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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

SPIEGEL HOLDINGS, INC.,)
)
Plaintiff,) Civil No. 03-334-KI
)
vs.) OPINION AND ORDER
)
THE OFFICE OF THE COMPTROLLER)
OF THE CURRENCY OF THE UNITED)
STATES, JOHN D. HAWKE, JR.,)
Comptroller, DEUTSCHE BANK AG)
NEW YORK BRANCH, and FIRST)
CONSUMERS NATIONAL BANK,)
)
Defendants.)
_____)

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8 KING, Judge:

9 Plaintiff Spiegel Holdings, Inc. (“SHI”) brings this action seeking declaratory and
10 injunctive relief concerning an escrow account it created for the benefit of First Consumers
11 National Bank (“FCNB”), as required by the Office of the Comptroller of the Currency of the
12 United States (“OCC”). The OCC filed a Motion to Dismiss the OCC and John D. Hawke, Jr.,
13 under Fed. R. Civ. P. 12(b)(1) for Lack of Subject Matter Jurisdiction pursuant to 12 U.S.C.
14 § 1818(i)(1) (#9). For the reasons below, I grant the motion and dismiss the Complaint.

15 **ALLEGED FACTS**

16 SHI, FCNB, and defendant Deutsche Bank entered into a deposit Escrow and Custody
17 Agreement on May 14, 2002, with SHI transferring \$120 M to Deutsche Bank as custodian. The
18 funds were for the purpose of ensuring that FCNB has the ability to meet its deposit liability
19 obligations. As of February 6, 2003, there was approximately \$30 M remaining in escrow. SHI
20 alleges that most of these remaining funds are excess funds and should be released from escrow

1 but the OCC objected to the release.¹ SHI seeks a declaratory judgment that the funds do qualify
2 as excess funds and should be released.

3 DISCUSSION

4 The escrow account was established pursuant to a Consent Order issued on May 15,
5 2002, by the OCC in its supervision of FCNB. The OCC contends that this court lacks subject
6 matter jurisdiction to compel the OCC to act in a particular manner regarding its enforcement of
7 the Consent Order and supervision of FCNB. The OCC relies on a provision in the Financial
8 Institutions Supervisory Act of 1966 (“FISA”), 12. U.S.C. § 1818 et seq.:

9 The appropriate Federal banking agency may in its discretion apply to the
10 United States district court . . . for the enforcement of any effective and
11 outstanding notice or order issued . . . and such courts shall have jurisdiction and
12 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.

13 12 U.S.C. § 1818(i)(1). The OCC contends that the relief SHI seeks would cause this court to
14 affect the enforcement of the Consent Order, which is prohibited by the FISA.

15 “To prevent regulated parties from interfering with the comprehensive powers of the
16 federal banking regulatory agencies, Congress severely limited the jurisdiction of courts to
17 review ongoing administrative proceedings brought by banking agencies.” Ridder v. Office of
18 Thrift Supervision, 146 F.3d 1035, 1039 (D.C. Cir. 1998), cert. denied, 526 U.S. 1004 (1999).
19 The FISA establishes a “tripartite regime of judicial review”: (1) a bank holding company may
20 seek an injunction in district court restraining enforcement of a temporary order pending
21 completion of the related administrative proceeding; (2) an aggrieved party may apply for a court

22
23 ¹ During the briefing on this motion, the parties have worked together and are in
24 agreement concerning most of the money remaining in escrow. There are several million dollars
25 in escrow, however, over which there is still a dispute. Although the issue will eventually
become moot due to FCNB’s winding down of its affairs, that day may not come for several
months. Consequently, I decided to issue this opinion.

1 of appeals review of final orders of a federal banking agency; and (3) the federal banking agency
2 may apply to a district court for enforcement of any effective and outstanding notice or order. Id.
3 None of the specified areas for judicial review apply to the situation before me.

4 Courts have applied § 1818(i)(1) in many types of situations. See Ridder v. Office of
5 Thrift Supervision, 146 F.3d 1035 (D.C. Cir. 1998) (case brought by former bank officers to
6 enjoin enforcement of temporary cease and desist order which prevented bank holding company
7 from paying the officers' legal expenses dismissed for lack of jurisdiction), cert. denied, 526 U.S.
8 1004 (1999); Henry v. Office of Thrift Supervision, 43 F.3d 507 (10th Cir. 1994) (case brought
9 by a savings and loan association's former director to rescind two stipulation and consent
10 agreements she made with the Office of Thrift Supervision was dismissed for lack of
11 jurisdiction).

12 The Supreme Court relied on the "plain, preclusive language" contained in § 1818(i)(1) in
13 holding that the section barred judicial review of administrative actions pending before the Board
14 of Governors of the Federal Reserve System ("Board"). Board of Governors v. MCorp Financial,
15 502 U.S. 32, 112 S. Ct. 459 (1991). MCorp, a bank holding company, filed a voluntary
16 bankruptcy petition and initiated an adversary proceeding against the Board to enjoin the
17 prosecution of two ongoing, nonfinal administrative proceedings against it. The Court concluded
18 that § 1818(i)(1) was not qualified or superseded by the general provisions in the Bankruptcy
19 Code, including the automatic stay provision. Id. at 39-42.

20 The Court also concluded that the exception for judicial review carved out in Leedom v.
21 Kyne, 358 U.S. 184, 79 S. Ct. 180 (1958), for the National Labor Relations Act ("NLRA"), does
22 not apply to § 1818(i)(1). The NLRA authorizes judicial review for other situations but does not
23 expressly authorize judicial review for the situation at issue in Kyne. The Kyne Court held that
24 there could be judicial review under the NLRA because the National Labor Relations Board's
25 decision was in direct conflict with the NLRA. MCorp distinguished Kyne in two ways. First,

1 the union in Kyne had no way to vindicate its statutory rights while MCorp could request
2 appellate review under the FISA if the Board concluded that the company violated the regulation.
3 Second, the clarity of the congressional preclusion of review in the FISA indicated that Congress
4 had spoken clearly and directly to preclude jurisdiction. The Court compared this clarity to the
5 NLRA’s provision for judicial review in other situations but its silence about judicial review for
6 the contested determination. Id. at 42-44.

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

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

14 SHI contends that § 1818(i)(1) does not apply because it is not contesting the validity of
15 the Consent Order. Instead, it claims to be asking the Court to make a legal determination on
16 whether certain accounts of FCNB constitute a “deposit,” as defined by statute. SHI argues that
17 such a legal determination would not affect enforcement of the Consent Order which states that
18 escrow funds shall solely be used to payoff FCNB’s deposits.

19 I cannot imagine a use for the legal determination sought by SHI other than for SHI to use
20 the determination to seek a change in the OCC’s enforcement of the Consent Order. This either
21 falls within the prohibition of § 1818(i)(1) or SHI is asking me for an advisory opinion, which I
22 will not make.

23 SHI also contends that the OCC is acting outside its authority in directing the FCNB to
24 take draws for expenses not intended to be covered by the LOC. SHI distinguishes MCorp by
25 contending that SHI has no meaningful and adequate opportunity to contest the OCC’s refusal to
26 release funds from escrow.

