to and arising from the Debtor or the Case. Nothing contained in this Article V.B shall release the Debtor's officers and directors from claims for actions taken before the Effective Date other than as provided in the Plan.

2. **Plan Committee.** As of the Effective Date, the Plan Committee shall be created and shall consist of three members of the New Board as identified in the Plan Supplement. Holdco, upon consultation with the Debtor, shall determine the identity of the initial members of the Plan Committee, and the New Board will appoint replacement members if needed thereafter. The Plan Committee shall oversee and have decision-making authority regarding any litigation and/or settlement of Causes of Action, including the FDIC Causes of Action and any litigation related to the subordination of the TOPrS Unsecured Claims, and the administration of Distributions. The fiduciary duties of the members of the Plan Committee (in their capacity as Plan Committee members) shall run to all parties entitled to Distributions under the Plan, whether or not such beneficiaries have elected the Proceeds Distribution Election. The Reorganized Debtor shall seek approval of any settlement of a Material Cause of Action from the Bankruptcy Court by the filing of an appropriate motion, and such approval shall be governed by Fed.R.Bankr.P. 9019, shall only come after a hearing, upon notice to all parties requesting service pursuant to Bankruptcy Rule 2002 or to such Entities as the Court may order.

C. Cancellation of TOPrS Debentures, TOPrS, and Equity Interests

1. **Cancellation of TOPrS Debentures.** On the Effective Date, except to the extent otherwise provided herein, all notes, stock, instruments, certificates and other documents evidencing the TOPrS Unsecured Claims and Equity Interests, including the TOPrS Documents and the TOPrS shall be deemed automatically canceled, shall be of no further force, whether surrendered for cancellation or otherwise, and the obligations of the Debtor thereunder or in any way related thereto shall be discharged.

2. **Limited Survival of TOPrS Documents.** Notwithstanding anything to the contrary contained in this Plan, (a) the TOPrS Documents will continue in effect solely for purposes of (i) allowing the applicable TOPrS Indenture Trustee to receive and make the Distributions to be made pursuant to this Plan on account of TOPrS Unsecured Claims, from Distributions received from the Reorganized Debtor in accordance with this Plan, and (ii) permitting such TOPrS Indenture Trustee to maintain any rights or Liens it may have under the applicable TOPrS Documents to receive TOPrS Indenture Trustee Fees, exculpation, indemnification and the protections provided for in Article VI of The Bank of New York Mellon related TOPrS Debenture Indenture, Article VI of the U.S. Bank National Association related TOPrS Debenture Indenture, and the corresponding provisions of other TOPrS Documents; provided that the Debtor or Reorganized Debtor, as applicable, will not have any obligation to any TOPrS Indenture Trustee for payment of any such TOPrS Indenture Trustee Fees or indemnifications except as otherwise provided in this Plan, and (iii) permitting the potential participation of any TOPrS Indenture Trustee in any appeal from any ruling on the FDIC's objection to the TOPrS Unsecured Claims, and (b) the TOPrS Debentures issued under such agreements will continue in effect solely for the purposes of permitting Holders thereof to receive Distributions from the applicable TOPrS Indenture Trustee in accordance with the Plan.

3. **Limited Preservation of TOPrS Indenture Trustee Rights to Charging Liens.** To the extent that, under the TOPrS Documents, the TOPrS Indenture Trustees are entitled to charging liens on account of unpaid TOPrS Indenture Trustee Fees, recoveries under the Plan will be adjusted so that sufficient Cash Distributions are available to allow the TOPrS Indenture Trustees to exercise such charging liens against Cash distributed under the Plan. Payment of fees, if any, to the TOPrS Indenture Trustees will reduce recoveries to all creditors regardless of whether they make the Proceeds Distribution Election or receive the New Series A Common Stock.

4. **Payment of Holdco Fees.** The Reorganized Debtor shall pay the Holdco Fees, after submission of invoices therefor. If and only if Holdco elects in its sole discretion, payment of the Holdco Fees shall not reduce the recovery, if any, of the FDIC in connection with any Allowed FDIC Non-Priority Claims, and the FDIC will be entitled to receive the same Distributions it would otherwise be entitled to receive absent payment of the Holdco Fees.

5. **Payment of TOPrS Indenture Trustee Fees.** On or as soon as practicable after the Effective Date, the Reorganized Debtor shall pay the TOPrS Indenture Trustee Fees, after submission of invoices therefor. Subsequent submissions by a TOPrS Indenture Trustee of TOPrS Indenture Trustee Fees incurred after the Effective Date may be made from time to time, but no more frequently than monthly, by delivery of invoices to the Reorganized Debtor for payment, but only for fees incurred by the TOPrS Indenture Trustee that are reasonably necessary for the implementation of this Plan, including in connection with any potential participation in any appeal from the FDIC's objection to the TOPrS Unsecured Claims. If and only if Holdco elects in its sole discretion, payment of the TOPrS Indenture Trustee Fees shall not reduce the recovery, if any, of the FDIC in connection with any Allowed FDIC Non-Priority Claims, and the FDIC will be entitled to receive the same Distributions it would otherwise be entitled to receive absent payment of the TOPrS Indenture Trustee Fees.

D. Reorganized Debtor Securities

1. **New Series A Common Stock.** The Reorganized Debtor's equity interests shall consist of New Series A Common Stock, and, if the Debtor elects (if necessary to cause Section 382(l)(5) of the Internal Revenue Code to apply to the Plan), the New Series B Common Stock, as provided for in Section V.D.2. below. On the Effective Date, or as soon as reasonably practicable thereafter, the Reorganized Debtor shall issue or reserve for issuance all securities to be issued pursuant to the terms of the Plan, without need for any further corporate or shareholder action.

2. **Optional Issuance of New Series B Common Stock (Separate Series or Classes of Common Stock).** To the extent the Reorganized Debtor chooses (if necessary to cause Section 382(l)(5) of the Internal Revenue Code to apply to the Plan or to preserve certain other tax attributes) to issue the New Series B Common Stock as one or more separate series or classes of common stock on account of the Proceeds Distribution Election, on the Effective Date each Holder that has made a Proceeds Distribution Election with respect to which the Reorganized Debtor chooses to issue New Series B Common Stock shall be issued, in lieu of or in exchange for Proceeds Distribution Election Trust Interests, New Series B Common Stock (which shall be in addition to such Holder's Pro Rata share of the D&O Litigation Trust Interests). In such case, the Proceeds Distribution Election Trust Interests that would have been issued to such Holders will be issued to a wholly owned, special purpose bankruptcy remote vehicle of Reorganized Debtor and the Proceeds Distribution Election Trust Agreement and the Reorganized Debtor's certificate of incorporation shall provide that (i) any Distributions on account of such Proceeds Distribution Election Trust Interests held by such special purpose vehicle shall be used exclusively for funding dividend, distribution, or redemption payments on the New Series B Common Stock and (ii) each holder of New Series B Common Stock shall be entitled to its Pro Rata share of Net Free Cash as if such Holder had received Proceeds Distribution Election Trust Interests in accordance with this Plan and the Proceeds Distribution Election Trust Agreement. If New Series B Common Stock is issued to the Holders making a Proceeds Distribution Election as provided above, then (x) the certificate of incorporation, charter and bylaws of the special purpose vehicle referred to above shall be subject to the approval of Holdco and the Committee, (y) the rights, preferences and privileges of the New Series B Common Stock contained in the certificate of incorporation, charter and bylaws of. Reorganized Debtor shall be subject to the approval of Holdco and the Committee; and (z) the certificate of incorporation of Reorganized Debtor shall provide that (I) the holder of each share of New Series B Common Stock, if any, shall

be entitled to receive a dividend, distribution, redemption, or similar payment corresponding to and from Distributions that are made from the Proceeds Distribution Election Trust representing such Holder's pro rata share of the amount of such Proceeds Distribution Election Trust Assets in accordance with this Plan and the Proceeds Distribution Election Trust Agreement, (II) the holder of each share of New Series B Common Stock shall be entitled to a liquidation preference in an aggregate amount equal to the their respective pro rata share of the fair market value of the Proceeds Distribution Election Trust Assets, as of the date of the liquidation or dissolution of the Reorganized Debtor, which may be satisfied by the distribution of the Proceeds Distribution Election Trust Interests held by the special purpose vehicle created pursuant to this Plan to the holders of the New Series B Common Stock pursuant to such liquidation or dissolution and (III) Reorganized Debtor may not be merged or consolidated with any other Entity or liquidated or dissolved at any time that the New Series B Common Stock is outstanding unless adequate provision is made to secure the right of the holders of the New Series B Common Stock to received Distributions of Net Free Cash as provided for in the Plan. Alternatively, the Proceeds Distribution Election Trust Agreement, the Reorganized Debtor's certificate of incorporation, and certificate of incorporation, charter and bylaws of the special purpose vehicle referred to above shall provide that at any time on or after the Effective Date, the New Board shall in its discretion distribute the Proceeds Distribution Election Trust Interests held by such special purpose vehicle to holders of New Series B Common Stock in the form a dividend, distribution, redemption, or any other type of payment, after which the Reorganized Debtor shall have no further obligations to make distributions to holders of New Series B Common Stock. Moreover, prior to the Effective Date and at the election of Holdco, in lieu of the creating a special purpose vehicle, the Debtor may distribute Proceeds Distributions Election Trust Interests directly to holders of New Series B Common Stock on the Effective Date, which such

distribution shall be in addition to, and not in lieu of the shares of New Series B Common Stock to be distributed on such date.

Alternatively, to the extent the Reorganized Debtor chooses (if necessary to cause Section 382(l)(5) of the Internal Revenue Code to apply to the Plan or to preserve certain other tax attributes) to issue a the New Series B Common Stock as one or more separate series or classes of common stock on account of part of the Proceeds Distribution Election, which shall be in addition to, and not in lieu of, the other Distributions to which a Holder making the Proceeds Distribution Election is entitled to receive under the Plan), each Holder who elects to receive the Proceeds Distribution Election:

(a) shall be entitled on account of such New Series B Common Stock to a pro rata share (such share to be calculated based on such Holder's number of shares of such New Series B Common Stock divided by the total outstanding shares as of the Effective Date of New Series B Common Stock issued to Holders who elect to receive the Proceeds Distribution Election) of any Net Free Cash that constitutes net proceeds of the Causes of Action, pursuant to redemption upon the terms set forth in the Reorganized Debtor's charter upon entry of a Final Order resolving the Causes of Action; and

(b) shall also be entitled to a right of payment equal to such holder's Pro Rata share of Net Free Cash that does not constitute the proceeds of the Causes of Action.

Each share of New Series B Common Stock shall entitle the Holder of such share to exercise voting rights equal to 1/20 of the voting rights exercisable by each of Holder of New Series A Common Stock.

3. **Limitation on Management and Control over the Reorganized Debtor.** If the Effective Date occurs prior to the FDIC Priority Claim Determination, the holders of the New Series A Common Stock shall exercise no management or control over the affairs of the

Reorganized Debtor until there is a Final Order resolving the FDIC Priority Claim Determination and holding that the FDIC Priority Claim is disallowed.

4. **Dividends, Other Attributes.**

a. **Dividends.** Except as otherwise provided by applicable law or in the corporate documents that will be included in the Plan Supplement, the holders of New Series A Common Stock and the New Series B Common Stock, if any, shall share ratably in all dividends and other Distributions made to their respective class, whether in respect of liquidation or dissolution (voluntary or involuntary) or otherwise. Without limiting the generality of the immediately preceding sentence, Holders of Allowed Claims who properly and timely make the Proceeds Distribution Election shall not receive an amount greater than the Pro Rata portion of Net Free Cash that such Holders would have received if all Net Free Cash was Distributed Pro Rata to all Holders of Allowed General Unsecured Claims, and all Cash received by such Holders, whether on account of D&O Litigation Trust Interests, Proceeds Distribution Election Trust Interests or New Series B Common Stock, shall be applied in reduction of such amount.

b. **Other Attributes of New Series A and B Common Stock** Shares of New Series A Common Stock and the New Series B Common Stock, if any, shall have conversion rights, redemption rights, preemptive rights, transfer restrictions and other rights, responsibilities and restrictions, all as set forth in the Plan Supplement, in order to preserve and maximize the value of all tax attributes that are or will be held by the Reorganized Debtor from and after the Effective Date.

c. **Redemption of Common Stock.** The New Board may elect to redeem all shares of New Common Stock held by a particular stockholder at any time, so long as the New Common Stock is redeemed for Fair Market Value Price. For purposes of the redemption of the New Common Stock, (i) to determine whether the New Series A Common Stock is redeemed for

Fair Market Value, the New Board may rely on a nationally recognized accounting or valuation firm to determine the Fair Market Value Price for the New Common Stock and (ii) to determine whether New Series B Common Stock is redeemed for Fair Market Value, the New Series B Common Stock shall be based on the fair market value of the Proceeds Distribution Election Trust Assets. Prior to making a final determination to exercise the Reorganized Debtor's redemption right under this paragraph, the Reorganized Debtor shall send a written notice to such stockholder (at the notice address appearing in the Reorganized Debtor's records) advising the stockholder of the Reorganized Debtor's intention to exercise its redemption right. In the event that the stockholder notifies the Reorganized Debtor in writing (within 60 days after the date of the Reorganized Debtor's notice) that such stockholder objects to the redemption of its shares, then the Reorganized Debtor shall not exercise the redemption right. In the event that the stockholder does not respond to the Reorganized Debtor's notice within 60 days the stockholder is deemed to have consented to the proposed redemption. In the event that the stockholder does not respond to the Reorganized Debtor's notice within 60 days after the date of the Reorganized Debtor's notice (or the stockholder notifies the Reorganized Debtor that it approves or does not object to such redemption), then the New Board shall be entitled to make a final determination to exercise the redemption right. In the event that the New Board makes such a final determination, then the redemption shall take place on a date determined by the New Board (but such redemption date shall be no later than 30 days after the New Board's final determination) and shall be at a price equal to the Fair Market Value Price. The purchase price payable in any such redemption shall be paid in cash or by check on the closing date. Such redemption shall be effective on the closing date of the redemption regardless of whether or not the stockholder participates in the closing or delivers his or its stock certificate to the Reorganized Debtor for cancellation.

E. Exemption from the Registration Requirements of the Securities Act; Investment Company Act

1. **Exemption from Securities Act.** The offering, issuance, and distribution of securities pursuant to the Plan shall be exempt from the registration requirements of section 5 of the Securities Act as one or more private placements pursuant to any and all applicable exemptions, including, as applicable, exemptions provided by Section 1145 of the Bankruptcy Code, Section 4(2) of the Securities Act and/or Rule 506 of Regulation D under the Securities Act, based on the number of creditors receiving securities under the Plan, the Reorganized Debtor's belief as to their status as accredited investors, and other factors. As a result, the securities issued under the Plan likely will be "restricted securities" for purposes of the federal securities laws. The Reorganized Debtor also reserves all rights to rely, if necessary in its sole discretion, on other exemptions to the registration requirements of section 5 of the Securities Act.

2. **Investment Company Act.** In addition, the Reorganized Debtor expects to rely on one or more of the exemptions contained in the Investment Company Act, which exemptions may include, without limitation, exemptions under Sections 3(c)1 and 3(c)7.

F. Restructuring Transactions

On the Effective Date or as soon as reasonably practicable thereafter, the Reorganized Debtor may take all actions as may be necessary or appropriate to effect any transaction described in, approved by, contemplated by or necessary to effectuate the Plan, including: (1) the execution and delivery of appropriate agreements or other documents of merger, consolidation or reorganization containing terms that are consistent with the terms of the Plan and that satisfy the requirements of applicable law; (2) the execution and delivery of appropriate instruments of transfer, assignment, assumption or delegation of any property, right, liability, duty or obligation on terms consistent with the terms of the Plan; (3) the filing of appropriate certificates of incorporation, charter, merger or

consolidation with the appropriate governmental authorities pursuant to applicable law; and (4) all other actions that the Reorganized Debtor determines are necessary or appropriate.

G. Corporate Action

Each of the matters provided for by the Plan involving the corporate structure of the Debtor or corporate, financing or related actions to be taken by or required of the Reorganized Debtor shall, as of the Effective Date, be deemed to have occurred and be effective as provided in the Plan (except to the extent otherwise indicated), and shall be authorized, approved, and, to the extent taken prior to the Effective Date, ratified in all respects without any requirement of further action by Holders of Claims or Equity Interests, the directors of the Debtor or any other Entity. Without limiting the foregoing, such actions will include: the adoption and (as applicable) filing of amended and restated certificate of incorporation, charter, bylaws and other governance documents; the appointment of officers and (as applicable) directors for the Reorganized Debtor; the issuance of the New Series A Common Stock and any security or instrument issued by the Reorganized Debtor on account of part of the Proceeds Distribution Election, and all related documents and instruments (as applicable). The Reorganized Debtor shall enter into such agreements and amend their corporate governance documents to the extent necessary to implement the terms and conditions of the Plan.

H. Effectuating Documents; Further Transactions

On and after the Effective Date, the Reorganized Debtor, and the officers and members of the New Board thereof, are authorized to and may issue, execute, deliver, file or record such contracts, securities, instruments, releases, and other agreements or documents and take such actions as may be necessary or appropriate to effectuate, implement, and further evidence the terms and conditions of the Plan and the securities issued pursuant to the Plan in the name of and on behalf of the Reorganized Debtor, and the Debtor may make non-material modifications to the documents set

forth in the Plan Supplement, without the need for any approvals, authorizations, or consents except for those expressly required pursuant to the Plan.

I. Exemption from Certain Transfer Taxes and Recording Fees

Pursuant to section 1146(a) of the Bankruptcy Code, any transfer from the Debtor to the Reorganized Debtor or to any Entity pursuant to, in contemplation of, or in connection with the Plan or pursuant to: (1) the issuance, distribution, transfer, or exchange of any debt, securities, or other interest in the Debtor or the Reorganized Debtor; (2) the creation, modification, consolidation, or recording of any mortgage, deed of trust or other security interest, or the securing of additional indebtedness by such or other means; (3) the making, assignment, or recording of any lease or sublease; or (4) the making, delivery, or recording of any deed or other instrument of transfer under, in furtherance of, or in connection with, the Plan, including any deeds, bills of sale, assignments, or other instrument of transfer executed in connection with any transaction arising out of, contemplated by, or in any way related to the Plan, shall not be subject to any document recording tax, sales tax, stamp tax, conveyance fee, intangibles or similar tax, mortgage tax, real estate transfer tax, mortgage recording tax, Uniform Commercial Code filing or recording fee, regulatory filing or recording fee, or other similar tax or governmental assessment, and the appropriate state or local governmental officials or agents shall forego the collection of any such tax or governmental assessment and to accept for filing and recordation any of the foregoing instruments or other documents without the payment of any such tax or governmental assessment.

J. Board Representation

The New Board shall be disclosed by the Plan Proponents in the Plan Supplement to be filed 10 days prior to the Voting Deadline in accordance with section 1129(a)(5) of the Bankruptcy Code. Holdco will select the members of the New Board after consultation with the Debtor. The initial members of the New Board shall serve staggered terms of one, two and three years, as designated.

Thereafter, the members of the New Board shall be elected on a staggered three-year basis by the holders of New Series A Common Stock and (as applicable and as may be in accordance with the Reorganized Debtor's certificate of incorporation) holders of New Series B Common Stock. The New Board shall have all authority to make business decisions under applicable law with respect to all matters effecting the Reorganized Debtor, including with investment activity and the Causes of Action.

K. Senior Management

Senior management of the Reorganized Debtors shall be disclosed by the Proponents in the Plan Supplement to be filed 10 days prior to the Voting Deadline in accordance with section 1129(a)(5) of the Bankruptcy Code. Holdco will select the members of the senior management after consultation with the Debtor, and thereafter the New Board will select members of the senior management as needed. The Reorganized Debtor may, but shall not be required, to enter into one or more contracts with one or more Entities to outsource or subcontract certain management functions, and the identity or identities of such Entities with whom the Reorganized Debtor may contract as of the Effective Date shall be disclosed in the Plan Supplement.

L. Committee, Vesting of Committee Standing in Reorganized Debtor and D&O Litigation Trustee

As of the Effective Date, the Committee shall dissolve, and its members shall be released and discharged from all further authority, duties, responsibilities and obligations relating to and arising from the Case. The retention and employment of the Professionals retained by the Committee shall terminate as of the Effective Date. As of the Effective Date, the Committee's standing and authority to bring and prosecute any Causes of Action, other than the Former Officers and Directors Causes of Action and the Committee Adversary Complaint shall vest in the Reorganized Debtor. As of the Effective Date, the Committee's standing and authority to bring and prosecute the Former Officers and Directors Causes of Action and the Committee Adversary Complaint shall vest in the D&O

Litigation Trustee. From and after the Effective Date, the Reorganized Debtor and the D&O Litigation Trustee, as applicable, shall have full standing and authority to bring and prosecute all such Causes of Action in place of the Committee and the Committee shall have no further standing or authority whatsoever to bring or prosecute any Causes of Action, including, without limitation, the Former Officers and Directors Causes of Action, except that the Committee shall be authorized to take any actions necessary to substitute the D&O Litigation Trustee as plaintiff with respect to the Committee Adversary Complaint.

M. Vesting of Assets in the Reorganized Debtor

Except as otherwise provided in this Plan or in any agreement, instrument or other document relating thereto, on or after the Effective Date pursuant to section 1141 of the Bankruptcy Code, all property of the Estate and any property acquired by the Debtor pursuant hereto shall vest in the Reorganized Debtor, free and clear of all Liens, Claims, charges or other encumbrances. Except as may be provided in this Plan or the Confirmation Order, including without limitation with respect to the D&O Litigation Trust and the Proceeds Distribution Election Trust, on and after the Effective Date, the Reorganized Debtor may use, acquire or dispose of its property and compromise or settle any Claims without supervision or approval by the Bankruptcy Court and free of any restrictions of the Bankruptcy Code or Bankruptcy Rules.

N. Prohibition Against Pledging Assets

Notwithstanding anything to the contrary contained herein, the Reorganized Debtor shall be precluded from, and the Confirmation Order shall expressly prohibit the Reorganized Debtor from, pledging any interest in (a) the Disputed Reserve or the assets therein; (b) the D&O Litigation Trust or the assets thereon; (c) the Proceeds Distribution Election Trust or Proceeds Distribution Election Trust Assets; or (d) any assets, or the proceeds thereof, that are or could become part of the Proceeds Distribution Election Assets, including without limitation any Causes of Action or the proceeds

thereof. The Confirmation Order shall also provide that any such pledge in violation of this section of the Plan is null and void.

O. Deregistration

As soon after the Effective Date as is practicable, the Reorganized Debtor shall terminate its registration under the Securities and Exchange Act of 1934 by filing a Form 15 "Certification and Notice of Termination of Registration Under Section 12(g) of the Securities Exchange Act of 1934 or Suspension of Duty to File Reports Under Sections 12 and 15(d) of the Securities and Exchange Act of 1934" with the United States Securities and Exchange Commission and shall otherwise comply with the statutory or regulatory requirements of a publicly traded company, including, but not limited to, seeking to deregister the Equity Interests.

P. Allowance of TOPrS Unsecured Claims.

The TOPrS Unsecured Claims will be deemed to be Allowed Claims in the amounts set forth in the proofs of claim filed by the TOPrS Indenture Trustees: (i) Claim No 26 in the amount of $31,841,833.78, (ii) Claim Nos. 11, 12 and 13 in the aggregate amount of $60,975,312.98.

Q. D&O Litigation Trust.

1. General. On or before the Effective Date, the D&O Litigation Trust Agreement, in form and substance satisfactory to the Plan Proponents and substantially as set forth in the Plan Supplement, will be executed and all other necessary steps will be taken to establish the D&O Litigation Trust and the beneficial interests therein, which will be for the benefit of the holders of Allowed General Unsecured Claims, whether Allowed on or after the Effective Date. In the event of any conflict or inconsistency between the terms of this Plan and the terms of the D&O Litigation Trust Agreement, then the terms of the D&O Litigation Trust Agreement will govern. The D&O Litigation Trust Agreement may provide powers, duties, and authorities in addition to those explicitly stated herein, but only to the extent that such powers, duties, and authorities do not affect

the status of the D&O Litigation Trust as a liquidating trust for United States federal income tax purposes, or otherwise have material adverse effect on the recovery of holders of Allowed General Unsecured Claims. This Section V.Q is qualified in its entirety by the terms of and is subject to the terms of the D&O Litigation Trust Agreement.

2. **Purpose of D&O Litigation Trust.** The D&O Litigation Trust will be established for the sole purpose of liquidating and distributing the D&O Litigation Trust Assets, in accordance with Treasury Regulation section 301.7701-4(d), with no objective to continue or engage in the conduct of a trade or business, except to the extent reasonably necessary to achieve, and consistent with, the liquidating purpose of the D&O Litigation Trust.

3. **Costs and Expenses of D&O Litigation Trust.** The costs and expenses of the D&O Litigation Trust, including the fees and expenses of the D&O Litigation Trustee and its retained professionals, will be paid out of the D&O Litigation Trust Assets, and the Reorganized Debtor will not be responsible for any fees, expenses or costs of the D&O Litigation Trust, provided, however, the Reorganized Debtor may, in its sole discretion, advance or pay any costs or expenses of the D&O Litigation Trust.

4. **D&O Litigation Trust Assets.** As of and as soon as practicable after the Effective Date, and subject to and in accordance with this Plan and the D&O Litigation Trust Agreement, the Debtor will assign and transfer to the D&O Litigation Trust all of its rights, title and interests in and to the D&O Litigation Trust Assets for the benefit of the holders of Allowed General Unsecured Claims, whether such Claims are Allowed on or after the Effective Date. Such transfers will be exempt from any stamp, real estate transfer, mortgage reporting, sales, use or other similar tax and, except as otherwise may be set forth specifically herein, will be free and clear of any liens, claims and encumbrances and no other entity (other than Creditors receiving rights under this Plan), including the Debtor or the Reorganized Debtor, will have any interest, legal, beneficial, or

otherwise, in the D&O Litigation Trust or the D&O Litigation Trust Assets upon their assignment and transfer to the D&O Litigation Trust (other than as provided herein or in the D&O Litigation Trust Agreement). Upon delivery of the D&O Litigation Trust Assets to the D&O Litigation Trust, the Reorganized Debtor will be deemed released of all liability with respect to the delivery of Distributions to holders of Allowed General Unsecured Claims with respect to the D&O Litigation Trust Assets, and will have no further obligations to the D&O Litigation Trust or the D&O Litigation Trustee.

5. Appointment of a D&O Litigation Trustee. Prior to the Effective Date, Holdco will select, and in the Plan Supplement will identify, the D&O Litigation Trustee. The salient terms of the D&O Litigation Trustee's employment, including the D&O Litigation Trustee's duties and compensation, will be set forth in the D&O Litigation Trust Agreement. The D&O Litigation Trust Agreement will specify the procedures for replacing the D&O Litigation Trustee.

6. Transferability and Form of D&O Litigation Trust Interests. The D&O Litigation Trust Interests shall not be transferable, unless otherwise provided for in the D&O Litigation Trust Agreement. To the extent such beneficial interests are deemed securities under applicable non-bankruptcy law, then such securities shall be exempt from the requirements of applicable non-bankruptcy law to the maximum extent permitted by 11 U.S.C. §1145. The D&O Litigation Trust Interests shall not be certificated.

7. Federal Income Tax Treatment of D&O Litigation Trust. For all federal income tax purposes, all parties (including, without limitation, the Debtor, Reorganized Debtor, the D&O Litigation Trustee, and the holders of Allowed General Unsecured Claims) will treat the transfer of the D&O Litigation Trust Assets to the D&O Litigation Trust, including any amounts or other assets subsequently transferred to the D&O Litigation Trust (but only at such time as actually transferred) for the benefit of the holders of Claims entitled to receive D&O Litigation Trust Interests, whether

Allowed on or after the Effective Date, as (A) a transfer of the D&O Litigation Trust Assets directly to the holders of such Allowed Claims, followed by (B) the transfer by such Persons to the D&O Litigation Trust of such D&O Litigation Trust Assets in exchange for beneficial interests in the D&O Litigation Trust. Accordingly, the holders of such Allowed Claims will be treated for federal income tax purposes as the grantors and owners of their respective shares of the applicable D&O Litigation Trust Assets. The foregoing treatment shall also apply, to the extent permitted by applicable law, for state and local income tax purposes.

8. D&O Litigation Trust a "Liquidating Trust." Subject to definitive guidance from the IRS or a court of competent jurisdiction to the contrary (including the issuance of applicable Treasury Regulations, the receipt by the D&O Litigation Trustee of a private letter ruling if the D&O Litigation Trustee so requests one, or the receipt of an adverse determination by the IRS upon audit if not contested by the D&O Litigation Trustee), all parties will treat the D&O Litigation Trust as a "liquidating trust" in accordance with Treasury Regulation section 301.7701-4(d), of which the holders of Allowed Claims described above, whether Allowed on or after the Effective Date, are the grantors and beneficiaries. In the event an alternative treatment of the D&O Litigation Trust is required for federal income tax purposes, the D&O Litigation Trustee will promptly notify in writing (or by comparable means) all holders of beneficial interests in the D&O Litigation Trust, and (if applicable) anyone who subsequently becomes a holder, of such alternative treatment. The D&O Litigation Trustee will file returns for the D&O Litigation Trust as a grantor trust pursuant to Treasury Regulation section 1.671-4(a). The D&O Litigation Trustee will send annually to each record holder of a beneficial interest in the D&O Litigation Trust a separate statement setting forth such holder's share of items of income, gain, loss, deduction, or credit and will instruct all such holders to report such items on their federal income tax returns or to forward the appropriate information to the beneficial holders with instructions to report such items on their federal income

tax returns. The D&O Litigation Trustee will also file (or cause to be filed) any other statements, returns, or disclosures relating to the D&O Litigation Trust that are required by any governmental unit. Except as may otherwise be provided, the D&O Litigation Trust's taxable income, gain, loss, deduction or credit will be allocated by reference to the manner in which an amount of Cash equal to such taxable income would be distributed (without regard to any restrictions on distribution described in the Plan) if, immediately prior to the deemed distribution, the D&O Litigation Trust had distributed all of its other assets (valued at their tax book value) in accordance with the provisions of the Plan and the D&O Litigation Trust Agreement, up to the tax book value of the D&O Litigation Trust Assets treated as contributed by the holders of Allowed Claims, whether Allowed on or after the Effective Date, adjusted for prior taxable income and loss, and taking into account all prior and concurrent distributions from the D&O Litigation Trust. Similarly, taxable loss of the D&O Litigation Trust will be allocated by reference to the manner in which an economic loss would be borne immediately after a liquidating distribution of the remaining assets.

9. **Tax Withholding by D&O Litigation Trustee.** The D&O Litigation Trustee may withhold and pay to the appropriate government authority all amounts required to be withheld pursuant to the Internal Revenue Code or any provision of any foreign, state or local tax law with respect to any payment or distribution to the holders of D&O Litigation Trust Interests. All such amounts withheld and paid to the appropriate government authority (or placed in escrow pending resolution of the need to withhold) shall be treated as amounts distributed to such holders of D&O Litigation Trust Interests for all purposes of the D&O Litigation Trust Agreement. The D&O Litigation Trustee shall be authorized to collect such tax information from the holders of D&O Litigation Trust Interests (including, without limitation, social security numbers or other tax identification numbers) as in its sole discretion the D&O Litigation Trustee deems necessary to effectuate the Plan, the Confirmation Order, and the D&O Litigation Trust Agreement. In order to

receive distributions under the Plan, all holders of D&O Litigation Trust Interests shall be required to identify themselves to the D&O Litigation Trustee and provide tax information and the specifics of their holdings, to the extent the D&O Litigation Trustee deems appropriate in the manner and in accordance with the procedures from time to time established by the D&O Litigation Trustee for these purposes. The D&O Litigation Trustee may refuse to make a distribution to any holder of a D&O Litigation Trust Interest that fails to furnish such information in a timely fashion, and until such information is delivered; provided, however, that, if such information is not furnished to the D&O Litigation Trustee within six (6) months of the original request to furnish such information, no further distributions shall be made to the holder of such D&O Litigation Trust Interest; and, provided, further, that, upon the delivery of such information by a holder of a D& O Litigation Trust Interest, the D&O Litigation Trustee shall make such distribution to which the holder of the D&O Litigation Trust Interest is entitled, without additional interest occasioned by such holder's delay in providing tax information; and, provided, further that, if the D&O Litigation Trustee fails to withhold in respect of amounts received or distributable with respect to any such holder and the D&O Litigation Trustee is later held liable for the amount of such withholding, such holder shall reimburse the D&O Litigation Trustee for such liability (to the extent such amounts were actually distributed to such holder).

R. Proceeds Distribution Election Trust.

1. General. On or before the Effective Date, the Proceeds Distribution Election Trust Agreement, in form and substance satisfactory to the Plan Proponents and acceptable to the Committee and substantially as set forth in the Plan Supplement, will be executed and all other necessary steps will be taken to establish the Proceeds Distribution Election Trust and the beneficial interests therein, which will be for the benefit of the holders of Allowed General Unsecured Claims, whether Allowed on or after the Effective Date, that choose the Proceeds Distribution Election. In

the event of any conflict or inconsistency between the terms of this Plan and the terms of the Proceeds Distribution Election Trust Agreement, then the terms of the Proceeds Distribution Election Trust Agreement will govern. The Proceeds Distribution Election Trust Agreement may provide powers, duties, and authorities in addition to those explicitly stated herein, but only to the extent that (i) such powers, duties, and authorities do not affect the status of the Proceeds Distribution Election Trust as liquidating trust for United States federal income tax purposes, or otherwise have material adverse effect on the recovery of holders of Allowed General Unsecured Claims, (ii) such powers, duties and authorities do not operate to confer standing upon the Proceeds Distribution Election Trustee to be a party to, or to participate in, the Reorganized Debtor's activities including litigation and/or settlement of Causes of Action, including the FDIC Causes of Action, and (iii) such powers, duties, and authorities are limited to the administration of distributions on account of the Proceeds Distribution Election Trust Interests. This Section V.R is qualified in its entirety by the terms of and is subject to the terms of the Proceeds Distribution Election Trust Agreement.

2. Purpose of Proceeds Distribution Election Trust. The Proceeds Distribution Election Trust will be established for the sole purpose of liquidating and distributing the Proceeds Distribution Election Trust Assets, in accordance with Treasury Regulation section 301.7701-4(d), with no objective to continue or engage in the conduct of a trade or business, except to the extent reasonably necessary to achieve, and consistent with, the liquidating purpose of the Proceeds Distribution Election Trust.

3. Costs and Expenses of Proceeds Distribution Election Trust. The costs and expenses of the Proceeds Distribution Election Trust, including the fees and expenses of the Proceeds Distribution Election Trustee and its retained professionals (if any), will be paid out of the Proceeds Distribution Election Trust Assets, and the Reorganized Debtor will not be responsible for any fees, expenses or costs of the Proceeds Distribution Election Trust.

4. Proceeds Distribution Election Trust Assets. Subject to and in accordance with this Plan and the Proceeds Distribution Election Trust Agreement, on the Effective Date or as soon as reasonably practical thereafter, the Debtor will assign and transfer to the Proceeds Distribution Election Trust all of its rights, title and interests in and to the portion of the following assets to which Holders making the Proceeds Distribution Election are entitled under this Plan: (x) the interest in the Trust Refund Escrow Account as provided in Section V.R.5 below, (y) Pro Rata Election Holders portion of Net Free Cash existing as of the Effective Date (which, for the avoidance of doubt, shall be net of any Net Free Cash Reserves) and (z) an undivided beneficial interest in and to the other Proceeds Distribution Election Trust Assets existing as of the Effective Date (including the Net Free Cash Reserves which for clarification purposes may be fully overseen, spent, reduced and otherwise controlled, in the sole and absolute discretion of the Plan Committee, by the Reorganized Debtor as provided in the Plan). Notwithstanding the foregoing, the Proceeds Distribution Election Trustee shall not be entitled, to receive Cash, which, in the aggregate (when added to all Cash received previously), exceeds what it otherwise would have been entitled to receive in the aggregate had all aggregate Cash proceeds generated from Proceeds Distribution Election Trust Assets been received by the Debtor by such date and then subsequently conveyed to the Proceeds Distribution Election Trust pursuant to the "Turnover Obligation" as defined below ("Cash Limitation Provision). In the event that Reorganized Debtor receives on account or in respect of any Proceeds Distribution Election Trust Assets any distribution or payment of Net Free Cash (after taking into account Net Free Cash Reserves and full payment or satisfaction of all Allowed Secured Claims, Allowed Administrative Claims, Allowed FDIC Priority Claims, and Allowed Non-FDIC Priority Claims; and costs of administering and implementing the Plan; but not including any costs and expenses solely attributable to the business operations of the Reorganized Debtor) the Reorganized Debtor shall segregate and hold in trust (as property of the Proceeds Distribution Election Trustee on behalf

of the beneficiaries of the trust) for the benefit of, and immediately upon receipt thereof, shall pay over or deliver to, the Proceeds Distribution Election Trustee such distribution or payment for application in accordance with the terms of this Plan (the "Turnover Obligation"). Such transfers will be exempt from any stamp, real estate transfer, mortgage reporting, sales, use or other similar tax and, except as otherwise may be set forth specifically herein, will be free and clear of any liens, claims and encumbrances and no other entity (other than the Proceeds Distribution Election Trustee and General Unsecured Creditors receiving rights under this Plan), including the Debtor or the Reorganized Debtor, will have any interest, legal, beneficial, or otherwise, in the Proceeds Distribution Election Trust or the Proceeds Distribution Election Trust Assets upon their assignment and transfer to the Proceeds Distribution Election Trust (other than as provided herein or in the Proceeds Distribution Election Trust Agreement). Upon delivery of the Proceeds Distribution Election Trust Assets to the Proceeds Distribution Election Trust, the Reorganized Debtor will be deemed released of all liability with respect to the delivery of distributions to holders of Allowed General Unsecured Claims with respect to the Proceeds Distribution Election Trust Assets, and will have no further obligations to the Proceeds Distribution Election Trust or the Proceeds Distribution Election Trustee except the Turnover Obligation referred to above and the Net Free Cash Reserve Obligation referred to in Section V.R.5 below.

5. **Current Conveyance of Interest in Tax Refund Escrow Account.** Subject to the Cash Limitation Provision defined above, on the Effective Date, the Reorganized Debtor will convey, transfer and assign, without recourse or warranty, to the Proceeds Distribution Election Trustee, for the benefit of the Holders making the Proceeds Distribution Election, all of Debtor's right, title and interest in and to a portion of the Tax Refund Escrow Account and the Cash in the Tax Refund Escrow Account ultimately determined to be distributable to the Reorganized Debtor ("Determined Tax Refund Assets"), equal to the Pro Rata Election Holders portion of Net Free Cash

that all of the Holders who make the Proceeds Entitlement Election are entitled under the terms of this Plan solely on account of Determined Tax Refund Assets in accordance with the Proceeds Distribution Election Trust Agreement. In addition, the Proceeds Distribution Election Trustee, for the benefit of the Holders electing the Proceeds Distribution Election, shall be entitled to an additional amount payable out of Reorganized Debtor's interest in the Tax Refund Escrow Account (after the transfer referred to above) equal to the Pro Rata Election Holders portion of any Net Free Cash Reserves attributable to the FDIC Causes of Action (and such allocation determined in the discretion of the Plan Committee) ("Reserve Escrow Payment") remaining upon the conclusion of the FDIC Causes of Action (the "Net Free Cash Reserve Obligation") but such amount shall only be payable solely to the extent that the Proceeds Distribution Election Trustee has not at such time received Cash from the Reorganized Debtor on account of its undivided beneficial interest in Net Free Cash Reserves attributable to the FDIC Causes of Action ("Unpaid Reserve Interest"); and further, to the extent that such Reserve Escrow Payment is made, it shall be deemed to be made on account of the Proceeds Distribution Election Trustee's undivided beneficial interest in Net Free Cash Reserves attributable to the FDIC Causes of Action and the Reorganized Debtor shall no longer have Turnover Obligations with respect to such asset.

6. Appointment of a Proceeds Distribution Election Trustee. Prior to the Effective Date, the Plan Proponents and the Committee will identify the Proceeds Distribution Election Trustee. The salient terms of the Proceeds Distribution Election Trustee's employment, including the Proceeds Distribution Election Trustee's duties and compensation, will be set forth in the Proceeds Distribution Election Trust Agreement. The Proceeds Distribution Election Trust Agreement will specify the procedures for replacing the Proceeds Distribution Election Trustee.

7. Transferability and Form of Proceeds Distribution Election Trust Interests. The Proceeds Distribution Election Trust Interests shall not be transferable, unless otherwise provided for

in the Proceeds Distribution Election Trust Agreement. To the extent such beneficial interests are deemed securities under applicable non-bankruptcy law, then such securities shall be exempt from the requirements of applicable non-bankruptcy law to the maximum extent permitted by 11 U.S.C. §1145. The Proceeds Distribution Election Trust Interests shall not be certificated.

8. Federal Income Tax Treatment of Proceeds Distribution Election Trust. For all federal income tax purposes, all parties (including, without limitation, the Debtor, Reorganized Debtor, the Proceeds Distribution Election Trustee, and the holders of Allowed General Unsecured Claims) will treat the transfer of the Proceeds Distribution Election Trust Assets to the Proceeds Distribution Election Trust, including any amounts or other assets subsequently transferred to the Proceeds Distribution Election Trust (but only at such time as actually transferred) for the benefit of the holders of Claims entitled to receive Proceeds Distribution Election Trust Interests, whether Allowed on or after the Effective Date, as (A) a transfer of the Proceeds Distribution Election Trust Assets directly to the holders of such Allowed Claims, followed by (B) the transfer by such Persons to the Proceeds Distribution Election Trust of such Proceeds Distribution Election Trust Assets in exchange for beneficial interests in the Proceeds Distribution Election Trust. Accordingly, the holders of such Allowed Claims will be treated for federal income tax purposes as the grantors and owners of their respective shares of the applicable Proceeds Distribution Election Trust Assets. The foregoing treatment shall also apply, to the extent permitted by applicable law, for state and local income tax purposes.

9. Proceeds Distribution Election Trust a "Liquidating Trust." Subject to definitive guidance from the IRS or a court of competent jurisdiction to the contrary (including the issuance of applicable Treasury Regulations, the receipt by the Proceeds Distribution Election Trustee of a private letter ruling if the Proceeds Distribution Election Trustee so requests one, or the receipt of an adverse determination by the IRS upon audit if not contested by the Proceeds Distribution Election

Trustee), all parties will treat the Proceeds Distribution Election Trust as a "liquidating trust" in accordance with Treasury Regulation section 301.7701-4(d), of which the holders of Allowed Claims described above, whether Allowed on or after the Effective Date, are the grantors and beneficiaries. In the event an alternative treatment of the Proceeds Distribution Election Trust is required for federal income tax purposes, the Proceeds Distribution Election Trustee will promptly notify in writing (or by comparable means) all holders of beneficial interests in the Proceeds Distribution Election Trust, and (if applicable) anyone who subsequently becomes a holder, of such alternative treatment. The Proceeds Distribution Election Trustee will file returns for the Proceeds Distribution Election Trust as a grantor trust pursuant to Treasury Regulation section 1.671-4(a). The Proceeds Distribution Election Trustee also may send annually to each record holder of a beneficial interest in the Proceeds Distribution Election Trust a separate statement setting forth such holder's share of items of income, gain, loss, deduction, or credit and will instruct all such holders to report such items on their federal income tax returns or to forward the appropriate information to the beneficial holders with instructions to report such items on their federal income tax returns. The Proceeds Distribution Election Trustee will also file (or cause to be filed) any other statements, returns, or disclosures relating to the Proceeds Distribution Election Trust that are required by any governmental unit. Except as may otherwise be provided, the Proceeds Distribution Election Trust's taxable income, gain, loss, deduction or credit will be allocated by reference to the manner in which an amount of Cash equal to such taxable income would be distributed (without regard to any restrictions on distribution described in the Plan) if, immediately prior to the deemed distribution, the Proceeds Distribution Election Trust had distributed all of its other assets (valued at their tax book value) in accordance with the provisions of the Plan and the Proceeds Distribution Election Trust Agreement, up to the tax book value of the Proceeds Distribution Election Trust Assets treated as contributed by the holders of Allowed Claims, whether Allowed on or after the Effective Date,

adjusted for prior taxable income and loss, and taking into account all prior and concurrent distributions from the Proceeds Distribution Election Trust. Similarly, taxable loss of the Proceeds Distribution Election Trust will be allocated by reference to the manner in which an economic loss would be borne immediately after a liquidating distribution of the remaining assets.

10. Tax Withholding by Proceeds Distribution Election Trustee. The Proceeds Election Distribution Election Trustee may withhold and pay to the appropriate government authority all amounts required to be withheld pursuant to the Internal Revenue Code or any provision of any foreign, state or local tax law with respect to any payment or distribution to the holders of Proceeds Distribution Election Trust Interests. All such amounts withheld and paid to the appropriate government authority (or placed in escrow pending resolution of the need to withhold) shall be treated as amounts distributed to such holders of Proceeds Distribution Election Trust Interests for all purposes of the Proceeds Distribution Election Trust Agreement. The Proceeds Distribution Election Trustee shall be authorized to collect such tax information from the holders of Proceeds Distribution Election Trust Interests shall be required to identify themselves to the Proceeds Distribution Election Trustee and provide tax information and the specifics of their holdings, to the extent the Proceeds Distribution Election Trustee deems appropriate in the manner and in accordance with the procedures from time to time established by the Proceeds Distribution Election Trustee for these purposes. The Proceeds Distribution Election Trustee may refuse to make a distribution to any holder of a Proceeds Distribution Election Trust Interest that fails to furnish such information in a timely fashion, and until such information is delivered; provided, however, that, if such information is not furnished to the Proceeds Distribution Election Trustee within six (6) months of the original request to furnish such information, no further distributions shall be made to the holder of such Proceeds Distribution Election Trust Interest; and, provided, further, that, upon the delivery of such information by a holder of a Proceeds Distribution Election Trust Interest, the

Proceeds Distribution Election Trustee shall make such Distribution to which the holder of the Proceeds Distribution Election Trust Interest is entitled, without additional interest occasioned by such holder's delay in providing tax information; and, provided, further that, if the Proceeds Distribution Election Trustee fails to withhold in respect of amounts received or distributable with respect to any such holder and the Proceeds Distribution Election Trustee is later held liable for the amount of such withholding, such holder shall reimburse the Proceeds Distribution Election Trustee for such liability (to the extent such amounts were actually distributed to such holder).

ARTICLE VI.

PROVISIONS GOVERNING DISTRIBUTIONS

A. Initial Distribution Date

On the Initial Distribution Date or as soon thereafter as is reasonably practicable, the Reorganized Debtor, the D&O Litigation Trustee or the Proceeds Distribution Election Trustee, as applicable, shall make the Distributions required to be made under the Plan.

B. Disputed Reserve

1. Establishment of Disputed Reserve

On the Initial Distribution Date, and after making all Distributions required to be made on such date under the Plan, the Reorganized Debtor shall establish a separate Disputed Reserve for Disputed Claims, which Disputed Reserve shall be administered by the Reorganized Debtor. The Reorganized Debtor shall reserve a number of shares of New Series A Common Stock, an amount of Cash, or any other security or equity interest issued under the Plan, depending on the election of the Holder of such Disputed Claims and whether the Debtor elects to issue a security on account of part of the Proceeds Distribution Election, sufficient to provide Holders of Disputed Claims the treatment such Holders would be entitled to receive under the Plan if all such Disputed

Claims were to become Allowed Claims (or such lesser amount as may be estimated by the Bankruptcy Court).

2. **Maintenance of Disputed Reserve**

The Reorganized Debtor shall hold unissued New Series A Common Stock and Cash in the Disputed Reserve in trust, segregated from and not to be commingled with any other assets of the Reorganized Debtor, for the benefit of the Holders of Claims ultimately determined to be Allowed. The Reorganized Debtor shall, in its sole discretion, distribute such amounts (net of any expenses, including taxes, relating thereto), as provided herein, as such Disputed Claims are resolved by a Final Order, and such New Series A Common Stock and Cash (or other security) will be distributable in respect of such Disputed Claims as such amounts would have been distributable had the Disputed Claims been Allowed Claims as of the Effective Date.

C. Tax Refund Litigation Reserve.

1. If the disputed tax refunds that are the subject of the FDIC Tax Refund Cause of Action are adjudicated to be property of the Debtor's Estate and the FDIC Non-Priority Claim becomes an Allowed Claim, then such refunds shall not be distributed pursuant to the Plan until a Final Order is also entered determining whether any Allowed FDIC Non-Priority Claim is contractually senior to the Allowed TOPrS Unsecured Claims pursuant to subordination provisions contained in the TOPrS Indentures. If and to the extent such disputed tax refunds are adjudicated to be property of the Debtor's Estate and such a Final Order is entered determining that any Allowed FDIC Non-Priority Claim is contractually senior to the TOPrS Unsecured Claims pursuant to the TOPrS Indentures, then such disputed tax refunds shall be distributed first to the FDIC on account of such Allowed FDIC Non-Priority Claim until such Claim is paid in full (and before any Distributions are made on account of any other Allowed TOPrS Unsecured Claims pursuant to the Plan), with the remainder being distributed pursuant to the terms of the Plan.

2. Pursuant to its Minute Order entered March 14, 2012, the Bankruptcy Court has established a procedure and has scheduled a summary judgment hearing for April 24, 2012 at 2:00 p.m. to determine whether any Allowed FDIC Non-Priority Claim is contractually senior to the Allowed TOPrS Unsecured Claims pursuant to the TOPrS Indentures.

D. Quarterly Distributions

On each Quarterly Distribution Date or as soon thereafter as is reasonably practicable, the Reorganized Debtor, the D&O Litigation Trustee or the Proceeds Distribution Election Trustee, as applicable, shall make the Distributions required to be made under the Plan on such date. Any Distribution that is not made on the Initial Distribution Date or on any other date specified herein because the Claim that would have been entitled to receive that Distribution is not an Allowed Claim on such date, shall be held by the Reorganized Debtor as applicable, in the Disputed Reserve and distributed on the first Quarterly Distribution Date after such Claim is Allowed. No interest shall accrue or be paid on the unpaid amount of any Distribution paid on a Quarterly Distribution Date. Distributions from the Proceeds Distribution Election Trust shall be supervised by the Plan Committee.

E. **Record Date for Distributions**

Except as otherwise provided in a Final Order of the Bankruptcy Court or as otherwise stipulated by the Debtor or Reorganized Debtor, as applicable, the transferees of Claims that are transferred pursuant to Bankruptcy Rule 3001 on or prior to the Distribution Record Date will be treated as the Holders of those Claims for all purposes, notwithstanding that any period provided by Bankruptcy Rule 3001 for objecting to the transfer may not have expired by the Distribution Record Date. The Reorganized Debtor shall have no obligation to recognize any transfer of any Claim occurring after the Distribution Record Date. In making any Distribution with respect to any Claim, the Reorganized Debtor shall be entitled instead to recognize and

deal with, for all purposes hereunder, only the Entity that is listed on the proof of Claim Filed with respect thereto or on the Schedules as the Holder thereof as of the close of business on the Distribution Record Date and upon such other evidence or record of transfer or assignment that are known to the Reorganized Debtor as applicable, as of the Distribution Record Date.

F. Delivery of Distributions

1. **General Provisions; Undeliverable Distributions**

Subject to Bankruptcy Rule 9010 and except as otherwise provided herein, Distributions to the Holders of Allowed Claims shall be made by the Reorganized Debtor at (i) the address of each Holder as set forth in the Schedules, unless superseded by the address set forth on proofs of Claim Filed by such Holder or (ii) the last known address of such Holder if no proof of Claim is Filed or if the Debtor or Reorganized Debtor, as applicable, has been notified in writing of a change of address; *provided, however*, that Distributions paid by the Reorganized Debtor for the benefit of Holders of TOPrS Debentures and the TOPrS shall be made to the appropriate TOPrS Indenture Trustee under the respective TOPrS Indenture for such obligations. Each such TOPrS Indenture Trustee shall, in turn, administer the Distributions to the respective holders of TOPrS Unsecured Claims in accordance with the Plan and the applicable TOPrS Indentures. Distribution to a TOPrS Indenture Trustee shall be promptly remitted by such TOPrS Indenture Trustee to the Holders of the TOPrS Unsecured Claims entitled thereto (i.e., the Holder of the relevant TOPrS on the Distribution Record Date) in accordance with this Plan and the TOPrS Indentures, and each such Distribution by the Reorganized Debtor to a TOPrS Indenture Trustee shall be deemed to have discharged the obligation of the Debtor to make such Distribution to the Holders of TOPrS Unsecured Claims represented by such TOPrS Indenture Trustee. The TOPrS Indenture Trustees shall not be required to give any bond or surety or other security for the performance of their duties unless otherwise ordered by the Bankruptcy Court. The TOPrS Indenture Trustees shall only be

required to make Distributions in accordance with the terms of the Plan and the respective TOPrS Indenture and shall have no liability for actions taken in accordance with the Plan or in reliance upon information provided to the TOPrS Indenture Trustees in accordance with the Plan, except for liabilities resulting from their own gross negligence or willful misconduct. If any Distribution is returned as undeliverable, the Reorganized Debtor, the D&O Litigation Trustee or the Proceeds Distribution Election Trustee, as applicable, may, in its discretion, make such efforts to determine the current address of the Holder of the Claim with respect to which the Distribution was made as the Reorganized Debtor, the D&O Litigation Trustee or the Proceeds Distribution Election Trustee, as applicable, deems appropriate, but no Distribution to any Holder shall be made unless and until the Reorganized Debtor, the D&O Litigation Trustee or the Proceeds Distribution Election Trustee, as applicable, has determined the then-current address of the Holder, at which time the Distribution to such Holder shall be made to the Holder without interest. Amounts in respect of any undeliverable Distributions made by the Reorganized Debtor, the D&O Litigation Trustee or the Proceeds Distribution Election Trustee, as applicable, shall be returned to, and held in trust by, the Reorganized Debtor, the D&O Litigation Trustee or the Proceeds Distribution Election Trustee, as applicable, until the Distributions are claimed or are deemed to be unclaimed property under section 347(b) of the Bankruptcy Code. The Reorganized Debtor, the D&O Litigation Trustee or the Proceeds Distribution Election Trustee, as applicable, shall have the discretion to determine how to make Distributions in the most efficient and cost-effective manner possible; *provided, however*, that its discretion may not be exercised in a manner inconsistent with any express requirements of the Plan, or the applicable trust agreement.

2. **Unclaimed Property**

Except with respect to property not distributed because it is being held in the Disputed Reserve, Distributions that are not claimed by the expiration of one year from the Initial

Distribution Date or Quarterly Distribution Date applicable to such Distribution, shall be deemed to be unclaimed property under section 347(b) of the Bankruptcy Code and shall vest or revest in the Reorganized Debtor, the D&O Litigation Trustee or the Proceeds Distribution Election Trustee, as applicable, and the Claims with respect to which those Distributions are made shall be automatically canceled. After the expiration of such one-year period, the Claim of any Entity to those Distributions shall be discharged and forever barred. Nothing contained in the Plan shall require the Reorganized Debtor, the D&O Litigation Trustee or the Proceeds Distribution Election Trustee, as applicable, to attempt to locate any Holder of an Allowed Claim. Except as otherwise provided herein, all funds or other property that vests or revests in the Reorganized Debtor, the D&O Litigation Trustee or the Proceeds Distribution Election Trustee, as applicable, pursuant to this Article shall be distributed by the Reorganized Debtor, the D&O Litigation Trustee or the Proceeds Distribution Election Trustee, as applicable, in accordance with the provisions of the Plan.

G. Surrender of Canceled Instruments and Securities

1. Generally

Except as set forth in this Plan, as a condition precedent to receiving any Distribution hereunder on account of an Allowed Claim evidenced by instruments, securities or other documentation canceled pursuant to this Plan, other than securities held in book entry form through the Depository Trust Company, the Holder of such Claim shall tender such instrument, security or other documentation evidencing such Claim to the Reorganized Debtor. In the event an Allowed Claim is evidenced by securities held in book entry form through the Depository Trust Company, such securities shall be cancelled in accordance with usual Depository Trust Company practices. Any Distributions pursuant to the Plan on account of any Claim evidenced by such instruments, securities or other documentation, other than securities held in book entry form through the Depository Trust Company, shall, pending such surrender, be treated as an undeliverable

Distribution; *provided, however*, that Holders of the TOPrS shall tender the TOPrS to the TOPrS Trust Indenture Trustee and Holders of the TOPrS Debentures shall tender the TOPrS Debentures to the TOPrS Debenture Indenture Trustee. All payments to Holders of TOPrS Unsecured Claims, other than TOPrS Unsecured Claims evidenced by securities held by the Depository Trust Company, shall only be made after such surrender, or in the event such certificate is lost, stolen, mutilated or destroyed, upon the Holder's compliance with the requirements set forth in this Plan. Upon surrender of such TOPrS, the TOPrS Trust Indenture Trustee shall cancel and destroy such TOPrS and upon surrender of such TOPrS Debentures, the TOPrS Debenture Indenture Trustee shall cancel and destroy such TOPrS Debentures. As soon as practicable after surrender of the TOPrS and the TOPrS Debentures, the TOPrS Indenture Trustee shall distribute to the Holder thereof, as the case may be, such Holder's Pro Rata share of the Distribution pursuant to the terms of the TOPrS Indenture, but subject to the rights of the TOPrS Indenture Trustee to assert (a) its charging lien to the extent the TOPrS Indenture Trustee Fees or any other fees owed to such TOPrS Indenture Trustee under the TOPrS Indenture, including without limitation, fees and expenses (including fees and expenses of its professionals), accrued prior to the Petition Date, are not paid pursuant to the Plan; or (b) any other rights or arguments to payment other than asserting its charging lien.

2. **Failure to Surrender Canceled Instruments**

If any Holder of an Allowed Claim evidenced by instruments, securities or other documentation canceled as set forth in this Plan, fails to surrender such instrument, security or other documentation or comply with the provisions of this Plan within one year after the Effective Date, its Claim for a Distribution under the Plan on account of such instrument, security, or other documentation shall be discharged, and such Holder shall be forever barred from asserting such Claim against the Reorganized Debtor or its property. In such case, any property held on account of such Claim shall be disposed of pursuant to the provisions set forth in this Plan.

H. Lost, Stolen, Mutilated or Destroyed Instrument or Security

Any Holder of an Allowed Claim evidenced by instruments, securities or other documentation canceled pursuant to this Plan that has been lost, stolen, mutilated or destroyed, shall, in lieu of surrendering such instrument, security or documentation: (i) deliver to the Reorganized Debtor (or in the case of the TOPrS Debentures or TOPrS, the applicable TOPrS Indenture Trustee) (a) an affidavit of loss reasonably satisfactory to the Reorganized Debtor (or in the case of the TOPrS Debentures or TOPrS, the applicable TOPrS Indenture Trustee) setting forth the unavailability of such instrument, security, or other documentation and (b) such additional security or indemnity as may reasonably be requested by the Reorganized Debtor to hold the Reorganized Debtor (or, in the case of the TOPrS Debentures or TOPrS, required by the applicable TOPrS Indenture Trustee to hold the applicable TOPrS Indenture Trustee) harmless from any damages, liabilities, or costs incurred in treating such Entity as a Holder of an Allowed Claim; and (ii) satisfy any other requirement under the TOPrS Indenture or any other relevant document. Upon compliance with this paragraph by a Holder of an Allowed Claim evidenced by such instrument, security or other documentation, such Holder shall, for all purposes under the Plan, be deemed to have surrendered such instrument, security or other documentation.

I. Manner of Cash Payments Under the Plan

Cash payments made pursuant to the Plan shall be in United States dollars by checks drawn on a domestic bank selected by the Reorganized Debtor, or by wire transfer from a domestic bank, at the option of the Reorganized Debtor.

J. Time Bar to Cash Payments by Check

Checks issued by the Reorganized Debtor on account of Allowed Claims shall be null and void if not negotiated within 90 days after the date of issuance thereof. Requests for the reissuance of

any check that becomes null and void pursuant to this paragraph shall be made directly to the Reorganized Debtor by the Holder of the Allowed Claim to whom the check was originally issued. Any claim in respect of such voided check shall be made in writing on or before the later of the first anniversary of the Initial Distribution Date or Quarterly Distribution Date on which such check was issued. After that date, all Claims in respect of void checks shall be discharged and forever barred and the proceeds of those checks shall revest in and become the property of the Reorganized Debtor as unclaimed property in accordance with section 347(b) of the Bankruptcy Code and be distributed as provided in this Plan.

K. Limitations on Funding of Disputed Reserve

Except as expressly set forth in the Plan, neither the Debtor nor the Reorganized Debtor shall have any duty to fund the Disputed Reserve.

L. Compliance with Tax Requirements

In connection with making Distributions under the Plan, to the extent applicable, the Reorganized Debtor shall comply with all tax withholding and reporting requirements imposed on it by any governmental unit, and all Distributions pursuant to the Plan shall be subject to such withholding and reporting requirements. Notwithstanding the above, each Holder that is to receive a Distribution under the Plan shall have the sole and exclusive responsibility for the satisfaction and payment of any taxes imposed on such Holder by an governmental unit, including income, withholding and other tax obligations, on account of such Distribution. ***The Reorganized Debtor may withhold the entire Distribution due to any Holder of an Allowed Claim until such time as such Holder provides the necessary information to comply with any withholding requirements of any governmental unit. Any property so withheld will then be paid by the Reorganized Debtor to the appropriate authority, including, without limitation, a signed and completed Internal Revenue Service Form W-8 or W-9, as applicable.*** If the Holder of an Allowed Claim fails to provide the

information necessary to comply with any withholding requirements of any governmental unit within 90 days from the Reorganized Debtor's request for such information, then such Holder's Distribution shall be treated as an undeliverable Distribution and such Holder's Claims shall not be Allowed.

M. No Payments of Fractional Dollars

Notwithstanding any other provision of the Plan to the contrary, no payment of fractional dollars shall be made pursuant to the Plan. Whenever any payment of a fraction of a dollar under the Plan would otherwise be required, the actual Distribution made shall reflect a rounding down of such fraction to the nearest whole dollar.

N. Interest on Claims

Except as specifically provided for in the Plan or the Confirmation Order, interest shall not accrue on Claims and no Holder of a Claim shall be entitled to interest accruing on or after the Petition Date on any Claim. Interest shall not accrue or be paid on any Disputed Claim in respect of the period from the Petition Date to the date a final Distribution is made thereon if and after that Disputed Claim becomes an Allowed Claim. Except as expressly provided herein or in a Final Order of the Bankruptcy Court, no prepetition Claim shall be Allowed to the extent that it is for postpetition interest or other similar charges.

O. No Distribution in Excess of Allowed Amount of Claim

Notwithstanding anything to the contrary contained in the Plan, no Holder of an Allowed Claim shall receive in respect of that Claim any Distribution in excess of the Allowed amount of that Claim.

P. Setoff and Recoupment

The Debtor and the Reorganized Debtor may, but shall not be required to, set off against, or recoup from, any Claim and the Distributions to be made pursuant to the Plan in respect thereof, any

Claims or defenses of any nature whatsoever that the Debtor, the Estate or the Reorganized Debtor may have against the Holder of such Claim, but neither the failure to do so nor the allowance of any Claim under the Plan shall constitute a waiver or release by the Debtor, the Estate, or the Reorganized Debtor of any right of setoff or recoupment that any of them may have against the Holder of any Claim.

Q. Cap and Limitation on Total Cash Payments to Creditors Who Make the Proceeds Distribution Election

Notwithstanding anything in the Plan or in any documents executed or delivered pursuant to or to implement this Plan, Holders of Allowed Claims who make the Proceeds Distribution Election shall not receive an amount of Cash greater than the Pro Rata portion of Net Free Cash that such Holders would have received if all Net Free Cash was Distributed Pro Rata to all Holders of Allowed General Unsecured Claims, and all Cash received by such Holders, whether on account of D&O Litigation Trust Interests, Proceeds Distribution Election Trust Interests or New Series B Common Stock, shall be applied in reduction of such amount.

ARTICLE VII.

DISPUTED CLAIMS

A. No Distribution Pending Allowance

1. **Distributions on Disputed Claims**

Except as otherwise provided in the Plan, a Final Order or as agreed to by the relevant parties and subject to the establishment of the Disputed Reserve, Distributions under the Plan on account of Disputed Claims that become Allowed after the Effective Date shall be made as soon as reasonably practicable after such Disputed Claims become Allowed Claims; *provided, however*, that (a) Disputed Administrative Claims with respect to liabilities incurred by the Debtor in the ordinary course of business during the Chapter 11 Case or assumed by the Debtor on or before the Effective Date that become Allowed after the Effective Date shall be paid or performed in the ordinary course

of business in accordance with the terms and conditions of any controlling agreements, course of dealing, course of business, or industry practice and (b) Disputed Priority Tax Claims that become Allowed Priority Tax Claims after the Effective Date, unless otherwise agreed, shall be paid in accordance with the Plan.

2. **No Partial Payments**

Notwithstanding any provision otherwise in the Plan and except as otherwise agreed by the Reorganized Debtor no partial payments and no partial Distributions shall be made with respect to a Disputed Claim until all such disputes in connection with such Disputed Claim have been resolved by settlement or Final Order. Any Entity that holds both an Allowed Claim and a Disputed Claim shall only receive a Distribution on the Allowed Claim unless and until all objections to the Disputed Claim have been resolved by settlement or Final Order.

B. Resolution of Disputed Claims

Unless otherwise ordered by the Bankruptcy Court after notice and a hearing, the Reorganized Debtor shall have the right to the exclusion of all others (except as to the Professionals' applications for allowances of compensation and reimbursement of expenses under sections 330 and 503 of the Bankruptcy Code and as to Holdco Fees), to make, File, prosecute, settle, compromise, withdraw or resolve in any manner approved by the Bankruptcy Court, objections to Claims, and to administer and adjust the Claims Register to, among other things, reflect any such settlements, compromises and withdrawals.

C. Objection Deadline

All objections to Disputed Claims shall be Filed and served upon the Holders of each such Claim on or before the Claims Objection Bar Date or the Administrative Claim Objection Bar Date. If an objection has not been Filed to a proof of Claim or request for payment of an Administrative Claim by the respective bar dates, then such Claim or Administrative Claim shall be treated as an

Allowed Claim for all purposes under the Plan. unless otherwise ordered by the Bankruptcy Court after notice and a hearing.

D. Estimation of Claims At any time, subsequent to the Effective Date, the Reorganized Debtor may request that the Bankruptcy Court estimate any contingent or unliquidated Claim to the extent permitted by section 502(c) of the Bankruptcy Code regardless of whether the Debtor or Reorganized Debtor has previously objected to such Claim or whether the Bankruptcy Court has ruled on any such objection, and the Bankruptcy Court shall have jurisdiction to estimate any Claim at any time during litigation concerning any objection to such Claim, including during the pendency of any appeal relating to any such objection.

E. Disallowance of Claims Except as otherwise agreed, any and all proofs of Claim Filed after the applicable bar date shall be deemed disallowed and expunged as of the Effective Date without any further notice or action, order or approval of the Bankruptcy Court, and Holders of such Claims may not receive any Distributions on account of such Claims, unless on or before the Confirmation Date the Bankruptcy Court has entered an order deeming such Claim to be timely filed.

ARTICLE VIII.

EFFECT OF PLAN CONFIRMATION

A. Satisfaction of Claims. Except to the extent otherwise provided in the Plan, the treatment of all Claims or Interests in the Debtor under the Plan shall be in exchange for and in complete satisfaction and release of, all Claims or Interests in the Debtor of any nature whatsoever, known or unknown, including any interest accrued or expenses incurred thereon from and after the Petition Date, or against the Estate. Except as otherwise provided in the Plan, upon the Effective Date, all Claims and Interests in the Debtor and the Estate shall be satisfied and released in full in exchange for the consideration provided under the Plan. Except as otherwise provided in the Plan,

all Persons shall be precluded and enjoined from asserting against the Debtor, the Estate or the Reorganized Debtor any Claims or Interests or other Claims based upon any act or omission, transaction or other activity of any kind or nature that occurred prior to the Effective Date.

B. Discharge. Except as otherwise specifically provided in this Plan or in the Confirmation Order, pursuant to section 1141(d) of the Code, the Distributions and rights that are provided in this Plan shall be in complete satisfaction, discharge and release, effective as of the Effective Date, of all Claims, including any interest or penalties accrued on such Claims from and after the Petition Date, whether known or unknown, against liabilities of, liens on, obligations of, rights against and Interests in the Debtor, or any of its assets or properties, regardless of whether any property shall have been distributed or retained pursuant to this Plan on account of such Claims, rights and Interests, including but not limited to, Claims and Interests that arose before the Confirmation Date, including all debts of the kind specified in sections 502(g), 502(h) and 502(i) of the Bankruptcy Code, in each case whether or not (a) a proof of Claim or interest based upon such Claim, debt, right or Interest is Filed or deemed Filed under section 501 of the Code; (b) a Claim or Interest based upon such Claim, debt, right or Interest is allowed under section 502 of the Code, or (c) the Holder of such a Claim, debt, right, or Interest accepted this Plan. Except as provided for in Bankruptcy Code section 1141(d)(6), the Confirmation Order shall constitute a determination of the discharge of all of the Claims against and Interests in the Debtor, subject to the occurrence of the Effective Date.

C. Compromise and Settlement. Pursuant to section 363 of the Bankruptcy Code and Bankruptcy Rule 9019, and in consideration for the Distributions and other benefits provided pursuant to the Plan, the provisions of the Plan shall constitute a good faith compromise of all Claims and Equity Interests on the terms set forth in the Plan. The entry of the Confirmation Order shall constitute the Bankruptcy Court's approval of the compromise or settlement of all Claims and

Equity Interests, as well as a finding by the Bankruptcy Court that such compromise or settlement is fair, equitable, reasonable and in the best interests of the Debtor, the Estate and Holders of Claims and Equity Interests. Entry of the Confirmation Order also shall constitute the Bankruptcy Court's approval of the releases set forth in the Plan pursuant to Bankruptcy Rule 9019 and its finding that the releases are: (i) in exchange for the good and valuable consideration provided by the Releasees, a good faith settlement and compromise of the Claims released by releases set forth in the Plan; (ii) in the best interests of the Debtor and all Holders of Claims; (iii) fair, equitable and reasonable; (iv) given and made after due notice and opportunity for hearing; and (v) a bar to any of the Debtor or the Reorganized Debtor, the Committee, or the Holders of Claims against the Debtor asserting any Claim released by the Releasing Parties set forth in the Plan against any of the Releasees.

D. Releases

1. ***Releases of Third Parties by the Debtor.*** **Notwithstanding anything contained in the Plan to the contrary, on the Effective Date and effective as of the Effective Date, the Debtor on behalf of itself and the Estate, for the good and valuable consideration provided by each of the Releasees, hereby provides a full release to the Releasees (and each such Releasee so released shall be deemed released by the Debtor) and their respective properties from any and all Causes of Action and any other debts, obligations, rights, suits, damages, actions, derivative claims, remedies and liabilities whatsoever, whether known or unknown, foreseen or unforeseen, existing as of the Effective Date, in law, at equity, whether for tort, contract, violations of federal or state securities laws, or otherwise, based in whole or in part upon any act or omission, transaction, or other occurrence or circumstances existing or taking place prior to or on the Effective Date arising from or related in any way to the Debtor, including, without limitation, those that the Debtor or the Reorganized Debtor would have been legally entitled to assert or that any Holder of a Claim against or Equity Interest in the**

Debtor or other Entity would have been legally entitled to assert for or on behalf of the Debtor, the Reorganized Debtor or the Estate and further including those in any way related to the Case or the Plan; *provided, however*, that the foregoing provisions shall have no effect on the liability of any Releasee that results from any act or omission (a) that is determined in a Final Order to be solely due to such Releasee's own gross negligence or intentional or willful misconduct or fraud; (b) with respect to any of the FDIC Causes of Action, (c) with respect to any of the Former Officers and Directors Causes of Action, and (d) with respect to the Avoidance Actions.

2. ***Releases of Third Parties by Others.*** **Notwithstanding anything contained in the Plan to the contrary, on the Effective Date and effective as of the Effective Date, the Releasing Parties shall be deemed to provide a full release to the Releasees and their respective property from any and all Causes of Action, whether known or unknown, whether for tort, contract, violations of federal or state securities laws or otherwise, and all direct claims, based in whole or in part upon any act or omission, transaction, or other occurrence or circumstances existing or taking place prior to or on the Effective Date arising from or related in any way to the Debtor, including those in any way related to the Case or the Plan; *provided, however*, that the foregoing provisions shall have no effect on the liability of any Releasee that results from any act or omission that is determined in a Final Order to be solely due to such Releasee's own gross negligence or intentional or willful misconduct or fraud; *provided, further, however*, that other than as set forth in the Plan, nothing in the Plan or the Confirmation Order shall affect, release, enjoin or impact in any way the prosecution of any claims by the FDIC against any non-Debtor, including the Releasees.**

3. **Injunction.** **Except as otherwise expressly provided in this Plan, the documents executed pursuant to this Plan, or the Confirmation Order, on and after the**

Effective Date, all Persons and Entities who have held, currently hold, or may hold a debt, Claim, or Interest discharged pursuant to the terms of this Plan (including but not limited to States and other governmental units, and any State official, employee, or other entity acting in an individual or official capacity on behalf of any State or other governmental units) shall be permanently enjoined from: (a) taking any of the following actions on account of any such discharged debt, Claim, or Interest: (1) commencing or continuing in any manner any action or other proceeding against the Debtor, the Reorganized Debtor, their successors, or their property; (2) enforcing, attaching, executing, collecting, or recovering in any manner any judgment, award, decree, or order against the Debtor, the Reorganized Debtor, their successors, or their property; (3) creating, perfecting, or enforcing any lien or encumbrance against the Debtor, the Reorganized Debtor, their successors, or their property; (4) asserting any set off, right of subrogation, or recoupment of any kind against any obligation due the Debtors, the Reorganized Debtors, their successors, or their property; and (5) commencing or continuing any action, in any manner, in any place that does not comply with or is inconsistent with the provisions of this Plan; and (b) taking any of the following actions on account of any Claims or Causes of Action that are revested in, or transferred to, the Reorganized Debtor as of the Effective Date or under this Plan commencing or continuing in any manner any action or other proceeding of any kind to recover on or otherwise with respect to such Claims or rights of action. Any person or entity injured by any willful violation of such injunction shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages from the willful violator.

E. Preservation of Causes of Action.

1. **Vesting of Causes of Action.** Except as expressly released or otherwise expressly provided in the Plan, pursuant to section 1123(b) of the Code, the Debtor, the Reorganized

Debtor and the D&O Litigation Trustee, as applicable, exclusively shall be vested with and shall retain and may enforce any and all Causes of Action (as applicable) that the Debtor or the Estate may hold or have against any Person or Entity (including, without limitation, the FDIC Causes of Action and the Former Officer and Director Causes of Action), all of which are hereby preserved, including all Causes of Action, and all rights of disallowance, offset, recharacterization and/or equitable subordination with respect to claims, and causes of action that have been or may be brought by or on behalf of the Debtor, the Estate, the Committee or the Reorganized Debtor. Except as otherwise provided in this Plan, such claims, rights and Causes of Action shall remain assets of and vest in the Reorganized Debtor, whether or not litigation relating thereto is pending on the Effective Date, and whether or not any such claims, rights and causes of action have been listed or referred to in the Plan, the Disclosure Statement, or any other document filed with the Bankruptcy Court. Neither the Debtor, the Estate nor the Reorganized Debtor waives, releases, relinquishes, forfeits, or abandons (nor shall they be estopped or otherwise precluded or impaired from asserting) any claims, rights and causes of action or defenses that constitute property of the Debtor or its Estate: (a) whether or not such claims, rights, causes of action, or defenses have been listed or referred to this Plan, the Disclosure Statement, or any other document filed with the Bankruptcy Court, (b) whether or not such claims, rights and causes of action, or defenses are currently known to the Debtor, and (c) whether or not a defendant in any litigation relating to such claims, rights or causes of action filed a proof of Claim in the Case, filed a notice of appearance or any other pleading or notice in the Case, voted for or against this Plan, or received or retained any consideration under this Plan. Without in any manner limiting the scope of the foregoing, notwithstanding any otherwise applicable principle of law or equity, including any principles of judicial estoppel, res judicata, collateral estoppel, issue preclusion, or any similar doctrine, (x) the failure to list, disclose, describe, identify, analyze or refer to any claims, rights and causes of action, or defenses in the Plan, the

Disclosure Statement, or any other document filed with the Bankruptcy Court shall in no manner waive, eliminate, modify, release, or alter the right of the Debtor or the Reorganized Debtor, to commence, prosecute, defend against, settle, recover on account of, and realize upon any such claims, rights and causes of action, that the Debtor, its Estate, or the Committee may have as of the Effective Date, and (y) from and after the Effective Date, the Reorganized Debtor and the D&O Litigation Trustee, as applicable, shall have exclusive standing and authority to prosecute any Causes of Action, including, without limitation, any FDIC Causes of Action or Former Officer and Director Causes of Action.

2. **Reservation of Causes of Action.** The Debtor expressly reserves all its Causes of Action, including, without limitation, all claims, rights, Causes of Action, including the FDIC Causes of Action, and defenses for later adjudication by the Debtor or Reorganized Debtor, as applicable, and, therefore, no preclusion doctrine, including the doctrines of res judicata, collateral estoppel, issue preclusion, claim preclusion, waiver, estoppel (judicial, equitable or otherwise) or laches will apply to such claims, rights and causes of action, and defenses upon or after the confirmation or consummation of the Plan based on the Disclosure Statement, the Plan or the Confirmation Order. In addition, the Debtor and the Reorganized Debtor expressly reserve the right to pursue or adopt claims, rights and causes of action that are alleged in any lawsuits in which the Debtor is a defendant or an interested party, against any entity, including the plaintiffs or co-defendants in such lawsuits. Any entity to whom the Debtor has incurred an obligation (whether on account of services, purchase, sale of goods or otherwise), or who has received services from the Debtor, or who has received money or property from the Debtor, or who has transacted business with the Debtor, or who has leased equipment or property from or to the Debtor should assume that such obligation, receipt, transfer or transaction may be reviewed by the Reorganized Debtor subsequent to the Effective Date and may be the subject of an action after the Effective Date,

whether or not: (a) such entity has filed a proof of Claim against the Debtor in this Case; (b) such entity's proof of Claim has been objected to by the Debtor; (c) such entity's Claim was included in the Debtor's Schedules; or (d) such entity's scheduled Claim has been objected to by the Debtor or has been identified by the Debtor as contingent, unliquidated or disputed.

3. **Reservation of Rights Regarding Claims.** Neither the failure to list a Claim in the Schedules filed by the Debtor, the failure of the Debtor or any other Person to object to any Claim for purpose of voting, the failure of the Debtor or any other Person to object to a Claim or Administrative Claim before confirmation or consummation of the Plan or the Effective Date, the failure of any Person to assert a Claim or cause of action before confirmation or consummation of the Plan or the Effective Date, the absence of a proof of Claim having been filed with respect to a Claim nor any action or inaction of the Debtor or any other Person with respect to a Claim or Administrative Claim, other than a legally effective express waiver or release, shall be deemed a waiver or release of the right of the Debtor or the Reorganized Debtor before or after solicitation of votes on the Plan or before or after the Confirmation Date or the Effective Date to (a) object to or examine such Claim or Administrative Claim in whole or in part or (b) retain and either assign or exclusively assert, pursue, prosecute, utilize, otherwise act or otherwise enforce any claim or cause of action against the holder of any such Claim.

F. Exculpation and Limitation of Liability.

1. **Exculpation of Releasees.** **The Releasees, including the Debtor, shall neither have nor incur any liability to any Person for any act taken or omission made in good faith in connection with or related to the administration of the Case, including, but not limited to, the formulation, implementation, confirmation, or consummation of the Plan, the Disclosure Statement, or any other contract, instrument, release, or other agreement or document created in connection with the Plan or regarding any Distribution made under the**

Plan, except to the extent that the action taken or omitted to be taken by each of the same is determined by a Final Order to be due to such Person's own respective gross negligence, intentional or willful misconduct or fraud.

2. **Good faith Solicitation.** Upon entry of the Confirmation Order, pursuant to section 1125(e) of the Code, the Debtor, the Committee and Holdco, and their respective present and former members, officers, directors, employees, agents, advisors, representatives, successors or assigns, and any Professionals (acting in such capacity) employed by any of the foregoing Persons will be deemed to have solicited votes on the Plan in good faith and in compliance with the Code and any applicable non-bankruptcy law, and, therefore, shall have no liability for the violation of any applicable law, rule or regulation governing the solicitation of votes on the Plan.

G. Cramdown. Notwithstanding anything to the contrary contained herein, the Plan Proponents reserve the right to seek confirmation of the Plan pursuant to section 1129(b) of the Code in the event any impaired Class of Claims or Interests does not vote to accept the Plan.

ARTICLE IX.

CONDITIONS PRECEDENT

A. Conditions to Confirmation.

The only condition precedent to confirmation of the Plan is that the Bankruptcy Court shall have Entered the Confirmation Order in form and substance acceptable to the Plan Proponents and the Committee.

B. Conditions to the Effective Date.

The following are conditions precedent to the occurrence of the Effective Date, each of which must be satisfied or waived in accordance with Section D of this Article IX:

(i) the Confirmation Order shall be a Final Order;

(ii) all other actions and all agreements, instruments or other documents necessary to implement the terms and provisions of the Plan shall have been effected, and in each case, shall have been duly and validly executed and delivered by the parties thereto and all conditions to their effectiveness shall have been satisfied or waived in accordance therewith; and

(iii) the Debtor shall have received all authorizations, consents, rulings, opinions, or other documents that are determined by the Debtor, to be necessary to implement the Plan and that are required by law, regulation, or order.

C. Waiver of Conditions to Confirmation The conditions set forth in Article IX, Sections A and B, supra (except for the condition appearing in Article IX.B. (iii)), may be waived, in whole or in part, by Holdco, after consultation with the Debtor and the Committee, and so long as the waived condition would not be or would not result in an effect that would be materially inconsistent with the material terms and conditions of this Plan or the Term Sheet, without any notice to any other parties in interest (other than the Debtor and the Committee) or the Bankruptcy Court and without a hearing. In the event there is a dispute between the Debtor and Holdco as to whether the proposed waiver would be materially inconsistent with the material terms and conditions of the this Plan or the Term Sheet, then the Bankruptcy Court will determine whether there is such a material conflict and the parties will accept and not appeal the Bankruptcy Court determination. In the event the Bankruptcy Court determines that the proposed waiver of condition would result in such a material conflict, Holdco shall not be permitted to waive such condition absent the Debtor's consent. The failure of the Plan Proponents to exercise any of the foregoing rights shall not be deemed a waiver of any other rights, and each such right shall be deemed an ongoing right, which may be asserted at any time.

D. Effect of Failure of Conditions If the Effective Date does not occur, the Plan shall be null and void in all respects and nothing contained in the Plan or the Disclosure Statement shall:

(i) constitute a waiver or release of any claims by or Claims against the Debtor; (ii) prejudice in any manner the rights of the Debtor, any holder of a Claim or Interest, or any other Person; or (iii) constitute an admission, acknowledgement, offer, or undertaking by the Debtor, any Creditors, or holders of Interests, or any other Person in any respect.

ARTICLE X.

RETENTION AND SCOPE OF JURISDICTION OF THE BANKRUPTCY COURT

A. Retention and Scope of Jurisdiction of the Bankruptcy Court.

Following the Effective Date, the Bankruptcy Court shall retain such jurisdiction to the maximum extent as is legally permissible, including, without limitation, for the following purposes:

1. To determine the allowability, amount, classification, or priority of Claims upon objection by the Reorganized Debtor;

2. To construe and to take any action to execute and enforce this Plan, the Confirmation Order, or any other order of the Bankruptcy Court, to issue such orders as may be necessary for the implementation, execution, performance, and consummation of this Plan, and all matters referred to herein, and to determine all matters that may be pending before the Bankruptcy Court in the Case on or before the Effective Date;

3. To rule on any and all applications for allowance of compensation and expense reimbursement of Professionals for periods on or before the Effective Date;

4. To rule on any request for payment of any Administrative Claim or administrative expense;

5. To resolve any dispute regarding the implementation, execution, performance, consummation, or interpretation of this Plan;

6. To resolve all applications, adversary proceedings, contested matters, and other litigated matters instituted on or before the Effective Date;

7. To hear and determine any actions related to the Causes of Action, whether or not such actions are pending on or commenced after the Effective Date and to recover any assets of the Debtor's Estate;

8. To determine such other matters and to perform other functions as may be provided in the Confirmation Order;

9. To modify this Plan under section 1127 of the Code, to remedy any apparent nonmaterial defect or omission in this Plan, or to reconcile any nonmaterial inconsistency in the Plan so as to carry out its intent and purposes;

10. To issue injunctions or take such other actions or make such other orders as may be necessary or appropriate to restrain interference with this Plan or its execution or implementation by any entity;

11. To issue such orders in aid of execution of the Plan and the Confirmation Order, notwithstanding any otherwise applicable non-bankruptcy law, with respect to any entity, to the full extent authorized by the Code;

12. To hear and determine any tax disputes concerning, and to determine and declare any tax effects under the Plan; and

13. To enter a final decree closing the Case.

ARTICLE XI.

MISCELLANEOUS

A. Governing Law.

Except to the extent that the Code or the Bankruptcy Rules are applicable, the rights and obligations arising under the Plan shall be governed by the laws of the State of California.

B. Successors And Assigns.

The rights, benefits and obligations of any Person named or referred to in this Plan are binding on, and will inure to the benefit of, any permitted heirs, executors, administrators, successors or assigns of such Person. Without limiting the generality of the immediately preceding sentence, the Reorganized Debtor and the D&O Litigation Trustee, as applicable, will succeed to all litigation privileges, rights and immunities (whether existing under the Federal Rules of Evidence or otherwise), held or enjoyed by the Debtor.

C. Modification of the Plan.

Holdco shall have the exclusive right to amend or modify the Plan so long as the Plan, as modified, is not inconsistent with the material terms and conditions of this Plan or the Term Sheet. In the event there is a dispute between the Debtor, Holdco and/or the Committee as to whether the proposed modifications to the Plan are in material conflict with the material terms and conditions of this Plan or the Term Sheet, then the Bankruptcy Court will determine whether there is such a material conflict and the parties will accept and not appeal the Bankruptcy Court determination. The Plan Proponents shall have the right to modify the Plan collectively at any time prior to the Effective Date, including, without limitation, (i) to remedy any defect or omission or reconcile any inconsistency in the Plan in such manner as may be necessary to carry out the purpose and intent of the Plan so long as such modification is not inconsistent with the terms of this Plan or as otherwise agreed by the Committee, (ii) pursuant to section 1127 of the Code, and (iii) to the extent applicable law otherwise permits.

D. Provisions Severable.

Should any provision in this Plan be determined to be unenforceable, such determination shall in no way limit or affect the enforceability and operative effect of any or all other provisions of the Plan.

E. Headings Do Not Control.

In interpreting this Plan, the headings of individual Sections are provided for convenience only, and are not intended to control over the text of any Section. The headings used in the Plan are inserted for convenience only and neither constitute a portion of the Plan nor in any manner affect the provisions of the Plan.

F. Inconsistency.

In the event that provisions of the Disclosure Statement and provisions of the Plan conflict, the terms of the Plan shall govern and control.

G. Post-Confirmation Notices or Requests.

From and after the Effective Date, any Person who desires notice of any pleading or document filed in the Bankruptcy Court, or any hearing in the Bankruptcy Court, or other matter as to which the Code requires notice to be provided, shall file a request for post-confirmation notice and shall serve the request on the Reorganized Debtor.

H. Successors/Representatives of the Debtor.

As of the Effective Date, the Reorganized Debtor shall be the representatives of the Estate under section 1123(b)(3) of the Code and successors to the Debtor under section 1142 of the Code.

ARTICLE XII.

CONFIRMATION REQUEST

The Plan Proponents request confirmation of the Plan pursuant to section 1129 of the Code.

Dated: January 12, 2012

Respectfully submitted,

Holdco Advisors L.P.

By: */s/ Vik Ghei*
Vik Ghei
Partner

Imperial Capital Bancorp, Inc.

Dated: January 12, 2012

By: */s/ Anthony Rusnak*
Anthony Rusnak
Chief Operating Officer, Secretary, and General Counsel

Submitted by:

/s/ Jeffrey D. Sternklar
JEFFREY D. STERNKLAR
JOHN P. COOLEY
DUANE MORRIS LLP
Counsel for Holdco Advisors, L.P.

/s/ Eve H. Karasik
GARY E. KLAUSNER
EVE H. KARASIK
GREGORY K. JONES, Members of
STUTMAN, TREISTER & GLATT
PROFESSIONAL CORPORATION
Reorganization Counsel for Debtor and Debtor in Possession
Stutman, Treister & Glatt PC

Schedule A

The following list of documents are referenced by the enumerated definitions of Article II, Section A. of the Plan:

108. ***"TOPrS Debenture Indenture"*** shall include: (i) that certain Junior Subordinated Indenture between ITLA Corporation and The Bank of New York Mellon, as Trustee, dated as of October 30, 2002; (ii) that certain Junior Subordinated Indenture between ITLA Corporation and The Bank of New York Mellon, as Trustee, dated as of December 10, 2002; (iii) that certain Indenture between ITLA Corporation and U.S. Bank National Association (successor to State Street Bank and Trust Company of Connecticut, National Association), as Trustee, dated as of September 7, 2000; (iv) that certain Indenture between Indenture between ITLA Corporation and U.S. Bank National Association (successor to State Street Bank and Trust Company of Connecticut, National Association), as Trustee, dated as of February 22, 2001; and (v) that certain Indenture between ITLA Corporation and U.S. Bank National Association (successor to State Street Bank and Trust Company of Connecticut, National Association), as Trustee, dated as of December 19, 2002.

115. ***"TOPrS Trust Guarantee"*** shall include: (i) that certain Guarantee Agreement between ITLA Corporation, as Guarantor, and The Bank of New York Mellon, as Guarantee Trustee, dated as of October 30, 2002; (ii) that certain Guarantee Agreement between ITLA Corporation, as Guarantor, and The Bank of New York Mellon, as Guarantee Trustee, dated as of December 10, 2002; (iii) that certain Guarantee Agreement between ITLA Corporation, as Guarantor and U.S. Bank National Association (successor to State Street Bank and Trust Company of Connecticut, National Association), as Guarantee Trustee, dated as of September 7, 2000; (iv) that certain Guarantee Agreement between ITLA Corporation, as Guarantor and U.S. Bank National Association (successor to State Street Bank and Trust Company of Connecticut, National Association), as Guarantee Trustee, dated as of February 22, 2001; and (v) that certain Guarantee Agreement between ITLA Corporation, as Guarantor and U.S. Bank National Association (successor to State Street Bank and Trust Company of Connecticut, National Association), as Guarantee Trustee, dated as of December 19, 2002.

117. ***"TOPrS Trust Indenture"*** shall include: (i) that certain Amended and Restated Trust Agreement among ITLA Capital Corporation, as Depositor, The Bank of New York Mellon, as Property Trustee, The Bank of New York Mellon (Delaware), as Delaware Trustee, and The Administrative Trustees named therein, as Administrative Trustees, dated as of October 30, 2002; (ii) that certain Amended and Restated Trust Agreement among ITLA Capital Corporation, as Depositor, The Bank of New York Mellon, as Property Trustee, The Bank of New York Mellon (Delaware), as Delaware Trustee, and the Administrative Trustees named therein, as Administrative Trustees, dated as of December 10, 2002; (iii) that certain Amended and Restated Trust Agreement among ITLA Capital Corporation, as Sponsor, U.S. Bank National Association (successor to State Street Bank and Trust Company of Connecticut, National Association), as Institutional Trustee, and the Administrators named therein, dated as of September 7, 2000; (iv) that certain Amended and Restated Trust Agreement among ITLA Capital Corporation, as Sponsor, U.S. Bank National Association (successor to State Street Bank and Trust Company of Connecticut, National Association), as Institutional Trustee, and the Administrators named therein, dated as of February 22, 2001; and (v) that certain Amended and Restated Trust Agreement among ITLA Capital Corporation, as Sponsor, U.S. Bank National Association (successor to State Street Bank and Trust Company of Connecticut, National Association), as Institutional Trustee, and the Administrators named therein, dated as of December 19, 2002.

TENTATIVE RULING

Debtor: IMPERIAL CAPITAL BANCORP, INC.
Number: 09-19431-LA11

Hearing: 02:00 PM Tuesday, April 24, 2012

Motion: SUMMARY JUDGMENT MOTION ON OBJECTION TO PROOFS OF CLAIM FILED BY U.S. BANK NATIONAL ASSOCIATION AND BANK OF NEW YORK MELLON AS INDENTURE TRUSTEES UNDER JUNIOR SUBORDINATED INDENTURES, AND TO ENFORCE CONTRACTUAL SUBORDINATION [11 U.S.C. SECTIONS 502(A) AND 510(A); FRBP 3007 AND 7001(8) FILED BY JEFFREY ISAACS ON BEHALF OF FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR IMPERIAL CAPITAL BANK. (Fr 3/13)

Summary Judgment is hereby **GRANTED** in favor of HoldCo and the Indenture Trustees ("Movants").

At issue is whether the claims asserted by the FDIC-R including (i) a contingent tax refund claim and (ii) "other claims" discussed in further detail below, are properly classified in the proposed Plan of Reorganization as *pari passu* with the TOPrS debenture claims or, as the FDIC-R contends, whether the FDIC-R is entitled to the benefit of the subordination provisions contained within the Indentures that govern the TOPrS debentures. Specifically, the FDIC-R argues that its tax refund claim is entitled to the benefit of the subordination provisions because, as a result of the Debtor's failure to turn over certain tax refunds to the FDIC-R, the FDIC-R extended credit to the Debtor and therefore, the Debtor "borrowed money" from the FDIC-R.

The subordination provisions of the Indentures carefully outline the limited types of indebtedness that will receive the benefit of the relevant provisions. While there are slight variances among the subordination provisions of the various Indentures, the language in each of the five provisions subordinate the TOPrS debentures only to "Senior Debt" or "Senior Indebtedness" which is defined, in relevant part, as "indebtedness of the Company for money borrowed."

Movants argue that the term "indebtedness of the Company for money borrowed" as used in the Indentures is plain and unambiguous because although the terms are not defined in the Indentures themselves, the terms "money" and "borrowed" have plain, ordinary and usual meanings.

Without specifically alleging that the subordination provisions in the Indentures are ambiguous, the FDIC-R contends that this Court must consider certain relevant regulations and policy statements, when interpreting the various subordination provisions including: (a) 12 C.F.R. 250.166 – the Federal Reserve Board's Regulation

regarding the treatment of mandatory convertible debt and subordinated notes of state member banks and bank holding companies as "capital"; (b) a certain Interagency Tax Policy Statement; and (c) the Tax Allocation Agreement that the Debtor entered into with Imperial Capital Bank, the failed affiliate that the FDIC-R subsequently took over as receiver.

A subordination agreement is enforceable in a chapter 11 case to the same extent that such agreement is enforceable under applicable nonbankruptcy law. 11 U.S.C. § 510(a). Whether a contract is ambiguous is a question of law to be resolved by the Courts. *W.W.W. Assocs., Inc. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990).

The New York Court of Appeals has provided us with clear, if conventional, guidelines to determine whether terms in a contract are ambiguous:

> Contracts are not to be interpreted by giving a strict and rigid meaning to general words or expressions without regard to the surrounding circumstances or the apparent purpose which the parties sought to accomplish. The court should examine the entire contract and consider the relation of the parties and the circumstances under which it was executed. Particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby. Form should not prevail over substance, and a sensible meaning of words should be sought.

William C. Atwater & Co. v. Panama R. Co., 246 N.Y. 519, 159 N.E. 418, 419 (1927) (citations and internal quotation marks omitted).

It is a well-established maxim of contractual interpretation that a contract is ambiguous only if it is "capable of more than one reasonable interpretation." *Miller v. U.S.*, 363 F.3d 999, 1004 (9th Cir. 2004) (internal citations omitted). However, a contract is not ambiguous simply because the parties do not agree on the meaning of its terms.

Moreover, a court "should not find the language ambiguous on the basis of the interpretation urged by one party, where that interpretation would *strain the contract language beyond its reasonable and ordinary meaning*." *In re Enron Creditors Recovery Corp.*, 370 B.R. 64, 71 (Bankr. S.D.N.Y. 2007) (internal citations omitted).

The FDIC-R does not argue that the Movants' interpretation of the term "money borrowed" is unreasonable. However, the FDIC-R contends that because the term "money borrowed" is not defined in the Indentures, it must, therefore be interpreted by examining "the transaction giving rise to the indebtedness" which, according to the FDIC-R, requires examination and interpretation of the ancillary documents and

regulations upon which the FDIC-R relies.

The Uniform Commercial Code defines "money" as "a medium of exchange currently authorized or adopted by a domestic or foreign government." UCC §1-201(24). Black's Law Dictionary notes that money can also be (a) assets that can be easily converted to cash, such as demand deposits or (b) capital that is invested or traded as a commodity. BLACK'S LAW DICTIONARY (9th ed. 2009). To "borrow" is to take something for temporary use, or to receive money with the understanding or agreement that it must be repaid, usually with interest. *Id.* at 985.

At least one court has held that the term "money borrowed," as defined in a TOPrS Indenture similar to those at issue is *not* ambiguous. *In re Enron Creditors Recovery Corp.*, 370 B.R. 64, 71 (Bankr. S.D.N.Y.2007) rev'd on other grounds, *In re Enron Creditors Recovery Corp.*, 380 B.R. 307 (S.D.N.Y. 2008) ("[a]lthough the terms "indebtedness" and "money borrowed" are not specifically defined in the 1993 and 1994 Loan Agreements, the terms are not ambiguous and must be applied in their ordinary sense and, therefore, represent debt.").

In evaluating the Indentures as a whole, this Court agrees with the conclusion reached by the Court in *Enron* and hereby concludes that the term "money borrowed" as applied to the subordination provisions in the Indentures has a plain, ordinary meaning and is unambiguous.

Under New York law, "a written agreement that is compete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *Greenfield v. Phillies Records, Inc.,* 98 N.Y.2d 562, 569 (2002); *W.W.W. Associates, Inc. v. Giancontieri*, 77 N.Y.2d 157, 163 (1990) (*citing Intercontinental Planning v Daystrom, Inc.*, 24 NY2d 372, 37) ([i]t is well settled that 'extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face.').

The types of debts embodied in the FDIC-R's tax refund claim do not qualify as "money borrowed" applying the ordinary meaning of these words. Simply put: none of the debts arise from the act of the Debtor's borrowing of money from Imperial Capital Bank with the promise to repay, nor do they arise from the Bank's act of advancing money to the Debtor upon the Debtor's promise to repay.

The FDIC-R improperly relies upon extrinsic documents to create a "borrowing event" - the Tax Allocation Agreement, the Federal Reserve Board's Interagency Policy on Income Tax Allocation in a Holding Company Structure and the Debtor's Income Tax Administration Policy. Moreover, even if we consider these extrinsic documents, the FDIC-R's reliance on these extrinsic documents is misplaced. These documents became irrelevant when the Debtor filed for bankruptcy because, as a debtor-in-possession, the Debtor could not "borrow" money without an order of this

Court. Likewise, the Debtor was prohibited from transferring the tax refunds to the FDIC-R without a court order because there is a dispute regarding whether the refunds are property of the Debtor's bankruptcy estate.

Finally, the Escrow Stipulation entered into by the Debtor and the FDIC-R gives the Debtor the right to receive the tax refunds (consistent with the Tax Administration Agreement), and requires the Debtor to deposit the tax refunds into a segregated account until ownership is determined. The Escrow Stipulation nullifies any possible argument that the Debtor breached its obligation to promptly pay over the tax refunds, and that this failure to promptly pay constituted the "borrowing event."

With regard to the FDIC-R's "Other Claims," the FDIC-R has completely failed to explain how its "Other Claims" constitute a claim for "money borrowed."

The Court's ruling is based on its interpretation of New York contract law and the Indentures as a whole. It is not based on any interpretation or application of the Tax Allocation Agreement between the Debtor and Imperial Capital Bank. That issue is currently pending in the Tax Refund Action before the United States District Court for the Southern District of California because the FDIC-R requested a withdrawal of the reference for the Tax Refund Action.

That said, a recent decision out of the Bankruptcy Court for the Central District of California which includes an analysis of a similar Tax Sharing Agreement is worth mentioning. In proposed findings and conclusions submitted to the District Court, Judge Bluebond in the *IndyMac* bankruptcy case recently concluded that even if you take into consideration ancillary documents, including a Tax Sharing Agreement similar to the one that the FDIC-R argues alters the interpretation of the subordination provision, the FDIC's tax refund claim is not a claim for "money borrowed." *Indymac Bancorp, Inc., v. Federal Deposit Insurance Corporation (In re Indymac),* 2012 WL 1037481 at *37 (Bankr. C.D.Cal. 2012).

This Court finds Judge Bluebond's reasoning in *IndyMac* sound. Thus, even if this Court were to interpret the ancillary documents in this case, including the Tax Allocation Agreement, it is unlikely that any such analysis would ultimately assist the FDIC-R's position.

Westlaw.

Slip Copy, 2012 WL 1037481 (Bkrtcy.C.D.Cal.)
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Only the Westlaw citation is currently available.

United States Bankruptcy Court, C.D. California,
Los Angeles Division.
In re INDYMAC BANCORP, INC., Debtor.
Alfred H. Siegel, solely as Chapter 7 Trustee of the estate of IndyMac Bancorp, Inc., Plaintiff,
v.
Federal Deposit Insurance Corporation, in its capacity as Receiver of IndyMac Bank, F.S.B. and as Conservator of IndyMac Federal Bank, F.S.B., Defendant.

Bankruptcy No. 2:08–bk–21752–BB.
Adversary No. 2:09–ap–01698–BB.
March 29, 2012.

David M. Stern, Lee R. Bogdanoff, Matthew Heyn, Whitman L. Holt, Robert J. Pfister, Klee, Tuchin, Bogdanoff & Stern LLP, Los Angeles, CA, for Plaintiff.

Allan H. Ickowitz, John W. Kim, Nossaman LLP, Los Angeles, CA, for Defendant.

REPORT AND RECOMMENDATION OF THE HONORABLE SHERI BLUEBOND, UNITED STATES BANKRUPTCY JUDGE, TO THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA CONTAINING PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL JUDGMENT REGARDING COMPETING MOTIONS FOR SUMMARY JUDGMENT WITH RESPECT TO THE OWNERSHIP OF CERTAIN TAX REFUNDS

SHERI BLUEBOND, United States Bankruptcy Judge.

*1 This Report and Recommendation is respectfully submitted by the undersigned Judge of the United States Bankruptcy Court for the Central District of California (the "Court") to the United States District Court for the Central District of California (the "District Court") pursuant to 28 U.S.C. § 157(c)(1) and Federal Rule of Bankruptcy Procedure 9033 based upon the District Court's prior determination that the matters addressed herein constitute a "non-core proceeding." *See Siegel v. FDIC (In re IndyMac Bancorp Inc.)*, No. 11–03969–RGK, 2011 WL 2883012, at *5–7 (C.D.Cal. July 15, 2011).

As detailed more fully below, the Court hereby recommends (1) that the District Court adopt all of this Court's proposed findings of fact and conclusions of law; (2) that the District Court sever, from the balance of the litigation, the claims which are the subject of this Report and Recommendation; and (3) that the District Court enter a final judgment in favor of Alfred H. Siegel, Chapter 7 Trustee of the estate of IndyMac Bancorp, Inc. and plaintiff in this proceeding (the "Trustee"), on those severed claims pursuant to Federal Rule of Civil Procedure 54(b).

I. *PROCEDURAL BACKGROUND*

1. On July 31, 2008 (the "Petition Date"), IndyMac Bancorp, Inc. ("Bancorp") filed a voluntary petition under chapter 7 of title 11 of the United States Code (the "Bankruptcy Code"), thereby commencing the bankruptcy case pending before this Court as *In re IndyMac Bancorp, Inc.*, Case No. 2:08–bk–21752–BB (Bankr.C.D.Cal.) (the "Bankruptcy Case"). The filing of the Bankruptcy Case created a bankruptcy estate under Bankruptcy Code section 541(a).

2. On August 4, 2008, the Office of the United States Trustee duly appointed Alfred H. Siegel as the interim Chapter 7 Trustee in the Bankruptcy Case. On December 4, 2008, the Court entered an order duly appointing Mr. Siegel as the permanent Chapter 7 Trustee in the Bankruptcy Case.

3. On or about November 26, 2008, the Federal Deposit Insurance Corporation as Receiver of IndyMac Bank, F.S.B. and as Conservator for IndyMac Federal Bank, F.S.B. (the "FDIC") filed a proof of claim in the Bankruptcy Case, which the Court's clerk assigned claim number 62 (the "FDIC Proof of Claim"). The FDIC Proof of Claim asserts various claims against the Bancorp bankruptcy estate in the FDIC's capacity as Receiver of IndyMac Bank, F.S.B. (the "Bank") and as Conservator for IndyMac Federal Bank, F.S.B. ("Federal Bank" and together with the Bank, the "IndyMac Banks"), including claims related to the FDIC's purported ownership of various tax refunds. The parties have stipulated that, subsequent to the filing of the FDIC Proof of Claim, the FDIC as Conservator for Federal Bank was replaced by the FDIC as Receiver of Federal Bank, and the FDIC in its capacity as Receiver of Federal Bank was substituted for the FDIC as Conservator of Federal Bank in this litigation

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[*see* Docket Nos. 53 & 54]. Accordingly, reference to the "FDIC" in this Report and Recommendation is to the FDIC both as Receiver of the Bank and as Receiver of Federal Bank.

***2** 4. On June 11, 2009, the Trustee filed his *Complaint (1) Objecting to FDIC Claim; (2) For Subordination of FDIC Claim; (3) Counterclaim for Declaratory Relief* (the "Initial Complaint" [Docket No. 1] [FN1]) against the FDIC in its capacity as Receiver of the Bank and as Conservator of Federal Bank, thereby commencing the adversary proceeding pending before this Court as *Siegel v. FDIC (In re IndyMac Bancorp, Inc.),* Adversary Proc. No. 2:09–ap–01698–BB (Bankr.C.D.Cal.) (the "Adversary Proceeding").

> FN1. Unless otherwise described, all bracketed references to docket numbers in this Report and Recommendation refer to the CM/ECF docket maintained for the Adversary Proceeding.

5. The Trustee and the FDIC thereafter entered into a series of consensual stipulations extending the FDIC's time to respond to the Initial Complaint, which stipulations were approved by the Court [*see* Docket Nos. 6, 7, 9, 10, 19, 20, 22, 23, 25 & 26].

6. On April 19, 2011, the Trustee filed his *First Amended Complaint (1) Objecting to FDIC Claim; (2) For Subordination of FDIC Claim; (3) Counterclaim for Declaratory Relief,* which is the operative complaint in the Adversary Proceeding (the "Complaint" [Docket No. 28]). The Complaint contains five claims for relief, four of which seek the disallowance or subordination of the FDIC Proof of Claim under provisions of the Bankruptcy Code. The fifth claim for relief seeks a declaration that the Trustee, as representative of Bancorp's estate, is entitled to receive all tax refunds resulting from consolidated or combined tax returns filed for the years 2000 through 2008 as property of Bancorp's estate under Bankruptcy Code section 541(a).

7. On April 19, 2011, the Trustee also filed his *Motion for Summary Judgment on Plaintiff's Fifth Claim for Relief, or, in the Alternative, for an Order that Certain Material Facts Are Not Genuinely in Dispute* (the "Trustee MSJ" [Docket No. 31]). In support of the Trustee MSJ, the Trustee submitted declarations from Benjamin P. Saul and Susan P. Tomlinson with certain exhibits thereto [Docket No. 32], as well as a statement of uncontroverted facts [Docket No. 33].

8. Before answering the Complaint or responding to the Trustee MSJ, the FDIC filed a *Motion to Bifurcate or Sever and Withdraw Reference of Only "Part" of the Adversary Proceeding Related to Tax Refund Claims and Offsets* in the District Court (the "FDIC Withdrawal Motion" [Docket No. 1 in Civil Case No. 11–03969–RGK]). The Trustee opposed the FDIC Withdrawal Motion, and the District Court ultimately denied the motion by order dated July 15, 2011. *Siegel v. FDIC,* 2011 WL 2883012. In that order, the District Court (1) rejected the FDIC's arguments for mandatory withdrawal of the bankruptcy reference, *id.* at *4–5; (2) concluded that the parties' tax refund "ownership dispute is non-core," *id.* at *6; but (3) declined to permissively withdraw the reference based upon the efficiencies associated with leaving the tax refund litigation before this Court, including "the knowledge that bankruptcy courts routinely resolve these types of disputes," *id.* at *7.

***3** 9. On June 2, 2011, the FDIC filed its answer to the Trustee's Complaint (the "FDIC Answer" [Docket No. 38]) and asserted a counterclaim for declaratory relief regarding the ownership of certain tax refunds (the "FDIC Counterclaim").

10. On June 3, 2011, the FDIC filed an opposition to the Trustee MSJ [Docket No. 39] and a competing *Cross–Motion for Partial Summary Judgment on (A) Count One of Counterclaim, (B) Plaintif's Fifth Claim for Relief, and (C) Offset Rights for Tax Refunds and Liabilities Asserted in Paragraphs 64, 65 and 66 of Plaintiff's First Claim, or for an Order that Certain Materials Facts Are Not in Dispute* (the "FDIC MSJ" [Docket No. 41]). In support of these two pleadings, the FDIC submitted certain additional materials, including a declaration from Brent H. Frost (the "Frost Declaration" [Docket No. 43]), a declaration from James A. Thormahlen (the "Thormahlen Declaration" [Docket No. 44]), a declaration from John W. Kim [Docket No. 45], a statement of uncontroverted facts in support of the FDIC MSJ [Docket No. 46], and a separate statement of supposedly genuine issues and uncontroverted facts in support of its opposition to the Trustee's statement of uncontroverted facts and the Trustee MSJ [Docket No. 40].

11. From and after June 3, 2011, the Court was effectively faced with two "dueling" motions for summary judgment regarding the tax refunds, which the Court viewed as advocating opposite sides of the same coin. Other bankruptcy courts have considered and resolved

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very similar litigation arising in a very similar procedural posture. *See, e.g.,* *BankUnited Fin. Corp. v. FDIC (In re BankUnited Fin. Corp.) ("BankUnited")*, 462 B.R. 885 (Bankr.S.D.Fla.2011) (opinion resolving cross-motions for summary judgment regarding whether certain tax refunds were property of a debtor-parent's bankruptcy estate or property of the FDIC as receiver); *Zucker v. FDIC (In re NetBank, Inc.) ("NetBank")*, 459 B.R. 801 (Bankr.M.D.Fla.2010) (same).

12. to a stipulated briefing schedule, both parties thereafter filed further briefs and declarations in support of and in opposition to their respective cross-motions. More specifically,

• On November 15, 2011, the Trustee filed, *inter alia,* (1) an opposition to the FDIC MSJ [Docket No. 59], (2) a supplemental declaration of Susan P. Tomlinson with certain exhibits thereto (the "First Supplemental Tomlinson Declaration" [Docket No. 62]), and (3) evidentiary objections to the Frost Declaration [Docket No. 63].

• On December 6, 2011, the parties filed a *Joint Notice Pursuant to LBR 7030–1(b)(4),* attaching certain marked deposition transcripts [Docket No. 67].[FN2]

FN2. As explained below, the Court ultimately did not rely on any of this deposition testimony in reaching the proposed findings and conclusions set forth in this Report and Recommendation.

• On December 6, 2011, the Trustee filed, *inter alia,* a reply brief in further support of the Trustee MSJ [Docket No. 68].

• On December 6, 2011, the FDIC filed, *inter alia,* (1) a reply brief in further support of the FDIC MSJ [Docket No. 72], (2) a declaration of William Lesse Castleberry (the "Castleberry Declaration" [Docket No. 73]), (3) a declaration of Stephan H. Wasserman (the "Wasserman Declaration" [Docket No. 74]), (4) a response to the Trustee's evidentiary objections to the Frost Declaration [Docket No. 75], (5) evidentiary objections to the First Supplemental Tomlinson Declaration [Docket No. 76], (6) a reply to the Trustee's response to the FDIC MSJ under Local Bankruptcy Rule 7056–1(c)(2) [Docket No. 77], and (7) a supplemental declaration of John W. Kim [Docket No. 79].

***4** • On December 8, 2011, the Trustee filed evidentiary objections to the Castleberry Declaration and to the Wasserman Declaration [Docket No. 81].

• On December 9, 2011, the Trustee filed a second supplemental declaration of Susan P. Tomlinson, which made one correction to paragraph 6 of the First Supplemental Tomlinson Declaration (the "Second Supplemental Tomlinson Declaration" [Docket No. 82]).

• On December 12, 2011, the FDIC filed a response to the Trustee's evidentiary objections to the Castleberry Declaration and to the Wasserman Declaration, which included another declaration of John W. Kim [Docket No. 83].

13. On December 13, 2011, the Court heard oral argument from the parties regarding their cross-motions for summary judgment and evidentiary objections, making certain oral rulings [*see* Docket No. 84 (transcript of December 13 hearing)]. After this hearing, the Court continued the hearing to January 24, 2012 and ordered the parties to file simultaneous supplemental briefs regarding the legal effect, if any, of the deemed rejection of an executory contract on the parties' tax refund ownership dispute.

14. The Trustee and the FDIC filed their respective supplemental briefs on January 13, 2012 [Docket Nos. 85 & 88]. Thereafter, the Trustee moved for leave to file a short written response to what the Trustee interpreted as a new argument in the FDIC's supplemental brief [Docket No. 89]. The Court granted this motion via an order entered on January 18, 2012 [Docket No. 91], and afforded each side the opportunity to file one additional supplemental reply brief. The Trustee and the FDIC each filed an additional brief [Docket Nos. 92 & 93].

15. The Court held a further hearing regarding the cross-motions on January 24, 2012 [*see* Docket No. 97 (transcript of January 24 hearing)]. After the hearing, the Court ruled from the bench that the Court would recommend granting the Trustee MSJ and denying the FDIC MSJ. The Court then set a further hearing for February 29, 2012, in order to allow the parties to address certain procedural issues regarding transmission of this Report and Recommendation to the District Court, along with any objection and response pursuant to Federal Rule of Bankruptcy Procedure 9033. Pursuant to a stipulation between the parties and the Court's order approving the

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stipulation [Docket Nos. 98 & 99], this hearing was continued to March 13, 2012, the parties jointly agreed that it was appropriate to include the proposed entry of a final order under Rule 54(b) in this Report and Recommendation, and a briefing schedule was set for the FDIC's objection and the Trustee's response under Federal Rule of Bankruptcy Procedure 9033(b).

16. Prior to the continued hearing and on the schedule set forth in their stipulation, the parties submitted briefing regarding the form of a report and recommendation, which included competing proposed forms submitted by the FDIC and the Trustee [Docket Nos. 102–103 & 105]. At the March 13, 2012 hearing, the Court allowed the parties to present oral argument regarding the competing forms. Based upon that argument, the Court indicated that certain changes should be made. The Court had explicit instructions with respect to a portion of the form of a report and recommendation through paragraph 53. The Court further indicated that it would review and make revisions to the balance of the proposed report *sua sponte* as it deemed appropriate. Thereafter, the Court requested the Trustee to submit a revised report and recommendation consistent with the Court's determinations at the hearing through paragraph 53 of the proposed report, which the Trustee did. The Court further reviewed the revised report and recommendation and made additional changes in the process of preparing the final form of the Court's Report and Recommendation. Except to the extent incorporated herein, all objections concerning the form of this Report and Recommendation have been overruled.

***5** 17. The Court has devoted substantial resources to fully evaluating the respective positions of the Trustee and the FDIC. The Court permitted two extra rounds of briefing, so that each side was ultimately allowed to file *five* separate merits briefs. Similarly, the Court scheduled and held two lengthy hearings to allow counsel for each side a full and fair opportunity to advance all relevant arguments. As such, the Court believes that it has a robust foundation upon which to propose findings and conclusions to the District Court.

18. Pursuant to 28 U.S.C. § 157(c)(1) and Federal Rule of Bankruptcy Procedure 9033, this Report and Recommendation is intended to provide proposed findings of fact and conclusions of law for the District Court, along with this Court's ultimate recommendation regarding how the District Court should dispose of the tax refund-related portions of this Adversary Proceeding.

II. *JURISDICTION AND VENUE*

19. Pursuant to 28 U.S.C. § 1334(b), Congress vested jurisdiction over this Adversary Proceeding in the District Court. Under 28 U.S.C. § 157(a), Local Bankruptcy Rule 5011–1(a), and District Court General Order No. 266, this Court may exercise jurisdiction over all aspects of this Adversary Proceeding. Because the District Court determined that the tax refund-related aspects of this Adversary Proceeding are "non-core," this Court cannot enter a final judgment on those aspects of the case. *See Stern v. Marshall*, 564 U.S. ——, 131 S.Ct. 2594, 2596, 180 L.Ed.2d 475 (2011); *Siegel v. FDIC*, 2011 WL 2883012, at *5. Instead, absent consent of all parties to the proceeding under 28 U.S.C. § 157(c)(2), this Court's must prepare proposed findings of fact and conclusions of law for the District Court's review under the framework established by 28 U.S.C. § 157(c)(1) and Federal Rule of Bankruptcy Procedure 9033. The FDIC will *not* consent to this Court's entry of a final judgment regarding the tax refunds. *See* Dec. 13, 2011 Hr'g Tr. at 14:9–14. This Report and Recommendation must therefore be submitted to the District Court, and the District Court must enter an order consistent with the District Court's rejection, acceptance, or modification of the Report and Recommendation under Federal Rule of Bankruptcy Procedure 9033(d).

20. Because the Bankruptcy Case is pending in the Central District of California, venue of the Adversary Proceeding in this Court and in the District Court is proper pursuant to 28 U.S.C. § 1409(a).

III. *PROPOSED FINDINGS OF FACT*

21. Despite the volume of material before the Court, the Court does not believe it necessary to make a large number of factual findings in order to dispose of the Trustee MSJ and the FDIC MSJ. Rather, upon the Court's extensive review and consideration of the legal briefing, declarations, documents, and other materials before it, the Court has determined that there is no *genuine* dispute as to the following propositions of fact that are actually *material* to the resolution of the matters addressed herein as a matter of law .[FN3]

FN3. The Court believes that all of the matters described in this Part III of the Report and Recommendation are purely factual, but to the extent they involve any legal conclusions, they should be treated as such. Likewise, the proposed legal conclusions and analysis in Part V below contain discussion of additional factual issues that, although *relevant* for purposes of considering cer-

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tain arguments made by the parties, ultimately are not *material* for purposes of ruling on the Trustee MSJ or the FDIC MSJ. To the extent the District Court disagrees with any of the Court's materiality analysis, the factual propositions at issue in Part V should be treated as though they were set forth in this Part III.

*6 22. At all times material to this Adversary Proceeding, Bancorp was the ultimate holding company for the Bank. Specifically, Bancorp held the stock of IndyMac Intermediate Holdings, Inc., which in turn held the Bank's stock. [*See* Docket No. 40 at p. 1 ¶ 1.]

23. Effective as of February 6, 2003, Bancorp and the Bank entered into the *Amended and Restated Tax Sharing Agreement* (the "TSA" [Docket No. 32 Ex. 4]). [*See* Docket No. 40 at p. 1 ¶ 2.] The TSA is a critical document for purposes of assessing the respective rights and obligations of Bancorp and the Bank with respect to any tax refunds.

24. Bancorp was the "common parent" of an "affiliated group" of corporations that the Internal Revenue Code allows to file a single consolidated income tax return. 26 U.S.C. §§ 1501 & 1504(a). The Department of the Treasury has promulgated certain regulations to address the filing of such consolidated returns, which, generally allow payment of refunds to the parent on behalf of the consolidated group. Tax regulations concerning the payment of refunds to a holding company (or any other entity) are not determinative of the ultimate ownership of such refunds. *See, e.g.,* 26 C.F.R. § 301.6402–7(j).

25. The TSA operates against the backdrop of tax rules that contemplate that Bancorp will file consolidated tax returns and directly receive payment of all tax refunds. It is a contract that sets forth rights and obligations to which all members of the consolidated group, including the Bank, are bound. *See* TSA § 6.

26. Consistent with its position as common parent, and prior to the Petition Date, Bancorp filed federal, state, and local consolidated or combined tax returns on behalf of itself and its subsidiaries, including the Bank, for the 2000, 2001, 2002, 2003, 2004, 2005, and 2006 tax years. [*See* Docket No. 40 at p. 1 ¶ 3 & Docket No. 32 Exs. 9–13 & 24–27.]

27. The Bank was a financial institution regulated by the former Office of Thrift Supervision (the "OTS"). On July 11, 2008, the OTS closed the Bank and appointed the FDIC to be the receiver for the Bank. [*See* Docket No. 40 at p. 1 ¶ 2.]

28. On July 11, 2008, Federal Bank, was formed as a newly chartered banking institution, and the OTS appointed the FDIC conservator of Federal Bank. On March 19, 2009, the OTS closed Federal Bank and appointed the FDIC receiver of Federal Bank.

29. As receiver and/or conservator of the IndyMac Banks, the FDIC succeeded to "all rights, titles, powers, and privileges of the insured depository institution, ... and the assets of the institution." 12 U.S.C. § 1821(d)(2)(A)(i).

30. As receiver and/or conservator of the IndyMac Banks, the FDIC is charged with preserving and conserving the assets and property of the failed institution. *Id.* § 1821(d)(2)(B)(iv).

31. As discussed above, the Petition Date occurred on July 31, 2008, and the Trustee was subsequently appointed the Chapter 7 Trustee for Bancorp's bankruptcy estate.

*7 32. The Trustee filed, on behalf of Bancorp and its subsidiaries, including the Bank, a 2007 consolidated federal tax return on September 15, 2008. The Trustee also filed an application for a tentative refund for the 2005 tax year as a result of carrying the consolidated net operating loss (or "NOL" and "NOLs" in plural form) reported on the 2007 consolidated federal tax return back to the 2005 tax year. [*See* Docket No. 32 Exs. 9 & 16–18.]

33. The Trustee filed, on behalf of Bancorp and its subsidiaries, including the IndyMac Banks, a 2008 consolidated federal tax return on or around September 15, 2009, and an amended 2008 return on or around September 13, 2010. Then, on or around January 27, 2011, the Trustee filed, on behalf of Bancorp and its subsidiaries, including the Bank, amended consolidated federal tax returns for tax years 2003, 2004, and 2005 carrying the NOL reported on the 2008 consolidated federal tax return back to offset tax liabilities in the 2003, 2004, and 2005 tax years. [*See* Docket No. 32 Exs. 19–23.] The carryback of the 2008 NOL to prior years allowed the Trustee to apply for and obtain refunds on account of taxes paid in those prior years.

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34. The Trustee and the FDIC entered into two stipulations, both of which were approved by the Court, that established a joint, interest-bearing account at Citibank, N.A. (the "Joint Account") into which all tax refunds could be deposited—without prejudice to either party's position regarding the ownership of such refunds—pending litigation or settlement of the parties' ownership dispute. [*See* Docket Nos. 363, 364, 444 & 447 in the Bankruptcy Case.]

35. The parties are in agreement that, as of November 15, 2011, the following funds generated from the following sources, paid by the relevant taxing authorities after the filing of Bancorp's bankruptcy petition, and based upon tax returns, amendments, and refund claims submitted by the Trustee after the filing of Bancorp's bankruptcy petition, were on deposit in the Joint Account:

Source of Funds	*Amount of Funds*
Carryback of consolidated NOLs for the 2007 tax year as adjusted by IRS audits (2004–2005), including interest thereon (federal)	$11,475,520.16
Carryback of consolidated NOLs for the 2008 tax year, including interest thereon (federal)	$40,695,712.07
Interest, penalty, payroll, audit, and other adjustments to prior tax years, 2003–2008 (federal)	$2,821,826.71
Misc. refunds received from state taxing authorities	$74,312.51
Interest accrued on funds deposited in the Joint Account through October 31, 2011	$38,282.82
TOTAL	**$55,105,654.27**

[*See* First Supplemental Tomlinson Declaration ¶ 9; Docket No. 88 Ex. B.]

36. The total refund amount set forth above will continue to increase as (1) interest continues to accrue monthly on the Joint Account, and (2) additional, smaller, miscellaneous tax refunds may be received. These funds represent the tax refunds that are the subject of the ownership dispute at the heart of the parties' cross-motions and this Court's Report and Recommendation.

IV. *EVIDENTIARY RULINGS*

*8 37. Before setting forth the Court's legal analysis regarding the ownership dispute, the Court first addresses certain evidentiary objections filed by the Trustee or by the FDIC.

A. The Frost Declaration [Docket No. 43]

38. Mr. Frost is the former tax director of Bancorp and the Bank. The FDIC proffered the Frost Declaration in an effort to (a) elaborate on the purported unwritten intent of the parties in executing the TSA, (b) describe how the refunds related to NOLs were generated, and (c) provide Mr. Frost's opinions about how such refunds would have been allocated under the TSA. The Trustee objected to admission of this declaration on two grounds: (1) the Frost Declaration is parol evidence that is not relevant to the interpretation of the TSA, and thus is inadmissible under Federal Rules of Evidence 401 and 402 [FN4]; and (2) testimony adduced at Mr. Frost's deposition demonstrates that Mr. Frost lacks personal knowledge of certain matters in the Frost Declaration, which makes such testimony inadmissible under Federal Rule of Civil Procedure 56(c)(4) and Federal Rule of Evidence 602.

FN4. The Federal Rules of Evidence are generally made applicable in bankruptcy cases by Federal Rule of Bankruptcy Procedure 9017.

39. The Court agrees with the Trustee's first argument and has determined not to admit the Frost Declaration because it is irrelevant parol evidence in light of the unambiguous written TSA. Given the unambiguous nature of the TSA, extrinsic or parol evidence is not relevant to its interpretation under California law (which governs the TSA per its Section 7(b)). *See generally Winet v. Price*, 4 Cal.App.4th 1159, 6 Cal.Rptr.2d 554, 557 n. 3 (Ct.App.1992).

40. The Court's initial review of the Frost Declaration and other pertinent extrinsic evidence did not expose any ambiguity in the TSA that warranted clarification via the admission or use of parol evidence. *See generally Pac.*

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Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 69 Cal.2d 33, 37, 69 Cal.Rptr. 561, 442 P.2d 641, 644 (1968). Thus, after considering all the materials before it, the Court has concluded that the TSA is not ambiguous, either on its face (*i.e.*, "patent" ambiguity) or following a preliminary reference to the pertinent extrinsic evidence (*i.e.*, "latent" ambiguity). There is no reason to look to what the parties intended beyond the four-corners of their written contract. As a consequence, the Frost Declaration is inadmissible. *See, e.g., ASP Props. Grp., L.P. v. Fard, Inc.*, 133 Cal.App.4th 1257, 35 Cal.Rptr.3d 343, 349 (Ct .App.2005); *Chaknova v. Wilbur–Ellis Co.*, 69 Cal.App.4th 962, 81 Cal.Rptr.2d 871, 875 (Ct.App.1999).

41. The Frost Declaration is comparable to the declaration of Dennis Brown described in a recent California Court of Appeals decision. Like Mr. Frost, Mr. Brown's declaration purported to testify about what the parties' "intent" *really* was. *See Lonely Maiden Prods., LLC v. GoldenTree Asset Mgmt., LP ("Lonely Maiden")*, 201 Cal.App.4th 368, 135 Cal.Rptr.3d 69, 83 (Ct.App.2011). The California courts refused to consider this sort of declaration for a number of reasons, and the appellate court noted that, even if the court did consider Mr. Brown's statements, "it would be pointless because Brown failed to offer evidence of an external manifestation of intention." *Id.* The Frost Declaration is inadmissible for the same reasons. The Court will interpret the TSA based upon the plain text that the parties chose to use at the time the document was executed, not based upon extrinsic testimony offered many years after the fact.

***9** 42. It is particularly appropriate to exclude the Frost Declaration in light of the FDIC's repeated urging to the Court that the TSA *is* unambiguous. Both the Trustee and the FDIC took the position in multiple briefs that the TSA's terms are plain and that this dispute can be resolved based upon the text within the four-corners of this contract.[FN5] In attempting to address the inconsistency between its position that the TSA is unambiguous and its submission of the Frost Declaration, the FDIC argued that some ambiguity must exist because the Trustee and the FDIC interpret the TSA in opposing fashions. The case law is clear, however, that mere inconsistent interpretations of a contract by two litigants does *not* mean a contract is ambiguous, but rather likely means that one of the parties is advancing a flawed interpretation. *See, e.g .*, *FDIC v. W.R. Grace & Co.*, 877 F.2d 614, 621 (7th Cir.1989); *PG & E v. FERC*, 746 F.2d 1383, 1387 (9th Cir.1984). *Accord Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 461, 119 S.Ct. 1411, 143 L.Ed.2d 607 (1999). In the common fact-pattern where even though "both parties contend that the agreement is unambiguous, each contends for an interpretation favorable to its own position," it falls to the Court to determine who is right based upon the words used in the contract. *See, e.g., Seymour v. Coughlin Co.*, 609 F.2d 346, 349–50 (9th Cir.1979). Because the Court concludes the TSA is in fact unambiguous and subject to interpretation based upon its plain text, the Court has not relied upon any of the extrinsic or parol evidence offered by either side to this litigation in performing its interpretive task.

> FN5. To quote the Trustee, "[t]he TSA is unambiguous." Docket No. 59 at 13:19. To quote the FDIC, it took positions that applied only "[t]o the extent an ambiguity exists within the TSA, *which it does not,....* " Docket No. 41 at 34:1–2 (emphasis added).

B. The Castleberry Declaration [Docket No. 73]

43. Mr. Castleberry is a tax partner at the law firm of Cooley LLP. As with the Frost Declaration, the FDIC proffered the Castleberry Declaration to assist the Court in interpreting the TSA, even though Mr. Castleberry is a non-percipient witness with no personal experience related to IndyMac prior to this litigation. The Trustee objected to admission of this declaration on several grounds: (1) it is improper new evidence submitted via reply briefing; (2) it is legal opinion that is irrelevant and inadmissible under Federal Rules of Evidence 401, 402, and 702; (3) it is putative "expert" testimony that failed to apply a reliable methodology as required by Federal Rule of Evidence 702 and the Supreme Court's decisions in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999); and (4) it is parol evidence that is not relevant to the interpretation of the TSA, and thus is inadmissible under Federal Rules of Evidence 401 and 402. The FDIC argued that Mr. Castleberry has personal knowledge of other tax sharing agreements between parent companies and their bank or thrift subsidiaries. The FDIC further suggested that Mr. Castleberry was an "expert" on the drafting and interpretation of agreements such as the TSA and that he was opining on "factual" matters—namely, how the TSA should be applied and what the parties intended based upon his purported experience and the language in the agreement. According to the FDIC, the Castleberry Declaration is admissible under Federal Rule of Evidence 704(a), which provides that

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"[a]n opinion is not objectionable just because it embraces an ultimate issue."

***10** 44. The Court sustained the Trustee's objection and declined to admit the Castleberry Declaration into evidence. As explained above, the TSA is not ambiguous, and thus parol evidence such as the Castleberry Declaration is not relevant to its interpretation. Moreover, opinion or "expert" testimony about legal issues is not admissible evidence. *Crow Tribe of Indians v. Racicot*, 87 F.3d 1039, 1045 (9th Cir.1996). *Accord United States v. McIver*, 470 F.3d 550, 561–62 (4th Cir.2006); *Dow Corning Corp. v. Safety Nat'l Cas. Corp.*, 335 F.3d 742, 751–52 (8th Cir.2003); *Owen v. Kerr–McGee Corp.*, 698 F.2d 236, 240 (5th Cir.1983). Because the interpretation of a contract such as the TSA is a legal issue for the Court, Mr. Castleberry's testimony would be inadmissible as evidence even if the Court believed the TSA is ambiguous (which the Court does not). *See, e.g., CMI–Trading, Inc. v. Quantum Air, Inc.* ., 98 F.3d 887, 890 (6th Cir.1996); *Marx & Co. v. Diners' Club, Inc.*, 550 F.2d 505, 508–10 (2d Cir.1977).

C. The Wasserman Declaration [Docket No. 74]

45. Mr. Wasserman is a non-percipient accountant who was retained by the FDIC to summarize certain prior tax filings, opine about which entity supposedly generated some or all of the NOLs that were carried back to obtain the tax refunds, and otherwise try to explain certain information for the Court. The Trustee objected to admission of this declaration, arguing that (1) it was improper new evidence submitted via reply briefing; and (2) nothing in the Wasserman Declaration ultimately has any bearing on the resolution of this dispute, thus the Wasserman Declaration is irrelevant. The FDIC argued that the Wasserman Declaration is admissible based upon certain documents and tax records and was proper as a reply to the First Supplemental Tomlinson Declaration submitted by the Trustee.

46. The Court sustained the Trustee's objection and declined to admit the Wasserman Declaration into evidence because the Court concluded it is not relevant.

D. The First Supplemental Tomlinson Declaration [Docket No. 62]

47. Ms. Tomlinson is a partner at the accounting firm that has been retained to assist the Trustee in his administration of the Bancorp estate. Ms. Tomlinson submitted three different declarations in this litigation. The FDIC did not object to the first or third Tomlinson declarations, but did object to parts of the First Supplemental Tomlinson Declaration.

48. Specifically, the FDIC argued that paragraph 6 of the First Supplemental Tomlinson Declaration was flawed because it improperly described the nature of the 2008 consolidated NOL. Although the Court does not believe that the quantification or specific attribution of the consolidated NOL is material to the resolution of this dispute, Ms. Tomlinson's admitted error was subsequently corrected by the Second Supplemental Tomlinson Declaration, to which the FDIC filed no objection. As such, the Court believes this issue has been resolved.

***11** 49. The FDIC also argued that the First Supplemental Tomlinson Declaration improperly described and failed to authenticate documents that were attached to the declaration as Exhibits "N", "O" and "P". These documents all relate to how Bancorp and the Bank handled a tax refund that was paid to Bancorp in late 2007, before the failure of the Bank and Bancorp's bankruptcy petition, which supported arguments that the Trustee made in opposition to the FDIC MSJ. In light of the Court's conclusion that the TSA is unambiguous, the Court ultimately did not rely upon evidence or argument about how this prebankruptcy 2007 tax refund was addressed. Nevertheless, the Court overruled the FDIC's authentication objection. In many bankruptcy cases, particularly chapter 7 cases in which a trustee is appointed, it is difficult if not impossible to locate the individuals who were involved with particular documents or transactions prior to the filing of the bankruptcy case. In such circumstances, the Court considers it appropriate to analyze the authenticity of documents based upon the best resources actually available to the trustee. Here, the Court does not have reason to doubt—and the FDIC never offered any—that the documents attached to Ms. Tomlinson's declaration are what they purport to be, which is certain banking statements and records that were maintained in the ordinary course of Bancorp's business and now are in the Trustee's possession. Therefore, the Court concludes that the Trustee may appropriately rely upon the documents attached to the First Supplemental Tomlinson Declaration.

V. *PROPOSED CONCLUSIONS OF LAW AND ANALYSIS*

50. Both the Trustee and the FDIC seek summary judgment, which is appropriate if there is no *genuine* dispute as to any *material* fact and the moving party "is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a)

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(made applicable here by Fed. R. Bankr.P. 7056). A dispute is "genuine" only "if the evidence is such that a reasonable [finder of fact] could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The only facts that are "material" for these purposes are those that "might affect the outcome of the suit under the governing law.... Factual disputes that are irrelevant or unnecessary will not [preclude summary judgment]." *Id.*

51. The Court concludes that there is no genuine dispute of material fact and that the Trustee is entitled to judgment as a matter of law regarding the status of the tax refunds as property of the Bancorp estate.[FN6] As detailed below, this conclusion flows from the terms of the TSA, the application of principles of California law in light of those terms, and the interface of the result under California law with black letter concepts of federal bankruptcy law.

> FN6. The factual findings that the Court believes necessary to resolve this litigation are set forth in Part III above. As noted in footnote 3, this Part V of the Report and Recommendation contains discussion of additional factual issues that, although *relevant* for purposes of considering certain arguments made by the parties, ultimately are not ones that the Court considers *material* for purposes of ruling on the Trustee MSJ or the FDIC MSJ. To the extent the District Court disagrees with any of the Court's materiality analysis, the factual propositions discussed below should be treated as though they were set forth in Part III.

A. A Bankruptcy Filing Creates An Estate That Encompasses A Very Broad And Expansive Set Of Property Interests, Including Contingent And Future Interests

***12** 52. When Bancorp filed a chapter 7 petition on July 31, 2008, a bankruptcy estate was created to hold "all legal or equitable interests of [Bancorp] in property *as of the commencement of the case.*" 11 U.S.C. § 541(a)(1) (emphasis added). The emphasized temporal phrase sets a "date of cleavage" and establishes the moment at which the parties' respective rights in property must be determined. *See, e.g., In re Peterson*, 106 B.R. 229, 230 (Bankr.D.Mont.1989); *In re Palmer*, 57 B.R. 332, 333–34 (Bankr.W.D.Va.1986). This is a longstanding and fundamental rule of bankruptcy law. *See Everett v. Judson*, 228 U.S. 474, 479, 33 S.Ct. 568, 57 L.Ed. 927 (1913).

53. The scope of an estate's property interests is broad. *E.g., United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204, 103 S.Ct. 2309, 76 L.Ed.2d 515 (1983); *In re Central Ark. Broad. Co.*, 68 F.3d 213, 214 (8th Cir.1995). 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); *see also, e.g.*, 11 U.S.C. § 541(c)(1)(A) (providing that assets become estate property notwithstanding any provision of nonbankruptcy law that would prevent their being liquidated or transferred by the debtor); H.R. REP. No. 95–595, at 175–76 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6136 (making clear that "property of the estate" includes all "contingent interests and future interests, whether or not transferable by the debtor").

54. Case law further confirms that "[a] debtor's contingent interest in future income has consistently been found to be property of the bankruptcy estate," because "every conceivable interest of the debtor, future, nonpossessory, contingent, speculative, and derivative, is within the reach of § 541." *In re Yonikus*, 996 F.2d 866, 869 (7th Cir.1993). Indeed, there is a series of decisions by the Ninth Circuit Court of Appeals finding that future rights or expectancies, including those related to future tax refunds and tax attributes, based on prepetition activities are within the expansive scope of bankruptcy estate property. *See United States v. Sims (In re Feiler) ("Feiler")*, 218 F.3d 948, 955–56 (9th Cir.2000); *Neuton v. Danning (In re Neuton)*, 922 F.2d 1379, 1382–83 (9th Cir.1990); *Rau v. Ryerson (In re Ryerson)*, 739 F.2d 1423, 1424–26 (9th Cir.1984).

55. In addition to broadly defining property of the estate in the first instance, the Bankruptcy Code also provides that, as a matter of federal law, a debtor's bankruptcy estate includes all "[p]roceeds, product, offspring, rents, or profits of or from property of the estate." 11 U.S.C. § 541(a)(6).

56. The central question on which the Trustee and the FDIC disagree is whether the tax refunds at issue are among the property interests that passed into Bancorp's bankruptcy estate on July 31, 2008. The first step to answering that question lies in the provisions of the TSA that Bancorp and the Bank executed many years before the filing of any bankruptcy case.

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B. Under A Well Established Body Of Case Law, The Relationship Between Bancorp And The Bank Was One Of Debtor And Creditor Under California Law, Which Means All The Refunds Are Now Property Of Bancorp's Estate

***13** 57. In analyzing the nature of the prebankruptcy rights, obligations, and relationships arising under the TSA, the Court has found guidance in two categories of authority. First, the Court has looked to a set of cases involving the very issue presented here: a dispute about the ownership of tax refunds in bankruptcy when a prebankruptcy tax sharing agreement existed. [FN7] Second, the Court has looked to a separate set of cases involving the interpretation of parties' legal relationships—both inside and outside of bankruptcy—under California law.[FN8] These central authorities, along with other cases involving analogous disputes, coalesce around a set of consistent and well developed legal principles. When the TSA is examined against this core set of principles, it becomes clear that the TSA established a debtor-creditor relationship between Bancorp and the Bank regarding future tax refunds, meaning that Bancorp owned the refunds in question and was obligated to make payments to the Bank pursuant to the terms of the TSA. The Bank held a right to payment against Bancorp for amounts that might or might not correspond with the amount of any refund received by Bancorp. The reasoning supporting the Court's conclusion, the rationales for distinguishing the FDIC's two cited authorities, and the consequences of the Court's conclusion vis-à-vis the respective rights of the Trustee and the FDIC in the Bankruptcy Case are developed below.

FN7. The primary authorities in this category are: *United States v. MCorp Fin., Inc. (In re MCorp Fin., Inc.) ("MCorp")*, 170 B.R. 899 (S.D.Tex.1994); *BankUnited*, 462 B.R. 885; *NetBank*, 459 B.R. 801; *Team Fin. Inc. v. FDIC (In re Team Fin., Inc.) ("Team Financial")*, Adv. Proc. No. 09–5084, 2010 WL 1730681 (Bankr.D.Kan. Apr.27, 2010); *Superintendent of Ins. v. First Cent. Fin. Corp. (In re First Cent. Fin. Corp.) ("First Central")*, 269 B.R. 481 (Bankr.E.D.N.Y.2001), *aff'd*, 377 F.3d 209 (2d Cir.2004); and *Franklin Sav. Corp. v. Franklin Sav. Ass'n (In re Franklin Sav. Corp.) ("Franklin Savings")*, 159 B.R. 9 (Bankr.D.Kan.1993), *aff'd*, 182 B.R. 859 (D.Kan.1995).

FN8. The primary authorities in this category are: *Foothill Capital Corp. v. Clare's Food Mkt., Inc. (In re Coupon Clearing Serv., Inc.) ("Coupon Clearing")*, 113 F.3d 1091 (9th Cir.1997); *Altura P'ship v. Breninc, Inc. (In re B.I. Fin. Servs. Grp., Inc.)*, 854 F.2d 351 (9th Cir.1988); *Weststeyn Dairy 2 v. Eades Commodities Co.*, 280 F.Supp.2d 1044 (E.D.Cal.2003); *Lonely Maiden*, 201 Cal.App.4th 368, 135 Cal.Rptr.3d 69; *Del Costello v. State of California*, 135 Cal.App.3d 887, 185 Cal.Rptr. 582 (Ct.App.1982); *Tyler v. State of California*, 134 Cal.App.3d 973, 185 Cal.Rptr. 49 (Ct.App.1982); and *Petherbridge v. Prudential Sav. & Loan Ass'n*, 79 Cal.App.3d 509, 145 Cal.Rptr. 87 (Ct.App.1978).

1. Analysis Of The TSA's Terms Reveals A Debtor–Creditor Relationship And Forecloses The Existence Of Any Other Relationship

58. The Court's analysis of the applicable case law indicates that three key factors are examined when considering whether a particular document or transaction establishes a debtor-creditor relationship, on the one hand, or a different sort of relationship (such as a trust, mere agency, or bailment relationship), on the other hand. Individually, each of these factors weighs in favor of the conclusion that the TSA establishes a debtor-creditor relationship; collectively, the factors provide strong support for that conclusion.[FN9] As explained above, the Court finds that the intention of the parties can be determined from the TSA itself and that there is no ambiguity which requires parol or extrinsic evidence to discern the parties' intentions.

FN9. In connection with the Trustee's opposition to the FDIC MSJ, the Trustee pointed to documents and deposition testimony concerning the actual course of conduct with respect to a tax refund paid to Bancorp in October 2007. The FDIC, on the other hand, pointed to a course of conduct with respect to a 2005 tax year refund that was described in the Wasserman Declaration. Because the Court concludes that the TSA is unambiguous in its creation of a debtor-creditor relationship, the Court did not find it necessary to consider extrinsic evidence beyond the four-corners of the contract. If, however, the District Court disagrees with this Court's reading of the TSA, it could be appropriate to consider the evidence and arguments that the parties made with respect to the course of dealing and the ramifications of that course of dealing.

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a. The TSA Creates Fungible Payment Obligations Unrelated To Any Refunds

59. Other courts have repeatedly found that the use of such terms as "reimbursement" or "payment" in a tax sharing agreement evidences a debtor-creditor relationship. *E.g.*, *BankUnited*, 462 B.R. at 900; *NetBank*, 459 B.R. at 814–15; *Team Financial*, 2010 WL 1730681, at *10–11; *First Central*, 269 B.R. at 497–98; *Franklin Savings*, 159 B.R. at 29. The reason is that such terms create "ordinary contractual obligations" or "an account, a debtor-creditor relationship, which is the quintessential business of bankruptcy." *MCorp*, 170 B.R. at 902; *First Central*, 269 B.R. at 498. This precept fully accords with the Ninth Circuit's application of California law in the bankruptcy context to "conclude that as a matter of law a debtor-creditor relationship" exists when the parties' prepetition agreements create fungible payment obligations. *Coupon Clearing*, 113 F.3d at 1101–02.[FN10]

FN10. In *Coupon Clearing*, a group of grocers argued that, under California's laws of agency, trust, and bailment, coupon proceeds in the process of being remitted by manufacturers were not property of the chapter 7 estate created when an intermediary (their coupon processor) filed for bankruptcy. As here, the retailers' relationship with the debtor was defined by the parties' prepetition contracts, which the retailers attempted to construe in a fashion similar to the FDIC's arguments about the TSA. The Ninth Circuit rejected the retailers' position, articulating principles that are equally instructive here.

***14** 60. Here, Sections 2, 3, and 4 of the TSA create a system of intercompany "payments" and "reimbursements" that may differ materially from the amount of any tax refunds actually received by Bancorp.

61. Bancorp is responsible under the TSA to pay all of the consolidated group's tax liability. TSA § 2. Each subsidiary of Bancorp, including the Bank, is required to pay to Bancorp the amount of its hypothetical separate tax liability, calculated as if it had filed a separate federal or state income tax return. *Id.* The TSA expressly authorizes Bancorp, in its "sole discretion," to determine whether any tax refunds to which the consolidated group is entitled will be paid or credited against future tax liabilities of the consolidated group. TSA § 5. Any payment of refunds is made directly to Bancorp and in Bancorp's name. *See* 26 C.F.R. § 1.1 502–77(a)(2)(v).

62. The TSA also provides for "payment" or "reimbursement" from Bancorp to the Bank under certain conditions if the Bank suffers losses that would have entitled it to a refund had it filed separate tax returns. In the case of the Bank having current losses, the TSA states that Bancorp "shall reimburse" the Bank for the Bank's current losses, but only in "an amount equal to the amount the Bank Group would have received had it carried back the current losses against the Bank Group's separate taxable income in prior years." TSA § 3. In the case of subsequent adjustments to income, gains, losses, deductions, or credits, the TSA requires "payment" by Bancorp to the Bank if the adjustment would have resulted in a smaller hypothetical separate tax liability for the Bank. TSA § 4(a). In both cases, "reimbursement" or "payment" is to be made no later than within 15 business days (*i.e.*, three weeks or more) after Bancorp actually receives a tax refund from the taxing authority. TSA §§ 3 & 4(a).

63. The terms "reimbursement" and "payment" are indicative of a debtor-creditor relationship and, in comparison, are completely inconsistent with the existence of a trust or agency relationship. *See, e.g.*, *Team Financial*, 2010 WL 1730681, at *10–11; *First Central*, 269 B.R. at 495–98; *Franklin Savings*, 182 B.R. at 863. Nothing in the TSA ever suggests that the Bank has a direct interest in any refunds, as opposed to the right to receive a generalized payment of money from Bancorp. Indeed, the prefatory paragraph regarding the "intent" of the TSA provides that the Bank should "make and receive *payments* as if it were filing income tax returns separate from and excluding [Bancorp]" (emphasis added). This right to receive fungible "payments" using a formula calculated as if the Bank were a separate tax filer is meaningfully different from the right to receive any specific *refunds* upon receipt.

64. Contrary to an argument made by the FDIC, the use of the terms "reimbursement" and "payment" in the TSA is not limited to an isolated occurrence. "Reimbursement" is used three times in Section 3 alone, and the terms "payment" or "shall pay" appear numerous times throughout the entire TSA, including in the initial paragraph about the parties' intent. The Court believes that this consistent, repeated use of these key terms and the overall system of intercompany "payments" or "reimbursements" established by the TSA strongly evidence the parties' creation of a debtor-creditor relationship. [FN11] Such terms are substantively meaningful indicia of the legal relationship created by agreement among the parties. The Court agrees with the Trustee that a series of decisions extend-

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ing from 1993 through the present that cite the terms "reimbursement" and "payment" as indicative of a debtor-creditor relationship are correctly decided.

> FN11. The FDIC cited *In re Florida Park Banks, Inc.*, 110 B.R. 986 (Bankr.M.D.Fla.1990), for the proposition that the term "reimbursement" is insignificant. In that case, the court determined there was *no agreement* between the holding company and the subsidiary. *Id. at* 988–89. Rather, the term "reimbursement" appeared in a "policy statement" regarding tax refunds in the minutes of a board meeting. In dicta, the court concluded that, even if the "policy statement" were a binding agreement, it did not create a debtor-creditor relationship not because it believed "reimbursement" was an insignificant term, but for other reasons. *See id.* at 988. This case is inapposite and distinguishable.

***15** 65. The Court finds it particularly telling that the amount due from Bancorp to the Bank under the TSA may be significantly different from the amount of any refunds received and may even be due when no refunds are paid to Bancorp. This is similar to the requirements of the agreements in the *NetBank* and *First Central* cases, which also provided that the subsidiary will be paid amounts equal to what the subsidiary would have received if it hypothetically were a standalone tax filer. *See NetBank*, 459 B.R. at 814–15; *First Central*, 269 B.R. at 496. Logically, this construct defeats the FDIC's suggestion that the Bank ever had direct property rights in tax refunds. Instead, what the Bank held was a contractual claim against Bancorp that may or may not be owing at the same time that Bancorp receives refunds and likely will be owing in an amount different from any refunds received. This relationship sits at the heart of the TSA and fits within the debtor-creditor paradigm.

b. The TSA Contains No Escrow, Segregation Requirement, Or Use Restrictions On Refunds That Bancorp Receives

66. Other courts have repeatedly found that the lack of provisions requiring the parent to segregate or escrow any tax refunds and the lack of restrictions on the parent's use of the funds while in the parent's possession further evidences a debtor-creditor relationship. *See, e.g., NetBank*, 459 B.R. at 812–14; *Team Financial*, 2010 WL 1730681, at *11; *First Central*, 269 B.R. at 496; *Franklin Savings*, 182 B.R. at 863. Once again, controlling Ninth Circuit authority involving other types of contracts is in accord. *See Coupon Clearing*, 113 F.3d at 1101–02; *In re B.I. Fin. Servs. Grp.*, 854 F.2d at 354–55. So too are decisions by California's state courts. *See Lonely Maiden*, 135 Cal.Rptr.3d at 78–82; *Del Costello v. State of California*, 185 Cal.Rptr. at 585–87; *Tyler v. State of California*, 185 Cal.Rptr. at 51–52; *Petherbridge*, 145 Cal.Rptr. at 92 & 97–98. In fact, the notion that a debtor-creditor relationship exists when, prior to bankruptcy, commingling or unrestrained use of funds by the debtor was possible is one that has been applied for decades and in the context of many different sorts of business relationships. *See, e.g., Pan Am. World Airways, Inc. v. Shulman Transp. Enters., Inc. (In re Shulman Trans. Enters., Inc .)*, 744 F.2d 293, 295–96 (2d Cir.1984); *Carlson, Inc. v. Commercial Disc. Corp.*, 382 F.2d 903, 905–06 (10th Cir.1967); *In re Lord's, Inc.*, 356 F.2d 456, 458–59 (7th Cir.1965); *In re Martin's*, 11 F.Supp. 99, 101 (E.D.N.Y.1935); *In re M.W. Sewall & Co.*, 431 B.R. 526, 529–32 (Bankr.D.Me.2010).

67. The key principle emerging from these cases was summarized in *In re Black & Geddes, Inc.*: "It is a firmly established principle that if a recipient of funds is not prohibited from using them as his own and commingling them with his own monies, a debtor-creditor, not a trust, relationship exists." 35 B.R. 830, 836 (Bankr.S.D.N.Y.1984). These precise words have been quoted and applied by the Ninth Circuit Court of Appeals and by California's state appellate courts. *See Coupon Clearing*, 113 F.3d at 1101; *Lonely Maiden*, 135 Cal.Rptr.3d at 79. In contrast to the first factor discussed in the preceding section, this factor does not turn on the precise words of the agreement, but instead looks to the broader range of actions that are permitted or forbidden by the agreement.

***16** 68. The TSA contains no escrow provision, segregation requirements, or restrictions on Bancorp's use of tax refunds that the government pays to Bancorp. Nothing contained in the TSA imposes any duty upon Bancorp to hold these funds in trust or to treat them as trust funds for the benefit of any of the other parties. Instead, before a payment becomes due to the Bank, the TSA provides that Bancorp has complete dominion and control over all monies received from the taxing authorities for three weeks or more, and the Bank's rights are limited to the expectancy of payment of a contractually calculated sum at a future date. These are facts the FDIC did not and cannot contest. Rather, the FDIC argued that decisions imposing requirements of segregation or use restrictions do not explain the basis for such requirements. This is not correct; the other courts *do* provide a basis for their conclusions.

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As those courts cogently explain, a debtor-creditor relationship is created because lack of segregation provisions or use restrictions undermines the direction and control necessary to establish an agent or trustee relationship. *See, e.g., Coupon Clearing,* 113 F.3d at 1099–1102; *NetBank,* 459 B.R. at 812–14; *First Central,* 269 B.R. at 496–97; *Lonely Maiden,* 135 Cal.Rptr.3d at 79–81 & 84.[FN12] As applied here, these principles make clear that when Bancorp holds tax refunds, Bancorp stands as a future debtor of the Bank (after the passage of three weeks), not as a trustee or an agent. The Court concludes that this factor is strongly indicative of a debtor-creditor relationship.

> FN12. To similar effect is *BankUnited;* as in that case, Bancorp was obligated *eventually* to remit a payment to the Bank under the TSA, but prior to that time:
>
> > the [tax agreement] does not require the Holding Company to deliver those funds to the Bank, nor does anything in the [tax agreement] suggest that the Holding Company accepts those funds from the IRS in any kind of trust or agency capacity or holds the funds under any specialized status that would cause those funds to be considered something other than the property of the Holding Company when in its possession.
>
> 462 B.R. at 900.

c. The TSA Delegates Complete And Unrestrained Decision–Making To Bancorp Regarding All Tax Matters

69. Other courts have repeatedly found that contractual provisions giving a parent sole discretion to prepare and file consolidated tax returns and to elect whether or not to receive a refund also evidence a typical debtor-creditor relationship. *E.g., NetBank,* 459 B.R. at 815–16; *First Central,* 269 B.R. at 497. Yet again, controlling Ninth Circuit case law supports and accords with the reasoning of these courts. *See Coupon Clearing,* 113 F.3d at 1099–1100.

70. Section 5 of the TSA gives Bancorp "sole discretion" over myriad tax-related matters, including the manner in which tax returns are prepared and filed, whether any refunds should be paid or credited against future tax liability and how to resolve disputes with the Internal Revenue Service (the "IRS"). This is the exact opposite of the Bank having day-to-day control over the means of Bancorp's implementation of the TSA. In *NetBank,* the parties had a contractual provision nearly identical to Section 5 of the TSA. *See* 459 B.R. at 804–05. That court held that this provision "does not subject the [Parent] to the direction or control of any member of the Consolidated Group and does not establish a principal-agent relationship." *Id.* at 816.

71. The FDIC asserted that the lone use of the word "agent" in Section 5 of the TSA somehow made Bancorp a mere agent as to any tax refunds it received. The Court declines to adopt the FDIC's interpretation of the contract. First, Section 5 does not address receipt or payment of refund-referenced amounts following receipt—those matters are governed by other parts of the TSA—or ever say that refunds payable to Bancorp are held merely as an agent. Second, Section 5 of the TSA similarly does not subject Bancorp to the Bank's direction or control in any fashion—the Bank expressly granted such control to Bancorp and relinquished any say in how Bancorp exercises its discretion as "agent" for the consolidated group. On this score, the Court believes that the word "agent" is a particularly loose and slippery term with many possible meanings.[FN13] As such, consistent with the approach taken by other courts, the Court finds it appropriate to analyze the practical substance of the parties' relationship, rather than to ascribe "talismanic" importance to an indefinite word such as "agent." *See, e.g., In re Morales Travel Agency,* 667 F.2d 1069, 1071–72 (1st Cir.1981); *NetBank,* 459 B.R. at 815–17. As a matter of substance, Section 5 of the TSA and the document as a whole place Bancorp firmly in the driver's seat regarding tax filings and refunds. This division of power further supports a finding that a debtor-creditor relationship existed between Bancorp and the Bank.

> FN13. The pliability of the word "agent" is underscored by the District Court's prior discussion of 26 C.F.R. § 1.1502–77, which makes Bancorp an "agent" to act on behalf of members of its consolidated group vis-à-vis the IRS. As the District Court noted, case law makes clear that this "agent" status is procedural only and without effect on the parties' ownership rights. *Siegel v. FDIC,* 2011 WL 2883012, at *5; *see also, e.g., BankUnited,* 462 B.R. at 896; *NetBank,* 459 B.R. at 809–10; *Team Financial,* 2010 WL 1730681, at *5–7; *First Central,* 269 B.R. at 489.

***17** 72. In sum, the Court concludes that there is a substantial body of case law demonstrating why the Trus-

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tee's proposed interpretation of the TSA is correct. The Court elects to follow the holdings of *MCorp*, 170 B.R. 899, *BankUnited*, 462 B.R. 885, *NetBank*, 459 B.R. 801, *Team Financial*, 2010 WL 1730681, *First Central*, 269 B.R. 481 & 377 F.3d 209, and *Franklin Savings*, 159 B.R. 9 & 182 B.R. 859, which are directly on point. This approach finds further support in the Ninth Circuit's controlling application of California law in *Coupon Clearing*, 113 F.3d at 1099–1102, and in several decisions by California's state courts. The Court views this line of authority as providing a well-reasoned and appropriate application of bankruptcy law to very similar agreements and facts. The Court's analysis of the factors developed in these cases required the Court to closely examine the TSA from all angles. The Court has not only carefully studied the text of the contract, but also considered the overall structure and substantive relationship it created between Bancorp and the Bank. Regardless of the path taken, the destination remains the same: as a matter of law, the TSA operates as part of a debtor-creditor relationship between Bancorp and the Bank with respect to the tax refunds.

2. The FDIC's Two Tax Refund Cases Are Distinguishable

73. In arguing against the effects of the authorities discussed in the preceding section of this Report and Recommendation, the FDIC relied upon two unpublished decisions in which other courts concluded that tax refunds were not property of the parent company's bankruptcy estate despite the existence of a prebankruptcy tax sharing agreement: *BSD Bancorp, Inc. v. FDIC (In re BSD Bancorp, Inc.) ("BSD Bancorp")*, No. 93–12207–A11 (S.D.Cal. Feb. 28, 1995), and *Lubin v. FDIC ("Lubin")*, No. 10–00874, 2011 WL 825751 (N.D.Ga. Mar. 2, 2011). The Court believes that both of these cases are distinguishable and concludes that neither of these decisions provides authority for the outcome urged by the FDIC in this case.

74. The key distinction between this case and both of the FDIC's cases is that courts found that the agreements in those cases affirmatively provided what the TSA does not. The *BSD Bancorp* tax sharing agreement allowed the parent to borrow tax refunds from the subsidiary in "remote" and "unusual" circumstances. *See* slip op. at 5 & 11. Therefore, by negative inference, the court found that the agreement did not create a debtor-creditor relationship because, looking at its "economic reality," "except in the 'unusual' circumstances in which the agreement allowed [parent] to borrow the refund, the agreement required [parent] to give the [subsidiary] its share of the refund in cash and *immediately*." *Id.* at 10–11 (emphasis added). The TSA contains no special and "unusual" loan option and does not include any requirement of an *immediate* downstream from Bancorp to the Bank. Rather, Bancorp obtains full control over the refunds upon receipt and then has three weeks before it is required to make any payment to the Bank, which might or might not equal the amount of the tax refunds previously received. The TSA cannot be premised on anything other than Bancorp's ownership interests in the tax refunds given Bancorp's unfettered dominion and control over the refunds and Bancorp's contractual obligation to pay amounts to the Bank that may vary significantly from the amount of any refunds paid to Bancorp. This is a different economic reality, creating different legal results. *See also* *BankUnited*, 462 B.R. at 900 (distinguishing *BSD Bancorp* where "nothing in the [tax agreement] suggests that there are particularized instances when the obligations between the Holding Company and the Bank *would* create a debtor/creditor relationship, such that in all other instances the nature of the obligation is something else"); *NetBank*, 459 B.R. at 816–17 (similarly distinguishing *BSD Bancorp* based upon key differences between the operative agreements).

***18** 75. Likewise, in *Lubin*, the court relied on the following language to find that the tax agreement in that case established an agency relationship:

> If the Holding Company receives a tax refund from a taxing authority, these funds *are obtained as agent* of the consolidated group *on behalf of the individual group members*. This allocation agreement as well as other corporate policies should not be intended to consider refunds attributable to the subsidiary banks, which are received by the Holding Company from the taxing authority, as the property of the Holding Company.

2011 WL 825751, at *5 (emphasis added). Thus, the *Lubin* court concluded that this agreement included specific contractual language affirmatively establishing a substantive agency relationship with respect to tax refunds and disclaiming any parent interest in those tax refunds. The TSA includes nothing of the sort. *See also* *BankUnited*, 462 B.R. at 900 (distinguishing *Lubin* on similar grounds).

76. The decisions in *BSD Bancorp* and *Lubin*, even if correctly decided, actually strengthen the Court's conclusion that the TSA establishes a debtor-creditor relationship. Each decision provides an example of language other courts deemed contrary to a debtor-creditor relation-

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ship that *could* have been included in the TSA if the parties had so desired, but was not. As a result, the Court does not believe that either of these decisions supports the FDIC's position.

77. The fact that Bancorp and the Bank could have structured a different prebankruptcy relationship resolves the FDIC's repeated emphasis on the fact that many of the losses indirectly resulting in the tax refunds were generated by the Bank, that the prior year taxes were paid on account of activities at the Bank, and that the Bank paid taxes directly to the taxing authorities. All of this may be true (although the Court made no specific findings since these disputes are not material), but Bancorp and the Bank reduced to writing their agreement and understanding about what would happen in these circumstances. Under Section 5 of the TSA, Bancorp had full discretion as to whether and how to file tax returns, including whether to carry consolidated NOLs back to obtain refunds or to carry them forward to offset future income. If Bancorp had elected to carry consolidated NOLs back and, if some portion of those NOLs arose on account of the Bank's operations, the parties agreed that Bancorp would have an eventual obligation to pay a mathematically determined sum to the Bank, which amount could differ greatly from the amount of any refunds or be due even if no refunds were received. The Court agrees with the Trustee that the TSA cannot be read to create anything other than a debtor-creditor relationship.

3. The Consequence Of A Debtor–Creditor Relationship Under Bankruptcy Law

78. Because the TSA sets forth a debtor-creditor relationship between Bancorp and the Bank with respect to the tax refunds, it is necessary to consider the consequences of this relationship in the context of the Bankruptcy Case. For the reasons expressed below, the Court concludes that the consequences are that (1) all of the refunds passed into Bancorp's bankruptcy estate on July 31, 2008; and (2) the FDIC acquired a prepetition "claim" under the Bankruptcy Code.

a. Bancorp Has An Interest In All The Tax Refunds as of the Petition Date

***19** 79. As explained in Part V.A above, case law and legislative history make clear that the property of a debtor's estate includes all manner of rights in which the debtor has an interest on the date it filed for bankruptcy, even if that interest was contingent, non-possessory, speculative, unliquidated or inchoate. The specific question presented here is whether the scope of property of the estate includes tax refunds resulting from the carryback of 2007 and 2008 consolidated NOLs to prior years, even if tax returns were not actually filed and the refunds were not actually paid until after the July 31, 2008 Petition Date.

80. The seminal case bearing on whether the tax refunds are petition date property is Segal v. Rochelle, 382 U.S. 375, 86 S.Ct. 511, 15 L.Ed.2d 428 (1966). In *Segal,* the debtors' bankruptcy petition was filed on September 27, 1961. *Id.* at 376. After the end of 1961, losses from that year were carried back against taxes the debtors paid on account of income in 1960 and 1959, which generated tax refunds. *Id.* Like the FDIC here, the *Segal* debtors argued that these tax refunds were not property of their estates because "under the statutory scheme no refund could be claimed from the Government until the end of the year." *Id.* at 380. The Supreme Court rejected this argument, and held instead that the tax refunds were "sufficiently rooted in the prebankruptcy past" to be property of the estate. *Id.* Although the tax year had not ended prior to the bankruptcy petition, "taxes had been paid on net income within the past three years, and the year of bankruptcy at that point exhibited a net operating loss," which rendered the debtors' future refunds—of taxes paid prepetition as the result of losses incurred prepetition—estate property notwithstanding the contingencies and uncertainties associated with actually obtaining those refunds. *See id.* at 380–81. In a line that remains equally applicable today, the Supreme Court emphasized that in bankruptcy "the term 'property' 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." *Id.* at 379.

81. *Segal's* "sufficiently rooted in the prebankruptcy past" standard remains the law under the Bankruptcy Code. *See, e.g.,* Feiler, 218 F.3d at 955–56; *Ryerson,* 739 F.2d at 1416. Indeed, in legislative history to the 1978 Bankruptcy Code, Congress wrote that "[t]he result of *Segal v. Rochelle* is followed, and the right to a refund is property of the estate." H.R. REP. No. 95–595, at 367 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6323 (citation and footnote omitted).

82. Many courts have followed *Segal* and held that a debtor's estate includes tax refunds actually paid postpetition as a result of the carryback of losses incurred or income earned during the year of the petition, even when the petition is filed in the middle of the year. *See, e.g.,* Araj v. Kohut (In re Araj), 371 B.R. 240, 242–44

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(E.D.Mich.2007); *United States v. Carey (In re Wade Cook Fin. Corp.) ("Wade Cook")*, 375 B.R. 580, 594–97 (B.A.P. 9th Cir.2007); *In re Flying J, Inc. ("Flying J")*, No. 08–13384, 2009 WL 5215000, at *4 (Bankr.D.Del. Dec.28, 2009); *In re Matthews*, 380 B.R. 602, 607 (Bankr.M.D.Fla.2007); *Wilson v. IRS (In re Wilson)*, 29 B.R. 54, 57–58 (Bankr.W.D.Ark.1982). Against the weight of these cases, the FDIC argued that the right to future tax refunds payable on account of the tax returns and refund claims filed by Trustee on behalf of the consolidated group of which the Bank and Bancorp were members did not constitute property of Bancorp's estate as of the Petition Date. The FDIC asserted that none of these cases apply here because none of them supposedly involved a bankruptcy estate asserting ownership of tax refunds based upon NOLs claimed by members of a consolidated group when the debtor in bankruptcy is the parent member of the group and therefore is responsible for filing all consolidated tax returns.

***20** 83. The Court finds the Trustee's line of authority persuasive and consistent with the reasoning of the Supreme Court in *Segal*. The central proposition of these cases is that, when there is an expectancy that future tax refunds may be paid based upon prebankruptcy events, those refunds are property of the debtor's bankruptcy estate, even if there are many steps that must be performed after bankruptcy in order to actually liquidate and obtain payment of the refunds (such as the ending of a taxable year, filing of tax returns, and payment of refunds by the government) and even if the amount of those refunds is unknown or unknowable on the Petition Date. *See Wade Cook*, 375 B.R. at 595–96. As applied here, the effects of *Segal* and its progeny make the future tax refunds that would be payable to Bancorp property of Bancorp's bankruptcy estate. As in all of these cases, the predicates of the tax refunds (payment of prior year taxes and incurrence of losses) occurred prior to bankruptcy, which renders the refunds sufficiently rooted in the prebankruptcy past to be estate property despite the fact that the Petition Date occurred in the middle of 2008. Although Bancorp's right to receive physical payment of the refunds depended on certain postpetition events, Bancorp's expectancy in those refunds was no more inchoate than the debtors' petition date expectancy in *Segal* or in the many cases that have followed *Segal*. The Court does not believe that the supposed distinction the FDIC tries to draw against these cases (that they do not involve disputes among members of a consolidated group) alters the analysis or the result. The FDIC cited no authorities to suggest this is a relevant distinction, and all of the key authorities involving ownership disputes among members of consolidated groups—including *BankUnited*, 462 B.R. 885, *NetBank*, 459 B.R. 801, *Team Financial*, 2010 WL 1730681, *First Central*, 269 B.R. 481 & 377 F.3d 209, and *Franklin Savings*, 159 B.R. 9 & 182 B.R. 859—demonstrate that the standard analysis about what is property of a bankruptcy estate applies with equal force in the consolidated group context.

84. The FDIC advanced several arguments designed to alter the status of at least some of the refunds resulting from the carryback of the 2008 NOL. After considering the FDIC's arguments and the Trustee's responses to these arguments, the Court concludes that none of the arguments provides a reason for the Court to depart from a straightforward application of *Segal* for the proposition that all of the tax refunds in question are property of Bancorp's bankruptcy estate.

(1) The FDIC's End–Of–Year Cases Are Distinguishable And Inapposite

85. In its briefing and at oral argument, the FDIC cited two lines of case law to support the assertion that Bancorp would have no right to refunds unless the tax year in which the consolidated NOLs were incurred actually closed before the Petition Date. The Court concludes that these cases address issues different from those presented here, a conclusion shared by the court in the *Flying J* case. *See* 2009 WL 5215000, at *2–4

***21** 86. First, the FDIC cited two cases addressing whether secured creditors could obtain liens against a debtor's tax refunds, each of which concluded that, for Uniform Commercial Code ("UCC") purposes, a debtor acquires "rights" to refunds only after the end of the taxable year.[FN14] But whether Bancorp had "rights" in the tax refunds for purposes of creating a security interest is critically different from whether those refunds fall within the broad scope of "property of the estate" under Bankruptcy Code section 541(a). For example, the *Brandt* case used a general rule of California law "that some interests are simply too remote or uncertain for a creditor's lien to attach" and the notion that, under the UCC, "a debtor cannot acquire rights in an item that may or may not come into existence based upon certain contingencies occurring in the future." *See* 279 B.R. at 559–60. That court explicitly distinguished its analysis from cases addressing whether tax refunds are property of the estate, including *Segal v. Rochelle*, as cases involving "issues particular to federal bankruptcy law." *Id.* at 559. But *this case* involves those very "issues particular to federal bankruptcy law," and Ninth Circuit authority demonstrates that assets may

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be property of a bankruptcy estate even though a debtor did not have sufficient rights in the collateral prepetition for a security interest to have attached to those rights under the UCC. *See* *In re Contractors Equip. Supply Co.*, 861 F.2d 241, 245 & 245 n. 7 (9th Cir.1988). Simply put, the FDIC's two cases apply a specific and different test for "rights" in collateral that is far narrower than the test utilized in the Ninth Circuit and elsewhere for "property of the estate." To the extent these cases purport to apply bankruptcy law concepts, the Court believes that their posited end of year rule cannot be reconciled with *Segal* and the Court elects to follow binding authority from the Supreme Court rather than non-binding authority from bankruptcy judges sitting in other districts. *Cf.* *Flying J*, 2009 WL 5215000, at *2–4.[FN15]

FN14. *Official Comm. of Unsecured Creditors of TOUSA, Inc. v. Citicorp N. Am., Inc. (In re TOUSA, Inc.) ("TOUSA")*, 406 B.R. 421, 431–32 (Bankr.S.D.Fla.2009); *Brandt v. Fleet Capital Corp. (In re TMCI Elecs.) ("Brandt")*, 279 B.R. 552, 558–61 (Bankr.N.D.Cal.2000).

FN15. The Court also specifically rejects the FDIC's attempted use of dicta in a footnote contained in the *NetBank* opinion. That footnote—citing *TOUSA*—states that tax refunds vest in a debtor "*no later than* ... the first day of the Debtor's tax year immediately succeeding the tax year in which the losses giving rise to the Tax Refund were incurred." 459 B.R. at 821 n. 12 (emphasis added). In the context of the *NetBank* opinion, this conclusion was all that was needed to resolve that litigation since—unlike here—the relevant tax years had actually ended prebankruptcy. That court's "no later than" language makes clear that the court was not opining on the separate issue presented here—which explains why *NetBank* does not ever cite or reference the *Segal* decision. Put simply, the FDIC's reading of this footnote is erroneous because it is divorced from the factual context of the *NetBank* decision.

87. Second, the FDIC cited a series of cases involving disputes between individual debtors and the trustee concerning refunds of income taxes that were withheld from the individuals' wages throughout the year.[FN16] Each of these cases contains virtually no discussion of the *Segal* decision. The reason why was explained by the *Flying J* court when it distinguished this series of cases: All of the FDIC's cases "dealt with the straightforward issue of the date the debtor became entitled to a tax refund for a tax year in which he overpaid," a scenario in which a "bright-line test is easily applied" because "the refund relates to activities in that tax year." 2009 WL 5215000, at *3. The reasoning of these cases is thus inapplicable in cases (such as *Flying J* and this case) "where the debtor seeks to apply losses incurred in one tax year to other tax years (either prospectively or retroactively)." *Id.* In the latter group of cases—where *income* ultimately producing refunds was earned in years that ended prior to the petition date—the resulting NOL carryback refunds are sufficiently rooted in the prebankruptcy past under *Segal*. *See id.* at *4.

FN16. *United States v. White*, 365 B.R. 457, 460 (M.D.Pa.2007); *In re Glenn*, 207 B.R. 418, 421 (E.D.Pa.1997); *In re Beaucage*, 334 B.R. 353, 357–58 (Bankr.D.Mass.2005); *In re Stienes*, 285 B.R. 360, 362 (Bankr.D.N.J.2002); *In re Conti*, 50 B.R. 142, 148 (Bankr.E.D.Va.1985).

(2) Parsing Of NOLs Among Entities Is Not Required, Although The Court Specifically Rejects The Notion That The "Consolidated Group" Owns Anything

***22** 88. Both sides to this litigation devoted attention to arguing about which specific NOLs were utilized to generate the tax refunds at issue. The Trustee introduced evidence that, of the $782,473,561 in consolidated 2008 NOL, $210,444,677 of that NOL is attributable to Bancorp activities. *See* Second Supplemental Tomlinson Declaration ¶ 2. The Trustee also cited case authority suggesting that all of the consolidated NOLs are property of Bancorp's estate.[FN17] For its part, the FDIC initially argued that the Bank had sufficient NOLs to generate all the refunds itself, and later took the position that each of the NOLs belonged to the "consolidated group" as a whole.

FN17. *See, e.g.*, *Marvel Entm't Grp., Inc. v. Mafco Holdings, Inc. (In re Marvel Entm't Grp., Inc.) ("Marvel")*, 273 B.R. 58, 83–85 (D.Del.2002); *Parker v. Saunders (In re Bakersfield Westar, Inc.) ("Bakersfield Westar")*, 226 B.R. 227, 232–34 (B.A.P. 9th Cir.1998); *In re Se. Banking Corp.*, No. 91–14561, 1994 WL 1893513, at *2 (Bankr.S.D.Fla. July 21, 1994); *In re PharMor, Inc.*, 152 B.R. 924, 926–27 (Bankr.N.D.Ohio 1993).

89. Ultimately, the Court believes that these debates are a sideshow and not material to resolution of this dispute—as the Ninth Circuit noted in *Feiler*, "[w]hether the

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NOLs themselves are considered property is something of a red herring," because the real issue is who owns the refunds. *See* 218 F.3d at 956. In answering that question, there are only two parties involved, Bancorp and the Bank. Additionally, although there is a tax law backdrop to this dispute, the central question—whether the tax refunds are property of Bancorp's bankruptcy estate—ultimately is an issue of bankruptcy law.

90. The debtor-creditor relationship established under the TSA means that Bancorp has an ownership interest in any tax refunds payable to it, *regardless* of the source of the losses (or the owner of any NOLs). The Bank—and *all* members of the entire consolidated group under Section 6 of the TSA—agreed to this structure in advance. The only issue to which the relative attribution of specific NOLs is germane is the mathematical calculation of any unsecured claim arising under the TSA. The fact that the TSA uses the adjectival term "the Group's" to modify "losses" and "refunds" has no impact on the nature of the relationship or rights created under that contract.

91. The Court specifically rejects the notion that the "consolidated group" could own anything in its own right. The "consolidated group" is a legal fiction created for tax purposes and for the convenience of the IRS. The "consolidated group" is not a legal entity or person with the capacity to own anything at all. *See, e.g.,* *Karls v. Mellon Capital Mgmt. Corp.*, 2010 WL 5115272, at *4–5 (Cal.Ct.App. Dec.15, 2010); I.R.S. Field Serv. Adv. Mem. 200027026, 2000 WL 33116161, at p. 4 (Apr. 10, 2000). A consolidated group cannot file its own bankruptcy case and did not file this Bankruptcy Case. Once again, the crux of this dispute is a fight between the Bancorp bankruptcy estate and the FDIC as receiver regarding the application of bankruptcy law concepts to these facts; the "consolidated group" is not and could not be a party to this litigation, and it does not have any property or other interests separate and apart from the members of the group.

(3) No Proration Is Required

***23** 92. First, regardless of the specific point at which NOLs accrued, the Court concludes that the entirety of the tax refunds are adequately grounded in the prebankruptcy past because all of the income that was subject to offset was undisputedly earned prepetition (in 2003, 2004, 2005, and 2006) and all of the prior year taxes that have now been refunded were paid prepetition in or for those prior years. As was true in the *Flying J* case, this reality leads the Court to conclude that the loss-carryback refund claim in this case is sufficiently rooted in the prebankruptcy past to be estate property under *Segal* regardless of when specific losses were occurred in 2008. *See* 2009 WL 5215000, at *4. Thus, no proration would be warranted even if some portion of the losses that generated the NOLs accrued post-petition.

93. Second, even if a proration analysis were undertaken, the record is such that the analysis would do nothing to improve the FDIC's position. The only legal foundation for proration would be dicta in *Segal* about the possibility of proration when "losses by the bankrupt after filing but before the year's end might *increase the refund.*" 382 U.S. at 380 n. 5 (emphasis added). Put differently, if sufficient losses existed prior to July 31, 2008 to generate the roughly $40 million in refunds resulting from the carryback of 2008 NOLs, then subsequent losses would be superfluous and provide nothing to which a proration analysis could even theoretically be applied.

94. An accountant declaration that the FDIC submitted in support of the FDIC MSJ leaves no doubt that there were sufficient, if not excessive, losses incurred prior to July 31, 2008 to generate the entire amount of the refunds now at issue. Specifically, the FDIC submitted the Thormahlen Declaration, a carefully written document which draws precise distinctions between the "Bank," the "Federal Bank," and the "Bank Group." This declaration provides what appears to be the only evidence in the record about the specific accrual of NOLs throughout 2008, and it is unequivocal in its statement that the Bank had, prior to its failure (on July 11, 2008, several weeks before the Petition Date), incurred sufficient NOLs to generate the refunds at issue here. Based upon these statements, the Court concludes that there necessarily would have been more than sufficient losses available to capture the same tax refunds if Bancorp's taxable year had ended on July 31, 2008.

95. Additionally, paragraph 4 of the Thormahlen Declaration explains further that massive losses were incurred in both 2007 and 2008, the amounts of which losses are *far* in excess of what would be needed to generate the $40 million in carryback tax refunds. Based upon this evidence, it defies logic for the FDIC to suggest that ample losses would not have existed prior to July 31, 2008 (at which point 7/12ths of the year would have elapsed). Indeed, common sense clearly indicts that a majority, if not the vast bulk, of the 2008 losses would have occurred in the first part of 2008, which is when the Bank was bleeding money and careening towards failure and

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seizure by the OTS. The FDIC's speculation, contradicted by the Thormahlen Declaration, that sufficient losses would not have been incurred to generate the exact same refunds is unsupported by the evidence. Thus, the Court finds that nothing in the record submitted to the Court gives rise to any *genuine* dispute about this issue in light of Mr. Thormahlen's unequivocal and uncontradicted testimony about the timing and magnitude of the losses.[FN18]

> FN18. The Court does believe that there is a factual disagreement about the full extent or attribution of NOLs beyond the amount sufficient to obtain the refund. As noted above, the Trustee has submitted evidence that $210,444,677 of the final 2008 consolidated NOL was attributable to Bancorp, which the FDIC disputed based upon statements in the Wasserman Declaration. Because the Court does not believe that it is necessary to resolve these issues to dispose of the Trustee MSJ or the FDIC MSJ, the Court ends its analysis at the point where the record makes clear that sufficient 2008 losses had been incurred prior to the Petition Date.

***24** 96. In summary, the Court does not believe that any "proration" analysis is appropriate here or that such an analysis, if undertaken, would alter the outcome. The simple fact of the matter is that the tax refunds at issue are all solidly grounded in the prebankruptcy period; the prospect that whatever taxes had been paid in prior years would be refunded was hardly one that was unduly remote. Under *Segal* and its progeny, that fact compels the conclusion that the refunds are property of Bancorp's estate.

97. Put very simply, the conclusion that follows from the debtor-creditor relationship under the TSA and decades of bankruptcy jurisprudence is that the tax refunds at issue are property of the Bancorp estate. *Segal* is directly applicable and dispositive here. There is no doubt that all of the income against which the consolidated NOLs were applied was earned prepetition or that there were sufficient prepetition 2007 and 2008 consolidated NOLs for Bancorp to carryback to prior years and obtain payment of all the tax refunds. As in *Segal, Wade Cook, Flying J* and other cases, both the income and the losses were rooted in the prebankruptcy past and gave Bancorp a vested prepetition interest in the tax refunds. The fact that *monetization* of Bancorp's Petition Date interests was contingent on the subsequent filing of tax returns, payment by the government, and the like does not diminish the *existence* of the refunds or their status as property of the estate on the Petition Date. "Filing a return is merely a procedural step that must be fulfilled in order to receive the refund." *Araj v. Kohut,* 371 B.R. at 244. The next question is what rights the *FDIC* possesses vis-à-vis those refunds, to which the Court now turns.

b. The FDIC Had A Petition Date "Claim" Relating To The Tax Refunds

96. In addition to defining the scope of Bancorp's estate under Bankruptcy Code section 541(a), the Petition Date also sets the marker for defining rights of creditors and third parties vis-à-vis the estate. *See, e.g., In re Fleishman,* 372 B.R. 64, 71 (Bankr.D.Or.2007); *In re Statmore,* 22 B.R. 37, 38 (Bankr.D.Neb.1982). This flows from the longstanding rule that a bankruptcy petition "fixes the moment when the affairs of the bankrupt are supposed to be wound up, as if the whole matter could be settled in a day." *Addison v. Langston (In re Brints Cotton Mktg.),* 737 F.2d 1338, 1342 (5th Cir.1984) (quoting *Sexton v. Dreyfus,* 219 U.S. 339, 344, 31 S.Ct. 256, 55 L.Ed. 244 (1911); internal quotation marks omitted). This rule is now codified in the provisions of the Bankruptcy Code bearing on the FDIC's claims and rights in the Bankruptcy Case. *See* 11 U.S.C. §§ 502(b) (claims are determined "as of the date of the filing of the petition") & 541(d) (competing claimants' interests in property are examined "as of the commencement of the case").

99. Upon the filing of Bancorp's case, the relative rights of Bancorp and the FDIC concerning any future tax refunds were governed by the TSA, which, as the Court has already concluded, established a debtor-creditor relationship. Although tax refunds resulting from the carryback of 2007 and 2008 consolidated NOLs were not yet received, the FDIC still had a prepetition "claim" against Bancorp with respect to those refunds.

***25** 100. The Bankruptcy Code defines a "claim" to encompass any "right to payment" or any "equitable remedy for breach of performance if such breach gives rise to a right to payment," whether or not such right or remedy "is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5).

101. Ninth Circuit case law clearly demonstrates that a creditor may have a prepetition general unsecured "claim" under a prebankruptcy contract even if the circumstances necessary to trigger that claim do not occur

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until after the bankruptcy filing. For example, in *Christian Life Ctr. Litig. Def. Comm. v. Silva (In re Christian Life Ctr.)*, 821 F.2d 1370, 1374 (9th Cir.1987), the court held that an officer's claim for indemnification was a prepetition, general unsecured claim that arose from a prepetition contract, noting in the process that it "makes no difference" that this contingent claim did not actually "accrue until after the petition was filed." Similarly, in *SNTL Corp. v. Centre Ins. Co. (In re SNTL Corp.)*, 571 F.3d 826, 843–44 (9th Cir.2009), the court concluded that a creditor had a contingent, unliquidated unsecured claim for attorneys' fees based upon a fee provision in a prepetition contract, even though those fees were not actually incurred until after the bankruptcy case was filed. The lesson of these cases is that parties may have unsecured "claims" under a contract that exists on the petition date, even if the events rendering those claims matured and liquidated claims happen thereafter. *See also, e.g., United States v. Gerth*, 991 F.2d 1428, 1433–34 (8th Cir.1993).

102. As applied here, it is apparent that the FDIC would have had a "claim" under the TSA on July 31, 2008, even though no tax refunds had actually been paid to Bancorp. This is particularly the case with respect to tax refunds that are rooted in the prebankruptcy past. Whatever rights the FDIC held as to future tax refunds all relate back to a contract that was executed and in effect at the commencement of the Bankruptcy Case. As with the future indemnity and attorneys' fee claims, the FDIC's claims are general unsecured claims.

103. As the Trustee's counsel correctly noted at the January 24, 2012 hearing, the FDIC's position that there is no "claim" under the TSA until Bancorp actually receives possession of tax refunds is akin to the flawed analysis adopted by the Third Circuit Court of Appeals in *Avellino & Bienes v. M. Frenville Co. (In re M. Frenville Co.)*, 744 F.2d 332, 336–38 (3d Cir.1984). The *Frenville* decision was widely criticized by courts and commentators alike—to the point of becoming something of a running joke among bankruptcy practitioners—and has been repeatedly rejected by the Ninth Circuit Court of Appeals. *See, e.g., Am. Law Ctr. PC, v. Stanley (In re Jastrem)*, 253 F.3d 438, 442 (9th Cir.2001). In fact, an *en banc* panel of the Third Circuit Court of Appeals recently overruled *Frenville*, noting how the decision was "universally rejected" by other circuit courts and criticized by numerous district courts, bankruptcy courts, and commentators. *See JELD–WEN, Inc. v. Van Brunt (In re Grossman's Inc.)*, 607 F.3d 114, 120–21 (3d Cir.2010). Because the FDIC's argument here relies on a narrow definition of a "claim" that has now been rejected in every circuit, it is no more persuasive than the Third Circuit's discredited reasoning in *Frenville*.

***26** 104. By its plain terms, the TSA gave the Bank a "right to payment" with respect to tax refunds paid or payable to Bancorp. Under Bankruptcy Code section 101(5) and numerous decisions, that contractual right to payment affords the FDIC an unsecured "claim" in the Bankruptcy Case (subject to the bases for disallowance or subordination asserted in the Complaint). The fact that this claim was "contingent" on future events (including the closing of the 2008 tax year, the filing of tax returns, and the payment of refunds to Bancorp), "unmatured" (until refunds were actually paid to Bancorp and the 15 business day period in the TSA passed), and "unliquidated" (until the specific amount of the claim was determinable) does not change the fundamental character of the claim. The Court believes that the only appropriate conclusion under the circumstances is that the FDIC has a general unsecured claim under the TSA for the amounts that would have been due to it under that agreement based upon the refunds that Bancorp received.

105. For the foregoing reasons, the Court concludes that the plain terms of the TSA suffice to define and resolve the relative rights of the parties; the tax refunds at issue are property of Bancorp's bankruptcy estate, and the FDIC has the ability to assert an unsecured claim under the TSA, subject to resolution in the claims allowance process. This conclusion does not end the analysis, however, because, throughout this litigation, the FDIC has offered a variety of theories as to why the TSA purportedly should not be applied in accordance with its plain terms. The Court considers these theories akin to affirmative defenses against the legal rights and relationships resulting from the TSA. The FDIC's arguments fall into four primary categories: (1) arguments based upon a 1973 opinion that both parties consistently refer to as "*Bob Richards* " [FN19]; (2) arguments based upon the Bankruptcy Code; (3) arguments based upon title 12 of the United States Code or a 1998 agency policy statement; and (4) arguments based upon California law. The Court has carefully considered all of the FDIC's affirmative defenses and concludes that none of them succeeds in defeating the basic legal construct that results under the TSA. In the interests of completeness, this Report and Recommendation now discusses the specifics of the FDIC's arguments in some detail.

FN19. *W. Dealer Mgmt., Inc. v. England (In re*

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Bob Richards Chrysler–Plymouth Corp.), 473 F.2d 262 (9th Cir.1973).

C. The *Bob Richards* Decision Is Not Applicable Here In Light Of The TSA

106. The FDIC devoted substantial effort in all five of its briefs and at both hearings attempting to fit this case into the rule articulated by *Bob Richards.* If *Bob Richards* still remains good law,[FN20] the Court believes it must be applied as actually stated: as a gap-filling rule limited to circumstances when no tax sharing agreement—express *or* implied—exists between the parties. *See* 473 F.2d at 264 (rule inapplicable "where an agreement can fairly be implied"); *id.* at 265 (applying rule because "there is no express or implied agreement" regarding rights to tax refunds). Here, there is an express agreement—the TSA.

FN20. Throughout the course of this litigation, the Trustee advanced three separate arguments about why *Bob Richards* no longer is good law. First, the Trustee argued that the decision posits a rule of "federal common law," which is something the Supreme Court has subsequently constrained courts from doing. *See Atherton v. FDIC,* 519 U.S. 213, 217–26, 117 S.Ct. 666, 136 L.Ed.2d 656 (1997); *O'Melveny & Myers v. FDIC,* 512 U.S. 79, 85–89, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994); *Ledo Fin. Corp. v. Summers,* 122 F.3d 825, 828–29 (9th Cir.1997). Second, the Trustee argued that *Bob Richards* presupposes that there be "separate NOLs" in which a subsidiary has some property interests or other rights, which is a proposition since rejected by the Supreme Court. *See United Dominion Indus. v. United States,* 532 U.S. 822, 829–30, 121 S.Ct. 1934, 150 L.Ed.2d 45 (2001); *Marvel,* 273 B.R. at 83–85. Third, the Trustee argued that subsequent articulations of California law—in such cases as *Coupon Clearing* and *Lonely Maiden*—demonstrate that if *Bob Richards* in fact purported to apply state law, it incorrectly stated and applied such law. Based upon these arguments, the Trustee takes the position that *Bob Richards* no longer remains a valid Ninth Circuit panel decision. *See Miller v. Gammie,* 335 F.3d 889, 900 (9th Cir.2003) (*en banc*); *Wolfson v. Watts (In re Watts),* 298 F.3d 1077, 1081–83 (9th Cir.2002). Because the Court has concluded that this dispute falls outside the reach of *Bob Richards* in any event, the Court has not resolved whether *Bob Richards* retains viability in light of the three lines of authorities presented by the Trustee. To the extent that a future court differs with this Court's reading of the TSA and *Bob Richards,* it would be appropriate for that court to address these issues.

*27 107. The FDIC argued that only "clear and explicit language" takes a prebankruptcy contract out of *Bob Richards.* The FDIC did not cite any cases adopting this position, which is belied by *Bob Richards* itself and at odds with the FDIC's own authorities about how even "implicit" agreements render *Bob Richards* inapplicable. *See, e.g., Capital Bancshares v. FDIC,* 957 F.2d 203, 207 (5th Cir.1992); *Brandt,* 279 B.R. at 556. Even *BSD Bancorp,* the principal case upon which the FDIC relies for this argument, recognizes that the *Bob Richards* "gap-filling rule" can be "expressly *or impliedly* " overridden in an agreement. Slip op. at 10 (emphasis added).

108. At bottom, the Court does not believe the tax sharing agreements in other cases were any more "explicit" or drafted more favorably for the debtor-parent than the TSA in this case. The courts deciding these other cases express a uniform view that tax sharing agreements very similar to the one here render *Bob Richards* inapplicable. *See BankUnited,* 462 B.R. at 897–901; *NetBank,* 459 B.R. at 810; *Team Financial,* 2010 WL 1730681, at *8; *First Central,* 269 B.R. at 489–90 & 500; *Franklin Savings,* 159 B.R. at 29. Thus, even assuming the *Bob Richards* rule remains good law, it is inapplicable here by its own terms due to the presence of a contrary "express or implied agreement."

109. The Court's view in this regard is fully consistent with how the District Court has already read *Bob Richards* in this very case, when it denied the FDIC's motion to withdraw the reference in part because—unlike here—the parties in *Bob Richards* "were functioning without a tax sharing agreement." *See Siegel v. FDIC,* 2011 WL 2883012, at *5. The FDIC's counsel took the position at oral argument that "the District Court erred in [its] reading of *Bob Richards.*" *See* Dec. 13, 2011 Hr'g Tr. at 28:9–11. The Court does not agree with the FDIC and reads *Bob Richards* in the same fashion as the District Court. There is a key distinction between a fact-pattern involving no tax agreement among the parties (*Bob Richards)* and one involving such an agreement (this case). This key distinction-the debtor-creditor relationship arising under the TSA-removes this case from the parameters of the *Bob Richards* decision. Because the TSA exists and serves to define the parties' rights, there is no "gap" that

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could ever be filled with the default rule stated in *Bob Richards.*

110. In addition, unlike the non-debtor parent corporation in *Bob Richards,* Bancorp is itself subject to a bankruptcy proceeding. Any proceeds received by the Trustee would be used to pay allowed valid claims against the estate, not to line the pockets of any of the parties involved. As explained in the *First Central* case (which involved an analogous tax refund dispute between a bankruptcy trustee and the liquidator of the debtor's failed insurance subsidiary), the unfortunate reality of Bancorp's insolvency is that the expectations of *all* unsecured creditors will be frustrated—myriad promises to pay will not be fulfilled. *See* 377 F.3d at 217. Hence, although the FDIC "may understandably chafe at being required to accept less than it was otherwise entitled to receive under the [Tax Sharing] Agreement, the short—and conclusive—answer is that this is not injustice, it is bankruptcy." *Id.; see also id.* at 218; *Ades & Berg Grp. Investors v. Breeden (In re Ades & Berg Grp. Investors),* 550 F.3d 240, 243 (2d Cir.2008) (*per curiam); MCorp,* 170 B.R. at 902. As the Court noted at the December 13 hearing, a case where the parent corporation is in bankruptcy presents exactly the opposite situation from that presented in *Bob Richards. See* Dec. 13, 2011 Hr'g Tr. at 31:3–21.

***28** 111. In assessing "unjust enrichment" and similar "equitable" arguments advanced by the FDIC, the Court is also mindful of how the Ninth Circuit Court of Appeals has repeatedly held that proper application of "equitable" doctrines will differ in the bankruptcy context. *See, e.g., Elliott v. Frontier Props. (In re Lewis W. Shurtlef, Inc.),* 778 F.2d 1416, 1419–20 (9th Cir.1985); *In re N. Am. Coin & Currency, Ltd.,* 767 F.2d 1573, 1575 (9th Cir.1985). *Accord XL/Datacomp v. Wilson (In re Omegas Grp.),* 16 F.3d 1443, 1452 (6th Cir.1994). As in *North American Coin,* the Court does not perceive any equitable rule requiring the Court to protect the FDIC fully at the great expense of Bancorp's other creditors; "the equities, as well as the principles underlying the bankruptcy laws, point in the other direction." 767 F.2d at 1578; *see also Mahon v. Stowers,* 416 U.S. at 105 ("This Court has previously held that an ordinary debtor-creditor relationship requires more than the post-bankruptcy disappointment of the creditor to convert it into a trust relationship."). Thus, because there will be no unjust enrichment if the Trustee retains the tax refunds for the benefit of Bancorp's estate, there is no factual basis for imposing the quasi-contractual remedy of *Bob Richards. Cf. First Central,* 377 F.3d at 218.

112. Finally, the Court observes that the existence of the TSA renders unnecessary reference to equitable doctrines that are used only when there is no contract, such as the rule in *Bob Richards.* This is true as a matter of bankruptcy law. *See, e.g ., TPG of Scottsdale, LLC v. Scott Desert Shadows, LLC (In re Scott Desert Shadows, LLC),* No. 06–0003, 2006 WL 1775828, at *3–4 (Bankr.D.Ariz. Apr.14, 2006). This is equally true as a matter of California law, which makes clear that when two parties have entered into a contract regarding a subject matter, the right of each party concerning that subject is to sue the counterparty for breach or, in certain specific circumstances, to compel performance, *not* to alter the parties' contractual relationship through the use of equitable doctrines. *See, e.g., Paracor Fin., Inc. v. GE Capital Corp.,* 96 F.3d 1151, 1167 (9th Cir.1996) (citing *Wal–Noon Corp. v. Hill,* 45 Cal.App.3d 605, 119 Cal.Rptr. 646, 650–51 (Ct.App.1975)); *Wilkison v. Wiederkehr,* 101 Cal.App.4th 822, 124 Cal.Rptr.2d 631, 636–41 (Ct.App.2002); *Hedging Concepts v. First Alliance Mortg. Co.,* 41 Cal.App.4th 1410, 49 Cal.Rptr.2d 191, 197–99 (Ct.App.1996).

D. The FDIC's Affirmative Defenses Under The Bankruptcy Code Do Not Overcome The TSA

113. The FDIC argued that the TSA was invalid based upon a number of bankruptcy concepts. The FDIC did not provide the Court with any applicable authorities in which any other court utilized these provisions of the Bankruptcy Code in the tax sharing context and as the FDIC suggests. Upon the Court's own analysis of these arguments, the Court finds each of the FDIC's attempts unavailing.

1. Nothing In The Record Suggests Any Relationship That Could Implicate Bankruptcy Code Section 541(d)

***29** 114. The FDIC argued that Bankruptcy Code section 541(d) removes the tax refunds from Bancorp's estate. Section 541(d) is a provision that is applicable when a third party can demonstrate that a debtor held absolutely *no* equitable interest in an asset as a result of a trust or similar relationship. As with the provisions of the Bankruptcy Code discussed above, section 541(d) once again requires the Court to examine the state of affairs "as of the commencement of the case." 11 U.S.C. § 541(d). As the party seeking to exclude property from the estate for its own benefit, it is the FDIC's affirmative burden to demonstrate that, as of July 31, 2008, the relationship between Bancorp and the Bank was such that any tax refunds received at that moment would have fallen outside

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the broad scope of section 541(a)(1). 5 COLLIER ON BANKRUPTCY ¶ 541.28 (16th ed. rev.2011); *Southmark Corp. v. Grosz (In re Southmark Corp.)*, 49 F.3d 1111, 1117–18 (5th Cir.1995).

115. In recognition of their disfavor in bankruptcy, the FDIC at one point suggested that it had abandoned any "constructive trust" theory, and instead sought to establish some other sort of "trust" relationship that could implicate Bankruptcy Code section 541(d). *See* Docket No. 41 at 14:6–13. There is nothing in the record to support any voluntary or resulting trust construct.

116. Under California law, "[a] voluntary trust is created by acts or words of the trustor which indicate (1) an intention to create a trust and (2) the subject, purpose, and beneficiary of the trust." *Weststeyn Dairy 2*, 280 F.Supp.2d at 1075. Of particular importance, "[w]here there is no agreement by the parties to segregate prepayments or to forbid the commingling of such prepayments with a party's general funds, such prepayments are not held in trust." *Id.* at 1080; *see also B.I. Fin. Servs. Grp.*, 854 F.2d at 354–55; *Lonely Maiden*, 135 Cal.Rptr.3d at 78–82. Here, as discussed above, nothing in the TSA imposes any segregation requirements or commingling restrictions. Thus, as a matter of law, the document does not establish a formal trust relationship.

117. Under California law, a resulting trust is an "intention-enforcing" device historically limited to real property transactions. *See Johnson v. Johnson*, 192 Cal.App.3d 551, 237 Cal.Rptr. 644, 647 & n. 1 (Ct.App.1987). "Clear and convincing proof is required to support a declaration that a resulting trust exists." *Id.* at 647. Such proof must be *particularly* clear and compelling "when an attempt is made to establish a resulting trust after the lapse of many years or where parol evidence alone is relied upon." *G.R. Holcomb Estate Co. v. Burke*, 4 Cal.2d 289, 299, 48 P.2d 669, 674 (1935). In addition, a resulting trust is an equitable remedy subject to the same strict limitations imposed on constructive trusts in bankruptcy.[FN21]

> FN21. *See, e.g., In re Foam Sys. Co.*, 92 B.R. 406, 409 (B.A.P. 9th Cir.1988), *aff'd*, 893 F.2d 1338 (9th Cir.1990) (unpublished table disposition); *In re Moore*, No. 11–41988, 2011 WL 1877879, at *2 (Bankr.N.D.Cal. May 16, 2011).

118. Here, the FDIC provides no evidence to support its resulting trust theory. If such an intention existed, then evidence of such intent should be readily available, but the FDIC provided the Court with no contemporaneous documents or any other material showing any intent by *anyone* to create any sort of "trust" or similar relationship. Rather, as in the recent *Lonely Maiden* decision, the actual evidence defeats this theory because the TSA between Bancorp and the Bank resulted in Bancorp obtaining beneficial interests in refunds it received, and there is no document or other admissible evidence remotely suggesting otherwise. *See* 135 Cal.Rptr.3d at 83–84.

***30** 119. In the Court's experience, most reasonably competent attorneys know how to draft language that creates a trust relationship if that is what their clients desire. Creating a trust relationship requires only a few words and the utilization of relative simply concepts, such as a segregated account. The TSA contains nothing along these lines, which leads the Court to conclude that no trust relationship was intended. This conclusion might be rebuttable if there were compelling evidence to the contrary in the record, but the FDIC has not provided the Court with any evidence upon which the Court could conclude a trust relationship was intended in 2003.

120. A complete lack of any evidentiary support is a far cry from the "clear and convincing proof" required by California law. Because the FDIC has no evidence supporting the existence any sort of trust relationship under California law, the FDIC cannot extricate the tax refunds from Bancorp's estate via Bankruptcy Code section 541(d).

2. Deemed Rejection Of The TSA Does Not Strip The Estate Of Petition Date Property Or Otherwise Alter The Outcome

121. The Court believes, and the parties appear to agree, that the TSA is an "executory contract" under the Bankruptcy Code. An "executory contract" is generally understood to be one under which future material performance remains due on both sides of the contract. *See In re Frontier Props., Inc.*, 979 F.2d 1358, 1364 (9th Cir.1992).

122. Section 365 of the Bankruptcy Code contains provisions that provide a bankruptcy trustee or debtor in possession with the ability to "assume" an executory contract—thereby allowing the bankruptcy estate to continue to obtain future performance from the counterparty, provided that the trustee or debtor in possession also perform under the contract—or to "reject" an executory contract—thereby freeing the estate of the burdens under the con-

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tract. *See* 11 U.S.C. § 365(a). Because this is a chapter 7 case and the Trustee did not affirmatively assume the TSA on or before September 29, 2008, the contract was "deemed rejected" under Bankruptcy Code section 365(d)(1).

123. The parties disagree about the legal consequences of the "deemed rejection." The FDIC argued that rejection returned the parties to a world in which relative rights vis-à-vis the tax refunds are governed by *Bob Richards.* The Trustee took the position that rejection does not have any effect on the estate's rights to the refunds, in part because those rights passed to the estate on the Petition Date. The Court permitted each side to file a supplemental brief specifically addressing this issue. After reviewing those supplemental briefs and allowing the parties additional oral argument about this issue, the Court has concluded that the Trustee's position is correct.

124. Under the Bankruptcy Code, the primary effect of rejection of an executory contract is to create a breach immediately prior to the bankruptcy filing, thereby leaving the counterparty with an unsecured damages claim. *See* 11 U.S.C. §§ 365(g)(1) & 502(g)(1). Beyond creating a breach and yielding a claim against the estate, rejection does *not* substantively affect the contract—it is not terminated, vaporized, or otherwise cancelled. *See, e.g., In re Cont'l Airlines,* 981 F.2d 1450, 1459 (5th Cir.1993); *Top Rank, Inc. v. Ortiz (In re Ortiz),* 400 B.R. 755, 761–64 (C.D.Cal.2009); *Cohen v. Drexel Burnham Lambert Grp., Inc. (In re Drexel Burnham Lambert Grp., Inc.),* 138 B.R. 687, 708 (Bankr.S.D.N.Y.1992).

***31** 125. The rejected executory contract continues to define the nature of the parties' relationship and provides the source to determine the extent of any unsecured claim against the estate. *See, e.g., First Ave. W. Bldg., LLC v. James (In re OneCast Media, Inc.),* 439 F.3d 558, 563 (9th Cir.2006); *Sir Speedy Inc. v. Morse,* 256 B.R. 657, 659 (D.Mass.2000). The estate is relieved from rendering further performance under the contract, and the contract counterparty is given an unsecured claim for breach that can be processed in bankruptcy with other creditors' claims. *See, e.g., In re Rega Props., Ltd.,* 894 F.2d 1136, 1140 (9th Cir.1990). Thus, as explained in the Collier treatise:

> Rejection and section 365(g)'s deemed breach do not affect the parties' substantive rights under the contract or lease, such as the amount owing or a measure of damages for breach, or the enforceability of an arbitration clause, and does not waive any defenses to the contract. However, rejection deprives the nondebtor party of a specific performance remedy that it might otherwise have under applicable nonbankruptcy law for breach of the contract or lease.
>
> 3 COLLIER ON BANKRUPTCY ¶ 365.10[1] (16th ed. rev.2011) (footnotes omitted).

126. Likewise, rejection does not operate to retroactively remove property from the estate. *See, e.g., Thompkins v. Lil' Joe Records, Inc.,* 476 F.3d 1294, 1306–08 (11th Cir.2007); *Simmons Capital Advisors, Ltd. v. Bachinski (In re Bachinski),* 393 B.R. 522, 543–45 (Bankr.S.D.Ohio 2008); *Thompson–Mendez v. St. Charles at Olde Court P'ship, LLC (In re Thompson–Mendez),* 321 B.R. 814, 819 (Bankr.D.Md.2005). This concept has been applied by other courts in the specific context of a rejected tax sharing agreement. *See NetBank,* 459 B.R. at 821. Simply put, if an asset would have been property of the bankruptcy estate as of the petition date, subsequent rejection of an executory contract does not change that result.

127. As detailed in Part V.B.3.a above, Bancorp had an interest in all the tax refunds at issue as of the Petition Date. Thus, based upon the foregoing lines of authority, the TSA did not divest Bancorp of that interest. Rather, rejection served to trigger a material breach of the rejected TSA, thereby creating a prepetition unsecured *damages claim* for the FDIC. *See, e.g., In re Aslan,* 909 F.2d 367, 371–72 (9th Cir.1990). Included within the FDIC's prepetition claim is whatever allowable damages result from the estate's future non-performance under the contract, all measured as of the Petition Date. *See, e.g., Taunton Mun. Lighting Plant v. Enron Corp. (In re Enron Corp.),* 354 B.R. 652, 655–59 (S.D.N.Y.2006). Put differently, rejection created a vehicle through which the FDIC's contingent and unliquidated claims under the TSA could be channeled against the estate for purposes of resolution in the Bankruptcy Case under the Bankruptcy Code.

128. The FDIC disagreed with the foregoing case law and took the position that the Trustee is inappropriately seeking to obtain further "benefits" under the TSA after its deemed rejection. The Court rejects the FDIC's analysis for several reasons. First, Bancorp's rights to future tax refunds—the only "benefit" to which the FDIC could conceivably point—became property of the estate on the Petition Date, not after the TSA's deemed rejection. Sec-

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ond, the Trustee has never sought to obtain any postpetition performance from the FDIC (including with respect to the Bank's theoretically unexecuted obligations in Sections 2(b), 2(c)(i), and 4(b) of the TSA) that would somehow benefit the bankruptcy estate. Nor has the Trustee sought to avail himself of any affirmative rights under the TSA. Rather, the only post-rejection actions the Trustee took were to file consolidated tax returns and receive payment of the tax refunds that vested in the Bancorp estate on the Petition Date.

***32** 129. The Trustee's position does not ask the FDIC or the Bank to do anything post-rejection; the only parties who must act are the IRS and other taxing agencies (by paying refunds to Bancorp as parent for a consolidated group), none of which are even parties to the TSA. This is a markedly different situation from cases in which a debtor has tried to compel ongoing or additional performance from a contractual counterparty post-rejection. Because the Trustee never sought any post-rejection performance under the TSA, the FDIC's position must reduce to the notion that the mere *existence* of the TSA confers some "benefit" on the Trustee. But rejection cannot change the fact that the TSA defined the relationship between Bancorp and the Bank on the Petition Date. Nor does rejection change that relationship; rather, even after rejection, the TSA continues to perform its *descriptive* function of setting forth a debtor-creditor relationship between Bancorp and the Bank. This is not a "benefit" of the TSA—it is the very essence of the TSA. Accordingly, the Court concludes that the Trustee will not inappropriately "benefit" from the TSA, and nothing about rejection operates to create any ownership rights for the FDIC or changes the nature of Bancorp's ownership interests in the tax refunds.

130. As the Trustee detailed at length in his supplemental briefing, the Trustee did not need to rely upon the TSA to file the tax returns that triggered payment of the tax refunds at issue. Rather, the applicable Treasury Regulations provided the Trustee with the sole authority to file the relevant returns and be paid the refunds separate and apart from anything in the TSA. [FN22] *See* 26 C.F.R. §§ 1.1502–77(a)(1)(i), 1.1502–77(a)(2)(v), 1.1502–77(d)(4)(ii) & 1.1502–78(b)(1). In fact, the Trustee was affirmatively *obligated* to file those consolidated tax returns as a matter of federal law. *See, e.g.,* 11 U.S.C. §§ 346(b), 521(j)(1) & 704(a); 26 U.S.C. § 6012(b)(3)-(4); 28 U.S.C. §§ 959(b) & 960(a). Hence, the Trustee did not need to rely upon or enforce any part of the TSA as a source of authority for these actions, which means that the Trustee does not inappropriately seek to enforce the TSA post-rejection.

> FN22. The parties devoted some of their briefing to the FDIC's potential ability to file a "competing" consolidated tax return under 26 C.F.R. § 301.6402–7. Because nothing in this regulation deprives or imposes any conditions on the Trustee's right to file the returns that he filed here (and the record shows that the FDIC never purported to file a tax return on behalf of the consolidated group), the Court does not believe this regulation bears on the outcome of this case. Nevertheless, for the sake of completeness, the Court notes that any effort by the FDIC to file any tax documents that could in any way affect Bancorp's estate postpetition would violate the automatic stay and would therefore be void under Ninth Circuit law. *See NetBank,* 459 B.R. at 819–20. This conclusion would obtain notwithstanding any argument under Internal Revenue Code section 6402(k) because Ninth Circuit case law makes clear that tax law must yield to bankruptcy law when the two conflict. *See, e.g., Feiler,* 218 F.3d at 950; *Bakersfield Westar,* 226 B.R. at 236.

131. As a variation on its general argument about the purported effects of deemed rejection, the FDIC also argued that Bancorp lacked a petition date interest in incremental tax refunds resulting from the passage of the *Worker, Homeownership, and Business Assistance Act of 2009,* Pub.L. No. 111–92, 123 Stat. 2984 (Nov. 6, 2009), which amended the Internal Revenue Code to allow taxpayers with a NOL for 2008 or 2009 to elect to carry NOL from one of those years back to the third, fourth, or fifth preceding taxable year instead of the second taxable year. *See id.* § 13. According to the FDIC, the estate lacks an interest in the additional refunds that became available under this legislation because the legislation was passed after the Petition Date and after the deemed rejection of the TSA. (The FDIC argued that this is particularly true because it asserts that the 2008 NOL did not even exist before Bancorp's bankruptcy petition was filed, which is an assertion that is legally and factually incorrect for the reasons discussed above.) The Court disagrees with this theory.

***33** 132. As an initial matter, the case law makes clear that, when the estate owns an asset such as stock or a building that appreciates in value postpetition, the added

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value inures to the benefit of the estate. *See, e.g., Gebhart v. Gaughan (In re Gebhart),* 621 F.3d 1206, 1211 (9th Cir.2010); *Koksal v. Postel (In re Koksal),* 451 B.R. 144, 153 (Bankr.D.Kan.2011). The 2009 tax legislation had the effect of making a property interest that vested in the estate on the Petition Date (the ability to carryback 2008 NOLs to obtain a refund of taxes paid several years prior to bankruptcy) more valuable, but it did not create any new property interests. In that sense, the tax legislation is akin to a zoning regulation that makes a building owned by the estate more valuable, or, as in two 19th century Supreme Court cases, acts of Congress that provide additional compensation for actions taken prior to a bankruptcy filing. *Williams v. Heard,* 140 U.S. 529, 535–41, 11 S.Ct. 885, 35 L.Ed. 550 (1891); *Milnor v. Metz,* 41 U.S. 221, 224–27, 16 Pet. 221, 10 L.Ed. 943 (1842). Those cases address the effects of postpetition legislation vis-à-vis property of an estate and hold that the fruits of such legislation remain property of the estate.

133. The parties pointed the Court to only one decision addressing a debtor's right to larger tax refunds after the passage of the 2009 tax legislation, which squarely rejects the FDIC's theory. *In re Hooper,* No. 09–26224, 2010 WL 5155828 (Bankr.D.Ariz. Dec.14, 2010). Relying heavily on *Segal v. Rochelle,* the court in *Hooper* rejected the notion that additional refunds resulting from the 2009 tax legislation were not property of the estate. As in *Segal,* all those refunds were sufficiently rooted to the prebankruptcy past to be estate property since "the Debtors have already paid taxes on the net income that will generate the refund, and as of the time of the filing of their bankruptcy petition, the Debtors have generated a loss from their business operations for the 2009 tax year." *Id.* at *3 n. 7. Application of *Segal* thus led to the conclusion

> that the postpetition refund generated by the enactment of postpetition legislation is property of the bankruptcy estate to the extent that the refund is predicated on prepetition taxes having been previously paid by the Debtors to the Internal Revenue Service. *The nature, not the timing, of the refund determines whether the refund is property of the bankruptcy estate.* The Debtors' 2008 and 2009 NOL's and the refund in question generated by those NOL's are property of the estate subject to the Trustee's turnover power under 11 U.S.C. § 542.

Id. at *4 (emphasis added).

134. In light of *Williams v. Heard, Milnor v. Metz,* and *In re Gebhart,* the Court found the analysis in *Hooper* to be compelling, and has determined that its conclusion is equally applicable here; the refunds at issue are predicated on taxes paid to taxing agencies in 2003–2006, and sufficient losses to obtain all those refunds existed on the day Bancorp filed its chapter 7 petition. The 2009 tax legislation was entirely retrospective in effect, providing a mechanism for prepetition losses to be used by Bancorp to obtain a refund of taxes that had been paid prepetition. *See id.* at *3–4. *Hooper* appropriately applies the rule of *Segal* in the context where postpetition legislation makes prebankruptcy assets or expectations more valuable. The FDIC pointed to no authority contrary to *Hooper* and provided no substantive basis for distinguishing the decision here, although the FDIC did assert that *Hooper* was like some other cases cited by the Trustee insofar as it did not involve the parent company of a consolidated group as the taxpayer. The Court does not believe this supposed distinction is one that makes any legal difference, however, and the FDIC cited no authority suggesting otherwise. Thus, the Court concludes that the fact that November 2009 tax legislation allowed the 2008 NOL to be carried back for a longer period of time than might otherwise have been the case does not mean that any incremental refunds fall outside the broad scope of property of the Bancorp estate. Once again, rejection of an executory contract simply does not strip property out of a bankruptcy estate.

3. Bankruptcy Code Section 365(c)(2) Does Not Apply Here

***34** 135. The FDIC argued that the operation of the TSA is undermined by Bankruptcy Code section 365(c)(2). Section 365(c)(2) establishes a general limitation on a bankruptcy trustee's ability to assume a certain type of executory contract and/or to assign that contract to a third party. Specifically, the trustee may not assume or assign "a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor." 11 U.S.C. § 365(c)(2).

136. Section 365(c)(2) is irrelevant by its plain terms; the Trustee never sought to "assume or assign" the TSA. As discussed above, the TSA was deemed rejected by operation of law, which means it can no longer be assumed or assigned. Therefore, a debate about whether the TSA is a contract whereby the Bank would make "financial accommodations" to Bancorp is purely academic. Even if it were somehow relevant, however, the Court concludes that the TSA does not involve the making of

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any "financial accommodations" to Bancorp, for at least two reasons.

137. First, as the Collier treatise explains, this term is "strictly construed and do[es] not extend to an ordinary contract to provide goods or services that has incidental financial accommodations or extensions of credit." 3 COLLIER ON BANKRUPTCY ¶ 365.07[2] (16th ed. rev.2011). Thus, only if a contract's "primary purpose" is "to extend financing to or guarantee the financial obligations of the debtor" does a "financial accommodation" exist; if an agreement "establishes a contractual business relationship and any financing that is a part of this relationship is only incidental to the relationship, then the [a]greement does not fall within the ambit of §§ 365(c)(2) and 365(e)(2)(B)." *Citizens & S. Nat'l Bank v. Thomas B. Hamilton Co. (In re Thomas B. Hamilton Co.)*, 969 F.2d 1013, 1019–20 (11th Cir.1990); *see also, e.g., In re United Airlines, Inc.*, 368 F.3d 720, 724 (7th Cir.2004). Here, the TSA's overarching purpose is to create a business relationship that governs the filing of consolidated tax returns and allocates tax liabilities and responsibilities among the IndyMac group's members. Although a debtor-creditor relationship may be created in *certain* scenarios in which a refund is received, the provision of that indirect "financing" certainly is not the TSA's "primary purpose," but rather is an attribute incidental to the broader arrangement. *Cf. In re Travel Shoppe, Inc.*, 88 B.R. 466, 470 (Bankr.N.D.Ga.1988) (rejecting interpretation that "would turn every contract where the debtor owed money into a contract for financial accommodations and would allow the exception to swallow the rule" (internal quotation marks omitted)). Because the TSA is not a contract for "financial accommodations," Bankruptcy Code section 365(c)(2) is not even theoretically relevant.

138. Second, and perhaps even more fundamentally, a "financial accommodation" can only be provided by a party who owns funds or assets in the first instance. *See, e.g., In re Farrell*, 79 B.R. 300, 304 (Bankr.S.D.Ohio 1987). Here, no money or property belonging to the Bank is ever "loaned" or "advanced" to Bancorp, which means the Bank is necessarily "under no obligation to provide advances of cash or new property" after Bancorp's bankruptcy filing. *See id.* Rather, Bancorp incurs a contingent future *contractual liability* to the Bank under certain scenarios, which payment would be made from Bancorp's own, fungible cash. All refunds that Bancorp receives are paid directly to it by the taxing agencies, not by the Bank—the taxing agencies are the only parties ever providing new property to Bancorp, but it is to fulfill their own, independent legal obligations, not as any loan or accommodation to Bancorp. This structure does not create a financial accommodation for Bancorp, and it does not involve any use of the Bank's property. The only asset owned by the Bank (or the FDIC as receiver) is a contractually calculated claim against Bancorp. Therefore, the Court rejects the FDIC's argument under Bankruptcy Code section 365(c)(2).

E. The FDIC's Affirmative Defenses Under Banking Law Do Not Overcome The TSA

***35** 139. In addition to its bankruptcy theories, the FDIC contended that provisions of title 12 of the United States Code or a 1998 banking agency policy statement provide affirmative defenses to the operation of the TSA. Upon due consideration of the FDIC's arguments, the Court concluded that each of them is incorrect or inapposite under the circumstances presented here. In many cases, although the FDIC's defenses are presented under other federal statutes, it is once again the operation of established bankruptcy law that prevents most of these defenses from being successful.

1. The FDIC's Attempted "Repudiation" Of The TSA Violated The Automatic Stay And Is Void

140. On August 15, 2008, the FDIC sent a letter to Bancorp in which it purported to "repudiate" the TSA under 12 U.S.C. § 1821(e). [Docket No. 32 Ex. 2.] The FDIC argues that this repudiation could have the effect of undoing the TSA or otherwise returning the parties to a world governed by the quasi-contractual rule of *Bob Richards*. The Court concludes that there are two reasons why the FDIC's argument does not work.

141. First, the FDIC's conduct violated the automatic stay that arose as a matter of law when Bancorp filed for bankruptcy on July 31, 2008. Under the Bankruptcy Code, a broad stay comes into effect upon the bankruptcy filing, and this stay prohibits, *inter alia*, any act to exercise possession or control over property of the estate, any act to enforce a prebankruptcy claim against a debtor or its estate, and an array of other conduct that might be appropriate outside of bankruptcy. *See* 11 U.S.C. § 362(a). Other courts have consistently held that the FDIC as receiver is subject to the automatic stay to the same extent as any other party. *See, e.g., Sunshine Dev., Inc. v. FDIC*, 33 F.3d 106, 111–14 (1st Cir.1994); *In re Colonial Realty Co.*, 980 F.2d 125, 137 (2d Cir.1992).

142. The Court concludes that the FDIC's purported "repudiation" of the TSA is among the actions that are

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prohibited by the automatic stay imposed by 11 U.S.C. § 362(a). Other courts to consider this issue have come to the same conclusion. *See, e.g .*, *NetBank*, 459 B.R. at 819–20. Because the automatic stay applied, the onus was on the FDIC to move for relief from stay under Bankruptcy Code section 362(d) before purporting to "repudiate" the TSA. The FDIC never brought such a motion, and the Court certainly did not modify the stay to allow the FDIC to act in this fashion. Any actions taken in violation of the stay are void *ab initio* under Ninth Circuit law. *See, e.g., Griffin v. Harvey (In re Wardrobe)*, 559 F.3d 932, 934–35 (9th Cir.2009); *Contractors' License Bd. v. Dunbar (In re Dunbar)*, 245 F.3d 1058, 1063 (9th Cir.2001). Therefore, the FDIC's purported repudiation could not, as a matter of law, have had any effect on the property rights of the Bancorp estate.

143. In addition, repudiation, just like rejection of an executory contract, merely constitutes a breach of the agreement that creates a contractual claim. *See* 12 U.S.C. § 1821(e)(3). The case law makes clear that repudiation under title 12 does *not* vaporize or nullify a contract. *See WRH Mortg., Inc. v. S.A.S. Assocs.*, 214 F.3d 528, 532–34 (4th Cir.2000); *ALLTEL Info. Servs., Inc. v. FDIC*, 194 F.3d 1036, 1039 (9th Cir.1999); *Howell v. FDIC*, 986 F.2d 569, 571 (1st Cir.1993).[FN23] For all the reasons set forth above concerning the non-effects of the TSA's deemed rejection under the Bankruptcy Code, the FDIC's attempted repudiation would not have divested the estate of any Petition Date property interests even if the repudiation had been successfully executed.

> FN23. The FDIC's power to "repudiate" contracts was modeled after and intended to operate like a trustee's power to "reject" executory contracts under the Bankruptcy Code. *See, e.g., Fresca v. FDIC*, 818 F.Supp. 664, 668 n. 2 (S.D.N.Y.1993). It is notable that the FDIC's own statutory power, which the FDIC improperly attempted to exercise here, merely breaches a contract, and does not destroy it for purposes of determining the parties' rights. As the Court has explained, rejection in bankruptcy operates similarly.

2. 12 U.S.C. § 371c Does Not Invalidate The TSA

***36** 144. The FDIC argued at some length that the interplay between the TSA and bankruptcy law somehow implicates and violates 12 U.S.C. § 371c, a banking statute that places certain general restrictions on the terms of loans between a regulated bank and its affiliates. According to the FDIC, section 371c alters the otherwise widely accepted rule that tax refunds belong to a parent corporation's bankruptcy estate when the parties entered into a tax sharing agreement of the sort present here. Based upon this notion, the FDIC argued that the Court should not adopt an interpretation of the TSA that would violate the FDIC's construction of federal law.

145. The FDIC's pleadings did not cite *any* case law supporting this concept, and the FDIC's counsel was unable to provide the Court with any authority supporting the FDIC's position about this statute when the Court pressed counsel at oral argument. *See* Dec. 13, 2011 Hr'g Tr. at 44:25–45:5. The Court found the FDIC's arguments on this front to be unconvincing, which is a conclusion the District Court appears to have separately reached. *See Siegel v. FDIC*, 2011 WL 2883012, at *4–5. The Court especially agrees with the District Court's assessment that the FDIC "fails to explain how a violation of federal statute § 371c(c) falls under TSA Section 7(a), which discusses penalties for violating the rules of the OTS or the FDIC, nor how a violation of § 371c(c) would void the TSA." *Id.* at *4. Nevertheless, for the sake of completeness, the Court considered the FDIC's arguments more fully and did not agree with them.

146. First, it is doubtful that section 371c has any relevance at all. The FDIC cited no case law for the proposition that tax sharing agreements give rise to a "loan" or similar "extension of credit." [FN24] This contention simply *assumes* that the Bank owned all the tax refunds (*i.e.*, the putative loaned or extended property) in the first instance. If this initial premise is wrong, then the FDIC's argument falls apart.

> FN24. The decision in *BSD Bancorp* suggests in dicta that section 371c may have been implicated in that particular case. *See BSD Bancorp*, slip op. at 11–12. This observation was made in the context of a different contract, which required an immediate downstream of any tax refunds and expressly created a "loan to parent" in the "remote" and "unusual" circumstances when that downstream did not occur. *See id.* at 5 (quoting the agreement). The TSA says nothing of the sort, and the Court believes this fact alone provides ample reason to distinguish the unpublished *BSD Bancorp* decision.

147. The premise behind the FDIC's argument is wrong. Until funds are paid over to the Bank by Bancorp,

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the Bank has no property interest or other rights with respect to any tax refunds. Instead, the Bank merely has a right to receive a payment under the TSA after the TSA's 15–business–day period actually runs. The import of this is manifest: Any loan or extension of credit could not occur until the Bank first obtained a vested right to payment, which it *then* might grant to Bancorp for some future period. Having ownership rights in the first instance is an inherent part of any loan. *See, e.g.,* BLACK'S LAW DICTIONARY 985 (9th ed.2009) (defining "lend" as allowing another the temporary use of one's property or money "on condition that the thing or its equivalent be returned" or that the money be repaid). Here, Bancorp, not the Bank, has ownership rights to the tax refunds under the TSA, which means those refunds cannot form the basis for any "loan" because there never is any borrowing event.

***37** 148. Nor does the Court believe there is any "extension of credit" for purposes of section 371c. This concept has been interpreted, based upon the words' plain meaning, to encompass a *continuation* of an obligation past the point at which it would otherwise be due.[FN25] Until the 15–business–day period in the TSA passes, however, the Bank has no rights against Bancorp, and thus could not be described as having extended any credit under the statute. The Court does not agree with the FDIC's suggestion that the mere fact that Bancorp would eventually be obligated to pay some money to the Bank—*i.e.,* the debtor-creditor relationship that is central to this case—also means that there must be a prohibited extension of credit. This sweeps far too broadly. Many relationships are of a debtor-creditor nature without involving any extension of credit. For example, tort victims, judgment creditors, and employees all have "claims" that establish a debtor-creditor relationship for bankruptcy purposes. 11 U.S.C. § 101(5) & (10).[FN26] It is untenable to suggest these parties extended credit to the debtor, however. The FDIC cited nothing to suggest that an extension of credit sweeps in an all-encompassing fashion, and the Court will use the "general definition" of a commonly understood term unless doing so would produce "absurd results." *Rowland v. Cal. Men's Colony,* 506 U.S. 194, 200, 113 S.Ct. 716, 121 L.Ed.2d 656 (1993). Because the TSA's operation does not involve a "loan" or other "extension of credit," as generally understood, and applying the general definition produces a sensible result, section 371c is inapplicable.

FN25. *See, e.g., Foley & Lardner v. Biondo (In re Biondo),* 180 F.3d 126, 132 (4th Cir.1999); *Field v. Mans,* 157 F.3d 35, 43 (1st Cir.1998); *Fid. & Deposit Co. v. Arnez,* 61 F.2d 607, 610 (9th Cir.1932), *rev'd on other grounds,* 290 U.S. 66, 54 S.Ct. 16, 78 L.Ed. 176 (1933).

FN26. The overarching nature of a "claim" in bankruptcy is further underscored by juxtaposing it with the many different legal forms that a party's right to receive payment of money may take outside of bankruptcy. In the commercial law context, for example, the Uniform Commercial Code draws broad distinctions between "notes" and other negotiable instruments (the subject of Article 3), bank deposits (the subject of Article 4), "letters of credit" (the subject of Article 5), and "securities" (the subject of Article 8). Within Article 9, there are further distinctions drawn between payment obligations taking the form of "accounts," "chattel paper," "promissory notes" and other "instruments," "commercial tort claims," and "payment intangibles." *See, e.g.,* CAL. COM.CODE § 9102. Every one of these items involves a debtor-creditor relationship and could be the source of a "claim" under Bankruptcy Code section 101(5). The FDIC's argument reduces to a logical fallacy: every "loan" or "extension of credit" may give rise to a "claim" in bankruptcy, but not every "claim" in bankruptcy originates in a "loan" or an "extension of credit."

149. Ultimately, the Court does not find section 371c of relevance here. The TSA is not structured as a "loan" or an "extension of credit." There is no borrowing event. There is no money or other property of the Bank ever borrowed by Bancorp. Instead of a claim for money borrowed, the TSA creates a general contractual obligation that may be triggered by external events. This is not the sort of transaction described by section 371c.

150. Even assuming section 371c has some relevance to the present dispute, the Court also finds that it does not apply in the fashion suggested by the FDIC. Contrary to the FDIC's assertions, the TSA contains no provision stating that the parties would not comply with whatever collateral posting or equity ratios may be associated with section 371c, if, as, and when those provisions became applicable. Rather, such ratios would be part of the document since "statutes in existence at the time a contract is executed are considered a part of the contract, as though they were expressly incorporated therein." *2 Tudor City*

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Place Assocs. v. 2 Tudor City Tenants Corp., 924 F.2d 1247, 1254 (2d Cir.1991). This puts to rest the FDIC's circular suggestion that Bancorp and the Bank must have intended some sort of non-debtor-creditor relationship because otherwise the TSA violates the law—section 371c itself contemplates debtor-creditor relationships and merely imposes certain conditions on certain subsets of them (as discussed above, the Court does not find the TSA to be within those subsets), and the TSA never states or even suggests that the parties would not comply with those conditions. Thus, section 371c's requirements are not at odds with the parties' contract, and, prior to Bancorp's chapter 7 petition, nothing restricted Bancorp's compliance with such requirements.

***38** 151. Nevertheless, as a matter of bankruptcy law, such requirements would not be enforceable postpetition. After all, although section 371c may require a security interest in some contexts, the statute itself does not create a security interest. Nor does the statute perfect any lien. *See* 67 Fed.Reg. 76560, at 76574 (Dec. 12, 2002) (preamble to "Regulation W" promulgated in connection with section 371c noting how "a member bank's security interest in any collateral required by section [371c] must be perfected in accordance with applicable law"). There is no indication that the Bank took steps to create or perfect any lien to which it may have been entitled prebankruptcy under section 371c or the TSA, and the FDIC never asserts the existence of any prepetition lien. There is no reason to believe such a lien was granted, let alone that it was properly perfected in accordance with applicable nonbankruptcy law. Whatever *might* have been required prior to or outside of bankruptcy, the Bank neither obtained nor perfected a lien against Bancorp prepetition. The automatic stay bars any tampering with the state of affairs on Bancorp's Petition Date. 11 U .S.C. § 362(a)(3), (4) & (6). As a result, the FDIC cannot use arguments under section 371c to improve its unsecured creditor position. Nor does the fact that section 371c could have theoretically required a lien in some situations provide any basis for elevating the FDIC's claim in the Bankruptcy Case above the level of an unsecured creditor. *See, e.g., TWA Inc. Post Confirmation Estate v. U.S. Dep't of Agric. (In re TWA Inc. Post Confirmation Estate)*, 312 B.R. 759, 761–65 (Bankr.D.Del.2004).

152. Finally, again assuming that section 371c applies and *further assuming* the TSA somehow violated it, the statute still does not work as the FDIC suggests. Nothing in section 371c says that a loan or extension of credit made in violation of the statute is void *ab initio* or fails to create an enforceable debtor-creditor relationship. To the contrary, the statute contemplates civil penalties (*see* 12 U.S.C. §§ 504 & 1818(i)(2)) or regulatory action, such as "cease and desist" orders (*see* 12 U.S.C. §§ 1468(c) & 1818), as the sole remedies for violations of section 371c. This stands in sharp contrast to other banking laws in which Congress made clear its intent to render certain transactions void or invalid. *See, e.g.,* 12 U.S.C. §§ 91, 1441a(y)(3) & 1467a(f).

153. Other courts have considered analogous arguments and rejected the notion that loans or extensions of credit made in purported violation of title 12's restrictions are voidable. *See Armstrong v. First Nat'l Bank (In re Clothes, Inc.)*, 40 B.R. 997, 1000 (D.N.D.1984); *In re Bates*, 58 B.R. 915, 916–17 (Bankr.W.D.Tenn.1986). And, as the District Court previously ruled in this very litigation, no regulatory action has been taken (or could be taken postpetition due to the automatic stay) and no provision of the TSA would operate to give any "voidable" power to section 371c. *See Siegel v. FDIC*, 2011 WL 2883012, at *4–5. Thus, nothing about section 371c or other banking law alters the prepetition debtor-creditor relationship that existed between Bancorp and the Bank.[FN27]

> FN27. In addition to disagreeing with the FDIC about the applicability of section 371c in the first instance and the legal consequences if it does apply, the Court rejects the FDIC's implicit binary structure. Even assuming that section 371c somehow violated the TSA, nothing about that fact would affirmatively create a trust or give the FDIC property rights in any tax refunds. In order to prevail in the ownership dispute, the FDIC must meet its burden of affirmatively establishing ownership rights in the refunds that suffice to extract that property from the broad reach of Bankruptcy Code section 541(a). Nothing in section 371c does this work for the FDIC.

***39** 154. At best, section 371c might have had some theoretical prebankruptcy applicability. Nothing about the TSA, however, necessarily violates the dictates of section 371c, and whatever the statute actually required would have been part of the parties' agreement. Once Bancorp filed for bankruptcy, however, the world changed dramatically and the Bankruptcy Code now forbids the FDIC from improving its prepetition rights. Nevertheless, the TSA remains the contract that defines the parties' relationship vis-à-vis tax refunds, and it continues to do so for

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purposes of ascertaining what is property of Bancorp's estate and what claims the FDIC may hold. *See* 11 U.S.C. §§ 502(b), 541(a)(1) & 541(d) (each making the Petition Date the operative cleavage point). Because the Trustee does not need to "enforce" the TSA to prevail in this dispute, any debate about whether enforcement would be consistent with section 371c is purely hypothetical.

3. The Interagency Policy Statement Is Legally And Factually Irrelevant

155. The FDIC argues that the 1998 *Interagency Policy Statement on Tax Allocation in a Holding Company Structure* (the "Policy Statement") is relevant to the interpretation of the TSA, because it supposedly is a "rule" that could result in provisions of the TSA being rendered "null and void" under Section 7(a) of the TSA. The Court finds the Policy Statement to be irrelevant here for several reasons.

156. First, as discussed in Part IV.A. above, the Court has determined the TSA is unambiguous and should be interpreted based upon its text, not based upon parol evidence such as the Policy Statement. Thus, the Court does not accept the FDIC's invitation to review the extrinsic evidence that the Court has declined to admit on the premise that it will support the FDIC's argument that the parties drafted the TSA with the intent that it be consistent with the Policy Statement.

157. Second, the District Court has already made clear in this litigation that the Policy Statement is "non-binding" and "not material to adjudicate the ownership issue." *Siegel v. FDIC*, 2011 WL 2883012, at *4; *see also, e.g., BankUnited*, 462 B.R. at 896 n. 29; *NetBank*, 459 B.R. at 817–18; *Team Financial*, 2010 WL 1730681, at *8–9. In the process, the District Court noted that this "Court *may* choose to consider" the Policy Statement in its legal analysis. *See* 2011 WL 2883012, at *4 (emphasis added). Because the Court agrees with the District Court that the Policy Statement is non-binding and not material to adjudicate the parties' dispute, the Court chooses not to dwell on how the Policy Statement should be interpreted.

158. Third, the TSA does not incorporate the Policy Statement. As a matter of law, the lack of a clear, specific, and unequivocal reference to the Policy Statement means the TSA does not incorporate it by reference under California law. *See, e.g., Cariaga v. Local No. 1184 Laborers Int'l Union of N. Am.*, 154 F.3d 1072, 1074–75 (9th Cir.1998); *Chan v. Drexel Burnham Lambert, Inc.*, 178 Cal.App.3d 632, 223 Cal.Rptr. 838, 843–46 (Ct.App.1986). In addition, the TSA only incorporates "rules promulgated by" the OTS and the FDIC, but the Policy Statement is obviously a mere statement of policy, not a formal "rule" and not anything "promulgated" by any federal regulator. *See, e.g., Pelissero v. Thompson*, 170 F.3d 442, 447 (4th Cir.1999); *NetBank*, 459 B.R. at 817. At best, the language of Section 7(a) is an "amorphous" description, one that fails to guide the reader to a Policy Statement that falls outside the scope of what Section 7(a) describes in extremely general terms. *Cf. Chan*, 223 Cal.Rptr. at 845. Once again, the Court will not look to the FDIC's extrinsic evidence to alter the TSA's clear text or to provide additional concepts and incorporations by reference that plainly appear nowhere in the document itself.

***40** 159. Finally, even if this Policy Statement were relevant or incorporated into the TSA the Court cannot agree that the TSA violates it. As the Trustee's briefing demonstrated, the Policy Statement contains several provisions that are consistent with there being a debtor-creditor relationship between the parent and its subsidiary concerning tax refunds, including characterizing the parent's obligation as a "reimbursement" and a "receivable," recommending that the parent make payments to the subsidiary from its general funds even when no tax refund is due or received, and suggesting that the subsidiary should receive payments calculated as if the subsidiary were a separate entity. The TSA comports with all of this.[FN28]

FN28. The Policy Statement does suggest that a "tax allocation agreement or other corporate policies should not purport to characterize refunds attributable to a subsidiary depository institution that the parent receives from a taxing authority as the property of the parent." This single, precatory sentence must be interpreted in the context of the Policy Statement as a whole and its general purpose. So interpreted, the only logical meaning of this provision is that the agencies might consider it an unsafe or unsound practice for a parent to keep all of a group's refunds free and clear without a corresponding reimbursement obligation to the subsidiary. Any other interpretation ignores and nullifies those provisions in the Policy Statement, among others, describing the parent's obligation to "reimburse" the subsidiary and to do so even if the parent never receives refunds. Nothing in the Policy Statement purports to describe the effects of a tax sharing agreement in bankruptcy or to reject

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> case law in existence when it was drafted. This is telling because the banking agencies could have taken a clear position in the Policy Statement that the debtor-creditor relationships firmly upheld by several bankruptcy and district courts in the *Franklin Savings* and *MCorp* matters, all published before the Policy Statement, were impermissible. The agencies chose not to, and the Court finds this silence in the face of established law to be as instructive as any words used in the Policy Statement.

4. The FDIC's Belated Argument Under 12 U.S.C. § 1823(e) Is Not Viable

160. In its December 6, 2011 reply brief, the FDIC argued for the first time that the TSA was invalid under 12 U.S.C. § 1823(e), which imposes certain conditions on the enforcement of an "agreement which tends to diminish or defeat the interest of the [FDIC] in any asset acquired by" it as receiver. The FDIC never previously referenced this argument in any of the lengthy prior briefing regarding the Trustee MSJ or the FDIC MSJ.

161. The Trustee objected to consideration of this argument on the grounds that it was inappropriately raised for the first time in the FDIC's reply. The Court agrees. The Court's local rules require replies to be limited to responding directly to opposition papers, LBR 9013–1(g)(1), and thus follows the ample authority precluding parties from raising new issues for the first time in a reply brief. *See, e.g.*, *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1289 n. 4 (9th Cir.2000); *Novosteel SA v. United States*, 284 F.3d 1261, 1274 (Fed.Cir.2002); *Docusign, Inc. v. Sertifi, Inc.*, 468 F.Supp.2d 1305, 1307 (W.D.Wash.2006). The FDIC waived its section 1823(e) argument by raising it in a dilatory and inappropriate fashion. The record demonstrates that the FDIC was aware of this potential argument before the start of briefing, as the FDIC included this claim among the affirmative defenses raised in the FDIC Answer. *See* FDIC Answer at pp. 15–16 ("Sixth Defense").

162. Even if the FDIC had not waived this argument, the Court does not find it persuasive. Section 1823(e) imposes four conditions on agreements encompassed within its scope. The FDIC does not contest that the TSA satisfies three of those conditions (it is a written document, executed by the Bank, which has continuously been among the Bank's official records). Rather, the FDIC maintains that the TSA was not approved by the board of directors of the Bank.

163. The Trustee offered documents showing that the TSA was approved by the board of directors of the Bank. Specifically, the Trustee provided documents (to which the FDIC lodged no objection) clearly evidencing that the TSA was part of a set of "Transactions with Affiliates" policies, which policies were specifically considered and approved in official corporate minutes and resolutions of the board of directors of the Bank. [*See* Docket No. 81 Ex. "Y".] By approving and adopting the transactions policies and expressly ratifying, confirming, adopting, and approving all actions taken to implement those policies—including having the TSA govern the Bank's tax rights—these documents unambiguously defeat the FDIC's unsubstantiated suggestion that the requirements of section 1823(e) were not met. The fact that documents attached to formal Bank board minutes specifically reference and acknowledge the TSA *by name* makes this case readily distinguishable from *FDIC v. Gardner*, 606 F.Supp. 1484 (S.D.Miss.1985), where the challenged contract was never referenced or acknowledged in board minutes or the attachments thereto, let alone affirmatively incorporated by name into a formal approval. Moreover, the FDIC simply ignores other documents that *the FDIC* sought to include in the record, which again demonstrate that the Bank's board approved the policies of which the TSA is a part and state that board approval of the TSA "shall be evidenced by the execution thereof." [*See* Docket No. 81 Ex. "X".] Based upon these clear documents and without any evidence on the other side, the Court is unable to conclude that there is any *genuine* dispute of fact on this front. [FN29]

> FN29. The only purported evidence that the FDIC put forward in support of this affirmative defense was a single paragraph in an attorney declaration, asserting that the attorney supervised a review of board minutes and supposedly was "unable to locate any minutes reflecting approval of the TSA." [Docket No. 79 ¶ 3.] In addition to being untimely submitted, this attorney declaration is directly contradicted by the aforementioned documents, and thus does not create a genuine issue of material fact. *See, e.g.*, *Estremera v. United States*, 442 F.3d 580, 584–85 (7th Cir.2006).

***41** 164. More generally, the Court is doubtful that section 1823(e) even applies in this context. The statute by its terms is limited to an "agreement which tends to diminish or defeat the interest of the [FDIC] in any asset"

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it acquired as receiver of the Bank. The FDIC's argument that the TSA defeats the supposed interest of the FDIC in tax refunds simply *assumes* that those refunds were an "asset" of the Bank to begin with. The Court again rejects this mischaracterization of the arrangements between Bancorp and the Bank. In addition, multiple courts have held that section 1823(e) only applies to "conventional loan" transactions. *See, e.g., John v. RTC,* 39 F.3d 773, 776 (7th Cir.1994); *E.I. du Pont de Nemours & Co. v. FDIC,* 32 F.3d 592, 597 (D.C.Cir.1994). As the Court has explained, the TSA is not an agreement for a "loan," and it certainly is not the sort of "regular banking transaction" to which section 1823(e) is intended to apply. Given that the TSA was repeatedly submitted to and approved by IndyMac's federal regulators, the Court does not accept the FDIC's suggestion that the TSA is one of the "secret agreements" at which the statute is aimed. *See, e.g., Brookside Assocs. v. Rifkin,* 49 F.3d 490, 495–97 (9th Cir.1995).

165. Because it was waived by the FDIC and is factually and legally inapplicable in any event, the Court rejects the FDIC's argument that it can defeat the TSA through section 1823(e). In particular, the Court finds that the FDIC's evidence and argument does not raise a genuine dispute of material fact and therefore rejects the FDIC's argument that the TSA did not fully comply with the provisions of 12 U.S.C. § 1823(e).

F. The FDIC's Affirmative Defenses Under California State Law Do Not Overcome The TSA

166. Beyond its technical bankruptcy and banking defenses, the FDIC also attempted to undo the TSA by relying on California law to support its arguments. Upon consideration of the legal principles behind these concepts, the Court does not find any of these arguments applicable to this case.

1. The TSA Is Supported By Adequate Consideration

167. The FDIC argued that the TSA was not supported by sufficient consideration to the Bank and therefore was not an enforceable contract. The Court disagrees with this argument. Under California law, "[a] written instrument is presumptive evidence of a consideration." CAL. CIV. CODE § 1614. Here, that written contract provides material benefits to all members of the consolidated IndyMac group by streamlining tax administration (which, among other things, eliminated the need for the Bank to incur the costs of preparing its own tax return). *See, e.g., Marvel,* 273 B.R. at 64–66. Indeed, federal regulators *encourage* parties to enter into these sort of contracts, *see, e.g., Team Financial,* 2010 WL 1730681, at *8–9, and the IndyMac TSA was subject to review and approval by outside regulators at the OTS. In addition to the resulting administrative efficiencies for the Bank, the Bank also received a significant potential unsecured contractual claim against Bancorp. The Court has no doubt that these benefits to the Bank easily surpass the mere "peppercorn" of consideration that is necessary for the TSA to be an enforceable contract under California law. *See Walters v. Calderon,* 25 Cal.App.3d 863, 102 Cal.Rptr. 89, 97 (Ct.App.1972).

2. The TSA Does Not Involve Any Problematic Assignment

***42** 168. The FDIC also argued that the TSA was ineffective to assign the Bank's refunds to Bancorp under California law. As with the FDIC's section 371c argument, this theory is misplaced because it simply presupposes that the Bank owned the tax refunds in the first instance. An "assignment," after all, requires that "the owner of the right" transfer the right to another. *See, e.g., Cockerell v. Title Ins. & Trust Co.,* 42 Cal.2d 284, 291, 267 P.2d 16, 20 (1954). Here, as the Court has explained, the Bank was never an owner of anything until funds were actually paid over to it by Bancorp. Plus, even if the Bank did have a preexisting interest in refunds that it could assign, this right was properly assigned via the TSA. Although an assignment requires the assignor to manifest its intent to transfer a right, this intent can be shown in many ways and need not be explicitly stated in the agreement. As the California Supreme Court has explained, "[a]n assignment requires very little by way of formalities and is essentially free from substantive restrictions ... '[i]t is sufficient if the assignor has, in some fashion, manifested an intention to make a present transfer of his rights to the assignee.' " *Amalgamated Transit Union v. Superior Court,* 46 Cal.4th 993, 1002, 95 Cal.Rptr.3d 605, 209 P.3d 937, 943 (2009) (citations omitted). As detailed above, the TSA manifests the parties' creation of a debtor-creditor relationship in myriad respects. Thus, there is no "assignment" associated with applying the TSA according to its terms.

3. There Is No Unjust Enrichment If The Trustee Retains The Refunds

169. Finally, the FDIC argued that the doctrine of unjust enrichment should prevent the Trustee from retaining the tax refunds under the TSA. As discussed at some length earlier in this Report and Recommendation, the Court does not believe that any unjust enrichment is happening here. In that regard, the Court again notes that the

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discussion of unjust enrichment by the Second Circuit Court of Appeals in the very analogous *First Central* case is extremely compelling. As in *First Central,* the Trustee here wants only to marshal "the assets of the estate under judicial supervision, for distribution according to federal law, under circumstances in which unsecured creditors receive fair but not full returns," which means that even if Bancorp's estate may be "enriched" if the Trustee retains the refunds, it will *not* be unjustly enriched. *See* 377 F.3d at 218.

170. Furthermore, the presence of the written TSA between the parties makes resort to unjust enrichment, unfairness, or similar equitable concepts and remedies inappropriate under California law in any event. *See, e.g., Total Coverage, Inc. v. Cendant Settlement Servs. Grp., Inc.,* 252 F. App'x 123, 125–26 (9th Cir.2007); *Hedging Concepts,* 49 Cal.Rptr.2d at 197–98. The FDIC's position again runs aground on the fundamental rule that "courts cannot make better agreements for parties than they themselves have been satisfied to enter into or rewrite contracts because they operate harshly or inequitably." *Walnut Creek Pipe Distribs., Inc. v. Gates Rubber Co. Sales Div.,* 228 Cal.App.2d 810, 39 Cal.Rptr. 767, 771 (Ct.App.1964). At the end of the day, there is nothing inequitable, unjust, overreaching, or otherwise unfair about the FDIC receiving proportional distributions on account of whatever unsecured claim the Bank would have enjoyed under the TSA. It is the opposite result advocated by the FDIC—under which the FDIC would receive an enhanced recovery at the expense of similarly situated unsecured creditors—that would be offensive to the principles of equality of distribution lying at the heart of the bankruptcy process.

VI. *PROPOSED CERTIFICATION UNDER RULE 54(b)*

***43** 171. The operative Complaint in this Adversary Proceeding involves five separate claims for relief. This Report and Recommendation addresses only one of those claims: the Fifth Claim for Relief, the only one that any party has suggested is a "non-core" matter on which this Court cannot enter final judgment, and the mirror image of that claim, the FDIC Counterclaim (together, the "Tax Refund Claims"). Although the adoption of the Court's recommendations by the District Court would fully resolve the tax refund-related issues, there remain additional, potentially complex causes of action to be litigated in this case.

172. In their February 8, 2012 stipulation, the parties jointly suggested that it would be appropriate to sever the "non-core" Tax Refund Claims from the remainder of the Adversary Proceeding, and for the District Court to certify any judgment entered after the District Court's review of this Report and Recommendation as a final judgment under Federal Rule of Civil Procedure 54(b).[FN30] After considering the parties' suggestion and the posture of this litigation, the Court agrees that entry of a final judgment would be appropriate, and hereby proposes that the District Court direct entry of a final judgment as to the Tax Refund Claims under Rule 54(b).

> FN30. As the parties' stipulation recognizes, such certification would be appropriate only if the District Court enters summary judgment in favor of one of the parties, and thus would not be possible to the extent that the District Court decides that neither party is entitled to summary judgment.

173. Rule 54(b) provides in relevant part that:

> When an action presents more than one claim for relief ... or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay.

Fed.R.Civ.P. 54(b); *see* Fed. R. Bank. P. 7054(a) (making rule applicable to adversary proceedings). Thus, a decision which would otherwise not be "final" for appellate purposes—such as an order granting partial summary judgment—may be "certified" as a final decision under Rule 54(b) if a court entering the judgment finds that "(1) there has been a final judgment on the merits, *i.e.,* an ultimate disposition on a cognizable claim for relief; and (2) there is 'no just reason for delay.' " *Berckeley Inv. Group, Ltd. v. Colkitt,* 455 F.3d 195, 202 (3d Cir.2006). Application of Rule 54(b) calls for an exercise of judicial discretion. *See Curtiss–Wright Corp. v. Gen. Elec. Co.,* 446 U.S. 1, 7–8, 100 S.Ct. 1460, 64 L.Ed.2d 1 (1980).

174. A determination under Rule 54(b) is appropriate here because the parties' dispute regarding the Tax Refund Claims is conceptually and legally distinct from the other claims for relief. Moreover, the Tax Refund Claims are separate claims that are capable of an ultimate resolution at this juncture. Therefore, a judgment on the Tax Refund Claims would be an appropriately final disposition of separate claims for relief. *See, e.g., Curtiss–Wright,* 446

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U.S. at 7; *United States v. Ettrick Wood Prods., Inc.*, 916 F.2d 1211, 1217 (7th Cir.1990).

175. Nor is there any "just reason for delay." This second prong of the Rule 54(b) analysis is necessarily a context-specific one, which "must take into account judicial administrative interests as well as the equities involved" in a particular case. *See Curtiss–Wright*, 446 U.S. at 8. This prong allows the District Court to act as a "dispatcher" for this case, applying its "sound judicial discretion ... to determine the 'appropriate time' when each final decision in a multiple claims action is ready for appeal." *See id.*

***44** 176. This Adversary Proceeding has been pending for several years, and the Bankruptcy Case has been pending even longer. Virtually all tax refunds that will ever be paid have been paid and are now held in the Joint Account where they are accruing very low rates of interest. Absent settlement, only a final judicial resolution will provide a mechanism whereby those funds are released for distribution. Both the Trustee and the FDIC have an understandable interest in seeing that the funds are distributed in a timely fashion. *See, e.g., Century Glove, Inc. v. First Am. Bank*, 860 F.2d 94, 98 (3d Cir.1988) (emphasizing how "issues central to the progress of the bankruptcy petition, those likely to affect the distribution of the debtor's assets, or the relationship among the creditors, should be resolved quickly" (citation and internal quotation marks omitted)). As both parties agree, accomplishing this important result is a reason to avoid delay through the entry of a final judgment on the Tax Refund Claims.

177. In addition, there are procedural benefits to entry of a final judgment under Rule 54(b). Although the District Court determined that the Tax Refund Claims are "non-core," the Court hereby finds that the claim allowance and subordination issues presented by the Trustee's remaining counts are "core" bankruptcy matters with little relationship to the underlying ownership dispute. 28 U.S.C. §§ 157(b)(2)(B), 157(b)(2)(O) & 157(b)(3); *Stern v. Marshall*, 131 S.Ct. at 2618. Under the Judicial Code, a federal district court analyzes a bankruptcy court's rulings on "core" matters in a fundamentally different fashion from its rulings on "non-core" matters. *See* 28 U.S.C. §§ 157(c)(1) & 158(a). It would likely be procedurally complex and inefficient for the District Court to perform both manners of review at the very end of the Adversary Proceeding. Since the "non-core" portion of this Adversary Proceeding is now ready for the District Court's review, the Court believes it would be just to allow that review to proceed with finality. This is particularly true given the Court's impression that, in light of intensity of the parties' litigation thus far, it is reasonably likely that the losing party before the District Court will seek to appeal to the Ninth Circuit Court of Appeals. In order to allow for that appeal to proceed now—rather than at the very end of the case when the District Court has reviewed all of the Court's ruling on all aspects of the Adversary Proceeding, including the remaining "core" matters—the District Court may need to enter a final order. *See generally* 28 U.S.C. § 1291. The District Court can accomplish this result by exercising its discretion under Rule 54(b).

178. In summary, the result recommended by this Report and Recommendation would include the final disposition of claims for relief that are distinct and separate from the other claims in the Trustee's Complaint or in the FDIC Answer. The Court does not perceive any just reason to delay the entry of a final judgment as to the Tax Refund Claims, and thus recommends that the District Court direct the entry of such a judgment under Rule 54(b).

VII. *CONCLUSION AND RECOMMENDATION*

***45** 179. The Court recognizes that this Report and Recommendation is lengthy and addresses many issues that may seem complex or esoteric. Much of the complexity is a function of the sheer number of different arguments and theories that the FDIC has advanced throughout the course of this litigation. After carefully working through all these arguments, the Court does not believe this to be as hard a case as it may appear. There is an established body of case law extending from 1993 through 2011 resolving very similar disputes about tax refunds in bankruptcy, and there is an established body of case law applying California law to determine the nature of a relationship, including in the bankruptcy context. These cases provide the first principles upon which this Report and Recommendation is based. As to each of the additional issues layered on top of this foundation, the Court believes that a clear answer can be found in the relevant statutes, existing case law, or logic itself.

180. After reviewing all of the evidence and arguments made by both parties in numerous rounds of briefing and hearings, the Court finds that there is no genuine dispute as to any material fact that would limit the Trustee's entitlement to judgment as a matter of law. As such, the Court's duly considered recommendation to the District Court would be that the District Court grant the relief requested by the Trustee MSJ and deny the FDIC MSJ.

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181. More specifically, the Court respectfully recommends that the District Court enter an order (1) adopting this Report and Recommendation in its entirety; (2) providing that the Trustee, as successor to Bancorp, is entitled to immediate payment, possession, and ownership of all refunds to be received on or after July 30, 2008 in connection with consolidated or combined federal and state tax returns filed or submitted for the years 2000 through 2008 and any interest associated therewith, including all funds now on deposit in the Joint Account; (3) holding that any legal rights of the FDIC, the Bank, or any subsidiary or affiliate of the Bank with respect to these tax refunds are properly asserted, if at all, solely in the form of a general unsecured claim against the Bancorp estate, subject to the bar date in effect in the Bankruptcy Case, as well as the objections, defenses, and causes of actions set forth in the Trustee's Complaint; and (4) expressly determining that there is no just reason for delay and directing that the judgment in favor of the Trustee and against the FDIC be entered as a final judgment under Federal Rule of Civil Procedure 54(b).

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United States District Court,
C.D. California.
In re INDYMAC BANCORP INC.

No. CV 12–02967–RGK.
May 30, 2012.

Proceedings: (IN CHAMBERS) Order Accepting Bankruptcy Court's Report & Recommendation (DE 2)

R. GARY KLAUSNER, District Judge.
***1** Sharon L. Williams Deputy Clerk

I. ***INTRODUCTION***

The Court is called upon to address the Proposed Findings of Fact and Conclusions of Law ("Proposed Order") submitted by Bankruptcy Judge Bluebond in this adversary proceeding between Alfred H. Siegel, as Trustee for IndyMac Bancorp ("Bancorp"), and the FDIC, as receiver for IndyMac Bank ("the Bank"). The FDIC did not consent to the Bankruptcy Court's entry of final judgment and has objected to the Proposed Order; the Trustee has in turn has responded to the FDIC's objections. Pursuant to Federal Rule of Bankruptcy Procedure 9033(d), this Court has conducted a *de novo* review of the FDIC's objections to the Proposed Order.

The facts and precise procedural history are complicated and described in more detail in the Proposed Order; this Order provides only a brief summary.

In July 2008, the Office of Thrift Supervision seized the Bank and appointed the FDIC as receiver to manage the Bank's assets and secured liabilities. Shortly thereafter, Bancorp, the holding company for the Bank, filed for bankruptcy in the United States Bankruptcy Court for the Central District of California.

Bancorp and the Bank filed consolidated tax returns pursuant to 26 U.S.C. § 1501 *et seq.* A consolidated tax return is a single return paid on behalf of an affiliated group of corporations. 26 U.S.C. § 1501. The parent company acts as the sole representative of the affiliated group to the Internal Revenue Service ("IRS"). 26 C.F.R. § 1.1502–77(a). Here, the parties signed a contract, the Amended and Restated Tax Sharing Agreement ("TSA"), which describes the mechanism by which the parties will coordinate amongst themselves for the payment of the consolidated tax return by Bancorp and distribute refunds received from the IRS.

Roughly $55 million in tax refunds paid by the IRS to Bancorp remain undistributed. The Bank made a claim against Bancorp's Bankruptcy Estate ("Estate") to these undistributed tax refunds, and in response the Trustee initiated the present adversary proceeding against the Bank asserting that the refunds are part of the Estate. The parties filed competing Motions for Summary Judgment as to the claims in the adversary proceeding that deal with the ownership of the tax refunds. Those Motions are the subject of the Proposed Order.

For the reasons discussed below, the Court **ACCEPTS** the Bankruptcy Court's Proposed Findings of Fact and Conclusions of Law. The Court **grants** the Trustee's Motion for Summary Judgment, **denies** the FDIC's Motion for Summary Judgment, and severs the claims that are the subject of the Proposed Order from the remaining claims in the adversary proceeding pursuant to Federal Rule of Civil Procedure 54(b).

II. ***LEGAL STANDARD***

A district court reviews de novo a party's objections to a bankruptcy judge's proposed findings of fact and conclusions of law. Fed. R. Bankr.P. 9033(d). Upon review, the court may "accept, reject, or modify the proposed findings of fact or conclusions of law" or may return the matter to the bankruptcy judge for further review. *Id.*

III. ***DISCUSSION***

***2** The FDIC objects to nearly every legal conclusion made by the Bankruptcy Court in the Proposed Order. Namely, the FDIC objects to the Bankruptcy Court's determinations that 1) the TSA creates

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a debtor/creditor relationship between Bancorp and the Bank rather than a principal/agent relationship or resulting trust, 2) the case *Western Dealer Management, Inc. v. England (In re Bob Richards Chrysler–Plymouth Corporation, Inc.) ("Bob Richards")*, 473 F .2d 262 (9th Cir.1973) is inapplicable, and 3) the FDIC's defenses under federal banking law, bankruptcy law, and California common law fail.

A. *The TSA Is Unambiguous and Describes a Debtor/Creditor Relationship*

The FDIC argues that the TSA creates a principal/agent relationship or resulting trust. The Bankruptcy Court found that the TSA is unambiguous and creates a debtor/creditor relationship. As such, the FDIC has a claim to the tax refunds as of the date Bancorp petitioned for bankruptcy ("petition date"). The Court agrees with the Bankruptcy Court's interpretation of the TSA.

First, the Court agrees with the Bankruptcy Court's holding that the TSA is unambiguous. In its Motion for Summary Judgment to the Bankruptcy Court, the FDIC itself argued that the TSA was unambiguous. (Bankr.DE 41.) The FDIC now argues that the Bankruptcy Court erred in excluding certain declarations and other evidence that the FDIC offered to interpret certain terms in the TSA. The Court finds that the Bankruptcy Court properly excluded this evidence as parol evidence through which the FDIC would attempt to give an alternative definition to terms in an unambiguous contract. *See* Cal.Code Civ. Proc. § 1856.

According to both bankruptcy law and California contract law, the TSA creates a debtor/creditor relationship. Bancorp owned the tax refunds and the TSA entitled the Bank to payment based on an amount that the Bank would have received in refunds had it filed its taxes separately. Bancorp's obligation to pay the Bank is not directly tied to the amount received from the IRS, Bancorp is not required to keep the refunds separate or in an escrow account, and Bancorp has complete decision-making authority over the process through which it distributes money to the Bank. Based on well established law these terms and arrangements are indicative of a creditor/debtor relationship rather than a principal/agent relationship. *See, e.g .*, *BankUnited Fin. Corp. v. FDIC (In re BankUnited Fin. Corp.) ("BankUnited")*, 462 B.R. 885 (S.D.Fla.2011); *Foothill Capital Corp. v. Clare's Food Mkt, Inc. (In re Coupon Clearing Serv., Inc.) ("Coupon Clearing")*, 113 F.3d 1091 (9th Cir.1997); *United States v. MCorp Fin. Inc. (In re MCorp Fin., Inc.) ("Mcorp")*, 170 B.R. 899 (S.D.Tex.1994).

The Proposed Order correctly concludes that the TSA clearly creates a debtor/creditor relationship between the parties. The FDIC's arguments that Bancorp acted as the Bank's agent are unavailing given the complete absence of control by the Bank over any tax-related decisions.

B. *The TSA Overrides the Default Rule Created by Bob Richards*

***3** The FDIC devotes considerable argument to the proposition that *Bob Richards* is applicable to this case and, as a result, the tax refunds are the property of the Bank. The Bankruptcy Court found that *Bob Richards* established a default rule which the parties negated by signing the TSA. The Bankruptcy Court further expressed doubt over whether *Bob Richards* was still good law. The Court agrees with the Bankruptcy Court that the TSA makes *Bob Richards* inapplicable.

By its very terms, *Bob Richards* applies to situations in which the parties file a consolidated tax return but have not agreed to any procedural mechanism regarding the distribution of refunds within the affiliated group. *Western Dealer Management, Inc. v. England (In re Bob Richards Chrysler–Plymouth Corporation, Inc.) ("Bob Richards")*, 473 F.2d 262, 265 (9th Cir.1973). In those circumstances, the tax refunds paid to the parent corporation are to be distributed to the subsidiary, so long as they were generated by the subsidiary's losses. *Id.* However, the Ninth Circuit specifically stated that this rule applied because the parties had not come to another agreement; in instances where the parties have agreed to the manner in which refunds are to be distributed, that agreement controls. *Id.* at 264–65.

Bob Richards is inapplicable to the present case because the parties signed the TSA. Other courts agree that the rule identified in *Bob Richards* is the default rule that the parties are free to adjust through an agreement between themselves. *See BankUnited Fin. Corp. v. FDIC (In re BankUnited Fin. Corp.) ("BankUnited")*, 462 B.R. 885, 889 (S.D.Fla.2011).

The Court need not reach the Bankruptcy Court's

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concerns over the present viability of *Bob Richards* as it finds the case inapplicable.

C. *The FDIC's Banking Law Defenses Fail*

The FDIC objects to the Bankruptcy Court's rejection of two of the defenses it raised under federal banking law. The Court will address each of these defenses in turn.

1. *The Requirements of 12 U.S.C. § 1283(e) Have Been Satisfied*

The FDIC argues that the TSA is void as a matter of law because it fails to meet the requirements of 12 U.S.C. § 1823(e). The Bankruptcy Court found that the FDIC's defense under § 1823(e) was inapplicable because the FDIC had waived its argument as it had not timely raised the defense, the requirements of § 1823(e) had been met, and alternatively that § 1823(e) was not applicable to the TSA. The Court agrees with the Bankruptcy Court's determination.

12 U.S.C. § 1823(e) requires that agreements which would defeat the interests of the FDIC in an "asset" have satisfied four procedural steps. The parties only dispute whether the requirement that the agreement be approved by the board of directors of the depository institution and reflected in the minutes of the meeting was met when the Bank agreed to the TSA. *See* 12 U.S.C. § 1823(e)(1)(C). The Bank's Board of Directors approved the TSA on July 29, 2003 as part of the bundle of agreements constituting "Transactions with Affiliates" and this decision is reflected in the minutes of the meeting. (Bankr.DE 81 Ex. Y.) Therefore, the requirements of § 1823(e) have been satisfied and the FDIC does not have a defense under this statute.

***4** Although the Court need not reach the Bankruptcy Court's alternative reasons as to why this defense fails, it notes that the FDIC appears to have waived the ability to use § 1823(e) as a defense by raising the argument for the first time as part of its reply memorandum and that § 1823(e) may not even apply in this instance as the TSA itself does not govern an "asset" owned by the Bank.

Therefore, the Court agrees with the Bankruptcy Court that the FDIC does not have a defense under 12 U.S.C. § 1823(e).

2. *12 U.S.C. § 371c Is Not Applicable*

The FDIC argues that the TSA violates 12 U.S.C. § 371c, which governs the terms of loans between regulated banks and affiliates. The Bankruptcy Court held that § 371c was inapplicable to the present case because the TSA does not create a loan or other extension of credit as those terms are commonly understood. The Court agrees with the Bankruptcy Court.

Section 371c(c) requires that loans or extensions of credit between a regulated bank and its affiliates be secured by a certain amount of collateral depending on the size of the loan. The FDIC argues that any obligation by Bancorp to pay the Bank money, such as the debtor/creditor relationship at issue here, constitutes a loan or extension of credit and falls within the ambit of § 371c(c). However, the FDIC provides no support for this argument. The term "extension of credit" as interpreted through regulations applies not to *any* payment obligation, but to payment obligations akin to loans. 12 C.F.R. § 223.3(o). This interpretation is consistent with the language of § 371c itself; "extension of credit" is used in conjunction with "loan." The only case the FDIC cites in support of its argument for a broad definition of "extension of credit" is not only an unpublished slip opinion, but distinguishable from the instant case in that the tax sharing agreement in that case functioned more like a loan than the payment system described in the TSA. *See BSD Bancorp, Inc. v. FDIC,* No. 93–12207–A11 (S.D.Cal. Feb. 28, 1995).

The Court agrees with the Bankruptcy Court that the TSA does not fall within the scope of 12 U.S.C. § 371c as it does not describe a loan or an extension of credit.

D. *Trustee's Rejection of the TSA Does Not Alter The Outcome*

The FDIC challenges the consequences of the Bankruptcy Court's determination that the TSA was an executory contract that the Trustee rejected during the bankruptcy filing. The Court finds that the FDIC's arguments are misplaced and do not accurately describe the legal realities of the tax refunds paid by the IRS to Bancorp.

The parties appear to agree that the TSA was an executory contract-one on which material performance remains due from both parties. When a party files for bankruptcy, it may either assume or reject its

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obligations under any executory contract. 11 U.S.C. § 365(a). Because the Trustee did not assume the TSA at the time of the bankruptcy filing, he is deemed to have rejected the contract. *See* 11 U.S.C. § 365(d)(1). The dispute here is over the consequences of that rejection.

***5** As the Bankruptcy Court noted, rejection of an executory contract by a bankruptcy trustee serves as a material breach of the contract by the bankrupt party and gives the other party to the contract a claim against the estate for breach of that contract. *See First Ave. W. Bldg., LLC v. James (In re Onecast Media, Inc.) ("Onecast Media")*, 439 F.3d 558, 563 (9th Cir.2006). Because the bankrupt party is in breach of the contract it is unable to obtain future benefits due under the contract, but the breach does not void the contract or defeat any pending claims the bankrupt party had under the contract. *Id.* (citing 3 Collier on Bankruptcy § 365.09[1] (15th rev. ed.2005).

Bancorp received additional tax refunds from the IRS after the petition date due to retroactive changes to the law governing net operating losses ("NOLs") under the Worker, Homeownership and Business Assistance Act ("WHBAA"). The FDIC argues that these additional refunds are "future benefits" paid to Bancorp under the contract and cannot be part of the Estate because the Trustee rejected the TSA. The Court agrees with the Bankruptcy Court that because the additional tax refunds resulted from a retroactive change in the law, they are not "future benefits" under the TSA and are instead properly part of the Estate as of the petition date even though they were paid later. This holding is analogous to other cases in which courts have found that an estate is entitled to post-petition appreciation in the value of its assets. *See, e.g., Gebhart v. Gaughan (In re Gebhart)*, 621 F.3d 1206, 1211 (9th Cir.2010). Here, any tax refunds are an asset of the Estate by virtue of the TSA and the WHBAA caused the value of those refunds to appreciate. *See In re Hooper*, No. 09–26224, 2010 WL 5155828 (Bankr.D.Ariz. Dec. 14, 2010); *see also Segal v. Rochelle*, 382 U.S. 375, 379 (1966) (finding that NOLs claimed after bankruptcy filing, but applied to taxable years before the bankruptcy filing were part of the bankruptcy estate).

The Court finds that the deemed rejection of the TSA by the Trustee does not eliminate the Trustee's interest in the additional tax refunds received as a result of changes to the law regards NOLs.

E. *The TSA Is Valid Under California Law*

The FDIC argues that the TSA is invalid under California law because it lacks adequate consideration, is an invalid assignment of Bank's interest in its tax refunds to Bancorp, and results in unjust enrichment to the Estate. The FDIC's arguments are unsupported by the law. Although it is undoubtedly unfortunate that the FDIC must stand as an unsecured creditor with a claim against the Estate, as the Bankruptcy Court noted, this is the nature of bankruptcy law and does not necessarily result in unjust enrichment to the Estate.

The Court finds that the TSA is valid under California law as it contains adequate consideration, is not an invalid assignment, and does not unjustly enrich the Estate.

IV. *CONCLUSION*

***6** For the reasons discussed above, the Court **ACCEPTS** the Proposed Findings of Fact and Conclusions of Law submitted by Bankruptcy Judge Bluebond. Pursuant to Federal Rule of Civil Procedure 54(b), the Court severs the claims that are the subject of this Order from the other claims remaining as part of this adversary proceeding. The parties are to submit a Proposed Judgment consistent with Order by Friday, June 8, 2012.

IT IS SO ORDERED.

C.D.Cal.,2012.
In re IndyMac Bancorp Inc.
Not Reported in F.Supp.2d, 2012 WL 1951474 (C.D.Cal.)

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