

1 Receiver moved to dismiss the complaint without prejudice as to FDIC/IndyMac on the
2 ground district courts lack jurisdiction over claims against banks where the action has been
3 instituted after appointment of the receiver and the administrative claims procedure
4 established by FIRREA has not been exhausted. In the instant memorandum opinion and
5 order, the court addresses the FDIC-Receiver's motion to dismiss and will deny the motion to
6 stay without prejudice as moot.

7 **FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

8 Plaintiffs filed the original complaint on October 5, 2007. The first amended
9 complaint was filed on October 26, 2007. Plaintiffs moved for leave to file a Second
10 Amended Complaint on July 11, 2008. The motion for leave to amend was granted on
11 September 26, 2008. The currently-operative Second Amended Complaint ("SAC") was
12 filed on October 1, 2008. The SAC names defendant IndyMac as one of the "Doe"
13 defendants for the first time. On October 24, 2008, Plaintiffs filed a proof of service
14 indicating the SAC had been served on IndyMac on October 22, 2008. Although the SAC
15 styles the action as a class action, the court's docket indicates that there has not been any
16 motion to certify a class. At present no other individual defendants, other than the two
17 identified in the SAC, have been identified.

18 The parties do not dispute that the Office of Thrift Supervision ("OTS") closed
19 IndyMac and appointed FDIC as Receiver on July 11, 2008. FDIC-Receiver further alleges,
20 and Plaintiffs do not dispute, that:

21 On that same date [July 11, 2008,] OTS authorized the creation of a new
22 institution, IndyMac Federal Bank F.S.B. ("IndyMac Federal"), and appointed
23 the FDIC as Conservator for IndyMac Federal ("FDIC-Conservator"). Also
24 on July 11, 2008, pursuant to a Purchase and Assumption Agreement among
25 the FDIC in its Corporate capacity, FDIC-Receiver and FCIC-Conservator, the
26 bulk of the assets of IndyMac were transferred to FDIC-Conservator, but the
27 transfer did not include "any defensive litigation with respect to which
28 [IndyMac] was a defendant or counterclaimant." [Citation.] Such litigation,
including this case, remained with FDIC-Receiver.

Doc. # 48 at ¶ 2.

1 FDIC-Receiver filed a motion to stay proceedings in this action on November 12,
2 2008. Plaintiffs opposed FDIC-Receiver's motion for stay on the ground the amount of time
3 authorized for a stay by 12 U.S.C. § 1821(d)(12)(A)¹ began to run as of the appointment of
4 FDIC as receiver, and the 90-day stay period had already expired by the time of the motion.
5 In their opposition, Plaintiff's argued that the restriction of the stay period to the first 90 days
6 after the appointment of the receiver was consistent with the purposes of the statute
7 "particularly [. . .] where the litigation at issue was not even commenced against the failed
8 bank until after the FDIC took over as receiver" Doc. # 60 at 6: 21-22. In their reply
9 brief, FDIC-Receiver noted Plaintiffs' admission that Plaintiffs' action was not filed against
10 FDIC until after FDIC was appointed receiver. Based on that admission, FDIC-Receiver
11 moved to dismiss Plaintiffs' claims without prejudice on the ground the court lacks
12 jurisdiction over Plaintiffs' claims against FDIC-Receiver pursuant to section 1821(d)(13)(D)
13 because Plaintiffs did not file and exhaust an administrative claim prior to filing the instant
14 action.

15 On December 16, 2008, the court requested further briefing from the parties regarding
16 FDIC-Receiver's motion to dismiss. In their sur-opposition to FDIC-Receiver's motion to
17 dismiss, Plaintiffs assert that administrative claims were timely filed and the claim procedure
18 was exhausted. FDIC-Receiver in its sur-reply, contends that the documents that were
19 exchanged between FDIC-Receiver and the attorney-representatives for Plaintiffs, and that
20 are provided as exhibits to Plaintiff's sur-opposition, are not sufficient to constitute evidence
21 of either the filing of an administrative claim or the final denial of an administrative claim
22 sufficient to satisfy the exhaustion requirement.

23 The hearing on FDIC-Receiver's motions to stay or dismiss was vacated on
24 December 10, 2008. Plaintiffs filed their sur-opposition on December 29, 2008, and FDIC-

26 ¹ References to section numbers hereinafter are to sections of Title 12 of the United
27 States Code unless otherwise specified.

1 Receiver filed their sur-reply on January 8, 2009.

2 LEGAL STANDARD

3 Rule 12(b)(1) of the Federal Rules of Civil Procedure allows a motion to dismiss for
4 lack of subject matter jurisdiction. It is a fundamental precept that federal courts are courts of
5 limited jurisdiction. Limits upon federal jurisdiction must not be disregarded or evaded.
6 Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978). The plaintiff has the
7 burden to establish that subject matter jurisdiction is proper. Kokkonen v. Guardian Life Ins.
8 Co., 511 U.S. 375, 377 (1994). This burden, at the pleading stage, must be met by pleading
9 sufficient allegations to show a proper basis for the court to assert subject matter jurisdiction
10 over the action. McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936);
11 Fed. R. Civ. P. 8(a)(1). When a defendant challenges jurisdiction “facially,” all material
12 allegations in the complaint are assumed true, and the question for the court is whether the
13 lack of federal jurisdiction appears from the face of the pleading itself. Thornhill Publishing
14 Co. v. General Telephone Electronics, 594 F.2d 730, 733 (9th Cir. 1979); Mortensen v. First
15 Fed. Sav. & Loan Ass’n, 549 F. 2d 884, 891 (3d Cir.1977); Cervantez v. Sullivan, 719 F.
16 Supp. 899, 903 (E.D. Cal.1989), rev’d on other grounds, 963 F. 2d 229 (9th Cir.1992).

17 A defendant may also attack the existence of subject matter jurisdiction apart from the
18 pleadings. Mortensen, 549 F. 2d at 891. In such a case, the court may rely on evidence
19 extrinsic to the pleadings and resolve factual disputes relating to jurisdiction. St. Clair v. City
20 of Chico, 880 F. 2d 199, 201 (9th Cir.1989); Roberts v. Corrothers, 812 F.2d 1173, 1177 (9th
21 Cir.1987); Augustine v. United States, 704 F.2d 1074, 1077 (9th Cir.1983). “No presumptive
22 truthfulness attaches to plaintiff’s allegations, and the existence of disputed material facts will
23 not preclude the trial court from evaluating for itself the merits of jurisdictional claims.”
24 Thornhill Publishing, 594 F.2d at 733 (quoting Mortensen, 549 F.2d at 891).

25 DISCUSSION

26 The focal point of FDIC’s motions has shifted since FDIC’s moving papers were first
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1 filed. At present, the court is primarily concerned with the issue of whether it has jurisdiction
2 over Plaintiffs' action. FDIC-Receiver challenges the court's jurisdiction based on the
3 limitation to judicial review set forth in the FIRREA at section 1821(d)(13)(D) which
4 provides:

5 Except as otherwise provided in this subsection, no court shall have
6 jurisdiction over –

7 (i) any claim or action for payment from, or any action seeking a
8 determination of rights with respect to, the assets of any depository institution
9 for which the Corporation has been appointed receiver, including assets which
10 the Corporation may acquire from itself as such receiver; or

11 (ii) any claim relating to any act or omission of such institution or the
12 Corporation as receiver.

13 As this court has noted, “jurisdiction over claims covered by section 1821(d)(13)(D)
14 is ‘otherwise provided’ in § 1821 only after completion of the claims procedures outlined in
15 §§ 1821(d)6(A) and (d)(8)(C).” Feise v. Resolution Trust Corp., 815 F.Supp. 344, 346 (E.D.
16 Cal. 1993). Section 1821(d)(6)(A), the only section of the two mentioned in the foregoing
17 quote that is applicable here, provides that a claimant may seek either further administrative
18 review, or review by a district court, of claims that are finally disallowed by the receiver or
19 may seek such review where the claim is not decided by the receiver within the statutory
20 time period. Thus, Section 1821(d)(6)(A) requires exhaustion of the administrative claims
21 procedures before a claim may be decided by a district court.

22 The effect of these provisions, read together, is to require anyone
23 bringing a claim against or “seeking a determination of rights with respect to
24 the assets of a failed bank held by the FDIC as receiver to first exhaust
25 administrative remedies by filing an administrative claim under the FEIC’s
26 administrative claims process. [Citation.] As the First Circuit explained,
27 “FIRREA makes participation in the administrative claims review process
28 mandatory for all parties asserting claims against failed institutions,” and
“where a claimant has . . . failed to initiate an administrative claim within the
filing period, the claimant necessarily forfeits any right to pursue a claim
against the failed institution’s assets in any court.” [Citation.] Section
1821(d)(13)(D) thus acts as a judicial bar to claims or actions by parties who
have not exhausted their § 1821(d) administrative remedies.

Freeman v. FDIC, 56 F.3d 1394, 1400 (9th Cir. 1995).

1 Neither party argues that Plaintiffs’ complaint is not a claim against the assets of a
2 depository institution for which FDIC is now acting as receiver. Plaintiffs’ opposition to
3 FDIC’s motion to dismiss argues, in part, that section 1821(d)(13(D) does not act as a
4 jurisdictional bar to Plaintiffs’ claims because those claims were pending as of the date FDIC
5 became receiver. Plaintiffs cite Henderson v. Bank of New England, 986 F.2d 319, 320-321
6 (9th Cir. 1993) for the proposition that the exhaustion requirement applied only to those
7 claims that were filed after FDIC was appointed receiver but before the administrative claims
8 process is exhausted. While it is true that Henderson did interpret the exhaustion requirement
9 in the context of a claim that had been filed *after* the FDIC had been appointed receiver, the
10 Ninth Circuit subsequently made it clear that the exhaustion requirement applies broadly to
11 all claims filed against the assets of the depository institution whether those claims are filed
12 before or after FDIC is appointed receiver. See Intercontinental Deposit Ins. Corp. v. FDIC,
13 45 F.3d 1278, 1282-1283 (9th Cir. 1994) (“Intercontinental Deposit”) (extending the holding
14 in Henderson to “cases in which the claimants filed their action *before* the FDIC was
15 appointed as receiver”). Significantly, the Intercontinental Deposit court specifically rejected
16 the argument Plaintiffs employ to advance their contention that their claims were not subject
17 to the exhaustion requirement. Id. The court concludes that Plaintiffs’ claims, whether filed
18 before or after the FDIC-Receiver was appointed, may not advance until the administrative
19 claims process has been finally exhausted as to each claimant.

20 While the parties’ disputations as to when Plaintiffs’ action was filed – before or after
21 FDIC was appointed as receiver – are of no moment as far as the exhaustion requirement
22 itself is concerned; whether administrative claims were *timely* filed by, or on behalf of, each
23 plaintiff is an important determinant of whether the court may maintain jurisdiction over the
24 proceeding. As discussed, Intercontinental Deposit, holds that claims against FDIC -receiver
25 cannot proceed unless Plaintiff filed and has exhausted the administrative claims procedure
26 of section 1821(d)(13(D). However, Intercontinental Deposit, also held the exhaustion
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1 requirement does not become a jurisdictional bar until “a claimant fails to file a *timely*
2 administrative claim.” Intercontinental Deposit, 45 F.3d at 1284 (citing Marquis v. FDIC,
3 965 F.2d 1148, 1154-1155 (1st Cir. 1992) (italics added). The Intercontinental Deposit court
4 agreed with the determination of some courts “that a stay may be appropriate where the
5 district court examines jurisdiction when the claimant still has time to file an administrative
6 claim with the FDIC *before* the administrative bar date passes.” Id.

7 Plaintiffs allege an administrative claim was commenced within the statutory period.
8 As evidence, Plaintiffs offer Exhibits “B,” “C,” and “D” to the Declaration of Michael
9 Browse in Support of Opposition to Motion to Dismiss. Doc. # 66-2. Exhibit “B” consists of
10 a letter to FDIC from Plaintiffs’ attorney’s office. The letter, dated August 27, 2008, (the
11 “August 27 Letter”) informs FDIC of the existence of the instant lawsuit and of the claims
12 alleged against IndyMac.

13 The August 27 Letter also lists a number of individuals and alleges that “the named
14 Plaintiffs in these actions [including this action and an action currently pending in the Central
15 District] do not currently have the ability to file individual claim forms on behalf of each and
16 every borrower who has an Option ARM loan during the liability period.” Doc. # 66-2 at 9.
17 The same letter lists the holders of twelve loans, not including the loan to the lead plaintiff in
18 this action, on whose behalf the August 27 letter was written. At page 9 of Doc. # 66-2, the
19 August 27 Letter somewhat confusingly refers to itself as a “Proof of Claim form” submitted
20 on behalf of the 12 named borrowers and “on behalf of each and every borrower who
21 received an Option ARM loan from IndyMac, or whose Option ARM loan was purchased by
22 IndyMac during the liability period.” Id.

23 The August 27 Letter also stated that Plaintiffs’ attorney’s office had requested that
24 FDIC send either “claims forms” or “proof of claims forms” for each person who took out an
25 option ARM loan from IndyMac during the liability period or for each option ARM loan that
26 was purchased by IndyMac after origination by another agent during the liability period. The
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1 August 27 Letter noted no reply had been received from FDIC. The August 27 Letter also
2 alleged that “[a]ggrieved borrowers are not being sent Proof of Claims forms via first class
3 mail as required under 12 U.S.C. § 1821(d)(3)(C)(i)&(ii). Rather, the FDIC has decided to
4 notify the aggrieved borrowers only by publication notice in a few select newspapers.” Doc.
5 # 66-2 at 11.

6 Exhibits “C” and “D” to the Declaration of Michael Bowse are letters from the FDIC-
7 Receiver to the attorneys for Plaintiffs dated September 2, 2008, and September 26, 2008,
8 respectively. The first of these letters sets forth FDIC-Receiver’s position that, pursuant to
9 the process established by Congress in the FIRREA, each individual claimant – in this case,
10 each individual holder of an Option-ARM mortgage within the definition of the Plaintiff
11 class – must file a claim himself or, if through a representative, only through a representative
12 possessing a written power of attorney.

13 The second of the letters from the FDIC-Receiver dated September 26, 2008,
14 references prior communication with Plaintiffs’ attorney firm and reiterates to some extent
15 FDIC-Receiver’s prior contention that each individual must timely file an administrative
16 claim or be permanently barred from any future action. The September 26 letter addresses
17 Plaintiffs’ attorneys’ contentions regarding adequacy of service of the notice of receivership
18 and states that FDIC-Receiver, through IndyMac Federal was in the process of offering a loan
19 modification program to its borrowers who are falling behind on their mortgages. Based on
20 its representation that it had been diligent in providing timely notice and that it had provided
21 abundant additional information regarding its loan modification program, FDIC-Receiver
22 declined to extend the claims bar date, which had been set at October 14, 2008.

23 Exhibit “E” to the Declaration of Michael Bowse is a notice sent by FDIC-Receiver to
24 the lead plaintiff in this action, Nick N. Vang. The notice, Dated October 22, 2008,
25 acknowledges that the date of the notice is past the claims bar date of October 14, 2008, and
26 acknowledges also that Vang may not have received actual notice of the failure of IndyMac,
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1 the appointment of FDIC as receiver, and the commencement of the claims filing period. The
2 notice includes a claims form and instructions for completion of the form. There is no
3 indication whether the form was completed and submitted.

4 Plaintiffs contend their proffer of documents attached as exhibits to the Declaration of
5 Michael Bowse is sufficient to show that administrative claims were timely filed by the
6 Plaintiffs and were finally denied by FDIC-Receiver. The court finds the documents
7 submitted are plainly not sufficient to establish that proposition. The letter from Plaintiffs'
8 attorneys to FDIC-Receiver talks about claims, proofs of claims and claim forms, but the
9 letter is not a claim or proof of claim itself. Although the issue of what constitutes a proper
10 claim is not precisely before the court, it is clear that section 1821(d)(4)(A) generally
11 empowers FDIC to "prescribe regulations regarding the allowance or disallowance of claims
12 by the receiver" This, the court must presume, includes determining what constitutes
13 adequate information to constitute a claim. Comparing the claim form attached to Exhibit E
14 of the Declaration of Michael Bowse with the information contained in the letter from
15 Plaintiffs' attorney to FDIC-Receiver at Exhibit B, the court must conclude the letter that
16 comprises Exhibit B does not contain enough identifying information or specific information
17 on the nature of the claim to constitute a proper administrative claim under the FIRREA.

18 Similarly, the court finds the letters from FDIC-Receiver to Plaintiffs' attorneys at
19 Exhibits C and D of the Declaration of Michael Bowse do not constitute final rejection of any
20 claim. At most, the letters from FDIC-Receiver are clarifications of FDIC-Receiver's
21 positions with regard to submission of claims and its contentions as to the adequacy of
22 service of notice. The letters do not address, let alone dispose of, Plaintiffs' substantive
23 claims.

24 As noted above, where jurisdiction is challenged by way of a motion pursuant to Rule
25 12(b)(1), the party bringing the action has the burden to show, "affirmatively and distinctly,
26 the existence of whatever is essential to federal jurisdiction," either on the basis of the
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1 complaint or on the basis of extrinsic materials. Smith v. McCullough, 270 U.S. 456, 459, 46
2 S.Ct. 338, 70 L.Ed. 682 (1926). The court has examined both the complaint and the
3 materials submitted by Plaintiffs and finds there is not a sufficient showing to establish
4 jurisdiction. Specifically, there is not sufficient information presented to show administrative
5 claims corresponding to the claims set forth in the SAC were timely filed and finally rejected
6 by FDIC-Receiver. Pursuant to Intercontinental Deposit, the court recognizes that it could,
7 under a proper set of facts, stay proceedings to await completion of the administrative claims
8 process without dismissing the action. However, this option is not available as facts currently
9 stand because the court lacks information sufficient to establish that administrative claims
10 were timely brought. Even if the court had information sufficient to establish that
11 administrative claims had been timely filed, FDIC-Receiver's motion in the alternative for
12 90-day stay pursuant to section 1821(d)(12) is not the appropriate vehicle for granting a stay
13 pending final outcome of administrative claims.

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15 THEREFORE, pursuant to the foregoing discussion, it is hereby ORDERED that the
16 motion to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure is
17 thereby GRANTED. The motion in the alternative to stay proceedings is DENIED as moot.
18 The SAC is hereby DISMISSED in its entirety as to FDIC as Receiver for IndyMac Bank
19 only. The dismissal is without prejudice. Leave is hereby granted to further amend the
20 complaint. Any further amendment of the complaint shall be filed and served not later than
21 twenty-one (21) days from the date of service of this order.

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23 IT IS SO ORDERED.

24 **Dated:** January 22, 2009

/s/ Anthony W. Ishii
CHIEF UNITED STATES DISTRICT JUDGE