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CLERK U.S. BANKRUPTCY COURT
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UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re
VINEYARD NATIONAL BANCORP,
Debtor.

Case No.: 2:10-BK-21661RN
Chapter 11

BRADLEY SHARP, AS LIQUIDATING
TRUSTEE OF THE LIQUIDATING
TRUST OF VINEYARD NATIONAL
BANCORP,

Plaintiff and
Counter-Defendant,
v.

FEDERAL DEPOSIT INSURANCE
CORPORATION, in its capacity
as receiver for Vineyard
Bank, National Association,

Defendant and
Counter-Plaintiff.

Adv. No.: 2:10-AP-01815RN

**MEMORANDUM OF DECISION AFTER
TRIAL ON (i) COUNT IV OF THE
COMPLAINT; AND (ii) COUNT I OF
THE AMENDED COUNTERCLAIM**

DATE: January 29, 2014
TIME: 9:00 a.m.
PLACE: Courtroom 1645

INTRODUCTION

Bradley Sharp, as Liquidating Trustee of the Liquidating Trust of Vineyard National Bancorp ("Plaintiff"), commenced this action on May 5, 2010 raising five claims for relief that seek to disallow the

1 claim of Defendant and Counter-Plaintiff FDIC-R ("Defendant" or
2 "FDIC-R"), as receiver for Vineyard Bank, N.A. ("Bank"), against the
3 chapter 11 estate of Vineyard National Bancorp ("Debtor"). Among
4 other things, Count IV of the complaint asserts the Debtor's
5 entitlement to certain tax refunds in connection with the Debtor and
6 the Bank's consolidated tax returns for the tax year 2008.³ (Compl.
7 ¶¶ 50-66.) With its Amended Counterclaim to the Complaint ("Am.
8 Countercl."), the FDIC-R rejects Plaintiff's position that the FDIC-
9 R is merely an unsecured creditor of the Debtor's estate on account
10 of the Bank's entitlement to the tax refunds and instead, asserts
11 its right to the said tax refunds as property of the FDIC-R. (Am.
12 Countercl. ¶¶ 5-14.)

13 On May 3, 2013, this Court issued its Memorandum of Decision
14 Re: (1) Motion of the Federal Deposit Insurance Corporation, as
15 Receiver for Vineyard Bank, N.A., to Dismiss Count IV of the
16 Adversary Complaint; and (2) Plaintiff's Motion for Partial Summary
17 Judgment as to (I) Capital Maintenance Claim Asserted by FDIC-R; and
18 (II) Ownership of Tax Refunds ("MOD"). The MOD, *inter alia*, denied
19 Plaintiff's motion for partial summary judgment on the issue
20 concerning the ownership of the 2008 tax refunds finding that a
21 material factual dispute exists on whether an enforceable Tax
22 Sharing Agreement ("TSA") was operative in 2008 and whether a signed
23 TSA had to be renewed every year since 2005 for the agreement to be
24 enforceable. (Mem. Of Decision, May 3, 2013.)

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28 ³ The complaint further alleges FDIC-R was instrumental in causing the diminution of Debtor's capital by requiring the Debtor to infuse at least \$1 million to the Bank between May 2008 and February 2009 that was intended to benefit the Bank and deplete Debtor's estate. Thus, its claim ought to be subordinated. (Compl. ¶¶ 23-29.)

1 In Courtroom 1645 of the above entitled Court, the Honorable
2 Richard M. Neiter, United States Bankruptcy Judge presiding,
3 conducted a two-day bench trial on January 29 and 30, 2014. Rolf S.
4 Woolner, Esq. and William R. Shafton, Esq. of Winston & Strawn, LLP
5 appeared on behalf of the Plaintiff and David A. Kettel, Esq. and
6 Jessica Mickelsen, Esq. of Katten Muchin Roseman, LLP appeared on
7 behalf of the Defendant. No other appearances were made.

8 The admitted facts in the parties' Pretrial Stipulation
9 approved on December 26, 2013 ("Admitted Fact(s)"), the Trial
10 Documents from both parties, the testimony of witnesses and the
11 stipulated exhibits for trial (collectively, "Stipulated
12 Exhibit(s)") admitted into evidence at trial govern the facts of
13 this case.⁴ The following witnesses testified at trial:

- 14 (1) Mr. Norman Morales⁵ ("Morales"),
- 15 (2) Mr. James LeSieur⁶ ("LeSieur"),
- 16 (3) Mr. Gordon Fong⁷ ("Fong"),
- 17 (4) Mr. Donald Henry Pelgrim, Jr.⁸ ("Pelgrim"),
- 18 (5) Ms. Jessica Mickelsen ("Mickelsen"),
- 19 (6) Mr. Joel Herbert Ravitz ("Ravitz"), and
- 20 (7) Mr. Chuck Lawrence Keagle.

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23 ⁴ Defendant's Exhibits Q and DD were excluded from trial while Defendant's Exhibits J, J1, K, L, M, and N were admitted subject to Plaintiff's evidentiary objections.

24 ⁵ Mr. Morales was the Debtor's President and CEO until January 2008 when Mr. LeSieur took over the CEO position.

25 ⁶ Mr. LeSieur was the Chairman of the Debtor's Board of Directors from January 2007 to August 2008; the Vice
26 Chairman of the Board of Directors from October 2008 until the Debtor's chapter 11 petition on July 21, 2009; the interim
27 CEO from January 2008 until the fall 2008; and interim CFO from December until the postpetition period of the Debtor's
28 bankruptcy case. He held the same positions with the Bank during the same time he was an officer and director of the
Debtor until the Bank was taken over by the FDIC-R.

⁷ Mr. Fong was the CFO and former Executive Vice President of the Bank and the Debtor.

⁸ Mr. Pelgrim was a former chief administrative officer for the Debtor.

1 Witnesses were cross-examined accordingly.

2 The Court has carefully considered the Admitted Facts, the
3 findings made in this Court's decision entered on May 3, 2013, the
4 testimonies and all exhibits admitted into evidence. The Court has
5 also considered the legal arguments made in the Plaintiff's Trial
6 Brief, the Trial Brief of the Federal Deposit Insurance Corporation,
7 as Receiver for Vineyard Bank, and the Plaintiff's Reply Trial
8 Brief. After trial, the Court took this matter under submission and
9 now renders its Memorandum of Decision containing its findings of
10 fact and conclusions of law as required under Fed. R. Bankr. P.
11 7052.

12 13 **JURISDICTION**

14 This Court's jurisdiction is established under 28 U.S.C. §§
15 157(b)(2)(B) and 1334, and as determined by this Court's Memorandum
16 of Decision issued on May 3, 2013.

17 18 **ISSUES**

19 The trial focused on the factual issue concerning the intent of
20 the parties to continue enforcing the terms of the TSA in 2008. A
21 factual determination of this issue would result in this Court
22 deciding whether the holding in *In re Bob Richards Chrysler-Plymouth*
23 *Corp., Inc.*, 473 F.2d 262 (9th Cir. 1973), applies in this case in
24 the absence of a signed TSA applicable in 2008 thereby determining
25 ownership of the 2008 tax refunds.

STATEMENT OF EVIDENTIARY FACTS

Debtor is the parent-holding company of the Bank. (Admitted Fact ¶ 1.) The Vineyard National Bancorp and Subsidiary Corporate Income Tax Sharing Agreement (as previously defined, "TSA") between the Bank and the Debtor was created on January 31, 2005 and signed by Mr. Norman Morales as President and Mr. Gordon Fong as Senior Vice President of both the Debtor and the Bank. (Id. ¶ 2; Pl. Stipulated Ex. 2 and Def. Stipulated Ex. A.) The respective boards of directors of the Debtor and of the Bank adopted the TSA as reflected in the minutes of the meeting on April 27, 2005. (Admitted Fact ¶ 2; Pl. Stipulated Ex. 3.) Identical versions of the TSA were signed by Mr. Morales and Mr. Fong on behalf of the Bank and the Debtor in 2006 and 2007. (Admitted Fact ¶ 3; Pl. Stipulated Exs. 4 and 5 and Def. Stipulated Ex. A.) However, there were no minutes of either board of directors' meeting reflecting their approval of the TSA signed in 2006 and 2007. (Admitted Fact ¶ 3.)

The TSA provides in pertinent part:

"[T]he ultimate responsibility to make timely estimated federal income and state franchise tax payments rests with the Company [Debtor]. It has been the policy and practice of both the Company and the Bank to have the Bank make the timely quarterly consolidated estimated Federal income and state franchise tax payments on behalf of both the Company and the Bank to the taxing authorities.

. . . .
Each quarterly amount advance or deducted by the Bank on behalf of the Company will approximate the estimated Federal income and state franchise tax liability or benefit calculated by multiplying the quarterly taxable income/loss of

1 the Company by the appropriate income tax rate.
2 These tax remittances shall not exceed the amount
3 the Bank would have paid had it filed separately.
4 *The Bank and Bancorp shall settle intercompany*
5 *taxes receivable/payable arising from these*
6 *estimated payments on a quarterly basis. Thus,*
7 *if the Bank incurs a tax loss it should receive a*
8 *refund in an amount no less than the amount the*
Bank would have received as a separate entity,
regardless of whether the consolidated group is
receiving a refund.” (Pl. Stipulated Exs. 2, 4
and 5 and Def. Stipulated Ex. A (emphasis
added).)

9 There was no TSA signed in 2008—the tax year that resulted in the
10 disputed tax refunds. (Admitted Fact ¶ 3.)

11 **A. A written Tax Sharing Agreement existed in 2008.**

12 The collective testimonies from the directors and officers
13 of the Debtor support a finding that a TSA was in effect in 2008.
14 Most notable was Mr. Fong’s testimony that at the time he joined the
15 Debtor in 2002, the company already had a preexisting written tax
16 sharing agreement with the Bank. At the time the federal regulators
17 in 2005 were conducting an examination of the Bank’s financial
18 condition, Mr. Fong changed the existing tax sharing agreement
19 between the Bank and the Debtor into a policy by changing the title
20 of the document from an “agreement” to a “policy”. Defendant’s
21 Stipulated Exhibit C referred to this as the “Affiliate Transaction
22 Policy” which the regulators found not to be an acceptable tax
23 sharing agreement. As such, the regulators required that the tax
24 sharing arrangement between the Debtor and the Bank be in the form
25 of an agreement. To be in compliance, Mr. Fong testified that he
26 changed the title back to an agreement which became the 2005 TSA
27 that the regulators then deemed acceptable. Mr. Fong further
28 testified that the body of the 2005 TSA contained verbatim the

1 language used in the tax sharing agreement that existed when he
2 joined the Debtor and the Bank. Defendant's Stipulated Exhibit C
3 further stated that the federal regulators encouraged the Bank's
4 management to review the TSA to incorporate, at a minimum, the
5 recommendations outlined in the Interagency Policy Statement on
6 Income Tax Allocation in a Holding Company Structure dated November
7 23, 1998 ("Interagency Policy Statement"). (Def. Stipulated Exs. C
8 and B.)

9 The TSA was then approved by the Bank's and the Debtor's
10 boards of directors in 2005. Mr. Fong further testified that in
11 2006 and 2007, he and Mr. Morales signed the same TSA to satisfy the
12 regulators. However, the boards of the Debtor and the Bank neither
13 approved nor disapproved the subsequent TSAs because, as Mr. Morales
14 testified, board approval was unnecessary unless the boards were
15 implementing a new policy. The TSA was considered to continue as
16 the standard operating procedure for an indefinite period of time
17 until modified or terminated. As a result, no board approval in
18 2006 and 2007 was required. Indeed, the TSA contained no
19 termination date or expiration date and the boards did not discuss a
20 termination date for the TSA at the meeting in 2005. There was no
21 requirement to approve the TSA and sign the document yearly absent a
22 statement that an annual review and approval was required for a
23 company policy. This was corroborated by similar testimony from Mr.
24 LeSieur. Mr. LeSieur further testified that there was no
25 requirement from a board to reexecute the same TSA every year and no
26 director sought to terminate or amend the existing TSA. Indeed, Mr.
27 Pelgrim testified he had no opinion as to why the TSA had to be
28 signed three years in a row.

1 In explaining why a TSA was signed in 2006 and 2007, Mr.
2 Morales testified that Mr. Fong was a detailed and pragmatic person;
3 hence, while unnecessary, Mr. Fong had a checklist of regulatory
4 requirements and signed TSAs dated 2006 and 2007 were presented to
5 satisfy the regulators. In 2008, Mr. Fong testified a 2008 TSA was
6 not signed because the Bank was dealing with more important pressing
7 matters than worrying about a signed TSA. However, Messrs. Morales
8 and LeSieur believed the same TSA approved in 2005 was in effect in
9 2008. Consequently, Mr. LeSieur testified that he understood the
10 same TSA remained in effect for 2008-2009. He did not see the
11 reexecuted TSAs for 2006 and 2007. When preparing the 2008
12 consolidated tax returns, he referred to the same TSA without
13 focusing on the date or doubting its effectiveness.

14 The Court finds, therefore, that the TSA approved by the
15 two boards in 2005 remained enforceable in 2008 notwithstanding the
16 absence of a signed TSA for that year. A tax sharing agreement
17 existed at all relevant times between the Bank and the Debtor as
18 memorialized by the TSA that was signed and approved by the boards
19 in 2005. The Court further finds that the signing of an identical
20 TSA in 2006 and 2007 was a superfluous exercise by Messrs. Fong and
21 Morales in order to remain in compliance with the regulators'
22 requirements. Defendant's Stipulated Exhibit C did not state that
23 the regulators informed management that the TSA had to be renewed
24 every year but only that management ensure the TSA was comprehensive
25 and that, at a minimum, the recommendations of the Interagency
26 Policy Statement were incorporated in the TSA.

B. The terms of the Tax Sharing Agreement established a creditor-debtor relationship.

This Court has ruled in its MOD that the terms of the TSA were not vague. The four corners of the TSA determine the relationship established by its terms.

The TSA provides that the Bank and the Debtor shall settle intercompany taxes receivable/payable arising from the estimated tax remittances made on a quarterly basis in the amount not to exceed the Bank's entitlement to a refund if it were to file a separate tax return. (Pl. Stipulated Exs. 2, 4 and 5 and Def. Stipulated Ex. A.) The TSA further provides that pursuant to this "true up", the Bank would be entitled to "receive" a refund equal to the amount it would have received regardless if the consolidated group obtained a refund. *Id.* The language of the TSA that refers to "intercompany tax receivable/payable" establishes an obligation of the Debtor to pay the Bank any amount owing based on the accounting framework set forth in the TSA equal to the amount of the refund the Bank would have received if it had filed its own tax return.

The Court rejects Defendant's position that the terms of the TSA created an agency relationship or a trust relationship between the parties and finds the TSA established a creditor-debtor relationship. Most telling of a creditor-debtor relationship is the language in the TSA that entitles the Bank to payment even if the consolidated group did not receive a refund so long as it would have received a refund if the Bank had filed a separate tax return. Under this requirement, the Debtor would have owed the Bank sums it did not receive from the IRS if the Bank were entitled to receive a refund based on a separate return. This is indicative of a debtor-

1 creditor relationship because it established the Debtor's obligation
2 irrespective of whether a refund was obtained. No trust or agency
3 relationship was created because no "res" existed that belonged to
4 the Bank under this circumstance. The Debtor will owe the Bank so
5 long as the Bank was entitled to a refund if the Bank had filed its
6 own tax return.

7 Additionally, the TSA simply required the Debtor to make a
8 payment to the Bank after a quarterly "true up". The TSA did not
9 state unequivocally that the Debtor serves as an agent for the Bank
10 for purposes of collecting any tax refund. Nor did it set forth
11 parameters that are consistent with a trust agreement. There was no
12 requirement to segregate funds belonging to the Bank, no restriction
13 on how the Debtor could use the funds, no identification of a trust
14 res, and no express declaration of the intent to create a trust or
15 to hold the tax refunds in trust for the benefit of the Bank, the
16 consolidated group or anyone else. The TSA simply did not set
17 limitations or controls over the use of the funds obtained from the
18 IRS that were in Debtor's possession including any fixed deadline
19 when the funds were to be paid to the Bank.

20 Instead, the terms "receivable" and "payable" in the
21 agreement and the requirement to pay the Bank its refund even if the
22 consolidated group did not receive a tax refund evidenced the intent
23 to create an obligation to the Bank in the form of a reimbursement
24 thereby establishing a debtor-creditor relationship. The Court
25 finds further that while the TSA was not a loan agreement or a
26 promissory note, its terms nevertheless established Debtor's payment
27 obligation to the Bank for any tax refund to which the Bank was
28 entitled. This fungible obligation negates a finding that the Bank

1 had an ownership right to the tax refunds. Accordingly, this Court
2 finds the terms of the TSA that were operative in 2008 evidence a
3 debtor-creditor relationship whereby the Debtor was obligated to pay
4 the Bank for any tax refund due to the Bank.

5 If any of the above findings of fact are subsequently
6 determined to be conclusions of law, they shall be deemed to be so
7 designated.

8
9 **CONCLUSIONS OF LAW**

10 Because an operative TSA was in effect in 2008, this Court
11 cannot reach the same holding as *Bob Richards'* rendering it
12 inapplicable in this case. The Ninth Circuit's decision in *Bob*
13 *Richards* advanced the principle that, "absent any differing
14 agreement, . . . a tax refund resulting solely from offsetting the
15 losses of one member of a consolidated filing group against the
16 income of that same member in a prior or subsequent year should
17 inure to the benefit of that member." *Id.* at 265. The terms of the
18 TSA, which this Court finds unambiguous, control the relationship of
19 the parties in this case. When parties have elected to put an
20 agreement in writing, the unambiguous words of the agreement
21 control, and their actual intent is ineffective. See *In re Nelco,*
22 *Ltd.*, 264 B.R. 790, 806-07 (Bankr. E.D. Va. 1999).

23 In concluding that the TSA establishes a creditor-debtor
24 relationship, this Court finds the Eleventh Circuit decisions in *In*
25 *re NetBank, Inc.*, 729 F.3d 1344 (11th Cir. 2013), and *In re BankUnited*
26 *Fin. Corp.*, 727 F.3d 1100 (11th Cir. 2013), distinguishable and its
27 decisions do not bind this Court. While this Court previously cited
28 to the lower courts' decisions in *BankUnited* and *NetBank* in its MOD,

1 the reversal of those decisions does not impact the conclusion
2 reached here.

3 For instance, in *NetBank*, the parent company had sole
4 responsibility for filing tax returns, and electing gains, losses,
5 deductions and credits on behalf of the consolidated group. 729
6 F.3d at 1347-48. Section §9 of the *NetBank* agreement expressly
7 stated "[e]ach Affiliate hereby irrevocably appoints NetBank as its
8 agent and attorney in fact. . . ." The *NetBank* TSA further stated in
9 § 10 the intent to allocate the tax liability in accordance with the
10 Interagency Policy Statement that establishes an agency
11 relationship. *Id.* at 1348. Unlike *NetBank*, the Debtor's TSA did
12 not include express agency language such as that found in NetBank's
13 tax sharing agreement.

14 At the same time, the Eleventh Circuit found NetBank's
15 agreement to be ambiguous because it included express agency
16 language and the intention to comply with the Interagency Policy
17 Statement while also including language that established the
18 parent's independent contractual obligation to pay the subsidiary
19 bank. 729 F.3d at 1349. Here, the Debtor's TSA is unambiguous.
20 The language of the TSA clearly demonstrates an obligation to pay
21 the Bank for refunds it is due. The TSA does not refer to an agency
22 relationship and does not clearly express the intent of the parties
23 to comply with the Interagency Policy Statement.

24 Lastly, the Eleventh Circuit found that § 10 of NetBank's TSA
25 explicitly stated that the tax settlements between the parties
26 "should result in no less favorable treatment to the affiliated
27 group than if it had filed its income tax return as a separate
28 entity" pursuant to the Interagency Policy Statement. 729 F.3d at

1 1350. Requiring the subsidiary bank to seek payment as an unsecured
2 creditor from the bankruptcy estate of NetBank would be a less
3 favorable treatment because the Interagency Policy Statement
4 contains specific language that the parent serves as an agent on
5 behalf of the consolidated group. *Id.* Unlike *NetBank*, the TSA is
6 simply silent on this point. Determining the Debtor to be the owner
7 of the refund when the TSA lacked express language of an agency
8 relationship does not diminish the Bank's entitlement to an amount
9 equal to its own refund.

10 The Eleventh Circuit's decision in *BankUnited* is equally
11 distinguishable. In *BankUnited*, the subsidiary bank was tasked with
12 distributing the tax refunds and collecting the tax liabilities on
13 behalf of the consolidated group which the Eleventh Circuit deemed
14 crucial in determining that an agency relationship existed between
15 the parent and the subsidiary bank. To hold that the refund was
16 owned by the holding company would "frustrate the Bank's ability to
17 discharge its obligation to distribute to the members of the Group
18 the portion of the tax refunds to which they are entitled."
19 *BankUnited*, 727 F.3d at 1108. Thus, the Eleventh Circuit found the
20 parties intended the TSA to require the holding company to forward
21 the tax refunds to the bank on receipt even without the express
22 language to do so. 727 F.3d at 1108.

23 Unlike *BankUnited*, the Bank is not tasked with the same
24 responsibility of collecting and distributing the tax refunds to the
25 consolidated group. Instead, the parties have a "true up" every
26 quarter to settle intercompany taxes receivable/payable arising from
27 the Bank's estimated tax payments. (Pl. Stipulated Ex. 2 and Def.
28 Stipulated Ex. A.)

1 As in *NetBank*, the Eleventh Circuit found *BankUnited's* tax
2 sharing agreement to be ambiguous. This Court, however, has
3 consistently held that the TSA approved in 2005 contains no
4 ambiguity.

5 In both decisions, the Eleventh Circuit discounted the lower
6 courts' findings that the tax sharing agreements did not contain
7 elements of a trust or an agency relationship, particularly,
8 restrictions on control or use of funds. However, in the Ninth
9 Circuit and in California, the absence of restrictions on the use or
10 the commingling of funds has been found relevant and indicative of a
11 debtor-creditor relationship. See e.g., *In re Coupon Clearing*
12 *Service, Inc.*, 113 F. 1091, 1099-1102 (9th Cir. 1996) (right to
13 control by the principal is sufficient to find an agency
14 relationship); *Lonely Maiden Productions, LLC v. GoldenTree Asset*
15 *Management, LP*, 201 Cal. App. 4th 368, 380 (2011) (citation omitted)
16 (if recipient of funds is not prohibited from using them as his own
17 and commingling them with his own monies, a debtor-creditor, not a
18 trust, relationship exists).

19 Conversely, the absence of a "fixed interest rate, a fixed
20 maturity date, or the ability to accelerate payment upon default" do
21 not negate finding a creditor-debtor relationship. Cf. *BankUnited*,
22 727 F.3d at 1108 (lack of fixed interest rate, maturity date or
23 default provision is evidence that no debtor-creditor relationship
24 exists). It simply shows that the TSA is not a loan but that it
25 created a different form of indebtedness under the parties'
26 contract.

27 Similar to the language used in the tax allocation agreement in
28 *In re IndyMac Bancorp, Inc.*, the TSA referred to "intercompany tax

1 receivable/payable" which established an obligation from the Debtor
2 to pay the Bank what was owed to it based on the parties' accounting
3 procedures if the Bank filed its own tax return. See *Siegel v. FDIC*
4 (*In re IndyMac Bancorp Inc.*), 2012 LEXIS 1462 *3-4 (Bankr. C.D. Cal.
5 Mar. 29, 2012) as accepted by *In re IndyMac Bancorp, Inc.*, 2012
6 LEXIS 88666 *13-17 (C.D. Cal. May 30, 2012).

7 As in *IndyMac* and *In re Team Financials, Inc.*, 2010 WL 1730681
8 *3 (Bankr. D. Kan. Apr. 27, 2010), the TSA did not create an express
9 trust as it lacked the necessary language to create such a trust.
10 See *Weststeyn Dairy 2 v. Eades Commodities Co.*, 280 F. Supp. 2d
11 1044, 1075 (E.D. Cal. 2003) (citation omitted) (voluntary trust
12 created by acts or words of the trustor indicated (1) an intention
13 to create a trust and (2) the subject, purpose, and beneficiary of
14 the trust); see also *In re First Central Financial Corp.*, 377 F.3d
15 209 (9th Cir. 2004) (no constructive trust was created). The TSA did
16 not identify the Debtor as, and the Debtor did not assent to
17 becoming, a trustee. As this Court found above, the TSA had no
18 requirement to segregate funds belonging to the Bank, no restriction
19 on how the Debtor could use the funds, no identification of a trust
20 res, and no express declaration of the intent to create a trust or
21 to hold the tax refunds in trust for the benefit of the consolidated
22 group. Likewise, the TSA did not state unequivocally that the
23 Debtor agreed to serve as an agent for the Bank for purposes of
24 collecting any tax refund. Instead, the terms "receivable" and
25 "payable" evidence the intent to create an obligation to the
26 subsidiary in the form of a reimbursement thereby establishing a
27 debtor-creditor relationship.

1 *Lubin*, a case cited by the FDIC-R, is consistent with this
2 principle. *Lubin v. FDIC*, 2011 WL 825751 *5 (N.D. Ga. 2011). The
3 bankruptcy court in *Lubin* found that the language of the existing
4 tax allocation agreement expressly provided:

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

13 *Lubin* found it clear from the language of the tax allocation
14 agreement that an agency relationship was intended. *Id.* at *6.
15 Such is not the case here.

16 The U.S. Supreme Court's decision in *US Airways, Inc. v.*
17 *McCutchen*, 133 U.S. 1537 (2013), does not defeat a finding that the
18 terms of the TSA establish a debtor-creditor relationship.
19 *McCutchen's* holding does not support Defendant's position that a TSA
20 must "expressly disavow" a default rule such as *Bob Richards* for *Bob*
21 *Richards* to be deemed inapplicable. *McCutchen* held that "default
22 rules" applied only in the absence of a clear expression of the
23 parties' intent so that if the express terms of a contract
24 contradict the default rule, the agreement governs. 133 S.Ct. at
25 1549. Unlike *McCutchen* where the ERISA plan provisions were silent
26 in allocating the costs of obtaining a third-party recovery thereby
27 "leaving space for the common-fund rule to operate", 133 S.Ct. at
28

1 1549, the TSA is not vague and contains express provisions that
2 establish a debtor-creditor relationship as explained above.

3 Similarly, *BSD Bancorp, Inc. v. FDIC (In re BSD Bancorp, Inc.)*,
4 1995 U.S. Dist. LEXIS 22588 *10 and 14 (S.D. Cal. Feb. 28, 1995), is
5 distinguishable because again, *BSD* found the tax sharing agreement
6 to be vague and that it provided for the parent's immediate
7 reimbursement of the bank's tax refund— aspects which are not
8 present in the 2005 TSA. *BSD* court held the terms of the agreement
9 must expressly or impliedly override the gap-filling (default) rule
10 itself. *Id.* at *13. Here, there is no gap as the TSA is
11 unambiguous and the provisions of the TSA create a fungible
12 obligation to pay the Bank its refund even if the consolidated group
13 does not receive a refund thereby creating a debt independent of a
14 res.

15 The unambiguous terms of the TSA and the holdings of these
16 cases coalesce into the conclusion that the TSA overrides the
17 holding in *Bob Richards* that a principal-agent relationship is
18 established by the filing of a consolidated tax return. This Court
19 holds that the TSA created a debtor-creditor relationship whereby
20 the Debtor owes the Bank sums equal to the amount of the refunds the
21 Bank would have received if it had filed its own separate tax
22 return.

23 The Court rejects the FDIC-R's position that the Interagency
24 Policy Statement must be given significant weight. The TSA is clear
25 and extrinsic evidence need not be considered. Moreover, the
26 District Court in *Siegel v. FDIC*, 20012 U.S. Dist. LEXIS 78418 *11
27 (C.D. Cal. 2011), found that the Interagency Policy Statement on
28 Income Tax Allocation in a Holding Company Structure, 63 Fed. Reg.

1 64757, is a non-binding policy statement and is not material to
2 adjudicate ownership of the refund.

3 *Team Financial* reached the same finding that nothing in the
4 Interagency Policy Statement renders it legally binding or has the
5 force of law. 2010 WL1730681 *8. Furthermore, the Court agrees
6 with *Team Financial* that the use of "agency" in the Statement refers
7 to Treas. Reg. § 1.1502-77(a), the main purpose of which is to set
8 the ground rules for how the IRS would deal with consolidated tax
9 groups filing consolidated returns. 2010 WL 1730681 *6. The tax
10 regulation requires the parent to act as the sole agent to handle
11 all matters relating to the tax return.

12 However, these regulations are basically procedural in purpose
13 and were adopted solely for the convenience and protection of the
14 federal government. *Bob Richards*, 473 F.2d at 265. The Court finds
15 irrelevant that the estate, instead of the Bank, received the tax
16 refunds directly from the IRS. The Treasury Regulation requires
17 that the tax refund be paid to the entity that filed the claim. 26
18 C.F.R. § 1.1502-77(a)(2)(v). The IRS is not concerned with the
19 subsequent disposition of tax refunds and none of its regulations
20 must be construed to govern this issue. *Bob Richards*, 472 F.2d at
21 265; *IndyMac*, 2011 LEXIS 78418 *12-13 citing *In re First Cent. Fin.*
22 *Corp.*, 269 B.R. 481, 489 (E.D.N.Y. 2001), *aff'd*, *Superintend. of*
23 *Ins. v. Ochs*, 377 F.3d 209 (2d Cir. 2004). Nothing in the Internal
24 Revenue Code or the regulations promulgated thereunder purports to
25 determine the relative rights of the members of a consolidated group
26 of companies with respect to tax refunds. Therefore, this Court is
27 unwilling to be bound by the Interagency Policy Statement.

1 Likewise, this Court finds the rejection of the TSA by
2 operation of the Debtor's confirmed plan did not extinguish the TSA.
3 Rejection of an executory contract results in a breach of such
4 contract but does not affect the substantive rights of the parties
5 under the rejected contract that was established at the time the
6 bankruptcy petition was filed. *In re Pomona Valley Medical Group,*
7 *Inc.*, 476 F.3d 665, 673 (9th Cir. 2007).


8 If any of the above conclusions of law are subsequently
9 determined to be findings of fact, they shall be so designated.

10
11 **CONCLUSION**

12 For the reasons stated herein, the Court finds in favor of the
13 Plaintiff on Count IV of the Complaint and against the Defendant on
14 Count I of the Amended Counterclaim. The Debtor is entitled to the
15 tax refunds in question and the Defendant is entitled to a general
16 unsecured claim against the Debtor's estate. A separate judgment
17 resolving all issues raised by the Complaint will be entered against
18 the Defendant upon the complete resolution of this proceeding.

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24 Date: March 28, 2014

25 
26 Richard M. Neiter
27 United States Bankruptcy Judge
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