IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

Mary E. Glover, individually and on behalf of other similarly situated former and current homeowners in Pennsylvania, Plaintiffs, vs. **Washington Mutual Bank, F.A.**, **Washington Mutual Home Mortgage**, **Mark J. Udren, Udren Law Offices,** **P.C.**, and **Wells Fargo Home Mortgage**, Defendants	)))))))))))))))	 **No. #2:08-cv-00990-RCM**

PLAINTIFF GLOVER'S OBJECTIONS TO THE MAGISTRATE COURT'S MARCH 20, 2009 OPINION AND ORDER

AND NOW, comes Ms. Glover and, pursuant to Fed. R. Civ. P. 72, makes this her objections to the Magistrate Court's March 20, 2009 Opinion and Order granting the FDIC's (as receiver for Washington Mutual Bank ("WaMu")) second statutory stay request for up to 180 days. (Op. at 18). Ms. Glover also objects to the Magistrate Court's order which also granted a similar statutory stay to receiver FDIC that prevents her from proceeding on her claims against third parties Wells Fargo (the assignee of Ms. Glover's mortgage) and debt collectors for WaMu, Mark J. Udren and Udren Law Offices, P.C. (collectively "the Udren Defendants") (Op. at 18). None of the third parties are in any receivership and therefore, Ms. Glover's claims against them are not subject to the provisions of the Financial Institution Reform, Recovery and Enforcement Act ("FIRREA"), 12 U.S.C. § 1821(d)(3) *et seq*. Respectfully, the Magistrate Court's March 20,

2009 stay opinion and order (hereafter "Op. at ___") violates FIRREA for the reasons stated below.

Statements of the Five Overreaching Legal Issues

1. Did the Magistrate Court err when it held that the FDIC authorized the court to provide the receiver (the FDIC) an implied 180-day stay in a pre-receivership case?

    Comment: Some courts imply an 180-day stay in post-receivership cases from § 1821(d)(5)(A)(i) (relating to "Procedures for determination of claims"). This section provides:

    > **(5) Procedures for determination of claims**[1]
    >
    > **(A) Determination period**
    >
    > **(i) In general**
    >
    > Before the end of the 180 -day period beginning on the date any claim against a depository institution is filed with the Corporation as receiver, the Corporation shall determine whether to allow or disallow the claim and shall notify the claimant of any determination with respect to such claim.

Plaintiff filed her suit on June 9, 2008 (Op. at 1). The effect of her pre-receivership lawsuit is found in § 1821(d)(E)(ii), entitled "Legal effect of filing" which provides:

> **(ii) No prejudice to other actions**
>
> Subject to paragraph (12), the filing of a claim with the receiver shall not prejudice any right of the creditor to *continue* any action which was filed before the appointment of the receiver. (Emphasis added)

Only ninety day stays are governed by Paragraph 12 (§ 1821(d)(2)(A) and (B) relating to "Suspension of legal action"), which provides:

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[1] Please note here and throughout, that the titles used by Congress under FIRREA may be informative in determining congressional intent. *See Hudson United Bank v. Chase Manhattan Bank*, 43 F.3d 843, 849 n.16 (3rd Cir. 1994).

> **(12) Suspension of legal actions**
>
> **(A) In general**
>
> After the appointment of a conservator or receiver for an insured depository institution, the conservator or receiver may request a stay for a period not to exceed-
>
> * * *
>
> (ii) 90 days, in the case of any receiver, in any judicial action or proceeding to which such institution is or becomes a party.

Therefore, Plaintiff has a right, after the 90-day mandatory stay period, to continue her pre-receivership lawsuit (*i.e.*, "to continue [her] action") without prejudice. § 1821(d)(E)(ii).

2. Did the Magistrate Court err when it implied it had the statutory power to grant a 180-day stay under § 1821(d)(5)(A)(i) (relating to "Procedures for determination of claims)?[2]

Comment: As recognized by the Third Circuit in *Praxis Properties, Inc. v. Colonial Sav. Bank, S.L.A.*, 947 F.2d 49, 63 n.14 (3rd Cir. 1991), FIRREA (the so-called implied so-called 180-day stay provision) does not appear to provide for a second statutory stay, stating:

> We express no opinion on whether the 180-day administrative stay of pending proceedings is a proper interference from the statute, especially where the statutory provisions are in tension. (Emphasis added)

Comment: The congressional stay provision in FIRREA, § 1821(d)(12) (relating to "Suspension of legal actions") provides:

> **(12) Suspension of legal actions**
>
> **(A) In general**
>
> After the appointment of a conservator or receiver for an insured depository institution, the conservator or receiver may request a stay for a period not to exceed-
>
> * * *

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[2] Because of the paramount importance of the statutory language used by Congress, that language has been repeated in an effort to hopefully help the reader analyze the issue.

> (ii) 90 days, in the case of any receiver, in any judicial action or proceeding to which such institution is or becomes a party.

The congressional provision in § 1821(d)(5)(A) (relating to "Procedures for determination of claims") provides:

> **(5) Procedures for determination of claims**
>
> **(A) Determination period**
>
> **(i) In general**
>
> Before the end of the 180 -day period beginning on the date any claim against a depository institution is filed with the Corporation as receiver, the Corporation shall determine whether to allow or disallow the claim and shall notify the claimant of any determination with respect to such claim.

This provision, as evidenced by its significantly different statutory language used by Congress, does not provide for "implied stays" in pre-receivership cases.

Respectfully, before the suspension of the legal "Procedures of determination of claims" (§ 1821(d)(5)) is judicially expanded and morphs into a "Suspension of legal actions" § 1821(d)(12), there should be a careful analysis of the conflicting statutory provisions.

3. Did the Magistrate Court err when it stayed the claims against third parties (Wells Fargo, Mark J. Udren and Udren Law Offices, P.C.)?

The Third Circuit has held that FIRREA cannot be extended to anyone other than the failed institution and the receiver of the failed institution. *See Rosa v. Resolution Trust Company*, 938 F.2d 383 (3rd Cir. 1991). In *Rosa*, the Third Circuit held that the claims against City Savings (which was not in a receivership but a conservatorship) could proceed:

> [T]hose claims seek payment from the assets of City Savings, which, for our purposes, is not a depository institution for which RTC has been appointed receiver. Nor does clause (ii) bar these claims. This is so because we construe the 'relating' language of that clause to refer to

> claims against the very institution whose acts are challenged, which must be an institution for which RTC has been appointed receiver. Similarly, the claims against City Savings and its conservator do not relate to acts or omissions of RTC 'as receiver.'

Id. at 394.

The Third Circuit next addressed the claims against the RTC itself for its alleged mishandling of the failed institution and held that the suit against the receiver for its alleged wrongful receiver activities could also proceed, stating: "We agree with RTC that the language of the bar cannot be construed to reach claims asserted against RTC in its corporate capacity." *Rosa* and other cases (most notably *In re Lewis*, 398 F.3d 735, 740 (6th Cir. 2005) discussed *supra*), recognize that actions against third parties cannot be stayed under FIRREA.

4. Did the district court, after holding that the FDIC mailed notice to Plaintiff Glover violated the notice provision of the administrative claims process (Op. at 9, 11) err when it failed to correctly apply *Coit Independence Joint Venture v. Fidelity Savings and Loan Ins. Corp.*, 489 U.S. 561 (1989) to the facts of this case?

In *Coit*, the Supreme Court held with respect to an agency error embedded into the administrative claims process that:

> Because the Bank Board's regulations do not place a reasonable time limit on FSLIC's consideration of claims, Coit cannot be required to exhaust those procedures. Coit is thus entitled to proceed directly to court for a *de novo* determination on the merits of its state law claims.
>
> In sum, we conclude that Congress has not granted . . . <u>[C]reditors are not required to exhaust the current administrative claims procedure established by the Bank Board</u> because it places no reasonable time limit on FSLIC's consideration of creditor claims. Accordingly, the judgment below is reversed, and the case is remanded for further proceedings consistent with this opinion. (Emphasis added)

Id. at 587.

5. Did the district court err when it failed to follow the line of cases which deemed the pre-receivership lawsuit to constitute the requisite administrative claim and held and that a second and redundant proof of claim form was not required?

See the Fifth Circuit case of *Greater Slidell Auto Auction v. American Bank & Trust Co. Of Baton Rouge, LA*, 32 F.3d 939, 941 (5th Cir. 1994) where the court correctly held:

> We hold that where the receiver fails to give notice of any other claims procedure, it must consider any pending law suits in the administrative process or forego the administrative process and proceed with the law suit. The receiver was thus bound to proceed administratively based on the claim as set forth in the petition pending in the court action.

Id. at 941.

> The consequence of the receiver's failure to act upon the claim administratively is that the jurisdiction of the court continues over the Plaintiffs' action under § 1821(d)(6)(A) ("claimant may ... continue an action commenced before the appointment of the receiver' within 60 days of the expiration of the claims-determination period described in § 1821(d)(5)(A)(i)).

See also Whatley v. Resolution Trust Company, 32 F.3d 905 (5th Cir. 1994); *Damiano v. F.D.I.C.*, 104 F.3d 328 (11th Cir. 1997); and *F.D.I.C. v. Lacentra Trucking Co., 157* F.3d 1292, 1299-1306 (11th Cir. 1998).

The Three Legal Precepts That Are Relevant
<u>to an Understanding of the Stay Issues</u>

Three legal precepts must be recognized at the outset to avoid confusion. <u>First</u>, the Magistrate Court correctly held that the FDIC's individual mailed notice to Ms. Glover was "tardy" and violated the strict notice and mailing provisions of § 1821(d)(3)(<u>ii</u>) (Op. at 9, stating the FDIC violated "the time dictates of the statute . . ."). Those notice and mailing requirements provide:

> **(B) Notice requirements**
>
> The receiver, in any case involving the liquidation or winding up of the affairs of a closed depository institution, shall-
>
> (i) promptly publish a notice to the depository institution's creditors to present their claims, together with proof, to the receiver by a date specified in the notice which shall be not less than 90 days after the publication of such notice; and
>
> (ii) republish such notice approximately 1 month and 2 months, respectively, after the publication under clause (i).
>
> **(C) Mailing required**
>
> The receiver shall mail a notice similar to the notice published under subparagraph (B)(i) at the time of such publication to any creditor shown on the institution's books-
>
> (i) at the creditor's last address appearing in such books; or
>
> (ii) upon discovery of the name and address of a claimant not appearing on the institution's books within 30 days after the discovery of such name and address.

Second, this case involves a pre-receivership case filed by Ms. Glover on June 9, 2008 against WaMu and the third parties before the September 25, 2008 appointment of the receiver, FDIC. Op. at 1-2. This fact is important because in the Third Circuit it means that the subsequent appointment of the FDIC as receiver did not divest this Court of subject matter jurisdiction. *See Resolution Trust Corporation v. W.W. Development & Management, Inc.* ("*RTC*"), 73 F.3d 1298, 1307 (3rd Cir. 1996) where the Third Circuit stated:

> FIRREA, though allowing the RTC to remove state cases to a federal court, does not generally divest courts of jurisdiction in pre-receivership cases. This is clear from 12 U.S.C. § 1821(d)(5)(F)(ii), which provides, with an exception dealing with stays, that filing a claim with a receiver does not prejudice the right of a claimant to continue an action filed before the receiver's appointment. It necessarily follows from this section that the

> institution of a proceeding under FIRREA does not oust a court of the jurisdiction it otherwise would have over an action involving a thrift institution. Accordingly, in *Praxis Properties, Inc. v. Colonial Sav. Bank,* 947 F.2d 49, 63 n. 14 (3d Cir.1991), we explained that if an action is filed before a thrift is placed in receivership, jurisdiction over the matter is not lost by the subsequent insolvency of the thrift and takeover by the RTC. *Id.* (Emphasis added).

Third, FIRREA, as recognized by multiple courts including the Third Circuit, is an exceptionally confusing and complex statute. *See Hudson United Bank v. Chase Manhattan Bank*, 43 F.3d 843, 852 (3rd Cir. 1994) *quoting Marquis v. FDIC*, 965 F.2d 1148, 1151 (1st Cir. 1992) as follows:

> As one court lamented when faced with the task of interpreting § 1821(d): 'FIRREA's text comprises an almost impenetrable thicket.... [C]onfusion over its proper interpretation is not only unsurprising-it is inevitable.' *Marquis v. FDIC,* 965 F.2d 1148, 1151 (1st Cir.1992)

Understandably, the district courts and appellate courts are conflicted. Great care must therefore be taken to follow the law of the Third Circuit, when available, and not that of other courts.

Specific Objections

1. As to notice provision § 1821(d)(3)(ii), the Magistrate Court held that the FDIC's notice to Ms. Glover was "beyond the publication date" was therefore "tardy" and violated the "time dictates of the statute." (Op. at 11). Respectfully, the Magistrate Court erred when it also held however that the record evidence did not support a violation of the notice provisions of § 1821(d)(3)(i):

> There is no evidence currently before the court as to whether Glover is listed on WMB's books as a creditor, thus, the proposition that notice was defective under §1821(d)(3)(C)(i) will not be entertained.

Op. at 7. Plaintiff Glover objects to this ruling. A pre-receivership lawsuit constitutes such notice. *See, e.g., Greater Slidell Auto Auction, Inc. v. American Bank & Trust Co. of Baton Rouge, LA*, 32 F.3d 939, 941 (5th Cir. 1994) and *F.D.I.C. v. Lacentra Trucking, Inc.* ("*Lacentra*"), 157 F.3d 1292, 1299-1306 (11th Cir. 1998). In *Lacentra*, the Fifth Circuit held:

> Thus, the RTC must satisfy two conditions to require the plaintiff in a pre-receivership lawsuit to exhaust its administrative remedies before continuing the action:: (1) *The RTC must 'insist on the use of its administrative processes,' by staying the action and informing the plaintiff that it is doing so pending exhaustion of the administrative remedies,* and (2) it must do so in a timely fashion, that is, within the ninety-day period specified in § 1821(d)(12). (Footnote omitted). (Emphasis added).

Id. at 1303, *quoting Damiano v. FDIC*, 104 F.3d 328, 335 (5th Cir. 1997)

2. Respectfully, in pre-receivership proceedings like this one, the court is prohibited from granting a second stay beyond the first mandatory 90-day stay. *See* § 1821(d)(5)(F)(ii).

> **(ii) no prejudice to other actions**
>
> Subject to paragraph (12), the filing of a claim with the receiver shall not prejudice any right of the claimant to continue any action which was filed before the appointment of the receiver.

Paragraph 12 of FIRREA (as referenced in the quote above) provides:

> **(12) Suspension of legal actions**
>
> **(A) In general**
>
> After the appointment of a conservator or receiver for an insured depository institution, the conservator or receiver may request a stay for a period not to exceed-
>
> * * *
>
> (ii) 90 days, in the case of any receiver, in any judicial action or proceeding to which such institution is or becomes a party.

> **(B) Grant of stay by all courts required**
>
> Upon receipt of a request by any conservator or receiver pursuant to subparagraph (A) for a stay of any judicial action or proceeding in any court with jurisdiction of such action or proceeding, the court shall grant such stay as to all parties. (Emphasis added).

See § 1821(d)(12). *See also Praxis Properties, Inc. v. Colonial Sav. Bank, S.L.A. v. Dynamic Industries Company, Inc.*, 947 F.2d 49, 63 n.14 (3rd Cir. 1991) suggesting that the relevant congressional language should be interpreted as written. Here, the Third Circuit pre-receivership law should have been followed.

3. Respectfully, the Magistrate Court, in its March 20, 2009 stay opinion, relied on caselaw that was rejected by many appellate courts. For example, the Magistrate Court erred when it relied on the line of cases represented by *Intercontinental Travel Marketing v. F.D.I.C.*, 145 F.3d 1278 (9th Cir. 1994). *See* Op. at 7, 15. Most recent Court of Appeals opinions have recognized that *International* was erroneously decided. *See, e.g., Lacentra, supra*, 157 F.3d at 1303 ("In our view [*Intercontinental*] it is not persuasive authority") and in *In re Lewis*, 398 F.3d 735 (6th Cir. 2005) where the court, after citing the earlier *Intercontinental* case line, stated "[W]e disagree with this [the *Intercontinental* court's] reasoning." *Id.* at 745. *See also Coast-to-Coast Financial Corporation v. U.S.*, 51 Fed.Cl. 358, 361-62 (Fed. Cl. 2002) (same). Each of these appellate courts provided a succinct analysis as to why *Intercontinental* had been wrongly decided. Here, the Magistrate Court provided no analysis of why it believed *Intercontinental* was correct, despite multiple courts of appeals which held the exact opposite.

4. For a somewhat similar example, the Magistrate Court heavily relied on the 1987 Supreme Court case of *Brock v. Pierce County*, 476 U.S. 253 (1986), a case also relied upon by

the disfavored *Intercontinental* court. *See* Op. at 7-8. In *Brock*, the Supreme Court recognized that "Every failure of an agency to observe a procedural requirement does not void subsequent agency action, especially when important public rights are at stake." Op. at 8. *A fortiori*, this means that some agency failures when important public rights are at stake do prevent subsequent agency actions. In *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561 (1989), the Supreme Court recognized that one important public right is the claimant's right to a time-limited administrative claims process.

5. *See Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561 (1989) (discussed at Op. at 10) where the Supreme Court recognized:

> [T]he regulations do not place a clear and reasonable time limit on FSLIC's consideration of whether to pay, settle, or disallow claims. Under the current regulations, FSLIC must allow, disallow, or retain a claim 'for further review' within six months after the filing of the claim or after the end of the 90-day notice period, 53 Fed.Reg. 43855 (1988), but no time limit is established for FSLIC's consideration of those claims retained for further review. Thus, as Coit so aptly puts it: 'These procedures give FSLIC virtually unlimited discretion to bury large claims like Coit's in the administrative process, and to stay judicial proceedings for an unconscionably long period of time given FSLIC's purportedly limited objectives of centralizing the claims process and deciding whether claims should be paid or not.' Reply Brief for Petitioner 18. (Emphasis added).

Id. at 586. Here, the administrative claims process under the FDIC's so-called "internal mailing policy" (Op. at 9, 11) is open-ended at the beginning of the process, which results in an administrative claims process where the end date can be unreasonably extended at the unfettered discretion, on an *ad hoc* basis, of the FDIC like in *Coit*.

6. Respectfully, the relief mandated by the Supreme Court in *Coit* should have been the relief granted here. *See Coit*, holding:

> Because the Bank Board's regulations do not place a reasonable time limit on FSLIC's consideration of claims, Coit cannot be required to exhaust those procedures. <u>Coit is thus entitled to proceed directly to court for a *de novo* determination on the merits of its state law claims</u>.
>
> * * *
>
> [C]reditors are not required to exhaust the current administrative claims procedure established by the Bank Board because it places no reasonable time limit on FSLIC's consideration of creditor claims. . . . (Emphasis added).

Id. at 587. Here, the FDIC, in accordance with FIRREA, correctly determined the start claims bar date of December 30, 2008 (Op. at 4) which required it to mail an individual mailed notice by November 30, 2008. *Id.* As a matter of law, any subsequent FDIC mailing delay – which, as here violated FIRREA – was not only "unreasonable," but illegal. Respectfully, the FDIC's "tardy" mailing (Op. at 9) which violated the "time dictates of the statute" (Op. at 11) triggered the right to the *Coit*-mandated remedy to proceed directly in court. Respectfully, an understanding of these differences would have (and should have) resulted in the denial of the FDIC's stay request.

7. The Magistrate Court defined the FDIC's purported "internal mailing policy" (Op. at 11) as follows:

> In instances where the letter notice was not provided to a creditor thirty days before the claims bar date, the FDIC's policy is to afford creditors ninety days from the notice date of the letter to submit a claim through the administrative claims process. Decl. of David Swiss 5.

See Op. at 5. FDIC Attorney Swiss, in his declaration, defined the FDIC's "internal mailing policy" quite differently. Attorney Swiss stated:

> In some cases, <u>individuals shown on WMB's books</u> may not have been mailed notice of the claims process until after November 30, 2008. Pursuant to FDIC-Receiver's policy, if a notice letter is provided to a creditor less than 30 days prior to the claims bar date. then the creditor is

> given 90 days from the date of the notice letter to submit a claim in the administrative claims process. (Emphasis added).

See the Declaration of Evelyn M. Dishman,. Esq., dated January 22, 2009, Para. 6, that referenced an attached declaration of David Swiss. Esq., dated January 6, 2009.

8. The FDIC, under FIRREA, however, is authorized only to send belated mailed notices to individuals not on WaMu's books. *See* § 1821(d)(3)(C)(ii):

> **(C) Mailing required**
>
> The receiver shall mail a notice similar to the notice published under subparagraph (B)(i) at the time of such publication to any creditor shown on the institution's books-
>
> (i) at the creditor's last address appearing in such books; or
>
> (ii) upon discovery of the name and address of a claimant not appearing on the institution's books within 30 days after the discovery of such name and address.

9. The FDIC violated § 1821(d)(3)(C)(ii) provision in two ways: First, as evidenced by Ms. Glover's pre-receivership lawsuit, she was on WaMu's books at all relevant times and, as a result of the appointment of the FDIC on September 25, 2008, it had notice of her claim.

10. Second, the FDIC, as held by the Magistrate Court, failed to comply with the "30 day" time provision of § 1821(d)(3)(C)(ii) and provided a "tardy" mailing (Op. at 9) that violated "the time dictates of the statute." Op. at 11.

11. Respectfully, the Magistrate Court failed to correctly interpret the FIRREA House Report that it relied upon. Op. at 10-11. The House Report stated:

> [FIRREA's] construct of administrative resolution and de novo judicial determination is responsive to the constitutional and statutory concerns with the FSLIC's current claims adjudication process as outlined by the Supreme Court in Coit . . . . The Committee believes it has provided a

> clear set of guidelines for claimants and for the FDIC with reasonable and specific time limits.
>
> H.R. No. 101-54(I), at 418-19, 1989 U.S.C.C.A.N. 86.

Op. at 10-11. From this House Report, the Magistrate Court concluded:

> While it is apparent that Congress intended FIRREA to provide an adequate administrative adjudicative process for claims against failed institutions it remains whether the FDIC's internal mailing policy for later-discovered creditors comports with the statute's goal."

Op. at 11.

12. The House Report does not address the issue second 180-day stay here, which is whether the FDIC's purported "internal mailing policy" (adopted after the passage of the Act) can be used as a basis to issue a second stay (*i.e*, the 180-day stay) in a pre-receivership case.

13. The House Report, however, does stand for the following points:

- It states Congress amended FIRREA in order to prevent agencies from adopting open-ended administrative exhaustion of claims processes like those prohibited by the Supreme Court in *Coit*. In *Coit*, the receiver adopted a regulation that could have had the affect of delaying the end of the administrative claims process for an unreasonable period of time. Under the FDIC's "internal mailing policy," the FDIC determines the end date of its administrative claims process on an *ad hoc* discretionary basis at the outset of the proceeding when it fails to send the required individual notice to a known claimant. If FIRREA, as stated by the House Report, solved the *Coit* administrative claims bar problem, then there would be no need for the FDIC, through its "internal mailing policy" to, post-act, resolve this problem for a second time.

- The Report states FIRREA presented "a clear set of guidelines for claimants." In contrast, the Magistrate Court seems to have concluded that FIRREA did not provide a clear set

of guidelines, and went on to allow the FDIC discretionary powers to deviate from the claims mailing notice mandated by Congress.

- The Report states that Congress had established "specific time limits" from when the FDIC initially determines to publish its first notice, to the end of the claims process were strictly regulated by set time constraints. In contrast, the Magistrate Court seems to have concluded that the FDIC, through its "internal mailing policy," could unreasonably (or illegally) enlarge the start date of the claims process on an *ad hoc* basis and thereby unreasonably enlarge the end date of the administrative claims process. Respectfully, the FDIC could not.[3]

14. Respectfully, the Magistrate Court in its opinion overlooked the vast difference between "creditors" and "debtors" like Ms. Glover. Significantly, the FIRREA notice provisions do not mandate any published or individual notice to debtors but only to creditors. The three FDIC publication notices here only provided:

> **TO THE <u>CREDITORS</u> OF THE FAILED INSTITUTION**
>
> All <u>creditors</u> having claims against the Failed Institution must submit their claims in writing, together with proof of the claims, to the Receiver by <u>December 30, 2008</u> (the "Bar Date") . . .
>
> <u>Under federal law, with certain limited exceptions, failure to file such claims by the Bar Date will result in disallowance by the receiver</u>, the disallowance will be final, and further rights or remedies with regard to the

[3] Plaintiff Glover needs to highlight precisely what she is arguing as well as what she is not. Plaintiff Glover is only arguing that the FDIC's "internal mailing policy" <u>as applied</u> to justify the FDIC's second stay request of up to 180 days was illegal. Other applications of this policy may (or may not) be legal. As recognized by the Third Circuit in *National Union Fire Insurance Company*, 28 F.3d 376, 392 n.22 (3rd Cir. 1994), "Courts routinely declare particular applications of a statute inconsistent while leaving the statute intact." Here, too, Plaintiff Glover's argument is a narrow one and it is only that the FDIC's application of its "internal mailing policy" to obtain a second 180-day stay is illegal or, as explained below, unconstitutional.

> claims will be barred. 12 U.S.C. Section 1821(d)(5)(C), (d)(6).
> (Emphasis added).

See the Declaration of Evelyn M. Dishman, Esq.., Para. 6, dated January 22, 2009, and the attached declaration of David Swiss. Esq., dated January 6, 2009 that included copies of the three published FDIC notices quoted above. Therefore, the FDIC failed to provide published notice to debtor homeowners like Ms. Glover that would have timely advised her of *inter alia*, the December 30, 2008 FIRREA claims bar date. Such a notice would have had to have been sent by the FDIC to Ms. Glover on or before November 30, 2008. (Op. at 4).[4]

15. Respectfully, the Magistrate Court's holding that the FDIC's "internal mailing policy" (Op. at 11) could toll the "claims bar date" (a date fixed by statute once the FDIC determines the first publication date) is inconsistent with the Act. *See F.D.I.C. v. Lacentra Trucking, Inc.*, 157 F.3d 1292, 1299-1306 (11th Cir. 1998) where the Eleventh Circuit, after squarely rejecting the earlier view expressed in *Intercontinental*, *supra* (and the views of the FDIC), quoted its earlier opinion in *Damiano v. F.D.I.C.*, 104 F.3d 328, 335 (11th Cir. 1997) with respect to the Act's exhaustion of administrative claims process, which held:

> Thus, the RTC must satisfy two conditions to require the plaintiff in a pre-receivership lawsuit to exhaust its administrative remedies before continuing the action: (1) *The RTC must 'insist on the use of its administrative processes,' by staying the action and informing the plaintiff that it is doing so pending exhaustion of the administrative remedies*, and

[4] A homeowner/ mortgagee is a debtor, not a creditor. Published notice was not designed to notify WaMu homeowners that the FDIC's claims bar date was December 30, 2008. Thus, the pre-receivership lawsuit itself is often deemed (and respectfully must be deemed) the requisite administrative claim notice. *See Greater Slidell Auto Auction, Inc. v. American Bank & Trust Co. Of Baton Rouge, LA.*, 32 F.3d 939, 941 (5th Cir. 1994) and *F.D.I.C. v. Lacentra Trucking, Inc.*, 157 F.3d 1292 (11th Cir. 1998). A second, redundant notice after the FDIC's appointment, is therefore not required.

> (2) it must do so in a timely fashion, that is, within the ninety-day period specified in § 1821(d)(12). (Footnote omitted). (Emphasis in original).

Likewise, in order to require a claimant to resort to the administrative claims process, the FDIC must notice the claimant "in a timely fashion" of the statutorily-required claims bar date, as held by the Magistrate Court. Here, the FDIC did not. Op. at 9, 11.

16. Given the reasoning adopted by the Magistrate Court, respectfully, the Magistrate Court should have considered whether, under Third Circuit caselaw, the FDIC's "internal mailing policy" as applied here (to obtain a 180-day (second) stay of pre-receivership litigation) is unconstitutional. *See, e.g.*, *National Union Fire Insurance Co. v. City Savings Bank, F.S.B.*, 28 F.3d 376, 389-90 n.16, 393 n.22 (3rd Cir. 1994) and *Hudson United Bank v. Chase Manhattan Bank*, 43 F.3d 843, 852 (3rd Cir. 1994), all suggesting that such a policy would be unconstitutional where it would significantly delay (or prevent) the pre-receivership litigation. *Cf. Com., Dept. of Environmental Protection v. F.D.I.C.*, 1997 WL 634495 *7 (E. D. Pa. 1997). Thus, in cases quite similar to this, the plaintiffs were allowed to continue with their pre-receivership lawsuit in court. *See also* the "as applied" jurisdictional holdings in *Hudson United Bank v. FDIC*, 43 F.3d 843 (3rd Cir. 1994) recognizing that "In the present case, § 1821(d) will not apply to bar judicial review because of untimely filing for administrative review." *Id.* at 851. (Emphasis added). *See also Greater Slidell Auto Auction v. American Bank & Trust Co. Of Baton Rouge, LA*, 32 F.3d 939 (5th Cir. 1974) and *F.D.I.C. v. Lacentra Trucking, Inc.*, 157 F.3d 1292, 1299-1306 (11th Cir. 1998).

The Magistrate Court's Stay Order As to Third Parties Wells Fargo and the Udren Defendants Should Be Vacated

17. The focus of these objections here and to the signature page change from the stay the Magistrate Court granted the FDIC as receiver to the stay the Magistrate Court granted the FDIC with respect to Plaintiff's third party claims against Wells Fargo, Mark Udren and Udren Law Offices, P.C. The Magistrate Court granted that stay in part to insure a proper use of judicial resources (Op. at 18). Respectfully, only Congress under FIRREA, not the courts, in the first instance, must determine whether or not such a second stay – the 180-day stay – is authorized based on a careful analysis of the congressional language found in FIRREA.

18. Notably, in *Hudson United Bank v. Chase Manhattan Bank*, 43 F.3d 843 (3rd Cir. 1994), the Third Circuit interpreted *Rosa v. Resolution Trust Corp.*, 938 F.2d 383 (3rd Cir.) *cert. denied,* 502 U.S. 981 (1991) as follows:

> This structure made us confident in *Rosa* that the failure to mention claims against the receiver in the first part was not just careless drafting. Where Congress took care in part (ii) to include claims relating to the receiver as well as the depository institution, we could assume that Congress intended in part (i) to include only claims against the institution and to exclude those against the receiver. Section 1821(d)(6)(A), however, contains no analogous divisions, and thus the import of the language is not as clear as it was for us in *Rosa.* Hudson's argument that we should read § 1821(d)(6)(A) literally, as we did § 1821(d)(13)(D), fails because of the difference in structure of the two subparagraphs.

See Hudson, at n.10. Respectfully, here, too, the same statutory comparison should have been made which would have also demonstrated that the only stay provision that explicitly extends to third parties is the mandatory 90-day stay provision in § 1821(d)(E) because it refers to "third

parties") and/ or because the administrative claims process will not resolve any of the statutory third party claims addressed here[5]

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[5] The express mandatory 90-day stay provision in § 1821(d)(E)(12)(ii) (which does authorize a third party stay) provides:

> **(12) Suspension of legal actions**
>
> **(A) In general**
>
> After the appointment of a conservator or receiver for an insured depository institution, the conservator or receiver may request a stay for a period not to exceed–
>
> (i) 45 days, in the case of any conservator; and
>
> (ii) 90 days in the case of any receiver, in any judicial action or proceeding to which such institution is or becomes a party.
>
> **(B) Grant of stay by all courts required**
>
> Upon receipt of a request by any conservator or receiver pursuant to subparagraph (A) for a stay of any judicial action or proceeding in any court with jurisdiction of such action or proceeding, the court shall <u>grant such stay as to all parties</u>. (Emphasis added).

The implied 180-day stay provision, however, does not extend to third parties, but is restricted, as evidenced in part by the omitted phrase "stay as to all parties." *See* § 1821(d)(5)(A), which only refers to the failed institution and the receiver, and provides:

> **(5) Procedures for determination of claims**
>
> **(A) Determination period**
>
> **(i) In general**
>
> Before the end of the 180 –day period beginning on the date any claim against a depository institution is filed with the Corporation as receiver, the Corporation shall determine whether to allow or disallow the claim and shall notify the claimant of any determination with respect to such claim.

19. The *Rosa, supra*, court went on to hold, "Whatever FIRREA's breadth, we do not believe [§ 1821(d)(13)(D)(ii) which refers to 'any claim relating to any act or omission of such institution or the corporation as receiver'] encompasses claims that are not susceptible of resolution through the claims procedure." *Id.* The same should have been held here. Respectfully, Plaintiff's claims against Wells Fargo and the Udren Defendants are not "susceptible of resolution through the claims procedure."

20. Respectfully, the caselaw relied on by the Magistrate Court (Op. at 17-19) does not support its third party stay legal conclusions. The first two appellate cases relied upon by the Magistrate Court do not address third party stays at all. Instead, they address the statutory powers of the court to stay claims asserted against the failed institution if and when the stay is requested by the receiver. *See Carney v. Resolution Trust Company*, 19 F.3d 950 (5th Cir. 1994) and *Brady Development Company v. RTC*, 14 F.3d 998 (4th Cir. 1994). (Op. at 17-18). One of the district court cases relied upon address a claim <u>filed by the receiver</u> (*i.e.*, not a third party claim as here). The court in *International Fidelity Insurance Company v. Yorkville Federal Savings and Loan Association*, 1990 WL 165720 (S.D.N.Y. 1990), granted the receiver's stay request based on reasons unique to the receiver and totally inapplicable here.

21. In the fourth case relied upon by the Magistrate Court, the court used its "discretionary" (not statutory) stay power after it carefully analyzed the claims against the failed institution and the receiver because it concluded that the claims against the failed institution and the third parties almost completely overlapped. *See Gumowitz v. First Federal Savings and Loan*

Association of Roanoke, 1991 WL 84630 (S.D.N.Y. 1991). No such or similar analysis was conducted here.[6]

22. A federal court must take great care not to enter any statutory stay order (unless authorized by Congress), and here, such a statutory stay was expressly prohibited. *See* FIRREA, 12 U.S.C. § 1821(j) which provides:

> <u>Except as provided in this section</u>, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the Corporation as a conservatory or a receiver. (Emphasis added).

23. Respectfully, the Magistrate Court adopted an overly broad interpretation of FIRREA with respect to whether to grant the implied 180-day stay to prevent claims from proceeding against third parties. *Contrast* in *In re Lewis,* 398 F.3d 735, 740 (6th Cir. 2005) where a similar FDIC position was rejected by the *Lewis* court.

> In this case, there is no evidence that the FDIC has sought to exercise any of its powers vis-a-vis the debtor's property. On this record, therefore, we cannot say that the bankruptcy court's avoidance of Superior Bank's mortgage pursuant to the Bankruptcy Code restrained or affected the FDIC's exercise of its powers or functions as Superior Bank's receiver in contravention of § 1821(j). (Emphasis added).

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[6] Plaintiff does not address whether the court, in an appropriate case, may exercise its inherent power to grant a stay "for cause." *See Landis v. North American Co.*, 299 U.S. 248 (1936). Plaintiff does not advance this argument because it was not raised by the FDIC or considered by the Magistrate Court. Nor did the FDIC provide the requisite factual record to support an inherent power stay. Respectfully, such an inherent power under FIRREA would violate fundamental canons of statutory construction under the *ejusdem generis* doctrine of statutory construction. *See Andrews v. Glover Const. Co.*, 446 U.S. 608 (1980)(discussing the interpretive statutory canon *expressio unius est exclusio* that, when a legislative body explicitly enumerates certain things, additional, similar or identical ones should not be implied). *See also Philadelphia & Reading Corp. v. United States*, 944 F.2d 1063, 1073 (3rd Cir. 1991).

Id. at 740. Note that the debtor's property with respect to the third parties is her cause of action against the third parties. The FDIC, as receiver, has no power to exercise, with respect to those third party assets. *Cf.* the Magistrate Court's opinion *quoting Cohen v. FTC*, 784 F. Supp. 197 (E.D. Pa. 1992) (Op. at 13) where that court referred to "the factual similarity between the matter pending in the court and the claim presented to the agency." Op. at 13. Respectfully, the Magistrate Court erred when it failed to consider the "factual similarity" between the claims asserted against WaMu through receiver FDIC and the third party debt collection claims against the Udren debt collector Defendants or Wells Fargo.

Respectfully, this Court Should Follow the *Greater Slidell* Line of Cases

In *Coit Independence Joint Venture v. Federal Savings and Loan Ins. Corp.*, 489 U.S. 561, 585 (1989), the Supreme Court held:

> In cases where suit has already been filed against a savings and loan association before FSLIC is appointed receiver, FSLIC will receive notice of those claims when it steps into the shoes of the failed [institution] and takes control of its assets.

Thus, the FDIC had notice of Ms. Glover's claims against WaMu as of September 25. 2008, the date it stepped into WaMu's shoes as a result of this lawsuit. It should have notified Ms. Glover in a timely manner (on or before November 30, 2008) (Op. at 4) if it wanted her to file a second redundant claim form. Instead, it elected to litigate.

The Fifth Circuit in *Greater Slidell Auto Auction v. American Bank & Trust Co. Of Baton Rouge, LA*, 32 F.3d 939, 941 (5th Cir. 1994) faced a virtually identical situation and correctly held:

> We hold that where the receiver fails to give notice of any other claims procedure, it must consider any pending law suits in the administrative

> process or forego the administrative process and proceed with the law suit. The receiver was thus bound to proceed administratively based on the claim as set forth in the petition pending in the court action. *Id.*

Id. at 941.

> The consequence of the receiver's failure to act upon the claim administratively is that the jurisdiction of the court continues over the Plaintiffs' action under § 1821(d)(6)(A) ("claimant may ... continue an action commenced before the appointment of the receiver' within 60 days of the expiration of the claims-determination period described in § 1821(d)(5)(A)(i)).

24. Respectfully, that is the same holding the Magistrate Court should have reached here after the expiration of the 90-day mandatory stay, *i.e.*, Ms. Glover should have been allowed to continue with her lawsuit. The "no notice" in *Slidell*, *supra*, was no different than the "no notice" or no timely notice of the claims bar date here.

<u>Conclusion</u>

Pursuant to Fed. R. Civ. P. 72, Plaintiff Glover has set forth her objections to the Magistrate Court's March 20, 2009 stay opinion and order. Respectfully, that order should be vacated with respect to the FDIC as receiver and with respect to third parties Wells Fargo and the Udren Defendants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of April 2009, a true and correct copy of the foregoing ***Plaintiff Glover's Objections to the Magistrate Court's March 20, 2009 Opinion and Order*** was served upon the following via e-mail and U.S. Mail:

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