

Judge Marsha J. Pechman

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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.

No.: 2:11-cv-00459-MJP

DEFENDANTS' MOTION FOR A REASONABLENESS DETERMINATION AND ENTRY OF FINAL JUDGMENT OF DISMISSAL PURSUANT TO SETTLEMENT

**Note on Motion Calendar:
February 24, 2012**

1 Defendants Kerry K. Killinger, Stephen J. Rotella, David C. Schneider, Linda C.
2 Killinger and Esther T. Rotella (“Defendants”) respectfully submit this motion for (1) a
3 reasonableness determination of the December 13, 2011 Settlement and Release Agreement
4 between the Defendants and The Federal Deposit Insurance Corporation, as Receiver for
5 Washington Mutual Bank (the “FDIC,” and collectively with the Defendants, the “Parties”)
6 (“Settlement Agreement,” attached as Exhibit A hereto), and (2) entry of a final judgment
7 substantially in the form of Exhibit B. Defendants’ motion is supported by the accompanying
8 declaration of the mediator who facilitated the Parties’ settlement, the Hon. Layn R. Phillips
9 (U.S. District Judge, Ret.) (“Phillips Declaration,” attached as Exhibit C hereto). The FDIC
10 supports Defendants’ motion and jointly requests its entry.

11 I. PROCEDURAL BACKGROUND

12 The Settlement Agreement required the Parties to submit the agreement for approval to
13 the Delaware Bankruptcy Court and for a reasonableness determination by this Court in
14 conjunction with the request for entry of a final judgment. Ex. A, Section II. B. On February 15,
15 2012, the Delaware Bankruptcy Court granted its approval of the Settlement Agreement. *See*
16 Exhibit D hereto. The next step contemplated by the Settlement Agreement is a determination
17 by this Court of the reasonableness of the settlement and entry of a final judgment.

18 The FDIC’s lawsuit, relying on jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1345,
19 asserted state law claims against the Defendants alleging negligence, breach of fiduciary duty
20 and fraudulent conveyance. The FDIC has commenced litigation against other parties in other
21 jurisdictions related to Washington Mutual Bank, which could put at issue whether the terms of
22 the Settlement are reasonable and the product of good faith, arms-length negotiations. The
23 Parties therefore agreed consistent with RCW 4.22.060 to submit the Settlement Agreement for a
24 reasonableness determination by this Court.

1 **II. ARGUMENT**

2 In conjunction with entry of the final judgment, the Defendants respectfully request this
3 Court to enter a finding, based on the Settlement Agreement itself, the declaration of Judge
4 Phillips, the Order approving the settlement entered by United States Bankruptcy Judge Mary
5 Walrath, and the standards set forth in RCW 4.22.060, that the terms of the Settlement
6 Agreement are fair, reasonable, the product of arm’s length negotiations, and non-collusive.

7 The federal courts in this District conduct reasonableness hearings pursuant to RCW
8 4.22.060. *See, e.g., Barabin v. AstenJohnson, Inc.*, 2010 WL 3699979 (W.D. Wash. Sept. 13,
9 2010). In making a reasonableness determination, the court considers the factors set out in
10 *Chaussee v. Maryland Casualty Co.*, 60 Wn. App. 504 (1991), which are derived from *Glover v.*
11 *Tacoma General Hospital*, 98 Wn.2d 708 (1983), *overruled on other grounds by Crown*
12 *Controls, Inc. v. Smiley*, 110 Wn.2d 695 (1988).¹ This Court has broad discretion as to how to
13 weigh the various factors. *Chaussee*, 60 Wn. App. at 512. The factors relevant to this case
14 include: the amount of damages sought by plaintiff, the merits of plaintiff’s liability theory, the
15 merits of defendant’s defense theory, the risks and expenses of continued litigation, the
16 defendants’ ability to pay, and any evidence of bad faith, collusion, or fraud in the settlement
17 negotiations. *Id.* As set forth below, application of the relevant *Glover* factors easily
18 demonstrates that the Settlement is reasonable.

19 **A. The Settlement Is The Result Of Extensive Arms-Length Negotiations With An**
20 **Experienced Mediator.**

21 The FDIC’s claims, Defendants’ defenses thereto, and the positions of the various
22 directors and officers liability (“D&O”) insurers were complex. The Parties required numerous
23 sessions with Judge Phillips, who is a former U.S. Attorney and U.S. District Judge and among

24 ¹ The Court’s jurisdiction to conduct reasonableness determinations extends to executed settlement agreements,
25 *see Villas at Harbour Pointe Owners Assoc.*, 137 Wn. App. 751, 760 (2007) and to cases in which all parties to a
26 case have settled, *see Martin v. Johnson*, 141 Wn. App. 611, 617 (2007) (reasonableness determination made when
there were no non-settling defendants and court stating “RCW 4.22.060’s requirement of a reasonableness hearing in
the tort litigation context [does not] preclude use of a reasonableness hearing in other contexts.”).

1 the most experienced and respected mediators of complex cases in the country. Judge Phillips
2 was familiar with many of the issues in this case because he was responsible for successfully
3 mediating the resolution of the WaMu MDL class action and the related “tag-along” *Flaherty*
4 and *Solton/Buenaventura* cases that were pending before this Court. Judge Phillips directly
5 oversaw a protracted mediation process, which involved ten days of face-to-face meetings and
6 extensive telephonic sessions over the course of nine months.

7 Based on his involvement in the mediation process, as detailed in his declaration, Judge
8 Phillips believes that the Settlement was fair, reasonable, the result of extensive arms’ length
9 negotiations, and not the result of any collusion. *See Phillips Decl.* ¶¶ 14-15. Judge Phillips also
10 observed that the arguments and positions by all involved with the mediation process were
11 complex and highly adversarial, as reflected in the length, number, and intensity of the
12 negotiation sessions that were required to reach an agreement in principle to settle this Action.
13 *See id.* ¶¶ 14, 17.

14 **B. The Terms Of The Settlement Are Reasonable.**

15 There were substantial risks to all Parties if a settlement was not reached. In connection
16 with the Defendants’ motions to dismiss, the parties have previously submitted extensive
17 briefing on the merits of the legal claims and defenses that they were prepared to litigate if the
18 case proceeded. As Judge Phillips observed, the FDIC was prepared to prosecute these claims
19 vigorously, while the Defendants were also prepared to defend the claims with equal vigor.
20 *Phillips Decl.* ¶ 7. Further, as discussed in more detail below, the FDIC was seeking substantial
21 damages that were well beyond the available D&O insurance limits and the Defendants’ ability
22 to pay.

23 In addition, a significant complication in the mediation process was the status of the
24 D&O insurance policies, which represented a material source for potential recovery. As this
25 Court is aware from its oversight of the WaMu MDL actions and approval of the WaMu MDL
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1 class settlement, there has been substantial erosion of the D&O insurance policies used to fund
2 the defense and settlement of the WaMu MDL and tag-along actions. The same D&O insurance
3 policies were at issue for this case. In addition, there are other pending cases and other potential
4 claimants to these D&O insurance policies that threatened further erosion of these policies. *See*
5 *id.* ¶¶ 9, 16.

6 Judge Phillips specifically noted the depletion of the D&O insurance policies as a
7 significant factor that not only led to the settlement, but also supports the reasonableness of the
8 settlement amount itself. *Id.* ¶ 9. Judge Phillips noted that, while the FDIC was intent on a
9 vigorous prosecution of its claims, Defendants were intent upon a vigorous defense of all
10 allegations of wrongdoing, and observes that, even if the FDIC had litigated this case through
11 trial and obtained a judgment against Defendants, there might not have been any insurance
12 available to satisfy a portion of that judgment. *Id.* ¶ 16.

13 Another significant complication was the potential contributions by the Defendants to
14 any settlement. The negotiations and discussions concerning whether and how the individuals
15 would personally contribute to any settlement were particularly difficult, especially given the
16 eventual agreed-upon structure of contributions that implicated issues and parties in the Chapter
17 11 proceedings involving Washington Mutual Inc. (“WMI”) pending in the United States
18 Bankruptcy Court for the District of Delaware. *Id.* ¶¶ 10, 16.

19 There were many complex issues that required careful analysis and creative solutions. In
20 particular, prior to filing this action, the FDIC had entered into a “Global Settlement Agreement”
21 with WMI and other parties, as a result of which the FDIC obtained highly significant value,
22 including \$125 million from WMI in exchange for the release of the FDIC’s claims against the
23 former WaMu directors (other than Mr. Killinger) and other WaMu officers. As part of the
24 Global Settlement Agreement, the FDIC agreed to judgment and settlement reduction provisions
25 by which WMI would not have to pay anything further as a result of any FDIC lawsuits against
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1 non-released WaMu directors and officers, such as Messrs. Killinger, Rotella and Schneider. *See*
2 Ex. E at § 3.6 (“Judgment Reduction Provision”). Because Messrs. Killinger, Rotella and
3 Schneider retained certain indemnification rights, there was a risk that any judgment the FDIC
4 might obtain against Messrs. Killinger, Rotella, or Schneider would be indemnifiable by WMI.
5 Thus, the Judgment Reduction Provision in the FDIC’s Global Settlement Agreement with WMI,
6 in the absence of available insurance, could have required the FDIC to reduce any judgment it
7 ultimately obtained to zero. As noted above, had the parties not settled, the available D&O
8 insurance likely would have been severely depleted or eliminated in its entirety by the time of
9 trial in this action (which had been set for September 2013), due to the potential settlement of
10 competing claims on the policies and defense costs. These factors created substantial risks
11 regarding the cost-effectiveness of the FDIC’s continued prosecution of the claims and were
12 important to the FDIC’s decision to settle and its evaluation of the overall amount of the
13 settlement.

14 Based on all of the above, and what he learned during the mediation regarding the
15 personal assets of the Defendants, Judge Phillips believes that it was reasonable for the FDIC and
16 in the FDIC’s interests to settle for the consideration provided in the Settlement Agreement –
17 \$39.575 million cash obtained from the D&O insurance policies, cash payments from the
18 Defendants of \$425,000 and their agreement to pay the FDIC an additional cash amount based
19 upon the amounts Defendants actually receive, after tax, from certain of their claims pending in
20 the WMI Chapter 11 proceedings (with a \$24.7 million pre-tax face value) – rather than to
21 proceed further with this action and, even if successful, risk getting far less or nothing at all.

22 Therefore, the parties submit that the settlement represents a recovery and outcome that is
23 reasonable and fair for the FDIC as Receiver for Washington Mutual Bank and the Defendants,
24 particularly given the litigation risks, the costs of prosecution, and the finite assets available to
25 satisfy any judgment that might have been obtained against the Defendants. There can be no
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1 question that this Settlement Agreement was not collusive, but was the result of difficult and
2 vigorous negotiations among experienced and sophisticated counsel. Judge Phillips thus
3 concluded that it was in the best interests of all Parties to avoid the burdens and risks associated
4 with further litigation and to enter into this Settlement Agreement.

5 **C. The Reaction Of The Bankruptcy Court To The Settlement Supports The**
6 **Reasonableness Of The Settlement.**

7 Consistent with Judge Phillips' conclusions about the reasonableness of the Settlement,
8 on February 15, 2012, United States Bankruptcy Judge Walrath entered an order approving the
9 Settlement and finding that it is fair and reasonable as to WMI and the Debtors in the Chapter 11
10 proceedings. *See* Ex. D. WMI itself proffered this settlement and filed the motion seeking Judge
11 Walrath's approval of the Settlement, pursuant to Section 105(a) of the Bankruptcy Code and
12 Rule 9019 of the Federal Rules of Bankruptcy Procedure. Dozens of third parties received notice
13 of WMI's motion (*see* Ex. F), and not a single objection was filed. *See* Ex. G. The findings of
14 Judge Walrath and the absence of any objections in the bankruptcy proceedings further support
15 the reasonableness of the Settlement.

16 **III. CONCLUSION**

17 For the foregoing reasons, Defendants respectfully request that this Court enter the
18 proposed judgment submitted herewith, which includes the reasonableness determination
19 consistent with RCW 4.22.060.

20 Dated: February 24, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on February 24, 2012, 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 24th day of February, 2012.

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