The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

THE FEDERAL DEPOSIT INSURANCE CORPORATION, as RECEIVER of WASHINGTON MUTUAL BANK, Plaintiff, v. KERRY K. KILLINGER, STEPHEN J. ROTELLA, DAVID C. SCHNEIDER, LINDA C. KILLINGER, and ESTHER T. ROTELLA, Defendants.	No. 2:11-cv-00459-MJP **DEFENDANTS KERRY K. AND LINDA C. KILLINGER'S MOTION TO DISMISS** NOTED FOR CONSIDERATION: September 15, 2011 ORAL ARGUMENT REQUESTED

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DEFENDANTS KERRY K. AND LINDA C. KILLINGER'S MOTION TO DISMISS

Pursuant to Federal Rule of Civil Procedure 12(b)(6) and Local Civil Rule 7, Defendant Kerry K. Killinger respectfully moves to dismiss Counts I-IV and VI of the Complaint. Mrs. Killinger respectfully joins the motion to dismiss Counts IV and VI, in which she is named as a defendant. In support thereof, Mr. and Mrs. Killinger provide the following memorandum.

I. BACKGROUND

The FDIC, as receiver of Washington Mutual Bank (WaMu), asserts claims for gross negligence, negligence, and breach of the fiduciary duty of care. It seeks to hold three former managers of WaMu personally liable for business decisions associated with a "Higher Risk Lending Strategy" adopted by the bank and its board in 2004 and reviewed and modified in each of the years thereafter.

The Complaint is unfounded. It is also incomplete. Although the Receiver now vigorously attacks the merits of the challenged business decisions, it fails to mention, for obvious reasons, that the FDIC and the Office of Thrift Supervision (OTS), which had on-site examiners at WaMu, knew about and approved the challenged business decisions in real time. The Receiver, in support of its claim that the challenged business decisions were mistaken, points to the fact that OTS ultimately placed WaMu into receivership. But the Receiver, not surprisingly, says nothing about the worldwide economic crisis that would have led to the failures of virtually all large banks but for unprecedented government intervention that was not extended to WaMu. The Receiver also accuses WaMu's management of ramping up the "Higher Risk Lending Strategy" instead of scaling it back once the housing market began to decline. Yet the Receiver neglects to mention that this accusation stands in stark contrast to the public announcement of OTS, on the day it placed WaMu into receivership, praising WaMu's management for "proactively changing its business strategy to respond to declining housing and market conditions" by, among other things, "tightening credit standards, eliminating purchasing and originating subprime mortgage loans, and discontinuing underwriting option ARM and stated income loans." Romero Decl., Ex. 1.

Even if one ignores the Complaint's glaring omissions and accepts its unfounded allegations as true, the Complaint fails to state a claim. The Receiver alleges, in hindsight, that Mr. Killinger and his colleagues made bad business decisions and that those decisions turned out poorly for WaMu. The well-established business judgment rule exists precisely to preclude this type of *ex post* assessment of business decisionmaking.

Under the business judgment rule, "corporate management is immunized from liability in a corporate transaction" where "the decision to undertake the transaction is within the power of the corporation and the authority of management" and "there is a reasonable basis to indicate that the transaction was made in good faith." *Scott v. Trans-Sys., Inc.*, 64 P.3d 1, 5 (Wash. 2003) (en banc). The rule recognizes that corporate officers are hired to exercise business judgment in a complex world of competing risks and returns. Officers are obligated to make good-faith, informed decisions, but they are not required to make decisions that plaintiffs or courts would characterize, after the fact, as "correct." For that reason, Washington courts have long held that "[a]bsent a showing of fraud, dishonesty, or incompetence, it is not the court's job to second-guess" the substantive correctness of management's business decisions. *Schwarzmann v. Ass'n of Apt. Owners*, 655 P.2d 1177, 1181 (Wash. Ct. App. 1982). Yet that is exactly what the Receiver seeks here.

The pleaded facts establish that this action is the quintessential case in which the business judgment rule immunizes management from liability:

- *The Receiver does not allege that Mr. Killinger made the challenged business decisions in bad faith*. To the contrary, the Complaint alleges typical risk-reward decisionmaking. Mr. Killinger allegedly elected to implement the "Higher Risk Lending Strategy" in order to achieve "[a]bove average creation of shareholder value." Compl. ¶ 25. The business strategy included "reducing interest-rate risk and replacing that risk with greater credit risk." *Id.* ¶ 53. Mr. Killinger allegedly advocated for this strategy because "Wall Street appears to assign higher P/Es to companies embracing credit risk and penalizes companies with higher interest-rate and operating risks." *Id.*

- *The Receiver does not allege that Mr. Killinger acted in a manner that was in any way fraudulent or dishonest*. It does not claim that the "Higher Risk Lending Strategy" was a secret or was in any way concealed from other WaMu executives, the WaMu board, shareholders, auditors, or regulators. To the contrary, the Complaint alleges that the strategy was part of WaMu's broader five-year plan and was approved on January 18, 2005 at a meeting attended by WaMu's credit risk managers. *Id.* ¶¶ 26-27. The strategy, moreover, was allegedly reflected in a series of annual "Strategic Direction" memoranda, *id.* ¶¶ 22, 40, 53, 64, 83, that were provided to, among others, WaMu's Board of Directors. *See, e.g.*, Romero Decl., Exs. 2-3.[1]
- *The Receiver does not allege that Mr. Killinger was incompetent*. There is no suggestion that he was uninformed about the risks associated with the "Higher Risk Lending Strategy," as is necessary to lose the protection of the business judgment rule based on incompetence. To the contrary, the Complaint alleges the exact opposite: that WaMu's

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[1] The cited exhibits consist of the first pages of two such "Strategic Direction" memoranda released to the public by the Senate Permanent Subcommittee on Investigations. The Court may take judicial notice of such "matters of public record" and consider them on a motion to dismiss. *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001). The Court may also consider them pursuant to the incorporation-by-reference doctrine, because the Receiver relied on them in the Complaint, they are central to the Receiver's claims, and their authenticity is not in question. *See In re Washington Mutual, Inc. Secs., Derivative & ERISA Litig.*, 259 F.R.D. 490, 495 (W.D. Wash. 2009) (Pechman, J.).

credit risk officers repeatedly advised Mr. Killinger about the risks associated with the business strategy. Compl. ¶ 85.

Conceding good faith, conceding an absence of fraud or dishonesty, and conceding awareness of the competing risks, what the Receiver seeks in this case is to establish culpability for the substantive decision to devise, implement, and maintain the "Higher Risk Lending Strategy." But that is what the business judgment rule bars. The rule shields Mr. Killinger from hindsight liability for management's alleged mistakes in business judgment, and nothing in the Complaint operates to remove that protection. Accordingly, the negligence-based claims (Counts I-II) must be dismissed. The breach of fiduciary duty claim, moreover, is duplicative of the negligence claims because the only fiduciary duty that the Complaint alleges Mr. Killinger to have violated was the duty of care. Accordingly, that claim (Count III) must be dismissed as well. Finally, the fraudulent transfer claim, which attempts to drag Mrs. Killinger into the case by mischaracterizing routine and publicly recorded estate-planning transactions as fraudulent, and the asset freeze claim (Counts IV and VI) must be dismissed because the substantive claims against Mr. Killinger fail.

II. ARGUMENT

A. The Negligence-Based Claims Are Precluded By the Business Judgment Rule.

The first two claims in the Complaint assert gross and ordinary negligence by Mr. Killinger for his alleged role in devising, implementing, and maintaining WaMu's "Higher Risk Lending Strategy." Those claims cannot proceed, however, because of the business judgment rule.

1. The Business Judgment Rule Immunizes Management From Liability for Allegedly Mistaken Business Decisions Unless Those Decisions Were Made in Bad Faith or Were Uninformed.

Courts look to state law to supply the rules of decision in actions brought by the FDIC in its capacity as receiver, *see Atherton v. FDIC*, 519 U.S. 213, 226 (1997), and have applied the business judgment rule to bar negligence-based claims by the FDIC as receiver, *see, e.g.*, *FDIC v. Castetter*, 184

F.3d 1040, 1046 (9th Cir. 1999) (barring negligence claims); *Wash. Bancorp. v. Said*, 812 F. Supp. 1256, 1267-68 (D.D.C. 1993) (barring gross negligence claims).

Washington courts "review business decisions under the business judgment rule and infrequently reverse a business decision." *Lane v. City of Seattle*, 194 P.3d 977, 979 (Wash. 2008) (en banc); *see also Nursing Home Bldg. Corp. v. DeHart*, 535 P.2d 137, 143 (Wash. Ct. App. 1975) ("Courts are reluctant to interfere with the internal management of corporations and generally refuse to substitute their judgment for that of the directors."). Under the business judgment rule, "'neither the directors nor the other officers of a corporation are liable for mere mistake or errors of judgment, either of law or fact.'" *DeHart*, 535 P.2d at 143-44 (citation omitted). That is true "'even though the errors may be so gross that they may demonstrate the unfitness of the directors to manage the corporate affairs.'" *Id.* at 144 (citation omitted). The rule applies to both directors and officers of a corporation. *Para-Medical Leasing, Inc. v. Hangen*, 739 P.2d 717, 721 (Wash. Ct. App. 1987); *Grassmueck v. Barnett*, 2003 WL 22128263, at *3 (W.D. Wash. July 7, 2003) (Pechman, J.).

The business judgment rule focuses "on the decision-making process," *In re Citigroup Inc. S'holder Deriv. Litig.*, 964 A.2d 106, 124 (Del. Ch. 2009), not the substantive merits of the business decision, *i.e.*, whether it was "wise in retrospect," *DeHart*, 535 P.2d at 144. Accordingly, under the rule, whether a factfinder "believes a decision substantively wrong, or degrees of wrong extending through 'stupid' to 'egregious' or 'irrational', provides no ground" for liability. *In re Citigroup Inc. S'holder Deriv. Litig.*, 964 A.2d at 122; *see also Gagliardi v. TriFoods Int'l, Inc.*, 683 A.2d 1049, 1053 (Del. Ch. 1996) ("[T]hat plaintiff regards the decision as unwise, foolish, or even stupid in the circumstances is not legally significant . . . ."). Simply put, the concept of "'substantive due care'" is "foreign to the business judgment rule." *Brehm v. Eisner*, 746 A.2d 244, 264 (Del. 2000). "Courts do not measure, weigh or quantify directors' judgments," or even "decide if they are reasonable in this context." *Id.* In considering the actions of a corporate officer, "the business judgment rule rather than the standard of ordinary care applies." *Para-Medical Leasing*, 739 P.2d at 722.

Because the business judgment rule "is process oriented," *In re Citigroup Inc. S'holder Deriv. Litig.*, 964 A.2d at 122, it permits liability only if management reached its decision in bad faith or made an uninformed decision. *See, e.g.*, *Schwarzmann*, 655 P.2d at 1181 ("Absent a showing of fraud, dishonesty, or incompetence, it is not the court's job to second-guess the actions of directors."). "[A] court will not substitute its judgment for that of corporate directors unless there is evidence of fraud, dishonesty, or incompetence (i.e., *failure to exercise proper care, skill, and diligence*)." *Riss v. Angel*, 934 P.2d 669, 681 (Wash. 1997) (en banc) (brackets and internal quotation marks omitted); *see also* Wash. Rev. Code §§ 23B.08.300, 23B.08.420. As courts have consistently recognized, a failure to exercise proper care, skill, and diligence in this context means a failure "to act in an informed manner." *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 66 (Del. 1989); *see also Shoen v. SAC Holding Corp.*, 137 P.3d 1171, 1178 (Nev. 2006) (en banc) (holding that "[i]n essence, the duty of care consists of an obligation to act on an informed basis"). That process-based understanding is sensible because a substantive due care exception would swallow the business judgment rule—reducing it to the empty proposition that it protects corporate decision-makers from errors in judgment, except where they have made errors in judgment.

Thus, as the Washington Supreme Court has held, a "failure to adequately investigate" would remove an officer or director "from the rule's insulating effect." *Riss*, 934 P.2d at 681. As another example, an actionable complaint might allege "that a board undertook a major acquisition without conducting due diligence, without retaining experienced advisors, and after holding a single meeting at which management made a cursory presentation." *Trenwick Am. Litig. Trust v. Ernst & Young L.L.P.*, 906 A.2d 168, 194 (Del. Ch. 2006), *aff'd*, 931 A.3d 438 (Del. 2007). And the rule would not protect an officer or director "who has wholly abdicated his corporate responsibility, closing his or her eyes to corporate affairs." *Castetter*, 184 F.3d at 1046. But a plaintiff cannot state a claim by alleging that management "undertook a business strategy that was 'all consuming and foolhardy' and that turned out badly," *Trenwick*, 906 A.2d at 194 (citation and footnote omitted); the business judgment rule shields from liability those who are "honestly mistaken" in their business judgment. *Castetter*, 184 F.3d at 1046; *see also In re Student Loan Corp. Deriv. Litig.*, 2002 WL 75479, at *4 (Del. Ch. Jan. 8, 2002) (dismissing due care claim because the "complaint is utterly devoid of any pled facts regarding the informedness of the board's deliberations, or the lack thereof").

The compelling policy arguments underlying the business judgment rule's protection of business decisions made on a good faith and informed basis are well-established. As the Washington Supreme Court has observed, the rule "allows the corporation to function effectively by allowing those having management responsibility the freedom to make in good faith the many necessary decisions quickly and finally without the impairment of having to be liable for an honest error in judgment." *Hines v. Data Line Sys., Inc.*, 787 P.2d 8, 18 (Wash. 1990) (en banc); *see also Castetter*, 184 F.3d at 1044 ("The general purpose of the business judgment rule is to afford directors broad discretion in making corporate decisions and to allow these decisions to be made without judicial second-guessing in hindsight.").

Similarly, the Delaware Court of Chancery, the "nation's leading authority on corporate law issues," *Simmonds v. Credit Suisse Secs. (USA) LLC*, 638 F.3d 1072, 1089 (9th Cir. 2011), *cert. granted*, 79 U.S.L.W. 3610 (U.S. June 27, 2011) (Nos. 10-1218, 10-1261), has grounded the business judgment rule in a court's inadequacy to evaluate, after the fact, "whether corporate decision-makers made a 'right' or 'wrong' decision," particularly within the context of risk-taking. *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d at 124. "Business decision-makers must operate in the real world, with imperfect information, limited resources, and an uncertain future." *Id.* at 126. "To impose liability on directors for making a 'wrong' business decision would cripple their ability to earn returns for investors by taking business risks." *Id.*

The Second Circuit has likewise recognized that "because potential profit often corresponds to the potential risk, it is very much in the interest of shareholders that the law not create incentives for overly cautious corporate decisions." *Joy v. North*, 692 F.2d 880, 886 (2d Cir. 1982). The corporate director or officer's function "is to encounter risks and to confront uncertainty, and a reasoned decision at the time made may seem a wild hunch viewed years later against a background of perfect knowledge." *Id.* The "circumstances surrounding a corporate decision are not easily reconstructed in a courtroom years later," and thus "a corporate officer who makes a mistake in judgment as to economic conditions" will "rarely, if ever, be found liable for damages suffered by the corporation." *Id.* at 885-86.

2. The Complaint Attacks Management's Historical Business Decisions.

The facts alleged in the Complaint trigger application of the business judgment rule. Indeed, the theory of liability upon which both negligence claims are based is the paradigmatic context in which courts have recognized the propriety of the business judgment rule. At bottom, the Receiver challenges the substantive merit of management's historical business decisions, accusing Mr. Killinger of "gross mismanagement," Compl. ¶ 11, because the alleged decisions to devise, implement, and maintain a business strategy intended to increase WaMu's returns supposedly led to "extreme" risks and to substantial losses, *id.* ¶ 1.

The business decisions targeted by the Complaint allegedly were reflected in a series of annual "Strategic Direction" memoranda that set forth WaMu's "Higher Risk Lending Strategy." Recognizing the trade-off between risk and reward, Mr. Killinger allegedly stated in the 2004 Strategic Direction memo that "[a]bove average creation of shareholder value requires significant risk taking." *Id.* ¶ 25. The memo allegedly set forth various financial goals, including achieving an average return on equity of at least 18% and average earnings per share growth of at least 13%, and proposed taking on "more credit risk" to achieve those goals. *Id.* ¶ 22. Mr. Killinger allegedly stated in the 2006 Strategic Direction memo that the business plan included "reducing interest-rate risk and replacing that risk with greater credit risk." *Id.* ¶ 53. Mr. Killinger allegedly advocated for this strategy because "Wall Street appears to assign higher P/Es to companies embracing credit risk and penalizes companies with higher interest-rate and operating risks." *Id.* He recognized that it was "important to adjust our culture from credit-risk avoidance to intelligent credit-risk taking and pricing discipline." *Id.* In the 2007 Strategic Direction memo, Mr. Killinger allegedly continued to emphasize "higher risk-adjusted return products." *Id.* ¶ 65. WaMu allegedly suffered substantial losses as a result of the challenged business decisions. *Id.* ¶ 86.

Such allegations form the prototypical example of risk-return decision-making that courts have long recognized are the appropriate domain of corporate directors and officers, and not a factfinder's own notions of sound business judgment, many years after the fact, aided by perfect information and the benefit of hindsight. "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." *Trenwick Am. Litig. Trust*, 906 A.2d at 193. "The essence of the business judgment of managers and directors is deciding how the company will evaluate the trade-off between risk and return. Businesses—and particularly financial institutions—make returns by taking on risk; a company or investor that is willing to take on more risk can make a higher return. Thus, in almost any business transaction, the parties go into the deal with the knowledge that, even if they have evaluated the situation correctly, the return could be different than they expected." *In re Citigroup Inc. S'holder Deriv. Litig.*, 964 A.2d at 126. The business judgment rule is "designed to allow corporate managers and directors to pursue risky transactions without the specter of being held personally liable if those decisions turn out poorly." *Id.* at 125.

Yet such personal liability is precisely what the Receiver seeks in this case. The business judgment rule applies with full force here.

3. The Complaint Does Not Allege Bad Faith and Alleges that the Business Decisions Were Made With Knowledge of the Competing Risks.

To remove this case from the purview of the business judgment rule, the Receiver must allege that Mr. Killinger made the challenged decisions in bad faith or that he was uninformed. *See, e.g.*, *Schwarzmann*, 655 P.2d at 1181 ("Absent a showing of fraud, dishonesty, or incompetence, it is not the court's job to second-guess the actions of directors."). In determining whether the Receiver has so alleged, the Court employs the "plausibility" standard the Supreme Court articulated in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). *See Labadie v. United States*, 2011 WL 1376235, at *2 (W.D. Wash. Apr. 12, 2011) (Pechman, J.). A review of the allegations in the Complaint confirms that the Receiver has not done so, and that the business judgment rule therefore shields Mr. Killinger from liability.

The Complaint does not allege that Mr. Killinger acted in bad faith (or acted in a manner that was in any way dishonest or fraudulent). Nor does the Complaint allege that Mr. Killinger was incompetent, *i.e.*, that he was inadequately "informed" when he supposedly participated in devising and implementing the "Higher Risk Lending Strategy." In fact, the Complaint alleges the opposite—that WaMu's credit risk managers provided input and informed Mr. Killinger about the risks associated with the business strategy, and that he and his colleagues elected to employ the strategy despite the risks, in hopes of earning a greater return for shareholders.

According to the Complaint, the "first phase of WaMu's Higher Risk Lending Strategy" was approved at a meeting on January 18, 2005 attended by WaMu's credit risk managers. Compl. ¶¶ 26-27. The Complaint alleges that at this meeting, and frequently thereafter, the credit risk managers advised Mr. Killinger regarding the various risks associated with the business strategy. *See, e.g., id.* ¶¶ 27-30, 39, 44-45, 47, 51, 58, 85. The Complaint further alleges that Mr. Killinger and the manager defendants continued with the business strategy despite the known risks. Compl., Factual Background I.A-E. It supposedly was Mr. Killinger's judgment to proceed with the strategy because "[a]bove average creation of shareholder value requires significant risk taking." *Id.* ¶ 25; *see also id.* ¶ 22 (alleging that Mr. Killinger proposed taking on "more credit risk" and setting forth various goals, including achieving an average return on equity of at least 18% and average earnings per share growth of at least 13%); *id.* ¶ 53 (alleging that Mr. Killinger reasoned that "Wall Street appears to assign higher P/Es to companies embracing credit risk and penalizes companies with higher interest-rate and operating risks"); *id.* ¶ 65 (alleging that Mr. Killinger emphasized "higher risk-adjusted return products"). And even then, the Complaint alleges that Mr. Killinger implemented measures to mitigate the risks associated with the business strategy. *See, e.g.*, *id.* ¶ 27 (alleging that "limits were placed on allowable delinquencies on . . . riskier loans").

There is no allegation that Mr. Killinger acted in bad faith or without knowledge of the competing risks in reaching his decisions. "[T]o allege that a corporation has suffered a loss as a result of a lawful transaction, within the corporation's powers, authorized by a corporate fiduciary *acting in a good faith pursuit of corporate purposes*, does not state a claim for relief against that fiduciary no matter how foolish the investment may appear in retrospect." *Gagliardi*, 683 A.2d at 1052. Accordingly, the negligence-based claims must be dismissed.

B. The Breach of Fiduciary Duty Claim Is Duplicative of the Negligence Claims.

The breach of fiduciary duty claim (Count III) simply incorporates the allegations that precede it, alleges that Mr. Killinger owed "fiduciary duties" to WaMu, and contends that Mr. Killinger breached those fiduciary duties, causing damages to WaMu. Compl. ¶¶ 192-196. Because this claim is duplicative of the claims for gross and ordinary negligence, the Court should dismiss it. The Receiver cannot avoid operation of the business judgment rule by labeling a negligence-based claim a breach of fiduciary duty claim.

Under Washington law, "fiduciary duty comprises three sub-duties: the duty of loyalty, the duty of care, and the duty to act in good faith." *Grassmueck v. Barnett*, 281 F. Supp. 2d 1227, 1232 (W.D. Wash. 2003) (Pechman, J.). The Complaint is premised entirely on Mr. Killinger's supposed breach of the duty of care—the same duty at issue in the negligence-based claims. *See* Compl. ¶¶ 184-185 (gross negligence); *id.* ¶¶ 189-190 (negligence); *id.* ¶¶ 194-195 (breach of fiduciary duty). The Complaint does not suggest, much less plausibly allege, that Mr. Killinger violated the duty of loyalty or the duty to act in good faith. Moreover, the structure of the Complaint underscores the overlap between the negligence-based claims and the fiduciary duty claim. The gross negligence claim alleges that "Killinger, Rotella and Schneider owed WaMu a duty of care to carry out their responsibilities by exercising the degree of care skill, and diligence that ordinarily prudent persons in like positions would use under similar circumstances." *Id.* ¶ 184. It then alleges that "[t]his duty of care, included, but was not limited to" an eleven-item list of duties. *Id.* The gross negligence claim further alleges that "Killinger, Rotella and Schneider, through their gross negligence, breached their duties of care by, among other things, acting with reckless disregard for or failing to exercise slight care in" fifteen different ways. *Id.* ¶ 185. The negligence claim and the breach of fiduciary duty claim incorporate by reference, and base liability entirely upon, the *same* eleven-item duty of care list and the *same* fifteen-item breach of care list. *See id.* ¶¶ 189-190 (negligence claim incorporating Compl. ¶¶ 184-185); *id.* ¶¶ 194-195 (breach of fiduciary duty claim incorporating Compl. ¶¶ 184-185).

Because Count III is wholly duplicative of Counts I and II, the appropriate course of action is to dismiss it. *See Swartz v. KPMG LLP*, 476 F.3d 756, 766 (9th Cir. 2007) (per curiam) (holding that claim that was "merely duplicative" was "properly dismissed"); *Hua v. Boeing Corp.*, 2009 WL 1044587, at *5 (W.D. Wash. Apr. 17, 2009) ("Plaintiff's negligent supervision claim is based on the same facts that support his claim against Boeing for unlawful discrimination. It is therefore duplicative, and, under Washington law, must be dismissed."); *Jacobson v. Wash. State Univ.*, 2007 WL 26765, at *11 (E.D. Wash. Jan. 3, 2007) ("A claim is duplicative and must be dismissed under Washington law when the plaintiff asserts the same factual basis for two claims."); *Beringer v. Standard Parking O'Hare Joint Venture*, 2008 WL 4890501, at *4 (N.D. Ill. Nov. 12, 2008) (dismissing negligence and breach of fiduciary duty claims because "both counts involve the same operative facts, the same injury, and require proof of essentially the same elements" as breach of contract claim); *CMMF, LLC v. J.P. Morgan Inv. Mgmt. Inc.*, 915 N.Y.S.2d 2, 6 (App. Div. 2010) (affirming dismissal of negligence and breach of fiduciary duty claims as duplicative of breach of contract claim); *Awai v. Kotin*, 872 P.2d 1332, 1337 (Colo. App. 1993) (affirming dismissal of breach of fiduciary duty claim where "[t]he factual allegations in support of this claim are the same as those in support of the claim of negligence" and the "claim for breach of fiduciary duty is therefore duplicative").

Dismissal of Count III is consistent not only with the authority cited above but also with decisions by courts addressing similar receivership cases brought by the FDIC or its predecessor, the RTC. In *Resolution Trust Corp. v. Hess,* 820 F. Supp. 1359 (D. Utah 1993), for example, the court dismissed the RTC's claim for breach of fiduciary duty because it was "tantamount to a claim of negligent mismanagement," which the RTC had also alleged. *Id.* at 1366. In *Resolution Trust Corp. v. Vanderweele,* 833 F. Supp. 1383 (N.D. Ind. 1993), the court dismissed the breach of fiduciary duty claim because it "amount[ed] to nothing more than a reformulation of the negligence claim." *Id.* at 1386; *see also FDIC v. Appling*, 992 F.2d 1109, 1114 (10th Cir. 1993) (holding that proposed jury instruction explicitly regarding a "fiduciary duty" was the same as a negligence instruction and thus superfluous); *FDIC v. Gonzalez-Gorrondona*, 833 F. Supp. 1545, 1560 (S.D. Fla. 1993) (striking breach of fiduciary duty claim that "merely restate[d]" prior negligence claim).

For these reasons, Count III should be dismissed.

C. The Remedial Claims Should Be Dismissed Because The Substantive Claims Fail.

Count IV of the Complaint alleges that Mr. and Mrs. Killinger fraudulently transferred certain properties, and it seeks an order voiding these transfers or a money judgment equal to the value of the properties. Count VI of the Complaint seeks to freeze the assets of Mr. and Mrs. Killinger, including but not limited to the properties described in Count IV. The Killingers deny that the routine estate-planning transactions alleged in the Complaint constitute fraudulent transfers; in any event, these unfounded remedial counts fail because the Receiver's substantive claims in Counts I-III fail.

Count IV is asserted pursuant to the Washington Uniform Fraudulent Transfer Act, Wash. Rev. Code §§ 19.40.011 *et seq.*, which provides remedies to creditors in the event of fraudulent transfers by debtors. *Id.* §§ 19.40.041, 19.40.071. But where the purported creditor has no underlying "enforceable claim, the UFTA does not provide the Plaintiff with a remedy." *Nat'l Ctr. for Emp't of Disabled v. Ross*, 2006 WL 778647, at *8 (D. Ariz. Mar. 27, 2006). Only one who "has a valid claim and right to payment" may "attack a conveyance as fraudulent." *Id*. Because the Receiver has no enforceable claims under Counts I, II, and III, it cannot seek relief under the fraudulent transfer statute.

As to Count VI, the Receiver cannot obtain a preliminary injunction freezing the assets of Mr. and Mrs. Killinger without establishing that it is to some degree "likely to succeed on the merits." *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 374 (2008); *see also Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011); *Mideast Awareness Campaign v. King Cnty.*, ___ F. Supp. 2d ___, 2011 WL 649488, at *3 (W.D. Wash. Feb. 18, 2011). Because dismissal of Counts I, II, and III establishes the lack of merit as to any of the Receiver's substantive claims, the Receiver is not entitled to a preliminary injunction.

Accordingly, Counts IV and VI should be dismissed.

III. CONCLUSION

The business judgment rule shields officers and directors from personal liability for business decisions made in good faith, on an informed basis, and absent fraud or dishonesty, regardless of whether a plaintiff or factfinder agrees with the wisdom of those decisions in retrospect. The allegations in the Complaint demonstrate that in this case, at bottom, the Receiver takes issue with the correctness of business decisions allegedly made by Mr. Killinger and his colleagues—decisions that at the time were made allegedly with awareness of the risks involved and without semblance of bad faith, dishonesty, or any other factor that precludes application of the business judgment rule. As such, the Receiver cannot proceed with its negligence-based claims. The Receiver's claim for breach of fiduciary duty likewise fails since the Complaint does not plausibly allege that Mr. Killinger violated any fiduciary duty besides the duty of due care, which the negligence-based claims encompass. Because the Receiver cannot state a claim against Mr. Killinger on any of its substantive counts, its remedial counts against Mr. Killinger and his wife seeking avoidance of purported fraudulent transfers and an asset freeze fail as well. Accordingly, the Complaint should be dismissed.

Respectfully submitted,

/s Tobin J. Romero

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JULY 1, 2011

CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all participants in this case who are registered CM/ECF users. I further certify that all participants to this case are registered with the CM/ECF system, and therefore no participant need be served by conventional methods.

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