its special rule was a feature of federal common law at the time of FIRREA.

[15] The FDIC criticizes the district court for supposedly predicting that "this Court would decline to apply" the FDIC's desired exemption even if it was established before FIRREA. Br. 46. The FDIC misunderstands the district court's analysis. Out of deference to this Court, the district court thoroughly considered

Recognizing that the rule it presses is far from "previously established and long-standing," the FDIC takes a different tack: It attempts to pass off its proposed exemption from the mitigation defense as a mere "refinement" of the "no duty" rule. Br. 42-43. But "[f]ederal courts are not common law courts possessing a general power to develop and refine their own rules of decision." *RTC v. Miramon*, 22 F.3d 1357, 1360 (5th Cir. 1994) (citing *Wayne v. TVA*, 730 F.2d 392, 398 (5th Cir. 1984)); *see also Nw. Airlines, Inc. v. Transp. Workers*, 451 U.S. 77, 95, 101 S. Ct. 1571, 1582 (1981) ("unlike their state counterparts, [federal courts] are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers").

Moreover, the *Motorcity* decisions do not support the FDIC's argument that the exemption it seeks is a mere "refinement" of the "no duty" rule and is thus permissible. Br. 42-43. The *Motorcity I* Court clearly did not think it was "refining" the *D'Oench* doctrine; on the contrary, it emphasized that barring "any

---

this Court's "precedent concerning the propriety of [federal] common law and FIRREA/FDIC policy" and correctly concluded that "binding Eleventh Circuit authority shows that common law is generally disfavored …." R.E. 139 at 37, 50. The district court's analysis of this Court's precedent on *other* federal common-law issues may have been unnecessary, as the critical question under *O'Melveny* and *Motorcity* is simply whether the FDIC's desired rule was itself "previously established and long-standing" when FIRREA was enacted. But this Court's "general[] disfavor[]" of federal common law, R.E. 139 at 50, reinforces the very high standard that the FDIC must meet to obtain its proposed exemption from Georgia law.

reliance by *Motorcity* on … oral agreements and representations" was at "the very core of the *D'Oench* doctrine." *See* 83 F.3d at 1338. Far from refining the federal common law, *Motorcity* merely applied existing Supreme Court precedent. *See, e.g.*, *id.* at 1337 (explaining that *Langley v. FDIC*, 484 U.S. 86, 108 S. Ct. 396 (1987), held that a defense based on alleged oral statements "was barred, notwithstanding the fact that it sounded in tort," just like Motorcity's tort claims).

The FDIC's rule is not a "refinement" of the "no duty" rule; it is a dramatic transformation of that rule. Unlike *FLSIC v. Two Rivers Associates*, 880 F.2d 1267 (11th Cir. 1989), where the Court recognized that *D'Oench* applied to the FDIC acting in both its regulatory and receivership capacities, the FDIC is not asking the Court simply to recognize the traditional "no duty" rule for the benefit of the FDIC as receiver as well as regulator. Instead, it is asking the Court to take a rule that a bank's directors cannot sue the FDIC for tort damages because the FDIC owes them no duty that would entitle them to bring a tort claim and transform that rule into a special exemption, uniquely for the FDIC, from the obligation of every tort plaintiff to take reasonable steps to mitigate its losses.

Further proof that the FDIC's proposed exemption from affirmative defenses is fundamentally different from the traditional "no duty" rule is that the law has long distinguished between what claims can be brought against the United States—the domain of the "no duty" rule—and what defenses a defendant can raise when the United States brings a claim. The Federal Tort Claims Act's many exceptions significantly limit the state-law tort claims that can be brought against the United States, but its limits have no application when the government is the plaintiff and the issue is how the defendant can defend. The rule in the latter context is well established: "a party sued by the United States may recoup damages … so as to reduce or defeat the government's claim … though no affirmative judgment … can be rendered against the United States." *United States v. Forma*, 42 F.3d 759, 765 (2d Cir. 1994) (alteration in original); *see also, e.g.*, *FDIC v. Lattimore Land Corp.*, 656 F.2d 139, 143 (5th Cir. Unit B 1981). The purpose of this rule is "to permit a transaction which is made the subject of suit by a plaintiff to be examined in all its aspects and judgment to be rendered that does justice in view of the one transaction as a whole." *FDIC v. Citizens Bank & Trust Co. of Park Ridge*, 592 F.2d 364, 373 (7th Cir. 1979).

For nearly 200 years federal courts have recognized that neither sovereign immunity nor want of statutory authority poses a bar on "recoupment" claims that involve affirmative defenses and counterclaims inextricably bound up with the subject matter of the litigation initiated by the United States or one of its agencies. *United States v. Ringgold*, 33 U.S. (8 Pet.) 150 (1834) (defendant may bring recoupment counterclaim against the United States, even without express statutory authority). Yet the FDIC seeks to prevent the Directors from asserting an affirmative defense that is intended to ensure that the Directors, rather than the FDIC itself, caused the losses that the FDIC is trying to make the Directors pay for. Not only does the FDIC believe it should not have to play by the same rules as other Georgia tort plaintiffs, but it also believes it should not have to play by the same rules as other federal agencies.

3. Georgia's Failure-to-Mitigate Defense Presents No Conflict with Federal Law.

The traditional "no duty" rule, which would bar an affirmative suit seeking damages based on the discretionary actions of the FDIC (whether as receiver or regulator), protects substantial federal interests. But when the FDIC elects to use state law to recover losses to a failed bank, it must "work out its claims under state law." *O'Melveny*, 512 U.S. at 87, 114 S. Ct. at 2054. When the FDIC invokes a state's tort law, it has no license to rewrite it to make it more favorable. There are thus "significant differences between suing the FDIC and asserting affirmative defenses against the FDIC" when it sues under state law. *Gladstone*, 44 F. Supp. 2d at 88.

There is no conflict between the duties the FDIC owes under FIRREA, *see* 12 U.S.C. § 1821(d)(13)(E)(i-v), and the obligation it has under state law as a would-be plaintiff to avoid avoidable losses. *See Wachovia Bank*, 275 Ga. App. at 232, 620 S.E.2d at 473; *Hobday*, 266 Ga. App. at 781-82, 598 S.E.2d at 352; *Sears*, 292 Ga. App. at 607, 664 S.E.2d at 915. The FDIC's "duty to dispose of assets according to FIRREA's objectives, and the state-law duties not to act negligently in so doing and to mitigate damages … are *distinct but compatible*." *Gladstone*, 44 F. Supp. 2d at 87 (emphasis added). Consistent with Georgia law, once the FDIC assumes control of a failed bank, courts have held that the FDIC must not "cause[] losses to the failed institution which could have been avoided, either by diligent collection efforts, diligent and proper marshaling of or proceeding against valuable collateral, or otherwise." *FDIC v. Niblo*, 821 F. Supp. 441, 455 (N.D. Tex. 1993).

The FDIC's concern about judicial second-guessing of its discretionary decisions is vastly overblown. *See* Br. 51-53. The obligation to mitigate is modest. It extends only to losses that are avoidable, and it requires only the exercise of ordinary care. Where the FDIC has a number of reasonable alternatives to maximize the value of a bank's assets and minimize or avoid losses, it has discretion to choose among them; any losses that result from choosing a reasonable strategy "should not be considered 'avoidable.'" *Gladstone*, 44 F. Supp. 2d at 87. If it is not "practicable" for the FDIC to reduce losses through the "exercise [of] ordinary care," no mitigation defense will succeed. *Wachovia Bank*, 275 Ga. App. at 232, 620 S.E.2d at 473. To whatever extent "allowing affirmative defenses based on [the FDIC's] conduct will allow judicial second-guessing of its choices," *Gladstone*, 44 F. Supp. 2d at 88, that is true of all tort plaintiffs and does not justify creating a special federal common-law exemption for the FDIC. The rule that defendants can assert "recoupment" counterclaims and defenses against the United States that they could not bring as affirmative claims as plaintiffs shows that the prospect of "second-guessing" of the government does not justify depriving defendants of their ordinary defenses. *See, e.g.*, *Forma*, 42 F.3d at 765. It is "one thing to say, as the FTCA does, that no one is entitled to damages based on the FDIC's negligence, but quite another to conclude from this, as the FDIC tries to do, that a [former director] may be held liable for damages [that] could have been avoided but for the FDIC's negligence." *Gladstone*, 44 F. Supp. 2d at 88 (citations omitted).

* * *

Georgia law requires every plaintiff in the FDIC's shoes to take reasonable, practicable steps to mitigate its losses before demanding that someone else pay for them. At this early stage, the Directors' mitigation defense—like the FDIC's claims themselves—remains to be tested and proven. Under the Supreme Court's decision in *O'Melveny* and this Court's decisions in *Motorcity*, the FDIC must play by state-law rules when it brings state-law claims, and the Directors are entitled to an opportunity to try to prove this defense.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's order dismissing the FDIC's negligence claims and denying the FDIC's motion for summary judgment on the Directors' mitigation affirmative defense.

Respectfully submitted,

/s/ Jeffrey S. Bucholtz
Jeffrey S. Bucholtz
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006
jbucholtz@kslaw.com
(202) 737-0500

David L. Balser
Tracy Klingler
Merritt E. McAlister
E. Claire Carothers
David M. Barnes
KING & SPALDING LLP
1180 Peachtree Street, NE
Atlanta, Georgia 30309
(404) 572-4600

Attorneys for Defendant Jack S. Murphy

James B. Manley, Jr.
Jill Kuhn
Jeffrey Ronald Baxter
McKenna Long & Aldridge
303 Peachtree Street, NE
One Peachtree Center, Suite 5300
Atlanta, Georgia 30308

Attorneys for Defendants Joseph J. Ernest, Donald C. Hartsfield, and Gerald O. Reynolds

Randy Edwards
Paul A. Piland
COCHRAN & EDWARDS, LLC
2950 Atlanta Road SE
Smyrna, GA 30080

Attorneys for Defendant Steven M. Skow

Robert R. Ambler, Jr.
James E. Connelly
John G. Perry
WOMBLE CARLYLE
SANDRIDGE & RICE, LLC
271 17th Street, NW, Suite 2400
Atlanta, GA 30363

Attorneys for Defendant Alan K. Arnold

Frank M. Young, III
Kirk D. Smith
Haskell Slaughter
Young & Rediker
2001 Park Place North
1400 Park Place Tower
Birmingham, AL 35203

Attorneys for Defendant Clinton M. Day

Richard A. Mitchell
Edward A. Marshall
ARNALL GOLDEN GREGORY LLP
171 17th Street, NW
Suite 2100
Atlanta, Georgia 30363

Attorneys for Defendant Douglas G. Ballard, II

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure Rule 32(a), I certify that this brief complies with the length limitations set forth in Fed. Rule App. Proc. 32(a)(7) because it contains 13,779 words, as counted by Microsoft Word, excluding the items that may be excluded under Federal Rule 32(a)(7)(B)(iii).

/s/Merritt E. McAlister
Merritt E. McAlister
Counsel for Jack S. Murphy

CERTIFICATE OF SERVICE

I certify that on April 17, 2013, I served the foregoing "Brief of Appellees" upon the counsel of record through the Court's CM/ECF system and by U.S. mail as follows.

Minodora D. Vancea
Federal Deposit Insurance Corporation
Appellate Litigation Unit
VS-D-7014
3501 Fairfax Dr.
Arlington, VA 22226

Kyle M. Keegan
Keegan DeNicola Kiesel Bagwell Juban & Lowe
5555 Hilton Ave., Ste 205
Baton Rouge, LA 70808

/s/Merritt E. McAlister
Merritt E. McAlister
Counsel for Jack S. Murphy