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.	No. 2:11-cv-00459-MJP **DEFENDANTS' JOINT OPPOSITION TO FDIC'S MOTION FOR PROTECTIVE ORDER** NOTE ON MOTION CALENDAR: August 26, 2011 **ORAL ARGUMENT REQUESTED**

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The FDIC's Motion for Protective Order seeks to bootstrap a doubtful legal argument—that it ***may someday*** succeed in dismissing certain affirmative defenses the Defendants ***may someday*** assert—to excuse its current refusal to produce documents relevant to elements of the claims asserted by the FDIC, including the standard of care for negligence, the Defendants' good faith in rendering their business judgments, causation as to the losses the FDIC alleges, and the amount of actual damages. Defendants are entitled to discover evidence, for example, that may show that the decisions the FDIC in ***hindsight*** alleges lacked ordinary care were known to, reviewed by, commented on, and deemed by regulators including the FDIC ***at the time*** to be consistent with a prudently-managed and sound Bank. The FDIC's sole argument in support of its Motion for Protective Order is that it is supposedly shielded from discovery because of the purported "no duty" rule, *i.e.*, that wrongdoing by bank regulators provides no affirmative defense because regulators owe no duty to the officers of banks they regulate. Remarkably, the FDIC relegates to a footnote that the viability of the "no duty" doctrine is in doubt since the Supreme Court's decision in *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994). Nowhere does the FDIC inform this Court that the only reported district court case in the Ninth Circuit to review the issue concluded the "no duty" rule did not survive *O'Melveny*. But regardless of the ongoing viability of the "no duty" rule, the Court should deny the FDIC's Motion for Protective Order. At most, the so-called "no duty" rule precludes Defendants from raising one kind of affirmative defense; it does not provide the FDIC with blanket immunity from ordinary civil discovery related to the elements of its claims and the defenses thereto.

Further, the posture in which the FDIC's motion comes before this Court is symptomatic of the FDIC's apparent belief that it does not have to follow the rules. Despite this Court requesting, and all parties agreeing, to manage discovery disputes according to Local Rule 37's expedited procedures, the FDIC has ignored the Rule's requirements and filed a preemptive Motion for Protective Order. More broadly, the FDIC appears to believe that it can file a multi-billion dollar lawsuit against the Defendants and exempt itself from Federal Rules of Civil Procedure 26 and 34, which require it to produce non-privileged documents in its

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possession, custody, or control that are relevant to any claim or defense in this case. According to the FDIC, regulator documents discussing Defendants or WaMu are divested of relevancy if they are not found in WaMu's own files. Where regulator documents happened into the WaMu files, and happen to be among the files later seized from the Bank, and happen to be among the files the FDIC subsequently designated as germane to its own purposes in the course of its investigation, the FDIC will produce the documents. Otherwise, it says, it will not. This Court should deny the FDIC's attempt to evade the rules.

I. BACKGROUND.

On April 29, 2011, Defendants Kerry and Linda Killinger propounded 43 document requests to the FDIC (the "Requests"). The FDIC requested three extensions of their obligation to respond, which Defendants granted because of pending mediation discussions. On July 11, 2011, the FDIC finally served its responses. *See* Ex. A to Decl. of Beth A. Stewart ("Responses"). The Responses stated that the FDIC would produce documents for only 11 of the Killingers' 43 Requests. Among the more pertinent Requests for which the FDIC refused to produce documents were Requests for the FDIC's communications with other regulators about the Bank they now allege to have been negligently managed (Requests 2-6), the FDIC's internal communications about the Bank (Requests 12-19), and even the FDIC's communications ***with*** the Bank (Requests 7-10).

Notably, the FDIC's Responses also stated that it would not produce ***any*** documents from "FDIC Corporate" because it was the "FDIC as Receiver" suing the defendants, and not "FDIC Corporate." Ex. A at 1. To obtain "FDIC Corporate" documents, the FDIC said, Defendants should submit a FOIA request and pay millions in fees for review and copying. *See* Ex. A at 2. The FDIC also refused to produce the FDIC's own documents because, it said, its internal regulations prevented it from providing the documents to the Defendants. *See id.*

On July 25, 2011, counsel for the Killingers wrote the FDIC a letter expressing serious concerns with the FDIC's unfounded positions and explaining, among other things, that the FDIC was obliged to produce FDIC Corporate documents because they were indisputably in

the FDIC's possession, custody, or control. *See* Ex. B (July 25, 2011 Ltr.). On August 2, 2011, the parties met and conferred by phone. Counsel for Stephen Rotella and David Schneider joined in the meet-and-confer, and join in this Opposition, because they had propounded requests that incorporated the Killingers' Requests. On the August 2 call, the FDIC stood on its objections, but requested additional time to respond in writing to the Killingers' July 25 letter.

On August 8, 2011, the FDIC submitted a letter withdrawing its position that Defendants had to obtain FDIC Corporate documents via FOIA, and also withdrawing its claim that its own regulations shielded its documents from production. *See* Ex. C (Aug. 8, 2011 Ltr.) at 1-2. However, the parties' August 9 meet and confer revealed these reversals of position to be illusory. In that call, the FDIC took the position, notwithstanding its concession that the FDIC Corporate documents were in its possession, custody or control, that it would not search for any of them because such documents would be irrelevant and too burdensome to log where privileged. The FDIC further raised the strawman argument, as it had in its August 8 letter, that the "no duty" rule prevented Defendants from raising regulator knowledge and conduct as an affirmative defense. According to the FDIC, the "no duty" rule somehow renders only FDIC or OTS documents that can be located in the seized WaMu files producible, and thus the only documents the FDIC intended to produce were the subset of the seized files that it had designated germane for its purposes and loaded into a database during its investigation.

The Defendants explained at great pains that the FDIC was mischaracterizing the purpose for which they sought the documents, and that it was not the present intention of the Defendants to assert regulatory failures as an affirmative defense, but rather to defend themselves ***on the elements of the claims the FDIC had asserted***. Defendants urged, for example, that the FDIC surely cannot sue Defendants today alleging they acted without ordinary care, and deny the Defendants documents in which the FDIC commented at the time on the care they were taking.

On August 10, 2011, counsel for the Killingers wrote the FDIC a further letter seeking to confirm the FDIC's position, and requesting that the FDIC notify counsel for the Killingers by noon on Friday, August 13, 2011 if the FDIC's positions were misstated in any way. *See* Ex. D

(Aug. 10, 2011 Ltr.) at 5. Counsel for the FDIC responded that he needed until Monday the 15th to respond because of alleged commitments in other cases, and counsel for the Killingers agreed. *See* Ex. E (Aug. 10, 2011 Email). On Monday, August 15, 2011, the FDIC sent the Killingers its responsive letter, *see* Ex. F (Aug. 15, 2011 Ltr.) and filed this motion three minutes later. Other than the three-minute gap between its letter and filing the motion, the FDIC never informed the Defendants it had decided to file a Motion for Protective Order, and at no time has the FDIC informed Defendants why it elected not to follow the Local Rule 37 expedited procedures that this Court requested and all parties agreed would govern discovery disputes. *See* Ex. G (Tr. of July 6, 2011 Status Conf. with Hon. Judge Pechman) at 18-19 (following Hon. Judge Pechman's inquiry if the parties objected to using Local Rule 37 to resolve disputes, "MR. ROSEN: Yeah, no objection, Judge.").

II. ARGUMENT.

A. The Disputed Requests Seek Relevant Documents.

1. The FDIC Seeks to Immunize Itself From Its Discovery Obligations.

Because the FDIC has not specified the Requests for which it is seeking a Protective Order, as it would have had it followed Local Rule 37 ("Each disputed discovery request and the opposing party's objection/response thereto shall be set forth in the submission"), Defendants assume based on prior correspondence that the operative Requests for which the FDIC seeks relief are as below:

- ***Documents Relating to Communications between the FDIC and Other Government Agencies About WaMu (Requests 2-6).*** These Requests seek documents relating to communications between the FDIC and other regulators and government entities about WaMu, including documents relating to communications between the FDIC and the OTS (Request No. 2); the Treasury Department (Request No. 3); the OCC (Request No. 4); the Federal Reserve (Request No. 5); and other government agencies (Request No. 6).

- ***Documents relating to the dialogue between WaMu and the FDIC/OTS as regulators (Requests 7-10).*** These Requests seek documents relating to communications between the FDIC or the OTS, on the other hand, and WaMu and its agents, on the other hand. Specifically, the Requests seek documents relating to FDIC or OTS communications with the Board, officers or managers of

WaMu (Request No. 7); with any employee about WaMu's Enterprise Risk Issue Control System ("ERICS") (Request No. 8); with Chase (Request No. 9); or with WaMu's auditors (Request No. 10).

- ***Documents relating to the results of the FDIC and OTS's contemporaneous audits or examinations of WaMu (Requests 12-19).*** These Requests seek documents relating to contemporaneous audits or examinations by the FDIC or the OTS regarding WaMu functions addressed in or otherwise relevant to the allegations of the Complaint, including: WaMu's risk management function (Request No. 12); WaMu's residential home loans underwriting (Request No. 13); WaMu's accounting for loan loss reserves (Request No. 14); WaMu's liquidity (Request No. 15); WaMu's capitalization (Request No. 16); WaMu's internal controls (Request No. 17); the issuance of CAMEL ratings for the Bank's soundness (Request No. 18); and work papers of the OIG of the OTS regarding WaMu (Request No. 19).

- ***Documents relating to the assessment of WaMu's soundness prior to its seizure and the seizure and sale more broadly.*** These Requests seek documents relating to the FDIC's assessment of the Bank's viability prior to the seizure (Request No. 26); documents relating to the decision to seize and sell the Bank in September 2008 (Request No. 23); and documents relating to decisions to seize and/or sell other institutions (Requests No. 24 and 25).

Either because it hopes to shield its documents from coming to light, or because it simply hopes to entirely avoid the substantial work inherent in the production of documents in a complex case, the FDIC has specifically told the Defendants that the ***only*** documents it will produce in response to the disputed Requests are a subset of the documents that were seized from WaMu—specifically, the subset of documents the FDIC deemed worthy of loading onto a data management platform review. In other words, the FDIC made up its mind before it filed this case what documents it thought were relevant to ***its theory of the case***, and it will give those to the Defendants, but it has no plans to conduct additional searches among either the WaMu documents it now controls, or its own Corporate servers, or OTS documents to which the FDIC has a statutory right under 12 U.S.C. § 1821(o), to identify documents relevant to the ***Defendants' theory*** of this action. Whatever Requests the Defendants propound, it seems, the FDIC's anticipated production will not change.

2. The Disputed Requests Seek Documents Relevant to the Claims and Defenses in this Case.

Under Fed. R. Civ. P. 26(b)(1), "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." As this Court has explained, "[r]elevance has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *City of Seattle v. Prof'l Basketball Club, LLC*, 2008 WL 539809, at *2 (W.D. Wash. Feb. 25, 2008) (Pechman, J.). "In the American legal system, discovery requests receive liberal treatment from the courts." *FDIC v. Wise*, 139 F.R.D. 168, 170 (D. Colo. 1991). The scope of discovery is broad because "[t]he parties to a federal civil suit should consistent with recognized privileges obtain the fullest possible knowledge of the issues and facts before trial." *FDIC v. Cherry, Bekaert & Holland*, 131 F.R.D. 202, 204 (M.D. Fla. 1990) (internal alteration, citation and quotations omitted) (requiring the FDIC to produce documents that may reveal admissible evidence on the issue of damages, causation, mitigation, and comparative negligence).

In this action, the FDIC challenges the business judgments of three managers of WaMu. According to the FDIC, in fulfilling their duties, the Defendants failed to act with even the most basic ordinary care. The FDIC alleges their failure to act with ordinary care is the proximate cause of subsequent losses to the Bank in the billions of dollars. Of course, the FDIC and the OTS had offices in the WaMu building at the time these allegedly negligent decisions were made. The FDIC and the OTS had access to WaMu's employees and documents—including the very strategy documents now challenged in the Complaint. And both the FDIC and the OTS made contemporaneous assessments about the decisions that the FDIC now challenges. Defendants' position is that the FDIC cannot sue them today for conduct about which it had knowledge at the time and commented on, and yet shield from discovery the documents relating to its own contemporaneous comment that might show the FDIC's hindsight bias.

After all, the FDIC itself has "put the requested information at issue by making it relevant to the case." *Wise*, 139 F.R.D. at 172 (granting motion to compel). The FDIC alleges that

Defendants were negligent by, among other things, failing to follow *FDIC guidance* on Option ARMS, HELOCs, and subprime mortgage products. (Compl. ¶¶ 107-118). In so doing, the FDIC put at issue and made relevant the guidance itself, the FDIC's actions in communicating that guidance to WaMu and to each other, and the FDIC's internal beliefs of whether WaMu was following the guidance. *See Wise*, 139 F.R.D. at 172 (finding that the FDIC waived its privileges by "inject[ing] into this controversy the actions, knowledge, and beliefs of the regulators, forcing these issues to the very forefront of the litigation"). Similarly, the good faith of Defendants in rendering their business judgments is at the core of relevant issues in this case.

Moreover, the FDIC's assessments of WaMu and its conduct in seizing and selling WaMu are relevant to issues of causation and damages. The FDIC's claim is that Defendants' failure to exercise ordinary care is a proximate cause of the losses to the Bank, in an amount the FDIC will undoubtedly seek to establish through expert and other testimony and evidence. Defendants dispute that the FDIC can establish they proximately caused the loss, and are entitled to discovery to establish, for example, that the premature seizure of the bank caused the loss, or that external market factors discussed by the regulators caused the loss. *See In re Sunrise Sec. Litig.*, 138 F.R.D. 60, 62 (E.D. Pa. 1991) (ordering documents produced where "[t]he defendants may contend that any one of a number of causal factors were the proximate cause of the losses, including the conduct of the FDIC"). Defendants are also entitled to documents—including internal FDIC or OTS documents—that would be relevant to the amount of the actual damages.

In addition to being relevant to the Defendants' defense of ***elements of the claims alleged by the FDIC***, the documents are relevant for other purposes. Many of the disputed Requests seek the FDIC's internal communications about WaMu, for example. Comments by the FDIC about WaMu or its managers are classic statements by a party-opponent and/or potential impeachment material. The FDIC will presumably introduce witnesses who will say that the Defendants failed to act with ordinary care. What could be more relevant than statements by FDIC employees on-site at the time about the Defendants and the institution they allegedly negligently managed?

The sole argument offered by the FDIC as to why these documents are ***not*** relevant is that Defendants may not interpose the wrongdoing of the regulators for their own under the common law "no duty" doctrine. On numerous occasions, Defendants have explained to the FDIC that they do not seek these documents in connection with an effort to interpose the regulators' wrongdoing for their own. After all, Defendants deny wrongdoing of any kind. Defendants are therefore candidly mystified as to how the FDIC justifies to itself its persistence in pretending the "no duty" straw man applies here. For example, in a letter from counsel to the Killingers to the FDIC on August 10, counsel stated:

> ***As we have repeatedly emphasized, we are seeking these documents not to show that the regulators failed in their duty***, but rather to show that the defendants acted consistent with their own duty of reasonable care and in good faith, a duty which they fulfilled through an open and transparent dialogue with the regulators. In other words, the documents are relevant to elements of the claims *the FDIC is asserting*, including the standard of care for negligence, but also including causation as to the losses the FDIC alleges and the amount of actual damages.

See Ex. E at 2-3 (emphasis added). Because the documents sought are plainly relevant to numerous purposes that are completely independent from an affirmative defense Defendants have not asserted (and may never assert), the FDIC has no basis to deny them.

B. The FDIC Has Failed To Establish "Good Cause" For a Protective Order.

"In general, the party seeking a protective order for discovery materials must demonstrate that 'good cause' exists for the protection of that evidence." *Rivera v. NIBCO, Inc.*, 384 F.3d 822, 827 (9th Cir. 2004). "Good cause is established where it is specifically demonstrated that disclosure will cause a specific prejudice or harm. Courts have held that the showing of 'good cause' under Rule 26 is a heavy burden. Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test." *Id.* (quotations omitted). As this Court has explained, "[a] claim that answering discovery will require the objecting party to expend considerable time and effort to obtain the requested information is an insufficient factual basis for sustaining an objection." *City of Seattle*, 2008 WL 539809, at *3 (Pechman, J.)

(citations omitted). Instead, the moving party "has the burden to provide sufficient detail in terms of time, money and procedure required to produce the requested documents." *Id.*

The entire basis of the FDIC's Motion is that producing the documents would present an undue burden on the FDIC because the "no duty" doctrine allegedly provides the FDIC an immunity from discovery of any documents relating to regulator conduct. Indeed, although it has never provided any specifics of the scope of the burden, the FDIC has conceded that ***"[t]his burden might be justified if the documents were likely to be relevant to a claim or defense in this case.***" Mot. at 12 (emphasis added). But the FDIC's reliance on the "no duty" doctrine cannot satisfy its burden to show "good cause" for a protective order. ***First*****,** the "no duty" doctrine is of questionable continuing viability. The only reported decision in the Ninth Circuit to consider the issue concluded it no longer applies in actions such as this one. ***Second***, even if the "no duty" rule did apply, it would only impact the ability of Defendants to raise affirmative defenses later; it is not a doctrine of discovery, and the FDIC has not cited a single case that precludes a party from obtaining discovery on the basis of the "no duty" rule.

1. The "No Duty" Doctrine Has Questionable Continuing Viability.

The "no duty" rule on which the FDIC relies is a federal common law doctrine that asserts than an officer of a Bank may not interpose the wrongdoing of the regulator for his own wrongdoing. The "no duty" rule has, however, been undermined by the Supreme Court's decision in *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 86 (1994). In *O'Melveny*, the Supreme Court considered whether federal common law or state law governed claims brought by the FDIC against a Bank's law firm. In the first part of its analysis, the Court assumed that the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") governed, and rejected the FDIC's argument that FIRREA can be supplemented or modified by federal common law. *Id.* at 87. In the second part of its analysis, the Court assumed that FIRREA did not apply, and concluded state law nonetheless governed absent a "significant conflict between some federal policy or interest and the use of state law." *Id.* (quotations omitted). Since the "no

duty" rule is a creature of federal common law, many courts (though not all courts) have held since *O'Melveny* that the doctrine no longer applies.

The FDIC has brought this action pursuant to FIRREA. *See* Compl. ¶¶ 13, 183. Thus, the FDIC's cursory handling of the *O'Melveny* decision in a five-line footnote is—***to say the least***—disingenuous. As the FDIC must surely be aware having been a party to the cases, courts have described the "no duty" rule—*not* as "well settled" as the FDIC claims (Mot. at 2)—but as, *inter alia*, "clouded with doubt," *RTC v. Baker*, No. Civ. A. 93-0093, 1994 WL 637359, at *3 (E.D. Pa. Nov. 14, 1994) (finding *O'Melveny* abrogated the "no duty" rule); "inappropriate," *RTC v. Liebert*, 871 F. Supp. 370, 373 (C.D. Cal. 1994) (same); "a mistaken premise," *FDIC v. Gladstone*, 44 F. Supp. 2d 81, 87 (D. Mass. 1999) (same); "undermined," *FDIC v. Ornstein*, 73 F. Supp. 2d 277, 282 (E.D.N.Y. 1999) (same); and "effectively ended," *RTC v. Mass. Mut. Life Ins. Co.*, 93 F. Supp. 2d 300, 306 (W.D.N.Y. 2000) (same).

The bulk of the cases cited by the FDIC in support of the "no duty" doctrine generally bear one of three flaws: either they pre-date *O'Melveny*, or have been criticized by courts in their own district, or are wrongly described by the FDIC. Most of the cases in the FDIC's Motion suffer from the first flaw—they pre-date *O'Melveny*. (*See* Mot. at 6 n.4 (citing *FSLIC v. Roy*, No. JFM-87-1227, 1988 WL 96570 (D. Md. June 28, 1988); *FDIC v. Burdette*, 718 F. Supp. 649 (E.D. Tenn. 1989); *FDIC v. Isham*, 782 F. Supp. 524 (D. Colo. 1992); *RTC v. Youngblood*, 807 F. Supp. 765 (N.D. Ga. 1992); *FDIC v. Bierman*, 2 F.3d 1424 (7th Cir. 1993); and *FDIC v. Mijalis*, 15 F.3d 1314 (5th Cir. 1994)).

The FDIC also relies heavily on *FDIC v. Raffa*, 935 F. Supp. 119 (D. Conn. 1995), the only post-*O'Melveny* case it cites in main text, but fails to disclose that *Raffa* has since been criticized by two decisions in its same Circuit—***including one decision by the judge who decided Raffa in the first instance***. Effectively reversing its own prior ruling in *Raffa*, the court in *FDIC v. Haines*, 3 F. Supp. 2d 155, 159 (D. Conn. 1997), concluded that *Raffa* had improperly looked to only the second prong of *O'Melveny*. *Id*. at 162. The court then found two more reasons to reject *Raffa*: "First, the Supreme Court specifically rejected the argument that there

was a public policy to enrich the insurance fund." *Id*. at 164 (citing *O'Melveny*, 512 U.S. at 86-87). "Second, to the extent the decision focuses on the alleged wrongdoing of the defendants, its analysis is predicated on the assumption that the defendants are guilty of wrongdoing. The question of the defendants 'wrongdoing' is, of course, a final conclusion properly determined by the jury at trial." *Id.* The court in *Mass. Mutual* subsequently likewise criticized *Raffa* and deemed the "no duty" rule "effectively ended." 93 F. Supp. 2d at 306-07.

The FDIC also cites *FDIC v. Oldenburg*, 38 F.3d 1119 (10th Cir. 1994), which it claims "explicitly rejected" the argument that *O'Melveny* displaced the "no duty" rule. (Mot. at 6 n. 4). But ***Oldenburg does not mention O'Melveny***, much less explicitly reject its relevance to the "no duty" rule. Even more remarkably, the FDIC fails to inform the Court that the only reported decision in the Ninth Circuit to address the "no duty" rule post-*O'Melveny* found that it ***did not survive*** that decision:

> The "no duty" rule is clearly a federal common law rule which has been engrafted by federal courts onto the statutory scheme of FIRREA, and the supplementation or modification of this statutory scheme by federal common law in this manner is inappropriate. The court concludes that, for purposes of FIRREA, the federal "no duty" rule does not survive the Supreme Court's *O'Melveny* decision, and does not apply to post-FIRREA suits.

Liebert, 871 F. Supp. at 373 (citation and quotations omitted). The FDIC's footnote dismissively states that "it has been ***argued*** that [*O'Melveny*] displaced the no-duty rule," Mot. at 6 n.4 (emphasis added), but *Liebert* is just one of the many cases that have so ***held***.

2. Even if It Were Applicable, the "No Duty" Rule Does Not Immunize the FDIC From Its Discovery Obligations.

Even in its strongest application, the "no duty" doctrine is not an immunity from producing documents, nor does it mean there is "no duty" to comply with the Federal Rules of Civil Procedure. Where applicable, it simply precludes defendants from raising one kind of affirmative defense; it does not limit their ability to obtain documents for *all* their defenses. Unsurprisingly, not one of the FDIC's cited cases addressing the so-called "no duty" rule arises in the context of a motion for a protective order or discovery motion.

In fact, in cases where discovery was at issue, the FDIC's argument has been rejected. In *FDIC v. Schoenberger*, the FDIC moved for a protective order to preclude the discovery of information regarding its post-closing activities based on its assertion that it had no duty to the defendants. No. 89-2756, 1990 WL 52863, at *1-2 (E.D. La. Apr. 24, 1990), *aff'd sub nom.*, No. 89-2756, 1990 WL 130641 (E.D. La. Aug. 30, 1990). Specifically, the FDIC argued that "public policy and established precedent preclude the discovery of such information by defendants for use in proving their affirmative defenses, such as contributory negligence of FSLIC and its failure to mitigate damages." *Id.* at *2-3. The defendants countered, first, that they were entitled to know how the institution was managed during the receivership "in order to gain insight into whether [defendants] actually caused the losses in dispute;" second, that the information is relevant to the calculation of damages; and third, "that a federal agency may no longer rely on public policy arguments to avoid discovery once the agency has decided to pursue litigation." *Id.* The court agreed with the defendants, rejecting the FDIC's arguments across-the-board, specifically rejecting the weight of the FDIC's proposed public policy argument. *Id*. The FDIC's arguments here must similarly fail.

The FDIC's outdated cases cannot be stretched to hold that the FDIC may preclude the Defendants from obtaining discovery. At most, the import of the FDIC's cases may have some relevance to issues that will be before this Court closer to August ***2013***, when the parties are approaching trial. This is August ***2011***. Defendants simply seek discovery so that they can develop their defenses. The FDIC has no proper basis to deny it.

III. CONCLUSION

Because the FDIC has failed to show good cause why a Protective Order should be granted, Defendants respectfully request that this Court deny the FDIC's motion.

Dated: August 24, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2011, I electronically filed the foregoing Defendants' Joint Opposition to FDIC's Motion for Protective Order, the Declaration in Support thereof, and the Exhibits thereto, with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all participants in this case who are registered CM/ECF users. I further certify that all participants to this case are registered with the CM/ECF system, and therefore no participant need be served by conventional methods.

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