The Federal Deposit Insurance Corporation, et al v. Killinger et al Doc. 78

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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.	Case No. 2:11-cv-00459 MJP REPLY IN FURTHER SUPPORT OF STEPHEN J. ROTELLA AND DAVID C. SCHNEIDER'S MOTION TO DISMISS NOTE ON MOTION CALENDAR: September 15, 2011 ORAL ARGUMENT REQUESTED

SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, New York 10017
-and-
1999 Avenue of the Stars, 29th Floor
Los Angeles, California 90067

DAVIS WRIGHT TREMAINE LLP
1201 Third Avenue, Suite 2200
Seattle, Washington 98101
Tel.: (206) 622-3150
Fax: (206) 757-7700

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SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, New York 10017
-and-
1999 Avenue of the Stars, 29th Floor
Los Angeles, California 90067

DAVIS WRIGHT TREMAINE LLP
1201 Third Avenue, Suite 2200
Seattle, Washington 98101
Tel.: (206) 622-3150
Fax: (206) 757-7700

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SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, New York 10017
-and-
1999 Avenue of the Stars, 29th Floor
Los Angeles, California 90067

DAVIS WRIGHT TREMAINE LLP
1201 Third Avenue, Suite 2200
Seattle, Washington 98101
Tel.: (206) 622-3150
Fax: (206) 757-7700

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SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, New York 10017
-and-
1999 Avenue of the Stars, 29th Floor
Los Angeles, California 90067

DAVIS WRIGHT TREMAINE LLP
1201 Third Avenue, Suite 2200
Seattle, Washington 98101
Tel.: (206) 622-3150
Fax: (206) 757-7700

INTRODUCTION

The FDIC seeks to eviscerate the business judgment rule, disavow its allegations in the separately-pending Appraisal Vendor Lawsuits, and avoid its pleading obligations with regard to the purported fraudulent transfers. The Court should grant Defendants' motion to dismiss.

First, the FDIC's Complaint alleges no fraud, intentional wrongdoing, bad faith, or corporate looting. Without these allegations, the Complaint fails as a matter of law because the FDIC has not overcome the business judgment presumption. The FDIC is plain wrong that the business judgment rule cannot be addressed at the pleading stage. Moreover, contrary to the FDIC's assertions, the business judgment rule ***does*** apply to alleged duty of care violations and protects the substance of the decisions the FDIC is now challenging, in hindsight, years later.

More fundamentally, the FDIC is suing former WaMu executives who implemented a less aggressive business plan than the business plan adopted by the WaMu Board of Directors before these executives were even hired. In short, it is the business judgment of the Board of Directors that the FDIC is actually seeking to challenge in this case.

Second, the FDIC is proceeding against other parties on an entirely different theory in the Appraisal Vendor Lawsuits, which were filed a thousand miles away from this Court. In the Appraisal Vendor Lawsuits, the FDIC claims WaMu's home loan losses were due to "grossly negligent appraisals." The FDIC asks each court to turn a blind eye to the pleadings in the other, arguing that the FDIC's own allegations in those pleadings cannot bind the FDIC at the motion to dismiss stage. Insisting that allegations in other cases are not "admissions," the FDIC is attempting to play "fast and loose" with the courts by taking inconsistent positions to gain an unfair advantage. Indeed, if the FDIC will not stand by its allegations in the Central District of California, the defendants in the Appraisal Vendor Lawsuits should be joined in this action.

Finally, conceding it failed to plead with the requisite particularity, the FDIC attempts to "plead" additional facts in its opposition to cure the defects in its Complaint. A party's belated allegations in opposition to a motion, however, are irrelevant in evaluating the sufficiency of the complaint. *Broam v. Bogan*, 320 F.3d 1023, 1026 n.2 (9th Cir. 2003). Moreover, the FDIC's

SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, New York 10017
-and-
1999 Avenue of the Stars, 29th Floor
Los Angeles, California 90067

DAVIS WRIGHT TREMAINE LLP
1201 Third Avenue, Suite 2200
Seattle, Washington 98101
Tel.: (206) 622-3150
Fax: (206) 757-7700

admissions that Mr. Rotella ***publicly recorded*** documents showing the QPRT transaction negates any inference of intent.

ARGUMENT

I. The FDIC Fails to Rebut the Business Judgment Presumption

In seeking to vilify Defendants for substantive business decisions presumptively protected by the business judgment rule, the FDIC re-writes Washington law by erroneously contending: (i) the business judgment rule is an affirmative defense and, as such, not grounds for challenging a pleading, and (ii) Washington's statutory due care standard effectively eliminates the business judgment rule because, according to the FDIC, officers are not entitled to the presumption unless and until they show the ***substance*** of their decisions reflect "due care." The FDIC is wrong on the law, and its Complaint fails to allege facts that overcome the business judgment rule.

A. The FDIC Misstates the Law

The business judgment rule is a rebuttable presumption—***not*** an affirmative defense—with the plaintiff bearing the initial burden of showing the rule does not apply. *See Grassmueck v. Barnett*, No. C03-122P, 2003 WL 22128263, at *3 (W.D. Wash. July 7, 2003) (Pechman, J.) (applying presumption at motion to dismiss stage but concluding that "Plaintiff has rebutted the presumption of good faith by asserting facts to show that the Defendants acted in bad faith and in self-interest"); (Killinger Reply, Dkt. No. 76, at 1–3). "Under [the business judgment] rule, a court will not substitute its own notions of sound business judgment for that of directors and officers unless the presumption is rebutted." *Grassmueck*, 2003 WL 22128263, at *3.

The business judgment rule permits liability only if management reached its decision in bad faith or made an uninformed decision. (*See* Mot. to Dismiss, Dkt. No. 53, at 11–12.) And for good reason. Where, as here, the former officers merely executed upon a business strategy that had been adopted by the WaMu Board of Directors, the business judgment rule applies *ipso facto*. The corporate 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

SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, New York 10017
-and-
1999 Avenue of the Stars, 29th Floor
Los Angeles, California 90067

DAVIS WRIGHT TREMAINE LLP
1201 Third Avenue, Suite 2200
Seattle, Washington 98101
Tel.: (206) 622-3150
Fax: (206) 757-7700

background of perfect knowledge." *Joy v. North*, 692 F.2d 880, 886 (2d Cir. 1982). Because the "circumstances surrounding a corporate decision are not easily reconstructed in a courtroom years later," "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. "Courts are reluctant to interfere with the internal management of corporations and generally refuse to substitute their judgment for that of the directors." *Nursing Home Bldg. Corp. v. DeHart*, 13 Wn. App. 489, 498, 535 P.2d 137, 143 (1975) (explaining that business judgment rule "immunizes" management from liability for good faith decisions).

The FDIC argues that pleading a breach of the duty of care, without more, is enough to preclude application of the business judgment rule entirely—*i.e.*, eliminate, not rebut, the rule. But if that were true, the business judgment rule would never be available to defend against a negligence claim. That is not the law. *See, e.g.*, *Grassmueck*, 2003 WL 22128263 (applying Washington's business judgment rule to negligence claim); *Para-Med. Leasing, Inc. v. Hangen*, 48 Wn. App. 389, 739 P.2d 717 (1987) (same). Indeed, the Washington Supreme Court recently reiterated Washington's commitment to the business judgment rule, stating "we review business decisions under the business judgment rule and infrequently reverse a business decision." *Lane v. City of Seattle*, 164 Wn. 2d 875, 882, 194 P.3d 977, 979 (2008).

The FDIC further confuses the issue by arguing it alleged a failure to exercise "due care in their decision-making" that places the Complaint outside the protection of the business judgment rule. (FDIC Opp'n, Dkt. No. 64, at 13:13–14.) The Complaint nowhere mentions "due care" or RCW 23B.08.420, which sets forth Washington's standards of conduct for officers. But, in any event, the FDIC's after-the-fact attempt to re-characterize its allegations does not satisfy the FDIC's burden to rebut the business judgment presumption.

As set forth in more detail in Mr. Killinger's reply brief, (Killinger Reply, Dkt. No. 76 at 9–11), the FDIC blurs the critical distinction between procedural and substantive due care. "Courts do not measure, weigh or quantify directors' judgments. [Courts] do not even decide if they are reasonable in this context. ***Due care in the decisionmaking context is process due care***

SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, New York 10017
-and-
1999 Avenue of the Stars, 29th Floor
Los Angeles, California 90067

DAVIS WRIGHT TREMAINE LLP
1201 Third Avenue, Suite 2200
Seattle, Washington 98101
Tel.: (206) 622-3150
Fax: (206) 757-7700

only." *Brehm v. Eisner*, 746 A.2d 244, 264 (Del. 2000) (emphasis added). *See also Nursing Home Bldg. Corp.*, 13 Wn. App. at 498–99, 535 P.2d at 143–44 ("It is too well settled to admit of controversy that ordinarily neither the directors nor the other officers of a corporation are liable for mere mistake or errors of judgment, either of law or fact." (citations omitted)); *Official Comm. of Bond Holders of Metricom, Inc. v. Derrickson*, No. C 02-04756 JF, 2004 WL 2151336, at *2 (N.D. Cal. Feb. 25, 2004) ("The duty of care is one of procedural due care, not of substantive due care, which, in the decision-making context, is foreign to the business judgment rule." (citations omitted)).

As set forth below, the FDIC's Complaint takes issue only with Messrs. Rotella and Schneider's substantive—not procedural—decision to support the "Higher Risk Lending Strategy," which the WaMu Board of Directors reviewed and approved in Summer 2004, before Messrs. Rotella and Schneider joined WaMu. That the FDIC now tries to recast its allegations as procedural—rather than hindsight challenges to substantive decisions insulated from liability—is transparently disingenuous. Moreover, the FDIC's allegations make no sense, given that WaMu's Board of Directors—which the FDIC chose not to sue—instituted the five-year strategic plan and bore ultimate responsibility for WaMu's corporate decision-making. The Complaint's conspicuous absence of the Board of Directors—to whom the WaMu's risk management function directly reported—calls into serious question the FDIC's alleged outrage over ***Defendants'*** purported risk management decisions as well as the FDIC's ability to meaningfully litigate those issues without naming the Board in this case.

B. The Complaint Fails to Allege Any Facts That Rebut Application of the Business Judgment Rule

The FDIC relies on its allegations attacking Defendants' substantive decisions to argue that Defendants' decision-making "process" lacked due care. (FDIC Opp'n, Dkt. No. 64, at 13–19.) But this new label does not change what the Complaint actually pleads—*i.e.*, that the FDIC is not challenging the ***way*** (the procedure by which) Messrs. Rotella and Schneider made their decisions but ***what*** Messrs. Rotella and Schneider decided:

SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, New York 10017
-and-
1999 Avenue of the Stars, 29th Floor
Los Angeles, California 90067

DAVIS WRIGHT TREMAINE LLP
1201 Third Avenue, Suite 2200
Seattle, Washington 98101
Tel.: (206) 622-3150
Fax: (206) 757-7700

- "With proper attention to risk management, Defendants ***could have*** aborted or at least tempered the Higher Risk Lending Strategy, and improved the risk management infrastructure for making and holding high risk loans." (Compl. ¶ 9 (emphasis added); *see also* FDIC Opp'n, Dkt. No. 64, at 1–3, 18–19.)

- "***Had they done this***, WaMu would have been better prepared for the inevitable decline in the housing market, and would have avoided or at least significantly mitigated the substantial losses that the Bank ultimately suffered." (Compl. ¶ 9 (emphasis added).)

- "As the person in charge of the day-to-day management of the Bank, and a member of the powerful Executive Committee that set the agenda for the Bank, Rotella ***had every opportunity*** to promote more prudent and diversified SFR lending supported by vigorous risk management." (*Id.* ¶ 127 (emphasis added).)

- "***Instead, he chose*** to focus on short term profits by promoting loan volume, without ensuring that the Bank had the controls and infrastructure necessary to manage the higher risks that it was taking and that ultimately led to billions of dollars of losses." (*Id.* (emphasis added).)

- "Schneider ***had every opportunity*** to promote more prudent and diversified SFR lending supported by vigorous risk management, ***but chose*** not to." (*Id.* ¶ 133 (emphasis added).)

Taking the FDIC's allegations as true, the FDIC alleges only that a risk infrastructure, which reported to the Board of Directors, was in place at WaMu and that the Defendants consulted the risk group before making decisions (*see* FDIC Opp'n, Dkt. No. 64, at 14–16; Compl. ¶¶ 6, 9, 101, 104–05, 149); that WaMu employed risk managers who regularly informed Defendants of the risks involved in their decisions (*see* FDIC Opp'n, at 15–18; Compl. ¶¶ 27–30, 39, 44, 47, 51, 58, 85); and that the FDIC now, years later (after an unanticipated worldwide economic collapse), disagrees with Defendants' decision to implement the Board of Directors' directive to go forward with a high risk lending strategy despite failures in its risk infrastructure and warnings from risk managers (*see* FDIC Opp'n, at 1–4, 14–19; Compl. ¶¶ 2, 5–9, 62, 67, 70, 73–74, 88, 114–15, 119, 125–27, 130–34, 141–42, 156, 175–76). But the business judgment rule exists to protect against exactly this type of hindsight second-guessing of informed corporate decision-making. *See, e.g.*, *FDIC v. Castetter*, 184 F.3d 1040, 1044 (9th Cir. 1999) ("The general purpose of the business judgment rule is to afford [decision makers] broad discretion in making corporate decisions and to allow these decisions to be made without judicial second-guessing in hindsight.").

SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, New York 10017
-and-
1999 Avenue of the Stars, 29th Floor
Los Angeles, California 90067

DAVIS WRIGHT TREMAINE LLP
1201 Third Avenue, Suite 2200
Seattle, Washington 98101
Tel.: (206) 622-3150
Fax: (206) 757-7700

II. The Court Should Hold the FDIC to Its Allegations in the Appraisal Vendor Lawsuits

A. The FDIC's Inconsistent Causation Allegations Render the Complaint Defective Under *Twombly* and *Iqbal*

Defendants have not asked the Court to decide that the appraisal vendors were, in fact, a superseding cause. Rather, the issue here is that the FDIC has made inconsistent allegations in two different federal courts, which means the Court should disregard the FDIC's causation allegations in evaluating whether the FDIC has stated a claim. *A/P Hotel, LLC v. Lehman Bros. Holdings, Inc.*, No. 10-720-RLH RJJ, 2010 WL 5100917, at *2 (D. Nev. Dec. 8, 2010) (dismissing complaint and explaining that "a plaintiff can 'plead himself out of a claim' by including factual allegations contrary to the factual elements of his claims or contradicted by documents referred to in the complaint") (citing *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001)); 71 C.J.S. *Pleading* § 254 (explaining that inconsistent or "repugnant" allegations neutralize each other).

The FDIC alleges that between 2005 and 2008, Defendants "caused WaMu to lose billions of dollars" in "WaMu's held-for-investment home loan portfolio." (Compl. ¶ 1.) Meanwhile, in the Appraisal Vendor Lawsuits, the FDIC alleges that after July 2006 "***[b]ut for*** the inflated appraisal services provided by [eAppraiseIT and LSI], WaMu would not have made the residential mortgage loans at issue and would not have suffered losses on those loans" to its "held-for-investment portfolio." (Mot. to Dismiss, Dkt. No. 53, Ex. A ¶ 3 & Ex. B ¶ 3.) The Appraisal Vendor Complaints further plead that the vendors' grossly negligent "conduct amounted to the want of even scant care or, alternatively, an extreme departure from the ordinary standard of care." (*Id.*, Ex. A ¶ 44 & Ex. B ¶ 44.) Thus, the FDIC appears to be alleging that the vendors are a "superseding cause [that] relieves [Defendants] from liability." Restatement (Second) of Torts § 440, cmt. b (1965). *See id.* § 447(c) (***acts of "extraordinary negligence" are superseding causes of harm***); *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn. 2d 468, 482, 951 P.2d 749, 756 (1998) ("A defendant's negligence is a proximate cause of the plaintiff's injury only if such negligence, unbroken by any new independent cause produces the injury complained of."); *Benefiel v. Exxon Corp.*, 959 F.2d 805, 808 (9th Cir. 1992) (recognizing "that where

SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, New York 10017
-and-
1999 Avenue of the Stars, 29th Floor
Los Angeles, California 90067

DAVIS WRIGHT TREMAINE LLP
1201 Third Avenue, Suite 2200
Seattle, Washington 98101
Tel.: (206) 622-3150
Fax: (206) 757-7700

causation cannot reasonably be established under the facts alleged by a plaintiff, the question of proximate cause is one for the court"); *Caraballo v. United States*, 830 F.2d 19, 23 (2d Cir. 1987) (finding conduct to be superseding cause as matter of law).

The FDIC contends "[t]here is nothing contradictory about the FDIC alleging such concurrent causes of loss in different actions against different defendants," (FDIC Opp'n, Dkt. No. 64, at 23:4–5), and that the "scope" of the allegations and damages is narrower in the Appraisal Vendor Complaints. (*Id.* at 20:9–12.) But, regardless whether the loans in the Appraisal Vendor Lawsuits are a subset of those in this case, the allegations are necessarily inconsistent because the FDIC cannot plausibly claim Defendants caused the damages to the held-for-investment portfolio—while simultaneously saying Defendants would not have even made the loans but for the bad appraisals. (*See* Mot. to Dismiss, Dkt. No. 53, Ex. A ¶ 31, Ex. B. ¶ 30 ("WaMu relied on these appraisal services in making residential loans to its borrowers, and . . . . ***WaMu would not have made these residential loans but for*** the inflated appraisals provided or approved by [eAppraiseIT and LSI].")) Under *Iqbal*, the Court may "draw on its experience and common sense" to conclude that these allegations are inconsistent and appropriately disregarded. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1940 (2009).

B. A Party Cannot Legitimately Make Factually Inconsistent Allegations in Contemporaneous Lawsuits Pending in Different Jurisdictions

The FDIC argues that the Court should pretend that the FDIC has not made any allegations in the Appraisal Vendor Lawsuits because the FDIC has license to make inconsistent factual allegations in ***other*** lawsuits without them constituting "admissions" in ***this*** lawsuit. But parties may not play "'fast and loose' with the courts by taking one position, gaining advantage from that position, then seeking a second advantage by later taking an incompatible position." *United Nat'l Ins. Co. v. Spectrum Worldwide, Inc.*, 555 F.3d 772, 778 (9th Cir. 2009). Stated simply, "a litigant may not benefit by making directly contradictory arguments regarding the same dispute in different tribunals." *PowerAgent, Inc. v. Elec. Data Sys. Corp.*, 358 F.3d 1187, 1192 (9th Cir. 2004); *Snohomish County v. Bowers*, No. C07-0875 MJP, 2009 WL 3858012, at *2 (W.D. Wash.

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425 Lexington Avenue
New York, New York 10017
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1999 Avenue of the Stars, 29th Floor
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DAVIS WRIGHT TREMAINE LLP
1201 Third Avenue, Suite 2200
Seattle, Washington 98101
Tel.: (206) 622-3150
Fax: (206) 757-7700

Nov. 17, 2009) (Pechman, J.) ("The equitable doctrine of judicial estoppel 'prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding.'" (citations omitted)). *See New Hampshire v. Maine*, 532 U.S. 742, 750–51 (2001) (listing non-exhaustive estoppel factors and stating primary purpose is "to protect the integrity of the judicial process . . . by prohibiting parties from deliberately changing positions according to the exigencies of the moment") (citations and quotation marks omitted).

Thus, courts need not accept as true allegations that a plaintiff contradicts in other pleadings filed in different courts. *See, e.g., Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008) (reiterating post-*Twombly* that the Court "need not accept as true allegations contradicting documents that are referenced in the complaint or that are properly subject to judicial notice"); *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000) (court need not accept as true allegations that contradict facts that may be judicially noticed by the court); *see also Minnick v. Clearwire US, LLC*, 683 F. Supp. 2d 1179, 1188 (W.D. Wash. 2010) (Pechman, J.) ("[T]he documents Plaintiffs incorporate by reference undermine the allegations in the Complaint. . . . The Court is left with Plaintiffs' conclusions of law, which are insufficient to state a claim."). Under *Twombly*, inconsistent or contradictory allegations are not "plausible." *See, e.g., Stanislaus Food Prods. Co. v. USS-POSCO Indus.*, CV F 09-0560 LJO SMS, 2011 WL 1677957, at *13 (E.D. Cal. Feb. 24, 2011) ("The Court does not ignore the prior allegations in determining the plausibility of the current pleadings.").

The FDIC cites no authority to the contrary but instead quips that the Court cannot judicially notice "as true" the Appraisal Vendor Lawsuit allegations and, thus, the FDIC has plausibly alleged causation. (FDIC Opp'n, Dkt. No. 64, at 22:10–12.) But the Court ***may*** take judicial notice of inconsistent pleadings because courts may judicially notice the files of courts of competent jurisdiction, including briefs, pleadings, and rulings. *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006) (taking judicial notice of briefs in another court); *Meredith v. Oregon*, 321 F.3d 807, 817 n.10 (9th Cir. 2003) (taking judicial notice of plaintiff's filing in state court); *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir.

SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, New York 10017
-and-
1999 Avenue of the Stars, 29th Floor
Los Angeles, California 90067

DAVIS WRIGHT TREMAINE LLP
1201 Third Avenue, Suite 2200
Seattle, Washington 98101
Tel.: (206) 622-3150
Fax: (206) 757-7700

1986) (taking judicial notice of motion to dismiss filed in separate suit because "[o]n a motion to dismiss, we may take judicial notice of matters of public record outside the pleadings").

Thus, whether or not the Appraisal Vendor Lawsuit allegations amount to legal "admissions," the FDIC's allegations are appropriately considered here. Independently, because "judicial efficiency demands that a party not be allowed to controvert what it has already unequivocally told a court by the most formal and considered means possible," *Soo Line R.R. Co. v. St. Louis Sw. Ry. Co.*, 125 F.3d 481, 483 (7th Cir. 1997), a party's contemporaneous allegations—even if they have been separated into different lawsuits—are properly deemed judicial admissions. *See e.g., Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988) ("Factual assertions in pleadings and pretrial orders, unless amended, are considered judicial admissions conclusively binding on the party who made them."); *Gradetech, Inc. v. Am. Employers Group*, No. C 06-02991 WHA, 2006 WL 1806156, at *3 (N.D. Cal. June 29, 2006) (holding statements made by defendant in complaints filed against unrelated third-parties in different case constituted judicial admissions for present case). The FDIC's cases are inapposite as none of them address inconsistent allegations being ***simultaneously*** litigated (whether or not in the same litigation).

III. If the FDIC Will Not Stand by Its Allegations in the Central District of California, the Court Should Direct Joinder of the Appraisal Defendants Here

If the FDIC refuses to stand by its out-of-forum allegations, the only way to protect against inconsistent lawsuits moving forward on separate tracks is to require the FDIC to join the appraisal vendors in this case. No "prescribed formula" dictates whether an entity is a "necessary party." *CP Nat'l Corp. v. Bonneville Power Admin.*, 928 F.2d 905, 912 (9th Cir. 1991). That "can only be determined in the context of particular litigation." *Id.* (quoting *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 118 (1968) (internal quotation marks omitted)). Courts have long described necessary parties as those "[p]ersons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete

SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, New York 10017
-and-
1999 Avenue of the Stars, 29th Floor
Los Angeles, California 90067

DAVIS WRIGHT TREMAINE LLP
1201 Third Avenue, Suite 2200
Seattle, Washington 98101
Tel.: (206) 622-3150
Fax: (206) 757-7700

justice, by adjusting all the rights involved in it." *Id.* (quoting *Shields v. Barrow*, 58 U.S. (17 How.) 130, 139 (1855) (internal quotation marks omitted)). "Rule 19 is designed to protect the interests of absent parties, as well as those ordered before the court, from multiple litigation, inconsistent judicial determinations or the impairment of interests or rights." *Id.* at 911.

Here, the FDIC alleges Defendants caused WaMu to incur losses in its home loans portfolio. At the same time, the FDIC alleges in two other lawsuits that WaMu's outside appraisers proximately caused the losses with respect to at least a significant portion of the home loans at issue in this case. Given the FDIC's incompatible allegations, *see supra* at II.A., and the FDIC's stated position that the Court may ***not*** take as true the facts alleged in the Appraisal Vendor Complaints, (FDIC Opp'n, Dkt. No. 64, at 22:10–12), the most prudent approach would be to deem the vendors necessary parties and require their joinder here. *See* Fed. R. Civ. P. 19 adv. comm.'s note ("The interests that are being furthered here are not only those of the parties, but also that of the public in avoiding repeated lawsuits on the same essential subject matter.").

IV. The FDIC Concedes It Failed to Plead Fraud with the Requisite Particularity

A complaint must provide "fair notice" of the nature of the claim and the "grounds" on which the claim rests. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007) (stating requirements of Rule 8). "Labels and conclusions" are not enough, and the FDIC must provide "factual allegations" that "raise a right to relief above the speculative level." *Id.*; *Iqbal*, 129 S. Ct. at 1950. "[C]onfusing complaints . . . impose unfair burdens on litigants and judges. . . . Defendants are . . . put at risk that . . . plaintiffs will surprise them with something new at trial which they reasonably did not understand to be in the case at all . . . ." *United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1059 (9th Cir. 2011) (citations omitted). Moreover, fraud claims must be pled "with particularity," Fed. R. Civ. P. 9(b), and "with a high degree of meticulousness," *Desaigoudar v. Meyercord*, 223 F.3d 1020, 1022 (9th Cir. 2000). Here, the FDIC's vague allegations of purported fraudulent transfers do not pass muster under Rules 8(a) or 9(b).

A. The FDIC Failed to Properly Plead a Fraudulent Monetary Transfer

With regard to the purported monetary transfer, the FDIC effectively concedes that it

SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, New York 10017
-and-
1999 Avenue of the Stars, 29th Floor
Los Angeles, California 90067

DAVIS WRIGHT TREMAINE LLP
1201 Third Avenue, Suite 2200
Seattle, Washington 98101
Tel.: (206) 622-3150
Fax: (206) 757-7700

failed to present a properly pled Complaint but criticizes Mr. Rotella for demanding that the FDIC comply with its statutory obligation. (*See* FDIC Opp'n, Dkt. No. 64, at 29:13–14.) The FDIC provides no explanation for why it vaguely pled, on "information and belief," that Mr. Rotella transferred "in excess of one million dollars to Esther Rotella after WaMu failed in September 2008," (Compl. ¶ 205), when the FDIC now says it had more detailed information all along. That the FDIC now claims two monetary transfers and that they took place a year later than stated in the Complaint, (FDIC Opp'n, Dkt. No. 64, at 29:10–12), exemplifies the precise reason for "notice pleading." *See Cafasso*, 637 F.3d at 1059 (explaining that pleading requirements protect against mischief and unfair prejudice).

The Court should review the sufficiency of the FDIC's Complaint based on its allegations therein, not new facts or claims contained in its opposition. *Broam v. Bogan*, 320 F.3d 1023, 1026 n.2 (9th Cir. 2003). "In determining the propriety of a Rule 12(b)(6) dismissal, a court may not look beyond the complaint to a plaintiff's moving papers, such as a memorandum in opposition to a defendant's motion to dismiss." *Id.*; *see also Amazon.com, Inc. v. Underwriters at Lloyd's London*, No. 04-1777 P, 2005 WL 1312046, at *2 (W.D. Wash. June 1, 2005) (Pechman, J.) (dismissing action, denying leave to amend, and explaining the "Court will not look beyond a Plaintiff's pleading papers and the exhibits submitted there with when conducting the 12(b)(6) inquiry"). Rule 9(b) does not allow the FDIC to make vague allegations that it may or may not clarify at some later, unspecified, point in time. Rather, the time for clarification was when the FDIC filed its Complaint.

B. The FDIC Failed to Allege Any Fraudulent Intent With Regard to the Publicly-Recorded Orient, New York QPRT Transaction

Mr. Rotella's opening brief established that the FDIC failed to adequately plead intent with regard to the alleged property transfer. In response, the FDIC incorrectly argues that it need only make a conclusory statement of fraudulent intent. (FDIC Opp'n, Dkt. No. 64, at 29:27–30:8.) However, the FDIC's inapposite, out-of-district cases, (*id.* at 30:4–8), do not trump the Federal Rules or Supreme Court authority requiring plaintiffs to set forth facts sufficient for the Court to draw an inference of scienter. *See Iqbal*, 129 S. Ct. at 1954 ("Rule 8 does not empower

SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, New York 10017
-and-
1999 Avenue of the Stars, 29th Floor
Los Angeles, California 90067

DAVIS WRIGHT TREMAINE LLP
1201 Third Avenue, Suite 2200
Seattle, Washington 98101
Tel.: (206) 622-3150
Fax: (206) 757-7700

respondent to plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss"); *United States ex rel. Lee v. Corinthian Colleges*, -- F.3d ----, 2011 WL 3524208, at *8 (9th Cir. Aug. 12, 2011) (dismissing, in part, for failure to "clearly allege sufficient facts to support an inference or render plausible" that defendant acted with the requisite scienter).

In any event, the FDIC's allegations fall short. The Court should disregard the FDIC's contention that "on information and belief, the transfers were not disclosed to or were concealed from his present and future creditors," (Compl. ¶ 206(e)), especially given that the FDIC has sought judicial notice of a report showing that the QPRT transaction was ***publicly recorded***. (*See* Dkt. No. 74 at 10, 22–23.) Publicly recording a document negates ***any*** plausible implication of concealment. Moreover, the FDIC concedes that, at the time of the alleged property transfer, Mr. Rotella had access to $250 million in insurance and was entitled to indemnification from WaMu. Accordingly, the FDIC's allegations concerning the property transfer lack plausibility.

CONCLUSION

For the reasons set forth in Defendants' opening motions and reply memoranda, (Dkt. Nos. 53, 54, 55, 76, 77), Defendants respectfully request that the Court dismiss the Complaint.

Dated this 15th day of September, 2011.

SIMPSON THACHER & BARTLETT LLP
Barry R. Ostrager (*pro hac vice*)
Mary Kay Vyskocil (*pro hac vice*)
425 Lexington Avenue
New York, New York 10017
Tel.: (212) 455-2000
Fax: (212) 455-2502
Email: bostrager@stblaw.com
mvyskocil@stblaw.com

Deborah L. Stein (*pro hac vice*)
1999 Avenue of the Stars, 29th Floor
Los Angeles, California 90067
Tel.: (310) 407-7500
Fax: (310) 407-7502
Email: dstein@stblaw.com

DAVIS WRIGHT TREMAINE LLP

By: /s/ *Stephen M. Rummage*
Stephen M. Rummage, WSBA #11168
Steven P. Caplow, WSBA #19843
1201 Third Avenue, Suite 2200
Seattle, Washington 98101-3045
Tel.: (206) 622-3150
Fax: (206) 757-7700
Email: steverummage@dwt.com
stevencaplow@dwt.com

Attorneys for Stephen J. Rotella and David C. Schneider

CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2011, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record who receive CM/ECF notification and that the remaining parties shall be served in accordance with the Federal Rules of Civil Procedure.

DATED this 15th day of September, 2011.

DAVIS WRIGHT TREMAINE LLP

By: /s/ *Steven P. Caplow*

Steven P. Caplow, WSBA #19843
1201 Third Avenue, Suite 2200
Seattle, Washington 98101-3045
Tel.: (206) 622-3150
Fax: (206) 757-7700
Email: stevencaplow@dwt.com