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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

PLUMBERS LOCAL NO. 137 PENSION FUND and LABORERS' LOCAL #231 PENSION FUND, Derivatively on Behalf of UMPQUA HOLDINGS CORPORATION, Plaintiffs, vs. RAYMOND P. DAVIS, et al., Defendants, – and – UMPQUA HOLDINGS CORPORATION, an Oregon corporation, Nominal Party.	Case No. 3:11-cv-00633-AC PLAINTIFFS' OBJECTION TO MAGISTRATE JUDGE'S RECOMMENDATION AND FINDINGS RE DEFENDANTS' MOTION TO DISMISS Request for Oral Argument

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STATUTES, RULES AND REGULATIONS

Plaintiffs Plumbers Local No. 137 Pension Fund and Laborers' Local #231 Pension Fund (collectively, "plaintiffs") respectfully submit this memorandum in objection to Magistrate Judge Acosta's Findings and Recommendation dated January 11, 2012, which recommended granting Defendants' Motion to Dismiss (the "Recommendation") (Dkt. No. 61).

I. PRELIMINARY STATEMENT

This case presents a shareholder's worst nightmare: a board of directors so beholden to company executives as to make them richer for making shareholders poorer. Umpqua Holdings Corporation's ("Umpqua" or the "Company") Board of Directors (the "Directors") executed a facially unreasonable compensation plan: across-the-board 60%-160% pay raises for Umpqua's executives following a year of losses and during a year in which shareholders lost over $100 million and returns lagged behind industry peers. A report from the independent Institutional Shareholder Services ("ISS") "found a 'disconnect' between [Umpqua's] CEO's compensation in 2010 and the company's total shareholder return." *See* Verified Shareholder Derivative Complaint for Breach of Fiduciary Duty of Loyalty, Aiding and Abetting, Breach of Contract and Unjust Enrichment ("Complaint") (Dkt. No. 3), ¶41. Then, the Directors put their compensation plan to an advisory vote of Umpqua's owners (*i.e.*, the shareholders) pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act. Umpqua's shareholders rejected defendants' excessive compensation plan by a huge margin. The Directors dismissed the shareholders' vote and deceptively justified their actions.

It is undisputed that all of Umpqua's Directors participated in the alleged wrongdoing here. Under Oregon law, therefore, plaintiffs were excused from making any presuit demand. The Recommendation's contrary view is due to its erroneous application of Delaware law. The facts show the Directors were not acting in good faith or in the best interest of the shareholders. Therefore, even under Delaware law, presuit demand was excused.

Plaintiffs respectfully submit that Magistrate Judge Acosta's Recommendation applied the wrong legal standard, improperly accepted defendants' explanations rather than the allegations of the Complaint, and effectively created a pleading standard that requires plaintiffs to prove their case before bringing it. Plaintiffs respectfully object.

II. RELEVANT LEGAL STANDARDS

A. Standard of Review

When either party objects to any portion of a Magistrate Judge's Findings and Recommendation concerning a dispositive motion, the District Court must make a *de novo* determination of that portion of the Magistrate's report. 28 U.S.C. §636(b)(1); Fed. R. Civ. P. 72(b); *McDonnell Douglas Corp. v. Commodore Bus. Machs., Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981).

B. Standard for Motion to Dismiss

Although defendants' "benign explanations for [disputed conduct], if unrebutted, are properly considered on a motion for summary judgment . . . , review under Rule 12(b)(6) is confined to the factual allegations of the complaint, which must be accepted as true." *In re Silicon Graphics Sec. Litig.*, 183 F.3d 970, 1002 (9th Cir. 1999), *superseded by statute on other grounds*.[1] Courts may also consider any relevant portions of documents referred to in the complaint. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). In addition to accepting a plaintiff's factual allegations as true, courts "construe those facts and draw all reasonable inferences therefrom 'in the light most favorable to the nonmoving party.'" *In re MRV Commc'ns, Inc.*, No. CV 08-3800 GAF

[1] Citations are omitted and emphasis is added throughout unless otherwise indicated.

(RCx), 2010 WL 1891717, at *2 (C.D. Cal. May 10, 2010) (quoting *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996)).

III. STATEMENT OF FACTS

In 2008, Umpqua's executive team piloted the bank to a state of desperation, forcing them to accept federal bailout funds. *See* Proxy at 38.[2] The restrictions that accompanied those bailout funds kept executive compensation in check throughout 2009. *Id.* ("We were unable to pay short term cash incentives or issue stock options to certain executives after February 11, 2009 until we completely exited the [federal bailout] Program in March 2010.").

In 2009, the bank had its worst year ever, losing $2.36 per share. *See* Proxy at 41. Umpqua's Compensation Committee, which includes several defendants, acknowledged that "the Company's . . . financial performance was unsatisfactory." *Id.* at 39. Yet, immediately after he had led the bank to that "unsatisfactory" performance in 2009, the Directors rewarded Umpqua's CEO with over $400,000 in additional compensation:

> In January 2010, based on the information received and reviewed and their deliberations, and acknowledging Mr. Davis's exceptional leadership through the economic downturn, the Compensation Committee ***increased Mr. Davis's base salary by $200,000 and approved a grant of 23,000 RSAs [believed to be worth over $200,000], which qualified under the CPP Compensation Regulations as incentive compensation for his performance in 2009***.

Id.

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[2] All references to "Proxy" refer to Umpqua's 2011 Proxy Statement to which the Complaint repeatedly refers. *See, e.g.*, Complaint, ¶¶16-17, 32, 38-40. A true and correct copy of the Proxy is attached as Exhibit A to the Declaration of Benny C. Goodman III in Support of Plaintiffs' Objection to Magistrate Judge's Recommendation and Findings re Defendants' Motion to Dismiss ("Goodman Decl."). In addition to being referenced throughout the Complaint, the Magistrate Judge expressly relied on the Proxy. *See* Recommendation at 2-4.

There is an obvious tension between the Company's admittedly unsatisfactory financial performance in 2009 and the raise CEO Davis received in the first month of 2010. The Directors transformed that tension into outright deception when they represented to shareholders that, "The Company's financial and operating performance in 2009 and the [federal bailout] [r]egulations served as the backdrop for the Committee's compensation decisions in early 2010." *See* Proxy at 37.

After its losses in 2009, the bank's year-end stock price was $13.41 per share. *See* Complaint, ¶34. By the end of 2010, its stock price had fallen to $12.18 per share, costing shareholders over $100 million. *Id.* That stock performance lagged behind Umpqua's industry peers, and shareholder returns for the year were ***negative*** 7.7%. *Id.*, ¶33. Yet, as shareholders got poorer throughout 2010, the Directors made Umpqua's executives richer. Much richer.

The Directors ***more than doubled*** Umpqua's executives' compensation in 2010, at an average rate of 118%. *See* Complaint, ¶36. For example, Umpqua's CEO received a raise from $2,316,716 in 2009 to $3,731,340 in 2010. *Id.*, ¶37. Its COO saw a jump in pay from $707,621 to $1,502,938. *Id.* Its CFO's income increased from $365,683 to $879,963. *Id.* And its Executive Vice President enjoyed a boost that took him from $343,340 in 2009 to $897,073 in 2010. *Id.* Again, the Directors showered this largess on the executive team ***as shareholders*** were losing over $100 million.[3]

When these machinations finally came to light and the compensation plan was up for an advisory vote by shareholders, the independent ISS found a "disconnect" between the pay hikes and the Company's total shareholder return. *See* Complaint, ¶41. Shareholders overwhelmingly

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[3] All Directors approved the 2010 pay increases. *See* Complaint, ¶¶15-24.

disapproved the Directors' compensation decisions, with over 54 million votes against the compensation program versus less than 31 million votes in favor. *See* Form 8-K at 2.[4] The Directors dismissed the results of the vote, declaring that they "believe[d] that the vote against the 'say on pay' resolution was primarily the result of votes cast by institutional investors that followed the recommendation of Institutional Shareholder Services (ISS)," which they attributed to an analytical approach with which they disagreed. *Id.* The Directors refused to alter their compensation program, promising only "to have constructive conversations with our shareholders, and look at ways to more closely align executive compensation to total shareholder return in 2011." *Id.* This suit followed.

IV. THE MAGISTRATE JUDGE'S FINDINGS AND RECOMMENDATION

On June 27, 2011, defendants filed a motion to dismiss plaintiffs' Complaint under Rule 12(b)(6). Plaintiffs filed their opposition on July 27, 2011, and defendants replied on August 25, 2011. On January 11, 2012, Magistrate Judge Acosta issued his Recommendation to grant defendants' motion.

Plaintiffs object to the substance of the Recommendation in its entirety, but will confine their arguments to the Magistrate Judge's holding that, "Plaintiffs failed to meet their burden with respect to the presuit demand requirement and, for this reason, Plaintiff's claims should be dismissed." *See* Recommendation at 2.

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4 References to "Form 8-K" refer to Umpqua's Form 8-K, filed on April 22, 2011 (referenced in the Complaint, ¶41). A true and correct copy of the Form 8-K is attached as Exhibit B to the Goodman Decl.

V. ARGUMENT

A. Demand Is Futile Under Oregon Law

1. Demand Futility

As the Recommendation rightly notes, Fed. R. Civ. P. 23.1 provides a heightened pleading standard for shareholder derivative actions such as this one. The Recommendation is based on Section (b)(3) of Rule 23.1, which requires a derivative action complaint to "(3) state with particularity: (A) any effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members; and (B) the reasons for not obtaining the action or not making the effort." Fed. R. Civ. P. 23.1(b)(3).

Plaintiffs are excused for "not making the effort" of obtaining the desired action from the directors prior to filing suit when such effort would be futile. This is known as the "demand futility" exception and is defined under the law of a company's state of incorporation. *Kamen v. Kemper Fin. Servs.*, 500 U.S. 90, 96 (1991). "[D]emand typically is deemed to be futile when a ***majority*** of the directors have participated in or approved the alleged wrongdoing . . . ." *Id.* at 102 (citing *Auerbach v. Bennett*, 47 N.Y.2d 619, 631-33 (1979)). Umpqua is incorporated in the state of Oregon, therefore, Oregon law applies to the demand futility analysis here. *Kamen*, 500 U.S. at 96; *see also* Complaint, ¶10.

2. Oregon Law

The demand futility standard that the U.S. Supreme Court observed to be "typical" has been the law in Oregon for more than a century. In *Wills v. Nehalem Coal Co.*, 52 Ore. 70, 86-87, 96 P. 528, 534 (1908), the Oregon Supreme Court addressed the same argument defendants raise here:

> It is next urged that the injury complained of being an injury to the corporate property, and not a direct and immediate injury to the stockholder, the suit to redress the wrong must be brought by the corporation, unless it is alleged with particularity

> that plaintiff had demanded and required of the officers of the corporation that they take steps to redress the wrong, and that they had refused.

The Oregon Supreme Court then proceeded to discuss the demand futility exception to this rule:

> "***The action may be maintainable without showing any notice, request, or demand to the managing body***, or any actual refusal by them to prosecute; in other words, the refusal may be virtual. ***If the facts alleged show that the defendants charged with the wrongdoing, or some of them, constitute a majority of the directors or managing body at the time of commencing the suit***, or that the directors or a majority thereof are still under the control of the wrongdoing defendants [or] if the plaintiff's pleading discloses any other condition of fact which renders it reasonably certain that a suit by the corporation would be impossible and that a demand therefore would be nugatory."

Id. at 534-35 (quoting 3 Pomeroy's Equitable Remedies (3d ed.) §1095). Similar to what the U.S. Supreme Court would observe decades later in *Kamen*, the Oregon Supreme Court concluded that "[t]his exemplification of the rule appears to be sustained by the great weight of authorities." *Wills*, 96 P. at 535.

Although old and easily overlooked, the Oregon Supreme Court has never retreated from its decision in *Wills*. Nor has the Oregon legislature abrogated it. *Wills* remains good law, as demonstrated by the District Court of Massachusetts' reliance on the *Wills* standard in the case of *In re Columbia Entities Litig.*, No. 04-11704-REK, 2005 U.S. Dist. LEXIS 33439, at *22-*23 (D. Mass. Nov. 30, 2005). The Massachusetts District Court in the *Columbia Entities* applied *Wills* for certain defendants who were organized under Oregon law. *Id*. at *21-*22. Because the complaint in that action alleged wrongdoing by the trustees and officers of Oregon companies, the Court held that "plaintiffs' pleadings disclose a situation where, if plaintiffs' allegations of wrongdoing are true, demand would likely be nugatory. Therefore, plaintiffs are hereby excused from the demand requirement for Count I as to the defendants organized under Oregon law . . . ." *Id.* at *23.

Here, there is no dispute that Umpqua is organized under Oregon law. *See* Complaint, ¶10. There is no question that ***all*** of the Directors participated in ***and*** approved the allegedly wrongful pay hikes. *Id.*, ¶¶15-24. Likewise, it cannot be contested that the defendant officers of Umpqua benefitted from the alleged wrongdoing. *Id.*, ¶¶11-14. Accordingly, under Oregon law, as demonstrated by *Wills* and *Columbia Entities*, plaintiffs here have plainly met the standard for demand futility.

3. *Wills* Remains Good Law, Despite Cases Overlooking It

A few years ago, the parties to a case in this District overlooked *Wills*, leading the Court to mistakenly conclude that "Oregon law is undeveloped in this area [of demand futility], so the parties look to Delaware law." *Sommers v. Lewis*, 641 F. Supp. 2d 1151, 1156 (D. Or. 2009). The area of demand futility at issue in *Sommers* was ***not*** the applicable standard, but rather whether a prior shareholders' demand precluded a subsequent shareholder from asserting demand futility. *Id*. That was ***not*** the issue in *Wills* and it is ***not*** the issue here.

A similar oversight occurred in *Crandon Capital Partners v. Shelk*, 219 Or. App. 16, 181 P.3d 773 (2008). In addition to not even recognizing the holding of *Wills*, the Oregon state appellate court simply cited Oregon's demand statute (Or. Rev. Stat. §60.261(2)) and noted "[t]hat provision has not previously been construed in Oregon." *Crandon*, 181 P.3d at 781. But §60.261(2) did not abrogate or even undermine *Wills*. In fact, as can be seen, §60.261(2) merely restates the same general rule that *Wills* recognized, along with a provision that implicitly recognizes a demand futility exception (highlighted below):

Wills, 96 P. at 534	Or. Rev. Stat. §60.261(2)
That the plaintiff should allege and prove that application was made to the directors or managing body, and a reasonable notice, request, or demand that they institute proceedings on the part of the corporation against the wrongdoers, and their refusal to do so after such reasonable request or demand, is but a statement of a general rule.	A complaint in a proceeding brought in the right of a corporation must allege with particularity the demand made, if any, to obtain action by the board of directors and either that the demand was refused or ignored ***or why a demand was not made***.

Most importantly, though, the plaintiffs in *Crandon* did not urge application of Oregon law (*i.e.*, *Wills*) because they prevailed under Delaware's standard for demand futility. *Crandon*, 181 P.3d at 787.

As a review of the cases demonstrates, neither *Sommers* nor *Crandon* acknowledged the clear holding of *Wills*, and neither case turned on the difference between the standards in Oregon and Delaware. Therefore, while this oversight was understandable and inconsequential in those cases, it should not be perpetuated here.

B. Demand Is Also Futile Under Delaware Law

In their moving papers, defendants overlooked *Wills* and invited Magistrate Judge Acosta to apply Delaware law for determining demand futility. Magistrate Judge Acosta mistakenly accepted this invitation, citing *Sommers* and overlooking *Wills*. *See* Recommendation at 6-7 & n.3. Nevertheless, plaintiffs' Complaint properly alleges that demand here was also futile under Delaware law.

1. Delaware Law

As the Recommendation explains, for corporations organized in Delaware, demand futility is determined under what is known as the *Aronson* test. *See* Recommendation at 7. *Aronson v. Lewis*, 473 A.2d 805, 814 (Del. 1984) established a two-prong test for determining demand futility in cases brought against Delaware corporations. Demand is deemed futile if, under the facts alleged, "a reasonable doubt is created that: (1) the directors are disinterested and independent and (2) the challenged transaction was otherwise the product of a valid exercise of business judgment." *Id.* "The two prongs of the *Aronson* test are disjunctive, meaning that if either part is satisfied, demand is excused." *In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 808, 820 (Del. 2005).

Directors are deemed to have a disqualifying interest in an action if the particularized facts of a complaint create a "substantial likelihood" of director liability. *Aronson*, 473 A.2d at 815. Since directors are only "disinterested" if there is no substantial likelihood of director liability, the first prong is satisfied if the alleged facts raise a reasonable doubt that there is ***no*** substantial likelihood of director liability. Therefore, in order to rule against a plaintiff on the interest prong, a court must find beyond all reasonable doubt that a majority of Umpqua's Directors do not face a substantial likelihood of liability. *Id*. Of course, a court must reach such a finding while accepting a plaintiff's factual allegations as true and drawing all reasonable inferences therefrom in the light most favorable to the plaintiff. *Silicon Graphics*, 183 F.3d at 1002. Otherwise, demand is futile.

Directors face a substantial likelihood of liability when plaintiffs raise a reasonable doubt that defendants' decision was made "in good faith and in the honest belief that the action taken was in the best interests of the company." *Spiegel v. Buntrock*, 571 A.2d 767, 774 (Del. 1990). Therefore, demand is futile if a plaintiff's allegations raise a reasonable doubt as to whether a business decision was made in good faith and that the action taken was in the best interests of the company. *Ryan v. Gifford*, 918 A.2d 341, 357 (Del. Ch. 2007).

2. The *Aronson* Test Is Satisfied Here

It was indefensible for the defendant Directors to award Umpqua's CEO a raise of over $400,000 immediately after the bank concluded its worst year ever and while the bank was still participating in the federal bailout program to which it had resorted due to prior failings of management. Although the Directors acknowledged the bank's "unsatisfactory" performance in 2009, they simply cannot reconcile that undeniable fact with their representation to shareholders that, "The Company's financial and operating performance in 2009 and the [federal bailout] [r]egulations served as the backdrop for the Committee's compensation decisions in early 2010." *See* Proxy at 37. This clearly was not a good faith attempt to provide an honest description of the Directors' decision to give the CEO a raise in January 2010. The unmistakable message from the Directors was that the early 2010 compensation decisions, which included the CEO's raise, were performance-based. *Id.* It is certainly reasonable to infer that they were not.

This pattern continued throughout 2010, as the Directors showered Umpqua's executives with raises ***averaging*** 118%, while the decline in the bank's stock price cost shareholders over $100 million. ¶¶34, 36. Indeed, the entire country was tightening their belts in 2010, yet Umpqua's executives got richer as their shareholders got poorer. Compounding the egregiousness of this practice, the Directors then tried to spin their compensation decisions as having been performance-based. *See, e.g.*, Complaint, ¶39; Proxy at 37, 39; Form 8-K at 3. Understandably, and resoundingly, shareholders rejected the Directors' contention that the bank's executives had earned performance-based raises during a year in which shareholders lost so much money and Umpqua's stock was outperformed by its peers. *See* Complaint, ¶41.

The Directors' dismissive reaction to shareholders' overwhelming vote clearly lends itself to the inference that the Directors were not acting in the best interest of the Umpqua and its shareholders. Rather than acknowledge their error, the defendant Directors dug in and derided one of the bases for criticism. *See* Form 8-K at 3 ("ISS used a formulaic approach . . . . We strongly disagree with this formulaic approach . . . ."). Moreover, as detailed below, the Directors' attempt to attribute their compensation decisions to a policy based on operating earnings per share ("OEPS") demonstrates yet another deceptive practice and a lack of good faith. *Id*. In any event, the defendant Directors' rationale that OEPS is the proper measure of performance is the very same rationale rejected so overwhelmingly by shareholders as not in their (or Umpqua's) best interests. *See* Complaint, ¶¶39-41; *see* §B.3., *supra* (detailing repeated lowering of OEPS so executives could achieve performance targets).

The circumstances alleged here are far too egregious to conclude beyond all reasonable doubt that the defendant Directors do not face a substantial likelihood of liability. Likewise, there is very good reason to doubt that defendants' compensation decisions, and the deceptive justifications for them, were made in good faith and in the best interest of Umpqua and its shareholders.[5] Therefore, plaintiffs have satisfied the *Aronson* test and demand here is excused.

3. The OEPS-Based Compensation Policy: Failing to the Top

The Recommendation notes that, "[a]ccording to Defendants, Umpqua's [compensation] policy provided that compensation be based on OEPS, a measurement standard which differs from a

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5 The Recommendation disregards the exceptional nature of these circumstances and misunderstands plaintiffs' argument concerning the business judgment presumption: "Plaintiffs' essential position is that if a simple comparison reveals a level of compensation inconsistent with general corporate performance, the business judgment presumption is necessarily overcome . . . ." *See* Recommendation at 14. That is not plaintiffs' position. Rather, we contend that at the ***pleading*** stage of a case, the exceptional circumstances here overwhelmingly raise a "reasonable doubt" as to whether the Directors exercised valid business judgment. First, the disparity between raises averaging 118% and shareholders losing over $100 million is not a mere inconsistency. Second, the Directors' deceptive explanations for those decisions are actionable in and of themselves. And third, dismissing the expressed wishes of an overwhelming majority of shareholders is further evidence that the Directors' actions were not mere oversights, but rather calculated decisions demonstrating an allegiance to Umpqua's executives, as opposed to their fiduciary duties to the Company (which is comprised of its shareholders).

standard based on shareholder return. Defendants contend that OEPS provides an alternative and rational basis for the compensation decision." *See* Recommendation at 12.[6] A review of Umpqua's Proxy, however, demonstrates how the Directors have manipulated the OEPS metric to the point where Umpqua's CEO is getting more money for worse performance.

Umpqua's CEO's greatest "success" may lie in his ability to lower the Directors' expectations of him. In 2008, Umpqua's OEPS target was $1.26. *See* Proxy at 41. They did not achieve it. *Id.* In 2009, the OEPS target was lowered to $.43. *Id.* Still, they did not achieve it. In 2010, expectations were dropped all the way down to an OEPS target of $.11 – less than 10% of expectations from only two years earlier. *Id.* Finally, the target was achieved – by one penny. *Id.* For this "accomplishment," the Directors awarded Umpqua's CEO with a bonus worth 25% of his base salary – or nearly a quarter-million dollars. *Id.* Therefore, although the Directors may have based their compensation policy on OEPS, they certainly did not disclose that their constant lowering of the targeted OEPS stripped their compensation policy of any meaningful relation to performance. In other words, the Directors' so-called performance-based compensation policy meant they could, and did, lower the so-called OEPS "performance targets" as needed to ensure that

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[6] In discussing both OEPS and defendants' use of a compensation committee (which includes several defendants), the Recommendation strays from the guiding principles for deciding motions to dismiss. Although defendants' "benign explanations for [disputed conduct], if unrebutted, are properly considered on a motion for summary judgment, . . . review under Rule 12(b)(6) is confined to the factual allegations of the complaint, which must be accepted as true." *Silicon Graphics*, 183 F.3d at 1002. Instead, the Recommendation seems to accept as true ***defendants***' explanations, and it treats their mere existence as dispositive. We are at the pleading stage of this litigation. As such, the existence and veracity of defendants' explanations are irrelevant at this stage. Otherwise, plaintiffs would effectively have to prove their case in order to bring it.

Umpqua's executives would receive the excessive compensation at issue here no matter what the circumstances, including worse OEPS performance.

The Directors perpetuated this deception in their dismissive response to their shareholders' vote and the ISS report. In an attempt to downplay the significance of the raise they awarded Umpqua's CEO, the Directors stated, "That improved performance [in 2010] was recognized by the Compensation Committee and Mr. Davis's total compensation in 2010 increased 16% over 2008." *See* Form 8-K at 3. This compensation increase for purportedly "improved performance" was anything but. Again, a return to Umpqua's OEPS, which ***defendants*** claimed to be the basis for their compensation policy, exposes the deception. In 2008, Umpqua's OEPS was $.82. *See* Proxy at 41. In 2010, the OEPS was $.12. *Id.* This means the Directors rewarded Umpqua's CEO with a 16% ***increase*** in compensation over 2008 for an 85% ***decrease*** in OEPS over 2008. This clearly would not qualify as a performance-based increase. The Directors manipulated their description of CEO Davis's raise by comparing his 2010 performance to his 2009 performance, and his 2010 compensation to his 2008 compensation. Thus, they used the lowest basis for comparison when it came to performance and the highest basis for comparison when it came to compensation. This is not good faith and, thus, is not protected by the business judgment rule.

VI. CONCLUSION

For all the foregoing reasons, plaintiffs respectfully request that the Court deny defendants' motion in its entirety. Alternatively, plaintiffs respectfully request leave to amend. *Carvalho v.*

Equifax Info. Servs., LLC, 615 F.3d 1217, 1232 (9th Cir. 2010) ("Under Federal Rule of Civil Procedure 15(a), leave to amend shall be freely given when justice so requires.").

DATED: January 25, 2012

Respectfully submitted,

s/ BENNY C. GOODMAN III

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CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2012, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on January 25, 2012.

s/ BENNY C. GOODMAN III
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