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8 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

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11 In re

12 VENTURE FINANCIAL GROUP, INC.,

13 Debtor.

14 MARK D. WALDRON, chapter 7 trustee
for Venture Financial Group, Inc.,

15 Plaintiff,

16 v.

17 FEDERAL DEPOSIT INSURANCE
CORPORATION, in its capacity as
18 Receiver of Venture Bank,

19 Defendant.

CASE NO. 15-5892 RJB

13-46392 BDL

ADVERSARY P. 14-04194 BDL

ORDER ON FDIC'S MOTION FOR
LEAVE TO APPEAL

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21 This matter comes before the Court on the Federal Deposit Insurance Corporation's
22 ("FDIC") Motion for Leave to Appeal the Bankruptcy Court's November 5, 2015 Order on
23 Motions for Summary Judgment (*Waldron v. FDIC*, United States Bankruptcy Court for the
24 Western District of Washington Adversary Proceeding No. 14-04194 BDL, Dkt. 80) pursuant to

1 28 U.S.C. § 158(a)(3). The Court has considered the pleadings filed regarding the motion, and
2 the remaining record.

3 The principal question in the case in which the order at issue was entered - *Waldron v.*
4 *FDIC*, United States Bankruptcy Court for the Western District of Washington Adversary
5 Proceeding No. 14-04194 BDL (“the adversary proceeding”) - is whether the FDIC-Receiver, as
6 receiver for Venture Bank (“Bank”) or the bankruptcy trustee (“Trustee”) for the bank’s holding
7 company Venture Financial Group, Inc. (“Holding Company”) is entitled to \$8,471,982.36 in
8 federal income tax refunds. Dkt. 1. The FDIC-Receiver contends that the Bankruptcy Court
9 improperly denied its motion for summary judgment in the adversary proceeding and that leave
10 for an immediate appeal of that order should be granted. For the reasons stated below, the
11 motion should be denied.

12 I. **FACTS**

13 According to the FDIC, Venture Bank was closed by the Washington Department of
14 Financial Institutions on September 11, 2009, and the FDIC was appointed its Receiver. The
15 Holding Company filed chapter 7 bankruptcy on October 10, 2013. *In re Venture Financial*
16 *Group, Inc.*, United States Bankruptcy Court for the Western District of Washington Case No.
17 13-46392 BDL.

18 The FDIC states that:

19 As the duly authorized alternative agent for the consolidated group including the
20 Bank and the Holding Company, the FDIC-Receiver filed all of the tax returns
21 requesting the Tax Refunds. The IRS paid \$6,204,763.10 of the Tax Refunds to
22 the FDIC-Receiver before the bankruptcy was filed and paid the remaining
23 \$2,267,219.26 to the FDIC-Receiver after the bankruptcy was filed. All parties
24 agree that the tax refunds are solely attributable to losscarrybacks claims filed by
the FDIC-Receiver on behalf of the failed Venture Bank.

The Trustee brought an adversary proceeding asserting four claims against the

1 FDIC-Receiver: (1) avoidance of a preferential transfer under 11 U.S.C. § 547,
2 seeking to recover the \$6,204,763.10 portion of the Tax Refunds received by the
3 FDIC-Receiver before the bankruptcy, (2) objection to the FDIC-Receiver's proof
4 of claim under 11 U.S.C. § 502, asserting that the bankruptcy estate owned the
5 Tax Refunds and that the FDIC-Receiver was, at most, entitled to an unsecured
6 claim, (3) declaratory judgment under 11 U.S.C. § 105 and 28 U.S.C. §§ 2201 and
7 2202 concerning ownership of the Tax Refunds, and (4) turnover of all Tax
8 Refunds, whether pending or received, under 11 U.S.C. § 542. The Trustee later
9 abandoned the claim for declaratory judgment, leaving the remaining three claims
10 at issue.

11 Dkt. 1.

12 Parties engaged in discovery in the adversary proceeding and filed cross motions for
13 summary judgment. *Waldron v. FDIC*, United States Bankruptcy Court for the Western District
14 of Washington Adversary Proceeding No. 14-04194 BDL, Dkts. 51 and 61. The Bankruptcy
15 Court denied both motions, providing in relevant part:

16 Venture Bank and Venture Wealth Management, Inc. are both wholly-owned
17 subsidiaries of VFG (collectively, the "Consolidated Group"). In the past, VFG,
18 as the parent corporation, served as sole agent for the Consolidated Group for tax
19 purposes, pursuant to 26 C.F.R. § 1.1502-77. In 2009, Venture Bank was closed
20 and placed into federal receivership, with FDIC-R appointed as receiver. In 2011,
21 FDIC-R made a request to the Internal Revenue Service (the "IRS") to serve as
22 alternative agent to file tax returns for the Consolidated Group, pursuant to 26
23 C.F.R. § 301.6402-7, which was approved despite VFG's objection. Between
24 2011 and 2013, FDIC-R filed amended tax returns as alternative agent for the
Consolidated Group, requesting refunds for years 2004 through 2007. VFG filed
its voluntary chapter 7 petition on October 10, 2013.

This dispute concerns ownership rights to tax refunds received by FDIC-R, as
alternative agent for the Consolidated Group, in the amounts of \$6,204,763.10 pre-
petition and \$2,267,219.26 post-petition (the "Tax Refunds"). . .

"In the context of tax refunds attributable to a subsidiary (but held by a parent as a
result of a decision to file consolidated tax returns)... 'the parties are free to adjust
among themselves the ultimate tax liability.'" *In re Indymac Bancorp, Inc.*, 554 F.
App'x 668, 669 (9th Cir. 2014) (quoting *W. Dealer Mgmt. v. England (In re Bob
Richards Chrysler-Plymouth Corp.)*, 473 F.2d 262, 264 (9th Cir. 1973) ("*Bob
Richards*")). Under *Bob Richards*, "where the parties have made no agreement
concerning the ultimate disposition of the tax refund, the parent holds the tax
refunds in trust for the subsidiary." *Id.* (internal quotations omitted). Therefore,
the threshold issue for determining ownership of the Tax Refunds is whether there
is an agreement concerning the ultimate disposition of the Tax Refunds, which

1 “may be done through an explicit agreement, or an agreement implied by the
2 parties' past practices.” *Id.* (citing *Bob Richards*, 473 F.2d at 264 & n. 4) (*internal
3 quotations omitted*).

4 *Waldron v. FDIC*, United States Bankruptcy Court for the Western District of Washington
5 Adversary Proceeding No. 14-04194 BDL, Dkt. 80, at 3-4. The Bankruptcy Court then held that:

6 The parties' positions on the threshold issue continue to evolve, but suffice to say
7 there are disputes regarding whether the tax allocation agreement of VFG's
8 predecessor-in-interest is still in effect, whether that agreement was abandoned,
9 whether that agreement was supplanted by a more recent written agreement which
cannot be located, whether there was an agreement which may be implied by the
parties past practices, and what the terms of the alleged written or implied
agreement are. There are genuine issues of material facts which prevent the Court
from resolving this issue on summary judgment.

10 *Waldron v. FDIC*, United States Bankruptcy Court for the Western District of Washington
11 Adversary Proceeding No. 14-04194 BDL, Dkt. 80, at 4.

12 The FDIC now moves for leave to file an immediate appeal of this order, and intends to
13 address the following legal issues on appeal:

- 14 1. Where the Trustee failed to adduce evidence of a binding applicable tax
15 sharing agreement, concedes that the Holding Company had no basis to claim
16 an ownership interest in the Tax Refunds, and claims, instead, that 11 U.S.C.
17 § 541(a) gives the Trustee greater property rights than the Holding Company
had before bankruptcy, did the Bankruptcy Court err when it refused to grant
summary judgment for the FDIC-Receiver on ownership of the Tax Refunds
and the related turnover and preference claims?
- 18 2. Where payment on an antecedent debt is a required element of a preference
19 claim, and there was no evidence in the record that the Holding Company
20 owed the Bank an antecedent debt in the 90 days before bankruptcy, did the
Bankruptcy Court err when it refused to grant summary judgment on the
preference claim to the FDIC-Receiver?

21 Dkt. 1.

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1 II. DISCUSSION

2 MOTION UNDER 28 U.S.C. § 158(a)(3)

3 Under 28 U.S.C. 158(a)(3), with leave of court, district courts have jurisdiction to hear
4 appeals of interlocutory orders and decrees of bankruptcy judges. “In determining whether to
5 grant leave to appeal an interlocutory order from the bankruptcy court, the court will apply the
6 standard set forth in 28 U.S.C. § 1292(b), which is the standard used by the court of appeals to
7 determine whether to entertain interlocutory appeals from the district court.” *See In re Futter*
8 *Lumber Corp.*, 473 B.R. 20, 26 (E.D.N.Y. 2012); *In re Belli*, 268 B.R. 851, 858 (B.A.P. 9th Cir.
9 2001)(in evaluating a § 158(a)(3) motion, “[w]e look for guidance to standards developed under
10 28 U.S.C. § 1292(b) to determine if leave to appeal should be granted, even though the procedure
11 is somewhat different”). A court of appeals has discretion to consider an interlocutory appeals
12 from a district court when a district judge certifies that the order at issue “involves a controlling
13 question of law as to which there is substantial ground for difference of opinion and that an
14 immediate appeal from the order may materially advance the ultimate termination of the
15 litigation.” 28 U.S.C. § 1292(b).

16 Applying that standard here, the motion for leave to appeal should be denied. There has
17 been no showing that the decision at issue involved a “controlling question of law as to which
18 there is a substantial ground for difference of opinion.” The Bankruptcy Court held that there are
19 issues of fact which precluded summary judgment. “A factual determination by the Bankruptcy
20 Court is accorded deferential review by this Court and is not a question of law as to which an
21 immediate interlocutory appeal is appropriate under § 1292(b).” *In re Futter*, at 27. Even if it
22 could be argued that the Bankruptcy Court’s determination regarding the whether there was a tax
23 allocation agreement in effect is a “controlling question of law,” it is a fact based inquiry.

1 “[W]here a legal issue is essentially fact based in nature, interlocutory appeal is not appropriate.”
2 *In re Futter*, at 27-28 (*internal quotations omitted*). Moreover, there is no showing that there is
3 substantial ground for difference of opinion. Further, there is no showing that an immediate
4 appeal may “materially advance the ultimate termination of the litigation.” The FDIC’s Motion
5 (Dkt. 1) should be denied.

6 III. **ORDER**

7 The Federal Deposit Insurance Corporation’s Motion for Leave to Appeal the Bankruptcy
8 Court’s November 5, 2015 Order on Motions for Summary Judgment (Adversary Proceeding
9 No. 14-04194, Dkt. 80) pursuant to 28 U.S.C. § 158(a)(3) (Dkt. 1) **IS DENIED**.

10 The Clerk is directed to send uncertified copies of this Order to all counsel of record and
11 to any party appearing *pro se* at said party’s last known address.

12 Dated this 16th day of December, 2015.

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14 ROBERT J. BRYAN
15 United States District Judge
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