No. 21-

IN THE

Supreme Court of the United States

CLARK COUNTY BANCORPORATION,

Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR BANK OF CLARK COUNTY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents an important issue of the failure of lower courts to adhere to relevant Supreme Court decisions, *Rodriguez v. FDIC, as Receiver for United Western Bank*, 589 U.S. ___, 140 S.Ct 713 (2020) ("*Rodriguez*"), and *United States v. Wong*, 575 U.S. 402 (2015) ("*Wong*"). The questions presented are:

1. Whether the Ninth Circuit Memorandum conflicts with the Supreme Court decision in *Rodriguez*, which confirmed that the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") is not applicable to tax refund determination declaratory judgment actions between a parent and the FDIC as Receiver for a subsidiary pursuant to tax allocation agreements.

2. Whether the Ninth Circuit Memorandum engaged in federal common lawmaking contrary to the Supreme Court decision in *Rodriguez*, by disregarding the United States Code, and the express jurisdiction provided therein by 12 U.S.C. § 1821(d)(6)(A)(ii).

3. Whether the Ninth Circuit Memorandum conflicts with the Supreme Court decision in *Wong*, whereby the FIRREA claims filing date provision is an administrative claims processing rule and is not jurisdictional.

RULE 29.6 DISCLOSURE STATEMENT

Clark County Bancorporation has no parent corporation, and no publicly held company owns 10% or more of its stock.

RELATED CASES

1. *Clark Cnty. Bancorporation v. FDIC as Receiver,* No. 19-35097, U.S. Court of Appeals for the Ninth Circuit. Judgment entered May 21, 2021.

2. *Clark Cnty. Bancorporation v. FDIC as Receiver,* No. C14-5816; C14-5852, consolidated under No. C14-5816, U.S. District Court for the Western District of Washington. Judgment entered January 10, 2019 (C14-5852 had been commenced in the U.S. District Court for the District of Columbia, *Clark Cnty. Bancorporation v. FDIC as Receiver, et al.*, No. 14-01304, thereafter transferred on October 27, 2014 from the U.S. District Court for the District of Columbia to the U.S. District Court for the Western District of Washington and assigned therein No. C14-5852).

3. *Clark Cnty. Bancorporation v. U.S. Dep't of Treasury, et al.,* No. 13–632, U.S. District Court for the District of Columbia. Judgment entered Sept. 19, 2014.

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PETITION FOR WRIT OF CERTIORARI

Clark County Bancorporation ("CCB") respectfully petitions for a writ of certiorari to review the judgment of the Ninth Circuit in this case.[1]

INTRODUCTION

This petition for a writ of certiorari involves the Ninth Circuit's Memorandum which conflicts with and contravenes two controlling decisions of the Supreme Court of the United States, *Rodriguez v. FDIC, as Receiver for United Western Bank*, 589 U.S. ___, 140 S. Ct. 713 (2020) and *United States v. Wong*, 575 U.S. 402 (2015). Adherence to Supreme Court decisions by lower courts is required. *Hutto v. Davis*, 454 U.S. 370 (1982).

OPINIONS BELOW

The Ninth Circuit Memorandum, as not for publication, ruling "on different grounds," dated May 21, 2021, is

1. May 21, 2021, not for publication, ruling "on different grounds." Pet. App. 1a, and which may be found at 848 F. App'x 321, 2021 WL 2026844 and 2021 U.S. App. LEXIS 15207. This appeal involves Case No. 3:14-cv-05852-BHS ("852 case") and Case No. 3:14-cv-05816-BHS ("816 case"), consolidated (over CCB's objection) under Case No. 3:14-cv-05816 by the District Court for the Western District of Washington Order on February 16, 2016, Dkt. No. 69. The 852 case was commenced on July 30, 2014 in the District of Columbia District Court, *Clark Cnty. Bancorporation v. FDIC as Receiver, et al.,* Case No. 14-01304-JEB (D.D.C.), and thereafter transferred on October 27, 2014 to the District Court for the Western District of Washington subsequent to filing of the 816 case in the District Court for the Western District of Washington (commenced October 15, 2014), thus assigned a subsequent case number.

attached at Pet. App. 1a, and which may be found at 848 F. App'x 321, 2021 WL 2026844 and 2021 U.S. App. LEXIS 15207. The Ninth Circuit order denying the petition for rehearing en banc, dated July 29, 2021, is attached at Pet. App. 75a, and may be found at 2021 U.S. App. LEXIS 22573. The Western District of Washington District Court ruling of January 10, 2019 on Plaintiff's Motions and Defendant's Motion is unreported, is attached at Pet. App. 4a, and may be found at 2019 WL 157942 and 2019 U.S. Dist. LEXIS 4936 as a single decision on Case No. 3:14-cv-05816 (BHS) and Case No. 3:14-cv-05852 (BHS). The Western District of Washington District Court ruling on Motion to Dismiss of February 4, 2016, is attached at Pet. App. 20a, the Western District of Washington District Court ruling on Motion to Dismiss of November 23, 2015, is attached at Pet. App. 23a, and may be found at 2015 WL 7458663 and 2015 U.S. Dist. LEXIS 158199, and the Western District of Washington District Court ruling on Motion to Dismiss of June 16, 2015, is attached at Pet. App. 28a, and may be found at 2015 WL 3752028 and 2015 U.S. Dist. LEXIS 77974.

JURISDICTION

The Ninth Circuit entered judgment on May 21, 2021. Pet. App. 1a. Petitioner filed a timely petition for rehearing en banc, which was denied on July 29, 2021. Pet. App. 75a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The time for filing this petition for certiorari was extended to December 23, 2021 by order of this Court dated October 20, 2021.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth at Pet. App. 77a to 81a.

STATEMENT OF THE CASE

The Ninth Circuit Memorandum conflicts with and contravenes two controlling decisions of the Supreme Court of the United States, *Rodriguez v. FDIC, as Receiver for United Western Bank*, 589 U.S. ___, 140 S. Ct. 713 (2020) ("*Rodriguez*") and *United States v. Wong*, 575 U.S. 402 (2015) ("*Wong*").

The Ninth Circuit Memorandum directly conflicts with the Supreme Court decision in *Rodriguez*, which confirmed that FIRREA[2] does not apply to tax refund determination declaratory judgment lawsuits between a parent and the FDIC as Receiver for a subsidiary. FIRREA was not implicated in *Rodriguez,* wherein no administrative claim against the FDIC under FIRREA had been filed in *Rodriguez*. *Rodriguez* confirmed FIRREA is not applicable to tax refund determination declaratory judgment lawsuits between a parent and the FDIC as Receiver for a subsidiary, however, the Ninth Circuit Memorandum conflicts with *Rodriguez* in applying FIRREA to a tax refund determination lawsuit between a parent and the FDIC as Receiver for a subsidiary.

2. Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Public Law 101-73. In certain circumstances, FIRREA requires the filing of administrative claims to the FDIC as a prerequisite to jurisdiction for a lawsuit against the FDIC. However, FIRREA is inapplicable in tax refund determination declaratory judgment actions.

If FIRREA were applicable, it would have been expected that the Supreme Court in *Rodriguez* would not have accepted certiorari and would not have issued a decision; rather the Supreme Court would have dismissed for lack of jurisdiction.

Rodriguez is controlling law at the time of the Ninth Circuit Memorandum. Notwithstanding *Rodriguez*, the Ninth Circuit Memorandum applied FIRREA to the instant appeal of a tax refund determination declaratory judgment action wherein the Ninth Circuit dismissed for lack of jurisdiction for failure to file a FIRREA claim by a claims filing date.

That FIRREA is not applicable in tax refund determination lawsuits had previously been established in other Circuit Courts of Appeals:

> The FDIC's argument [lack of jurisdiction for failure to file a FIRREA claim] is unpersuasive. Section [12 U.S.C.] 1821(d)(13)(D) applies only to assets of the FDIC's receivership. It therefore does not preclude the Bankruptcy Court from determining the threshold question of whether the tax refunds are an asset of the bankruptcy estate.

Zucker v. FDIC (In re BankUnited Fin. Corp.), 727 F.3d 1100, 1104 n.5 (11th Cir. 2013).[3]

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3. See also, *FDIC v. Zucker (In re NetBank, Inc.)*, 729 F.3d 1344 (11th Cir. 2013); *Cantor v. FDIC (In re Downey Fin. Corp.)*, 593 F. App'x 123 (3d Cir. 2015); and *Rodriguez v. FDIC, as Receiver for United Western Bank*, 893 F.3d 716 (10th Cir. 2018), 917 F.3d 1262 (10th Cir. 2019).

This is consistent with IRS regulation, 26 C.F.R § 301.6402-7(j), that the IRS issuance of a consolidated return refund check payable to a fiduciary is not a determination of ownership: "(j) This section … is *not determinative of ownership* of any such amount among current or former members of a consolidated group…." (emphasis added).[4]

The Ninth Circuit fails to address *Rodriguez*.

The Ninth Circuit Memorandum also conflicts with and fails to adhere to *Rodriguez*, by engaging in federal common lawmaking. The Ninth Circuit Memorandum disregarded the express jurisdiction provided by 12 U.S.C. § 1821(d)(6)(A)(ii), which provides independent jurisdiction for the 816 case.

One of the two cases on appeal (816 case) had been filed on October 15, 2014, within 60 days of the FDIC Notice of Disallowance in the proper court. *CCB v. FDIC*, 3:14-cv-05816-BHS (W.D.Wa.), Dkt. No. 1. Pet. App. 82a. Therefore, pursuant to 12 U.S.C. § 1821(d)(6)(A)(ii), express independent jurisdiction exists for this case. The Ninth Circuit Memorandum engaged in common lawmaking, in disregard of the express jurisdiction provided by this statute.

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4. The IRS merely determines whether a consolidated return refund is due and for administrative convenience may issue a refund check to any member of the consolidated group. No determination of ownership has yet occurred, as this is left to the consolidated group members to determine under their tax agreement and therefore the refund is not an asset of the subsidiary [FDIC]; as the refund is not an asset of the subsidiary [FDIC], FIRREA is inapplicable.

Nevertheless under any hypothetical FIRREA application, the Ninth Circuit Memorandum conflicts with and fails to adhere to the Supreme Court decision in *United States v. Wong*, 575 U.S. 402 (2015).

Wong defined whether federal statutory provisions are either administrative claims processing rules or jurisdictional. Under *Wong*, the FIRREA claims filing date provision constitutes an administrative claims processing rule and is not jurisdictional.

The Ninth Circuit Memorandum fails to follow this controlling law in *Wong*, instead dismissing for lack of jurisdiction for failure to file a claim before a claims filing date. Pursuant to *Wong*, 575 U.S. at 410-413, the FIRREA claims filing date provision does not discuss jurisdiction or the court's powers, and thus is not jurisdictional.[5] Rather, a subsequent section of FIRREA discusses jurisdiction and the court's powers, and that section is jurisdictional.[6]

The Ninth Circuit Memorandum fails to address *Wong*.[7]

Certiorari is appropriate as the Ninth Circuit Memorandum directly conflicts with two relevant decisions of the Supreme Court, *Rodriguez* and *Wong*.

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5. 12 U.S.C. § 1821(d)(3)(B)(i).

6. 12 U.S.C. § 1821(d)(6).

7. Other Circuit Courts of Appeal had ruled that the FIRREA claims filing date provision was not jurisdictional, but rather an administrative claims processing rule, including *Carlyle Towers Condo. Assn., Inc. v. F.D.I.C.*, 170 F.3d 301 (2d Cir. 1999) and *Heno v. FDIC*, 20 F.3d 1204 (1st Cir. 1994).

Adherence to Supreme Court decisions by lower courts is required. *Hutto v. Davis*, 454 U.S. 370 (1982).

The instant case involves determination of $9,121,204.00 in tax refunds between the parent [CCB] and the subsidiary [Bank of Clark County, FDIC as Receiver] pursuant to a tax allocation agreement. The District Court for the Western District of Washington had jurisdiction under 28 U.S.C. §§ 2201 and 1331, and in addition with respect to the 816 case under 12 U.S.C. § 1821(d)(6)(A)(ii).

The writ should be granted and the Ninth Circuit judgment should be reversed.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT MEMORANDUM CONFLICTS WITH THE SUPREME COURT DECISION IN *RODRIGUEZ*, WHICH CONFIRMED FIRREA IS NOT APPLICABLE TO TAX REFUND DETERMINATION ACTIONS BETWEEN A PARENT AND THE FDIC AS RECEIVER FOR A SUBSIDIARY PURSUANT TO TAX ALLOCATION AGREEMENTS.

If jurisdiction did not exist, it would have been expected that the Supreme Court would not have granted certiorari and would not have issued a decision on the merits regarding a tax refund determination lawsuit between a parent and subsidiary (FDIC as Receiver). FIRREA was not involved in *Rodriguez v. FDIC, as Receiver for United Western Bank*, 589 U.S. ___, 140 S. Ct. 713 (2020) ("*Rodriguez*").

The Supreme Court confirmed that FIRREA is not applicable in tax refund determination declaratory judgment lawsuits, as had been established in numerous other Circuits.[8]

Rodriguez is controlling in the instant action for adjudication of the 852 and 816 tax refund determination lawsuits between the parent [CCB], and its subsidiary [Bank of Clark County, FDIC as Receiver].

The 2020 *Rodriguez* decision, confirming that FIRREA is not germane to tax refund determination lawsuits, is the governing law at the time of the instant Ninth Circuit Memorandum of May 21, 2021. Pet. App. 1a.

A. Adherence To Supreme Court Decisions By Lower Courts Is Required.

As set forth in *Hutto v. Davis*, 454 U.S. 370, 375 (1982), ". . . unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." "Courts of Appeal must adhere to the controlling decisions of the Supreme Court." *Miranda v. Selig*, 860 F.3d 1237, 1242 (9th Cir. 2017). "[W]e are bound to follow a controlling Supreme Court precedent until it is explicitly overruled by that Court." *Miranda v. Selig*, 860 F.3d at 1243 (citation omitted).

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8. *Zucker v. FDIC (In re BankUnited Fin. Corp.)*, 727 F.3d 1100, 1104 n.5 (11th Cir. 2013). See also, *FDIC v. Zucker (In re NetBank, Inc.)*, 729 F.3d 1344 (11th Cir. 2013); *Cantor v. FDIC (In re Downey Fin. Corp.)*, 593 F. App'x 123 (3d Cir. 2015); and *Rodriguez v. FDIC, as Receiver for United Western Bank*, 893 F.3d 716 (10th Cir. 2018), 917 F.3d 1262 (10th Cir. 2019).

Moreover, when there is a subsequent Supreme Court decision, the Supreme Court law controls. *Herrera v. Wyoming*, 587 U.S. ___, 139 S. Ct. 1686, 1697 (2019); *Bobby v. Bies*, 556 U.S. 825, 836 (2009) (issue preclusion inapplicable where subsequent Supreme Court decisions).

The only issue before the Ninth Circuit was whether jurisdiction existed at the time of the Ninth Circuit Memorandum, and such jurisdiction did exist as confirmed by *Rodriguez*.

The Ninth Circuit Memorandum citation of FIRREA is in direct conflict with *Rodriguez*, which confirmed that FIRREA is not implicated in such tax refund determination lawsuits. Thus, if jurisdiction did not exist, it would be expected that certiorari would not have been granted and a decision would not have been issued by the Supreme Court in *Rodriguez* (FIRREA not involved in the *Rodriguez* case). The Ninth Circuit Memorandum conflicts with *Rodriguez* in applying FIRREA to the instant tax refund determination lawsuits.

This petition for certiorari is based on the Ninth Circuit's failure to adhere to two controlling Supreme Court decisions in existence at the time of the Ninth Circuit decision, *Rodriguez* and *United States v. Wong*, 575 U.S. 402 (2015) ("*Wong*"). As *Rodriguez* confirms that FIRREA does not apply to such tax refund determination actions, utilization of a jurisdictional ruling from a prior action filed by CCB in 2013 involving different issues, CCB's constitutional challenge to IRS statutes and regulations ("2013 constitutional challenge action"), is inapplicable to the instant declaratory judgment tax refund determination cases. Therefore, any argument

as to preclusion is improper. It should also be noted that although not relevant to this petition for certiorari, as *Rodriguez* and *Wong* supersede the decision in the 2013 constitutional challenge action, preclusion did not exist in any event.

The instant consolidated lawsuit involves CCB's declaratory judgment action for tax refund determination. CCB's 2013 constitutional challenge action challenged IRS statutes and regulations allowing the IRS to issue and forward consolidated group tax refund checks to certain entities other than the parent taxpayer, without contemporaneous notice of such to the parent taxpayer.[9]

The District of Columbia District Court decision acknowledged that CCB's 2013 constitutional challenge action was not a tax refund claim: "This case, unfortunately, is not a tax-refund suit"; ". . . Plaintiff never asserts a tax-refund claim in this suit . . ."; "As noted above, however, [Plaintiff] Clark County [Bancorporation] does not bring such a tax-refund suit in these proceedings."[10] Thus, contrary to the Ninth Circuit Memorandum, the

9. CCB'S Second Amended Complaint in the 2013 constitutional challenge action addressed IRS statutes and regulations, did not involve the subject of this appeal, but rather challenged the constitutionality of IRS statutes and regulations, and included causes of action for violations of the Fourth and Fifth Amendments, due process, property rights, as well as unconstitutionality of 26 C.F.R. § 301.6402-7. *CCB v. U.S. Dep't of Treasury, et al.,* Case No. 13-0632 (JEB) (D.D.C.), Second Amended Complaint, January 30, 2014, Dkt. No. 28.

10. *CCB v. United States Dep't of Treasury, et al.,* Civil Action No. 13-632 (JEB), 2014 WL 5140004, at *1, *11, *12, 2014, and 2014 U.S. Dist. LEXIS 147984 (D.D.C. Sept. 19, 2014).

Ninth Circuit appeal did not involve the "same tax-refund claims," Pet. App. 3a, as the instant tax refund determination declaratory judgment actions were not a part of the 2013 constitutional challenge action complaint.

Consistent with the foregoing, at the time the District of Columbia District Court dismissed the 2013 constitutional challenge action, the 852 tax refund determination case was already pending in the D.C. District Court before the same judge.[11] The same judge in the D.C. District Court did not dismiss the pending 852 case regarding tax refund determination. Instead, the D.C. District Court dismissed CCB's 2013 constitutional challenge action and allowed the 852 tax refund determination case to stand. Nor could preclusion exist with respect to the 816 case, as that case was not in existence at the time of the D.C. District Court decision on the 2013 constitutional challenge action. Although preclusion had been raised on numerous occasions, the District Courts below failed to adopt those arguments, including at Pet. App. 20a, Pet. App. 23a, and Pet. App. 28a.

The subsequent Supreme Court decisions in *Rodriguez* and *Wong* govern the instant actions, and the Ninth Circuit Memorandum conflicts with the Supreme Court decisions in *Rodriguez* and *Wong*. While the instant

11. 852 case commenced July 30, 2014 in the District of Columbia District Court, *CCB v. FDIC, et al.*, Case No. 1:14-cv-01304-JEB (D.D.C.), and thereafter transferred on October 27, 2014 to the District Court for the Western District of Washington, assigned therein as *CCB v. FDIC,* Case No. 3:14-cv-05852-BHS (W.D.Wash.), subsequently consolidated (Dkt. No. 69) with the 816 case which had been filed in the District Court for the Western District of Washington on October 15, 2014.

tax refund determination lawsuits between CCB and the FDIC were not a part of the 2013 constitutional challenge action complaint, nevertheless, two Supreme Court decisions, *Rodriguez* and *Wong*, are controlling. "… [E]ven if the core requirements for issue preclusion had been met …," a subsequent Supreme Court decision applies in any event. *Bobby v. Bies*, 556 U.S. at 836.

B. The Ninth Circuit Has Engaged In Federal Common Lawmaking By Disregarding The United States Code, Contrary To *Rodriguez.*

The Ninth Circuit's failure to acknowledge the express independent statutory jurisdiction (12 U.S.C. § 1821(d)(6)) of the 816 case constitutes federal common lawmaking, in direct conflict with *Rodriguez.*

The FDIC forwarded to CCB a Notice of Newly-Discovered Claim in 2014, CCB responded by filing a claim, and thereafter the FDIC forwarded a Notice of Disallowance, dated August 26, 2014. Pet. App. 82a. CCB then commenced the 816 case on October 15, 2014, within the 60 day time period and in the proper court as required.[12]

Even assuming FIRREA application, nevertheless express and independent statutory jurisdiction exists for the 816 case as provided in 12 U.S.C. 1821(d)(6)(A), which provides jurisdiction for filing suit:

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12. Subsequently consolidated by the District Court for the Western District of Washington with the 852 case under the 816 docket number. *CCB v. FDIC,* 3:14-cv-05816-BHS (W.D.Wa.), Dkt. No. 92.

> Before the end of the 60-day period beginning on … (ii) the date of any notice of disallowance … in the [United States district court] within which the depository institution's principal place of business is located … (and *such court shall have jurisdiction to hear such claim*) (emphasis added).

The FDIC Notice of Disallowance itself references the statute and the right to file a lawsuit:

> Pursuant to 12 U.S.C. § 1821(d)(6), if you do not agree with this disallowance, *you have the right to file a lawsuit on your claim* … If you do not file a lawsuit … before the end of the 60-day period, the disallowance of your claim will be final and you will have no further rights or remedies with respect to your claim (emphasis added). Pet. App. 82a-83a.

1. The Ninth Circuit disregarded the express jurisdiction provided by 12 U.S.C. § 1821(d)(6)(A)(ii) which provides independent jurisdiction for the 816 case.

One of the two cases on appeal (the 816 case) had been filed on October 15, 2014, within 60 days of the FDIC Notice of Disallowance in the proper court. Pet. App. 82a, *CCB v. FDIC*, 3:14-cv-05816-BHS (W.D.Wa.), Dkt. No. 1. Therefore, pursuant to 12 U.S.C. § 1821(d)(6)(A)(ii), jurisdiction exists for this case. The Ninth Circuit engaged in common lawmaking, in disregard of the express jurisdiction provided by this statute.

"The cases in which federal courts may engage in common lawmaking are few and far between." *Rodriguez v. FDIC*, 140 S. Ct. at 716.

12 U.S.C. § 1821(d)(6)(A)(ii) provides express and independent jurisdiction for the 816 case.

The Notice of Disallowance, Pet. App. 82a, serves as a federal right to sue letter, with its own express and independent basis for jurisdiction under 12 U.S.C. § 1821(d)(6)(A)(ii).

The Ninth Circuit cannot disregard and nullify the jurisdiction provided by this statute, whereby a court is to determine "such claim," namely whether the reason for disallowance is sustainable. 12 U.S.C. § 1821(d)(5)(A)(iv)(I) requires the Notice of Disallowance, "shall contain-(I) a statement of each reason for disallowance."

The Ninth Circuit fails to address this absolute statutory jurisdiction for the 816 case.

In failing to apply 12 U.S.C. § 1821(d)(6)(A)(ii), the Ninth Circuit conflicts with *Rodriguez* by engaging in federal common lawmaking, and certiorari is appropriate.

II. THE NINTH CIRCUIT MEMORANDUM CONFLICTS WITH THE SUPREME COURT DECISION IN *WONG,* WHEREBY THE FIRREA CLAIMS FILING DATE PROVISION IS AN ADMINISTRATIVE CLAIMS PROCESSING RULE AND IS NOT JURISDICTIONAL.

As *Wong* defined whether federal statutory provisions are either administrative claims processing rules or

jurisdictional, the FIRREA claims filing date provision is an administrative claims processing rule and is not jurisdictional. The Ninth Circuit Memorandum conflicts with *Wong* in ruling that the FIRREA claims filing date provision is jurisdictional.

The Ninth Circuit fails to address the 2015 controlling law in *Wong* that such federal statutory filing date provisions are not jurisdictional, but rather, administrative claims processing rules.

Wong established that the FIRREA claims filing date provision is not jurisdictional, but rather an administrative claims processing rule. Other Circuit Courts had ruled that the FIRREA claims filing date provision was not jurisdictional, but rather an administrative claims processing rule, including *Carlyle Towers Condo. Assn., Inc. v. F.D.I.C.*, 170 F.3d 301 (2d Cir. 1999) and *Heno v. FDIC*, 20 F.3d 1204 (1st Cir. 1994).

"Congress must do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional …." *Wong*, 575 U.S. at 410. A statute is jurisdictional only if it ". . . refer[s] to the jurisdiction of the district courts …." *Wong*, 575 U.S. at 403. "Rather, in case after case, we have emphasized another distinction – that jurisdictional statutes speak about jurisdiction, or more generally phrased, about a court's powers." *Wong*, 575 U.S. at 412 n.4. "This Court has often explained that Congress's separation of a filing deadline from a jurisdictional grant indicates that the time bar is not jurisdictional." *Wong*, 575 U.S. at 411.

A. The FIRREA Claims Filing Date Provision Is Not Jurisdictional, As It Does Not Contain Jurisdictional Language And Is In A Separate Location From The Section On Jurisdiction.

12 U.S.C. § 1821(d)(3)(B)(i), addresses the claims filing date, "Authority of receiver to determine claims":

> The receiver … shall—
>
> (i) … publish a notice … to present their claims … to the receiver by a date specified in the notice which shall be not less than 90 days after the publication of such notice;

This claims filing date provision does not speak in jurisdictional terms and does not address the powers of the court. Under *Wong* this is an administrative claims processing rule, and is not jurisdictional; thus jurisdictional dismissal for failure to file a claim before the claims filing date is improper as in conflict with *Wong*.

B. The FIRREA Claims Filing Date Provision Is Not Jurisdictional, As The Section Addressing Jurisdiction And The Court's Powers Is Located In A Different Section From The Claims Filing Date Provision.

12 U.S.C. § 1821(d)(6)(A) addresses jurisdiction, "Provision for agency review or judicial determination of claims":

> Before the end of the 60-day period beginning on the earlier of—

> (i) the end of the period described in paragraph (5)(A)(i) with respect to any claim … for which the Corporation is receiver; or
>
> (ii) the date of any notice of disallowance of such claim pursuant to paragraph (5)(A)(i),
>
> the claimant may …*file suit* on such claim … in the [United States District Court] within which the depository institution's principal place of business is located … (and *such court shall have jurisdiction to hear such claim*) (emphasis added).

This section expressly addresses jurisdiction and the court's powers. To the contrary, the claims filing date provision does not address jurisdiction, and thus is an administrative claims processing rule. It is undisputed that the lawsuits herein were timely filed in the proper court pursuant to the foregoing jurisdictional section.

The claims filing date provision does not reference jurisdiction of the district courts, does not discuss a court's powers, and is in a separate location from the jurisdictional section, thus pursuant to *Wong* is an administrative claims processing rule and is not jurisdictional.

The Ninth Circuit Memorandum citation to a prior jurisdictional dismissal of CCB's 2013 constitutional challenge to IRS statutes and regulations is improper, as involving altogether different issues and claims; in any event, that prior ruling has been superseded by *Wong*. The Ninth Circuit Memorandum citation of *Intercontinental Travel Mktg, Inc. v. FDIC*, 45 F.3d 1278 (9th Cir. 1994)

("*Intercontinental*") (which held the FIRREA claims filing date provision was jurisdictional), is misplaced as *Intercontinental* has been superseded by *Wong*. Moreover, unlike the CCB case, *Intercontinental* did not involve a Notice of Disallowance, and thus did not address the express independent jurisdiction conferred by 12 U.S.C. § 1821(d)(6)(A)(ii).[13]

Wong was neither acknowledged nor discussed by the Ninth Circuit. As in conflict with the Supreme Court in *Wong,* certiorari is appropriate.

III. QUESTIONS PRESENTED ARE OF CONSIDERABLE IMPORTANCE.

This question is important regarding lower court adherence to Supreme Court decisions. This case provides an appropriate means to address the fundamental judicial tenet requiring lower court adherence to Supreme Court decisions.

CONCLUSION

The Ninth Circuit Memorandum is in conflict with two separate Supreme Court decisions.

Rodriguez confirmed FIRREA is not applicable to tax refund determination lawsuits between a parent

13. Other Circuit Courts had ruled that the FIRREA claims filing date provision was not jurisdictional, but rather an administrative claims processing rule, including *Carlyle Towers Condo. Assn., Inc. v. F.D.I.C.*, 170 F.3d 301 (2d Cir. 1999) and *Heno v. FDIC*, 20 F.3d 1204 (1st Cir. 1994).

and the FDIC as Receiver for a subsidiary. However, contrary to *Rodriguez,* the Ninth Circuit Memorandum applied FIRREA to the tax refund determination lawsuits between a parent (CCB) and the FDIC as Receiver for a subsidiary.

Further, contrary to *Rodriguez,* the Ninth Circuit has engaged in federal common lawmaking in failing to acknowledge the express independent statutory jurisdiction of 12 U.S.C. § 1821(d)(6)(A)(ii).

Wong defined whether federal statutory provisions are either administrative claims processing rules or jurisdictional, such that the FIRREA claims filing date provision is an administrative claims processing rule and is not jurisdictional. Pursuant to *Wong*, as the claims filing date provision is in a separate location from the jurisdictional section, and as the jurisdictional section discusses jurisdiction and a court's powers, the claims filing date provision is an administrative claims processing rule and is not jurisdictional. In ruling that the FIRREA claims filing date provision is jurisdictional, the Ninth Circuit Memorandum conflicts with *Wong.*

The petition for a writ of certiorari should respectfully be granted.

Dated: December 21, 2021

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED MAY 21, 2021

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19-35097

CLARK COUNTY BANCORPORATION,

Plaintiff-Appellant,

v.

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

Defendant-Appellee.

MEMORANDUM[*]

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

May 5, 2021, Argued and Submitted, Seattle, Washington; May 21, 2021, Filed

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

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 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 U.S. Dist. LEXIS 147984, 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." 2014 U.S. Dist. LEXIS 147984, [WL] at *13; *see* 12 U.S.C. § 1821(d). Because CCB "did not timely file claims for refunds . . . through FIRREA's required

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

administrative process," the D.C. court dismissed the claims against the FDIC. *Clark Cnty. Bancorporation*, 2014 U.S. Dist. LEXIS 147984, 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 recreated 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.[11]

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.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT TACOMA, DATED JANUARY 10, 2019, CASE NO. 05816 AND CASE NO. 05852

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON AT TACOMA

CASE NO. C14-5816 BHS;
C14-5852 BHS

CLARK COUNTY BANCORPORATION,

Plaintiff,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Defendant.

ORDER DENYING PLAINTIFF'S MOTIONS AND GRANTING DEFENDANT'S MOTION

This matter comes before the Court on Defendant Federal Deposit Insurance Corporation-Receiver's ("Receiver") motion to dismiss or in the alternative, motion for summary judgment, Dkt. 172,[1] and Plaintiff Clark County Bancorporation's ("CCB") motion for summary judgment, Dkt. 175, motion for status conference, Dkt. 179,

1. Unless otherwise noted, references to the docket refer to documents in Cause No. 14-5816-BHS.

and motion pursuant to Rule 56(d) of the Federal Rules of Civil Procedure, Dkt. 180. The Court has considered the pleadings filed in support of and in opposition to the motions and the remainder of the file and hereby denies CCB's motions and grants the Receiver's motion for the reasons stated herein.

I. PROCEDURAL AND FACTUAL BACKGROUND

A. Receivership and Tax Refunds

On August 1, 2001, CCB and the Bank of Clark County ("Bank") entered into a Tax Allocation Agreement ("TAA"). Dkt. 88 at 28-30. CCB was a registered bank holding company and parent of the Bank. *Id.* at 28. CCB and the Bank planned "to file consolidated federal and state income tax returns for the year 2001 and plan[ned] to continue to file consolidated income tax returns for all future years." *Id.* The entities agreed that the tax settlements between CCB and the Bank would be "conducted in a manner that is no less favorable to [the Bank] than if it were a separate taxpayer." *Id.* The TAA requires the Bank to compute its federal and state income taxes on a separate entity basis and then pay that full amount to the CCB, regardless of the amount owed by the consolidated entity. *Id.* at 28-29. Regarding the Bank's tax refunds, the TAA provides as follows:

> In the event [the Bank] incurs a loss for tax purposes, as computed in paragraph 1, [the Bank] shall record a current income tax benefit and receive a refund from [CCB] in an amount

> no less than the amount [the Bank] would have been entitled to receive as a separate entity as computed in paragraph 1. [CCB] shall pay such refund to [the Bank] not later than 30 days after the date [the Bank] would have filed its own return, regardless of whether the consolidated group is receiving a refund.

Id. at 29, ¶ 4.

On January 16, 2009, the Washington State Department of Financial Institutions closed the Bank and named the FDIC as receiver. Dkt. 173 at 60. CCB knew of the appointment of the Receiver on that date. Dkt. 174 at 7. On March 15, 2009, the Receiver submitted a request to the Internal Revenue Service ("IRS") to extend the Bank's 2008 tax return filing to September 15, 2009. Dkt. 173 at 95. On September 11, 2009, the Receiver filed a 2008 loss year tax return for the consolidated group based exclusively on the Bank's financial information and claiming a refund of $729,231 for payments applied to estimated 2008 tax liability. Dkt. 173 at 5, ¶ 13. On October 5, 2009, the Receiver filed amended tax returns for the consolidated group's 2006 and 2007 tax years and claiming refunds for overpayments of $2,529,379 and $2,410,299, respectively, based on the carryback of the 2008 loss under the then applicable two-year carryback rule. *Id.* ¶ 14. By letter dated October 2, 2009, the Receiver sent Michael Worthy, the Chief Executive Officer of CCB, copies of the 2007 and 2006 refund forms. *Id.* at 97.

On November 2, 2009, the IRS issued refunds checks totaling $4.9 million to the Receiver as fiduciary for the

Bank and as agent for the consolidated group. *Id.* at 6, ¶ 18; Dkt. 174 at 21, ¶ 9. One check was made out to "Clark County Bancorporation c/o FDIC as Receiver" and the other was made out to "Clark County Bancorporation." Dkt. 174 at 21, ¶ 9.

On April 29, 2010, CCB filed a 2008 loss year tax return and forms attempting to amend its 2003-07 tax returns to request refunds based on net operating loss carrybacks. Dkt. 173 at 7-8, ¶ 30. The IRS, however, only processed and accepted the Receiver's tax forms instead of CCB's forms. Dkt. 174 at 23, ¶ 15.

On October 7, 2010, the Receiver unsuccessfully attempted to contact representatives of CCB to obtain CCB's consent for the Receiver to accept the checks on behalf of CCB. Dkt. 173 at 6, ¶ 18. When CCB failed to respond, the Receiver contacted the IRS requesting that the existing checks be cancelled and new checks be issued. *Id.* On April 12, 2011, the IRS obliged and issued new checks made out to "Bank of Clark County c/o FDIC as Receiver." Dkt. 174 at 21, ¶ 10.

On August 15, 2011, the Receiver requested authorization to act on behalf of the consolidated group. Dkt. 173 at 6, ¶ 20. On August 16, 2011, the IRS granted the request. *Id.* ¶ 21. On November 28, 2011, the IRS issued additional refund checks for the 2003-07 tax years. *Id.* at 7, ¶ 23. On January 12, 2012, the Receiver sent the IRS a letter stating that it was returning the checks because they were not payable to the Receiver. *Id.* ¶ 24. On February 6, 2012, the IRS reissued the checks payable to the Receiver. Dkt. 174 at 24, ¶ 21.

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B. Litigation History

On May 2, 2013, CCB filed a complaint against the Department of the Treasury, the IRS, and the FDIC in the District Court for the District of Columbia. *Clark Cty. Bancorporation v. United States Dep't of Treasury*, Cause No. CV-13-0632-JEB, Dkt. 1, (D.D.C.). CCB sought a declaratory judgment requiring the IRS to issue new refunds to CCB. *Id.* On August 8, 2013, CCB filed an amended complaint adding the Receiver as a party. *Id.*, Dkt. 5.

On December 6, 2013, CCB sent the Receiver a letter demanding delivery of the tax refunds as well as all information related to the refund checks. Dkt. 88 at 26. On January 16, 2014, the Receiver responded and stated that CCB may have a claim against the failed Bank. Dkt. 173 at 112-16. The letter advised CCB to submit a proof of claim no later than April 16, 2014 even though the Receiver considered the claims bar date to be April 23, 2009 ("Claims Bar Date"). *Id.* at 112. CCB did not submit a claim. *Id.* at 8, ¶ 34.

On January 30, 2014, CCB filed an amended complaint that "meander[ed] through various and sundry legal theories and claims for relief." *Clark Cty. Bancorporation v. United States Dep't of Treasury*, Cause No. CV-13-0632-JEB, 2014 U.S. Dist. LEXIS 147984, 2014 WL 5140004, at *2 (D.D.C. Sept. 19, 2014). All Defendants moved to dismiss for various reasons. *Id.*

On July 29, 2014, CCB submitted a completed proof of claim form with the Receiver requesting the tax refunds. Dkt. 88 at 22-24.

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On July 30, 2014, while the motions to dismiss were pending, CCB filed a new complaint against the FDIC and the Receiver in the D.C. district court. *Clark Cty. Bancorporation v. Federal Deposit Insurance Company*, Cause No. CV-14-1304-JEB, Dkt. 1 (D.D.C.). CCB sought declaratory relief requiring the delivery of the tax refunds. *Id.*

On August 20, 2014, the Receiver sent CCB a notice of disallowance of CCB's claim because it was filed after the established bar date of December 30, 2008. Dkt. 35 at 6-7.[2]

On September 19, 2014, the D.C. court granted the motions to dismiss in the first action, CV-13-0632-JEB, 2014 U.S. Dist. LEXIS 147984, 2014 WL 5140004 at *5-16. As an introduction, the court provided as follows:

> This case, unfortunately, is not a tax-refund suit. Instead of pursuing this straightforward route against the Internal Revenue Service, the parent of a failed bank has presented an agglomeration of mismatched claims against a series of governmental agencies. Occasionally perceived amidst all of this legal fog is the relief actually requested: the return of a tax refund issued to the subsidiary bank's Receiver instead of to its parent company.
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2. The Receiver admits that the stated bar date of December 20, 2008, was a scrivener's error. Dkt. 197 at 10 n.11.

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> In lieu of a tax-refund action, Plaintiff has thrown into this suit every alternative approach it could conceive of: it brings constitutional challenges, administrative-law claims, and statutory causes of actions; it seeks damages, declaratory relief, injunctive relief, and a writ of mandamus; and it does so against the United States, the Department of the Treasury and its Acting Commissioner, the IRS and its Acting Commissioner, the FDIC in its corporate capacity together with its Acting Chairperson, and the FDIC in its capacity as Receiver together with its Acting Chairperson.

2014 U.S. Dist. LEXIS 147984, [WL] at *1.

On October 14, 2014, shortly after its other complaint was dismissed, CCB filed a motion to transfer the second action, CV 14-1304-JEB, to this district. *See* Cause No. 14-5852-BHS, Dkt. 6. That same day CCB filed two complaints in this district. Cause No. 14-05811-BHS, Dkt. 1; Cause No. 14-05816-BHS, Dkt. 1. On October 27, 2018, the D.C. court granted the motion to transfer, which resulted in CCB having three actions pending in this district over the same tax refunds.

On June 16, 2015, the Court granted the United States of America, the Department of the Treasury, and the IRS's motion for summary judgment concluding in relevant part that, once a tax refund is issued, CCB may not pursue an action for an additional refund against any of these parties. Cause No. 14-5811-BHS, Dkt. 42. That same day, the Court denied the Receiver's motion to dismiss CCB's amended

complaint concluding that CCB may be entitled to equitable extensions of the claim bar date. Cause No. 14-5816-BHS, Dkt. 56. The Court relied on CCB's allegations that its claim arose after the claims bar date. *Id.* at 3-4.

On November 23, 2015, the Court granted in part and denied in part the Receiver's motion to dismiss CCB's complaint. Cause No. 14-5852-BHS, Dkt. 52. In relevant part, the Court denied the motion on CCB's claim for breach of the TAA. *Id.*

On February 10, 2016, CCB filed a fourth amended complaint asserting one claim for relief. Cause No. 14-5816-BHS, Dkt. 88. On February 16, 2016, the Court consolidated Cause No. 14-5816-BHS with Cause No. 14-5852-BHS. *See* Cause No. 14-5816-BHS, Dkt. 92.

On May 18, 2017, the Court denied CCB's motion for summary judgment as premature because the Receiver had failed to process CCB's administrative claim. Dkt. 116.

On August 27, 2018, the Receiver filed a motion to dismiss or, in the alternative, a motion for summary judgment, Dkt. 172, and CCB filed a motion for summary judgment, Dkt. 175.

On September 10, 2018, CCB filed a motion for status conference and motion pursuant to Rule 56(d). Dkts. 179, 180. On September 24, 2018, the Receiver responded to these motions. Dkts. 183, 184. On September 28, 2018, CCB replied. Dkt. 186.[3]

3. The Court denies both motions. In the motion for a status conference, CCB sought guidance on whether it should respond to

On October 5, 2018, the parties responded to the dispositive motions. Dkts. 187, 191. On November 8, 2018, the parties replied. Dkts. 197, 200.

II. DISCUSSION

The Receiver moves to dismiss CCB's complaints for lack of jurisdiction or, in the alternative, for summary judgment on all of CCB's claims in both complaints. Dkt. 172. CCB moves for summary judgment requesting an order that the tax refunds are property of the parent, CCB, pursuant to the TAA. Dkt. 175 at 1-2.

Although CCB's claims are unclear, it is clear that CCB is not making a claim pursuant to the Financial Institution Reform, Recovery and Enforcement Act of 1989 ("FIRREA"). Dkt. 88 ("The tax refunds are not assets of a failed institution for which the FDIC serves as receiver, therefore FIRREA would not apply."). Instead, CCB seeks a "determination of ownership of refunds . . . pursuant to contract law in relation to the TAA." *Id.* Thus, the Court will address the contract interpretation issue.

Regarding FIRREA, CCB devotes a small portion of its opposition to this issue. Dkt. 200 at 8-10 ("Assuming

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the Receiver's motion to dismiss for lack of jurisdiction. The Court denies CCB's motion for status conference as moot because CCB filed a full response to the Receiver's dispositive motion. In the motion for a stay pursuant to Rule 56(d), CCB requested that the Court stay consideration of the Receiver's motion pending the outcome of CCB's three motions to compel discovery. On September 19, 2018, the Court denied the motions to compel. Dkt. 182. Thus, the Court denies this motion as moot.

Arguendo FIRREA Applies . . ."). CCB, however, fails to overcome binding precedent establishing that the Court lacks jurisdiction to consider CCB's late filed claims. *Intercontinental Travel Mktg., Inc. v. F.D.I.C.*, 45 F.3d 1278, 1284 (9th Cir. 1994) ("We read the claims bar date to be a jurisdictional requirement."). *See also Kuhlmann v. Sabal Fin. Grp. LP*, 26 F. Supp. 3d 1040, 1049 (W.D. Wash. 2014) ("The Ninth Circuit has repeatedly recognized the jurisdictional nature of FIRREA's mandatory exhaustion and filing requirements."). Therefore, to the extent CCB's claims are based on claims against a failed institution under FIRREA, the Court concludes that CCB failed to timely file a claim and the Court lacks jurisdiction to consider the claim.

Regarding equitable doctrines that could toll the claims bar date, the Court finds that on balance CCB would not be entitled to extensions in equity. Although the Court is bound by the binding precedent that the bar date is a jurisdictional requirement, it seems completely inequitable that the Receiver is entitled to a bar date of April 2009 when Congress passed the law allowing entities to carry back losses for additional refunds in November 2009. However, based on the facts of this case, CCB failed to properly file claims with the Receiver or the IRS for the original refunds or the additional refunds. Now, CCB attempts to gain from the proper actions of the Receiver when the Receiver timely filed tax forms for both refunds. Moreover, since the Bank has been dissolved, CCB intends to use the funds to pay its attorneys and distribute the remainder as CCB's board determines, including payments to the board members themselves. Dkt. 191 at 18 n.16. In short, CCB's board intends to unfairly gain

assets that it failed to properly secure itself. Nothing in this fact patterns seems equitable even if the Ninth Circuit were to alter the binding precedent. Therefore, the Court grants the Receiver's motion on this issue and will now consider the contract issue.

A. Summary Judgment Standard

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt"). *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The Court must consider the substantive evidentiary burden that the nonmoving party must meet at trial—e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson*, 477 U.S. at 255). Conclusory, nonspecific statements in affidavits are not sufficient, and missing facts will not be presumed. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990).

B. TAA

"[T]he right to receive a tax refund constitutes an interest in property." *United States v. Sims*, 218 F.3d 948, 955 (9th Cir. 2000). "Unless some federal interest requires a different result," the federal choice of law rule for an issue regarding an interest in property is state law. *Butner v. United States*, 440 U.S. 48, 55, 99 S. Ct. 914, 59 L. Ed. 2d 136 (1979).

CCB argues that ownership of the property at issue should be determined by the TAA. Under Washington law, contract interpretation is a question of law when the

interpretation does not depend on the use of extrinsic evidence. *Wash. State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Constr. Co.*, 176 Wn.2d 502, 517, 296 P.3d 821 (2013); *see also Mut. of Enumclaw v. USF Ins. Co.*, 164 Wn.2d 411, 424 n.9, 191 P.3d 866 (2008) (noting that when a contract presents no ambiguity and no extrinsic evidence is required to make sense of the contract terms, contract interpretation is a question of law).

In this case, the Court is able to interpret the TAA as a matter of law because CCB has failed to establish any ambiguity. Paragraph four of the TAA is entitled "Tax Refund from Parent." Dkt. 88 at 29. The first sentence of that paragraph explicitly provides that, "[i]n the event [the Bank] incurs a loss for tax purposes . . . [the Bank] shall record a current income tax benefit and receive a refund from [CCB] in an amount no less than the amount [the Bank] would have been entitled to receive as a separate entity." *Id.* CCB fails to establish any ambiguity in that sentence. Thus, when the Bank incurred substantial losses, it was entitled to a refund from CCB in an amount no less than the amount it would have been entitled to as a separate entity. Under the facts of this case, even if CCB has properly filed the tax returns to obtain the contested refunds, it was contractually bound to refund the amount to the Bank. Therefore, the Court concludes that CCB's claim of entitlement to the refunds is without merit, grants the Receiver's motion for summary judgment, and denies CCB's motion for summary judgment.

The Court notes that CCB cites some authorities for the proposition that the TAA creates a debtor-creditor

relationship. Dkt. 175 at 5-9. The Receiver, however, correctly argues that these authorities are distinguishable and, even if persuasive, the TAA controls the disposition of the refunds. First, CCB's authorities considered the scope of assets when a party files for bankruptcy protection. *In re IndyMac Bancorp, Inc.*, 2012 Bankr. LEXIS 1462, 2012 WL 1037481 (Bankr. C.D. Cal. Mar. 29, 2012); *In re IndyMac Bancorp, Inc.*, 2012 U.S. Dist. LEXIS 88666, 2012 WL 1951474 (C.D. Cal. May 30, 2012) *aff'd, In re IndyMac Bancorp, Inc.*, 554 F. App'x 668 (9th Cir. 2014); *In re Imperial Capital Bancorp, Inc.*, 492 B.R. 25 (S.D. Cal. 2013); *In re Downey Financial Corp.*, 499 B.R. 439 (Bankr. D. Del. 2013) *aff'd*, 593 F. App'x 123 (3d Cir. 2015). Under bankruptcy law, the scope of an estate's property interests is broad. *See, e.g., United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204, 103 S. Ct. 2309, 76 L. Ed. 2d 515, (1983). Estate property includes all of a debtor's rights and expectancies and is a concept that "has been construed most generously and an interest is not outside its reach because it is novel or contingent or because enjoyment must be postponed." *Segal v. Rochelle*, 382 U.S. 375, 379, 86 S. Ct. 511, 15 L. Ed. 2d 428 (1966).

In this case, the Court is not required to determine the scope of CCB's assets that will be subject to an orderly distribution under the bankruptcy laws. Instead, CCB asserts a breach of contract claim that requires to the Court to consider "(1) a contract that imposed a duty, (2) breach of that duty, and (3) an economic loss as a result of the breach." *Myers v. State*, 152 Wn. App. 823, 827-28, 218 P.3d 241 (2009) (citing *Nw. Indep. Forest Mfrs. v. Dep't of Labor & Indus.*, 78 Wn. App. 707, 712, 899 P.2d 6

(1995)). If CCB had a duty to pay the refund to the Bank under the terms of the TAA, then CCB fails to establish how the scope of assets in a bankruptcy action alters that duty. Thus, the Court rejects CCB's bankruptcy analogy.

Second, Ninth Circuit authorities hold that "'the parties are free to adjust among themselves the ultimate tax liability' . . . through 'an explicit agreement.'" *In re Indymac Bancorp, Inc.*, 554 Fed. Appx. at 669-70 (quoting *W. Dealer Mgmt. v. England*, 473 F.2d 262, 264 (9th Cir. 1973)). CCB and the Bank entered such an explicit agreement that included a provision governing the distribution of the refunds. CCB fails to cite any provision or evidence in support of the proposition that it reserved some discretion on whether to make the required refund payment to the Bank. Thus, it stands to reason that if CCB had properly filed the tax returns and received the contested refunds, it would have breached the contract by not paying the refund to the Bank. Regardless, CCB has failed to show that the Bank, or the Receiver on behalf of the Bank, breached the TAA by obtaining the refund itself. Thus, CCB's reliance on bankruptcy law is misplaced and easily distinguishable.

III. ORDER

Therefore, it is hereby **ORDERED** that the Receiver's motion to dismiss or in the alternative, motion for summary judgment, Dkt. 172, is **GRANTED** and CCB's motion for summary judgment, Dkt. 175, motion for status conference, Dkt. 179, and motion pursuant to Rule 56(d) of the Federal Rules of Civil Procedure, Dkt. 180, are **DENIED**.

Appendix B

The Clerk shall post this order in both cases, enter a **JUDGMENT** for the Receiver in both cases, and close both cases.

Dated this 10th day of January, 2019.

/s/ Benjamin H. Settle
BENJAMIN H. SETTLE
United States District Judge

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON AT TACOMA, FILED FEBRUARY 4, 2016, CASE NO. 05816

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CLARK COUNTY BANCORPORATION,

Plaintiff,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, and FEDERAL DEPOSIT INSURANCE CORPORATION-RECEIVER,

Defendants.

CASE NO. C14-5816 BHS

ORDER DENYING DEFENDANT'S MOTION TO DISMISS AND REQUESTING RESPONSES

This matter comes before the Court on Defendant Federal Deposit Insurance Corporation-Receiver's ("FDIC-R") motion to dismiss third amended complaint (Dkt. 77).

On August 12, 2015, Plaintiff Clark County Bankcorporation ("CCB") filed a third amended complaint.

Dkt. 77. On October 22, 2015, FDIC-R filed the instant motion to dismiss. Dkt. 77. On November 25, 2015, CCB responded and voluntarily withdrew its second and third claims for relief. Dkt. 83. On December 17, 2015, FDIC-R replied. Dkt. 86.

In this case, CCB's complaint is virtually identical to its complaint in what FDIC-R refers to as the "Companion Litigation," which is *Clark County Bancorporation v. FDIC*, Cause No. 3:14-cv-05852BHS (W.D. Wash). There are some minor differences such as footnote material included in the main paragraphs instead of in footnotes, but otherwise the complaints contain almost identical allegations. On November 23, 2015, the Court denied FDIC-R's motion to dismiss CCB's breach of contract claim in the Companion Litigation stating that "FDIC-R has sufficient notice of the claim against it and it is time to move to the merits of the parties' dispute." *Id.*, Dkt. 62. Likewise, it is time to move to the interpretation and substance of the disputed contract and FDIC-R fails to provide any reason to conclude otherwise. Therefore, the Court **DENIES** FDIC-R's motion to dismiss, and CCB shall file a new complaint consistent with its voluntary withdrawal of claims.

Furthermore, the Court requests responses to the issue of consolidation with the Companion Litigation. In order to conserve the Court and the parties' resources, it seems readily evident that almost identical complaints should be prosecuted in a consolidated action. Responses may be filed no later than February 12, 2016.

IT IS SO ORDERED.

Dated this 4th day of February, 2016.

/s/
BENJAMIN H. SETTLE
United States District Judge

APPENDIX D — UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON AT TACOMA, FILED NOVEMBER 23, 2015, CASE NO. 05852

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CLARK COUNTY BANCORPORATION,

Plaintiff,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION and FEDERAL DEPOSIT INSURANCE CORPORATION-RECEIVER, Departments of the United States of America

Defendants.

CASE NO. C14-5852 BHS

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS AND DENYING PLAINTIFF'S MOTION FOR LEAVE TO FILE SURREPLY

This matter comes before the Court on Defendant Federal Deposit Insurance Corporation-Receiver's ("FDIC-R") motion to dismiss (Dkt. 51) and Plaintiff Clark County Bancorporation's ("CCB") motion for leave to file surreply to defendant FDIC-Receiver's reply in support

of motion to dismiss (Dkt. 61). The Court has considered the pleadings filed in support of and in opposition to the motions and the remainder of the file and hereby rules as follows:

I. PROCEDURAL HISTORY

On July 30, 2014, CCB filed a complaint against Defendants Federal Deposit Insurance Corporation ("FDIC") and FDIC-R in the United States District Court for the District of Columbia. Dkt. 1. On October 15, 2014, that Court granted CCB's motion to transfer the action to this district. Dkt. 7.

On February 26, 2015, CCB filed an amended complaint against Defendants. Dkt. 30. On July 1, 2015, the Court granted FDIC-R's motion to dismiss CCB's complaint and granted CCB leave to file an amended complaint. Dkt. 44.

On July 31, 2015, CCB filed a second amended complaint asserting causes of action for conversion and unjust enrichment. Dkt. 48 ("SAC"). On August 21, 2015, FDIC-R filed a motion to dismiss the SAC. Dkt. 51. On October 15, 2015, CCB responded. Dkt. 55. On October 20, 2015, FDIC-R filed a motion for an extension of time. Dkt. 58. On October 29, 2015, FDIC-R replied. Dkt. 59. On November 4, 2015, CCB filed a motion for leave to file a surreply and attached the proposed surreply. Dkt. 61[1].

1. This is the second substantive surreply that CCB has filed. After the first, the Court specifically informed CCB that the brief

Appendix D

II. FACTUAL BACKGROUND

The material facts of this case are almost entirely undisputed. CCB was the parent of the Bank of Clark County ("Bank"), which was taken over by the FDIC in 2009. Based on the Bank's losses, the FDIC-R filed amended tax returns for previous years, and the IRS subsequently issued refunds to the FDIC for more than nine million dollars. CCB also filed amended tax returns based on the same losses, but the IRS did not issue duplicate refunds. CCB's complaint alleges that it is entitled to the refunds that the IRS sent to the FDIC-R.

III. DISCUSSION

FDIC-R moves to dismiss all three claims in CCB's complaint. Dkt. 51.

A. Standard

Motions to dismiss brought under Rule 12(b)(6) of the Federal Rules of Civil Procedure may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under such a theory. *Balistreri v. Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir. 1990). Material allegations are taken as admitted and the complaint is construed in the plaintiff's favor. *Keniston v. Roberts*, 717 F.2d 1295, 1301 (9th Cir. 1983).

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violated the local rules of procedure. Regardless of CCB's disregard for the rules and the Court's previous ruling, the Court again denies CCB's motion.

To survive a motion to dismiss, the complaint does not require detailed factual allegations but must provide the grounds for entitlement to relief and not merely a "formulaic recitation" of the elements of a cause of action. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007). Plaintiffs must allege "enough facts to state a claim to relief that is plausible on its face." *Id.* at 1974.

B. Contract Claim

Although CCB filed an amended complaint, CCB included most, if not all, of its previous allegations. As such, the Court adheres to its previous ruling that these allegations do not meet even a basic formalistic recitation of the elements of a cause of action. Dkt. 44. Moreover, failing to cure deficiencies is grounds for dismissal without leave to amend. See *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 809 (9th Cir.1988) (district court did not abuse its discretion by refusing to allow a second amended complaint where the first amendment had failed to cure deficiencies). Therefore, the Court dismisses CCB's federal and constitutional claims.

With regard to CCB's new allegations, it asserts a right to the refunds pursuant to a Tax Allocation Agreement ("TAA") between it and the Bank. Dkt. 48, ¶¶ 20–41. FDIC-R attacks the substance of the TAA, which goes beyond whether CCB has stated a claim upon which relief may be granted. While it is true that CCB could have been more explicit in asserting a simple breach of contract claim, FDIC-R has sufficient notice of the claim against it and it is time to move to the merits of the

parties' dispute. Therefore, the Court denies FDIC-R's motion to dismiss CCB's TAA claim.

C. Other Claims

CCB asserts claims for conversion and unjust enrichment. Dkt. 48, ¶¶ 43–46. FDIC-R argues that these claims were not properly exhausted, should be dismissed under the doctrine of issue preclusion, and may not be maintained against FDIC-R as conservator or receiver. Dkt. 51 at 15–17. CCB provides a two-paragraph response based on "secrecy and concealment." Dkt. 55 at 23. CCB's arguments are wholly without merit. Therefore, the Court grants FDIC-R's motion on CCB's second and third claims.

IV. ORDER

Therefore, it is hereby **ORDERED** that FDIC-R's motion to dismiss (Dkt. 51) is **GRANTED in part** and **DENIED in part** and CCB's motion for leave to file surreply to defendant FDIC-Receiver's reply in support of motion to dismiss (Dkt. 61) is **DENIED**.

Dated this 23rd day of November, 2015.

/s/_____
BENJAMIN H. SETTLE
United States District Judge

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT TACOMA, FILED JUNE 16, 2015, CASE NO. 05816

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CLARK COUNTY BANCORPORATION,

Plaintiff,

v.

FEDERAL DEPOSIT INSURANCE
CORPORATION-RECEIVER,

Defendant.

June 16, 2015, Decided;
June 16, 2015, Filed

CASE NO. C14-5816 BHS

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS, GRANTING PLAINTIFF LEAVE TO AMEND, AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on Plaintiff Clark County Bancorporation's ("CCB") motion for summary

judgment (Dkt. 25) and Defendant Federal Deposit Insurance Corporation-Receiver's ("FDIC-R") motion to dismiss (Dkt. 40). The Court has considered the pleadings filed in support of and in opposition to the motions and the remainder of the file and hereby rules as follows.

I. PROCEDURAL HISTORY

On October 15, 2014, CCB filed a complaint against Defendants Federal Deposit Insurance Corporation ("FDIC") and FDIC-R demanding a ruling that the FDIC's Disallowance of Claim was improper and awarding CCB $9,682,280.05 as set forth in CCB's proof of claim. Dkt. 1.

On January 9, 2015, CCB filed a motion for summary judgment. Dkt. 25.

On February 12, 2015, FDIC filed a motion to dismiss. Dkt. 32. On February 26, 2015, CCB filed an amended complaint. Dkt. 35. On March 3, 2015, CCB voluntarily dismissed its claim against FDIC. Dkt. 36.

On March 6, 2015, FDIC-R responded to CCB's motion for summary judgment. Dkt. 37.

On March 11, 2015, FDIC-R filed a motion to dismiss. Dkt. 40. On April 27, 2015, CCB responded to FDIC-R's motion (Dkt. 46) and replied to its motion for summary judgment (Dkt. 49). On May 18, 2015, FDIC-R replied to CCB's response. Dkt. 53.

Appendix E

II. FACTUAL BACKGROUND

The material facts of this case are almost entirely undisputed. CCB was the parent of the Bank of Clark County, which was taken over by the FDIC in 2009. Based on the Bank of Clark County loses, the FDIC-R filed amended tax returns for previous years, and the IRS subsequently issued refunds to the FDIC for more than nine million dollars. CCB also filed amended tax returns based on the same loses, but the IRS did not issue duplicate refunds. CCB's complaint alleges that it is entitled to the refunds that the IRS sent to the FDIC-R.

III. DISCUSSION

A. Motion to Dismiss

FDIC-R requests that the Court dismiss CCB's complaint because the Court lacks jurisdiction over CCB's claims and because CCB fails to state a valid claim for relief.

1. Subject Matter Jurisdiction

The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") provides the FDIC, acting in its capacity as receiver, with the authority to determine claims against a failed depository institution. 12 U.S.C. § 1821(d)(3)(A). If a claimant submits a timely claim to the FDIC, it must determine within 180 days whether to allow or disallow the claim. *Id.* § 1821(d)(5)(A)(i). On the other hand, if a claimant does not submit a

timely claim, then the claim "shall be disallowed and such disallowance shall be final." *Id.* § 1821(d)(5)(C)(i). There is one exception to this bar wherein FDIC-R may consider claims filed after the claims bar date if: (1) the claimant did not receive notice of the appointment of the Receiver in time to file a claim, and (2) the claim is filed in time to permit payment of the claim. 12 U.S.C. § 1821(d)(5)(C)(ii). The FIRREA, however, is silent on the factual situation that CCB currently alleges, which is that CCB knew about the receivership during the relevant time period, but did not know about the claim until the bar date had passed. In such a situation, the Court declines to accept FDIC-R's position that the claim is barred.

Instead, there is some case law in CCB's favor. For example, the Second Circuit held in a factually similar case that

> upon a review of the FIRREA's structure, its legislative history, and relevant precedent, we are left with "substantial doubt" that Congress intended the notice provision to act as a jurisdictional bar in the circumstances presented here.

Carlyle Towers Condo. Ass'n, Inc. v. F.D.I.C., 170 F.3d 301, 310 (2d Cir. 1999). Moreover, "like a statute of limitations, the filing period is subject to 'waiver, estoppel, and equitable tolling.'" *Id.* (citing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393, 102 S. Ct. 1127, 71 L. Ed. 2d 234 (1982)).

In this case, FDIC-R has failed to show that the Court is without jurisdiction to consider CCB's claim. In the unique situation where an entity is aware of the receiver before the bar date, but not aware of the claim before the bar date, equitable remedies are available to the entity to pursue its claim. Although CCB's current arguments miss the mark on any of these equitable remedies, the Court declines to foreclose any possible argument under such doctrines. Therefore, the Court denies FDIC-R's motion to dismiss based on a lack of jurisdiction.

2. Failure to State a Claim

Motions to dismiss brought under Rule 12(b)(6) may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under such a theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). Material allegations are taken as admitted and the complaint is construed in the plaintiff's favor. *Keniston v. Roberts*, 717 F.2d 1295, 1301 (9th Cir. 1983). To survive a motion to dismiss, the complaint does not require detailed factual allegations but must provide the grounds for entitlement to relief and not merely a "formulaic recitation" of the elements of a cause of action. *Twombly*, 127 S. Ct. at 1965. Plaintiffs must allege "enough facts to state a claim to relief that is plausible on its face." *Id.* at 1974.

In this case, FDIC-R argues that CCB's claim is based on a theory that has already been rejected. Dkt. 40 at 13-14. In making and responding to this argument, the parties stray far from the allegations set forth in the

complaint. For example, CCB's complaint requests that the Court enter judgment that the disallowance of its claim was improper and then award CCB all relief requested in its proof of claim. Dkt. 35 at 3. While CCB may ultimately prove its case as to both requests, it appears to the Court that there is a fair amount of ground to cover between allowing the claim and proving the merits of the claim. Moreover, if the Court enters judgment that the FDIC-R should have accepted the claim, it is unclear whether the claim should be remanded for further administrative consideration or whether the parties are entitled to litigate the merits of the claim in this proceeding. Regardless, the Court agrees with FDIC-R that the current operative complaint is not even a formalistic recitation of the elements of a cause of action. Therefore, the Court grants FDIC-R's motion to dismiss because CCB fails to either state a cognizable legal theory or allege sufficient facts under a cognizable legal theory.

With regard to a remedy, leave to amend shall be freely given when justice so requires. Fed. R. Civ. P. 15(a). "If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962). On a Rule 12(b)(6) motion, "a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000).

In this case, the Court is not currently persuaded that CCB's pleading could not be possibly cured by any amendment. Therefore, the Court grants CCB leave to amend its complaint.

B. Summary Judgment

CCB moves for summary judgment on all relief requested in its complaint. Dkt. 25. As set forth above, there exist preliminary matters that must be addressed before the Court will engage in any determination of the merits of CCB's claim. Therefore, the Court denies CCB's motion without prejudice.

IV. ORDER

Therefore, it is hereby **ORDERED** that CCB's motion for summary judgment (Dkt. 25) is **DENIED without prejudice**, FDIC-R'S motion to dismiss (Dkt. 40) is **GRANTED in part and DENIED in part**, and CCB is **GRANTED** leave to amend. CCB shall file an amended complaint no later than June 26, 2015. Failure to file an amended complaint or show good cause why one could not be filed by the deadline will result in **DISMISSAL**.

Dated this 16th day of June, 2015.

/s/ Benjamin H. Settle
BENJAMIN H. SETTLE
United States District Judge

APPENDIX F — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, DATED SEPTEMBER 19, 2014

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 13-632 (JEB)

CLARK COUNTY BANCORPORATION,

Plaintiff,

v.

UNITED STATES DEPARTMENT
OF TREASURY, ET AL.,

Defendants.

MEMORANDUM OPINION

This case, unfortunately, is not a tax-refund suit. Instead of pursuing this straightforward route against the Internal Revenue Service, the parent of a failed bank has presented an agglomeration of mismatched claims against a series of governmental agencies. Occasionally perceived amidst all of this legal fog is the relief actually requested: the return of a tax refund issued to the subsidiary bank's Receiver instead of to its parent company.

Plaintiff in this suit is Clark County Bancorporation. That entity was the parent company of the Bank of Clark County, whose insolvency led the Federal Deposit Insurance

Corporation to be named as Receiver of the Bank in 2009. Plaintiff subsequently filed amended income-tax returns for the years 2003 through 2009 for all of its operations, including the Bank. At the same time, the FDIC also filed tax returns on behalf of the Bank, which the IRS honored by issuing refunds to the FDIC as Receiver. Plaintiff now seeks those refunds, together with books and records it alleges that the FDIC improperly seized when taking over the Bank.

In lieu of a tax-refund action, Plaintiff has thrown into this suit every alternative approach it could conceive of: it brings constitutional challenges, administrative-law claims, and statutory causes of actions; it seeks damages, declaratory relief, injunctive relief, and a writ of mandamus; and it does so against the United States, the Department of the Treasury and its Acting Commissioner, the IRS and its Acting Commissioner, the FDIC in its corporate capacity together with its Acting Chairperson, and the FDIC in its capacity as Receiver together with its Acting Chairperson.

Defendants have now moved in three groups to dismiss Plaintiff's claims — some for lack of jurisdiction and others for failure to state a claim. Because the Court finds that none of Plaintiff's claims survives, it will grant the Motions and dismiss the suit in its entirety.

I. Background

A. The Takeover

Viewing the facts as pled in the Second Amended Complaint, the Court begins with the basics: Plaintiff

Clark County Bancorporation ("Clark County") used to be the parent of the Bank of Clark County ("the Bank"). Sec. Am. Compl., ¶ 11. In January 2009, the FDIC took over the insolvent Bank as Receiver. *See id*. Under normal conditions, Clark County would act as sole agent of its consolidated group for purposes of filing tax returns, and this group would include the Bank. *See* 26 C.F.R. § 1.1502-77(a). When the FDIC took the Bank over, however, Clark County and the Bank no longer operated under normal conditions. For such situations, Congress "authorize[d] the Secretary to issue regulations providing for the payment of a refund directly to the . . . fiduciary of an insolvent corporation that was a subsidiary in a consolidated group . . . ." 26 C.F.R. § 301.6402-7(a)(1); 26 U.S.C. § 6402(k) (authorizing statute).

Per regulation, "[t]he fiduciary for the [insolvent] institution may, in addition to the common parent, act as agent for the group in certain matters relating to the tax liability of the group in the year in which a loss arose and for the year to which a claim for refund or application for tentative carryback adjustment relates . . . ." 26 C.F.R. § 301.6402-7(a)(2)(i). The IRS, moreover, "may deal directly with the common parent or the fiduciary (or both) as agent for the group . . . ." *Id*. § 301.6402-7(a)(2)(ii). Acting under this authority, the FDIC filed tax returns seeking refunds on behalf of the failed Bank in 2009.

As it turns out, Clark County also filed amended tax returns for 2003 through 2007 together with returns for 2008 and 2009 — returns that included the operations of the Bank. *See* SAC, ¶ 12. These returns "involve[ed]

tax refund payments due to . . . Clark County . . . in an amount in excess of nine million dollars . . . ." *Id.* When Clark County did not receive these refunds, it requested to meet with the IRS, but was declined on several occasions. *Id.*, ¶ 16.

Clark County then filed this action on May 2, 2013, naming as Defendants the Department of Treasury, the IRS, and the FDIC. *See* ECF No. 1. It amended its Complaint on August 8, 2013, *see* ECF No. 5, and in that pleading sought injunctive and declaratory relief requiring Defendants to deliver to it "tax refunds pursuant to the tax returns" it had filed, along with the items it claimed the FDIC had improperly seized when it took over the Bank. *See* Am. Compl., ¶ 12; Prayer for Relief. Clark County also sought money damages in this new Complaint. *See id.*, Prayer.

The Government moved to dismiss in November 2013, *see* ECF No. 15, and Plaintiff responded in January 2014. *See* ECF No. 21. Because the Court then granted Plaintiff's consent motion for leave to file a second amended complaint, *see* Minute Order of Jan. 30, 2014, the Court denied the Government's motion to dismiss without prejudice. *See* Minute Order of Feb. 5, 2014.

Here we get to the nub of this case. While all this was going on, Plaintiff learned of two refund checks worth nearly five million dollars that the IRS had issued in 2009. *See* SAC, ¶ 13. Though addressed to the FDIC as Receiver, one check was issued payable to "Clark County Bancorporation [c/o] FDIC as Receiver," and the

other simply to "Clark County Bancorporation." *See* Pl. Opp. Treas., Exh. B. This, of course, is puzzling; Clark County Bancorporation is the Plaintiff and has never itself been in receivership. It thus makes no sense to issue a check to Clark County "care of" the FDIC. The IRS's documentation is not much help on this front; it simply lists the checks "as '[u]ndelivered' and 'returned to IRS.'" SAC, ¶ 14. Yet Defendants "made no effort to contact . . . Plaintiff in regard to ensuring delivery of these two checks . . . although [Defendants] at all times [were] . . . aware of Plaintiff's proper address and location." *Id.*, ¶ 15.

In fact, five other checks were issued in November 2011, again payable to Plaintiff care of the FDIC, again addressed to the FDIC. *See* Pl. Opp. Treas., Exh. C. The FDIC returned these checks to the IRS in January 2012, having marked them "VOID," and it asked the IRS to reissue the checks payable to *the Bank* care of the FDIC, which the IRS did. *Id.*, Exhs. C, D. All told, the seven issued checks represent about nine million dollars' worth of tax refunds. The FDIC as Receiver retained these funds, which is what this lawsuit is all about.

B. Causes of Action

Plaintiff filed its Second Amended Complaint — the operative complaint here — on January 30, 2014. *See* ECF No. 28. In this Complaint, Clark County adds as Defendants the United States, the Acting Commissioner of the Department of Treasury, the Acting Commissioner of the IRS, the Acting Chairperson of the FDIC in its corporate capacity, and the Acting Chairperson of the

FDIC in its capacity as Receiver. Plaintiff seizes on the issue of the canceled checks and expands its allegations accordingly. Its nine-count Second Amended Complaint meanders through various and sundry legal theories and claims for relief. At the risk of imposing on the patience of the reader, the Court will detail the counts of the Second Amended Complaint as pled. They unfold as follows:

- *Count I: "Declaratory and Injunctive Relief" (Treasury Defendants)*

In Count I, Clark County alleges that the United States, the IRS, and the Treasury Department (collectively, Treasury Defendants) violated its rights under the Fourth Amendment, the Fifth Amendment, and the Administrative Procedure Act. *See* SAC, ¶¶ 21-22. It seeks declaratory and injunctive relief together with a writ of mandamus ordering Treasury Defendants to deliver the 2009 checks along with "all checks and monies plus interest." *Id.*, ¶¶ 23-24. Plaintiff also claims damages for tort violations, 28 U.S.C. §§ 1346(b), 2671-80, Privacy Act violations, 5 U.S.C. § 552a, and the unauthorized disclosure of tax-return information, 26 U.S.C. § 7431. *See* SAC, ¶ 25.

- *Count II: "Unconstitutionality of 26 CFR § 301.6402-7 Pursuant to Fourth and Fifth Amendment of the United States Constitution" (All Defendants)*

In Count II, Clark County seeks a declaration that 26 CFR § 301.6402-7 — the regulation that empowers the

FDIC to file tax returns on behalf of insolvent corporations — is itself unconstitutional. *See* SAC, ¶ 30. According to Plaintiff, because the regulation "allow[s] for the delivery of tax payments . . . to a person, party or entity which did not pay the tax," the regulation "depriv[es] the party filing the tax returns of its property rights and due process." *Id.*, ¶ 27.

- *Count III: "Defendants' Violation of Fourth and Fifth Amendments of the United States Constitution" (All Defendants)*

In Count III, Clark County claims that Defendants failed to follow applicable regulations and in so doing violated its constitutional rights. According to Plaintiff, Treasury Defendants "delivered to the FDIC/FDIC-R tax refund payments that were issued to Plaintiff" without proper authorization. *Id.*, ¶¶ 33-34. "The Defendants' failure to deliver these checks and monies," Plaintiff claims, "is arbitrary, capricious, and unlawful[,] . . . constitutes a seizure without a warrant," and violates "property rights without due process of law . . . ." *Id.*, ¶ 36. According to Clark County, moreover, "delivery of Plaintiff's information to the FDIC/FDIC-R, without Plaintiff's consent, was improper . . . ; [r]etention of checks issued to Plaintiff was improper; [o]pening and/or retaining mail to Plaintiff was improper; and . . . [r]efusing to provide documentation to Plaintiff upon Plaintiff's requests was improper." *Id.* Plaintiff seeks declaratory and injunctive relief, and a writ of mandamus, together with damages on the same statutory bases listed in Count I. *Id.*, ¶ 37.

Appendix F

- *Count IV: "Violation of Due Process" (All Defendants)*

In Count IV, Clark County claims that "Defendants failed to engage in a process for determining the ultimate rights of ownership of the tax payments," that ownership should be determined in its favor, and that monies in possession of the FDIC should be delivered to it. *Id.*, ¶¶ 39, 40. Claiming — predictably at this point — that Defendants' failure in this regard violates its rights under the APA and the Fourth and Fifth Amendments, Plaintiff seeks declaratory and injunctive relief, a writ of mandamus, and damages. *Id.*, ¶¶ 42-43.

- *Count V: "Constitutional Violations and Violation of APA" (FDIC Defendants)*

In Count V, Clark County alleges that the FDIC's "retention of . . . checks and monies . . . is arbitrary, capricious, and unlawful" and violates Plaintiff's constitutional rights. *Id.*, ¶ 44. It seeks declaratory and injunctive relief, a writ of mandamus, and damages. *Id.*, ¶¶ 45-46.

- *Count VI: "Failure to Return Plaintiff's Property/ Right to Accounting" (FDIC Defendants)*

In Count VI, Clark County seeks "books, records, documents and information" the FDIC allegedly seized when it took over the Bank. *Id.*, ¶¶ 47-48. Plaintiff also claims it is entitled to "an accounting of the disposition of assets of the FDIC/FDIC-Receiver" as well as "an

accounting of all payments transferred in relation to the FDIC Receivership, including that certain depositors did not yet receive all of their funds." *Id.*, ¶¶ 50-51. Again, Plaintiff seeks declaratory and injunctive relief, a writ of mandamus, and damages. *Id.*, ¶¶ 52-53.

- *Count VII: "Writ of Mandamus" (All Defendants)*

In Count VII, Clark County simply repeats the previous allegations, causes of action, and prayers for relief — including damages claims — it has already pled in the first six counts. *See id.*, ¶¶ 54-56. It does not explain how mandamus is a cause of action unto itself or how damages are available in a writ of mandamus.

- *Count VIII: "28 U.S.C. §§1346(b), 2671-80" (All Defendants)*

In Count VIII, Clark County repeats the factual allegations of the previous counts, alleges that Defendants knew or should have known that their actions violated the Constitution and the applicable regulations, and seeks damages pursuant to 28 U.S.C. §§ 1346(b), 2671-80. *See id.*, ¶¶ 57-69.

- *Count IX: "Gross Negligence" (All Defendants)*

In Count IX, Clark County alleges that the previously listed violations amounted to gross negligence and seeks damages. *See id.*, ¶¶ 70-82.

* * *

Although Clark County's Complaint is notable for the breadth of claims it includes, it is perhaps more notable for what it excludes. For some reason, Plaintiff never asserts a tax-refund claim in this suit under 26 U.S.C. § 7422 and 28 U.S.C. § 1346(a)(i) . The closest it comes is in Count IV, "Violation of Due Process," where Plaintiff acknowledges that "Defendants may contend that Plaintiff's claims are also in the nature of [a tax-refund suit]," and it "requests that the Court determine the applicability of these contentions of Defendants." SAC, ¶ 41. The Court declines that invitation. Clark County cannot refuse to base its case on the most germane cause of action to its prayer, articulate instead every alternative theory, and then vaguely request the Court to "look into" Defendants' "contentions" regarding the "applicability" of such a suit.

C. The Motions to Dismiss

In response to the Second Amended Complaint, Defendants filed separate Motions to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6). The Treasury Defendants collectively filed one. *See* ECF No. 35. The FDIC in its capacity as receiver (FDIC-Receiver) filed another. *See* ECF No. 36. And the FDIC in its corporate capacity (FDIC-Corporate) filed a third. *See* ECF No. 34. Defendants argue that the Court lacks jurisdiction over the majority of the claims and that Plaintiff has otherwise failed to state a claim in its remaining allegations. All Motions are now ripe for review.

II. Legal Standard

Under Federal Rule of Civil Procedure 12(b)(1), a court must dismiss a claim for relief when the complaint "lack[s] . . . subject-matter jurisdiction." To survive a motion to dismiss under Rule 12(b)(1), Plaintiff bears the burden of proving that the Court has subject-matter jurisdiction to hear its claims. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992); *U.S. Ecology, Inc. v. Dep't of Interior*, 231 F.3d 20, 24, 343 U.S. App. D.C. 386 (D.C. Cir. 2000). A court has an "independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006). "For this reason 'the [p]laintiff's factual allegations in the complaint . . . will bear closer scrutiny in resolving a 12(b)(1) motion' than in resolving a 12(b)(6) motion for failure to state a claim." *Grand Lodge of the Fraternal Order of Police v. Ashcroft*, 185 F. Supp. 2d 9, 13-14 (D.D.C. 2001) (quoting 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1350 (2d ed. 1987) (alteration in original)). Additionally, unlike with a motion to dismiss under Rule 12(b)(6), the Court "may consider materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction." *Jerome Stevens Pharms., Inc. v. FDA*, 402 F.3d 1249, 1253, 365 U.S. App. D.C. 270 (D.C. Cir. 2005); *see also Venetian Casino Resort, LLC v. EEOC*, 409 F.3d 359, 366, 366 U.S. App. D.C. 89 (D.C. Cir. 2005) ("given the present posture of this case — a dismissal under Rule 12(b)(1) on ripeness grounds — the court may consider materials outside the

pleadings"); *Herbert v. Nat'l Acad. of Sciences*, 974 F.2d 192, 197, 297 U.S. App. D.C. 406 (D.C. Cir. 1992).

Under Rule 12(b)(6), a court must dismiss a claim for relief when the complaint "fail[s] to state a claim upon which relief can be granted." In evaluating a motion to dismiss under Rule 12(b)(6), the Court must "treat the complaint's factual allegations as true and must grant plaintiff the benefit of all inferences that can be derived from the facts alleged." *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113, 342 U.S. App. D.C. 268 (D.C. Cir. 2000) (citation and internal quotation marks omitted); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). A court need not accept as true, however, "a legal conclusion couched as a factual allegation," nor an inference unsupported by the facts set forth in the complaint. *Trudeau v. FTC*, 456 F.3d 178, 193, 372 U.S. App. D.C. 335 (D.C. Cir. 2006) (quoting *Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)). Although "detailed factual allegations" are not necessary to withstand a Rule 12(b)(6) motion, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), "a complaint must contain sufficient factual matter, [if] accepted as true, to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (internal quotation marks omitted). Though a plaintiff may survive a Rule 12(b)(6) motion even if "recovery is very remote and unlikely," the facts alleged in the complaint "must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555-56 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)).

A motion to dismiss under Rule 12(b)(6) must rely solely on matters within the pleadings, *see* Fed. R. Civ. P. 12(d), which include statements adopted by reference as well as copies of written instruments joined as exhibits. *See* Fed. R. Civ. P. 10(c). Where the Court must consider "matters outside the pleadings" to reach its conclusion, a motion to dismiss "must be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d); *see also Yates v. District of Columbia*, 324 F.3d 724, 725, 355 U.S. App. D.C. 344 (D.C. Cir. 2003).

III. Analysis

Because Clark County's Second Amended Complaint largely repeats the same legal theories and prayers for relief in many different counts, the Court believes that the better organizing principle for this Opinion is to consider claims separately by Defendant. It will begin with Treasury Defendants. Because the FDIC's corporate and receiver capacities are separate legal entities, *see, e.g., Dubois v. Washington Mut. Bank*, No. 09-2176, 2010 U.S. Dist. LEXIS, 91855 2010 WL 3463368, at *6 (D.D.C. Sept. 3, 2010) (collecting cases), *aff'd*, 492 F. App'x 117 (D.C. Cir. 2012), the Court will next discuss these two Defendants separately, starting with FDIC-Receiver and concluding with FDIC-Corporate.

A. Treasury Defendants

Clark County's causes of action and claims for relief against Treasury Defendants can be grouped into six categories. First is a facial constitutional attack

on a particular regulation. Second is an as-applied constitutional challenge to Treasury Defendants' conduct in implementing this regulation. Third, Plaintiff seeks injunctive relief under the APA. Fourth, it pursues declaratory relief under the Declaratory Judgment Act. Fifth, Clark County brings claims for monetary damages. Sixth, it requests a writ of mandamus. The Court treats each in turn.

1. Facial Challenge (Count II)

In Count II, Clark County mounts a facial challenge to 26 C.F.R. § 301.6402-7, alleging that the regulation itself violates "the Fourth and Fifth Amendments." SAC, ¶ 27. To review, the regulation in question authorizes "[t]he fiduciary for [an insolvent financial] institution" to "act as agent for the [consolidated] group in certain matters relating to the tax liability of the group in the year in which a loss arose and for the year to which a claim for refund or application for tentative carryback adjustment relates . . . ." 26 C.F.R. § 301.6402-7(a)(2)(i). A refund payment made to the fiduciary under the regulation "is considered a payment to all members of the carryback year group," *id.* § 301.6402-7(k), and "may not be challenged by the common parent, any member of the group, or the fiduciary." *Id.* According to Clark County, the regulation thus "allow[s] for the delivery of tax payments and/or refunds . . . to a person, party or entity which did not pay the tax." SAC, ¶ 27. Because the regulation deprives parties of this property without any means to challenge that deprivation, Clark County concludes, it does not pass constitutional muster. The Court disagrees.

Appendix F

A facial challenge is "the most difficult challenge to mount successfully, since the *challenger must establish that no set of circumstances exists under which the [challenged regulation] would be valid." City of Chicago v. Morales*, 527 U.S. 41, 78-79, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999) (quotation marks omitted). "'The fact that [a regulation] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid . . . .'" *Id*. at 79.

As a preliminary matter, the Court is unclear how this regulation purports to violate the *Fourth* Amendment, a confusion that Plaintiff never elucidates. As to the Fifth Amendment, "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) (internal quotation marks omitted). Thus, to allege that 26 C.F.R. § 301.6402-7 facially violates due process, Plaintiff must show that it *never* affords such an opportunity.

This Clark County cannot do. First, as parent of the Bank, it could challenge the initial takeover. *See* 12 U.S.C. § 1821(c)(7). If successful in such an action, a claimant like Clark County would be entitled to all tax refunds related to the consolidated group. More important, beyond challenging the initial takeover, claimants can also bring a tax-refund suit under 26 U.S.C. § 7422 and 28 U.S.C. § 1346(a)(1). District courts generally have original jurisdiction over "[a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed

or collected . . . ." 28 U.S.C. § 1346(a)(1). And "(s)ection 7422 . . . provides an administrative framework under which suits seeking to recover [such] taxes . . . may be brought to court . . . ." *Z St., Inc. v. Koskinen*, No. 12-0401, 44 F. Supp. 3d 48, 2014 U.S. Dist. LEXIS 71638, 2014 WL 2195492, at *13 (D.D.C. May 27, 2014).

While the regulation in question does empower the IRS, "in its sole discretion, [to] pay to the fiduciary all or any portion of [a] refund or tentative carryback adjustment," it limits the amount so payable to that which is "attributable to the net operating losses of the institution." *See* 26 C.F.R. § 301.6402-7(g)(1). If a parent company like Clark County believed that some sum returned to a fiduciary was *more* than the fiduciary was entitled to, it could bring a suit alleging as much. Treasury Defendants concur that this would be entirely appropriate. *See* Treas. Mot. at 27. As noted above, however, Clark County does not bring such a tax-refund suit in these proceedings. The fact that it could have challenged the issuance of the refunds as well as the initial takeover shows that the regulation provides more than enough opportunities to be heard to satisfy due process.

In briefing (but not in its Complaint), Clark County also posits a global administrative challenge to the refund regulation — namely, that it "impermissibly varies from statute." Pl. Opp. Treas. Mot. at 16. Although Plaintiff promises that "Count [II] explains the basis for th[is] challenge," it is difficult to discern just where that explanation might be found. Count II never cites the enabling statute or the APA, and it says nothing of

"deviation" or "variance." SAC, ¶¶ 26-30. The Court thus finds this pleading insufficient to raise such a variance claim.

The Court, accordingly, dismisses Plaintiff's facial challenge to 26 CFR § 301.6402-7.

2. As-Applied Challenges (Counts I-IV)

In its next cluster of claims, Clark County brings as-applied challenges to Treasury Defendants' actions, alleging that they violated its rights under the Fourth and Fifth Amendments. These allegations are stated most succinctly in Counts III and IV of the Second Amended Complaint, though they are sprinkled throughout the others counts as well. In Count III, Plaintiff claims that Treasury Defendants issued checks to FDIC-Receiver without its authorization, and that their failure to deliver these checks to Plaintiff "constitutes a seizure without a warrant and . . . a violation of property rights without due process of law . . . ." SAC, ¶¶ 33-36. In Count IV, Clark County claims that "Defendants failed to engage in a process for determining the ultimate rights of ownership of the tax payments," that ownership should be determined in its favor, and that Defendants' failure in this regard violates both the Fourth and Fifth Amendments. *Id*., ¶¶ 39-42. These allegations do not survive.

Begin with Plaintiff's Fourth Amendment claim. That Amendment "protects two types of expectations, one involving 'searches,' the other 'seizures.'" *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S. Ct. 1652, 80

L. Ed. 2d 85 (1984). Given that Plaintiff alleges no actual search, it must be referring to an unlawful seizure. "A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *Id.* (footnote omitted).

Yet Clark County never stakes out a clear claim of entitlement to the money it seeks. Its best claim to the tax-refund money trades on an equivocation. Plaintiff stresses time and again that there were once *checks* with its name on them, and it bemoans the fact that it was never made aware of these checks. And then it requests *money* — specifically, the amount it would have received had it cashed those checks. But money and checks are not the same thing; to obtain the money, it must also be the case that those checks *ought* to have been issued in Plaintiff's name. In the tax-refund context, a check should only issue to a party if it wrongly paid taxes; whether or not that is the case will determine entitlement. To see the problem, consider the following: If the government had erroneously printed checks for $1 million in the name of "John Smith," he would not actually have a possessory interest in that sum. Since Clark County has not shown an entitlement to the money, it cannot prevail here. Even if it had alleged some entitlement to this money, moreover, Plaintiff provides no authority for the novel idea that the government's withholding of a tax refund somehow constitutes a *Fourth Amendment* violation.

Plaintiff's as-applied claim under the Fifth Amendment fares no better. Clark County's allegations on this front largely mirror those just addressed in the facial challenge

above. The only aspect unique to Plaintiff's claim is the fact that at some point there existed checks issued in its name. And as Plaintiff stresses — in one brief, no fewer than fourteen times in seven pages — it was never made aware of the existence of the checks originally made payable to it. Putting aside the entitlement problems the Court has already explained, this as-applied claim fails for the same reason Clark County's facial challenge founders: Plaintiff could always challenge the IRS's withholding of these checks in a tax-refund suit.

As Clark County has failed to state a claim for a constitutional violation against Treasury Defendants, all constitutional claims will be dismissed against them.

3. APA Cause of Action (Counts I-IV)

Clark County asserts an APA cause of action against Treasury Defendants in nearly every count of its Complaint. The factual predicate of this claim is by now familiar: "[T]he IRS issued to Plaintiff two checks in the total amount of $4,939,678.00 and mailed them, but Plaintiff did not receive these checks." SAC, ¶ 13. By issuing these checks, "Defendants have already acknowledged [them] to be Plaintiff's property." *Id.*, ¶¶ 24, 37. Yet Treasury Defendants made "no effort to contact . . . Plaintiff in regard to ensuring delivery of these two checks," though they were "at all times . . . aware of Plaintiff's proper address and location." *Id.*, ¶ 15.

Clark County alleges that Treasury Defendants thereby failed "to comply with . . . appropriate notice

provisions, . . . approval provisions, and . . . delivery provisions." *Id.*, ¶ 31. Specifically, it claims that "[s]ending to the FDIC/FDIC-Receiver mail and/or checks addressed and/or issued to the Plaintiff was improper . . . ." *Id.*, ¶ 36. "Approving the FDIC/FDIC-R to act as agent for the Plaintiff without Plaintiff's consent, without due process, and without satisfying the requirements of 26 CFR § 301.6402-7, was improper . . . ." *Id.* And Defendants' failure "to engage in a process for determining the ultimate rights of ownership of the tax payments, as between the Plaintiff and the FDIC/FDIC-Receiver" was improper. *Id.*, ¶ 39. Clark County, accordingly, seeks injunctive relief under the APA to remedy these violations — specifically, the delivery of checks and monies related to the tax returns it filed.

Treasury Defendants raise a number of defenses to this claim, but the Court need analyze only one — namely, that the APA itself bars this cause of action. They are correct that 5 U.S.C. § 704 subjects to review "final agency action for which there is *no other adequate remedy in a court*." *Id.* (emphasis added). The APA "does not provide additional judicial remedies in situations where . . . Congress has provided special and adequate review procedures," because review under the APA is not meant to "duplicate existing procedures for review of agency action." *Bowen v. Massachusetts*, 487 U.S. 879, 903, 108 S. Ct. 2722, 101 L. Ed. 2d 749 (1988) (footnote omitted). An existing review procedure will therefore bar a duplicative APA claim so long as it provides adequate redress.

In determining whether an alternative remedy is adequate, the Court must give the APA's "generous

review provisions" a hospitable interpretation, such that "only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Labs. v. Gardner*, 387 U.S. 136, 141, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967) (internal quotation marks omitted). Under this standard, "an alternative remedy will not be adequate . . . if the remedy offers only 'doubtful and limited relief.'" *Garcia v. Vilsack*, 563 F.3d 519, 522, 385 U.S. App. D.C. 310 (D.C. Cir. 2009) (quoting *Bowen*, 487 U.S. at 901). The "alternative remedy," however, "need not provide relief identical to relief under the APA . . . ." *Id.* Instead, relief of "the same genre" will be "sufficient to preclude the APA remedy . . . ." *Women's Equity Action League v. Cavazos*, 906 F.2d 742, 751, 285 U.S. App. D.C. 48 (D.C. Cir. 1990).

In this case, Congress has established a specific judicial procedure to review the IRS's handling of tax refunds — namely, a tax-refund suit. "A taxpayer seeking a refund of taxes . . . may bring an action . . . either in United States district court or in the United States Court of Federal Claims." *United States v. Clintwood Elkhorn Min. Co.*, 553 U.S. 1, 4, 128 S. Ct. 1511, 170 L. Ed. 2d 392 (2008) (citing 28 U.S.C. § 1346(a)(1)). To bring such a suit, "the taxpayer must comply with the tax refund scheme established in the Code." *Id.* "That scheme provides that a claim for a refund must be filed with the [IRS] before suit can be brought, and establishes strict timeframes for filing such a claim." *Id.* Specifically, before any "suit or proceeding" can be "maintained in any court for the recovery of any internal revenue tax," claimants must first file "a claim for refund or credit . . . with the [IRS]." 26 U.S.C. § 7422(a).

It is clear based on these strict procedural requirements that Congress intended the review of tax-refund determinations to proceed through a specific administrative framework. *See Clintwood*, 553 U.S. at 9 (holding that "[t]he refund scheme in the current Code would have 'no meaning whatever' if taxpayers failing to comply with it were nonetheless allowed to bring suit subject only to the Tucker Act's longer time bar"). Because Congress has provided an alternative review procedure specific to tax-refund claims, the only remaining question is whether a tax-refund suit is "adequate" in Clark County's case.

On this point there can be no doubt. Clark County's APA claim against Treasury Defendants is essentially a suit for a tax refund. Plaintiff strives heroically to escape this reality. It argues that because the IRS has not "denied" it a refund — and has in fact issued refunds to another party — its claims are not about refunds, but about ensuring delivery of checks. But the factual bases for Plaintiff's claims are not the issue. The question is the adequacy of remedy, and Plaintiff's claims against Treasury Defendants — no matter how styled — always come back to taxes. This action is a refund suit in everything but name.

Clark County has also failed to identify any relief it might obtain through an APA claim that would be unavailable in a refund suit — a key consideration in recent D.C. Circuit cases examining the adequacy of an alternative remedy. In *Cohen v. United States*, 650 F.3d 717, 397 U.S. App. D.C. 33 (D.C. Cir. 2011), for instance,

upon which Plaintiff heavily relies, the D.C. Circuit found a tax-refund suit inadequate because the plaintiffs in that case sought *prospective* relief not typically available in a tax-refund suit. *See id.* at 732. All of Clark County's equitable claims, in contrast, relate to alleged wrongs that have already occurred. Unlike the plaintiffs in *Cohen*, Clark County does not seek to invalidate a refund procedure before having to comply with it. Forcing it to bring a tax-refund suit, consequently, would not frustrate the purpose of its claim by also forcing it to submit to the procedure it challenges, as was the case in *Cohen*. Finally, the plaintiffs in *Cohen* sought class-wide relief that would not be available in a tax-refund suit; Clark County, conversely, seeks only individual relief. At the end of the day, Clark County wants tax money from Treasury Defendants, and the congressionally specified avenue to recover such sums is more than adequate to redress the wrongs it alleges.

The Court, as a result, will dismiss the APA cause of action against Treasury Defendants.

4. DJA Cause of Action (Counts I-IV)

Clark County also brings a cause of action under the Declaratory Judgment Act. Although the DJA generally empowers courts to "declare the rights and other legal relations of any interested party seeking such declaration," it explicitly "except[s suits] with respect to Federal taxes . . . ." 28 U.S.C. § 2201(a). It cannot be gainsaid that Plaintiff's declaratory cause of action relates to Federal taxes. After all, Clark County asks specifically

for "declaratory . . . relief requiring the delivery to Plaintiff of all monies claimed by Plaintiff under the amended [tax] returns of 2003 to 2007, and the returns of 2008 and 2009." SAC, Prayer. Because Clark County's cause of action under the DJA is explicitly excepted by the statute itself, the Court will dismiss it for lack of jurisdiction. *See Falck v. I.R.S.*, No. 06-2269, 2007 U.S. Dist. LEXIS 42729, 2007 WL 1723675, at *3 (D.D.C. June 14, 2007) ("Because plaintiffs seek declaratory relief 'with respect to Federal taxes,' the Court lacks subject matter jurisdiction and their claim must be dismissed pursuant to Rule 12(b)(1).").

5. Damages Claims (Counts VIII and IX)

Most of what remains against Treasury Defendants is a grab bag of damages causes of action — one under the Federal Tort Claims Act, one under the Privacy Act, and a tax-disclosure claim. None of these remaining options offers success.

a. FTCA

Plaintiff's first cause of action for damages falls under the Federal Tort Claims Act, a claim highlighted in Count VIII of the Second Amended Complaint. In Count IX, Clark County also brings a purported claim for gross negligence, but fails to provide any additional statutory basis. As the FTCA provides the exclusive remedy for tort claims against federal agencies, *see* 28 U.S.C. § 2679(a) ("[T]he remedies provided by this title in such cases shall be exclusive . . . ."); *Jones v. United States*, 949 F. Supp.

2d 50, 53 (D.D.C. 2013) (The FTCA "is the only possible basis for jurisdiction" where "a plaintiff seeks monetary damages against a federal agency for torts committed by federal employees . . . ."), the Court will treat Counts VIII and IX together.

The FTCA provides in relevant part that "[t]he United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . . ." 28 U.S.C. § 2674. The category of claims for which the United States has waived its sovereign immunity "includes claims that are: [1] against the United States, [2] for money damages, . . . [3] for injury or loss of property, or personal injury or death [4] caused by the negligent or wrongful act or omission of any employee of the Government [5] while acting within the scope of his office or employment, [6] under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." *FDIC v. Meyer*, 510 U.S. 471, 477, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994) (quoting 28 U.S.C. § 1346(b); alterations in the original).

As is clear from the text, only the United States may be named as a defendant in an FTCA action. As the Supreme Court has explained, "[I]f a suit is 'cognizable' under § 1346(b) of the FTCA, the FTCA remedy is 'exclusive' and the federal agency cannot be sued 'in its own name . . . .'" *Meyer*, 510 U.S. at 476. Clark County's FTCA causes of action against all Defendants but the United States therefore cannot stand.

The Court notes, however, that although the United States is the only proper defendant in an FTCA cause of action, the statute renders it potentially liable for the actions of "employees" of the United States government regardless of agency. *See id*. at 477. As Clark County's FTCA claims relate to the actions of Treasury Defendants as well as FDIC-Receiver and FDIC Corporate, the Court will treat allegations against all Defendants together — both in the seizure of the Bank and in the handling of its taxes — in analyzing Plaintiff's entitlement to relief.

Clark County's FTCA cause of action is based on the same factual allegations as the rest of its Complaint and achieves no greater success for several reasons. First, Plaintiff failed to exhaust its administrative remedies, which bars it from bringing suit in federal court. *See McNeil v. United States*, 508 U.S. 106, 113, 113 S. Ct. 1980, 124 L. Ed. 2d 21 (1993). Under 28 U.S.C. § 2675, "[a]n action shall not be instituted upon a claim against the United States for money damages for injury or loss of property . . . unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail." 28 U.S.C. § 2675. Specifically, a plaintiff must first file with the agency a "written notification of [the] incident, accompanied by a claim for money damages in a sum certain for injury to or loss of property." 28 C.F.R. 14.2(a).

Exhaustion, moreover, must be pled, *see Colbert v. U.S. Postal Serv.*, 831 F. Supp. 2d 240, 243 (D.D.C. 2011), yet Clark County makes no mention of this prerequisite

in its Second Amended Complaint. The best Plaintiff can do is to claim in briefing that its tax returns and requests for meetings with the IRS were sufficient "written statements" to satisfy its exhaustion obligations. *See* Pl. Opp. Treas. at 39. Plaintiff is wrong. How its tax returns put the IRS on notice of a tort claim is never expressed, and meeting requests hardly constitute "sum-certain damages claims" based on any tort theory.

Second, Clark County fails to identify a state law that any federal employee may have violated in the takeover of the Bank or in the handling of the refunds in question. The FTCA "does not create a cause of action against the United States; it allows the United States to be liable if a private party would be liable under similar circumstances in the relevant jurisdiction." *Hornbeck Offshore Transp., LLC v. United States*, 569 F.3d 506, 508, 386 U.S. App. D.C. 349 (D.C. Cir. 2009). The Court thus looks "to the law of the local jurisdiction . . . to determine whether there is a local private party analog to [Plaintiff's] claims." *Id.*

Here as ever, Plaintiff is both coy and duplicative. It notes circuitously that its claim arises "in relation to the conduct . . . that underlie the other counts; namely, issuing checks payable to Plaintiff Clark County Bancorporation and then reissuing them payable to a different party without notice to Plaintiff, failure of communications, failure to provide information, and constitutional as well as legal and regulatory violations." Pl. Opp. Treas. at 37.

Yet Plaintiff cites to no state law to support its FTCA action, and none is available. It is clear that all of Plaintiff's

"claims arise purely out of a federal statutory scheme that has no local analog," and although it "casts its complaint in common law tropes," its allegations cannot "sustain its claim, as [none is] . . . analogous to the federal legal duty that was violated." *Hornbeck*, 569 F.3d at 508. "Violations of federal law—when not accompanied by any local law violation—cannot support a suit under the FTCA." *Id.* "[B]y basing its negligence claim entirely on violation of federal duties, [Plaintiff] fails to consider that the FTCA waives the immunity of the United States only to the extent that a private person in like circumstances could be found liable in tort under local law." *Art Metal-U.S.A., Inc. v. United States*, 753 F.2d 1151, 1157, 244 U.S. App. D.C. 1 (D.C. Cir. 1985). While "[i]t is true that negligent performance of (or failure to perform) duties embodied in federal statutes and regulations may give rise to a claim under the FTCA," this holds true "*only* if there are analogous duties under local tort law." *Id.* Plaintiff has identified no such state-law analogue.

Finally, Plaintiff's claims appear to be specifically excepted from the FTCA. The Act's waiver of sovereign immunity does not reach a claim "arising in respect of the assessment or collection of any tax." 28 U.S.C. § 2680(c). "This language is broad enough to encompass any activities of an IRS agent even remotely related to his or her official duties." *Childress v. Northrop Corp.*, 618 F. Supp. 44, 49 (D.D.C. 1985), *aff'd*, 784 F.2d 1131, 251 U.S. App. D.C. 327 (D.C. Cir. 1986). Given this expansive application, the Court could find Clark County's claims excepted.

Plaintiff's FTCA claim will thus also be dismissed as against all Defendants.

b. Privacy Act

Clark County's second damages claim arises under the Privacy Act, but this one stumbles right out of the gate. The Privacy Act "extends no rights to organizations or corporations." *Pub. Employees for Envtl. Responsibility v. U.S. E.P.A.*, 926 F. Supp. 2d 48, 55 (D.D.C. 2013). Ultimately, "[c]orporations and organizations lack standing to sue under the [Privacy Act], which creates a cause of action for 'individuals' as defined in 5 U.S.C. § 552a(a)(2)." *Id.*; *see also SAE Prods., Inc. v. FBI*, 589 F. Supp. 2d 76, 83 (D.D.C. 2008) (same); *Am. Fed'n of Gov't Employees v. Hawley*, 543 F. Supp. 2d 44, 49-50 (D.D.C. 2008) (same). Plaintiff musters one contrary, unpublished authority, *Recticel Foam Corp. v. U.S. Dep't of Justice*, No. 98-2523, 2002 U.S. Dist. LEXIS 29242 (D.D.C. Jan. 31, 2002). But that case involved both corporate and *individual* plaintiffs — who have their own privacy rights — and both Privacy Act and FOIA claims — the latter of which allows for corporate plaintiffs. Because Clark County lacks standing to bring a Privacy Act claim, it will be dismissed as to all Defendants.

c. Unauthorized Disclosure

Plaintiff last invokes the statutory cause of action for unauthorized disclosure of tax-return information under 26 U.S.C. § 7431. This statute provides in relevant part that "[i]f any officer or employee of the United

States knowingly, or by reason of negligence, inspects or discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103, such taxpayer may bring a civil action for damages against the United States in a district court of the United States." *Id*. § 7431(a)(1).

Clark County merely cites this provision in passing throughout its Complaint, yet fails to identify almost every element of its claim: (1) an officer or employee who allegedly disclosed information; (2) any information disclosed — except the checks originally issued; (3) or any knowledge or ignorance that caused the disclosure. The Court finds this pleading insufficient to state a claim. *See, e.g., Marsoun v. United States*, 525 F. Supp. 2d 206, 209 (D.D.C. 2007) (dismissing claim based on allegations that "six IRS employees disclosed unidentified confidential information . . . in the absence of a written agreement required by the Internal Revenue Code, and that [another party], in turn, unlawfully inspected and disclosed that information to another employee") (quotation marks and alterations omitted). This cause of action will be dismissed as to all Defendants.

6. Mandamus

Plaintiff's remaining count against Treasury Defendants is one for mandamus. "Mandamus is an extraordinary remedy 'reserved for really extraordinary cases,'" *In re Bituminous Coal Operators' Ass'n, Inc*., 949 F.2d 1165, 1167, 292 U.S. App. D.C. 309 (D.C. Cir. 1991) (quoting *Ex parte Fahey*, 332 U.S. 258, 260, 67 S.

Ct. 1558, 91 L. Ed. 2041 (1947)), and it "is hardly ever granted." *In re Cheney*, 406 F.3d 723, 729, 365 U.S. App. D.C. 387 (D.C. Cir. 2005) (*en banc*). "Mandamus is available only if: (1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to plaintiff." *Power v. Barnhart*, 292 F.3d 781, 784, 352 U.S. App. D.C. 77 (D.C. Cir. 2002) (internal quotation marks and citation omitted). "[A] writ of mandamus will issue 'only where the duty to be performed is ministerial and the obligation to act peremptory, and clearly defined. The law must not only authorize the demanded action, but require it; the duty must be clear and undisputable.'" *13th Reg'l Corp. v. U.S. Dep't of Interior*, 654 F.2d 758, 760, 210 U.S. App. D.C. 43 (D.C. Cir. 1980) (quoting *United States ex rel. McLennan v. Wilbur*, 283 U.S. 414, 420, 51 S. Ct. 502, 75 L. Ed. 1148 (1931)); *Lozada Colon v. U.S. Dep't of State*, 170 F.3d 191, 335 U.S. App. D.C. 154 (D.C. Cir. 1999) (*per curiam*). "[E]ven if the plaintiff overcomes all these hurdles, whether mandamus relief should issue is discretionary," *In re Cheney*, 406 F.3d at 729, and typically the Court must also "find[] 'compelling . . . equitable grounds.'" *In re Medicare Reimbursement Litig.*, 414 F.3d 7, 10, 367 U.S. App. D.C. 116 (D.C. Cir. 2005) (quoting *13th Reg'l Corp.*, 654 F.2d at 760) (alteration in original).

None of these conditions is satisfied here. Plaintiff fails to show that its right to a writ is clear and indisputable. As should be clear by now, Plaintiff has not even shown it has any clear entitlement to the refunds it seeks. Considering that it could have brought a tax-refund suit, moreover, the Court is far from satisfied that no other remedies are

available. All of Clark County's claims for mandamus relief against Treasury Defendants as articulated in Count VII and elsewhere will be dismissed.

* * *

In sum, Clark County has failed to state a claim for constitutional violations, both facial and as applied (Counts II-IV), the Court lacks jurisdiction over its claims for declaratory and injunctive relief (Counts I-V), and Plaintiff has failed to state any claim for damages or mandamus (Counts VII-IX). The Court will, therefore, dismiss the Second Amended Complaint in its entirety as against Treasury Defendants.

B. FDIC-Receiver

The Court next addresses Clark County's claims against FDIC-Receiver. Because there is no "acting chairperson" of FDIC-Receiver, Plaintiff has dropped its cause action against that individual. *See* Pl. Opp. to FDIC-R at 44 n.55. In addition, since the Court's resolution of Clark County's *damages* claims covered all Defendants, only the equitable claims against FDIC-Receiver are left. The Court will consider Clark County's constitutional, injunctive, declaratory, and mandamus causes of action against FDIC-Receiver together because they stand or fall as one.

Clark County's factual allegations against FDIC-Receiver stem from two events. First, Plaintiff takes issue with the actual takeover of the Bank. "Upon seizure of the

Bank," Clark County claims, the FDIC improperly seized "all of Plaintiff['s] . . . books, records and documentation." SAC, ¶¶ 19, 47. Clark County asserts an entitlement to this property, "an accounting of the disposition of assets of the FDIC/FDIC-Receiver," and "an accounting of all payments transferred in relation to the FDIC Receivership, including that certain depositors did not yet receive all of their funds." *Id.*, ¶¶ 50-51.

Second, Clark County challenges FDIC-Receiver's actions regarding the tax refunds at issue in this case. According to Plaintiff, FDIC-Receiver filed tax returns and accepted the related tax refunds, although it "did not seek to obtain permission" to do so until its actions were accomplished. *Id.*, ¶¶ 33, 34. Plaintiff also claims that "[r]eceipt by the FDIC/FDIC-Receiver of mail and/or checks addressed and/or issued to Plaintiff was improper," *id.*, ¶ 36; "[r]etention of checks issued to Plaintiff was improper," *id.*; "[o]pening and/or retaining mail to Plaintiff was improper," *id.*; "[r]eceipt of information regarding Plaintiff from the IRS/Treasury/USA, without Plaintiff's consent, was improper," *id.*, ¶ 44; and "communications between the IRS/Treasury/USA, and the FDIC, FDIC-Receiver, and their employees" was improper. *Id.* Not surprisingly, Clark County asserts that these actions violated its Fourth and Fifth Amendment rights, governing regulations, and the APA.

FDIC-Receiver counters that the Court lacks jurisdiction over all of these claims, no matter what the theory. The governing statutory plan, the Financial Institution Reform, Recovery and Enforcement Act of

1989 (FIRREA) establishes an administrative-claims process related to institutions like the Bank that have gone into receivership. FIRREA bars judicial review of claims absent exhaustion of this process. According to FDIC-Receiver, Plaintiff's failure to exhaust sinks its claims. The Court agrees.

Congress enacted FIRREA "to enable the . . . expeditious[] wind up [of] the affairs of literally hundreds of failed financial institutions throughout the country." *Freeman v. FDIC*, 56 F.3d 1394, 1398, 312 U.S. App. D.C. 324 (D.C. Cir. 1995). It "creates an administrative claims process for banks in receivership with the FDIC." *Am. Nat. Ins. Co. v. FDIC*, 642 F.3d 1137, 1141, 395 U.S. App. D.C. 316 (D.C. Cir. 2011) (citing 12 U.S.C. § 1821(d)(3)-(13)). FIRREA also limits the availability of judicial review to claims that have gone through this process. It provides in relevant part:

> Except as otherwise provided in this subsection, no court shall have jurisdiction over—
>
> (i) 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; or
>
> (ii) any claim relating to any act or omission of such institution or the Corporation as receiver.

12 U.S.C. § 1821(d)(13)(D). The only avenue of review "otherwise provided" comes in § 1821(d)(6), which empowers a claimant to bring an action in court *after* the FDIC has disallowed the claim. The D.C. Circuit has thus "described § 1821(d)(6) and § 1821(d)(13)(D) as setting forth a 'standard exhaustion requirement.'" *Am. Nat. Ins.*, 642 F.3d at 1141 (quoting *Auction Co. of Am. v. FDIC*, 141 F.3d 1198, 1200, 329 U.S. App. D.C. 414 (D.C. Cir. 1998)). In other words, "Section 1821(d)(13)(D) . . . acts as a jurisdictional bar to claims or actions by parties who have not exhausted their § 1821(d) administrative remedies." *Id.*

FDIC-Receiver argues that, because Clark County did not present a claim for the tax refunds, books, or records through the administrative process, it cannot do so here. As quoted above, the exhaustion requirement has two prongs, (i) and (ii). The second bars broadly "any claim relating to any act or omission of . . . the Corporation as receiver." 12 U.S.C. § 1821(d)(13)(D)(ii); *see Westberg v. FDIC*, 741 F.3d 1301, 1306, 408 U.S. App. D.C. 246 (D.C. Cir. 2014) (distinguishing the two bases of the jurisdictional bar). In this case, Clark County's claims go directly to alleged "act[s] or omission[s] of . . . the Corporation as receiver." 12 U.S.C. § 1821. This is because Plaintiff challenges FDIC-Receiver's seizure of property, its filing of tax returns, its communications with the IRS, and its retention of refunds. As a result, subsection (ii) requires exhaustion.

FIRREA, moreover, provides an additional limitation on the Court's jurisdiction: "[N]o 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." 12 U.S.C. § 1821(j). "Section 1821(j) does indeed effect a sweeping ouster of courts' power to grant equitable remedies," including a plea for "declaratory relief," against FDIC-Receiver. *Freeman*, 56 F.3d at 1399. Ultimately, it prohibits "courts from restraining or affecting the exercise of power or functions of the FDIC as a conservator or a receiver unless it has acted or proposed to act beyond, or contrary to, its statutorily prescribed, constitutionally permitted, powers or functions." *Id.* at 1398 (quotation marks and alterations omitted).

Clark County argues that this bar does not apply because FDIC-Receiver, in the actions it challenges, did indeed act beyond its statutory and constitutional authority. Yet all of Plaintiffs' claims relate either to the original takeover of the Bank or the manner in which FDIC-Receiver went about collecting obligations due to the Bank. As a result, in this case, "the FDIC [was] unquestionably acting in its capacity as 'receiver,' and as such [was] authorized by statute to exercise all rights, titles, powers, and privileges of the insured depository institution with respect to the assets of the institution." *Id.* (quotation marks and alterations omitted). "This includes the power to 'collect all obligations and money due the institution,' to 'place the . . . institution in liquidation and proceed to realize upon the assets of the institution,' to 'transfer any asset or liability of the institution,', and to 'exercise . . . such incidental powers as shall be necessary to carry out' these express powers." *Id.* at 1398-99

(quoting 12 U.S.C. § 1821(d)(2)(I)(i), (B)(ii), (E), and (G)(i)(II)). Plaintiff's challenges to these actions are unavailing because they seek to "affect[] the exercise of power . . . of the FDIC as a . . . receiver." 12 U.S.C. § 1821(j).

To the extent Plaintiff alleges that FDIC-Receiver through some specific act technically violated any statutory or regulatory duties, the D.C. Circuit has explained, "We do not think it possible, in light of the strong language of § 1821(j), to interpret the FDIC's 'powers' and 'authorities' to include the limitation that those powers be subject to — and hence enjoinable for non-compliance with — *any and all other federal laws . . . .*" *Nat'l Trust for Historic Pres. in U.S. v. FDIC*, 995 F.2d 238, 240, 301 U.S. App. D.C. 338 (D.C. Cir. 1993) (emphasis added), *reh'g granted, judgment vacated*, 5 F.3d 567, 303 U.S. App. D.C. 315 (D.C. Cir. 1993), *opinion reinstated in part on reh'g*, 21 F.3d 469, 305 U.S. App. D.C. 375 (D.C. Cir. 1994).

Clark County must, accordingly, have filed a claim through FIRREA's administrative process to be able to proceed here, and it is undisputed that it did not do so by the applicable bar date, April 23, 2009.

Plaintiff, however, is not done yet. It argues that the exhaustion requirement should be equitably tolled as it did not know of the issuance of checks in its name until much later. But the only statutory exception to the exhaustion requirement is for situations in which the claimant did not receive notice of the appointment of the receiver in time to file its claim. *See* 12 U.S.C. §1821(d)(5)(C). Even if the exhaustion requirement were equitably

tolled, moreover, Clark County still would not have filed a timely claim. By Plaintiff's own account, it knew as early as October 2010 that FDIC-Receiver had received the first two checks. It learned of them when FDIC-Receiver contacted it seeking authorization to accept possession of them. *See* Pl. Opp. FDIC-R at 11 n.15. It also learned of FDIC-Receiver's appointment as alternate agent for the consolidated tax group at the very latest in August 2011. *See id.*, Ex. H. Plaintiff, however, did not file a claim at either point. In fact, the only communication that could possibly be construed as an adequate claim did not come until December 2013. *See id.*, Ex. O.

In sum, Clark County did not timely file claims for refunds, books, or records through FIRREA's required administrative process. Its injunctive, declaratory, and mandamus causes of action are therefore barred. Because these are the only remaining claims against FDIC-Receiver, the Court will dismiss the Second Amended Complaint against FDIC-Receiver in its entirety.

C. FDIC-Corporate

Clark County also names FDIC-Corporate as well as its acting chairperson as a party in Counts II-IX. As noted above, FDIC-Corporate and FDIC-Receiver are separate legal entities. *See, e.g., Dubois*, No. 09-2176, 2010 U.S. Dist. LEXIS, 2010 WL 3463368, at *6. "In its corporate capacity, the FDIC acts as an insurer of bank deposits, while as a receiver it manages the assets and liabilities of failed institutions." *Id.* (citations omitted). Plaintiff has pled no facts supporting the inference that

FDIC-Corporate had anything to do with the takeover of the Bank, the issuance of the disputed tax-refund checks, the return of those checks, or their reissuance. All of these actions were taken by FDIC-Receiver or Treasury Defendants.

Plaintiff tries to ensnare FDIC-Corporate in its injunctive claim for books and records that allegedly were wrongfully seized. *See* SAC, ¶ 19. It argues that "who" did this seizing is an issue factually in debate. *See* Pl. FDIC-C Srpl. at 1-2. All of Clark County's contentions, however, relate to the takeover of the Bank — actions dedicated by law to FDIC-Receiver. *See Dubois*, No. 09-2176, 2010 U.S. Dist. LEXIS, 2010 WL 3463368, at *6. Clark County must do more than *say* a fact is in dispute, particularly when the law determines it to be otherwise, and a court need not accept as true an inference unsupported by the facts set forth in the complaint. *See Trudeau*, 456 F.3d at 193. All Plaintiff can really contend on this front is that it seeks records so that it might later determine if it can pursue an action against FDIC-Corporate for interference with "[Troubled-Asset-Relief-Program] procedures and Plaintiff's other operations." Pl. FDIC-C Srpl. at 3. But Clark County cannot justify a claim against FDIC-Corporate on the theory that, were its relief granted, it might discover actionable conduct on the part of that Defendant. Plaintiff has it the wrong way round. Clark County must allege actionable conduct in the complaint and seek relief from that conduct, which it has failed to do here. "In light of the separate legal identities of FDIC—Receiver and FDIC-Corporate, all claims against FDIC-Corporate must be dismissed for failure to state a

claim for relief that is plausible on its face." *See Dubois*, No. 09-2176, 2010 U.S. Dist. LEXIS, 2010 WL 3463368, at *7 (citing *Iqbal*, 129 S.Ct. at 1950).

* * *

The Court, having completed its analysis of Plaintiff's various claims, is well aware that two central questions remain unanswered. First, the government, for its part, has not explained its error in initially issuing checks payable to Plaintiff. Its miscues on this front, however, do not entitle Clark County to any relief. Second, Clark County never discusses throughout its voluminous briefing why it has not brought the most logical cause of action — namely, a tax-refund suit, which the government has urged it to do from the first. As the Court cannot pretend to be Agatha Christie, resolving all puzzles on the last page, these mysteries must remain mysterious.

IV. Conclusion

For the foregoing reasons the Court will dismiss Clark County's Second Amended Complaint in its entirety against all Defendants. A contemporaneous Order issued this day will so state.

/s/ James E. Boasberg
JAMES E. BOASBERG
United States District Judge

Date: September 19, 2014

APPENDIX G — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JULY 29, 2021, D.C. NOS. 05816 AND 05852

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19-35097

CLARK COUNTY BANCORPORATION,

Plaintiff-Appellant,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR BANK OF CLARK COUNTY,

Defendant-Appellee.

D.C. Nos. 3:14-cv-05816-BHS, 3:14-cv-05852-BHS
Western District of Washington, Tacoma

ORDER

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

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

Appendix G

Judge Murguia votes to deny the petition for rehearing en banc and Judge Boggs and Judge Tashima so recommend.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED (Doc. 62).

APPENDIX H — STATUTORY AND REGULATORY PROVISIONS

12 U.S.C. § 1821(d)(3)(B)(i)

(3) Authority of receiver to determine claims.

(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

Appendix H

12 U.S.C. § 1821(d)(5)(A)(iv)(I)

(A) Determination period.

(iv) Contents of notice of disallowance. If any claim filed under clause (i) is disallowed, the notice to the claimant shall contain—

(I) a statement of each reason for the disallowance;

Appendix H

12 U.S.C. § 1821(d)(6)

(A) In general. Before the end of the 60-day period beginning on the earlier of—

(i) the end of the period described in paragraph (5)(A)(i) with respect to any claim against a depository institution for which the Corporation is receiver; or

(ii) the date of any notice of disallowance of such claim pursuant to paragraph (5)(A)(i), the claimant may request administrative review of the claim in accordance with subparagraph (A) or (B) of paragraph (7) or file suit on such claim (or continue an action commenced before the appointment of the receiver) in the district or territorial court of the United States for the district within which the depository institution's principal place of business is located or the United States District Court for the District of Columbia (and such court shall have jurisdiction to hear such claim).

(B) Statute of limitations. If any claimant fails to—

* * *

(ii) file suit on such claim (or continue an action commenced before the appointment of the receiver), before the end of the 60-day period described in subparagraph (A), the claim shall be deemed to be disallowed (other than any portion of such claim which was allowed by the receiver) as of the end of such period, such disallowance shall be final, and the claimant shall have no further rights or remedies with respect to such claim.

Appendix H

26 C.F.R. § 301.6402-7(j)

(j) Determination of ownership. This section determines the party to whom a refund or tentative carryback adjustment will be paid but is not determinative of ownership of any such amount among current or former members of a consolidated group (including the institution).

APPENDIX I — NOTICE OF DISALLOWANCE, DATED AUGUST 26, 2014

FDIC
Federal Deposit Insurance Corporation

CERTIFIED MAIL RETURN RECEIPT REQUESTED
7014 1200 0000 0463 2921

August 26, 2014

CLARK COUNTY BANCORPORATION
ATTN: MICHAEL C. WORTHY
512-F NE 81ST STREET
VANCOUVER, WA 98665

SUBJECT: 10029 – Bank of Clark County
Vancouver, WA – In Receivership
Claimant ID: **NS1002915003**
Claim Amount: **$9,682,280.08**

NOTICE OF DISALLOWANCE OF CLAIM

Dear Claimant:

The FDIC as Receiver for **Bank of Clark County** has reviewed your general unsecured claim ("claim") against the receivership. After a thorough review of your filed claim along with your supporting documentation, the Receiver has determined to disallow your claim for the following reason(s):

> **Claim was filed after established Bar date of December 30, 2008. Therefore the**

claim is disallowed in the total claimed $9,682,280.08 as untimely.

Pursuant to 12 U.S.C. section 1821(d)(6), if you do not agree with this disallowance, you have the right to file a lawsuit on your claim (or continue any lawsuit commenced before the appointment of the Receiver). You lawsuit must be filed within 60 days after the date of this notice. You must file your lawsuit either in the United States District (or Territorial) Court for the District where the Failed Institution's principal place of business was located or in the United States District Court for the District of Columbia.

Lawsuits: If you do not file a lawsuit (or continue any lawsuit commenced before the appointment of the Receiver) before the end of the 60-day period, the disallowance of your claim will be final and you will have no further rights or remedies with respect to your claim. 12 U.S.C. 1821(d)(6)(B)(ii).

While section 1821(d)(7)(A) of Title 12 of the United States Code provides that you may request an administrative review of the disallowance of your claim in lieu of filing or continuing any lawsuit, the FDIC must agree to your request for such a review. The FDIC will not agree to any request for an administrative review of your disallowed claim.

Insured Deposit Claims: Claims for insured deposits are claims against FDIC in its corporate capacity as deposit insurer – not against the Receiver. If any portion of you claim is for an insured deposit, your rights differ from the

rights described in the preceding paragraphs. An insured depositor's rights are set forth in 12 U.S.C. Section 1821(f). Please contact a claims agent at the below phone number for a deposit claims inquiries.

If you have any questions about this letter, please contact the undersigned at **(972) 761-2613.**

Sincerely,

/s/_____
CLAIMS AGENT
Claims Department