

Exhibit A

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

MAY 21 2021

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

CLARK COUNTY BANCORPORATION,

Plaintiff-Appellant,

v.

FEDERAL DEPOSIT INSURANCE
CORPORATION, as Receiver for Bank of
Clark County,

Defendant-Appellee.

No. 19-35097

D.C. Nos. 3:14-cv-05816-BHS
3:14-cv-05852-BHS

MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Benjamin H. Settle, District Judge, Presiding

Argued and Submitted May 5, 2021
Seattle, Washington

Before: BOGGS,** TASHIMA, and MURGUIA, Circuit Judges.

Plaintiff-Appellant Clark County Bancorporation (“CCB”) appeals the district court’s grant of Defendant-Appellee Federal Deposit Insurance Corporation as Receiver for Bank of Clark County’s (“FDIC”) motion to dismiss or, in the

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Danny J. Boggs, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

alternative, motion for summary judgment. The parties are familiar with the facts, so we do not recite them here. We have jurisdiction under 28 U.S.C. § 1291, and we affirm the district court's dismissal, "albeit on different grounds." *See Isabel v. Reagan*, 987 F.3d 1220, 1225–26 (9th Cir. 2021).

CCB initially sued the FDIC in its capacity as receiver, along with several other federal entities and officials, in the United States District Court for the District of Columbia ("D.C. court"). *See Clark Cnty. Bancorporation v. U.S. Dep't of Treasury*, No. 13–632 (JEB), 2014 WL 5140004 (D.D.C. Sept. 19, 2014). The D.C. court determined that CCB had failed to exhaust its administrative remedies under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") with respect to its challenge to the "FDIC-Receiver's actions regarding the tax refunds at issue." *Id.* at *13; *see* 12 U.S.C. § 1821(d). Because CCB "did not timely file claims for refunds . . . through FIRREA's required administrative process," the D.C. court dismissed the claims against the FDIC. *Clark Cnty. Bancorporation*, 2014 WL 5140004 at *15. CCB did not appeal the D.C. court's judgment of dismissal.

The D.C. court's determination that CCB failed to timely exhaust its administrative remedies is entitled to preclusive effect here. *See Deutsch v. Flannery*, 823 F.2d 1361, 1364 (9th Cir. 1987) ("It matters not that the prior action resulted in a dismissal without prejudice, so long as the determination being

accorded preclusive effect was essential to the dismissal.”). Once the D.C. court determined that it lacked subject matter jurisdiction because CCB failed to timely file a claim with the FDIC, neither CCB’s nor the FDIC’s subsequent actions re-created subject matter jurisdiction over the same tax-refund claims. *See Intercontinental Travel Mktg., Inc. v. FDIC*, 45 F.3d 1278, 1286 (9th Cir. 1994) (explaining that waiver and estoppel doctrines do not apply to subject matter jurisdiction). Therefore, the district court did not err by granting the FDIC’s motion to dismiss.¹

AFFIRMED.

¹ Plaintiff-Appellant CCB’s motions to take judicial notice (Doc. 15 and Doc. 31) and motion to supplement the record on appeal (Doc. 30) are denied as moot. The substance of these motions pertains to the merits of the tax-refund ownership question, which we do not reach here.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.