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The Honorable Marsha J. Pechman

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.	)

Case No. 2:11-cv-00459 MJP  
  
ESTHER T. ROTELLA AND STEPHEN ROTELLA'S OPPOSITION TO FDIC'S MOTION TO COMPEL JURISDICTIONAL DISCOVERY AND FOR EXTENSION OF TIME TO RESPOND TO ESTHER ROTELLA'S MOTION TO DISMISS  
  
NOTE ON MOTION CALENDAR:  
September 9, 2011

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1 **INTRODUCTION**

2 “It is not acceptable for a plaintiff to hale a party into court, then ask leave to conduct  
3 discovery to establish that he had a right to do so.” *Swartz v. KPMG LLC*, 401 F. Supp. 2d 1146,  
4 1157 (W.D. Wash. 2004) (Pechman, J.), *rev’d on other grounds*, 476 F.3d 756 (9th Cir. 2007).

5 On August 22, in lieu of filing an opposition to Esther Rotella’s July 1 motion to dismiss, the  
6 FDIC filed a motion to compel “jurisdictional” discovery and for an extension of time to oppose  
7 the motion to dismiss. By failing to file an opposition, the FDIC has admitted pursuant to Local  
8 Rule 7(b)(2) that Mrs. Rotella’s motion has merit. *See* Local Rule 7(b)(2) (“If a party fails to file  
9 papers in opposition to a motion, such failure may be considered by the court as an admission  
10 that the motion has merit.”). The FDIC offers no explanation for its failure to plead facts  
11 supporting the exercise of long-arm jurisdiction. Nor does the FDIC explain why it did not file  
12 an opposition to Section II of Mrs. Rotella’s motion, titled “The FDIC Fails to State a Claim  
13 Against Mrs. Rotella.” Absent a well-pled claim, there can be no long-arm jurisdiction. The  
14 Court should reject the FDIC’s effort to obtain discovery in hopes of curing this defect.

15 ***First***, the FDIC fails to show good cause for an extension of time to respond to Mrs.  
16 Rotella’s pending motion to dismiss. In fact, the FDIC’s motion does not substantively address  
17 the extension request at all.

18 ***Second***, despite years of pre-complaint discovery and over seven weeks to prepare its  
19 opposition, the FDIC cannot identify any factual basis for asserting specific jurisdiction over  
20 Mrs. Rotella. Jurisdictional discovery is not a device for curing a plaintiff’s pleading failure but  
21 rather aids the Court when the jurisdictional facts ***pled*** are in dispute. *See, e.g., Jarvis v. Regan*,  
22 833 F.2d 149, 155 (9th Cir. 1987) (finding discovery improper where complaint’s allegations  
23 were deficient as a matter of law); *Robinson v. DaimlerChrysler AG*, No. 07-3258 SC, 2008 WL  
24 728877, at \*6 (N.D. Cal. Mar. 17, 2008) (refusing to allow discovery where plaintiff’s failure to  
25 establish jurisdiction was based on the failure to allege the necessary facts). Having conceded  
26 the absence of such facts, the FDIC is not entitled to jurisdictional discovery.

1 *Third*, the FDIC makes much of the difference between a “*prima facie*” and “colorable”  
2 showing of personal jurisdiction but fails to meet either standard, assuming a distinction exists.  
3 The FDIC’s supposed new-found “evidence” provides no support for the FDIC’s March 2011  
4 conclusory allegation that this Court has long-arm jurisdiction. At most it would show that Mrs.  
5 Rotella held title to real property or was registered to vote in Washington, which does not bear  
6 upon whether Mrs. Rotella committed a tortious act in the state, RCW 4.28.185(1)(b),  
7 particularly when the FDIC failed to plead the requisite tortious act and has not timely opposed  
8 Mrs. Rotella’s motion to dismiss for failure to state a claim.

9 *Finally*, the FDIC’s concession that it needs discovery to oppose Mrs. Rotella’s motion  
10 to dismiss raises serious questions as to whether the FDIC had an adequate factual basis for the  
11 Complaint’s conclusory allegations. The fraudulent transfer allegations are “indispensible to [the  
12 FDIC’s] ability to show personal jurisdiction over [Mrs. Rotella] and to support [its] substantive  
13 claims.” *In re Wash. Mut., Inc. Sec., Derivative & ERISA Litig.*, No. 08-1919-MJP, 2010 WL  
14 2803033, at \*4 (W.D. Wash. July 15, 2010) (Pechman, J.). The FDIC’s request to compel  
15 discovery on the alleged transfers thus “highlights the defects” in the FDIC’s claim. *Id.* Given  
16 that the FDIC issued (and received responsive information to) pre-complaint subpoenas, (*see*  
17 FDIC Mot., Dkt. No. 65, at 4:8-9), the FDIC has no excuse for the absence of sufficient factual  
18 allegations in the Complaint.

19 Accordingly, the Court should deny the FDIC’s motion and dismiss its complaint against  
20 Mrs. Rotella.

21 **BACKGROUND**

22 Pursuant to a stipulation ordered by the Court, the FDIC’s deadline for opposing Mrs.  
23 Rotella’s Motion to Dismiss was August 22—*seven-and-a-half weeks* after Mrs. Rotella filed  
24 her five-page motion. At no time during those seven-and-a-half weeks did the FDIC move the  
25 Court for an extension to respond or seek leave to conduct jurisdictional discovery. Instead, the  
26 FDIC waited until 4:55 p.m. on the day its opposition was due to file a motion seeking an  
27

1 extension and moving to compel jurisdictional discovery that the FDIC had not obtained  
2 permission to propound.

3 \* \* \*

4 On March 16, 2011, the FDIC filed its Complaint naming Mrs. Rotella as a defendant.  
5 Noticeably absent from the FDIC's Complaint were any *facts* that would support a claim of  
6 personal jurisdiction over Mrs. Rotella. The FDIC's Complaint makes just one conclusory  
7 statement regarding this Court's jurisdiction over Mrs. Rotella: "[t]his Court has personal  
8 jurisdiction over . . . each of the defendants named in this action pursuant to Revised Code of  
9 Washington § 4.28.185(1)(a), (b) and/or (c)." (Compl. ¶ 20.) Apart from this statement, the  
10 FDIC failed to allege any facts that could possibly form a basis for the Court's exercise of  
11 personal jurisdiction over Mrs. Rotella. (*See, e.g.*, Compl. ¶¶ 18, 203–215.) The FDIC's motion  
12 makes clear that the FDIC has no answer for its failure to plead a single jurisdictional fact  
13 supporting its conclusory allegation that the long-arm statute applies vis-à-vis Mrs. Rotella. It  
14 also makes clear that the FDIC cannot attempt to cure its failure unless the Court grants it the  
15 ability to conduct discovery into the factual basis for its conclusory allegation.

16 On July 1, 2011, Mrs. Rotella moved to dismiss the Complaint based on the FDIC's  
17 failure to allege even a single fact sufficient to make a *prima facie* showing of personal  
18 jurisdiction. (*See* Dkt. No. 54.) Mrs. Rotella also joined in her co-Defendants' motions to  
19 dismiss for failure to state a claim, and included a short section in her motion entitled "The FDIC  
20 Fails to State a Claim Against Mrs. Rotella." (*Id.* at 5.) On July 15, 2011, *two weeks* after Mrs.  
21 Rotella filed her Motion to Dismiss, the FDIC propounded "jurisdictional" discovery, seeking  
22 information to support its position that Mrs. Rotella engaged in tortious conduct in  
23 Washington—even though, months before the FDIC filed its Complaint, counsel for the Rotellas  
24 provided the FDIC with "specific information about these monetary transfers in response to an  
25 FDIC asset subpoena." (FDIC's Opp'n to MTD, Dkt. No. 64, at 29; *see also* FDIC Mot. 4:8-9.)

26 On August 15, 2011, the Rotellas served their discovery objections with supporting case  
27 law. The Rotellas' principal objection was that the FDIC was not entitled to jurisdictional

1 discovery when it had not pled a single fact supporting the exercise of long-arm jurisdiction over  
2 Mrs. Rotella. And, although the FDIC characterized its discovery as “jurisdictional,” many of  
3 the requests far exceeded the topic of jurisdiction. (*See* Pietrkowski Cert., Dkt. No. 66, Ex. F  
4 Nos. 1, 3, 5, 7, and 9 & Ex. G Nos. 1, 3, 5–6, and 8.)

5 *After* receiving the objections, the FDIC apparently decided to search for a “colorable  
6 basis” for its jurisdictional allegation. (Pietrkowski Cert. at ¶ 5.) On August 17 and 18, 2011,  
7 and just a few days before its response to the Motion to Dismiss was due, the FDIC obtained a  
8 copy of two warranty deeds and a voter registration record. (*Id.*, Exs. A–B, E; *see also id.*, Ex. C  
9 (Lexis Nexis background report obtained July 26, 2011) & Ex. D (Westlaw real estate  
10 transaction record obtained July 21, 2011.) The voter registration record, as the FDIC discloses  
11 in a 10-point footnote, is erroneous on its face as it lists Mrs. Rotella’s birthday as --/--/1982—  
12 thirty years *after* she was born—which, in any event, reflects no in-person voting. (The FDIC  
13 also violated Federal Rules of Civil Procedure 5.2(a)(1) and (2) and Local Rules 5.2(a)(1) and  
14 (3) by publicly filing documents with Mrs. Rotella’s (as well as Mr. Rotella’s and their  
15 children’s) birth dates and portions of their social security numbers.) Moreover, none of the  
16 documents the FDIC has belatedly obtained has any bearing on whether Mrs. Rotella committed  
17 a tort—which the FDIC fails to adequately plead—much less whether such conduct took place in  
18 Washington.

## 19 ARGUMENT

### 20 **I. THE FDIC IS NOT ENTITLED TO AN EXTENSION OF TIME TO RESPOND** 21 **TO MRS. ROTELLA’S MOTION TO DISMISS**

22 By allowing the deadline to pass without filing a response, the FDIC concedes the merits  
23 of Mrs. Rotella’s motion to dismiss. *See* Local Rule 7(b)(2) (“If a party fails to file papers in  
24 opposition to a motion, such failure may be considered by the court as an admission that the  
25 motion has merit.”). Yet, beyond the title of the motion and request for relief, the FDIC fails to  
26 address, much less demonstrate, good cause for a further extension of time to respond to Mrs.  
27 Rotella’s motion. Fed. R. Civ. P. 6(b)(1). Despite pre-complaint discovery and over seven



1 weeks to prepare its opposition, (*see* Dkt. 50), the FDIC neither identified a basis for specific  
2 jurisdiction nor sought a timely extension.

3 Under Federal Rule of Civil Procedure 6(b)(1), the court may, *for good cause*, extend a  
4 deadline. *See In re Veritas Software Corp. Sec. Litig.*, 496 F.3d 962, 974 (9th Cir. 2007). No  
5 good cause exists here. Where the party seeking an extension is doing so because of lack of  
6 diligence, there is no good cause for granting an extension. *See Johnson v. Mammoth*  
7 *Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). “If the party seeking the modification [of  
8 the scheduling order] ‘was not diligent, the inquiry should end’ and the motion to modify should  
9 not be granted.” *Irving v. County of Sacramento*, 231 F. App’x. 584, 585 (9th Cir. 2007)  
10 (quoting *Johnson*, 975 F.2d at 609). Waiting until its briefing deadline to file a motion to extend  
11 time demonstrates a lack of diligence and, thus, an absence of good cause. *See id.* at 585–86  
12 (affirming district court order denying good cause for modification of scheduling order when  
13 plaintiffs filed motion for extension of time on same day their opposition to summary judgment  
14 was due). *See also Marks v. City of Seattle*, No. C03-1701P, 2003 WL 23024522, at \*1 (W.D.  
15 Wash. Oct. 16, 2003) (Pechman, J.) (denying request for extension of time when plaintiff’s  
16 request was filed after the response was due, and noting “a failure to file any opposition to a  
17 motion may be considered by the court as an admission that the motion has merit”).

18 In the present case, the FDIC made the calculated decision that “it’s better to beg for  
19 forgiveness than to ask for permission.” The FDIC has not articulated good cause for an  
20 extension or its unilateral decision not to comply with the Scheduling Order’s deadline—  
21 especially with respect to Mrs. Rotella’s non-jurisdictional arguments for dismissal. Its request  
22 for an extension should be denied, and the Complaint should be dismissed.

## 23 **II. THE FDIC IS NOT ENTITLED TO JURISDICTIONAL DISCOVERY**

### 24 **A. The FDIC Cannot Use Discovery As a Substitute for Its Inadequate Pleading**

25 The FDIC attempts to use jurisdictional discovery as an end-run around its pleading  
26 obligations. Rather than seek discovery to locate facts that support sufficiently pled allegations,  
27 the FDIC demands further discovery in an effort to give it *some* basis for the conclusory

1 allegations in the complaint. “As a rule, a plaintiff is not entitled to jurisdictional discovery to  
2 enable her to bolster an inadequate pleading if the defendant merely challenges the legal  
3 sufficiency of the jurisdictional allegations in the complaint, and does not place the factual basis  
4 for personal jurisdiction in issue.” *In re Teligent, Inc.*, Nos. 01-12974 SMB, 03-3577, 2004 WL  
5 724945, at \*6 (Bankr. S.D.N.Y. Mar. 30, 2004) (denying jurisdictional discovery until the  
6 plaintiff pleads “legally sufficient, *non-conclusory* allegations” (emphasis added)). Courts  
7 routinely deny requests for jurisdictional discovery where the only question is whether the  
8 plaintiff sufficiently pled its jurisdictional allegations. *See, e.g., Swartz*, 401 F. Supp. 2d at 1157  
9 (“It is not acceptable for a plaintiff to hale a party into court, then ask leave to conduct discovery  
10 to establish that he had a right to do so.”); *Robinson*, 2008 WL 728877, at \*6 (refusing to allow  
11 discovery where plaintiff’s failure to establish jurisdiction was not based on a failure to prove the  
12 facts alleged, but the failure to even allege the necessary facts).

13 Discovery is particularly inappropriate here where the FDIC: (i) does not (and cannot)  
14 contest that its jurisdictional pleading is inadequate; and (ii) failed to plead with particularity a  
15 fraudulent transfer by Mrs. Rotella. *See Jarvis*, 833 F.2d at 155 (affirming district court order  
16 denying discovery where “the appellants’ *complaint* did not raise factual issues that required  
17 discovery for their resolution”) (emphasis added); *Optical Coating Lab., Inc. v. Applied Vision,*  
18 *Ltd.*, No. C-92-4689 MHP, 1995 WL 150513, at \*4 (N.D. Cal. Mar. 20, 1995) (“Discovery  
19 cannot, however, serve as a substitute for an adequate pleading, and cannot be used to launch a  
20 fishing expedition that may or may not subsequently substantiate an allegation of fraud that lacks  
21 any basis at the time it is pled.”); *Cascade Yarns, Inc. v. Knitting Fever, Inc.*, No. C10-861 RSM,  
22 2011 WL 2470671, at \*5 (W.D. Wash. June 17, 2011) (denying “fishing expedition” for  
23 jurisdictional discovery).

24 **B. Discovery Is Not Appropriate Where a Motion to Dismiss Challenges the**  
25 **Pleading, Not the Facts Alleged**

26 The FDIC’s Motion to Compel misses the point—that discovery cannot be used to cure  
27 an inadequate pleading—and attempts to shoehorn this case into the mold of cases involving

1 contested facts, competing affidavits, and contradictory evidence. As the FDIC’s cases show,  
2 courts allow jurisdictional discovery to assist in deciding personal jurisdiction questions only  
3 where the parties dispute the facts the plaintiff alleges to establish jurisdiction. *See, e.g., Hamad*  
4 *v. Gates*, No. C10-591 MJP, 2010 WL 4511142, at \*2 (W.D. Wash. Nov. 2, 2010) (granting  
5 jurisdictional discovery where defendants “argue[d]” the contacts alleged by the plaintiff had  
6 ended so could not be considered continuous for purposes of general jurisdiction); *Orchid*  
7 *Biosciences, Inc. v. St. Louis Univ.*, 198 F.R.D. 670, 671–72 (S.D. Cal. 2011) (granting  
8 jurisdictional discovery where defendant submitted with his motion to dismiss affidavits  
9 identifying his limited contacts with the state); *Mitan v. Feeney*, 497 F. Supp. 2d 1113, 116–18  
10 (C.D. Cal. 2007) (engaging in colorable showing analysis where plaintiffs and defendant  
11 submitted competing affidavits).

12 Here, the FDIC does not contest that its jurisdictional pleading is inadequate. Instead, the  
13 FDIC claims that its conclusory allegation of specific personal jurisdiction entitle it to conduct a  
14 jurisdictional fishing expedition. The cases say nothing of the kind.

15 **III. THE FDIC HAS NOT MADE ANY, MUCH LESS A “COLORABLE,” SHOWING**  
16 **OF PERSONAL JURISDICTION**

17 Apparently recognizing the paucity of its personal jurisdiction allegations, the FDIC  
18 argues that a less demanding “colorable basis” standard governs those allegations and that it has  
19 met this purportedly more lax standard. But even under the FDIC’s “colorable basis” standard,  
20 the FDIC must provide the Court with facts “tending to establish” that the Court has personal  
21 jurisdiction over Mrs. Rotella. *Mitan*, 497 F. Supp. 2d at 1119. *Compare Cent. States, Se. & Sw.*  
22 *Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934, 946 (7th Cir. 2000) (using  
23 “*prima facie*” and “colorable” showing interchangeably). The FDIC has failed to do so. The  
24 FDIC’s motion to compel falls far short of implicating the long-arm statute, much less satisfying  
25 the first two prongs of the Ninth Circuit specific jurisdiction test: (i) the FDIC has made no  
26 showing that Mrs. Rotella “purposefully directed” her activities at the forum or performed some  
27 act by which she “purposefully availed” herself of the privilege of conducting activities in the

1 forum; and (ii) the FDIC's claims do not arise out of Mrs. Rotella's "forum-related activities."  
2 *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004) (citation omitted).

3 **A. The Purported Fraudulent Monetary Transfers Occurred *After* the Rotellas**  
4 **Allegedly Sold Their Seattle Home and Purchased a New York Home**

5 In the Complaint, the FDIC alleges "upon information and belief" that after September  
6 2008, Mr. Rotella transferred in excess of \$1 million to Mrs. Rotella. (Compl. ¶ 205.) This  
7 allegation fails as a matter of law under Rule 9(b). (*See Rotella & Schneider Mot. to Dismiss*,  
8 Dkt. No. 53, at 16–17; E. Rotella's Mot. to Dismiss, Dkt. No. 54, at 4:8–12.) Now, in its motion  
9 to compel, the FDIC explains that the monetary transfers referred to in the Complaint are a  
10 \$158,000 transfer to Mrs. Rotella's Schwab account on June 23, 2009 and a second \$1.2 million  
11 transfer on December 17, 2009. (FDIC Mot. at 4:9–12.) The FDIC has proffered no information  
12 connecting these transfers to Washington conceding "[t]hese transfers occurred during the  
13 interim period described above in which it is unclear where Esther Rotella resided." (*Id.* at 4:12–  
14 13.)

15 As an initial matter, the Complaint fails to sufficiently plead tortious conduct by Mrs.  
16 Rotella with regard to the transfers described in the FDIC's motion, and "defective" allegations  
17 cannot form the basis for long-arm jurisdiction. *In re Wash. Mut., Inc. Sec., Derivative & ERISA*  
18 *Litig.*, 2010 WL 2803033, at \*4 (where a plaintiff's "defective allegations are the only ones that  
19 could possibly satisfy personal jurisdiction," a plaintiff has "failed to provide any support for  
20 specific jurisdiction"). In addition to the Complaint's Rule 9(b) failure, the FDIC cites no  
21 Washington authority for the proposition that the *transferee* of an alleged fraudulent transfer is a  
22 tortfeasor. And for good reason. Washington's fraudulent transfer statute looks to the  
23 *transferor's* intent to determine whether the transfer is fraudulent. *See Thompson v. Hanson*,  
24 168 Wn. 2d 738, 747, 749 (2010) (explaining that Washington's UFTA provides remedies  
25 against transferees without regard to mental state). Thus, the monetary transfer allegations fail  
26 under both the long-arm statute and the Ninth Circuit's due process test. *See Schwarzenegger*,

1 374 F.3d at 802 (requiring “purposeful” direction/availment and that claims arise out of “forum-  
2 related activities”).

3 Moreover, the FDIC makes *no* evidentiary showing that the monetary transfers took  
4 place in Washington. To the contrary, the FDIC states that the alleged monetary transfers  
5 between the Rotellas occurred *after* the Rotellas sold their Seattle home, when Mrs. Rotella was  
6 using an address in New York, and after the Rotellas purchased a New York home. Specifically,  
7 the FDIC states that the alleged transfers occurred on June 23 and December 17, 2009, (FDIC  
8 Mot. at 4:8–12), *after* the FDIC states the Rotellas sold their Seattle home in May 2009. (*Id.* at  
9 2:22–3:4.) The second purported transfer also allegedly occurred after the FDIC claims Mrs.  
10 Rotella purchased a home in New York. (*Id.* at 3:9–11.) Moreover, elsewhere the FDIC  
11 contends that prior to these transfers, the Rotellas “retained possession of the [Orient,] New York  
12 residence . . . and continued to live and use it.” (Compl. ¶ 206(d).) And “for the period between  
13 July 2009 and January 2010,” “[t]he only address listed for [Esther Rotella] is a ‘P.O. Box 600’  
14 in Orient New York.” (FDIC Mot. at 3:15–18.)

15 Finally, the FDIC’s suggestion that an “injury” *may* have occurred in Washington  
16 sufficient to give rise to long-arm jurisdiction is not credible. *The Complaint does not allege*  
17 *that any injury from any supposed fraudulent transfer has happened yet*, (*see* Compl. ¶¶ 203-  
18 208), because there has been no alleged judgment in the FDIC’s favor, much less one in excess  
19 of the remaining insurance policy limits, and no alleged failure to satisfy such future judgment.  
20 And, in any event, the “commission of a tortious act” in Washington is not established merely by  
21 showing that someone in Washington suffered a financial loss. *See Oertel v. Bradford Trust Co.*,  
22 33 Wn. App. 331, 336–37 (1982) (where New York trust company’s alleged tortious act of  
23 conversion originated outside Washington, alleged financial impact to plaintiff in Washington  
24 was insufficient to satisfy jurisdictional requirement of tortious act within state).

25 **B. The New York Property Transfer Does Not Fall Within RCW 4.28.185(1)(b)**

26 The FDIC alleges the Rotellas transferred their Orient, New York property to trusts in  
27 their own names. (Compl. ¶ 204.) As explained (and not opposed) in Mrs. Rotella’s Motion to

1 Dismiss, the FDIC’s allegation that Mrs. Rotella transferred *her* interest in the residence into the  
2 Esther Rotella Trust has no significance under Washington’s Uniform Fraudulent Transfer Act  
3 because the FDIC does not allege Mrs. Rotella is a “debtor” under the statute or that the FDIC is  
4 a creditor of Mrs. Rotella. *See Premier Capital, Inc. v. Klein*, 776 N.Y.S.2d 74, 76 (N.Y. App.  
5 Div. 2004) (finding transfer of real property to defendant’s wife was not fraudulent as to  
6 defendant’s wife because she was not alleged to be a debtor of the plaintiff’s assignor). As such,  
7 the Complaint provides no factual basis for the assertion that Mrs. Rotella intended a transaction  
8 to “hinder, delay or defraud” creditors. *In re Daisy Sys. Corp.*, No. C-92-1845-DLJ, 1993 WL  
9 491309, at \*9 (N.D. Cal. Feb. 3, 1993). (*See* E. Rotella’s Mot. to Dismiss, Dkt. No. 54, at 4.)  
10 Further, nowhere in the Complaint does the FDIC allege that Mrs. Rotella believed or should  
11 have reasonably believed that she would incur debts beyond her ability to pay as they became  
12 due.

13 The FDIC’s allegations of “actual intent” (Compl. ¶ 206(a)–(e)) as to Mrs. Rotella are  
14 likewise insufficient. The FDIC does not allege Mrs. Rotella was a named defendant in any  
15 lawsuits at the time of the transfer, that the transfer of her interest in the residence was  
16 concealed, or that she failed to properly record the trust according to the laws and regulations  
17 governing the public recording of real property. The only “actual intent” allegation is that Mrs.  
18 Rotella retained an interest in her share of the residence by remaining a trustee, and that she  
19 continued to live in the New York property after the trust was created in 2008. (*Id.*)

20 Again, the FDIC does not show how a transfer of New York property has the necessary  
21 nexus within RCW 4.28.185(1)(b) or comports with the Ninth Circuit’s due process test. The  
22 FDIC’s argument that an “injury” occurred in Washington is defeated because there has been no  
23 alleged injury by Mrs. Rotella and, in any event, a financial loss is insufficient to implicate the  
24 long-arm statute. *See* Section III.A., above. Moreover, the New York real estate transfer  
25 occurred *before* Washington Mutual Bank failed and thus *before* Mr. Rotella was arguably a  
26 “debtor” of a Washington-based bank. (*See* Compl. ¶¶ 11, 204.) Thus, it is not even plausible  
27

1 that at the time of the New York transfer, Mrs. Rotella intentionally engaged in conduct that she  
2 thought would have an impact in Washington.

3 **CONCLUSION**

4 The FDIC has not demonstrated “good cause” for an extension or failure to timely seek  
5 one. Accordingly, the motion to extend should be denied. Moreover, the FDIC is not entitled to  
6 jurisdictional discovery because the FDIC pled no facts in support of the exercise of long-arm  
7 jurisdiction. Even if the Court were to consider the “evidence” submitted with the motion to  
8 compel, the FDIC has not made a *prima facie* or colorable showing of personal jurisdiction that  
9 would entitle the FDIC to discovery to resolve a factual dispute. For these reasons, the motion to  
10 compel should also be denied and the Complaint should be dismissed.

11  
12 Dated this 6th day of September, 2011.

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on September 6, 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 DATED this 6th day of September, 2011.

7  
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