IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

SPIEGEL HOLDINGS, INC., a Delaware corporation, Plaintiff, v. The OFFICE OF THE COMPTROLLER OF THE CURRENCY OF THE UNITED STATES, an agency of the United States; JOHN D. HAWKE, JR., COMPTROLLER OF THE CURRENCY; FEDERAL DEPOSIT INSURANCE CORPORATION, a corporation organized under the laws of the United States; DEUTSCHE BANK AG NEW YORK BRANCH, a German banking corporation; and FIRST CONSUMERS NATIONAL BANK, a national bank, Defendants.	Civil No. 03-335-KI OPINION

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KING, Judge:

Plaintiff Spiegel Holdings, Inc. ("SHI") brings this action seeking declaratory and injunctive relief concerning a $78 M letter of credit ("LOC") it obtained for the benefit of First Consumers National Bank ("FCNB"), as required by the Office of the Comptroller of the Currency of the United States ("OCC"). I held an argument concerning Defendants' Motion for a Protective Order (#15) during which the OCC raised the issue of this court's jurisdiction. Although the immediate motion concerned staying discovery as to the OCC, it became clear during argument that the jurisdictional issue needed to be resolved before the case could proceed to a preliminary injunction hearing. I asked the parties to file supplemental briefing. The OCC filed a Motion to Dismiss the OCC and John D. Hawke, Jr., under Fed. R. Civ. P. 12(b)(1) for Lack of Subject Matter Jurisdiction pursuant to 12 U.S.C. § 1818(i)(1) (#18). For the reasons below, I grant the motion and dismiss the Complaint.

ALLEGED FACTS

SHI owns all voting stock of Spiegel, Inc. FCNB is a wholly-owned subsidiary of Spiegel, Inc. FCNB issued credit cards and purchased credit card receivables based on the charges. It secured the receivables by selling the right to receive payments from the credit card holders who owe purchase amounts and financing fees.

Pursuant to a Consent Order, the OCC required that a $78 M LOC be issued for the benefit of FCNB as a condition of its continuing to act as a national bank. SHI obtained the LOC from Deutsche Bank on May 14, 2002. SHI alleges that the OCC's motive in requiring the LOC was to provide a source of funding if it became necessary for the purchase of credit card receivables based on charges on the credit cards. The OCC was concerned that if the credit cards were terminated, FCNB would be liable for receivables for which it might not otherwise be able to pay. The LOC could then be used to pay those obligations.

On March 12, 2003, FCNB drew over $14 M under the LOC.

In its Complaint, SHI asks for an injunction prohibiting the OCC, or the FDIC if it is appointed receiver or conservator of FCNB, from requesting or ordering FCNB to make any further draws on the LOC and enjoining Deutsche Bank from honoring any draws on the LOC. Based on discussions between the parties after this litigation began, SHI now realizes that there can be legitimate draws on the LOC due to trailing receivables, as one example. SHI is concerned, however, that FCNB will make a draw that is either fraudulent or in violation of the terms of the LOC.

DISCUSSION

The OCC contends that this court lacks subject matter jurisdiction to compel the OCC to act in a particular manner regarding its enforcement of the Consent Order and supervision of FCNB. The OCC relies on a provision in the Financial Institutions Supervisory Act of 1966 ("FISA"), 12. U.S.C. § 1818 et seq.:

> The appropriate Federal banking agency may in its discretion apply to the United States district court . . . for the enforcement of any effective and outstanding notice or order issued . . . and such courts shall have

> jurisdiction and power to order and require compliance herewith; but . . . no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under any such section, or to review, modify, suspend, terminate, or set aside any such notice or order.

12 U.S.C. § 1818(i)(1). The OCC contends that the relief SHI seeks would cause this court to affect the enforcement of the Consent Order, which is prohibited by the FISA.

"To prevent regulated parties from interfering with the comprehensive powers of the federal banking regulatory agencies, Congress severely limited the jurisdiction of courts to review ongoing administrative proceedings brought by banking agencies." Ridder v. Office of Thrift Supervision, 146 F.3d 1035, 1039 (D.C. Cir. 1998), cert. denied, 526 U.S. 1004 (1999). The FISA establishes a "tripartite regime of judicial review": (1) a bank holding company may seek an injunction in district court restraining enforcement of a temporary order pending completion of the related administrative proceeding; (2) an aggrieved party may apply for a court of appeals review of final orders of a federal banking agency; and (3) the federal banking agency may apply to a district court for enforcement of any effective and outstanding notice or order. Id. None of the specified areas for judicial review apply to the situation before me.

Courts have applied § 1818(i)(1) in many types of situations. See Ridder v. Office of Thrift Supervision, 146 F.3d 1035 (D.C. Cir. 1998) (case brought by former bank officers to enjoin enforcement of temporary cease and desist order which prevented bank holding company from paying the officers' legal expenses dismissed for lack of jurisdiction), cert. denied, 526 U.S. 1004 (1999); Henry v. Office of Thrift Supervision, 43 F.3d 507 (10th Cir. 1994) (case brought by a savings and loan association's former director to rescind two stipulation and consent agreements she made with the Office of Thrift Supervision was dismissed for lack of jurisdiction).

The Supreme Court relied on the "plain, preclusive language" contained in § 1818(i)(1) in holding that the section barred judicial review of administrative actions pending before the Board of Governors of the Federal Reserve System ("Board"). Board of Governors v. MCorp Financial, 502 U.S. 32, 112 S. Ct. 459 (1991). MCorp, a bank

1 holding company, filed a voluntary bankruptcy petition and initiated an adversary
2 proceeding against the Board to enjoin the prosecution of two ongoing, nonfinal
3 administrative proceedings against it. The Court concluded that § 1818(i)(1) was not
4 qualified or superseded by the general provisions in the Bankruptcy Code, including the
5 automatic stay provision. Id. at 39-42.

6 The Court also concluded that the exception for judicial review carved out in
7 Leedom v. Kyne, 358 U.S. 184, 79 S. Ct. 180 (1958), for the National Labor Relations Act
8 ("NLRA"), does not apply to § 1818(i)(1). The NLRA authorizes judicial review for other
9 situations but does not expressly authorize judicial review for the situation at issue in
10 Kyne. The Kyne Court held that there could be judicial review under the NLRA because
11 the National Labor Relations Board's decision was in direct conflict with the NLRA.
12 MCorp distinguished Kyne in two ways. First, the union in Kyne had no way to vindicate
13 its statutory rights while MCorp could request appellate review under the FISA if the Board
14 concluded that the company violated the regulation. Second, the clarity of the
15 congressional preclusion of review in the FISA indicated that Congress had spoken clearly
16 and directly to preclude jurisdiction. The Court compared this clarity to the NLRA's
17 provision for judicial review in other situations but its silence about judicial review for the
18 contested determination. Id. at 42-44.

19 > Viewed in this way, Kyne stands for the familiar proposition that only upon a showing of clear and convincing evidence of a contrary
20 > legislative intent should the courts restrict access to judicial review. As we have explained, however, in this case the statute [§ 1818(i)(1)] provides us
21 > with clear and convincing evidence that Congress intended to deny the District Court jurisdiction to review and enjoin the Board's ongoing
22 > administrative proceedings.

23 Id. at 44 (internal quotation and citation omitted).

24 SHI contends that § 1818(i)(1) does not apply because it is not contesting the
25 validity of the Consent Order. Instead, it claims to be asking the Court to resolve the
26 parties' rights regarding the LOC and to determine whether proposed draws against the
27 LOC are covered under the contract terms. SHI argues that the Consent Order did not set
28 conditions for drawing on the LOC but only required that the LOC be established to ensure

performance by Spiegel, Inc. affiliates to purchase receivables from FCNB.

SHI also contends that the OCC is acting outside its authority in directing the FCNB to take draws for expenses not intended to be covered by the LOC. SHI distinguishes MCorp by contending that SHI has no meaningful and adequate opportunity to contest unwarranted draws on the LOC because it is likely that FCNB will be insolvent. Further, SHI argues that a judicial declaration as to the meaning of the LOC does not affect enforcement of the Consent Order. SHI points to "term sheets" that it received in discovery which set forth terms required by the OCC that were instrumental in the wording of the LOC and its draw certificate. SHI claims that the OCC reviewed the drafted language, proposed changes, and asked for clarification of the language.

There is no dispute that the OCC was within its statutory authority to enter into the Consent Order requiring a LOC acceptable to the OCC. I also agree with SHI that the court can interpret the terms of a contract, including one in the form of a letter of credit. Under the terms of the LOC, however, FCNB, and not the OCC, makes the draws against the LOC. This is the case even if FCNB makes a draw that is in violation of the LOC and even if FCNB makes that draw under pressure from the OCC. If an improper draw is made, SHI has contract remedies against FCNB. Alternatively, if Deutsche Bank honors a draw which on its face is not covered by the LOC, SHI would have a remedy against Deutsche Bank. The fact that FCNB may not be able to satisfy a judgment against it does not give this court the authority to enjoin the OCC or its supervision of the Consent Order and required LOC. Many plaintiffs face the same problem of insolvent defendants. Consequently, I am not persuaded by SHI's attempt to distinguish MCorp. I agree with the OCC that this court does not have jurisdiction over the agency or its enforcement of the Consent Order.

CONCLUSION

Motion to Dismiss the OCC and John D. Hawke, Jr., under Fed. R. Civ. P. 12(b)(1) for Lack of Subject Matter Jurisdiction pursuant to 12 U.S.C. § 1818(i)(1) (#18) is granted. Both parties are dismissed from this action. Defendants' Motion for a Protective Order

(#15) is moot. The preliminary injunction hearing is canceled. Because no relief that I can grant is sought in the Complaint, the Complaint is dismissed. Plaintiff has leave to file an Amended Complaint within 14 days if it wishes to pursue a contract or other theory against the remaining defendants.

DATED this 28th day of April, 2003.

/s/ Garr M. King
GARR M. KING
United States District Judge