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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.

Case No.: 2:11-cv-00459

JOINT STATUS REPORT AND
DISCOVERY PLAN

Pursuant to this Court’s April 18, 2011, Order and Federal Rule of Civil Procedure 26(f), counsel for Plaintiff, Federal Deposit Insurance Corporation, as Receiver of Washington Mutual Bank (“FDIC” or “Plaintiff”) and counsel for Defendants, Kerry K. Killinger, Stephen J. Rotella, David C. Schneider, Linda C. Killinger and Esther T. Rotella (collectively, “Defendants”) submit this Joint Status Report and Discovery Plan.

1. The FDIC alleges that three of Washington Mutual Bank’s (“WaMu”) top executives – Defendants Kerry K. Killinger, Stephen J. Rotella and David C. Schneider – failed

1 to properly manage risk in WaMu's home loans portfolio, leading to billions of dollars of
2 losses. The FDIC has sued these three defendants for gross negligence (Count I), ordinary
3 negligence (Count II) and breach of fiduciary duty (Count III). In addition to these three
4 causes of action, the FDIC also claims that Kerry Killinger and his wife, Linda Killinger, and
5 Stephen Rotella and his wife, Esther Rotella, engaged in fraudulent conveyances under
6 Washington Revised Code § 19.40.041 (Counts IV and V). Count VI requests that, pursuant to
7 the powers given to the FDIC under 18 U.S.C. § 1821(d)(18)-(19), this Court should freeze the
8 Defendants' alleged fraudulently transferred real estate assets and impose a notice requirement
9 to guard against fraudulent transfers during the pendency of this litigation. The Defendants
10 deny the FDIC's allegations against them, and dispute the appropriateness of the entry of any
11 freezing order.
12

13
14 This is a complex case potentially involving millions of pages of documents, dozens of
15 depositions and the likely need for multiple expert witnesses. The parties also anticipate
16 significant motion practice during the course of the litigation. Defendants intend to file
17 motions to dismiss along with supporting memoranda on June 17, 2011. On May 24, 2011, the
18 Court approved the following stipulated briefing schedule for the motions to dismiss: the FDIC
19 has 60 days to oppose the motions, up to and including August 16, 2011, and Defendants have
20 30 days to file replies, up to and including September 15, 2011. *See* Dkt. No. 46.
21

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23 2. The parties have engaged former federal judge Layn Phillips in an effort to
24 mediate this dispute.

25 3. The parties have already engaged in mediating this dispute and continue to do
26 so.
27
28

1 4. The parties propose June 1, 2012, as the deadline for joining additional parties to
2 this action.

3 5. The parties propose the following discovery plan:

4 A. The initial FRCP 26(f) conference was held by telephone on May 16,
5 2011. FRCP 26(a) initial disclosures were exchanged on June 6, 2011.

6 B. The parties anticipate that extensive discovery will be required by both
7 sides. The parties do not see any need at this time for a phased fact
8 discovery approach; however the parties are meeting and conferring
9 concerning the potential bifurcation of certain issues that may include
10 phasing of discovery. See paragraph 8.

11 C. Pursuant to FRCP 30(a)(2), the parties stipulate or request leave of Court
12 to allow up to 90 fact witness depositions for the FDIC and up to 90 fact
13 witness depositions for the Defendants collectively. The FDIC further
14 requests, pursuant to FRCP 30(d)(1), that the depositions of Defendants
15 Kerry Killinger, Stephen Rotella and David Schneider each last up to
16 three days with a maximum of seven hours of examination time per day.
17 The FDIC believes that this extended time is necessary to fully question
18 the Defendants about their alleged misconduct, their communications
19 with WaMu risk managers and other persons, and the numerous
20 documents and presentations authored and reviewed by them over the
21 four-year period discussed in the lawsuit. Defendants do not believe that
22 three days of questioning is a reasonable amount of time. The parties
23 three days of questioning is a reasonable amount of time. The parties
24 three days of questioning is a reasonable amount of time. The parties
25 three days of questioning is a reasonable amount of time. The parties
26 three days of questioning is a reasonable amount of time. The parties
27 three days of questioning is a reasonable amount of time. The parties
28 three days of questioning is a reasonable amount of time. The parties

1 will continue to meet and confer to see if they can reach agreement on an
2 appropriate time limit for these three depositions.

3 D. In order to minimize expense in this action, the parties have agreed to
4 cooperate in seeking permission from the Court and/or the party that
5 produced documents in the WaMu MDL securities class action that are
6 potentially relevant here to disclose and use such documents in this case.
7 In this regard, the FDIC and the Defendants plan to jointly move this
8 Court to modify the protective order in the MDL securities class action.
9 The FDIC further has agreed to make available to defense counsel its
10 entire "DMS" database of documents that the FDIC obtained upon the
11 closing of Washington Mutual Bank, subject to a preliminary review and
12 right to clawback for privileged documents. The "DMS" database
13 contains many of the categories of documents disclosed in the FDIC's
14 initial disclosures.

15 E. A draft Protective Order shall be submitted to the Court pursuant to Rule
16 26(c) of the Federal Rules of Civil Procedure and Local Rule 5(g). The
17 protective order will cover, at a minimum: (i) all potentially relevant
18 documents produced in the securities class action litigation that are not
19 otherwise public; (ii) all documents contained in the FDIC's DMS
20 system that are not otherwise public; (iii) all responsive documents
21 obtained from the Office of Thrift Supervision; and (iv) all responsive
22 documents obtained from third parties that are not otherwise public.
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1 6. The parties propose a deadline of December 1, 2011, for the substantial
2 completion of document production in this matter, and a deadline of August 31, 2012 for the
3 close of all fact discovery. The parties anticipate substantial expert discovery after the close of
4 fact discovery.
5

6 7. The parties do not consent to the referral of this case to the Magistrate Judge.

7 8. The parties agree that the trial should not be bifurcated between liability and
8 damages issues. However, the Defendants propose to bifurcate the gross negligence, ordinary
9 negligence and breach of fiduciary duty claims (Counts I, II and III) from the fraudulent
10 conveyance and asset freeze claims (Counts IV, V and VI) so that liability on Counts I, II or III
11 must first be established before trying the fraudulent conveyance claims. The FDIC disagrees
12 with the bifurcation of these claims. If the parties cannot reach agreement through further
13 meet-and-confer conferences, they will brief the issue for the Court at an appropriate time.
14

15 9. At this time, counsel for the parties do not see any need to modify the pretrial
16 statements and pretrial order requirements in Local Rules 16 and 16.1.
17

18 10. See paragraph 5.D. above.

19 11. The parties anticipate that the case will be ready for trial on September 16, 2013.
20 However, this is subject to change based on the course of motion practice, fact discovery and
21 expert discovery.
22

23 12. The FDIC has demanded a jury trial.

24 13. The parties anticipate an eight week trial.
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15 15. Each of the Defendants has agreed to waive service of the FDIC's Complaint
16 and to answer or otherwise plead on or before June 17, 2011.

18 16. The parties do not request a scheduling conference prior to entry of the
19 scheduling order, unless the Court desires such a conference. The parties have attached hereto
20 as Exhibit A a draft agreed Scheduling Order for the Court's convenience.

21 ///

22 ///

1 Dated: June 13, 2011

2 Respectfully submitted,

3 FEDERAL DEPOSIT INSURANCE
4 CORPORATION, as Receiver for
5 WASHINGTON MUTUAL BANK,
6 *Plaintiff*

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8 One of Its Attorneys

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1 I hereby certify that on June 13, 2011, the foregoing was electronically filed with the
2 Clerk of the Court using the CM/ECF system which will send notification of such filing to all
3 counsel of record who receive CM/ECF notification, and that the remaining parties shall be
4 served in accordance with the Federal Rules of Civil Procedure.
5

6
7 /s Bruce E. Larson
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

THE FEDERAL DEPOSIT INSURANCE
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Plaintiff,

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KERRY K. KILLINGER, STEPHEN J.
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Defendants.

Case No.: 2:11-cv-00459

[PROPOSED] ORDER SETTING TRIAL
DATE AND RELATED DEADLINES

Having reviewed and considered the Joint Status Report and Discovery Plan filed by the parties on June 13, 2011, the Court hereby sets the following schedule for this matter:

Defendants' Answers or other responsive pleadings due	June 17, 2011
Plaintiff's Oppositions to Motions to Dismiss	August 16, 2011

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EXHIBIT A

1	Defendants' Replies in support of Motion(s) to Dismiss	September 15, 2011 ¹
2	Document production to be substantially completed	December 1, 2011
3	Fact witness depositions begin (other than document	January 9, 2012
4	custodian depositions, which may done earlier)	
5	Last day to join additional parties/amend pleadings	June 1, 2012
6	Close of fact discovery	August 31, 2012
7	Exchange of initial expert reports	November 1, 2012
8	Exchange of rebuttal expert reports	January 15, 2013
9	Close of expert discovery	February 15, 2013
10	Last day to file dispositive motions	March 15, 2013
11	Oppositions to dispositive motions due	May 15, 2013
12	Replies in support of dispositive motions due	June 14, 2013
13	Proposed pretrial order and <i>motions in limine</i> due	August 1, 2013
14	Oppositions to <i>motions in limine</i> due	August 22, 2013
15	Final Pretrial Conference	August 29, 2013
16	Case ready for trial	September 16, 2013
17		[anticipated eight week
18		trial]

IT IS HEREBY ORDERED.

Dated: _____

Honorable Marsha J. Pechman
United States District Judge

¹ This Court's May 24, 2011, Order previously set these first three dates regarding the deadline for Defendants' responsive pleadings and the briefing schedule on any motions to dismiss.

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DECLARATION OF SERVICE

I hereby certify that on June 13, 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.

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