Exhibit H-18

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 09-22384-CIV-JORDAN

BANK OF AMERICA, N.A.,

Plaintiff,

v.

COLONIAL BANK, & JOHN DOES 1-10,

Defendants.

FDIC'S SUPPLEMENTAL MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

The Federal Deposit Insurance Corporation, in its capacity as Receiver for Defendant Colonial Bank ("FDIC"), by and through the undersigned counsel, hereby files its Supplemental Memorandum of Law in Opposition to Preliminary Injunction, and states as follows:

Plaintiff, Bank of America, N.A. ("Bank of America") is asking this Court to do what FIRREA expressly forbids it to do. FIRREA's detailed statutory scheme strictly limits how and when courts can interfere with the FDIC's exercise of its functions as receiver. In particular, 12 U.S.C. § 1821(d)(13)(D) provides that "no court shall have jurisdiction over . . . any claim relating to any act or omission of [a failed bank] or the [FDIC] as receiver" unless that claim has first been presented to the FDIC through a defined claims process. That section applies fully here because Bank of America's claims rest on alleged acts or omissions of both Colonial and the FDIC. And 12 U.S.C. § 1821(j) broadly divests courts of jurisdiction to enter injunctive relief. That section too applies fully here because ample authority establishes that this provision applies if the FDIC is even

colorably acting within its receivership functions. Because taking custody and control of any and all of the funds it found at Colonial is one of the most fundamental FDIC receivership functions, Section 1821(j)'s broad language comfortably encompasses the FDIC's exercise of custody over the funds at issue. That being so, this Court is without jurisdiction to enjoin the FDIC's handling of those funds or to determine Bank of America's claims that Colonial and the FDIC have acted unlawfully with respect to those funds.

This is not to say, of course, that Bank of America is without a remedy. FIRREA provides a claims process through which Bank of America can assert its arguments to the Receiver. If Bank of America is unsatisfied with the outcome of that process, it can then follow the statutory provisions for obtaining a *de novo* determination of its claims by a court. What is at issue now is not whether Bank of America can have its claims resolved, but when. FIRREA's comprehensive scheme answers that question in Sections 1821(j) and (d)(13(D).

Bank of America has advanced a number of cases to support its request that the Court ignore Section 1821's clear terms. None of those cases provide any basis for doing what the statute so clearly forbids.

Controlling authority within this Circuit establishes that the courts are without jurisdiction to restrain the FDIC receiver when the receiver is acting ***colorably*** under its powers – even when those actions might violate other provisions of law. *Bursik v. One Fourth Street North, Ltd.* 84 F.3d 1395, 1397(11th Cir. 1996); *accord Gross v. Bell Savings Bank Pa, SA,* 974 F.2d 403, 408 (3d Cir. 1992). The FDIC cannot be enjoined even if Bank of America alleges that its actions as a receiver somehow run afoul of Florida's civil theft statute.

This principle was recognized in the Southern District of Florida in *Bender v. Centrust Mortgage Corp.,* 833 F. Supp. 1540 (S.D. Fla. 1992), where a claimant sought to restrain the RTC in

marshaling assets within its control. The court (Judge Marcus) explained that Section 1821(j) barred it from enjoining the RTC "even if in the underlying suit on the merits the RTC is in error." 833 F. Supp. at 1543. On appeal, the Eleventh Circuit found that a constructive trust (which is essentially what Bank of America seeks here) was impermissible against the receiver. *Bender*, 53 F.3d 1027, 1030 (11th Cir. 1995). The Eleventh Circuit also found that Section 1821(d)(13)(C) prohibited equitable relief to protect a claimant seeking to recover money from the receivership estate: "the relief requested by Bender to carve out a portion of the receivership assets for his benefit constitutes a form of attachment because it would preclude RTC as Receiver from disposing of receivership assets." *Id.,* at 1030-31.

Bank of America attempts to distinguish this controlling law by arguing that it seeks an injunction over money that was bailed with Colonial and which it rightfully owns. Appellate courts have had no difficulty rejecting such attempts to evade the statute's clear language. As the Third Circuit said:

> [T]he RTC was acting within its legitimate authority in withholding the Grosses' deposits, whether we characterize the RTC's action as withholding deposits pending determination of a liability to the bank or as taking measures to preserve and conserve the assets of the institution. The RTC may withhold funds under its powers as a receiver.

Gross, 974 F.2d at 408. In so ruling the Third Circuit noted with approval the unreported decision of a district court in *Clarke v. RTC*, which characterized its holding as precluding an injunction that would have been "a direction to RTC as to what to do or not to do, with what RTC regards as an asset now in RTC's custody." *Clarke v. RTC*, No. 90-7758, 1992 WL 245717 (E.D. Pa. 1992). That conclusion fully accords with 12 U.S.C. § 1821(d)(13)(C), prohibiting attachment or execution upon assets "in the possession" of the receiver, and with the purposes behind Section 1821(j).

As a threshold matter, Bank of America has not established any binding pre-existing, pre-receivership right to the funds. All that occurred was entry of an *ex parte* TRO against Colonial

based on pleadings in which Bank of America pled "on information and belief" that it was entitled to certain funds that are admittedly in an account *not* in Bank of America's name, but in the name of "TBW Investor Funding." There was certainly no "final unappealable judgment" that would bind the FDIC under 12 U.S.C. § 1821(d)(13)(A), and the FDIC is entitled to raise any defenses now available to it. *In re Geri Zahn*, 25 F.3d 1539, 1545 (11th Cir. 1994); *Baumann v. Savers Federal Sav. & Loan Assoc.,* 934 F.2d 1506, 1514 (11th Cir.1991) ("we are aware of Congress's recognition that '[t]he appointment of a conservator or receiver can often change the character of litigation....' "). Simply put, Bank of America seeks a determination of its rights to funds that were in the possession of Colonial when it failed. But Congress has divested this Court of jurisdiction to grant that relief.

Nor do the cases raised by Bank of America at the hearing Monday support a different result. *Cummings Properties Mgmt., Inc. v. FDIC*, 786 F. Supp 144 (D. Mass. 1992), was expressly vacated by the First Circuit. *Cummings Properties Mgmt., Inc. v. FDIC*, No. 92-1504, 1992 WL 366909 (1st Cir. 1992). Moreover, the reasoning of the *Cummings* decision, which relied on *Coit Independence Joint Venture v. FSLIC,* 489 U.S. 561, 109 S.Ct. 1361, 103 L.Ed.2d 602 (1989), was roundly rejected in *Bender*, which was subsequently affirmed by the Eleventh Circuit.

FDIC v. Source One Mort. Services Corp, 844 F. Supp. 40 (D. Ma 1994), is both inapposite and no longer supported within its circuit. As a threshold matter, the decision does not involve the explicit prohibition against injunctive relief at issue here. Moreover, the case involved "netting" of fees under the control of the *claimant*, rather than under the control of the receiver. As such the case could never be a basis for injunctive relief against the *receiver*. But most importantly, the court's conclusion that the claims at issue fell outside both the administrative claims process and the jurisdictional bar of Section 1821(d)(3)-(13) was premised on a decision of the First Circuit that was later withdrawn. The First Circuit held that the statute *includes* such repudiation claims within the

administrative claims process and approvingly noted that the district court had determined it lacked jurisdiction to enter injunctive relief. *Heno v. FDIC*, 20 F.3d 1204, 1209-1210 (1st Cir. 1994).

Chicago Title Ins. Co. v. RTC, 868 F. Supp. 135 (D.S.C. 1994), is also inapposite. As a threshold matter, the case does not involve injunctive relief; the court deferred consideration of such relief. More importantly, the district court invoked jurisdiction under the *deposit insurance* statute, holding that Chicago Title's claim was in the nature of a dispute as to recovery of deposit insurance (Chicago Title "stands in the shoes of the insured depositor"). Moreover, the court concluded that Section 1821(d)'s administrative claims process did not govern because Chicago Title was not a "creditor" and had not received mailed notice of the administrative claims process. *Chicago Title,* 868 F.Supp. at 140. But the weight of authority establishes that the claims process is not confined to "creditors." *McCarthy v. FDIC*, 348 F.3d 1075, 1079 (9th Cir. 2003) (exhaustion requirement applies to bank debtors and acts of receiver); *Tri-State Hotels v. FDIC*, 79 F.3d 707 (8th Cir. 1996) ("debtors" of receivership as well as creditors are subject to claims process); *Freeman v. FDIC*, 56 F.3d 1394 (D.C.Cir. 1995) (§ 1821(d) is not limited to claims by "creditors", but extends to all claims and actions against the receivership). Here, the claims process has just begun and not all creditors have yet received individual notice, although there has been notice by publication. See www.fdic.gov/bank/individual/failed/colonial.

In re Scott, 157 B.R. 297 (Bank. W.D. Tex. 1993), likewise offers no support. The decision was withdrawn by the court, and was expressly disagreed with by the Third Circuit in *National Union Fire Ins. Co. v. City Sav. FSB*, 28 F.3d 376, 386 (3d Cir. 1994) ("rejecting" argument that FIRREA jurisdictional bar is "strained and limited" by claims process procedures).

Finally, the *Merrill* and *Sharpe* cases do not govern. *Merrill* does not address injunctive relief; rather, it implicitly recognizes that resolution of a claim for relief through the administrative

claims process and subsequent judicial review is the available avenue for relief. As the 9th Circuit later recognized in significantly limiting it, "*Sharpe* was an unusual case." Without expressly overruling *Sharpe,* the court in *McCarthy* brought the Ninth Circuit into accord with the other circuits by holding that claims, including non-creditor claims, can and must be addressed through the administrative claims process. In *Sharpe*, the district court did not dismiss the Sharpes' claim, but instead stayed the case. The Panel concluded that if the claims process applied, the Sharpes would be without a remedy, as they had not filed an administrative claim. The panel found that the claims process did not apply to creditor claims. *McCarthy* later explained and demonstrated that creditors are subject to the process. *Sharpe* should be limited to it unique facts, and its reasoning should not be extended, as the Ninth Circuit implicitly acknowledged in *McCarthy*.

CONCLUSION

It is indisputable that Bank of America asks this court to determine that it has a superior right to assets controlled by and in the possession of the receiver, and that under other provisions of law it is entitled to those funds. The plain language of the statute provides that this court may not restrain or affect the FDIC in exercising its powers and functions as receiver, and the controlling law of this circuit establishes that the FDIC is free from restraint if it is ***colorably*** exercising its authority over assets in its control, even where the FDIC's actions conflict with other provisions of law. Injunctive relief is unavailable, and the preliminary injunction must be dissolved.

Dated: September 1, 2009

Respectfully submitted,

FEDERAL DEPOSIT INSURANCE CORPORATION as Receiver for Colonial Bank

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

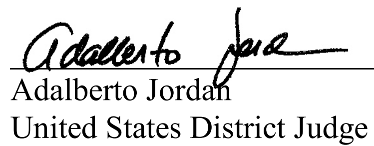
CASE NO. 09-22384-CIV-JORDAN

BANK OF AMERICA, N.A.,	)
Plaintiff	)
	)
vs.	)
COLONIAL BANK, & JOHN DOES 1-10,	)
	)
Defendants	)
	)

ORDER EXTENDING PRELIMINARY INJUNCTION

For reasons stated in court on Monday, August 31, 2009, the preliminary injunction in this case is extended until 6:00 p.m. on Thursday, September 3, 2009.

DONE and ORDERED in chambers in Miami, Florida, this 1st day of September, 2009.



Adalberto Jordan
United States District Judge

Copy to: All counsel of record

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served via CM/ECF on this 1st day of September, 2009, on: **Marty Steinberg** and **Patricia Acosta,** Attorneys for Plaintiff, Hunton & Williams LLP, 1111 Brickell Avenue, Suite 2500, Miami, FL 33131.

By: /s/ Jose I. Rojas

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 09-22384-CIV-JORDAN

BANK OF AMERICA, N.A.,

Plaintiff

vs.

FEDERAL DEPOSIT INSURANCE CORP.,

Defendant

ORDER GRANTING & EXTENDING PRELIMINARY INJUNCTION

After consideration of the parties' submissions and arguments, the preliminary injunction in this case shall remain in effect.

Bank of America filed this lawsuit on August 12, 2009, in order to obtain from Colonial Bank the return of cash and mortgages valued in excess of $1,000,000,000. In its dealings with Bank of America, Colonial Bank served as custodian, holding in trust loans issued by a subsidiary of Bank of America while Freddie Mac determined whether or not to purchase each loan. Pursuant to the bailee letters governing this relationship, Colonial would hold possession of the mortgages and related documents pending Freddie Mac's review of the loans. As to each loan that was purchased, Colonial was required to hold the proceeds in a segregated and specifically identified trust account. For each loan that Freddie Mac rejected or refused to purchase, Colonial was obligated to return the mortgage to Bank of America. In no event was Colonial permitted under the agreement to hold the sale proceeds or notes at issue for more than 15 days from the date of the transmittal letter. *See* Transmittal Letter, Declaration of Sumeet Wadhera, Exh. A.

Relations between Bank of America and Colonial soured when it came to light in late July of 2009 that Colonial was not in compliance with the Federal Reserve's capital requirements and was on the verge of insolvency. *See* Complaint at ¶¶ 18–19. Subsequent revelations indicated that Colonial was the subject of a criminal probe by the Department of Justice, in part due to accounting irregularities related to its mortgage warehouse lending division. *See* Declaration of Christian Mundigo at ¶ 12. On August 11, 2009, Bank of America sent a letter to Colonial that purported to

revoke all outstanding transmittal letters, and demanded the return by 12:00 p.m. on August 12, 2009, of all sale proceeds and loan agreements held by Colonial as custodian for Bank of America. *See* Revocation Letter, Declaration of Tammy Spriggs, Exh. A. When Colonial failed to comply, Bank of America filed this lawsuit, which included a request for a temporary restraining order enjoining Colonial from liquidating, transferring, or encumbering the assets at issue in this case.

On August 13, 2009, I issued an order granting Bank of America's request for a TRO based on my findings that–in light of the custodial relationship between the parties–Colonial Bank owed to Bank of America a clear contractual obligation to return the assets at issue, and that Colonial's failure to comply with Bank of America's requests for remittance gave rise to a civil theft claim under Florida law. I therefore concluded that Bank of America had demonstrated (1) a substantial likelihood of success on the merits; (2) immediate danger of significant loss;[1] (3) that the potential harm to Bank of America outweighed the damage to Colonial; and (4) that the injunction would not be adverse to the public interest. *See* Order Granting Motion for Temporary Restraining Order [D.E. 6].

The next day, on August 14, 2009, the Alabama State Banking Department appointed the FDIC as receiver for Colonial in what is–at least to date–the largest bank failure of 2009.[2] Thereafter, the FDIC, in its capacity as receiver, was substituted for Colonial as a party in interest in this case. *See* Order Substituting Federal Deposit Insurance Corporation as Defendant [D.E. 17]. Following this substitution, the FDIC moved to dissolve the TRO.

The FDIC does not dispute the propriety of the issuance of temporary injunctive relief on the merits, nor does it challenge any of the findings I made in that order. Instead, it argues that pursuant to the jurisdiction-stripping provisions of the Financial Institutions Reform Recovery and

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[1]Although Rule 65 generally requires a showing of irreparable harm, *see Mesa Air Group, Inc. v. Delta Air Lines, Inc.*, 573 F.3d 1124, 1128 (11th Cir. 2009), Rule 64 makes available in federal court all remedies relating to the prejudgment seizure of assets provided for by the state in which the court is located. In cases involving civil theft, Florida law relaxes the traditional "irreparable harm" requirement, and instead only requires the movant to make "a showing of immediate danger of significant loss[.]" *See* Fla. Stat. § 812.035(6).

[2]Following two hearings, I converted the TRO into a preliminary injunction that is effective until Friday, September 4, 2009.

Enforcement Act of 1989 (FIRREA), 12 U.S.C. §§ 1821(d)(13)(C)–(D) & 1821(j), I lack jurisdiction to enjoin the FDIC in its exercise of its receivership duties.[3] *See Bender v. Centrust Mortgage Corp.*, 51 F.3d 1027, 1030–31 (11th Cir. 1995) (constructive trust against assets *of* failed institution would violate § 1821(d)(13)(C): "the relief requested by Bender to carve out a portion *of the receivership assets* for his benefit constitutes a form of attachment because it would preclude RTC as Receiver from disposing *of receivership assets*.") (emphasis added); *RPM Investments, Inc. v. Resolution Trust Corp.* 75 F.3d 618, 620 (11th Cir. 1996) (quoting *Nat'l Trust for Historic Pres. v. F.D.I.C.*, 995 F.2d 238, 240 (D.C. Cir.1993) ("In disposing of the assets *of a bank*, the FDIC is performing a routine 'receivership' function . . . [and §] 1821(j) limits our jurisdiction such that we cannot grant relief that would restrain or effect the RTC's exercise of its statutory powers.") (emphasis added).

During oral argument, the FDIC conceded that FIRREA's jurisdictional bars are not absolute, and that I have the authority to make a threshold determination of whether the Corporation is acting in its receivership capacity. *See* Transcript of August 28, 2009, Hearing [D.E. 28]; Transcript of August 31, 2009, Hearing [D.E. 30]. Thus, the FDIC's position is that I do not have jurisdiction to enjoin the Corporation where it is acting colorably under its powers as receiver. *See* FDIC's Supplemental Memorandum of Law at 2 [D.E. 32]. In response, Bank of America argues that, because Colonial's interest in the assets at issue is merely that of a custodian with no right to long-term outright possession, the funds are not Colonial's assets, and therefore not part of the

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[3] *See* 12 U.S.C. § 1821(d)(13)(C) ("No attachment or execution may issue by any court upon assets in the possession of the receiver."); 12 U.S.C. § 1821(d)(13)(D) ("no court shall have jurisdiction over . . . any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the Corporation has been appointed receiver, including assets which the Corporation may acquire from itself as such receiver"); 12 U.S.C. § 1821(j) ("Except as provided in this section, 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 conservator or a receiver."). Although § 1821(d)(13)(C) is clearly the broadest of FIRREA's jurisdictional bars, it does not apply to the present case and I do not consider its effect, because the preliminary injunctive relief sought by Bank of America contemplates neither attachment nor execution. *See* BLACK'S LAW DICTIONARY 145 (9th ed. 2009) (defining "attachment" as "the seizing of a person's property to secure a judgment or to be sold in satisfaction of a judgment"). The preliminary injunction in this case merely restrains the FDIC from disposing of property that, at least on this record, indisputably belongs to Bank of America.

receivership estate. Accordingly, Bank of America asserts that the injunction can remain in place because I have the authority to enjoin the FDIC when it is acting outside its capacity as a receiver. I find Bank of America's position to be more persuasive.

As the Ninth Circuit held in *Sharpe v. FDIC*, 126 F.3d 1147, 1155 (9th Cir. 1997), the jurisdiction-stripping provisions of FIRREA do not "extend to situations in which the FDIC as receiver asserts authority beyond that granted to it as receiver. . . . [T]he provision does not bar injunctive relief when the FDIC has acted beyond, or contrary to, its statutorily prescribed, constitutionally permitted, powers or functions." The plain language of FIRREA, which sets forth the duties and responsibilities of the FDIC when functioning as receiver, makes clear that the Corporation's powers extend to the "assets" *of* the failed institution. *See* 12 U.S.C. § 1821(d)(2)(A) ("The Corporation shall, as conservator or receiver, and by operation of law, succeed to . . . all rights, titles, powers, and privileges of the insured depository institution . . . with respect to the institution and the assets of the institution[.]"); § 1821(d)(2)(B) ("The Corporation may . . . take over the assets of and operate the insured depository institution . . . and preserve and conserve the assets and property of such institution."); § 1821(d)(2)(E) ("The Corporation may . . . as receiver, place the insured depository institution in liquidation and proceed to realize upon the assets of the institution[.]"). Because the assets held by Colonial in a custodial capacity for Bank of America are not assets of and do not belong to Colonial, they are not a part of the receivership estate, and the FDIC's ability to dispose of these funds is a matter subject to the jurisdiction of an Article III court.

There apparently is no definition of "asset" in FIRREA or its accompanying regulations, but in normal parlance an "asset" is an "item that is *owned* and has value." BLACK'S LAW DICTIONARY 134 (9th ed. 2009) (emphasis added). *See also* 1 SHORTER OXFORD DICTIONARY 133 (5th ed. 2002) ("any property or effects available to meet the debts of a testator, debtor, or company, whether sufficient or not"). As Bank of America demonstrates in its briefing on this issue, the FDIC's own advisory opinions and internal procedures compel the conclusion that the funds at issue–on this record–are outside the receivership. Indeed, in two separate advisory opinions that predate FIRREA, the FDIC concluded that assets held by a bank for safekeeping or in the nature of a bailment remained the property of the client (not the bank) and must be returned to the customer. *See* Advisory Opinion FDIC-87-7, Aug. 17, 1987 [D.E. 31-3]; Advisory Opinion FDIC-88-14, Feb. 4,

1988 [D.E. 31-4]. This position was reiterated by the Corporation as recently as last year, in its publication entitled *FDIC Consumer News Summer 2008: "\Get a Good Night's Sleep; Rest Assured, Your Money is Safe in an FDIC Insured Account*:

> Securities and other assets held in trust, fiduciary or custodial accounts at a bank are *not* assets of the failed bank and are *not* subject to claims by the failed bank's creditors. These assets will either be returned to you or arrangements will be made for another institution to become the new custodian or trustee of your accounts.

[D.E. 31-2].

This sentiment is reflected by other governmental bodies as well. The Federal Financial Institutions Examination Council, which prescribed the manner in which banks must report their financial condition to the FDIC, as well as various other federal agencies, defines a a "custody account" as "one in which securities or other assets are held by a bank on behalf of a customer under a safekeeping arrangement." In compiling these reports, the FFIEC instructs that "[a]ssets held in such a capacity are not to be reported in the balance sheet of the reporting bank nor are such accounts to be reflected as a liability." *See* Call Report Instruction Book Update at 9 [D.E. 31-8].

Courts defining the boundaries of estates in analogous contexts have similarly concluded that property held pursuant to a bailment or other custodial arrangement is not part of the estate. *See, e.g., Merrill Lynch Mortgage Capital, Inc. v. FDIC*, 293 F. Supp. 2d 98, 103 (D.D.C. 2003) ("Deposits can be categorized as either specific or general. Specific deposits are like bailments in which the bank becomes a bailee and the depositor retains title to the things or money deposited. Special deposits are not the property of a bank. If a bank fails, special deposits do not become part of the receivership estate."); *In re Haase*, 224 B.R. 673, 678 (C.D. Ill. 1998) ("[T]here is no dispute that Interstate entrusted the cattle to the Debtor for the special purpose of fattening them for market. The substance of the agreement between the Debtor and Interstate was a bailment agreement. It follows that Interstate owned the cattle and that the cattle were not property of the Debtor's estate."); *City of Farrell v. Sharon Steel Corp.*, 41 F.3d 92, 95 (3d Cir. 1994) ("We start from the well-settled principle that debtors do 'not own an equitable interest in property ... [they] hold[ ] in trust for another,' and that therefore funds held in trust are not 'property of the estate.'") (quoting *Begier v. IRS*, 496 U.S. 53, 59 (1990)).

In this case, edicts from federal agencies and federal courts are in accordance with common sense. Notwithstanding the maxim that possession is nine tenths of the law, this is a case that falls well within the ambit of the remaining 10%. Just like a customer who held a safe-deposit box with Colonial for the protection of valuable family heirlooms or important legal documents (or even currency), Bank of America never intended to give, nor could Colonial have expected to receive, any ownership interest in the assets as issue. As I noted in the order granting the TRO, the bailee letters governing the parties' relationship clearly required the return of all assets within a brief period of time. The funds here may be of greater pecuniary value than a keepsake stored in a safe-deposit box, but the same principle applies in both situations. Accordingly, this was "money that [did] not belong to [Colonial] in the first place." *See* Order at 3.

As the FDIC has itself acknowledged, albeit in contradiction to the position it has taken in its briefs filed in this case, assets held at Colonial Bank in safe-deposit boxes are not considered part of the receivership process by the Corporation:

> *Safe Deposit boxes:* How can I claim the contents of my safe deposit box?
>
> *Answer:* It is business as usual. You can go into your local branch and access your safe deposit box; no action on your part is required because of this transaction.

See Failed Bank Information - Questions and Answer Guide for Colonial Bank [D.E. 31-10].Thus, based on the FDIC's own position with respect to safe-deposit boxes,[4] if the bailee letters had required that Colonial keep an equivalent amount of gold bullion in a vault within one of its branches, then Bank of America would be able to recover the funds at issue at any time. There is no reason why the assets held in segregated accounts by Colonial pursuant to the bailee letters should

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[4]Of course, the mere failure by the FDIC to follow its own procedures does not allow for jurisdiction to enjoin the Corporation when it is acting pursuant to its statutorily prescribed powers as receiver or conservator. *See Bursik v. One Fourth Street N. Ltd.*, 84 F.3d 1395, 1397 (11th Cir. 1996). Instead, my finding in this case is that the FDIC cannot act as a receiver with respect to funds that are not part of the receivership estate, and FIRREA's jurisdiction-stripping provisions are therefore inapplicable to the claims and remedies at issue.

be viewed any differently. Accordingly, I find that the funds at issue are not part of the receivership estate[5] and that § 1821(j) does not bar injunctive relief.

Because the funds and property held pursuant to the bailee letters are outside the receivership estate, I also find that the jurisdiction-stripping provisions of FIRREA do not apply to the FDIC's disposition of these assets. *See Sharpe*, 126 F.3d at 1155. *See also Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. City Sav., F.S.B.*, 28 F.3d 376, 384 (3d Cir. 1994) (holding that court lacked jurisdiction to hear declaratory judgment action because the assets at issue belonged to the failed bank and were therefore part of the receivership estate: "If the insurance policies are not assets of the bank, then National Union and Gulf's declaratory judgment action for and affirmative defenses of rescission of those insurance policies would not be barred under § 1821(d)(13)(D)(I)."). *Cf. Coit Indep. Joint Venture v. Fed. Sav. & Loan Ins. Corp.*, 489 U.S. 561, 574 (1989) (noting that an analogous statutory bar to judicial review of actions by the Federal Savings and Loan Insurance Corporation "simply prohibits courts from restraining or affecting FSLIC's exercise of those receivership 'powers and functions' that have been granted by other statutory sources" and does not limit the court's ability to enjoin actions taken outside of that statutory authority); *F.D.I.C. v. Merchants Nat'l Bank of Mobile*, 725 F.2d 634, 639 (11th Cir. 1984) (noting that FDIC's power as receiver does not extend to assets that are not properly in the possession of the receivership estate).

Although there is a dearth of caselaw interpreting FIRREA's various bars to judicial review, my ruling is, I think, consistent with those few courts that have addressed the propriety of injunctive or declaratory relief against the FDIC with regard to property that did not belong to the failed institution. Noting that "§ 1821(j) does not elevate the FDIC to the position of a sacred cow which may graze upon the rights of others at will, unchecked by the courts", the district court in *Cummings Prop. Mgmt., Inc. v. F.D.I.C.*, 786 F. Supp. 144, 145–47 (D. Mass. 1992), entered a preliminary injunction enjoining the FDIC from removing an ATM from the one of the branches of the insolvent bank, where the bank's lease clearly indicated that the ATM was a fixture not subject to ownership

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[5] So far, the FDIC has not tried to show that the funds held by Colonial for Bank of America have been commingled or were not held in segregated accounts. Given the evidence submitted by Bank of America so far, and Colonial's contractual obligations, I find that the funds were held in segregated accounts as required.

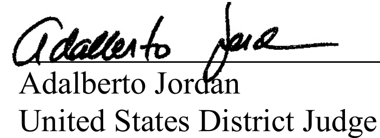
by the bank after the termination of the lease. Similarly, in *In re Scott*, 157 B.R. 297, 315 (Bankr. W.D. Tex. 1993), the bankruptcy court engaged in an exhaustive analysis of § 1821(d)(13)(D), and concluded that "FIRREA's jurisdictional bar applies only to actions seeking a determination of rights with respect to *assets* of a failed depository institution not to property merely *claimed* to be an asset by the receiver." The bankruptcy court then held that it had jurisdiction to adjudicate claims regarding assets that were not rightfully possessed by the failed bank. Along these same lines, the district court in *Chicago Title Ins. Co. v. Resolution Trust Corp.*, 868 F. Supp. 135, 140 (D.S.C. 1994), found that, notwithstanding FIRREA, it had subject-matter jurisdiction to consider claims for damages and preliminary injunctive relief where the funds at issue were in the possession of the failed bank as a result of their unlawful conversion from the trust account of the plaintiff's attorney. Although both *Cummings* and *Scott* were later vacated through settlement, I find the reasoning in each of these cases persuasive. *See Friends of Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1218 (11th Cir. 2009) (Courts are "free to give statements in a vacated opinion persuasive value if it thinks they deserve it."). Indeed, I reach the same legal conclusion in this case as the courts in *Cummings*, *Scott*, and *Chicago Title*: assets possessed by, but not belonging to, the failed bank are outside the receivership estate, and the FDIC's attempts to dispose of these assets is therefore not protected by the jurisdiction-stripping provisions of FIRREA.

Based on the exhibits and declarations submitted by Bank of America in its motion for a temporary restraining order, I was more than satisfied that the circumstances of this case warranted the extraordinary remedy of ex parte injunctive relief. The FDIC, which came into this case after the TRO was issued, must stand in the shoes of Colonial with respect to those findings until there is evidence to the contrary. *See F.D.I.C. v. Harrison*, 735 F.2d 408, 412 (11th Cir. 1984) ("[W]hen FDIC acts in its corporate capacity as receiver, its liability must be determined in the same fashion as that of a private party. . . . [W]hen FDIC acts as a receiver and liquidating agent for a failed bank, as it did here, it merely 'stands in the shoes of the insolvent bank.'") (quoting *F.D.I.C. v. Glickman*, 450 F.2d 416, 418 (9th Cir. 1971)). As noted earlier, the Corporation has not challenged the propriety of the TRO or the preliminary injunction other than to assert that I now lack jurisdiction to continue to enforce the equitable relief. I now reject that assertion, and I further find that the

extension of the preliminary injunction in this case remains proper under both federal and Florida law.[6]

Accordingly, the preliminary injunction in this case shall remain in effect.

DONE and ORDERED in chambers in Miami, Florida, this 4th day of September, 2009.



Adalberto Jordan
United States District Judge

Copy to: All counsel of record

[6] I acknowledge that, in light of Colonial's collapse and the involvement of the FDIC, some of the circumstances have changed since the TRO was first entered, particularly with respect to the public interest considerations contemplated by the injunctive-relief analysis. *See Mesa Air Group*, 573 F.3d at 1128. But this has not been raised as an issue by the FDIC, and has not been briefed by either party. I therefore reaffirm the factual findings I made in the order granting the TRO and conclude that these circumstances warrant conversion of that TRO into a preliminary injunction. If the FDIC has any evidence indicating that the funds in question are assets of Colonial, or it wishes to assert additional objections to the preliminary equitable relief, it may of course move to dissolve the injunction.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 09-22384-CIV-JORDAN

BANK OF AMERICA, N.A.,

Plaintiff,

v.

COLONIAL BANK, & JOHN DOES 1-10,

Defendants.

NOTICE OF APPEAL

Notice is hereby given that the Federal Deposit Insurance Corporation as Receiver for Colonial Bank, defendant in the above-captioned case, hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the Order Granting and Extending Preliminary Injunction in this action, entered on September 4, 2009 [D.E. 36].

Pursuant to 12 U.S.C. Section 1819(b)(4), the FDIC "shall not be required to post any bond to pursue any appeal and shall not be subject to payments of any filing fees in United States district courts or courts of appeals."

Dated: September 8, 2009

Respectfully submitted,

FEDERAL DEPOSIT INSURANCE CORPORATION as Receiver for Colonial Bank

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served via CM/ECF on this 8th day of September, 2009, on: **Marty Steinberg** and **Patricia Acosta,** Attorneys for Plaintiff, Hunton & Williams LLP, 1111 Brickell Avenue, Suite 2500, Miami, FL 33131.

By: /s/ Jose I. Rojas

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 09-22384-CIV-JORDAN

BANK OF AMERICA, N.A., Plaintiff	)
vs.	)
FEDERAL DEPOSIT INSURANCE CORP., Defendant	)

AMENDED ORDER GRANTING & EXTENDING PRELIMINARY INJUNCTION[1]

After consideration of the parties' submissions and arguments, the preliminary injunction in this case shall remain in effect.

Bank of America filed this lawsuit on August 12, 2009, in order to obtain from Colonial Bank the return of cash and mortgages valued in excess of $1,000,000,000. In its dealings with Bank of America, Colonial Bank served as custodian, holding in trust loans issued by a subsidiary of Bank of America while Freddie Mac determined whether or not to purchase each loan. Pursuant to the bailee letters governing this relationship, Colonial would hold possession of the mortgages and related documents pending Freddie Mac's review of the loans. As to each loan that was purchased, Colonial was required to hold the proceeds in a segregated and specifically identified trust account. For each loan that Freddie Mac rejected or refused to purchase, Colonial was obligated to return the mortgage to Bank of America. In no event was Colonial permitted under the agreement to hold the sale proceeds or notes at issue for more than 15 days from the date of the transmittal letter. *See* Transmittal Letter, Declaration of Sumeet Wadhera, Exh. A.

Relations between Bank of America and Colonial soured when it came to light in late July of 2009 that Colonial was not in compliance with the Federal Reserve's capital requirements and was on the verge of insolvency. *See* Complaint at ¶¶ 18–19. Subsequent revelations indicated that

[1]This order modifies the prior order extending the preliminary injunction [D.E. 36] only to the extent that it encompasses the precise language of the injunctive relief being granted.

Colonial was the subject of a criminal probe by the Department of Justice, in part due to accounting irregularities related to its mortgage warehouse lending division. *See* Declaration of Christian Mundigo at ¶ 12. On August 11, 2009, Bank of America sent a letter to Colonial that purported to revoke all outstanding transmittal letters, and demanded the return by 12:00 p.m. on August 12, 2009, of all sale proceeds and loan agreements held by Colonial as custodian for Bank of America. *See* Revocation Letter, Declaration of Tammy Spriggs, Exh. A. When Colonial failed to comply, Bank of America filed this lawsuit, which included a request for a temporary restraining order enjoining Colonial from liquidating, transferring, or encumbering the assets at issue in this case.

On August 13, 2009, I issued an order granting Bank of America's request for a TRO based on my findings that–in light of the custodial relationship between the parties–Colonial Bank owed to Bank of America a clear contractual obligation to return the assets at issue, and that Colonial's failure to comply with Bank of America's requests for remittance gave rise to a civil theft claim under Florida law. I therefore concluded that Bank of America had demonstrated (1) a substantial likelihood of success on the merits; (2) immediate danger of significant loss;[2] (3) that the potential harm to Bank of America outweighed the damage to Colonial; and (4) that the injunction would not be adverse to the public interest. *See* Order Granting Motion for Temporary Restraining Order [D.E. 6].

The next day, on August 14, 2009, the Alabama State Banking Department appointed the FDIC as receiver for Colonial in what is–at least to date–the largest bank failure of 2009.[3] Thereafter, the FDIC, in its capacity as receiver, was substituted for Colonial as a party in interest in this case. *See* Order Substituting Federal Deposit Insurance Corporation as Defendant [D.E. 17]. Following this substitution, the FDIC moved to dissolve the TRO.

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[2]Although Rule 65 generally requires a showing of irreparable harm, *see Mesa Air Group, Inc. v. Delta Air Lines, Inc.*, 573 F.3d 1124, 1128 (11th Cir. 2009), Rule 64 makes available in federal court all remedies relating to the prejudgment seizure of assets provided for by the state in which the court is located. In cases involving civil theft, Florida law relaxes the traditional "irreparable harm" requirement, and instead only requires the movant to make "a showing of immediate danger of significant loss[.]" *See* Fla. Stat. § 812.035(6).

[3]Following two hearings, I converted the TRO into a preliminary injunction that is effective until Friday, September 4, 2009.

The FDIC does not dispute the propriety of the issuance of temporary injunctive relief on the merits, nor does it challenge any of the findings I made in that order. Instead, it argues that pursuant to the jurisdiction-stripping provisions of the Financial Institutions Reform Recovery and Enforcement Act of 1989 (FIRREA), 12 U.S.C. §§ 1821(d)(13)(C)–(D) & 1821(j), I lack jurisdiction to enjoin the FDIC in its exercise of its receivership duties.[4] *See Bender v. Centrust Mortgage Corp.*, 51 F.3d 1027, 1030–31 (11th Cir. 1995) (constructive trust against assets *of* failed institution would violate § 1821(d)(13)(C): "the relief requested by Bender to carve out a portion *of the receivership assets* for his benefit constitutes a form of attachment because it would preclude RTC as Receiver from disposing *of receivership assets*.") (emphasis added); *RPM Investments, Inc. v. Resolution Trust Corp.* 75 F.3d 618, 620 (11th Cir. 1996) (quoting *Nat'l Trust for Historic Pres. v. F.D.I.C.*, 995 F.2d 238, 240 (D.C. Cir.1993) ("In disposing of the assets *of a bank*, the FDIC is performing a routine 'receivership' function . . . [and §] 1821(j) limits our jurisdiction such that we cannot grant relief that would restrain or effect the RTC's exercise of its statutory powers.") (emphasis added).

During oral argument, the FDIC conceded that FIRREA's jurisdictional bars are not absolute, and that I have the authority to make a threshold determination of whether the Corporation is acting in its receivership capacity. *See* Transcript of August 28, 2009, Hearing [D.E. 28]; Transcript of August 31, 2009, Hearing [D.E. 30]. Thus, the FDIC's position is that I do not have jurisdiction to enjoin the Corporation where it is acting colorably under its powers as receiver. *See* FDIC's

---

[4]*See* 12 U.S.C. § 1821(d)(13)(C) ("No attachment or execution may issue by any court upon assets in the possession of the receiver."); 12 U.S.C. § 1821(d)(13)(D) ("no court shall have jurisdiction over . . . any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the Corporation has been appointed receiver, including assets which the Corporation may acquire from itself as such receiver"); 12 U.S.C. § 1821(j) ("Except as provided in this section, 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 conservator or a receiver."). Although § 1821(d)(13)(C) is clearly the broadest of FIRREA's jurisdictional bars, it does not apply to the present case and I do not consider its effect, because the preliminary injunctive relief sought by Bank of America contemplates neither attachment nor execution. *See* BLACK'S LAW DICTIONARY 145 (9th ed. 2009) (defining "attachment" as "the seizing of a person's property to secure a judgment or to be sold in satisfaction of a judgment"). The preliminary injunction in this case merely restrains the FDIC from disposing of property that, at least on this record, indisputably belongs to Bank of America.

Supplemental Memorandum of Law at 2 [D.E. 32]. In response, Bank of America argues that, because Colonial's interest in the assets at issue is merely that of a custodian with no right to long-term outright possession, the funds are not Colonial's assets, and therefore not part of the receivership estate. Accordingly, Bank of America asserts that the injunction can remain in place because I have the authority to enjoin the FDIC when it is acting outside its capacity as a receiver. I find Bank of America's position to be more persuasive.

As the Ninth Circuit held in *Sharpe v. FDIC*, 126 F.3d 1147, 1155 (9th Cir. 1997), the jurisdiction-stripping provisions of FIRREA do not "extend to situations in which the FDIC as receiver asserts authority beyond that granted to it as receiver. . . . [T]he provision does not bar injunctive relief when the FDIC has acted beyond, or contrary to, its statutorily prescribed, constitutionally permitted, powers or functions." The plain language of FIRREA, which sets forth the duties and responsibilities of the FDIC when functioning as receiver, makes clear that the Corporation's powers extend to the "assets" *of* the failed institution. *See* 12 U.S.C. § 1821(d)(2)(A) ("The Corporation shall, as conservator or receiver, and by operation of law, succeed to . . . all rights, titles, powers, and privileges of the insured depository institution . . . with respect to the institution and the assets of the institution[.]"); § 1821(d)(2)(B) ("The Corporation may . . . take over the assets of and operate the insured depository institution . . . and preserve and conserve the assets and property of such institution."); § 1821(d)(2)(E) ("The Corporation may . . . as receiver, place the insured depository institution in liquidation and proceed to realize upon the assets of the institution[.]"). Because the assets held by Colonial in a custodial capacity for Bank of America are not assets of and do not belong to Colonial, they are not a part of the receivership estate, and the FDIC's ability to dispose of these funds is a matter subject to the jurisdiction of an Article III court.

There apparently is no definition of "asset" in FIRREA or its accompanying regulations, but in normal parlance an "asset" is an "item that is *owned* and has value." BLACK'S LAW DICTIONARY 134 (9th ed. 2009) (emphasis added). *See also* 1 SHORTER OXFORD DICTIONARY 133 (5th ed. 2002) ("any property or effects available to meet the debts of a testator, debtor, or company, whether sufficient or not"). As Bank of America demonstrates in its briefing on this issue, the FDIC's own advisory opinions and internal procedures compel the conclusion that the funds at issue–on this record–are outside the receivership. Indeed, in two separate advisory opinions that predate FIRREA,

the FDIC concluded that assets held by a bank for safekeeping or in the nature of a bailment remained the property of the client (not the bank) and must be returned to the customer. *See* Advisory Opinion FDIC-87-7, Aug. 17, 1987 [D.E. 31-3]; Advisory Opinion FDIC-88-14, Feb. 4, 1988 [D.E. 31-4]. This position was reiterated by the Corporation as recently as last year, in its publication entitled *FDIC Consumer News Summer 2008: Get a Good Night's Sleep; Rest Assured, Your Money is Safe in an FDIC Insured Account*:

> Securities and other assets held in trust, fiduciary or custodial accounts at a bank are *not* assets of the failed bank and are *not* subject to claims by the failed bank's creditors. These assets will either be returned to you or arrangements will be made for another institution to become the new custodian or trustee of your accounts.

[D.E. 31-2].

This sentiment is reflected by other governmental bodies as well. The Federal Financial Institutions Examination Council, which prescribed the manner in which banks must report their financial condition to the FDIC, as well as various other federal agencies, defines a a "custody account" as "one in which securities or other assets are held by a bank on behalf of a customer under a safekeeping arrangement." In compiling these reports, the FFIEC instructs that "[a]ssets held in such a capacity are not to be reported in the balance sheet of the reporting bank nor are such accounts to be reflected as a liability." *See* Call Report Instruction Book Update at 9 [D.E. 31-8].

Courts defining the boundaries of estates in analogous contexts have similarly concluded that property held pursuant to a bailment or other custodial arrangement is not part of the estate. *See, e.g., Merrill Lynch Mortgage Capital, Inc. v. FDIC*, 293 F. Supp. 2d 98, 103 (D.D.C. 2003) ("Deposits can be categorized as either specific or general. Specific deposits are like bailments in which the bank becomes a bailee and the depositor retains title to the things or money deposited. Special deposits are not the property of a bank. If a bank fails, special deposits do not become part of the receivership estate."); *In re Haase*, 224 B.R. 673, 678 (C.D. Ill. 1998) ("[T]here is no dispute that Interstate entrusted the cattle to the Debtor for the special purpose of fattening them for market. The substance of the agreement between the Debtor and Interstate was a bailment agreement. It follows that Interstate owned the cattle and that the cattle were not property of the Debtor's estate."); *City of Farrell v. Sharon Steel Corp.*, 41 F.3d 92, 95 (3d Cir. 1994) ("We start from the well-settled

principle that debtors do 'not own an equitable interest in property ... [they] hold[ ] in trust for another,' and that therefore funds held in trust are not 'property of the estate.'") (quoting *Begier v. IRS*, 496 U.S. 53, 59 (1990)).

In this case, edicts from federal agencies and federal courts are in accordance with common sense. Notwithstanding the maxim that possession is nine tenths of the law, this is a case that falls well within the ambit of the remaining 10%. Just like a customer who held a safe-deposit box with Colonial for the protection of valuable family heirlooms or important legal documents (or even currency), Bank of America never intended to give, nor could Colonial have expected to receive, any ownership interest in the assets as issue. As I noted in the order granting the TRO, the bailee letters governing the parties' relationship clearly required the return of all assets within a brief period of time. The funds here may be of greater pecuniary value than a keepsake stored in a safe-deposit box, but the same principle applies in both situations. Accordingly, this was "money that [did] not belong to [Colonial] in the first place." *See* Order at 3.

As the FDIC has itself acknowledged, albeit in contradiction to the position it has taken in its briefs filed in this case, assets held at Colonial Bank in safe-deposit boxes are not considered part of the receivership process by the Corporation:

> *Safe Deposit boxes:* How can I claim the contents of my safe deposit box?
>
> *Answer:* It is business as usual. You can go into your local branch and access your safe deposit box; no action on your part is required because of this transaction.

See Failed Bank Information - Questions and Answer Guide for Colonial Bank [D.E. 31-10].Thus, based on the FDIC's own position with respect to safe-deposit boxes,[5] if the bailee letters had required that Colonial keep an equivalent amount of gold bullion in a vault within one of its branches, then Bank of America would be able to recover the funds at issue at any time. There is

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[5]Of course, the mere failure by the FDIC to follow its own procedures does not allow for jurisdiction to enjoin the Corporation when it is acting pursuant to its statutorily prescribed powers as receiver or conservator. *See Bursik v. One Fourth Street N. Ltd.*, 84 F.3d 1395, 1397 (11th Cir. 1996). Instead, my finding in this case is that the FDIC cannot act as a receiver with respect to funds that are not part of the receivership estate, and FIRREA's jurisdiction-stripping provisions are therefore inapplicable to the claims and remedies at issue.

no reason why the assets held in segregated accounts by Colonial pursuant to the bailee letters should be viewed any differently. Accordingly, I find that the funds at issue are not part of the receivership estate[6] and that § 1821(j) does not bar injunctive relief.

Because the funds and property held pursuant to the bailee letters are outside the receivership estate, I also find that the jurisdiction-stripping provisions of FIRREA do not apply to the FDIC's disposition of these assets. *See Sharpe*, 126 F.3d at 1155. *See also Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. City Sav., F.S.B.*, 28 F.3d 376, 384 (3d Cir. 1994) (holding that court lacked jurisdiction to hear declaratory judgment action because the assets at issue belonged to the failed bank and were therefore part of the receivership estate: "If the insurance policies are not assets of the bank, then National Union and Gulf's declaratory judgment action for and affirmative defenses of rescission of those insurance policies would not be barred under § 1821(d)(13)(D)(I)."). *Cf. Coit Indep. Joint Venture v. Fed. Sav. & Loan Ins. Corp.*, 489 U.S. 561, 574 (1989) (noting that an analogous statutory bar to judicial review of actions by the Federal Savings and Loan Insurance Corporation "simply prohibits courts from restraining or affecting FSLIC's exercise of those receivership 'powers and functions' that have been granted by other statutory sources" and does not limit the court's ability to enjoin actions taken outside of that statutory authority); *F.D.I.C. v. Merchants Nat'l Bank of Mobile*, 725 F.2d 634, 639 (11th Cir. 1984) (noting that FDIC's power as receiver does not extend to assets that are not properly in the possession of the receivership estate).

Although there is a dearth of caselaw interpreting FIRREA's various bars to judicial review, my ruling is, I think, consistent with those few courts that have addressed the propriety of injunctive or declaratory relief against the FDIC with regard to property that did not belong to the failed institution. Noting that "§ 1821(j) does not elevate the FDIC to the position of a sacred cow which may graze upon the rights of others at will, unchecked by the courts", the district court in *Cummings Prop. Mgmt., Inc. v. F.D.I.C.*, 786 F. Supp. 144, 145–47 (D. Mass. 1992), entered a preliminary injunction enjoining the FDIC from removing an ATM from the one of the branches of the insolvent

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[6] So far, the FDIC has not tried to show that the funds held by Colonial for Bank of America have been commingled or were not held in segregated accounts. Given the evidence submitted by Bank of America so far, and Colonial's contractual obligations, I find that the funds were held in segregated accounts as required.

bank, where the bank's lease clearly indicated that the ATM was a fixture not subject to ownership by the bank after the termination of the lease. Similarly, in *In re Scott*, 157 B.R. 297, 315 (Bankr. W.D. Tex. 1993), the bankruptcy court engaged in an exhaustive analysis of § 1821(d)(13)(D), and concluded that "FIRREA's jurisdictional bar applies only to actions seeking a determination of rights with respect to *assets* of a failed depository institution not to property merely *claimed* to be an asset by the receiver." The bankruptcy court then held that it had jurisdiction to adjudicate claims regarding assets that were not rightfully possessed by the failed bank. Along these same lines, the district court in *Chicago Title Ins. Co. v. Resolution Trust Corp.*, 868 F. Supp. 135, 140 (D.S.C. 1994), found that, notwithstanding FIRREA, it had subject-matter jurisdiction to consider claims for damages and preliminary injunctive relief where the funds at issue were in the possession of the failed bank as a result of their unlawful conversion from the trust account of the plaintiff's attorney. Although both *Cummings* and *Scott* were later vacated through settlement, I find the reasoning in each of these cases persuasive. *See Friends of Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1218 (11th Cir. 2009) (Courts are "free to give statements in a vacated opinion persuasive value if it thinks they deserve it."). Indeed, I reach the same legal conclusion in this case as the courts in *Cummings*, *Scott*, and *Chicago Title*: assets possessed by, but not belonging to, the failed bank are outside the receivership estate, and the FDIC's attempts to dispose of these assets is therefore not protected by the jurisdiction-stripping provisions of FIRREA.

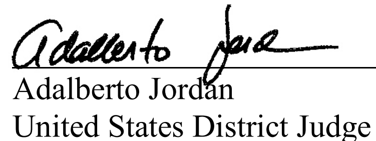
Based on the exhibits and declarations submitted by Bank of America in its motion for a temporary restraining order, I was more than satisfied that the circumstances of this case warranted the extraordinary remedy of ex parte injunctive relief. The FDIC, which came into this case after the TRO was issued, must stand in the shoes of Colonial with respect to those findings until there is evidence to the contrary. *See F.D.I.C. v. Harrison*, 735 F.2d 408, 412 (11th Cir. 1984) ("[W]hen FDIC acts in its corporate capacity as receiver, its liability must be determined in the same fashion as that of a private party. . . . [W]hen FDIC acts as a receiver and liquidating agent for a failed bank, as it did here, it merely 'stands in the shoes of the insolvent bank.'") (quoting *F.D.I.C. v. Glickman*, 450 F.2d 416, 418 (9th Cir. 1971)). As noted earlier, the Corporation has not challenged the propriety of the TRO or the preliminary injunction other than to assert that I now lack jurisdiction to continue to enforce the equitable relief. I now reject that assertion, and I further find that the

extension of the preliminary injunction in this case remains proper under both federal and Florida law.[7]

Accordingly, the preliminary injunction and bond in this case shall remain in effect.

The FDIC in its receivership capacity for Colonial Bank, Colonial Bank and the John Doe defendants, and all persons acting under their direction or control, or in concert with them, are hereby enjoined and restrained from selling, pledging, assigning, liquidating, encumbering, transferring, or otherwise disposing of all or any portion of (a) the proceeds paid by Freddie Mac to Colonial Bank, as trustee, custodian, bailee, and agent, for certain mortgage loans and corresponding loan documents owned by Ocala Funding, LLC ("Ocala"), and (b) certain mortgage loans and corresponding loan documents delivered to Colonial Bank, as trustee, custodian, bailee, and agent, which were not purchased by Freddie Mac as set forth on the schedule annexed hereto as Schedule A to the complaint in this action.

DONE and ORDERED in chambers in Miami, Florida, this 8th day of September, 2009.



Adalberto Jordán
United States District Judge

Copy to: All counsel of record

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[7] I acknowledge that, in light of Colonial's collapse and the involvement of the FDIC, some of the circumstances have changed since the TRO was first entered, particularly with respect to the public interest considerations contemplated by the injunctive-relief analysis. *See Mesa Air Group*, 573 F.3d at 1128. But this has not been raised as an issue by the FDIC, and has not been briefed by either party. I therefore reaffirm the factual findings I made in the order granting the TRO and conclude that these circumstances warrant conversion of that TRO into a preliminary injunction. If the FDIC has any evidence indicating that the funds in question are assets of Colonial, or it wishes to assert additional objections to the preliminary equitable relief, it may of course move to dissolve the injunction.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 09-22384-CIV-JORDAN

BANK OF AMERICA, N.A.,

Plaintiff,

v.

COLONIAL BANK, & JOHN DOES 1-10,

Defendants.

AMENDED NOTICE OF APPEAL

Notice is hereby given that the Federal Deposit Insurance Corporation as Receiver for Colonial Bank, defendant in the above-captioned case, hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the **Amended** Order Granting and Extending Preliminary Injunction in this action, entered on September 9, 2009 [D.E. 41].

Pursuant to 12 U.S.C. Section 1819(b)(4), the FDIC "shall not be required to post any bond to pursue any appeal and shall not be subject to payments of any filing fees in United States district courts or courts of appeals."

Dated: September 9, 2009

Respectfully submitted,

FEDERAL DEPOSIT INSURANCE CORPORATION as Receiver for Colonial Bank

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served via CM/ECF on this 9th day of September, 2009, on: **Marty Steinberg** and **Patricia Acosta,** Attorneys for Plaintiff, Hunton & Williams LLP, 1111 Brickell Avenue, Suite 2500, Miami, FL 33131.

By: /s/ Jose I. Rojas

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