

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

FEDERAL DEPOSIT INSURANCE)
CORPORATION, AS RECEIVER FOR)
INDYMAC BANK, F.S.B.,)
Plaintiff,)
v.)
MATTHEW PERRY,)
Defendant.)

Case No. CV 11-5561-ODW (MRWx)
AMENDED ORDER DENYING
DEFENDANT’S MOTION TO
DISMISS [18]

I. INTRODUCTION

Currently before the Court is Defendant Matthew Perry’s (“Perry” or “Defendant”) Motion to Dismiss Plaintiff Federal Deposit Insurance Corporation (“FDIC”), as Receiver for Indymac Bank, F.S.B.’s (“Plaintiff”) Complaint. (Dkt. No. 18.) After careful consideration, the Court deems the matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78; C. D. Cal. L. R. 7-15. For the following reasons, the Court **DENIES** Defendant’s Motion.

II. FACTUAL BACKGROUND

This case arises from Defendant’s actions related to Indymac Bank, F.S.B.’s (“Indymac”) investment in risky residential loans. Specifically, between at least April

1 and October 2007, Defendant—Indymac’s chief executive office (“CEO”)—is alleged
2 to have negligently permitted the production of a pool of more than \$10 billion in risky,
3 residential loans intended for sale into a secondary market. (Compl. ¶ 3.) Due to the
4 volatility of the secondary market, however, Indymac was forced by the fourth quarter
5 of 2007 to transfer the loans into its own investment portfolio. (*Id.*) Plaintiff alleges that
6 Defendant’s actions, whereby he chose to aggressively gamble by investing in these risky
7 loans, were beyond what a reasonable banker would have done under similar
8 circumstances. (Compl. ¶¶ 3, 97–98.) As a result, the loans that had to be transferred
9 into Indymac’s investment portfolio generated substantial losses in excess of \$600
10 million. (Compl. ¶ 3.) On July 11, 2008, Indymac ultimately closed and the FDIC was
11 appointed as its receiver. (Compl. ¶ 13.)

12 Based on the foregoing, Plaintiff brings this action pursuant to 12 U.S.C.
13 § 1821(d)(2) and 12 U.S.C. § 1821(k) alleging that Defendant, as CEO, breached his
14 duties to Indymac and acted negligently in allowing Indymac to continue to generate and
15 purchase loans for sale into the secondary market.¹ (Compl. ¶ 97.) As a result of the
16 Defendant’s conduct, Plaintiff alleges that it was damaged in a sum in excess of \$600
17 million. (Compl. ¶ 98.)

18 **III. LEGAL STANDARD**

19 “To survive a motion to dismiss for failure to state a claim under Rule 12(b)(6), a
20 complaint generally must satisfy only the minimal notice pleading requirements of Rule
21 8(a)(2).” *Porter v. Jones*, 319 F.3d 483, 494 (9th Cir. 2003). Rule 8(a)(2) requires “a
22 short and plain statement of the claim showing that the pleader is entitled to relief.” Fed.

23
24
25 ¹ The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (“FIRREA”) provides that directors and officers of insured depository institutions may be held liable for money damages brought by the FDIC for “gross negligence, including any similar conduct or conduct that demonstrates a greater disregard of a duty of care (than gross negligence) including intentional tortious conduct, as such terms are defined and determined under applicable State law.” 12 U.S.C. § 1821(k). “[S]tate law sets the standard of conduct as long as the state standard (such as simple negligence) is stricter than that of the federal statute.” *Atherton v. FDIC*, 519 U.S. 213, 215-16 (1997). Because California’s simple negligence standard is stricter than the gross negligence standard provided for in 12 U.S.C. § 1821(k), California law and its simple negligence standard is applicable for assessing liability under *Atherton*. *FDIC v. Caster*, 184 F.3d 1040, 1043 (9th Cir. 1999).

1 R. Civ. P. 8(a)(2). For a complaint to sufficiently state a claim, its “[f]actual allegations
2 must be enough to raise a right to relief above the speculative level.” *Bell Atl. Corp. v.*
3 *Twombly*, 550 U.S. 554, 555 (2007). Mere “labels and conclusions” or a “formulaic
4 recitation of the elements of a cause of action will not do.” *Id.* Rather, to overcome a
5 12(b)(6) motion, “a complaint must contain sufficient factual matter, accepted as true, to
6 state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937,
7 1949 (2009) (internal quotation and citation omitted). “The plausibility standard is not
8 akin to a probability requirement, but it asks for more than a sheer possibility that a
9 defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent
10 with a defendant’s liability, it stops short of the line between possibility and plausibility
11 of entitlement of relief.” *Id.* (internal quotation and citation omitted).

12 When considering a 12(b)(6) motion, a court is generally limited to considering
13 materials within the pleadings and must construe “[a]ll factual allegations set forth in the
14 complaint . . . as true and . . . in the light most favorable to [the plaintiff].” *See Lee v.*
15 *City of L.A.*, 250 F.3d 668, 688 (9th Cir. 2001) (citing *Epstein v. Wash. Energy Co.*, 83
16 F.3d 1136, 1140 (9th Cir. 1996)). A court is not, however, “required to accept as true
17 allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable
18 inferences.” *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).
19 Thus, the Ninth Circuit has summarized the governing standard, in light of *Twombly* and
20 *Iqbal*, as follows: “In sum, for a complaint to survive a motion to dismiss, the non-
21 conclusory factual content, and reasonable inferences from that content, must be plausibly
22 suggestive of a claim entitling the plaintiff to relief.” *Moss v. U.S. Secret Serv.*, 572 F.3d
23 962, 969 (9th Cir. 2009) (internal quotation marks omitted).

24 **IV. DISCUSSION**

25 The parties dispute as to whether the business judgment rule (“BJR”) protects
26 corporate officers as well as directors from judicial second guessing business decisions
27 made on behalf of the corporation. Specifically, Defendant moves to dismiss Plaintiff’s
28 Complaint arguing that the allegations fail to plead facts sufficient to overcome BJR. In

1 making this argument, Defendant contends that California law applies BJR to corporate
2 decision makers including both directors and officers. In addition, Defendant avers that
3 even if BJR does not apply to officers, the Complaint focuses on Indymac's allegedly
4 flawed core business strategy. Thus, Defendant argues that BJR applies in this case as
5 the allegations implicate Defendant's performance as a director and not as his role as
6 Indymac's CEO. In any event, Defendant contends that BJR applies and insulates him
7 from personal liability related to his actions during the alleged time period prior to
8 Indymac's demise.

9 Plaintiff opposes Defendant's Motion arguing that BJR does not apply to officers
10 in California. Likewise, Plaintiff contends that Defendant is being sued in his capacity
11 as Indymac's CEO as opposed to his role as director, and consequently, Plaintiff argues
12 that BJR need not apply. As a result, Plaintiff contends that it was not required to plead
13 around this defense. Moreover, Plaintiff avers that the issue of whether BJR applies to
14 officers is not properly before this Court pursuant to a Rule 12(b)(6) motion.

15 As an initial matter, plaintiffs generally need not anticipate a defense. *See* Fed. R.
16 Civ. P. 8(b)-(c); *see also Gomez v. Toledo*, 446 U.S. 635, 640 (1980) (holding the burden
17 of pleading a defense rests with the defendant). Where the complaint's allegations,
18 however, reveal the existence of an affirmative defense, as Defendant argues here,
19 plaintiffs must plead around the defense, by alleging specific facts that would avoid the
20 apparent defense as Defendant argues. *Doe II v. Myspace, Inc.*, 175 Cal. App. 4th 561,
21 566 (Ct. App. 2009) (citation and quotation omitted). "Absent such allegations, the
22 complaint is subject to demurrer for failure to state a cause of action" *Id.* at 566
23 (citation omitted); *Berg & Berg Enters., LLC v. Boyle, et al.*, 178 Cal. App. 4th 1020,
24 1046 (Ct. App. 2009) ("[T]he failure to sufficiently plead facts to rebut the business
25 judgment rule or establish its exceptions may be raised on demurrer, as whether sufficient
26 facts have been so pleaded is a question of law." (citations omitted)). Thus,
27 if BJR applies to corporate officers under California law, the Complaint must include
28 facts pleading around the defense. The Court holds, however, that Plaintiff was not

1 required to plead around BJR because BJR does not apply to corporate decisions of
2 officers in California.

3 At first blush, Defendant’s argument that BJR applies to both corporate directors
4 as well as officers seems viable. Many California courts, when mentioning BJR, have
5 repeatedly lumped officers and directors together without distinction, albeit in dicta. In
6 addition, and not surprisingly, the distinction as to whether BJR applies to both corporate
7 officers and directors has been the subject of much academic debate as the parties in this
8 case suggest. Despite the confusion and debate, the Court must disagree with
9 Defendant’s contention.

10 To begin, common law BJR “has two components—one which immunizes
11 directors from personal liability if they act in accordance with its requirements, and
12 another which insulates from court intervention those management decisions which are
13 made by directors in good faith in what the directors believe is the organization’s best
14 interest.” *Berg & Berg Enters., LLC*, 178 Cal. App. 4th at 1045 (citations and quotations
15 omitted.) California courts traditionally have applied common law BJR to shield from
16 scrutiny qualifying decisions made by a corporation’s *board of directors*. *See, e.g.,*
17 *Lamden v. La Jolla Shores Clubdominium Homeowners Ass’n*, 21 Cal. 4th 249, 259
18 (1999) (emphasis added). Detracting from its traditional application, Defendant proposes
19 that common law BJR apply to corporate officers as well as directors. Defendant’s
20 proposition, however, seems unprecedented as the Court’s research reveals no judicial
21 decision in California applying common law BJR to corporate officers.

22 Rather, one decision by the California Court of Appeal has held that judicial
23 deference afforded under BJR should not apply to interested directors who effectively
24 were acting as officers. *Gaillard v. Natomas, Co.*, 208 Cal. App. 3d 1250, 1265 (Ct.
25 App. 1989) (“[Interested directors] were not ‘perform[ing] the duties of a director’ as
26 specified in section 309, but were acting as officer employees of the corporation. The
27 judicial deference afforded under the business judgment rule therefore should not apply.”
28 (citation and quotations omitted)). The Court of Appeal further articulated that “an

1 officer-director might be liable for particular conduct because of his capacity as an
 2 officer, whereas the other directors would not. This result is in accord with the premise
 3 of the business judgment rule that courts should defer to the business judgment of
 4 disinterested directors who presumably are acting in the best interests of the corporation.”
 5 *Gaillard*, 208 Cal. App. 3d at 1265. Still, Defendant contends that the broader “second
 6 component” of common law BJR encompassing the general judicial policy of deference
 7 to business decisions should apply to officers. The Court, nevertheless, finds that no
 8 authority exists supporting such a proposition.²

9 In addition, California’s statutory BJR does not extend its protection to corporate
 10 officers. Cal. Corp. Code § 309³ (“§ 309”), which codifies California’s common law
 11 BJR, expressly pertain to directors’ duties and liabilities and does not mention “officer”
 12 anywhere in its text. Consequently, the California legislature, without mistake, omitted
 13 officers in codifying BJR, and this Court cannot infer otherwise. *See Troppman v.*
 14 *Valverde*, 40 Cal. 4th 1121, 1135 n.10 (2007) (Courts are “not to insert what has been
 15 omitted, or to omit what has been inserted”) (citing Cal. Code Civ. Proc. § 1858;
 16 *Cal. Teachers Ass’n v. Governing Bd. of Rialto Unified Sch. Dist.*, 14 Cal. 4th 627, 633
 17 (1997)).

20 ² Defendant cites cases that do not support his contention that common law BJR applies to
 21 corporate officers. *See Berg & Berg Enters.*, 178 Cal. App. 4th at 1045 (applying BJR to a director);
 22 *Lee v. Interinsurance Exch.*, 50 Cal. App. 4th 694, 713 (Ct. App. 1996) (same); *Biren v. Equality*
 23 *Emergency Med. Group*, 102 Cal. App. 2d 663, 676 (Ct. App. 2002) (same); *Francis T. v. Village Green*
 24 *Owners Ass’n*, 42 Cal. 3d 490, 508-09 (1986) (holding that third party tort claims against corporate
 25 directors and officers are governed by the common law “ordinary prudent person” standard); *PMC, Inc.*
 26 *v. Kadisha*, 78 Cal. App. 4th 1368, 1386-87 (Ct. App. 2000) (applying tort and agency principles in
 27 determining liability pursuant to third party intentional tort claims); *FDIC v. Castetter*, 184 F.3d at 1044
 28 (applying BJR to a director).

26 ³ Corporations Code § 309, subdivision (a) provides that “[a] director shall perform the duties
 27 of a director . . . in good faith, in a manner such director believes to be in the best interests of the
 28 corporation and its shareholders and with such care, including reasonable inquiry, as an ordinarily
 prudent person in a like position would use under similar circumstances.” A director “who performs the
 duties of a director in accordance with” this subdivision, as well as other subdivisions that permit
 reliance on information provided by others under certain circumstances not relevant here, “shall have
 no liability based upon any alleged failure to discharge the person’s obligations as a director.” Cal.
 Corp. Code § 309(c).

1 Likewise, the legislative committee's comments show that it was the drafters'
2 intent not to include officers when applying BJR's standard of care to directors. *See San*
3 *Diego Cnty. Emps. Ret. Ass'n v. Superior Court*, 196 Cal. App. 4th 1228, 1237 (Ct. App.
4 2011) ("A court's overriding purpose in construing a statute is to ascertain legislative
5 intent . . . a court looks first to the words of the statute and gives them their usual and
6 ordinary meaning.") (citations and quotations omitted); *see also Pacific Gas & Elec. Co.*
7 *v. Workers' Comp. Appeals Bd.*, 114 Cal. App. 4th 1174, 1180 (Ct. App. 2004) ("Both
8 the legislative history of the statute and the wider historical circumstances of its
9 enactment may be considered in ascertaining the legislative intent.") (citation omitted).
10 Specifically, with respect to the standard of care, the legislative comments state, in part:
11 "[I]t is the intent of the draftsmen, by combining the requirement of good faith within the
12 standard of care, to incorporate the familiar concept that, these criteria being satisfied, a
13 director should not be liable for an honest mistake of business judgment." *See* Cal. Corp.
14 Code § 309 (Legislative Committee Comment) (quotation omitted). With respect to this
15 standard of care, officers were expressly excluded. *See id.* ("The standard of care does
16 not include officers."). The draftsmen reason: "Although a non-director officer may have
17 a duty of care similar to that of a director [], his ability to rely on factual information,
18 reports or statements may, depending upon the circumstances of the particular case, be
19 more limited than in the case of a director in view of the greater obligation he may have
20 to be familiar with the affairs of the corporation." *Id.* In other words, when the California
21 legislature had the opportunity to codify common law BJR, it purposely excluded its
22 application to corporate officers.

23 In light of the apparent lack of authority and the California legislature's expressed
24 intent not to include corporate officers in codifying common law BJR, this Court holds
25 that BJR does not protect officers' corporate decisions. Accordingly, to the extent
26 Defendant argues that Plaintiff's Complaint should be dismissed for failure to plead
27 around BJR, the Court **DENIES** Defendant's Motion.

28 Furthermore, the Court finds unavailing Defendant's argument that Plaintiff's

1 allegations pertain to Defendant’s capacity as Indymac’s director as opposed to his role
2 as CEO. It is axiomatic that Plaintiff is the master of the Complaint. *See, e.g., Lincoln*
3 *Property Co. v. Roche*, 546 U.S. 81, 90 (2005) (“In general, the plaintiff is the master of
4 the complaint and has the option of naming only those parties the plaintiff chooses to sue,
5 subject only to the rules of joinder [of] necessary parties.” (citation omitted)). Here,
6 Plaintiff alleges sufficiently that Defendant’s conduct and actions were undertaken in his
7 capacity as an officer. Whether Plaintiff can ultimately prove these allegations is not
8 before this Court at this time. Accordingly, to the extent Defendant’s Motion is based on
9 this argument, the Court **DENIES** Defendant’s Motion.

10 **V. CONCLUSION**

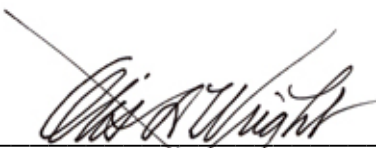
11 Based on the foregoing, the Court **DENIES** Defendant’s Motion to Dismiss in its
12 entirety.

13 Pursuant to 28 U.S.C. § 1292(b), the Court finds the instant order involves a
14 controlling question of law as to which there is substantial ground for difference of
15 opinion and that an immediate interlocutory appeal therefrom may materially advance
16 the ultimate termination of the litigation.

17
18
19
20
21
22
23
24
25
26
27
28

IT IS SO ORDERED.

February 21, 2012



HON. OTIS D. WRIGHT II
UNITED STATES DISTRICT JUDGE