

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

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6	Victor A. Dela Cruz, Mary M.	)
7	Dela Cruz,	) 2:11-cv-1176-GEB-DED
8		)
9	Plaintiffs,	)
10		)
11	v.	) <u>ORDER GRANTING THE FEDERAL</u>
12		) <u>DEPOSIT INSURANCE</u>
13		) <u>CORPORATION'S MOTION TO</u>
14	Washington Mutual Bank, Federal	) <u>DISMISS FOR LACK OF</u>
15	Deposit Insurance Company, JP	) <u>JURISDICTION*</u>
16	Morgan Chase, N.A., Wells Fargo	)
17	Bank, N.A., California	)
18	Reconveyance Company,	)
19		)
20	Defendants.	)
21		)
22		)

Defendant Federal Deposit Insurance Corporation ("FDIC"), erroneously sued as "Federal Deposit Insurance Company," moves under Federal Rule of Civil Procedure ("Rule") 12(b)(1) for dismissal of all Plaintiffs' claims alleged against it. The basis of FDIC's motion is that the Court is without subject matter jurisdiction since Plaintiffs "failed to exhaust the mandatory administrative claims process against [the] FDIC [as required by the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA")] prior to filing suit."<sup>1</sup>

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\* This matter is deemed suitable for decision without oral argument. E.D. Cal. R. 230(g).

<sup>1</sup> The FDIC argues in the alternative, that Plaintiffs' complaint should be dismissed under Rule 12(b)(6). Defendants JP Morgan Bank, N.A., Wells Fargo Bank, N.A., and California Reconveyance Company also move under Rule 12(b)(6) for dismissal of Plaintiffs' complaint. (ECF No. 12.) In addition, the FDIC moves under Rule 12(f) for an order striking portions of Plaintiffs' complaint. (ECF No. 10.) Since the FDIC's Rule 12(b)(1) motion will be granted and this case will be remanded to the state court from which it was removed if Plaintiffs have

(continued...)

1 (Defendant the Federal Deposit Insurance Corporation's Motion to Dismiss  
2 ("Mot.") 2:19-21, ECF No. 9-1.)

3 "A Rule 12(b)(1) jurisdictional attack may be facial or  
4 factual." Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir.  
5 2004). Here, the FDIC's Rule 12(b)(1) motion is a facial attack because  
6 it "asserts that the allegations contained in a complaint are  
7 insufficient on their face to invoke federal jurisdiction." Id. Because  
8 a facial attack challenges jurisdiction based on what is alleged in the  
9 complaint, the factual allegations are assumed to be true, and all  
10 reasonable inferences capable of being drawn therefrom are drawn in  
11 favor of the non-movant. Wolfe v. Strankman, 392 F.3d 358, 362 (9th Cir.  
12 2004). However, "the tenet that a court must accept as true all of the  
13 allegations contained in a complaint is inapplicable to legal  
14 conclusions." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).

15 The FDIC argues because "Plaintiffs have not even alleged that  
16 they have complied with FIRREA by filing an administrative claim with  
17 [the] FDIC . . . Plaintiffs have not exhausted their administrative  
18 remedies," and Plaintiffs' claims against the FDIC must be dismissed  
19 "for lack of subject matter jurisdiction under Rule 12(b)(1)." (Mot.  
20 8:28, 9:1-5.)

21 Under FIRREA, judicial review is constrained as follows:

22 Except as otherwise provided in this subsection, no  
23 court shall have jurisdiction over--

24 (i) any claim or action for payment from, or any  
25 action seeking a determination of rights with  
26 respect to, the assets of any depository  
27 institution for which the Corporation has been

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27 <sup>1</sup>(...continued)  
28 not exhausted FIRREA's mandatory administrative claims process for the  
claims against the FDIC, the Rule 12(b)(6) and Rule 12(f) motions will  
not be addressed in this order.

1 appointed receiver, including assets which the  
2 Corporation may acquire from itself as such  
receiver; or

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

5 12 U.S.C. § 1821(d)(13)(D). FIRREA is "a comprehensive statutory scheme  
6 granting [the] FDIC authority to act as Receiver for failed financial  
7 institutions [and] creat[ing] a statutory procedure for the processing  
8 of claims against the FDIC." Ramos v. NDEX West, LLC, No. 09-0190, 2010  
9 WL 1675911, at \*2 (E.D. Cal. June 1, 2009) (citing 12 U.S.C. §§  
10 1821(d)(3)-(13)). "FIRREA's exhaustion requirement applies to any claim  
11 or action respecting the assets of a failed institution for which the  
12 FDIC is receiver." McCarthy v. FDIC, 348 F.3d 1075, 1081 (9th Cir. 2003)  
13 (emphasis in original).

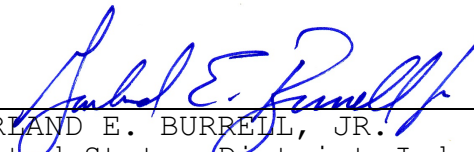
14 Plaintiffs allege that "[t]he Office of Thrift Supervision  
15 . . . closed Defendant [Washington Mutual] on September 25, 2009, and  
16 appointed the FDIC to act as receiver." (First Amended Complaint ("FAC")  
17 ¶ 7, ECF No. 3.) Plaintiffs allege eleven claims against the FDIC in the  
18 FAC. However, Plaintiffs do not allege in the FAC that they exhausted  
19 FIRREA's administrative remedies applicable to Plaintiffs' claims  
20 against the FDIC. Plaintiff's only reference in the FAC to the FIRREA  
21 administrative claims procedure is that "[o]n December 30, 2008,  
22 Defendant FDIC established the deadline for filing claims for  
23 [Washington Mutual's] liabilities." (FAC ¶ 39.) In addition, Plaintiffs  
24 do not indicate in their opposition to the FDIC's Rule 12(b)(1) motion  
25 that they have exhausted their claims against the FDIC under FIRREA.  
26 Instead, Plaintiffs argue FIRREA is not applicable and exhaustion is not  
27 necessary in this case because they are "challenging the direct actions  
28 of [Washington Mutual] in purportedly attempting to foreclose on their  
mortgage, and not the actions of FDIC as receiver[, and] . . . FDIC

1 stepped into [Washington Mutual's] shoes in acting beyond, or contrary  
2 to, its statutorily and contractually prescribed, constitutionally  
3 permitted, powers or functions." (Plaintiffs' Opposition to FDIC's  
4 Motion to Dismiss 6:17-23, ECF No. 17.)

5           However, "Plaintiffs' only basis for naming the FDIC as a  
6 Defendant is the fact that it is the receiver of [Washington Mutual], a  
7 failed bank that was party to Plaintiffs' loan agreement. As such,  
8 Plaintiffs' claims relate to any act or omission of an institution  
9 subject to FDIC receivership, triggering FIRREA's jurisdictional bar."  
10 Herrera v. Streamline Funding, Inc., No. 11-709, 2011 WL 2110813, at \*3  
11 (N.D. Cal. May 26, 2011) (finding "no support in the law" for the same  
12 arguments raised by Plaintiffs here).

13           Therefore, the FDIC's motion to dismiss for lack of  
14 jurisdiction is granted. This dismissal is without prejudice and  
15 Plaintiffs are granted five court (5) days leave from the date on which  
16 this order is filed to file an amended complaint for the limited purpose  
17 of alleging exhaustion of FIRREA's administrative claims procedure, if  
18 this occurred. If Plaintiffs do not amend their complaint as stated  
19 within this time period, this dismissal will be with prejudice and the  
20 Court will direct the Clerk of Court to enter judgment in favor of the  
21 FDIC, and to remand the case to the Superior Court of California in the  
22 County of Sacramento from which it was removed.

23 Dated: February 15, 2012

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GARLAND E. BURRELL, JR.  
United States District Judge