

The Honorable 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,	)	
	)	
	)	NO. 11-459 MJP
	)	
Plaintiff,	)	REVISED JOINT STATUS REPORT
	)	AND DISCOVERY PLAN
v.	)	
	)	
KERRY K. KILLINGER, STEPHEN J. ROTELLA, DAVID C. SCHNEIDER, LINDA C. KILLINGER, and ESTHER T. ROTELLA,	)	
	)	
Defendants.	)	
	)	

Pursuant to this Court’s Orders dated April 18, 2011, and July 8, 2011, 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 Revised Joint Status Report and Discovery Plan.

REVISED JOINT STATUS REPORT  
AND DISCOVERY PLAN - 1  
No. 11-459MJP  
#808363 v1 / 44469-001

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

12           This is a complex case potentially involving millions of pages of documents, dozens of  
13 depositions and the likely need for multiple expert witnesses. The parties also anticipate  
14 significant motion practice during the course of the litigation. Defendants have filed motions to  
15 dismiss along with supporting memoranda on July 1, 2011. On June 16, 2011, the Court  
16 approved the following stipulated briefing schedule for the motions to dismiss: the FDIC shall  
17 file its opposition to the motions on or before August 22, 2011, and Defendants shall file their  
18 replies on or before September 15, 2011. (*See* Dkt. No. 50.)

19           2.       The parties have engaged former federal Judge Layn Phillips in an effort to  
20 mediate this dispute.

21           3.       Mediation efforts have been unsuccessful.

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

24           5.       The parties propose the following discovery plan:

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

27                   A Joint Status Report and Discovery Plan was submitted to the Court on  
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1 June 13, 2011 (Dkt. No. 47.) On July 6, 2011, this Court held an initial  
2 status conference and ordered the parties to submit a revised Joint Status  
3 Report and Discovery Plan on or before July 20, 2011. (Dkt. Nos. 57,  
4 58.) Subsequently, counsel for all parties met and conferred by email  
5 and telephone on numerous occasions, including on July 13, 15, 19 and  
6 20, 2011. This Revised Joint Status Report and Discovery Plan is the  
7 result of those conferences and emails.

8 B. The parties anticipate that extensive discovery will be required by both  
9 sides. The parties do not see any need at this time for a phased fact  
10 discovery approach; however, Defendants have raised with Plaintiff the  
11 possibility of bifurcating certain issues. Such bifurcation may include  
12 phasing of discovery. See paragraph 8. The parties have been  
13 discussing this issue, and Plaintiff intends to make a written proposal to  
14 Defendants that may obviate the dispute. If the parties do not reach  
15 resolution of the matter, they will advise the Court.

16 C. Pursuant to Fed. R. Civ. P. 30(a)(2), the parties stipulate or request leave  
17 of Court to allow up to 140 fact witness depositions collectively. This  
18 number is 40 less than the previously proposed figure of 180 total  
19 depositions, and is the result of further discussions among counsel  
20 regarding the potential overlap in witnesses by both sides. The FDIC has  
21 identified approximately 57 witnesses who it may wish to depose in this  
22 matter in addition to the dozens of witnesses it previously interviewed to  
23 ensure their testimony is available for trial. Taking into account that  
24 additional depositions may be necessary as discovery progresses, the  
25 FDIC believes that a total of 70 depositions would be appropriate from  
26 its standpoint. Defendants have disclosed over 100 witnesses in their  
27 initial disclosures and believe that many of the individuals they wish to  
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1 depose will overlap with those the FDIC wishes to depose. Thus, the  
2 parties arrived at a total of 140 potential deponents. Counsel for the  
3 parties also have agreed to cooperate in the deposition scheduling  
4 process, including (i) the use of deposition “phases,” (ii) sharing allotted  
5 deposition time, and (iii) selecting certain depositions for extended  
6 examination time beyond the seven hours normally permitted under Fed.  
7 R. Civ. P. 30(d)(1). The parties are currently working in good faith to  
8 reach a more detailed deposition protocol consistent with these  
9 parameters. The FDIC further requests, pursuant to Fed. R. Civ. P.  
10 30(d)(1), that the depositions of Defendants Kerry Killinger, Stephen  
11 Rotella, and David Schneider each last up to three days with a maximum  
12 of seven hours of examination time per day. The FDIC believes that this  
13 extended time is necessary to fully question the Defendants about their  
14 alleged misconduct, their communications with WaMu risk managers  
15 and other persons, and the numerous documents and presentations  
16 authored and reviewed by them over the four-year period discussed in  
17 the complaint. Defendants do not believe that three days of questioning  
18 is a reasonable amount of time for these witnesses. As discovery  
19 progresses, the parties will continue to meet and confer to determine if  
20 they can reach agreement on an appropriate time limit for these three  
21 depositions.

22 D. Documents Produced in the MDL. The parties have had several  
23 conversations about how they can minimize the expense of discovery in  
24 this case. In their initial Discovery Plan, the parties informed the Court  
25 that they planned to seek the Court’s assistance in modifying the  
26 protective order in the WaMu MDL to provide the parties access to  
27 documents produced in that matter. To avoid unnecessary motion  
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practice, the parties have decided instead to contact the parties/non-parties that produced documents in the MDL that are relevant to this action (by subpoena, to the extent necessary), and ask the producing parties in the MDL to provide the parties and their counsel in this action access to the already-produced documents in lieu of making a second production of those same documents, subject to the protective order in this case that the parties will be proposing to the Court forthwith. (The parties in this action will likely also need to seek some additional documents from some of those third parties that were not produced in the MDL.)

E. Party Productions. The FDIC has preliminarily agreed to provide Defendants load files for certain documents processed to date by its outside vendor. Likewise, Defendants have preliminarily agreed to provide the FDIC with load files for certain documents that were produced in the MDL, subject to the FDIC’s obtaining permission from, or enforcing a subpoena against, the person or entity who originally produced those documents in the MDL. The FDIC has informed the Defendants that it has a significant volume of additional forensically-collected raw data that has not yet been electronically processed. The parties have agreed to work together to identify the portion of that data that may need to be processed and produced. If the parties are unable to agree on the custodians and/or search terms for the additional processing of data or on who will pay the costs of any such production, they will inform the Court. A draft Protective Order will be submitted to the Court pursuant to Rule 26(c) of the Federal Rules of Civil Procedure and Local Rule 5(g).

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. After the Initial Status Conference on July 6, 2011, counsel for the  
4 parties met and conferred to determine whether to shorten these dates based on the reduced  
5 number of depositions discussed above or other factors that could reduce the length of  
6 discovery in general. After revisiting this issue, counsel continue to believe that it would be  
7 difficult to shorten the proposed schedule given the substantial document production that has  
8 yet to begin. Further, given the number of anticipated depositions and the associated  
9 scheduling challenges, counsel believe the eight-month time frame set forth in the attached  
10 Scheduling Order at Exhibit A (from January 9, 2012 to August 31, 2012) is necessary, if not  
11 ambitious. Counsel have also taken into consideration that at least some of the witnesses who  
12 were deposed in the MDL case will need to be re-deposed in this action because this case  
13 implicates various issues not raised by the allegations in the MDL. The parties also anticipate  
14 substantial expert discovery after the close of fact discovery and have allotted what they believe  
15 to be sufficient time for such expert discovery. For all these reasons, counsel believe the  
16 proposed schedule at Exhibit A is appropriate for the complexity of this case. Finally, when  
17 initially submitting this proposed schedule, counsel based the proposal partly on the schedule  
18 previously approved by this Court in the WaMu MDL.

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

20           8.     The parties agree that the trial should not be bifurcated between liability and  
21 damages issues. However, the Defendants propose to bifurcate the gross negligence, ordinary  
22 negligence and breach of fiduciary duty claims (Counts I, II and III) from the fraudulent  
23 conveyance and asset freeze claims (Counts IV, V and VI) so that liability on Counts I, II or III  
24 must first be established before trying the fraudulent conveyance claims. The FDIC continues  
25 to disagree with the proposed bifurcation of these claims. Nonetheless, as set forth above, the  
26 parties are working to resolve this issue. If the parties cannot reach agreement through further  
27 meet-and-confer conferences, they will brief the issue for the Court at an appropriate time.

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

3           10.       See paragraph 5 above.

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

7           12.       The FDIC has demanded a jury trial.

8           13.       The parties anticipate an eight week trial.

9           14.       **Trial counsel for the FDIC:**

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15.       Each of the Defendants agreed to waive service of the FDIC's Complaint and to answer or otherwise plead on or before July 1, 2011, which they have done.

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



1 Dated: July 20, 2011

2 Respectfully submitted,

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DECLARATION OF SERVICE

I hereby certify that on July 20, 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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