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 REPLY IN SUPPORT OF MOTION TO DISMISS** NOTED FOR CONSIDERATION: September 15, 2011 ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

The Receiver's opposition is fraught with legal error and provides no basis for sustaining the Complaint. The Receiver contends that the business judgment rule is an affirmative defense when it is not; it asserts that the business judgment rule is inapplicable in circumstances so expansive as to eviscerate the doctrine; and it argues that it would be premature to dismiss a breach of fiduciary duty claim that it concedes is duplicative of other claims. These contentions are without basis, and the Complaint should be dismissed.

II. ARGUMENT

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

The Receiver advances two reasons why, in its view, the business judgment rule does not preclude its negligence-based claims: first, that the doctrine is a "fact-bound affirmative defense" and thus unfit for resolution on a 12(b)(6) motion; and second, that the business judgment rule and the statutory standards of care are equivalent, and the Complaint alleges sufficient facts to state a breach of the statutory standards of care. Opp. 2-3. Each of these contentions lacks merit.

1. The Business Judgment Rule Provides a Basis for 12(b)(6) Dismissal.

The Receiver first contends (Opp. 5-8) that the business judgment rule "cannot be properly decided" on a Rule 12(b)(6) motion purportedly because it is an affirmative defense. Opp. 8. But fewer than two months ago, under circumstances strikingly similar to those here, the United States District Court for the Central District of California invoked the business judgment rule to dismiss a complaint against corporate decisionmakers under Rule 12(b)(6). *See National Credit Union Admin. v. Siravo*, No. 10-1597 (C.D. Cal. July 25, 2011) (Romero Decl., Ex. 1). In *Siravo*, as here, a federal regulator took over a failed financial institution and brought suit against the institution's former directors, alleging, *inter alia*, that in 2002, they "departed from [the institution's] traditional business model" and instead focused on amassing "risky" mortgage-backed securities in the company's investment portfolio—all "without taking steps to monitor or control the risk" inherent in such a strategy, and all to "justify [their] increased compensation." Second Am. Compl. ¶¶ 31, 43, 70, *Siravo* (Romero Decl., Ex. 2). By 2006, despite being aware

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of "escalating delinquencies and the inability of borrowers to refinance," and despite believing that the housing market was "in the most precarious position ever seen in the United States," the directors "continued to cause [the company] to increase the concentration of" such risky investments in its portfolio. *Id.* ¶¶ 139, 140, 144. Following the collapse of the real estate market, the institution recorded $6.8 billion in losses, "effectively rendering it insolvent." *Id.* ¶ 40. The federal government's complaint alleged that the directors "were negligent and grossly negligent" and "breached their fiduciary duties" to the institution. *Id.* ¶ 43.

The court dismissed the suit against the directors "because of the effect of the business judgment rule." *National Credit Union Admin. v. Siravo*, No. 10-1597, at 4 (C.D. Cal. July 7, 2011) (Romero Decl., Ex. 3). The court referred to an earlier decision in the same litigation in which it had concluded that the government failed to allege sufficient facts to rebut the "presumption afforded by the business judgment rule." *1st Valley Credit Union v. Bland*, No. 10-1597, at 4-9 (C.D. Cal. Dec. 20, 2010) (Romero Decl., Ex. 4); *see also National Credit Union Admin. v. Siravo*, No. 10-1597 (C.D. Cal. Jan. 31, 2011) (Romero Decl., Ex. 5). Notably, the court expressly addressed "the procedural setting in which this issue has been raised" and held that "[b]usiness judgment rule applications can (and arguably should, at least where the allegations are as detailed as they are here) be made at the motion-to-dismiss stage." Romero Decl., Ex. 4, at 8; *see also id.* (describing the business judgment rule as "the rough corporate equivalent of the government actor's qualified immunity motion").[1]

The reasoning in *Siravo* applies here and is consistent with the well-established principle, recognized by this Court, that the business judgment rule is a "rebuttable presumption" that requires a plaintiff to "assert[] facts to show" that the defendant is not entitled to the rule's protections at the outset. *Grassmueck v. Barnett*, 2003 WL 22128263, at *3 (W.D. Wash. July 7, 2003) (Pechman, J.); *see also In re Citigroup Inc. S'holder Deriv. Litig.*, 964 A.2d 106, 124 (Del. Ch. 2009) ("The business judgment rule is a presumption . . . . The burden is on plaintiffs . . . to

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[1] The court permitted claims to proceed against former officers of the institution, but only because applicable state law did not extend the business judgment rule to officers. Romero Decl., Ex. 4, at 9-11. The Receiver does not dispute that under Washington law, the business judgment rule applies to both directors and officers. *See* Mot. 5.

rebut this presumption."). Indeed, were the Receiver's claim that it is "premature" to invoke the business judgment rule at this stage true, this Court in *Grassmueck* would have had no need to assess whether the plaintiff in that case had "rebutted the presumption of good faith" by alleging that "the Defendants acted in bad faith and in self-interest." 2003 WL 22128263, at *3. Rather, it simply would have denied the motion outright as inappropriate at the 12(b)(6) stage. But it did not do so, as the Receiver disingenuously suggests. *See* Opp. 5. Nor is the Receiver's position supported by *Washington Bancorp. v. Said*, 812 F. Supp. 1256 (D.D.C. 1993), which expressly rejected the argument—then, as now, propounded by the FDIC—that the business judgment rule "is merely a defense and has no part in the decision of whether to grant a motion to dismiss or for summary judgment." *Id.* at 1268. To the contrary, "[t]he business judgment rule . . . is most applicable" when "facing one of these motions." *Id.* Likewise, the court in *Talib v. Skyway Communications Holding Corp.*, 2005 WL 1610707 (M.D. Fla. July 7, 2005), denied dismissal not because reliance on the business judgment rule was "premature," but because the plaintiffs had adequately alleged fraud, rebutting the rule's presumptive protections. *Id.* at *6.

The Receiver argues that the business judgment rule is an affirmative defense that cannot be resolved on a motion to dismiss unless it is "explicitly raised on the face of the plaintiff's complaint." Opp. 5-6. But nearly all of the decisions it cites trace back to a single Third Circuit opinion that, in passing and without analysis, labeled the business judgment rule an "affirmative defense." *See In re Tower Air, Inc.*, 416 F.3d 229, 238 (3d Cir. 2005). Other courts have consistently and correctly rejected the argument that the business judgment rule "is merely a defense." *Said*, 812 F. Supp. at 1268; *see also, e.g.*, *Kaye v. Lone Star Fund V (U.S.), L.P.*, ___ B.R. ___, 2011 WL 1548967, at *27 (Bankr. N.D. Tex. Apr. 26, 2011) ("[D]escribing the presumption created by the business judgment rule as an affirmative defense is, at best, a dubious characterization of the rule"); *In re Fleming Packaging Corp.*, 351 B.R. 626, 634-35 (Bankr. C.D. Ill. 2006) ("[T]he business judgment rule is not a true affirmative defense."). Rather than an affirmative defense that, by definition, "[t]he defendant bears the burden of proving," *Black's Law Dictionary* 482 (9th ed. 2009), the business judgment rule is a "rebuttable presumption," *Grassmueck*, 2003 WL 22128263, at *3. As such, "the initial burden of pleading and the

ultimate burden of persuasion are placed on the challenger to prove the inapplicability of the business judgment rule," Adam J. Richins, Note, *Risky Business: Directors Making Business Judgments in Washington State*, 80 Wash. L. Rev. 977, 984 (2005).

Tower Air has also been justly criticized for its peculiar conclusion that the business judgment rule *can* be invoked on a motion to dismiss so long as the complaint explicitly raises it. Such a rule "provides plaintiffs a powerful and perverse incentive to 'dummy-up' about the obvious implications of the business judgment rule when drafting their complaints in the first instance." *Kaye*, 2011 WL 1548967, at *28 (internal quotation marks omitted). Furthermore, *Tower Air* was decided before *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), which "appear to expand the right to have business judgment considered pursuant to a motion to dismiss." *Heard v. Perkins*, 441 B.R. 701, 711 (N.D. Ala. 2010). In short, neither *Tower Air* nor the cases relying on it provides a basis for deviating from the well-taken principle, recognized by this Court, that the business judgment rule is a rebuttable presumption that may serve as a basis for 12(b)(6) dismissal in federal court.

Finally, whether or not the Delaware courts require greater specificity in pleading than the federal courts, *see* Opp. 6-7, that concern goes toward the sufficiency of the allegations to survive a motion to dismiss—not whether the business judgment rule is a basis for dismissal in the first place. "[T]he protections of the business judgment rule . . . are a substantive point of law that . . . stands largely independent both of the procedural distinction between direct and derivative actions and of the notice purpose inherent in procedural rules of pleading." *In re IT Grp. Inc.*, 2005 WL 3050611, at *8 n.10 (D. Del. Nov. 15, 2005). As this Court and other federal courts have recognized, the substantive protections of the business judgment rule apply *ab initio*, and it is that substance-based presumption—not any procedure-based "heightened pleading requirements," Opp. 7—that the Receiver must surmount in order for its suit to proceed.

2. The Allegations in the Complaint Attacking Management's Historical Business Decisions Fail to Rebut the Substantive Protections of Washington's Business Judgment Rule.

As set forth in Mr. Killinger's opening brief, "the business judgment rule 'is process oriented'" and "permits liability only if management reached its decision in bad faith or made an

uninformed decision." Mot. 6. In large part, the Receiver does not take issue with those principles. It does not dispute—nor could it—that the business judgment rule focuses "on the decision-making process," *In re Citigroup Inc. S'holder Deriv. Litig.*, 964 A.2d at 122, not on the substantive merits of a business decision, *i.e.*, whether it was "wise in retrospect," *Nursing Home Bldg. Corp. v. DeHart*, 535 P.2d 137, 143-44 (Wash. Ct. App. 1975). It agrees that the business judgment rule fails to protect decisions made in bad faith, and it does not seriously contend that the Complaint alleges bad faith, fraud, or dishonesty.[2] And the Receiver does not claim that Mr. Killinger was uninformed about the risks of the "Higher Risk Lending Strategy" in planning and executing that business strategy; to the contrary, the Receiver asserts (as the Complaint alleges) that Mr. Killinger had *actual knowledge* of those risks. Opp. 15-16.

The Receiver instead argues that the business judgment rule and Washington Rev. Code §§ 23B.08.300 and 23B.08.420 are equivalent—that the business judgment rule "expressly incorporates the statutory ordinary care standard." Opp. 8-9. According to the Receiver, because the Complaint adequately alleges violations of that broad statutory standard, the business judgment rule does not apply at this stage. *Id.* at 13. But that argument is without basis in Washington law, effectively encompasses the very review of substantive decisionmaking the Receiver purportedly disclaims, and would eliminate the business judgment rule in practice. Properly understood, the business judgment rule is not rebutted by the Receiver's allegations, and Counts I and II should be dismissed.

a) The Receiver Distorts the Business Judgment Rule.

The Receiver first errs in asserting that the Washington Supreme Court "has held that" §§ 23B.08.300 and 23B.08.420 "are a 'codification'" of Washington's business judgment rule. Opp. 9. To be sure, those statutes set forth current standards of care for corporate directors and officers—requiring, *inter alia*, "the care an ordinarily prudent person in a like position would exercise under similar circumstances." But the cases cited by the Receiver merely noted—in

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[2] Its arguments to this end are limited to two conclusory footnotes, only one of which identifies an allegation that is itself a "naked assertion[] devoid of further factual enhancement" not "entitled to the assumption of truth." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949, 1951 (2009) (quotation marks omitted); Opp. 13 n.7, 18 n.8 (citing Compl. ¶ 9).

dicta, no less—that a *predecessor* statute, § 23A.08.343, codified the business judgment rule. *See Riss v. Angel*, 934 P.2d 669, 681 n.5 (Wash. 1997) (en banc); *Hines v. Data Line Sys., Inc.*, 787 P.2d 8, 18 (Wash. 1990). Prior to the alleged conduct here, that statute was repealed and replaced by current Title 23B of the Washington Code, which adopted the ABA's Revised Model Business Corporations Act (RMBCA). *See Equipto Div. Aurora Equip. Co. v. Yarmouth*, 950 P.2d 451, 453 (Wash. 1998) (en banc); *Matthew G. Norton Co. v. Smyth*, 51 P.3d 159, 163 n.2 (Wash. Ct. App. 2002). Significantly, the comments to the RMBCA—which the Washington legislature published in the *Senate Journal* and thereby constitute "persuasive authority," *Humphrey Indus., Ltd. v. Clay Street Associates, LLC*, 242 P.3d 846, 852 n.9 (Wash. 2010)—expressly state that the new statute only "defines the general standard of conduct" for corporate executives and "*does not try to codify the business judgment rule*." 2 S. Journal, 51 Leg., Reg. Sess. at 3041-42 (Wash. 1989) (emphasis added); *see also Shinn v. Thrust IV, Inc.*, 786 P.2d 285, 834 n.1 (Wash. Ct. App. 1990) (noting that the comments "indicate that the statutory language is not intended to be a codification of the business judgment rule"). Rather, "[t]he elements of the business judgment rule . . . are continuing to be developed by the courts in Washington and elsewhere." 2 S. Journal, at 3042. The Washington Supreme Court has not addressed the question under the new statute, but courts in other states addressing materially identical statutes modeled on the RMBCA have held that they do not codify the business judgment rules of those particular states. *See, e.g.*, *Henrichs v. Chugach Alaska Corp.*, 250 P.3d 531, 538 (Alaska 2011); *Gundaker/Jordan Am. Holdings, Inc. v. Clark*, 2008 WL 4550540, at *2 (E.D. Ky. Oct. 9, 2008).

Additional statutory comments explain how the separate concepts of the statutory standards of care and the business judgment rule are intended to interact: "If compliance with the standard of conduct set forth in [the statute] is established, there is no need to consider possible application of the business judgment rule. . . . *The possible application of the business judgment rule need only be considered if compliance with the standard of conduct set forth in [the statute] is not established*." 2 S. Journal, at 3044 (emphasis added). The Washington legislature has thus recognized not only that *current* §§ 23B.08.300 and 23B.08.420 (as opposed to predecessor statutes) do not codify the state's business judgment rule, but also that the

business judgment rule only comes into play *after* directors or officers fail to comply with the statutory standards of care. In other words, the business judgment rule provides additional protections *beyond* the safe harbor of compliance with the statutory standards of care.

The Receiver's expansive view of conduct that removes the protections of the business judgment rule is premised on the faulty assumption that the statutory standards of care and the business judgment rule are equivalent—that because §§ 23B.08.300 and 23B.08.420 "include an ordinary care standard," then "[t]he test for applying the business judgment rule in Washington . . . expressly incorporates the statutory ordinary care standard." Opp. 9. In the Receiver's view, any conduct that does not satisfy an "ordinary care standard" necessarily precludes application of the business judgment rule. But as explained above, that position is not the law. To this end, the Receiver's reliance on *FDIC v. Stahl*, 89 F.3d 1510 (11th Cir. 1996) is unavailing. Opp. 11-12. The Florida statute that *Stahl* examined was a pre-RMBCA provision enacted in 1975. The court thus had no occasion to consider statutory commentary like that recognized by the Washington legislature in connection with §§ 23B.08.300 and 23B.08.420—commentary that expressly recognizes statutory standards of care and the business judgment rule as separate, distinct, and not coextensive. Indeed, after the Florida legislature replaced the pre-RMBCA provision addressed in *Stahl* with an RMBCA-modeled law, *see* Fla. Stat. § 607.0830, courts have held that *Stahl*'s impact is "unclear." *Kloha v. Duda*, 246 F. Supp. 2d 1237, 1244 n.20 (M.D. Fla. 2003).

Proceeding on this errant understanding of the interplay between the statutory standards of care and the business judgment rule, the Receiver contends that any conduct that fails to satisfy an "ordinary care standard" removes the protections of the business judgment rule, and it misconstrues cases stating that the doctrine does not apply if there is evidence of "incompetence (i.e., failure to exercise proper care, skill, and diligence)." Opp. 9-10 (citing *Riss*, *Shinn*, and *In re Spokane Concrete Prods., Inc.*, 892 P.2d 98 (Wash. 1995)). But "competence"—as well as "proper care, skill, and diligence"—must mean something more than acting in compliance with "the broad statutory 'due care' language that exists in Washington," as the Receiver argues. *Id.* at 11. Otherwise, contrary to the view of the legislature, the business judgment rule would merely replicate the statutory standards of care, rather than serving as a separate (and

subsequent) inquiry. The "competence" requirement, as defined by the Receiver, would swallow the business judgment rule entirely, dictating that the doctrine protects decisionmakers from mistakes, except when they have made mistakes (by failing to act with "due care"). As such, a failure to act with "competence" or "proper care, skill, and diligence" must necessarily address a narrower range of conduct than that which fails to comply with statutory standards.

As Mr. Killinger has explained, leading authorities have repeatedly defined "competence"—*i.e.*, "proper care, skill, and diligence"—as "act[ing] in an informed manner." *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 66 (Del. 1989); Mot. 6-7. That is also how other state courts interpreting statutory standards materially identical to Washington's have held. *See, e.g.*, *Cuker v. Mikalauskas*, 692 A.2d 1042, 1045-47 (Pa. 1997) ("The business judgment rule insulates an officer or director of a corporation from liability for a business decision made in good faith if he is not interested in the subject of the business judgment, *is informed with respect to the subject of the business judgment to the extent he reasonably believes to be appropriate under the circumstances*, and rationally believes that the business judgment is in the best interests of the corporation." (emphasis added)).

The Receiver claims that Mr. Killinger is "narrowly limit[ing] th[e] ordinary care standard," Opp. 10, but that contention is unavailing. *First*, as the Washington legislature has recognized, the prerequisites for losing the business judgment rule's protections are distinct from the statutory "ordinary care standard," and by necessity must be confined to a more limited set of misconduct. The Receiver cannot explain how the business judgment rule would remain viable in Washington under its approach. *Second*, while the Receiver claims that Mr. Killinger fails "to cite a single Washington case that supports [his] proposition," Opp. 10, Mr. Killinger noted that in *Riss*, the Washington Supreme Court identified the "failure to adequately investigate" as conduct that would rise to "incompetence." Mot. 6 (citing 934 P.2d at 681). That holding is notable because while the Washington Supreme Court has "stated that the term 'incompetence' is related to the concept of 'proper care, skill, and diligence," it has otherwise "never substantially elaborated on the meaning of these standards." Richins, *supra*, at 1007. Accordingly, what little that court *has* said on the issue is significant and supports Mr. Killinger.

Third, the Receiver seeks to undermine Mr. Killinger's citation of Delaware authority by noting differences in statutory language. But Delaware's business judgment rule—like Washington's—is a common-law, not statutory, doctrine. *MM Cos. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1127 (Del. 2003). Notably, the Receiver does not dispute the primacy of Delaware authority on corporate law matters, which is significant given the relative paucity of and "inconsistencies" in Washington case law regarding these issues. Richins, *supra*, at 979; *see also* Mot. 7.

b) The Complaint Attacks the Substantive Merit of Mr. Killinger's Historical Business Decisions.

Armed with its unduly restrictive definition of the business judgment rule, the Receiver identifies three categories of allegations that purportedly preclude the rule's protections at this stage. Opp. 13-19. But notwithstanding the Receiver's claims that they involve the "process" of decisionmaking, these allegations, at bottom, all challenge the substantive correctness of management's historical business decisions. That is precisely what the business judgment rule—properly characterized—prohibits.

To begin with, the complaint's allegations bear a striking resemblance to those in the *Siravo* case, which was recently dismissed on business judgment rule grounds. There, as here, a federal regulator alleged, *inter alia*, that a failed financial institution's executives "departed from [the institution's] traditional business model" by amassing "risky" mortgage-backed securities in the institution's portfolio without "taking steps to monitor or control the risk" inherent in such a strategy, despite their awareness of "escalating delinquencies and the inability of borrowers to refinance" and their belief that the housing market was "in the most precarious position ever seen in the United States." *See* pp. 1-2, *supra*. Notably, *Siravo* was dismissed under California's business judgment rule, which the Receiver argues is premised on the same statutory standards as Washington's business judgment rule. *See* Opp. 12; Romero Decl., Ex. 3, 4.

The Receiver recites a laundry list of allegations that confirm that the Receiver simply takes issue with the substantive merits of the Defendants' decisions. For example, the Receiver refers to "a number of contemporaneous warnings that the Defendants received" regarding supposedly inadequate risk management infrastructure. Opp. 15-16. But those allegations only confirm that the Defendants *were* informed about circumstances at WaMu, consistent with other

allegations in the complaint—curiously unmentioned in the Receiver's opposition—that Mr. Killinger repeatedly met with risk managers and was aware of the risks associated with the "Higher Risk Lending Strategy." *See* Mot. 10-11. These allegations flatly contradict the Receiver's current claim that Mr. Killinger "clos[ed] [his] eyes to corporate affairs," as is required to remove the rule's protections. Opp. 19 (citing *FDIC v. Castetter*, 184 F.3d 1040, 1046 (9th Cir. 1999)). In truth, the Receiver takes issue with its own Complaint, which alleges that, after receiving information concerning the risks of their business strategy, the Defendants nevertheless elected to continue with it, on the belief that it would lead to greater returns and thus be in the company's best interests. *See* Mot. 11; Compl. ¶¶ 22, 25, 53, 65. That is an attack on management's substantive decisionmaking, which the business judgment rule squarely prohibits.

Likewise, the Receiver asserts that Defendants "purposely excluded risk managers from having a meaningful voice in their decision-making process." Opp. 16. The Receiver also contends that Defendants made their decisions "knowing that [WaMu] lacked the infrastructure to properly measure and manage" risk. *Id.* at 14. But these, too, are claims that challenge the substantive merits of Defendants' business decisions. The Receiver's argument—aided, of course, by perfect information in retrospect—is that certain officers of a company should have given more of a voice to certain other officers, and they should have implemented a different (and purportedly more robust) infrastructure. But the business judgment rule is designed to prevent such "judicial second-guessing in hindsight." *Castetter*, 184 F.3d at 1044. Indeed, "the amount of information that it is prudent to have before a decision is made is itself a business judgment of the very type that courts are institutionally poorly equipped to make." *In re RJR Nabisco, Inc. S'holders Litig.*, 1989 WL 7036, at *19 (Del. Ch. Jan. 31, 1989); *see also RTC v. Rahn*, 854 F. Supp. 480, 490 (W.D. Mich. 1994); *Estate of Detwiler v. Offenbecher*, 728 F. Supp. 103, 152 (S.D.N.Y. 1989); *Citron v. Fairchild Camera & Instrument Corp.*, 1988 WL 53322, at *17 (Del Ch. May 19, 1988), *aff'd*, 569 A.2d 53 (Del. 1989). Under the business judgment rule, "courts are not to second-guess the corporate decision makers' choice of procedures." *In re Consumers Power Co. Deriv. Litig.*, 132 F.R.D. 455, 483 (E.D. Mich. 1990). The choices of how much information to obtain from other officers before making a decision, or what kind of

infrastructure to implement or maintain in order to execute a business strategy, are committed to the discretion of business decisionmakers, and to impose liability "for making a 'wrong' decision" in those respects would "cripple [executives'] ability to earn returns for investors." *In re Citigroup Inc. S'holder Deriv. Litig.*, 964 A.2d at 126.

Finally, the Receiver cites Mr. Killinger's purported "failure to create and implement an exit strategy" in the event of the bursting of the housing bubble. Opp. 18. It is difficult to imagine a more glaring example of second-guessing substantive business decisions than the contention that a company's executives should have implemented a particular business strategy. Whether the Receiver regards Mr. Killinger's actions (or inactions) "as unwise, foolish, or even stupid in the circumstances" is "not legally significant." *Gagliardi v. TriFoods Int'l, Inc.*, 683 A.2d 1049, 1053 (Del. Ch. 1996). Indeed, that the Receiver believes this allegation to constitute a "flaw in the Defendants' decision-making process," Opp. 18, confirms the infirmity of the Receiver's understanding of the business judgment rule and its misguided conception of the decisionmaking "process," as explained above. For if this allegation sufficed to remove the protections of the business judgment rule, then truly the doctrine amounts to a legal nullity. Under a proper understanding of the Washington business judgment rule, the Receiver's allegations fail to rebut the substantive protections of the doctrine that apply at the outset, warranting dismissal of Counts I and II.

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

The Receiver does not dispute the wholly duplicative nature of Count III, the breach of fiduciary duty claim. It merely asserts that it would be "premature" to dismiss the claim at this stage. Opp. 26-28. But that is exactly what courts have done in identical situations where one claim is based "on the same facts" as another claim. *Hua v. Boeing Corp.*, 2009 WL 1044587, at *5 (W.D. Wash. Apr. 17, 2009); *Jacobson v. Wash. State Univ.*, 2007 WL 26765, at *11 (E.D. Wash. Jan. 3, 2007). The Receiver's assertion that these cases "relied on *state* procedural law for dismissal," Opp. 27, is mystifying, given that the same pleading standards applied in those federal cases as here. But even crediting the Receiver's argument, Count III should be dismissed, for as here, Washington state law applied in those cases. Indeed, the basis for

dismissal is even stronger here, where the claims not only are based "on the same facts" but are *legally* identical. As the Receiver does not dispute, the only fiduciary duty at issue is the duty of care, which is completely encompassed by negligence claims. *See* Mot. 11-12.

The Receiver's other arguments are equally unavailing. It claims that other cases cited by Mr. Killinger "involved dismissal of claims on the ground that the claims were not viable as pled," but that contention is squarely contradicted by the language of those decisions. *See, e.g.*, *Swartz v. KPMG LLP*, 476 F.3d 756, 766 (9th Cir. 2007) (per curiam) (holding that a claim that was "merely duplicative" was "properly dismissed"). It claims that there is "no danger of prejudice to Defendants" in allowing the claim to proceed; yet in *RTC v. Hess*, 820 F. Supp. 1359 (D. Utah 1993)—a decision cited by Mr. Killinger and unaddressed by the Receiver—the court dismissed a breach of fiduciary claim that was duplicative of a negligence claim because "[a]llowing RTC to continue with both claims would unduly prejudice defendants." *Id.* at 1366. It claims that the Western District of Washington has "frequently cautioned against prematurely dismissing similar claims" but overlooks that the claims here are not just "similar" but *legally and factually identical*. Finally, it asserts that this Court in *Grassmueck v. Barnett*, 281 F. Supp. 2d 1227 (W.D. Wash. 2003), refused to dismiss a supposedly duplicative claim. *Grassmueck*, however, did not address whether certain claims were duplicative or whether dismissal was an appropriate remedy; the only question before the Court was whether the complaint pleaded facts regarding bad faith and intentional conduct sufficient to preclude applicability of director protection provisions in a company's corporate charter. *Id.* 1231-33. That question is not before the Court, which should adhere to well-established principles and dismiss Count III.

C. The Remedial Claims Should Be Dismissed Since the Substantive Claims Fail.

The Receiver does not dispute that if Counts I-III against Mr. Killinger are dismissed, Counts IV and VI must be dismissed as well. Opp. 28-29. Because Counts I-III fail, Counts IV and VI should be dismissed.

III. CONCLUSION

For the reasons herein and in Mr. Killinger's opening brief, the Complaint should be dismissed.

Respectfully submitted,

/s Tobin J. Romero

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SEPTEMBER 15, 2011

CERTIFICATE OF SERVICE

I hereby certify that on September 15, 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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