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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

MULTIBANK 2009-1 CML-ADC
VENTURE, LLC,

Plaintiff,

v.

JAIMEE YOSHIZAWA, *et al.*,

Defendants.

Case No. 2:10-cv-00695-LDG (LRL)

ORDER

THE VILLAGE AT RUSSELL-PHASE
1, LLC,

Third-party Plaintiff,

v.

FEDERAL DEPOSIT INSURANCE
CORPORATION, AS RECEIVER FOR
SILVER STATE BANK,

Third-party Defendant.

One of the defendants, The Village at Russell-Phase 1, LLC (Village), filed a Third-party Complaint (#21) against third-party defendant, Federal Deposit Insurance

1 Corporation, as Receiver for Silver State Bank (FDIC-R).¹ The FDIC-R moves to dismiss
2 (#62) the third-party complaint for lack of subject matter jurisdiction pursuant to Fed. R. Civ.
3 Pro. 12(b)(1). Having considered the pleadings and arguments of the parties, the Court
4 must dismiss the third-party complaint for lack of subject matter jurisdiction.

5
6 Motion to Dismiss Pursuant to Rule 12(b)(1)

7 Rule 12(b)(1) authorizes a motion to dismiss for want of subject matter jurisdiction.
8 “It is a fundamental precept that federal courts are courts of limited jurisdiction . . . [and]
9 limits upon federal jurisdiction . . . must be neither disregarded nor evaded.” *Owen*
10 *Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). The plaintiff has the
11 burden of establishing subject matter jurisdiction is proper, see *Kokkonen v. Guardian Life*
12 *Ins. Co.*, 511 U.S. 375, 377 (1994), and must meet that burden at the pleading stage by
13 alleging sufficient facts to show a proper basis for the court to assert subject matter
14 jurisdiction over the action. See *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178,
15 189 (1936); Fed. R. Civ. Pro. 8(a)(1) (a pleading “must contain: (1) a short and plain
16 statement of the grounds for the court’s jurisdiction”).

17 When considering a motion to dismiss for lack of subject matter jurisdiction, the
18 court presumes the factual allegations of the complaint are true and draws all reasonable
19 inferences in favor of the non-moving party. *Whisnant v. United States*, 400 F.3d 1177,
20 1179 (9th Cir. 2005). However, bare, conclusory allegations, including legal allegations
21 couched as factual, are not entitled to be assumed to be true. *Bell Atlantic Corp. v.*
22 *Twombly*, 550 U.S. 544, 555 (2007). “[T]he tenet that a court must accept as true all of the
23 allegations contained in a complaint is inapplicable to legal conclusions.” *Ashcroft v. Iqbal*

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25 _____
26 ¹ Though Village’s pleading is captioned only as a counterclaim, the pleading is
a third-party complaint as against the FDIC-R, as FDIC-R is not a plaintiff in the suit filed
against Village.

1 556 U.S. ____, 129 S.Ct. 1937, 1949 (2009). “While legal conclusions can provide the
2 framework of a complaint, they must be supported by factual allegations.” *Id.*, at 1950.
3 Thus, this court considers the conclusory statements in a complaint pursuant to their
4 factual context.

5
6 Relevant Factual Background as Alleged in Third-party Complaint

7 In October 2006, Village obtained a construction loan (the Loan) from Silver State
8 Bank to fund the development of commercial buildings. From October 2006 through May
9 2008, Silver State Bank timely disbursed funds for the construction of the commercial
10 buildings.

11 On September 5, 2008, the Nevada Financial Institutions Division closed Silver
12 State Bank. The FDIC-R was named as Receiver. Pursuant to the Financial Institutions
13 Reform, Recovery, and Enforcement Act of 1989 (FIRREA), 12 U.S.C. §§ 1821 *et seq.*, the
14 FDIC-R succeeded Silver State Bank. On or about the same day, the FDIC-R notified
15 Village that it had assumed control of Silver State Bank’s assets. The FDIC further notified
16 Village that the Note and Loan were now owned by the FDIC.

17 On September 10, 2008, Village was notified that the FDIC had approved a
18 disbursement request that Village had submitted in July. Although Village had requested
19 \$93,903.98, the FDIC approved only \$28,698.44.

20 On September 16, 2008, the FDIC notified Village that it was “increasingly unlikely
21 that the FDIC is going to continue to allow draws on the Village at Russell.” The FDIC also
22 notified Village that it was looking to convert the construction loan to a permanent loan.

23 Village asserts that the FDIC constructively repudiated the Loan Documents.
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1 Relevant Factual Background Submitted by the FDIC-R and Conceded by Village

2 The FDIC-R published notices, which announced that the administrative claims bar
3 date was December 10, 2008, in (1) the Las Vegas Review-Journal on Sept. 11, 2008, and
4 October 13, 2008, (2) the Wall Street Journal on October 13, 2008, and November 14,
5 2008, and (3) in the Arizona Republic on October 13, 2008, and November 13, 2008.

6 Village did not file a Proof of Claim with the FDIC-R on or before the bar date of
7 December 10, 2008. Village filed its Proof of Claim with the FDIC-R on July 2, 2010. On
8 August 27, 2010, the FDIC-R disallowed the claim as untimely filed.

9
10 Analysis

11 No court has jurisdiction over claims that are subject to but that have not been
12 exhausted by the mandatory administrative claims process outlined in the Financial
13 Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA). *See Henderson v.*
14 *Bank of New England*, 986 F.2d 319, 320-21 (9th Cir. 1993) (no jurisdiction if claimant fails
15 to exhaust FIRREA's administrative process, §1821(d)(13)(D) strips all courts of jurisdiction
16 over claims made outside of §1821's administrative procedures). Pursuant to
17 §1821(d)(5)(C), the FDIC-R must disallow claims filed after the bar date specified in notices
18 published pursuant to §1821(d)(3)(B)(i).² Such a disallowance is final. As compliance with
19 the claims bar date is a jurisdictional requirement, *see Intercontinental Travel Marketing,*
20 *Inc. v. FDIC*, 45 F.3d 1278, 1284 (9th Cir. 1994), the Court lacks jurisdiction over any claim
21 that was not presented to the FDIC-R by the claims bar date.

22 The FDIC-R argues Village has not alleged facts in its complaint sufficient to
23 establish this Court's jurisdiction. Village responds that, in Paragraph 4 of its complaint, it

24 _____
25 ² Section 1821(d)(3)(B) requires that the FDIC-R publish a notice to creditors to
26 present their claims by a specified date that is not less than 90 days after the initial
publication of the notice, and republish the notice one month and two months after the
initial publication.

1 alleged that the Court has jurisdiction pursuant to 12 U.S.C. §1821(d)(6). Village's
2 allegation is a conclusory legal allegation that is unsupported by any fact alleged in the
3 complaint. Such factual allegations would necessarily include the date the FDIC-R
4 disallowed a claim, given that courts have jurisdiction only over lawsuits filed by the end of
5 the 60-day period that commences on the earlier of the expiration of the 180-day period
6 described in §1821(d)(5)(A)(i) or the date that the FDIC-R disallows a claim. Further, such
7 factual allegations would necessarily include the claims bar date and the date the plaintiff
8 submitted its Proof of Claim with the FDIC-R, given that courts have jurisdiction only over
9 claims that were filed by the claims bar date. In its complaint, Village has not alleged that it
10 submitted a Proof of Claim, and has not alleged the date it filed its claim, and has not
11 alleged the claims bar date, and has not alleged the date the FDIC-R disallowed its claim.
12 Accordingly, Village has failed to plead facts permitting a conclusion that the Court has
13 jurisdiction of its complaint.

14 Though the relevant allegations of fact are missing from its complaint, Village points
15 out that the facts regarding the submission and denial of its Proof of Claim are uncontested
16 and that the FDIC-R has submitted evidence of those uncontested facts to the Court. That
17 evidence establishes that the claims bar date was December 10, 2008, that Village
18 submitted its Proof of Claim on July 2, 2010, and that the FDIC-R denied the claim as
19 untimely. These facts establish that Village failed to properly exhaust the statutorily
20 mandated exhaustion requirements of §1821(d) because Village did not timely submit its
21 claim to the FDIC-R and the FDIC-R disallowed the claim as untimely. Accordingly, the
22 facts that Village notes are uncontested establish that this Court lacks jurisdiction over
23 Village's complaint, and that Village cannot amend its complaint to cure this defect.

24 Although Village submitted its Proof of Claim more than 18 months after the claims
25 bar date, it argues that its submission of the Proof of Claim was not untimely because the
26 FDIC-R did not mail the notice of the claims bar date to Village. The FDIC-R counters that,

1 as established in *Intercontinental Travel Marketing*, the FDIC-R's failure to mail the notice
2 required by §1821(d)(3)(C) does not excuse Village's failure to file its Proof of Claim by the
3 claims bar date. Village responds that *Intercontinental Travel Marketing* established a
4 judicial exception pursuant to which the claims bar date is tolled where the FDIC-R's failure
5 to mail the notice is not based on excusable neglect. Village further argues that the FDIC-
6 R cannot argue excusable neglect, or alternatively, that this issue should be determined on
7 a motion for summary judgment after the parties have engaged in discovery.

8 Village's argument that the bar date can be tolled emphasizes the defect of its
9 complaint in pleading jurisdiction. As the Court lacks jurisdiction over an untimely claim,
10 the tolling of the claims bar date is a jurisdictional issue when a claim is filed after the
11 claims bar date. As Village filed its claim after the claims bar date, Village had the burden,
12 in alleging jurisdiction, to allege facts permitting the inference that the bar date was tolled.
13 As argued by Village, those facts include the FDIC-R's failure to mail the notice and that
14 such failure was due to affirmative misconduct. The complaint, however, lacks such factual
15 allegations.

16 Further, the record before the Court precludes a determination that the bar date was
17 tolled as to Village. Contrary to Village's argument, the Ninth Circuit did not carve out a
18 judicial exception, in *International Travel Marketing*, that tolls the bar date when the FDIC-R
19 fails to mail notice and such failure is not based on excusable neglect. Rather, the Ninth
20 Circuit held only that the FDIC-R's negligent failure, in that case, to mail the notice did not
21 toll the claims bar date. As to whether the bar date could be tolled, the Ninth Circuit stated
22 that "while in some cases affirmative misconduct or intentional disregard of the mail notice
23 requirement by the FDIC could toll the bar date, we do not have such a case before us
24 here." *International Travel Marketing*, 45 F.3d at 1285. As the Ninth Circuit, itself,
25 recognized that it was not considering such a case in which the bar date was tolled, the
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1 statement is dicta. The Ninth Circuit has yet to recognize any judicial exception to
2 §1821(d)(5)(C).

3 Further, the Ninth Circuit did not even suggest that every case of affirmative
4 misconduct or intentional disregard by the FDIC-R tolled the bar date. Rather, and at most,
5 the court suggested that “in some cases affirmative misconduct or intentional disregard of
6 the mail notice requirement by the FDIC could toll the bar date.” While some cases could
7 toll the bar date, the language of the Ninth Circuit also indicates that some cases of
8 affirmative misconduct or intentional disregard by the FDIC would not toll the bar date.

9 Finally, as in *International Travel Marketing*, the facts of this case do not present a
10 circumstance in which the claims bar date should be tolled as to Village. Not only did the
11 FDIC-R properly publish notice of the claims bar date in the present case, but Village
12 received actual notice of the receivership, “greatly diminish[ing] the possibility that the FDIC
13 was ‘laying in ambush’” As alleged by Village in its complaint, the FDIC-R notified
14 Village that it had assumed control of Silver State Bank and owned the Loan on or about
15 the same day that the FDIC-R was named receiver. As further alleged by Village, by
16 September 16, 2008, the FDIC-R had notified it that it was unlikely that the FDIC-R would
17 allow any further draws on the Loan. Under these circumstances, the Court finds that the
18 FDIC-R’s failure to mail the notice to Village did not toll the claims bar date or otherwise
19 excuse Village from properly exhausting its claim.

20 As the FDIC-R notified Village that it was the receiver for Silver State Bank on the
21 same date that the FDIC-R was appointed receiver, Village’s argument that its due process
22 rights were violated is without merit.

23 The Court lacks jurisdiction over Village’s claims, as Village failed to properly
24 exhaust them as required by FIRREA.

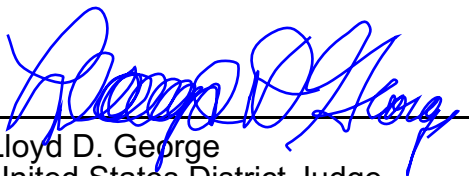
25 Relying primarily on *Sharpe v. FDIC*, 126 F.3d 1147 (9th Cir. 1997), Village argues
26 that the Court nevertheless has jurisdiction of its claims because FIRREA’s administrative

1 claims procedures do not apply to claims for repudiation and breach of contract. As such,
2 Village suggests that it was not required to exhaust its claims. The argument is without
3 merit. The Ninth Circuit distinguished *Sharpe* in *McCarthy v. FDIC*, 348 F.3d 1075, 1081
4 (9th Cir. 2003), stating: “apart from claims made in connection with bankruptcy proceedings
5 or arising out of a breach of contract fully performed by the aggrieved party but not
6 repudiated by the receiver, all claims or actions must be submitted for administrative
7 resolution.” Village has not argued or alleged that it, as the aggrieved party, fully
8 performed its contractual obligations. Indeed, Village expressly argues that it has brought
9 this suit to be relieved of its obligations under the contract. Accordingly,

10 THE COURT **ORDERS** that the Motion to Dismiss (#62) of Federal Deposit
11 Insurance Corporation, as Receiver for Silver State Bank, is GRANTED. The Third-Party
12 Complaint of Village at Russell-Phase 1, LLC is DISMISSED with prejudice.

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DATED this 29 day of August, 2011.


Lloyd D. George
United States District Judge