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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-MJP
)
) FDIC’S MOTION TO COMPEL
) DEFENDANTS ESTHER AND STEPHEN
) ROTELLA TO ANSWER
) JURISDICTIONAL DISCOVERY AND FOR
) EXTENSION OF TIME TO RESPOND TO
) ESTHER ROTELLA’S MOTION TO
) DISMISS
) **Note on Motion Calendar:**
) **September 9, 2011**
)
) **[Local Civil Rule 7(d)(2)]**

Plaintiff Federal Deposit Insurance Corporation, as Receiver of Washington Mutual Bank (“FDIC”), by and through its undersigned attorneys, and pursuant to Federal Rules of Civil Procedure 6 and 37, hereby submits this Motion to Compel Defendants Esther and Stephen Rotella to Answer Jurisdictional Discovery and for Extension of Time to Respond to Esther Rotella’s Motion to Dismiss. For the reasons stated below, the motion should be granted.

I. INTRODUCTION.

Defendant Esther Rotella has filed a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction over the FDIC’s fraudulent transfer claims against her. Yet she and her husband, Stephen Rotella, have refused to answer a single interrogatory or production request aimed at

1 developing a full factual record for resolving her motion. The Rotellas try to justify their refusal
2 to provide jurisdictional discovery by claiming that the FDIC first must establish a *prima facie*
3 case of personal jurisdiction to be entitled to the discovery. However, that is *not* the test for
4 obtaining discovery on the threshold jurisdictional issues relevant to resolving Esther Rotella's
5 Rule 12(b)(2) motion. Courts in the Ninth Circuit have held that the plaintiff need only make a
6 "colorable" showing to obtain jurisdictional discovery, not a *prima facie* case. Moreover, the
7 Ninth Circuit itself has held that jurisdictional discovery ordinarily should be allowed where
8 disputed or additional facts are needed to flesh out personal jurisdiction issues. Here, the FDIC
9 presents publicly available information demonstrating that Esther Rotella lived in the State of
10 Washington during the first alleged fraudulent transfer in March or April 2008 and possibly
11 during the later fraudulent transfers of more than \$1 million after the Bank failed. This public
12 information is sufficient to create a colorable basis for allowing the jurisdictional discovery
13 sought by the FDIC.

14 Therefore, the FDIC respectfully asks this Court to compel Defendants Esther and
15 Stephen Rotella to answer the pending jurisdictional discovery requests, and to extend the time
16 for the FDIC to respond to Esther Rotella's Rule 12(b)(2) motion to dismiss until 15 days after
17 the complete answers to such discovery are received.

18 **II. FACTUAL BACKGROUND.**

19 Defendant Esther Rotella is the wife of Defendant Stephen Rotella, who was Washington
20 Mutual Bank's President and Chief Operating Officer from January 2005 until September 25,
21 2008, when the Bank failed. (FDIC Compl. [Dkt. 1] ¶¶ 15, 18.) Public records obtained from
22 the King County Recorder's Office reveal that on or about June 13, 2005, Stephen and Esther
23 Rotella obtained the deed to a large residence in Seattle, Washington, located at 1642 Federal
24 Ave E. (See Certification/Declaration of Henry Pietrkowski ("Pietrkowski Cert."), Ex. A,
25 Certified Copy of Statutory Warranty Deed dated June 13, 2005; *see also* Ex. C, Lexis Nexis
26 Comprehensive Report on Esther T. Rotella.)¹ The King County Recorder's Office's records
27

28 ¹ These materials, especially those certified by the King County Recorder's Office, may be subject to judicial notice by this Court. *See, e.g., Hamilton v. US Bank, N.A.*, No. 11CV977 DMS, 2011 WL 3475442, at *3 n.1 (S.D. Cal.

1 further show that the Rotellas sold their Seattle residence on or about May 5, 2009. (*See*
2 *Pietrkowski Cert., Ex. B, Certified Copy of Statutory Warranty Deed dated May 5, 2009; see*
3 *also Ex. C, Lexis Nexis Comprehensive Report on Esther T. Rotella; Ex. D, Westlaw Real*
4 *Property Transaction Record.*) In addition, Esther Rotella’s public voter registration record from
5 the King County Elections Office indicates that she registered to vote in the State of Washington
6 on August 5, 2005, and that she last voted in Washington on November 4, 2008. (*See*
7 *Pietrkowski Cert., Ex. E, Certified Copy of King County Voter Registration Record.*)²

8 While it appears that Esther Rotella currently lives in New York, it is less clear *when* she
9 moved there from Washington. For instance, publicly available records show that she purchased
10 real estate at 101 Central Park W, Unit 16G, New York, on December 16, 2009. (*Pietrkowski*
11 *Cert., Ex. C.*) However, the owner’s address for that December 2009 transaction is listed as
12 1642 Federal Ave E, Seattle WA 98102-4235. (*Id.*) It is not clear when Esther Rotella vacated
13 her Seattle residence or when she moved into her New York residence. Publicly available
14 records show that the earliest registration date for Esther Rotella’s automobile in New York was
15 January 22, 2010. (*Id.*) Where she resided between the sale of her Seattle home on May 5, 2009,
16 and the purchase of her New York residence on or about December 16, 2009, is unknown. The
17 only address listed for that time period is a “P.O. Box 600” in Orient, New York, for the period
18 between July 2009 and January 2010. (*Id.*)

19
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21 Aug. 8, 2011) (taking judicial notice of several documents recorded in the San Diego County Recorder's Office);
22 *Karimi v. GMAC Mortgage*, No. 11–CV–00926–LHK, 2011 WL 3360017, at *1 (N.D. Cal. Aug. 2, 2011) (taking
23 judicial notice of mortgage documents recorded with the Santa Clara County Recorder's Office); *Williams v. Baca*,
24 No. CV 06-0956-GHK, 2006 WL 4704618, at *1 n.1 (C.D. Cal. July 21, 2007) (taking judicial notice of address of
25 Men’s Central Jail) (citing *Myers Investigative & Sec. Servs., Inc. v. U.S.*, 47 Fed. Cl. 288, 297 (2000) (taking
26 judicial notice of addresses of federal buildings)). But even if the FDIC could not introduce these materials for the
27 truth of the matters asserted, the documents still show that the FDIC has a colorable basis for believing that personal
28 jurisdiction over Esther Rotella is proper in this state. As discussed below, this is sufficient to entitle the FDIC to
obtain jurisdictional discovery from the Rotellas so that a fuller evidentiary record can be created for purposes of
resolving Esther Rotella’s Rule 12(b)(2) motion to dismiss. *See, e.g., Klein v. Freedom Strategic Partners, L.L.C.*,
595 F. Supp. 2d 1152, 1157, 1160 (D. Nev. 2009) (considering Nevada Secretary of State filings to show residence
or business addresses of defendants in personal jurisdiction analysis and allowing further discovery on these issues).

² The voter registration report indicates Esther Rotella’s date of birth as “04/XX/1982” but this appears to be a
typographical error because her date of birth on other public documents is listed as “4/xx/1952” (*see, e.g.,*
Pietrkowski Cert., Ex. C) and her name and address otherwise match up correctly on the voter registration record.

1 The FDIC alleges in its Complaint that in or about March or April 2008, Esther Rotella
2 participated with her husband, Stephen Rotella, in transferring their undivided interest in a
3 property located in Orient, New York, to two irrevocable qualified personal residential trusts
4 (“QPRTs”) named the Stephen J. Rotella QPRT 2008 Trust and the Esther T. Rotella QPRT
5 2008 Trust. (Compl. ¶ 204.) Based on the public records cited above, these transfers occurred
6 while the Rotellas still were living in Seattle and Stephen Rotella was working at WaMu. The
7 FDIC further alleges that, “[o]n information and belief, Stephen Rotella transferred in excess of
8 one million dollars to Esther Rotella after WaMu failed in September 2008.” (*Id.* ¶ 205.) The
9 FDIC understands from representations by the Rotellas in response to the FDIC’s asset subpoena
10 that these monetary transfers consisted of Stephen Rotella’s transfer of \$158,000 to his wife’s
11 Schwab account on June 23, 2009, and a second transfer of \$1.2 million to his wife’s Schwab
12 account on December 17, 2009. These transfers occurred during the interim period described
13 above in which it is unclear where Esther Rotella resided.

14 At the time of each of the transfers alleged in the FDIC’s Complaint, Stephen Rotella had
15 been personally named as a defendant in numerous class action lawsuits that threatened to
16 bankrupt him and exhaust any available insurance proceeds. (Compl. ¶¶ 206.a., 207.) Moreover,
17 the monetary transfers to Esther Rotella were made after WaMu was seized by the Office of
18 Thrift Supervision and placed into receivership in September 2008. (*Id.* ¶ 206.b.) The Rotellas’
19 alleged fraudulent transfers may impact the FDIC’s ability, as WaMu’s Receiver, to recover any
20 judgment in this case for the benefit of WaMu, a Washington-based bank. The FDIC has
21 brought counts against Stephen and Esther Rotella for violation of the Washington Uniform
22 Fraudulent Transfer Act, RCW § 19.40.041, and for a limited asset freeze pursuant to 12 U.S.C.
23 § 1821(d)(18)-(19). (*Id.*, Counts V and VI, ¶¶ 203–215.)

24 **II. PROCEDURAL BACKGROUND.**

25 On July 1, 2011, Defendant Esther Rotella filed a Rule 12(b)(2) motion to dismiss for
26 lack of personal jurisdiction. (Dkt. 54.) On July 15, 2011, the FDIC served Esther Rotella with
27 its First Set of Jurisdictional Interrogatories and served Esther and Stephen Rotella with its First
28 Set of Jurisdictional Requests for Production. On August 15, 2011, Esther and Stephen Rotella

1 responded to these jurisdictional interrogatories and requests for production by uniformly
2 objecting to them on the basis that the FDIC had not made a “*prima facie* showing of
3 jurisdictional facts to withstand” Esther Rotella’s Rule 12(b)(2) motion to dismiss. (Pietrkowski
4 Cert., Exs. F, G.) The Rotellas further objected to this discovery on the basis that it was “an
5 improper request for merits discovery” and that such discovery should be stayed pending
6 resolution of the Rule 12(b)(2) motion. (*Id.*)

7 On August 19, 2011, counsel for the FDIC and for the Rotellas met and conferred by
8 phone regarding the Rotellas’ objections to the FDIC’s jurisdictional discovery. (Pietrkowski
9 Cert. ¶ 5.) The FDIC’s counsel also sent an email on August 19 to the Rotellas’ counsel setting
10 forth applicable case law and enclosing certified copies of Esther Rotella’s real estate and voter
11 registration records described above. (*Id.* at ¶ 6.) On August 22, 2011, counsel for the parties
12 participated in a second meet-and-confer conference during which it was determined that they
13 were at an impasse on the FDIC’s jurisdictional discovery requests. (*Id.* at ¶ 7-8.) This motion
14 to compel followed.

15 **III. ARGUMENT.**

16 **A. Jurisdictional Discovery Ordinarily Is Allowed Where the Plaintiff Presents** 17 **a Colorable Basis for Asserting Personal Jurisdiction Over the Defendant.**

18 The Ninth Circuit repeatedly has held that discovery ordinarily should be allowed where
19 a more satisfactory showing of the facts is necessary to determine whether the trial court has
20 personal jurisdiction over a defendant. *See Laub v. U.S. Dep’t of the Interior*, 342 F.3d 1080,
21 1093 (9th Cir. 2003) (“discovery should ordinarily be granted where pertinent facts bearing on
22 the question of jurisdiction are controverted or where a more satisfactory showing of the facts is
23 necessary”) (quoting *Butcher’s Union Local No. 498 v. SDC Inv., Inc.*, 788 F.2d 535, 540 (9th
24 Cir. 1986)); *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 430 n.24 (9th Cir.
25 1977) (“Discovery . . . should be granted where pertinent facts bearing on the question of
26 jurisdiction are controverted . . . or where a more satisfactory showing of the facts is necessary.”)
27 (citation omitted); *see also Chan v. Society Expeditions, Inc.*, 39 F.3d 1398, 1406 (9th Cir. 1994)
28 (remanding for additional discovery and findings on personal jurisdiction issue). Thus, while the

1 decision to grant jurisdictional discovery lies in the discretion of the district court, the Ninth
2 Circuit has held that “discovery should be granted when, as here, the jurisdictional facts are
3 contested or more facts are needed.” *Laub*, 342 F.3d at 1093 (citing *Wells Fargo*, 556 F.2d at
4 430 n.24). Conversely, a refusal to grant jurisdictional discovery is appropriate only when “it is
5 clear that further discovery would not demonstrate facts sufficient to constitute a basis for
6 jurisdiction.” *Id.* (citing *Wells Fargo*, 556 F.2d at 430 n.24).

7 This Court’s prior decisions regarding jurisdictional discovery requests echo these
8 principles. *See, e.g., Hamad v. Gates*, No. C10-591 MJP, 2010 WL 4511142, at *3 (W.D. Wash.
9 Nov. 2, 2010) (allowing plaintiff’s request for jurisdictional discovery as to certain defendants;
10 “Discovery should ordinarily been granted where ‘pertinent facts bearing on the question of
11 jurisdiction are controverted or where a more satisfactory showing of the facts is necessary.’”)
12 (citing *Butcher’s Union*, 788 F.2d at 540); *Loya v. Starwood Hotels & Resorts*, No. C06-
13 0815MJP, Order on Defendants’ Motion to Dismiss, at 1–2 (W.D. Wash. Nov. 30, 2006)
14 (Pietrkowski Cert., Ex. H) (“Courts may give the parties time to conduct jurisdictional discovery
15 when the record is insufficient to properly decide issues of personal jurisdiction.”) (citing Ninth
16 Circuit’s *Chan*, *Laub* and *Wells Fargo* decisions); *In re: Microsoft Partner Program Litig.*, No.
17 C05-1922P, 2006 WL 1348390, at *2 (W.D. Wash. May 16, 2006) (“The Court also agreed that
18 Microsoft was entitled to some discovery before responding to Ms. Will’s claims that the Court
19 lacked personal jurisdiction over her.”).

20 The Rotellas object to the FDIC’s discovery requests on the basis that the FDIC “has not
21 made a *prima facie* showing of jurisdictional facts to withstand the [Rule 12(b)(2)] motion to
22 dismiss.” (*See, e.g., Pietrkowski Cert.*, Ex. F at 3; Ex. G at 4.) However, a *prima facie* showing
23 of jurisdictional facts is *not* the applicable standard for determining when jurisdictional
24 discovery is appropriate. Rather, as this Court has held, a plaintiff need only make a “*colorable*”
25 showing of personal jurisdiction to be entitled to seek jurisdictional discovery. *See Hamad*, 2010
26 WL 4511142, at *8 (Pechman, J.) (“Hamad presents a *colorable* argument that the Court has
27 personal jurisdiction over Gates, Hill, and McNeill[;] therefore, the court GRANTS Hamad’s
28 request for limited jurisdictional discovery with respect to these defendants.”) (emphasis added).

1 Many other district courts in the Ninth Circuit have adopted this same “colorable showing”
2 standard for obtaining jurisdictional discovery. *See, e.g., Orchid Biosciences, Inc. v. St. Louis*
3 *Univ.*, 198 F.R.D. 670, 673 (S.D. Cal. 2011) (“It would . . . be counterintuitive to require a
4 plaintiff, *prior to* conducting discovery, to meet the same burden that would be required in order
5 to defeat a motion to dismiss.”) (original emphasis); *Mentor Graphics Corp. v. Eve-USA, Inc.*,
6 No. CV-10-954-HU, 2010 WL 5173560, at *2 (D. Or. Dec. 15, 2010) (holding that a “colorable
7 basis” for personal jurisdiction was the proper test for discovery rather than a *prima facie*
8 showing); *Mitan v. Feeney*, 497 F. Supp. 2d 1113, 1119 (C.D. Cal. 2007) (“In order to obtain
9 discovery on jurisdictional facts, the plaintiff must at least make a ‘colorable’ showing that the
10 Court can exercise personal jurisdiction over the defendant. This ‘colorable’ showing should be
11 understood as something less than a *prima facie* showing, and could be equated as requiring the
12 plaintiff to come forward with ‘some evidence’ tending to establish personal jurisdiction over the
13 defendant.”) (internal citations omitted); *Emag Solutions, LLC v. Toda Kogyo Corp.*, No. C 02-
14 1611, 2006 WL 3783548, at *2 (N.D. Cal. Dec. 21, 2006) (“the court finds that it has the
15 discretion to permit limited jurisdictional discovery without a full *prima facie* showing of
16 personal jurisdiction by the plaintiffs”).

17 None of the cases cited by Esther and Stephen Rotella in their discovery objections
18 address this “colorable” showing standard or the general rule in the Ninth Circuit that
19 jurisdictional discovery normally should be allowed where more facts are needed to flesh out the
20 jurisdictional issues.

21 **B. The FDIC Has Presented a Colorable Basis for Asserting Personal**
22 **Jurisdiction over Esther Rotella and Is Entitled to Seek Jurisdictional**
23 **Discovery to Present a Full Evidentiary Record on Her Rule 12(b)(2) Motion**
24 **to Dismiss.**

25 The FDIC can defeat Esther Rotella’s Rule 12(b)(2) motion to dismiss not merely
26 through the allegations in its Complaint, which must be accepted as true, but also through
27 evidentiary submissions after obtaining appropriate discovery. *Doe v. Unocal Corp.*, 248 F.3d
28 915, 922 (9th Cir. 2001) (citation omitted). Any “[c]onflicts between the parties over statements
contained in affidavits must be resolved in plaintiff’s favor.” *Schwarzenegger v. Fred Martin*

1 *Motor Co.*, 374 F. 3d 797, 800 (9th Cir. 2004); *Doe*, 248 F.3d at 922.

2 The FDIC’s Complaint expressly invokes the Washington long-arm statute, RCW
3 § 4.28.185(1), to establish personal jurisdiction over Esther Rotella. (Compl. ¶ 20.) Specifically,
4 the FDIC invoked § 4.28.185(1)(b), which provides that, “Any person, whether or not a citizen
5 or resident of this state, who in person or through an agent does any of the acts in this section
6 enumerated, thereby submits said person . . . to the jurisdiction of the courts of this state as to
7 any cause of action arising from the doing of any of said acts: . . . (b) The commission of a
8 tortious act within this state” The fraudulent conveyance claims against Esther Rotella is
9 such a tortious act. *See Morgenthau v. A.J. Travis, Ltd.*, 708 N.Y.S.2d 827, 832 (N.Y. Sup. Ct.
10 2000) (“A cause of action for fraudulent conveyance is a species of tort.”). A “tortious act
11 occurs in Washington under RCW § 4.28.185(1)(b) when the injury occurs in this state.”
12 *Attachmate Corp v. Public Health Trust of Miami-Dade County Fla.*, 686 F. Supp. 2d 1140,
13 1146 n.1 (W.D. Wash. 2010) (citing *Harbison v. Garden Valley Outfitters, Inc.*, 849 P.2d 669,
14 674 (Wash. Ct. App. 1993)).

15 Washington’s long-arm statute permits the exercise of jurisdiction to the fullest extent of
16 the due process clause of the U.S. Constitution. *Easter v. American W. Fin.*, 381 F.3d 948, 960
17 (9th Cir. 2004); *Attachmate Corp.*, 686 F. Supp. 2d at 1145 (“Because Washington’s long arm
18 statute is ‘co-extensive with federal due process requirements, the jurisdictional analyses under
19 Washington law and federal law merge together.”). Accordingly, the inquiry whether the FDIC
20 has satisfied the Washington long-arm statute is only a question of whether federal due process
21 has been satisfied. To satisfy specific jurisdiction under the due process clause, the Ninth Circuit
22 requires three prongs to be met: “(1) the defendant has performed some act or consummated
23 some transaction within the forum [state] or otherwise purposefully availed [her]self of the
24 privileges of conducting activities in the forum, (2) the claim arises out of or results from the
25 defendant’s forum-related activities, and (3) the exercise of jurisdiction is reasonable.” *Bancroft*
26 *& Masters, Inc. v. Augusta Nat’l, Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000). Importantly, while
27 the FDIC bears the burden of establishing the first two prongs, if it does so successfully, the
28 burden then shifts to Mrs. Rotella to prove that the exercise of jurisdiction would be

1 “unreasonable” under the circumstances. *Menken v. Emm*, 503 F.3d 1050, 1057 (9th Cir. 2007).

2 As indicated by the factual background set forth above, the FDIC has a colorable basis
3 for claiming personal jurisdiction over Esther Rotella because she committed one or more
4 tortious acts while in the State of Washington. The publicly available documents discussed
5 above reveal that Esther Rotella lived with her husband in Seattle, Washington, for
6 approximately four years from at least June 2005 through at least May 2009, which includes the
7 period of the fraudulent real estate transfer alleged in the FDIC’s Complaint. (Compl. ¶ 204.)
8 She therefore purposely availed herself of the privilege of conducting activities in Washington
9 when, in March or April 2008, she and her husband transferred their undivided interests in their
10 Orient, New York property to qualified personal residence trusts, allegedly to hinder collection
11 of that property by present and future creditors. *Bancroft & Masters*, 223 F.3d at 1086.
12 Similarly, if jurisdictional discovery confirms that Esther Rotella was present in Washington at
13 the time of this transfer, then the FDIC’s claim arises out of or results from her forum-related
14 activities. *Id.* At that point, it would be Mrs. Rotella’s burden to show that personal jurisdiction
15 over her was unreasonable. *Menken*, 503 F.3d at 1057. The public records cited above also raise
16 questions as to whether Mrs. Rotella was present in Washington when she received one or both
17 of the significant monetary transfers from her husband after WaMu failed in September 2008.
18 (Compl. ¶ 205.) Again, if jurisdictional discovery confirms these facts, then the first two prongs
19 of the Ninth Circuit’s personal jurisdiction test would be met and the burden would shift to Mrs.
20 Rotella to show that jurisdiction over her is unreasonable.³ Moreover, each of these fraudulent
21 transfers affects the FDIC’s ability, as Receiver of WaMu, to collect a future judgment from
22 Stephen Rotella. Because WaMu is a Washington-based bank, these fraudulent transfers result
23 in an injury in the State of Washington, which is all that is required for personal jurisdiction
24

25 ³ Even if discovery reveals that Esther Rotella was not present in Washington when she received the monetary
26 transfers from her husband, the FDIC still would have arguments for maintaining personal jurisdiction over those
27 claims, such as under the pendent personal jurisdiction doctrine. *See, e.g., Action Embroidery Corp. v. Atlantic*
28 *Embroidery, Inc.*, 368 F.3d 1174, 1181 (9th Cir. 2004) (“When a defendant must appear in a forum to defend against
one claim, it is often reasonable to compel that defendant to answer other claims in the same suit arising out of a
common nucleus of operative facts.”). Moreover, under the “effects” doctrine, fraudulent conveyances outside of
the forum may still lead to personal jurisdiction if it affects the plaintiff’s collection efforts within the forum state.

1 under RCW § 4.28.185(1)(b) of the long-arm statute. *Attachmate*, 686 F. Supp. 2d at 1146 n.1.
2 In sum, the FDIC has demonstrated a colorable basis for asserting jurisdiction over Esther
3 Rotella in Washington and it is entitled to jurisdictional discovery before having to respond to
4 her Rule 12(b)(2) motion to dismiss.

5 The cases cited in the Rotellas' objections to the FDIC's jurisdictional discovery do not
6 change this result. As mentioned above, those cases do not deal explicitly with the "colorable"
7 showing standard that governs requests for jurisdictional discovery in the Ninth Circuit. Those
8 cases show that where a plaintiff has no real basis to assert personal jurisdiction over the defendant,
9 they cannot go on a "fishing expedition" to discover those facts. *See, e.g., Cunningham Field &*
10 *Research Serv., Inc. v. Johnston*, No. C05-1354-MJP, 2005 WL 2704510, at *2 (W.D. Wash.
11 Oct. 20, 2005) (plaintiff's jurisdictional allegations, on the face of complaint, were too attenuated
12 to show personal jurisdiction; thus, additional discovery was not necessary); *Schwartz v. KPMG,*
13 *LLC*, 401 F. Supp. 2d 1146, 1157 (W.D. Wash. 2004) (plaintiff was not entitled to jurisdictional
14 discovery when he alleged only overbroad, conclusory allegations and presented no other basis
15 for asserting personal jurisdiction), *rev'd on other grounds*, 476 F.3d 756 (9th Cir. 2007); *In re*
16 *Teligent, Inc. v. Gent, Inc.*, Nos. 01-12974 (SMB), 03-3577, 2004 WL 724945, at *6 (S.D.N.Y.
17 Mar. 30, 2004) (dismissing complaint without prejudice under Rule 12(b)(2), but with leave to
18 replead conclusory allegations of personal jurisdiction). Defendants' cases further show that
19 where no amount of further discovery would be able to establish personal jurisdiction either as a
20 matter of law or because the defendant has submitted evidence disproving the plaintiff's
21 jurisdictional allegations, then jurisdictional discovery should not be allowed. *See, e.g., Pebble*
22 *Beach Co. v. Caddy*, 453 F.3d 1151, 1160 (9th Cir. 2006) ("[W]here a plaintiff's claim of
23 personal jurisdiction appears to be both attenuated and based on bare allegations ***in the face of***
24 ***specific denials made by the defendants***, the Court need not permit even limited discovery")
25 and rejecting plaintiff's basis for personal jurisdiction as a matter of law) (emphasis added;
26 citation omitted); *Rae v. Union Bank*, 725 F.2d 478, 481 (9th Cir. 1984) (refusing to allow
27 jurisdictional discovery where no factual issues existed regarding personal jurisdiction and claim
28 would have failed as matter of law); *Plastwood SRL v. Rose Art Indus., Inc.*, No. C07-0458-JLR,

1 2007 WL 3129589, at *3, 5 (W.D. Wash. Oct. 23, 2007) (refusing to allow jurisdictional
2 discovery where defendant submitted contrary evidence rebutting plaintiff's allegations).

3 But this case presents neither of these scenarios. Here, the FDIC has come forward with
4 publicly available facts to support its allegations of personal jurisdiction over Esther Rotella,
5 which arguably establish her presence in Washington at the time of the fraudulent transfers.
6 Moreover, Esther Rotella has not introduced a single piece of evidence to disclaim her presence
7 in Washington during the time frame of the fraudulent transfers alleged in the FDIC's
8 Complaint. Instead, she argues only that the FDIC has not alleged enough facts to establish a
9 *prima facie* case. But as explained above, that is not the test for jurisdictional discovery; the
10 FDIC need only make a colorable showing, which it has done here.⁴ Because the FDIC has
11 established that more facts would be necessary to fully vet the personal jurisdiction issue, the
12 normal rule allowing jurisdictional discovery in these circumstances should apply. *See Laub*,
13 342 F.3d at 1093 ("discovery should ordinarily be granted where pertinent facts bearing on the
14 question of jurisdiction are controverted or where a more satisfactory showing of the facts is
15 necessary") (citation omitted).

16 Defendants' discovery objections also cite to a series of cases involving a stay of merits-
17 related discovery where a motion to dismiss is pending on a threshold issue. However, those
18 cases are inapposite for a number of reasons. *First*, Defendants filed no motion to stay merits
19 discovery when Mrs. Rotella filed her Rule 12(b)(2) motion to dismiss on July 1, 2011. Thus, no
20 such request for stay of discovery is pending before this Court. *Second*, it makes little sense to
21 stay discovery as to Esther Rotella when the discovery directed to her husband, Stephen Rotella,
22 will be virtually the same and he has no personal jurisdiction motion pending. *Third*, the
23 discovery propounded by the FDIC is intended to obtain discovery on the personal jurisdiction
24 issues. The facts surrounding the FDIC's fraudulent conveyance claims may be tied up with
25 those threshold jurisdictional issues, but that does not make its discovery requests "merits"-

26 _____
27 ⁴ If the Court believes that the FDIC needs to plead the publicly available facts of which it is aware, it seeks leave to
28 do so. As stated above, however, the FDIC can defeat a Rule 12(b)(2) motion to dismiss not merely through its
allegations, which must be accepted as true, but also through evidentiary submissions after obtaining the appropriate
discovery. *Schwarzenegger*, 374 F. 3d at 800; *Doe*, 248 F.3d at 922.

1 based. *Fourth*, many of Defendants' cases are incorrectly cited or are distinguishable. For
2 instance, Defendants inadvertently cite to the defendants' *reply brief* in *Zovo Lingerie Co., LLC*
3 *v. DMH Enters., Inc.*, No. 2:08-CV-00393, 2008 WL 2776623 (W.D. Wash. June 18, 2008),
4 rather than to the actual court decision that *allowed* jurisdictional discovery. *See Zovo Lingerie*
5 *Co., LLC v. DMH Enters., Inc.*, No. 2:08-CV-00393, Minute Order [Dkt. 26] at 1 (July 16, 2008)
6 (Pietrkowski Cert., Ex. I). *Little v. City of Seattle*, 863 F.2d 681, 685 (9th Cir. 1988), dealt with
7 the issue of immunity, not personal jurisdiction, and found that "discovery could not have
8 affected the immunity decision." Here, in contrast, further factual discovery could help resolve
9 the personal jurisdiction issue. Moreover, *Stienmier v. Donley*, No. 09-cv-01260-KMT-BNB,
10 2010 WL 1576714, at *1-2 (D. Colo. Apr. 20, 2010), and *Johnson v. N.Y. Univ. Sch. of Educ.*,
11 205 F.R.D. 433, 434 (S.D.N.Y. 2002), are cases outside of this Circuit that employ a balancing
12 test that does not apply here.

13 **IV. CONCLUSION.**

14 For all the foregoing reasons, the FDIC respectfully requests that the Court:

- 15 (1) Compel Defendants Esther and Stephen Rotella to answer the FDIC's
16 jurisdictional discovery;
- 17 (2) Grant the FDIC an extension to respond to Esther Rotella's Motion to Dismiss
18 until 15 days after the FDIC receives its answers to the jurisdictional discovery
19 served on Esther and Stephen Rotella; and
- (3) Grant such other and further relief as the Court deems just or necessary.

20 Dated: August 22, 2011.

Respectfully submitted,

21 FEDERAL DEPOSIT INSURANCE
22 CORPORATION, as Receiver for
WASHINGTON MUTUAL BANK, *Plaintiff*

23 s/ Henry Pietrkowski

24 One of Its Attorneys

25 Barry S. Rosen (admitted *pro hac vice*)

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on August 22, 2011, the foregoing was electronically filed with the
3 Clerk of the Court using the CM/ECF system which will send notification of such filing to all
4 counsel of record who receive CM/ECF notification, and that the remaining parties shall be
5 served in accordance with the Federal Rules of Civil Procedure.

6
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