

1 **I. Defendants Concede that Only a Colorable Showing is Needed to Entitle the FDIC**
2 **to Jurisdictional Discovery.**

3 On pages 6-7 of its opening motion, the FDIC cited a number of cases from district courts
4 within the Ninth Circuit, including this Court, which held that a party need only make a
5 “colorable” showing of personal jurisdiction to be entitled to seek jurisdictional discovery.
6 Defendants do not seriously contest that this is the proper standard to be used in deciding the
7 FDIC’s motion to compel. Defendants make only a passing reference to a Seventh Circuit
8 decision that used the terms “prima facie” and “colorable” interchangeably. *See Cent. States, Se.*
9 *& Sw. Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934, 946-47 (7th Cir.
10 2000). But that case has been rejected as not comports with Ninth Circuit precedent, which
11 distinguishes between the colorable showing necessary to obtain jurisdictional discovery and the
12 higher *prima facie* showing needed to defeat a Rule 12(b)(2) motion to dismiss. *See Focht v. Sol*
13 *Melia S.A.*, No. C-10-0906 EMC, 2010 WL 3155826, at *2 (N.D. Cal. Aug. 9, 2010).

14 Defendants also argue that the FDIC’s colorable showing cases allow jurisdictional
15 discovery “only where the parties dispute the facts the plaintiff alleges to establish jurisdiction.”
16 (Defs’ Opp’n at 7.) But that is wrong. Both the Ninth Circuit and this Court have held that,
17 “Discovery should ordinarily be granted where ‘pertinent facts bearing on the question of
18 jurisdiction are controverted *or where a more satisfactory showing of the facts is necessary.*”
19 *Hamad v. Gates*, No. C10-591 MJP, 2010 WL 4511142, at *3 (W.D. Wash. Nov. 2, 2010)
20 (quoting *Butcher’s Union Local No. 498 v. SDC Inv., Inc.*, 788 F.2d 535, 540 (9th Cir. 1986))
21 (emphasis added); *Laub v. U.S. Dep’t of the Interior*, 342 F.3d 1080, 1093 (9th Cir. 2003)
22 (same). Indeed, in *Hamad*, where this Court granted a request for jurisdictional discovery, the
23 facts themselves were not disputed; the parties only disputed the legal effect of those facts.
24 *Hamad*, 2010 WL 4511142, at *2; *see also eMag Solutions LLC v. Toda Kogyo Corp.*, No. C 02-
25 1611, 2006 WL 3783548, at *2 (N.D. Cal. Dec. 21, 2006) (noting that the plaintiffs had
26 “provided some evidence,” thus permitting jurisdictional discovery, but mentioning only the
27 defendant’s criticism of the legal sufficiency of the pleading). In short, there is no requirement
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1 that the defendant must dispute the facts in order for the FDIC to meet the colorable showing
2 standard for obtaining jurisdictional discovery; it is enough that a “more satisfactory showing of
3 the facts is necessary.” *Laub*, 342 F.3d at 1093; *Hamad*, 2010 WL 4511142, at *2. Here,
4 jurisdictional discovery would allow the FDIC to confirm Mrs. Rotella’s whereabouts during the
5 alleged fraudulent conveyances at issue and would help develop a fuller evidentiary record for
6 the Court’s review when deciding her jurisdictional motion to dismiss.
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8 **II. The FDIC’s Complaint is Not Deficient, and the FDIC Need Not Plead Publicly**
9 **Available Facts That Are Subject to Judicial Notice.**

10 A repeated theme in Defendants’ opposition is that the FDIC “concedes” that its pleading
11 is inadequate. The FDIC concedes no such thing. The FDIC has pled that personal jurisdiction
12 is appropriate over Esther Rotella pursuant to RCW § 4.28.185(1)(b), which involves the
13 commission of a tort. (Complaint ¶ 20.) The FDIC further has pled that Esther Rotella was
14 involved in making or receiving fraudulent transfers with her husband, Stephen, in March or
15 April 2008 and again after the Bank failed in September 2008. (*Id.* ¶¶ 18, 204-205.) The FDIC
16 further alleges that Stephen Rotella served as Washington Mutual Bank’s President and COO
17 from January 2005 through September 2008; therefore, he presumably lived in Seattle during this
18 time. (*Id.* ¶ 15.) When these allegations are combined with publicly available information about
19 Esther Rotella’s whereabouts during the times of the alleged fraudulent transfers, the FDIC has
20 made a colorable showing to justify its request for jurisdictional discovery. Nowhere in their
21 Opposition do Defendants argue that this Court cannot take judicial notice of the materials
22 submitted by the FDIC, which show that Esther Rotella resided in Washington through at least
23 May 2009 and possibly as late as December 2009. (See Dkt. 65, FDIC’s Mot. at 2-3 & n.1; Dkt.
24 66, H. Pietrkowski Cert./Decl. at ¶¶ 9-13.) See, e.g., *Klein v. Freedom Strategic Partners, LLC*,
25 595 F. Supp. 2d 1152, 1157, 1160 (D. Nev. 2009) (considering Nevada filings that showed
26 addresses of defendants in personal jurisdiction analysis and allowing further discovery).
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28 Because the FDIC has made a colorable showing of actual or alleged jurisdictional facts,

1 it is entitled to obtain jurisdictional discovery to resolve any remaining questions about Esther
2 Rotella's whereabouts during the fraudulent transfers at issue. This is not a situation where a
3 party makes a conclusory allegation about personal jurisdiction and presents no supporting facts
4 whatsoever. *Cf. In re: Wash. Mut., Inc. Secs., Derivative & ERISA Litig.*, No. 08-1919-MJP,
5 2010 WL 2803033, at *4 (W.D. Wash. July 15, 2010) (denying a request for jurisdictional
6 discovery where the plaintiffs failed to provide any support for their allegations-); *Robinson v.*
7 *Daimlerchrysler AG*, No. 07-3258 SC, 2008 WL 728877, at *3, 6 (N.D. Cal. Mar. 17, 2008)
8 (granting motion to dismiss for lack of personal jurisdiction where plaintiff presented no facts to
9 support its agency theory and "[d]iscovery will not cure this"). In none of the cases cited on
10 page 6 of Defendants' Opposition did the plaintiff introduce judicially noticed facts to help
11 support the allegations in their complaints. Here, the FDIC has submitted such facts through
12 certified copies of official county records and other publicly available documents, which is
13 enough to make the "colorable showing" needed.¹

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15 The FDIC's motion is straightforward. It requests additional time to respond to Esther
16 Rotella's motion to dismiss in order to obtain threshold jurisdictional discovery that will confirm
17 or deny where she was located when the alleged fraudulent conveyances were made. This useful
18 information will help the Court decide the personal jurisdiction issues she has raised. If Mrs.
19 Rotella truly had nothing to hide, she would not so vehemently be opposing the FDIC's motion.
20 Instead, she tries to twist the facts to make it seem as though she was not in Washington, but she
21 never actually confirms her whereabouts during these times. For example, on page 4 of her
22 Opposition, Mrs. Rotella implies that the certified voter registration record the FDIC submitted
23 refers to someone other than herself: "The voter registration record . . . is erroneous on its face
24 as it lists Mrs. Rotella's birthday as --/--/1982 – thirty years *after* she was born." (original
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28 ¹ Alternatively, if the Court requires the FDIC to plead these publicly available facts, it can do so. (*See* Dkt 65, FDIC's Mot. to Compel at 11 n.4.)

1 emphasis).² But is Mrs. Rotella really contending that the record does not refer to her when its
2 lists her full name, including the middle initial, as well as her correct home address? She never
3 denies that it is her voting record; she just uses a technical error to make it *seem* as though it is
4 not her voting record. Similarly, she asserts that, because her Seattle home was sold in May
5 2009 and she lists a New York post office box from July 2009 through January 2010, that must
6 mean she was in New York during this time. (Opp'n at 9.) But again, she relies only on the
7 FDIC's assertions rather than actually confirming or denying if she was in Washington or New
8 York. The jurisdictional discovery is intended to put an end to this gamesmanship and determine
9 the truth so that the personal jurisdiction issues can be decided on a full evidentiary record.
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11 **III. Esther Rotella Is an Alleged Tortfeasor Who Made and Received Fraudulent**
12 **Transfers in Washington That May Affect Collection of a Washington Judgment.**

13 Defendants also argue that the FDIC is not entitled to jurisdictional discovery because it
14 has not shown that Mrs. Rotella "purposefully directed" her activities at the forum, "purposefully
15 availed" herself of the privilege of conducting activities in Washington, or that the FDIC's
16 claims arise out of "forum-related activities." (Def's' Opp'n at 7-8.) But that puts the cart before
17 the horse. Jurisdictional discovery is required to create a full evidentiary record so that the Court
18 can make these substantive rulings on the personal jurisdictional issue. Essentially, the Rotellas
19 are trying to deny the FDIC the right to obtain jurisdictional discovery, but at the same time, they
20 are refusing to tell the FDIC (or the Court) what the true facts really are about Mrs. Rotella's
21 involvement in the alleged fraudulent transfers and whether she was in Washington at the time of
22 her conduct. This "heads I win, tails you lose" strategy should not be countenanced.
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24 In any event, Defendants are wrong that Esther Rotella did not commit a tortious act for
25 purposes of Washington's long-arm statute. RCW § 4.28.185(1)(b). The allegations of the
26 Complaint, along with the publicly available facts submitted to the Court, indicate that Esther
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28 ² Defendants point out that certain attachments contain partial social security numbers and birthdates. The FDIC has informed the ECF clerk of this issue and has substituted a redacted filing to remedy this issue. (See Dkt. 74.)

1 Rotella was living with her husband in Seattle in March or April 2008 when she allegedly
2 participated in a fraudulent conveyance of their undivided interest in a jointly owned property to
3 two irrevocable trusts. (Complaint ¶ 204; Dkt. 66, H. Pietrkowski Cert./Decl. ¶¶ 9-13.)
4 Similarly, jurisdictional discovery will help confirm whether Esther Rotella received either of the
5 monetary transfers from her husband while she was in Washington. If either of these things is
6 true, then it is clear that Mrs. Rotella “purposefully availed” herself of the privilege of
7 conducting activities in Washington. While she tries to make substantive arguments for why
8 those transfers are not tortious, the FDIC has responses to each of those arguments, which it is
9 prepared to make in response to her motion to dismiss at the appropriate time.³ But that is not a
10 basis to deny the FDIC’s motion to compel jurisdictional discovery now.

12 **IV. The FDIC Was Diligent in Seeking Jurisdictional Discovery and Moving for an**
13 **Extension of Time to Respond to Esther Rotella’s Motion to Dismiss.**

14 Esther Rotella also makes the specious argument that the FDIC has violated Local Rule
15 7(b)(2) and has waived its right to respond to her motion to dismiss by “allowing the deadline to
16 pass without filing a response.” (Defs’ Opp’n at 4.) But this ignores the fact that Federal Rule
17 of Civil Procedure 6(b) allows the Court to extend the time to respond to a motion “for good
18 cause” so long as the request is made “before the original time or its extension expires.” All but
19 one of the cases cited on page 5 of Defendants’ Opposition involved *untimely* requests for
20 extension after the expiration of the deadline. Here, in contrast, the FDIC filed its motion for
21 extension of time on August 22, *before* the deadline to file its response to the motion to dismiss
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23 ³ For instance, Esther Rotella asserts that the FDIC has no claim against her because she is not a “debtor.” But at the
24 very least, she assisted a debtor (*i.e.*, her husband) to fraudulently transfer real estate that was jointly owned by them
25 in an undivided interest. Stephen Rotella could not have accomplished his fraudulent transfer without her.
26 Likewise, Esther Rotella asserts that the transferee of an alleged fraudulent transfer is not a tortfeasor. But the very
27 same Washington Supreme Court decision that she cites for this proposition, *Thompson v. Hanson*, 168 Wash. 2d
28 738 (Wash. 2009), emphasizes that under “Washington’s Uniform Fraudulent Transfer Act (UFTA), chapter 19.40
RCW, creditors have a cause of action against transferees who received fraudulently conveyed property of debtors.”
Id. at 741-42. Again, these and the other substantive issues should be fully briefed on Mrs. Rotella’s motion to
dismiss after the jurisdictional discovery is completed. There is no efficiency in responding to only part of Mrs.
Rotella’s motion to dismiss, especially if those arguments dovetail with the jurisdictional analysis. Moreover, the
FDIC already addressed many of these arguments in its Consolidated Response to the other defendants’ motions to
dismiss. (See Dkt. 64, FDIC’s Consol. Resp. to Defs’ Motions to Dismiss, at 28-30 & n.17.)

1 expired. One case cited by Defendants involved the denial of a request for extension the day a
2 summary judgment response was due where the respondent claimed they were waiting for a
3 deposition transcript that would not have changed the outcome. *See Irving v. County of*
4 *Sacramento*, 231 Fed. Appx. 584, 585-86, 2007 WL 1280742, at **1 (9th Cir. 2007). But here,
5 the FDIC has demonstrated its need for jurisdictional discovery through a colorable showing of
6 jurisdictional facts, which is enough to constitute “good cause” for an extension under Rule 6.
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8 Defendants wrongly assert that the FDIC failed to show due diligence in seeking an
9 extension of time. But the record demonstrates the opposite. On July 1, 2011, the FDIC
10 received three separate motions to dismiss – one from Kerry and Linda Killinger, a second from
11 Stephen Rotella and David Schneider, and a third from Esther Rotella. (Dkt Nos. 53-55.) Just
12 two weeks later, on July 15, the FDIC propounded jurisdictional discovery requests to Stephen
13 and Esther Rotella. (Dkt. 66, H. Pietrkowski Cert./Decl. ¶ 3.) However, the Rotellas waited the
14 entire 30 days – until August 15 – to answer these jurisdictional discovery requests even though
15 every single request was answered with essentially the same form objections. (*Id.*) The very
16 next day, Tuesday, August 16, the FDIC’s counsel contacted the Rotellas’ counsel to set up a
17 meet-and-confer conference, indicating that they needed this discovery in advance of the August
18 22 deadline for responding to Esther Rotella’s motion to dismiss. But the earliest day on which
19 Rotellas’ counsel were willing to meet was Friday, August 19 – just one business day before the
20 August 22 deadline. (*Id.* at ¶ 4.) Counsel met and conferred both on Friday, August 19, and
21 Monday morning, August 22, but the Rotellas’ counsel steadfastly refused to respond to any
22 discovery. (*Id.* at ¶¶ 5-7.) Having reached an impasse, the FDIC immediately filed its motion
23 that same afternoon. (*Id.* at ¶ 8.)⁴ Thus, it was the Defendants’ delay, not the FDIC’s lack of
24 diligence, which caused the motion for extension to be filed the same day the response was due.
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28 ⁴ Given the timing of the FDIC’s jurisdictional discovery and its motion for extension of time, the parties did not believe it was feasible to follow the Local Rule 37 procedure for this motion. The FDIC did subsequently offer to re-file its motion to compel using the Local Rule 37 procedure if Esther Rotella would agree to extend the time for the FDIC to respond to her motion to dismiss until the discovery dispute was resolved. However, Esther Rotella’s counsel declined this offer.

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2 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 9, 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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