APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT

IN RE: UNITED WESTERN BANCORP, INC.,
Debtor.

SIMON E. RODRIGUEZ, IN HIS CAPACITY AS
CHAPTER 7 TRUSTEE FOR THE BANKRUPTCY ESTATE OF
UNITED WESTERN BANCORP, INC.,
Plaintiff-Appellant,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
IN ITS CAPACITY AS RECEIVER FOR
UNITED WESTERN BANK,
Defendant-Appellee.

No. 17-1281

FILED January 29, 2019

Appeal from the United States District Court
for the District of Colorado

(D.C. No. 1:16-CV-02475-WJM) (D. Colo.)

Before BRISCOE, SEYMOUR, and HOLMES, Circuit Judges.

ORDER

This matter is before the court on the appellant's *Petition for Panel Rehearing and Motion for Clarification.* Upon consideration, the request for panel rehearing is granted in part and to the limited extent that footnote 3 of the original Opinion will be deleted. The *Petition* is otherwise denied, as is the motion to clarify. A copy of the revised version is attached to this order. The clerk is directed to file the amended version of the Opinion effective the date of this order.

Opinion

BRISCOE, Circuit Judge:

This appeal, which arises out of a bankruptcy adversary proceeding, concerns the ownership of a federal tax refund. The tax refund was issued by the Internal Revenue Service (IRS) to United Western Bancorp, Inc. (UWBI), a thrift holding company that had, under the terms of a written "Tax Allocation Agreement," filed consolidated returns on behalf of itself and several subsidiary corporations. The tax refund was the result, however, of net operating losses incurred by United Western Bank (the Bank), one of UWBI's subsidiaries.

Simon Rodriguez, in his capacity as the Chapter 7 Trustee for the bankruptcy estate of UWBI, initiated this adversary proceeding against the Federal Deposit Insurance Corporation (FDIC), as receiver for the Bank, alleging that the tax refund was owned by UWBI and was thus part of the bankruptcy estate. The bankruptcy court agreed and entered summary judgment in favor of the Trustee. The

FDIC appealed to the district court, which reversed the decision of the bankruptcy court. The Trustee now appeals from the district court's decision.

Exercising jurisdiction pursuant to 28 U.S.C. § 158(d)(1), we agree with the district court that the tax refund belongs to the FDIC, as receiver for the Bank. Consequently, we affirm the judgment of the district court and remand to the bankruptcy court for further proceedings.

I

a) UWBI and its affiliates

UWBI is a Colorado corporation and a "unitary thrift [or bank] holding company." Aplt. App., Vol. I at 41. UWBI owned several affiliate subsidiaries, including the Bank. The Bank, UWBI's principal subsidiary, was headquartered in Denver and operated a community-based banking network that was comprised of eight banking locations and a loan servicing office.

b) The Tax Allocation Agreement

UWBI's affiliate subsidiaries were "members of an affiliated group ... within the meaning of Section 1504(a) of the Internal Revenue Code of 1986." Id. at 41; see 26 U.S.C. § 1504(a). Beginning in 2004 and continuing thereafter, the affiliated group "file[d] ... consolidated federal income tax returns." Aplt. App., Vol. I at 41.

On January 1, 2008, UWBI and its affiliate subsidiaries entered into a Tax Allocation Agreement

(the Agreement).[1] The Agreement's preamble noted that the affiliates had previously filed, and intended to continue to file, "consolidated federal income tax return[s]." Id. The preamble further stated that "UWBI and the Affiliates desire[d] to establish a method for (i) allocating the consolidated tax liability of the Group among its members, (ii) reimbursing UWBI for the payment of such tax liability, and (iii) compensating each member of the Group for the use of its losses by any other member of the Group." Id.

The Agreement in turn, under Section A, entitled "General Rule – Federal," outlined how federal tax payments would be made:

> 1. Except as specifically set forth herein to the contrary, each Affiliate shall pay UWBI an amount equal to the federal income tax liability such Affiliate would have incurred were it to file a separate return (or, if appropriate, a consolidated return with its subsidiary affiliates). If a regulated first-tier Affiliate incurs a net operating loss or excess tax credits, the regulated Affiliate is entitled to a refund equal to the amount that it would have been entitled to receive had it not joined in the filing of a consolidated return with UWBI. Similar treatment is optional at UWBI discretion for nonregulated first-tier Affiliates. Any refund shall generally not exceed the amount claimed or received as a refund resulting from a carryback claim filed by

[1] Prior to 2008, UWBI and its affiliates had filed taxes under similar, but not identical, written agreements. Aplt. App., Vol. I at 182.

> UWBI. However, this shall not prevent UWBI from the ability to make a refund over the amount received or claimed as a refund or carryback, if in its sole discretion it believes such payment is in its best interest. Additionally, if part of [sic] all of an unused consolidated net operating loss, net capital loss, tax credit or similar type item is allocated to an Affiliate pursuant to Regulations Section 1.1502-21, and it is carried back, if utilized, or it is carried forward, whether or not utilized, to a year in which such Affiliate filed a separate income tax return or a consolidated federal income tax return with another group, any refund or reduction in tax liability arising from the carryback or carryforward shall be retained by such Affiliate and such item shall not enter into the calculation of liability to or from UWBI.
>
> 2. In essence, this Agreement requires that each first-tier subsidiary be treated as a separate taxpayer with UWBI merely being an intermediary between an Affiliate and the Internal Revenue Service ("IRS").

Id. The Agreement also, in Section C, included "specific policies designed to cover certain factual scenarios" including, for example, "[c]haritable contributions." Id. at 42.

Section G of the Agreement stated that "[e]ach Affiliate hereby appoints UWBI as its agent, as long as such Affiliate is a member of the UWBI group, for the purpose of filing such consolidated Federal income tax returns for the UWBI group as UWBI

may elect to file and making any election, application or taking any action in connection therewith on behalf of the Affiliates." Id. at 44. Each affiliate also, under Section G, "consent[ed] to the filing of any such returns and the making of any such elections and applications." Id.

Under Section H, entitled "Miscellaneous," the Agreement contained a provision regarding refunds from the IRS:

> In the event of any adjustment to the tax returns of the Group as filed (by reason of an amended return, claim for refund, or an audit by a taxing authority), the liability of the parties to this Agreement shall be redetermined to give effect to any such adjustment as if it had been made as part of the original computation of tax liability, and payments between the appropriate parties shall be made within 10 business days after any such payments are made or refunds are received, or, in the case of contested proceedings, within 10 business days after a final determination of the contest.

Id. (quoting § H.1).

Also under Section H, the Agreement stated, in pertinent part:

> The intent of this Agreement is to provide an equitable allocation of the tax liability of the Group among UWBI and the Affiliates. Any ambiguity in the interpretation hereof shall be resolved, with a view to effectuating such

> intent, in favor of any insured depository institution.

Id. at 45 (quoting § H.4).

c) UWBI's filing of federal tax returns on behalf of the group

UWBI proceeded, in accordance with the terms of the Agreement, to file federal income tax returns for the consolidated group. In doing so, "the tax liabilities and tax benefits" were computed "on a separate-entity basis for each Affiliate," but UWBI ultimately filed one tax return "on a consolidated basis." Id. at 82.

For the tax year 2008, UWBI filed a federal income tax return for the affiliated group and reported that the Bank generated $34,397,709 in taxable income. The return indicated that UWBI itself did not generate taxable income in 2008.

In 2010, the Bank suffered at least $35,351,690 in losses. Based upon the Bank's 2010 net operating losses, UWBI, at some point in 2011, filed on behalf of the affiliated group a tax refund request of $4,846,625 to recover a portion of the taxes paid by the Bank on its 2008 taxable income.[2]

d) Appointment of the FDIC as receiver for the Bank

The Bank was a federally chartered savings and loan association. On January 21, 2011, the Office of Thrift Supervision (OTS) closed the Bank and

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[2] The Internal Revenue Code permits corporations to "carryback" net operating losses for up to two taxable years. See 26 U.S.C. § 172.

appointed the Federal Deposit Insurance Corporation (FDIC) as receiver. Shortly thereafter, the FDIC notified the IRS of these events.

e) UWBI's bankruptcy proceedings

Because the Bank was UWBI's principal, if not sole, source of income, the Bank's receivership resulted in UWBI becoming insolvent. On March 2, 2012, UWBI filed a petition for Chapter 11 bankruptcy. As of that date, the tax refund request that UWBI filed in 2011 was still pending before the IRS.

On August 30, 2012, the FDIC filed a proof of claim in UWBI's bankruptcy case in the aggregate amount of $4,847,000. The FDIC alleged that, as receiver for the Bank, it was entitled to the federal tax refund that was due and owing from the IRS to the affiliate group because the refund stemmed exclusively from the Bank's business loss carrybacks. The FDIC also alleged that its claim covered "potential fraudulent transfers or unlawful dividends, unearned insurance premiums to the extent that the source of the premium payments was the Bank, insurance proceeds paid under applicable insurance coverage for any such losses, and other protective claims." Id. at 62.

The bankruptcy case was converted to a Chapter 7 proceeding on April 15, 2013. Rodriguez was appointed as the Chapter 7 trustee for the bankruptcy estate.

f) The adversary proceeding

On April 16, 2014, the Trustee initiated this adversary proceeding by filing a complaint against the FDIC asserting three claims: (1) a claim for declaratory relief in the form of a determination that the tax refund was the property of the debtor rather than the FDIC, (2) a claim for turnover of the tax refund, pursuant to 11 U.S.C. § 542, to the extent the FDIC possessed the tax refund, and (3) an objection to the FDIC's proof of claim. The bankruptcy court subsequently authorized the tax refund to be deposited into the court's registry. On November 25, 2014, the FDIC filed a counterclaim alleging that the FDIC, as the receiver for and successor to the Bank, owned the tax refund.

On October 30, 2015, the parties filed cross motions for summary judgment. The FDIC argued that there was "no provision in the ... Agreement that transfers ownership of the Bank-generated tax refunds to [UWBI], indicates that the Bank intended to transfer beneficial ownership of the tax refunds to [UWBI], or otherwise alters the widely recognized default rule regarding ownership of tax refunds by the entity in a consolidated tax group that generated those tax refunds." Aplt. App., Vol. I at 78. The FDIC also argued that "[e]ven if the anticipated tax refund is paid to [UWBI], [UWBI] acts as agent for the Affiliated Group and, therefore, would only hold bare legal title in the tax refund." Id. The Trustee argued, in contrast, that the Agreement "establishe[d] a debtorcreditor relationship between [UWBI] and the Bank with respect to any tax refunds" and that "[i]f and when the Refund [wa]s paid to UWBI the funds w[ould] therefore become property of the

[bankruptcy] Estate and [the FDIC] w[ould] have an unsecured, nonpriority claim for its pro rata share." Id. at 178.

In 2015, the IRS, after completing an audit, issued a refund in the amount of $4,081,334.67.

On September 16, 2016, the bankruptcy court issued an opinion and order granting summary judgment in favor of the Trustee and denying the FDIC's motion for summary judgment. In doing so, the bankruptcy court began by noting that 11 U.S.C. § 541 outlines the creation of a bankruptcy estate and provides, in pertinent part, that the estate includes " 'all legal or equitable interests of the debtor in property as of the commencement of the case ... wherever located and by whomever held.' " Aplt. App., Vol. II at 382 (quoting § 541(a)). The bankruptcy court also noted that "[a] long line of bankruptcy cases (even pre-dating the modern Bankruptcy Code) dictate that if a debtor owns or is entitled to a federal loss carryback tax refund, such refund generally becomes property of the debtor's bankruptcy estate." Id. at 383.

The bankruptcy court concluded that the Agreement, "the Internal Revenue Code, and the IRS regulations all dictate that [UWBI], as the bank holding company for the Affiliated Group has *at least bare legal title* to the Tax Refund." Id. at 386 (emphasis in original). "After all," the bankruptcy court noted, "26 C.F.R. § 1.1502-77(d)(5) requires that the Tax Refund be made 'directly to and in the name of' [UWBI]." Id.

The bankruptcy court in turn concluded that the FDIC failed to establish that the Bank had equitable ownership of the Tax Refund. In support of this conclusion, the bankruptcy court noted that "neither the Internal Revenue Code nor the IRS regulations establish which entity, [UWBI] or the Bank, has equitable or beneficial ownership of the Tax Refund." Id.

The bankruptcy court also determined that the Agreement created a debtor-creditor relationship between UWBI and the Bank with respect to the tax refund. In particular, the bankruptcy court concluded that the Agreement (a) "created fungible payment obligations through an intercompany account of payments and reimbursements" that indicated "the parties were creating a debtor-creditor relationship," (b) contains no escrow, segregation, or use restrictions regarding what UWBI can or cannot do when it receives a tax refund from the IRS, and (c) delegates decision-making on tax matters to UWBI. Id. at 390. Consequently, the bankruptcy court concluded that UWBI was "the beneficial owner of the Tax Refunds," and thus the Tax Refund "belong[ed] to the Trustee (as Trustee of the [UWBI] bankruptcy estate)." Id.

Based upon these conclusions, the bankruptcy court determined "that the Trustee [wa]s entitled to the Tax Refund." Id. at 400. The bankruptcy court emphasized that this "d[id] not leave the FDIC without a remedy" because it was "still a general unsecured creditor of the [UWBI] bankruptcy estate and [could] share *pari passu* with any other allowed general unsecured claims." Id. at 400-01.

The bankruptcy court entered judgment in the adversary proceeding on September 16, 2016.

g) The district court's decision

The FDIC appealed and, on July 10, 2017, the district court issued an order reversing the judgment of the bankruptcy court. The district court concluded, in pertinent part, that the Agreement was "ambiguous regarding whether [UWBI] may keep the tax refund in the present circumstances" and "that any ambiguity [should] be construed in favor of the Bank." Aplt. App., Vol. III at 529. The district court noted that the plain language of Section A.2 of the Agreement "declare[d] that the purpose of the [Agreement] is to set up an arrangement in which [UWBI] acts as nothing more than a go-between, as between the subsidiaries and the IRS." Id. at 552. The district court also concluded that Section H.4 of the Agreement required it to construe any ambiguities in favor of the Bank and that, consequently, it was required to interpret the Agreement as requiring UWBI "to act as agent on behalf of the Bank in obtaining and remitting the refund." Id. at 559. Accordingly, the district court concluded that UWBI "held no more than legal title to the Refund, while the Bank held equitable title," and thus "[t]he Refund [wa]s not part of [UWBI's] bankruptcy estate." Id. at 560.

The Trustee now appeals from the district court's decision.

II

The Trustee's arguments on appeal

The Trustee argues that under "[t]he plain language" of the Agreement, "UWBI holds equitable title to the Tax Refund, and thus ... the Refund is property of the UWBI estate." Aplt. Br. at 12. In support, the Trustee asserts that the Agreement "imposes two reciprocal obligations." Id. He contends that "[i]t requires each affiliate to pay to UWBI funds equal to the amount the affiliate would have been liable to pay the IRS had the affiliate filed an individual ... tax return," and it in turn "obliges UWBI to pay each affiliate funds equal to the amount of the refund to which that affiliate would have been entitled had it filed a separate tax return." Id. at 12-13. Further, the Trustee argues that "[n]othing in the [Agreement] grants [the Bank] any interest in any IRS tax refund actually received by UWBI." Id. at 13. In short, the Trustee argues, the Agreement "creates a debtor-creditor relationship, and the Bank holds only an unsecured claim against the UWBI estate in the amount of funds the Bank would have received had it filed a separate tax return." Id. at 14.

Standard of review

"When hearing an appeal from a district court's review of a bankruptcy-court order, 'we independently review the bankruptcy court's decision, applying the same standard as the ... district court.' " In re Peeples, 880 F.3d 1207, 1212 (10th Cir. 2018) (quoting In re C.W. Min. Co., 798 F.3d 983, 986 (10th Cir. 2015)). "We review

bankruptcy-court orders granting summary judgment in adversarial proceedings de novo, and affirm if 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.' " Id. (quoting Fed. R. Civ. P. 56(a)).

The scope of UWBI's bankruptcy estate

It is well established that "[f]iling for Chapter 11 [or Chapter 7] bankruptcy has several relevant legal consequences," the most important of which, for purposes of this appeal, is that "an estate is created comprising all property of the debtor." Czyzewski v. Jevic Holding Corp., ––– U.S. ––––, 137 S.Ct. 973, 978, 197 L.Ed.2d 398 (2017) (citing 11 U.S.C. § 541(a)(1)). This includes "all legal or equitable interests of the debtor in property as of the commencement of the [bankruptcy] case." 11 U.S.C. § 541(a)(1). The estate does not include, however, "[p]roperty in which the debtor holds, as of the commencement of the [bankruptcy] case, only legal title and not an equitable interest ...." 11 U.S.C. § 541(d). Thus, in order for the tax refund to be considered part of UWBI's estate, UWBI must hold both legal and equitable title to the tax refund.

The analytical framework for resolving ownership of the tax refund

Section 1501 of the Internal Revenue Code (the Code) authorizes an "affiliated group" of corporations to "mak[e] a consolidated return with respect to income tax ...." 26 U.S.C. § 1501. The Code defines the term "affiliated group" to mean, in pertinent part, "1 or more chains of includible corporations

connected through stock ownership with a common parent corporation which is an includible corporation ....” 26 U.S.C. § 1504(a)(1)(A). The Code does not, however, specify what happens when an affiliated group that has filed a consolidated federal tax return receives a tax refund. More specifically, the Code is silent with respect to the legal and equitable ownership of such a tax refund.

Federal common law, however, provides a framework for resolving this issue. The general rule in this circuit, as outlined in Barnes v. Harris, 783 F.3d 1185, 1195 (10th Cir. 2015), is that “a tax refund due from a joint return generally belongs to the company responsible for the losses that form the basis of the refund.” In adopting this principle, Barnes cited to and effectively adopted the Ninth Circuit’s decision in In re Bob Richards Chrysler-Plymouth Corp., Inc., 473 F.2d 262, 265 (9th Cir. 1973).[3]

Bob Richards involved facts somewhat similar, but not identical, to those at issue here. Western Dealer Management, Inc. (WDM) was a parent corporation that wholly owned two subsidiary corporations, one of which was Bob Richards Chrysler-Plymouth Corporation, Inc. (Bob Richards). In October 1965,

[3] In Fed. Deposit Ins. Corp. v. AmFin Fin. Corp., 757 F.3d 530 (6th Cir. 2014), the Sixth Circuit declined to adopt the Bob Richards rule on the grounds that it “is a creature of federal common law” and that “federal common law constitutes an unusual exercise of lawmaking which should be indulged only in a few restricted instances.” Id. at 535. Whether or not this is a valid criticism, we are bound by the decision in Barnes.

Bob Richards filed a petition in bankruptcy. While that bankruptcy proceeding was pending, WDM filed consolidated federal income tax returns on behalf of itself and its two subsidiaries for the tax years 1965 and 1966. Notably, "[t]he return for 1966 showed that the consolidated group was entitled to a refund of taxes" in the amount of $10,063.25 and "[t]he entire refund ... was due to the earnings history of" Bob Richards. Id. at 263. The bankruptcy trustee claimed that the refund belonged to the bankruptcy estate, but WDM claimed a right to the entire tax refund "as a set-off" of a "$45,000 unsecured obligation of" Bob Richards. Id.

The Ninth Circuit concluded that "[t]he Trustee, not WDM, [wa]s entitled to the refund." Id. at 264. In reaching this conclusion, the Ninth Circuit first "note[d] that at the date of the filing of the petition in bankruptcy, the Trustee acquired any interest [Bob Richards] had in the carryback tax refund." Id. The Ninth Circuit in turn noted there was "no evidence that [Bob Richards] or the Trustee at any time voluntarily assigned its rights in the refund to WDM." Id. Although the Ninth Circuit acknowledged that Bob Richards "consented to the filing of a consolidated tax return," it noted that "such consent [could not] be construed to include the transfer of a valuable asset without further consideration." Id.

Relatedly, the Ninth Circuit noted "that there is nothing in the [Internal Revenue] Code or Regulations that compels the conclusion that a tax saving must or should inure to the benefit of the parent company or of the company which has sustained the loss that makes possible the tax saving." Id. (quotations and brackets omitted). Thus,

the Ninth Circuit noted, the normal rule is that "where there is an explicit agreement, or where an agreement can fairly be implied, as a matter of state corporation law the parties are free to adjust among themselves the ultimate tax liability." Id. In the case before it, however, "the parties made no agreement concerning the ultimate disposition of the tax refund." Id. at 265.

All of which led the Ninth Circuit to adopt what has since become known as "the Bob Richards rule":

> Absent any differing agreement we feel that a tax refund resulting solely from offsetting the losses of one member of a consolidated filing group against the income of that same member in a prior or subsequent year should inure to the benefit of that member. Allowing the parent to keep any refunds arising solely from a subsidiary's losses simply because the parent and subsidiary chose a procedural device to facilitate their income tax reporting unjustly enriches the parent.

Id.

Applying these principles to the facts before it, the Ninth Circuit emphasized that "WDM received the tax refund from the government only in its capacity as agent for the consolidated group." Id. And because "there [wa]s no express or implied agreement that the agent had any right to keep the refund," it concluded "that WDM was acting as a trustee of a specific trust and was under a duty to return the tax refund to the estate of the bankrupt." Id.

The Trustee argues that Barnes and Bob Richards are inapplicable here because of the existence of the Agreement. But the Trustee is only partially correct. Barnes, which adopted Bob Richards, clearly applies to this case and outlines the general framework that we must apply in resolving the parties' dispute. The Trustee is correct, however, that this case differs from Barnes and Bob Richards because there was a written agreement in place—the Agreement—that discussed the filing of a consolidated federal tax return. Consequently, as directed by Barnes and Bob Richards, we must look to the terms of the Agreement and, taking into account Colorado case law, decide whether it unambiguously addresses how tax refunds are to be handled and, if so, whether it purports to deviate from the general rule outlined in Barnes and Bob Richards. See generally Barnhill v. Johnson, 503 U.S. 393, 398, 112 S.Ct. 1386, 118 L.Ed.2d 39 (1992) ("In the absence of any controlling federal law, 'property' and 'interests in property' are creatures of state law." (quotations omitted)).

What does the Agreement say about tax refunds?

As we shall explain, the written terms of the Agreement are, at best, ambiguous regarding the nature of the relationship that UWBI and the Bank intended to create with one another. Specifically, certain of its provisions suggest the existence of an agency relationship, while other provisions suggest the intent to create something other than an agency relationship.

As noted, Section A.1 of the Agreement, which is contained under the heading "General Rule — Federal," provides, in pertinent part:

> If a regulated first-tier Affiliate incurs a net operating loss or excess tax credits, the regulated Affiliate is entitled to a refund equal to the amount that it would have been entitled to receive had it not joined in the filing of a consolidated return with UWBI. Similar treatment is optional at UWBI discretion for nonregulated first-tier Affiliates. Any refund shall generally not exceed the amount claimed or received as a refund resulting from a carryback claim filed by UWBI. However, this shall not prevent UWBI from the ability to make a refund over the amount received or claimed as a refund or carryback, if in its sole discretion it believes such payment is in its best interest. Additionally, if part of [sic] all of an unused consolidated net operating loss, net capital loss, tax credit or similar type item is allocated to an Affiliate pursuant to Regulations Section 1.1502-21, and it is carried back, if utilized, or it is carried forward, whether or not utilized, to a year in which such Affiliate filed a separate income tax return or a consolidated federal income tax return with another group, any refund or reduction in tax liability arising from the carryback or carryforward shall be retained by such Affiliate and such item shall not enter into the calculation of liability to or from UWBI.

Aplt. App., Vol. I at 41.

The first of these sentences—stating that "[i]f a regulated first-tier Affiliate," i.e., the Bank, "incurs a net operating loss or excess tax credits, the regulated

Affiliate is entitled to a refund equal to the amount that it would have been entitled to receive had it not joined in the filing of a consolidated return with USBI"—is arguably ambiguous. On the one hand, it purports to "entitle[ ]" the regulated affiliate "to a refund equal to the amount that it would have received had it not joined in the filing of a consolidated return." On the other hand, when contrasted with the last sentence, it does not give the Bank the right to "retain" the refund. Instead, under the first sentence, a refund received by UWBI as a result of a net operating loss incurred by the Bank is taken into account by the parties in calculating their year-end liabilities to each other.

The second and third sentences of Section A.1 afford UWBI with two types of discretion: (1) whether to pay any refund at all to a nonregulated affiliate; and (2) when it pays a refund to any affiliate, whether to pay an amount equivalent to the amount the affiliate would have received had it filed its own income tax return, or instead to pay a greater amount. These sentences thus arguably point toward something more than a mere agency relationship.

The last sentence of Section A.1 indicates that if a net operating loss of any affiliate is carried back to a year when that affiliate was filing a separate income tax return (or filing a consolidated return with another group), then "any refund ... shall be retained by such Affiliate and such item will not enter into the calculation of liability to or from UWBI." This arguably suggests that, in all other situations, an affiliate does not "retain" a tax refund and, instead, refunds are taken into consideration during the annual reconciliation of liability between the parties.

Section A.2 of the Agreement, which is also contained under the heading "General Rule – Federal," states: "In essence, this Agreement requires that each first-tier subsidiary be treated as a separate taxpayer with UWBI merely being an intermediary between an Affiliate and the Internal Revenue Service ...." Id. Although the term "intermediary" is not expressly defined in the Agreement, it is commonly understood to mean "[a] mediator or gobetween. " *Intermediary*, Black's Law Dictionary (10th ed. 2014). Thus, in contrast to most of Section A.1, Section A.2 clearly points to the existence of an agency relationship between UWBI and its affiliates, rather than a debtor/creditor relationship. In other words, it suggests that UWBI will simply act as a conduit through which the refund will pass.

Section F of the Agreement, entitled "Tax Settlement Payments – Federal and State," states, in pertinent part, that affiliates are to make "[e]stimated payments of Federal ... taxes" to UWBI on a specified quarterly basis (April 15, June 15, September 15, and December 15). Id. at 44. Those estimated payments are to be in "an amount equal to the amount of any estimated federal income taxes which the Affiliate would have been required to pay on or before such dates if the Affiliate had filed its own separate income tax return for such taxable period." Id. "Payments [by UWBI] to an Affiliate for net operating losses or similar items shall not be made under this provision, but rather on an annual basis pursuant to Section A" of the Agreement. Id.

In turn, Section E of the Agreement, entitled "Tax Settlement Payments – Federal," provides in pertinent part:

> 1. Preliminary tax settlement payments are due on or before March 15 following the end of the appropriate taxable year. Although overpayments of estimated taxes made by Affiliates are not refunded until final tax settlement is done, an Affiliate with a taxable loss for the year may recover estimated taxes paid for that year before final settlement if an "expedited refund" claim is filed with UWBI by February 15 following the end of the tax year.
>
> 2. Each first-tier Affiliate shall compute its final tax settlement liability based on the amounts included for that Affiliate (and its subsidiaries, if applicable) in the consolidated federal income tax return filed. A copy of such computation will be prepared by October 31, and any differences will be resolved. Final tax settlement payments or refunds are due on or before November 15.

Id. at 43-44.

Considered together, Sections E and F obligate affiliates to make quarterly estimated tax payments to UWBI during the course of a taxable year, preliminary tax settlement payments to UWBI on or before March 15th following the end of the taxable year, and final tax settlement payments, if necessary, to UWBI on or before November 15th following the end of the taxable year. In turn, Section E, when considered together with Section A,

obligates UWBI to (1) refund to its affiliates, by November 15th following the end of the taxable year, any overpayments of estimated taxes, (2) expedite any such refund if an affiliate has a taxable loss for the year in question and the affiliate files with UWBI an expedited refund claim by February 15th following the end of the taxable year, and (3) ensure that, when a regulated firsttier affiliate incurs a net operating loss or excess tax credits, any such refunds paid to that affiliate are equal to or greater than the amount that such affiliate would have been entitled to receive had it not joined in the filing of the consolidated tax return.

Section G of the Agreement states that "[e]ach Affiliate hereby appoints UWBI as its agent ... for the purpose of filing such consolidated Federal income tax returns for the UWBI group as UWBI may elect to file and making any election, application, or taking any action in connection therewith on behalf of the Affiliates." Id. at 44.

Lastly, Section H of the Agreement, entitled "Miscellaneous," contains two relevant paragraphs. Section H.1 states:

> In the event of any adjustment to the tax returns of the Group as filed (by reason of an amended return, claim for refund, or an audit by a taxing authority), the liability of the parties to this Agreement shall be re-determined to give effect to any such adjustment as if it had been made as part of the original computation of tax liability, and payments between the appropriate parties shall be made within 10 business days after

> any such payments are made or refunds are received, or, in the case of contested proceedings, within 10 business days after a final determination of the contest.

Id. Further, Subsection H.4 states, in pertinent part:

> The intent of this Agreement is to provide an equitable allocation of the tax liability of the Group among UWBI and the Affiliates. Any ambiguity in the interpretation hereof shall be resolved, with a view to effectuating such intent, in favor of any insured depository institution.

Id. at 45.

Considered in its entirety, it is apparent that the Agreement was intended to authorize the filing of a consolidated tax return and, in turn, to create a series of payment obligations between UWBI and its affiliates— including the Bank—in order to carry out the goal of filing a consolidated tax return. Affiliates are obligated, by way of both estimated and final tax payments, to pay UWBI the precise amount of their federal income tax obligations. UWBI, in turn, is obligated to refund to its affiliates any overpayments of estimated taxes. When an affiliate incurs a taxable loss due to net operating losses or excess tax credits, UWBI's obligations depend upon the nature of the affiliate. If the affiliate is a regulated, first-tier affiliate such as the Bank, then UWBI is obligated to pay that affiliate "a refund equal to" or greater than "the amount that it would have been entitled to receive had it not joined in the filing of a consolidated return with UWBI." Id. at 41 (§ A.1 of

the Agreement). For "nonregulated first-tier Affiliates," UWBI has the discretion to decide whether or not to treat them similarly to regulated first-tier affiliates in terms of tax refunds. Id.

Critically, however, the Agreement is, on its face, ambiguous with respect to the type of relationship it intends to create between UWBI and regulated, firsttier affiliates, such as the Bank, regarding the ownership of refunds from the IRS.[4] See Pinnacol Assurance v. Hoff, 375 P.3d 1214, 1229 (Colo. 2016) (noting that a contract is ambiguous if it is reasonably susceptible of more than one meaning); id. ("Whether a written contract is ambiguous is a question of law that we review de novo."). On the one hand, portions of the Agreement quite clearly indicate the intent to create an agency relationship between UWBI and its regulated, first-tier affiliates. For example, Section A.2 states that "each first-tier subsidiary [is to] be treated as a separate taxpayer with UWBI merely being an intermediary between an Affiliate and the" IRS. Aplt. App., Vol. I at 41. Likewise, Section G states that UWBI is being appointed by each affiliate to act as its agent for purposes of filing the consolidated tax return and taking any action in connection therewith. On the other hand, portions of the Agreement arguably suggest the intent for UWBI to retain tax refunds

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[4] Rodriguez argues the FDIC has waived any argument that the Agreement is ambiguous. We reject that argument. The FDIC has consistently argued the Agreement creates an agency relationship, rather than a debtor/creditor relationship. The FDIC has also consistently argued that any ambiguity in the Agreement must be resolved in the Bank's favor. Aplt. App., Vol. I at 89, 237; Vol. III at 423, 434, 452, 453, 500, 520-21.

before forwarding them on to regulated, first-tier affiliates. For example, parts of Section A.1 imply that UWBI will retain tax refunds and then later take them into account during the annual settlement process. In addition, the fact that Section A.1 affords UWBI with discretion regarding the amount to refund a regulated, first-tier affiliate (i.e, the exact amount of the refund or a greater amount) seems to suggest something other than an agency relationship. Finally, the ambiguity of the Agreement on this issue is compounded by the fact that it contains no language requiring UWBI to utilize a trust or escrow for tax refunds—which would suggest the existence of an agency or trust relationship—nor does it contain provisions for interest and collateral—which would be indicative of a debtor-creditor relationship. See In re NetBank, Inc., 729 F.3d 1344, 1351 (11th Cir. 2013); Fed. Deposit Ins. Corp. v. AmFin Fin. Corp., 757 F.3d 530, 535 (6th Cir. 2014).

Resolving the Agreement's ambiguity

Notably, the Agreement itself provides a method for resolving the ambiguity. Section H.4 of the Agreement states that "[a]ny ambiguity in the interpretation hereof shall be resolved, with a view to effectuating such intent [i.e., to provide an equitable allocation of the tax liability of the Group among UWBI and the Affiliates], in favor of any insured depository institution." Aplt. App., Vol. I at 45. Quite clearly, construing the Agreement to create an agency relationship between UWBI and the Bank with respect to federal tax refunds—and thereby affording ownership of the tax refund to the Bank—is more favorable to the Bank than construing the

Agreement to create a debtor/creditor relationship and thus affording ownership of federal tax refunds to UWBI. We therefore conclude that the ambiguity in the Agreement must be construed in favor of the Bank and the FDIC, and that, consequently, the Agreement must be read as creating only an agency relationship between UWBI and the Bank.

Conclusion

In sum, we conclude that the Agreement creates an agency relationship between UWBI and the Bank and that, consequently, the Agreement's intended treatment of tax refunds does not differ from the general rule outlined in Barnes and Bob Richards. Therefore, we conclude that the tax refund at issue belongs to the Bank, and that the FDIC, as receiver for the Bank, was entitled to summary judgment in its favor.

III.

We AFFIRM the judgment of the district court and REMAND to the bankruptcy court for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT,
D. COLORADO

IN RE: UNITED WESTERN BANCORP, INC.,
Debtor.

FEDERAL DEPOSIT INSURANCE CORPORATION,
IN ITS CAPACITY AS RECEIVER FOR
UNITED WESTERN BANK,
Defendant-Appellant,

v.

SIMON E. RODRIGUEZ, IN HIS CAPACITY AS
CHAPTER 7 TRUSTEE FOR THE BANKRUPTCY ESTATE OF
UNITED WESTERN BANCORP, INC.,
Plaintiff-Appellee.

Civil Action No. 16-cv-2475-WJM

Signed 07/10/2017

ORDER REVERSING BANKRUPTCY COURT'S JUDGMENT

William J. Martinez, United States District Judge

The Federal Deposit Insurance Corporation ("FDIC"), acting as receiver for the defunct United Western Bank ("Bank"), appeals the Bankruptcy Court's determination that a tax refund generated on account of the Bank's losses should remain a part of the bankruptcy estate of the Bank's parent company,

United Western Bancorp, Inc. ("Holding Company"). *See In re United W. Bancorp, Inc.*, 558 B.R. 409 (Bankr. D. Colo. 2016) ("*UWBI* "). For the reasons explained below, the Court finds that the relevant contract between the Bank and the Holding Company is ambiguous regarding whether the Holding Company may keep the tax refund in the present circumstances. That contract further requires that any ambiguity be construed in favor of the Bank. Accordingly, the tax refund is not part of the Holding Company's bankruptcy estate and must be remitted to the Bank. The judgment of the Bankruptcy Court is reversed.[1]

I. STANDARD OF REVIEW

In reviewing a bankruptcy court's decision, the district court normally functions as an appellate court, reviewing the bankruptcy court's legal conclusions *de novo* and its factual findings for clear error. 28 U.S.C. § 158(a); *In re Warren*, 512 F.3d 1241, 1248 (10th Cir. 2008). The Bankruptcy Court's judgment rested on a contract interpretation made as a matter of law, so this Court's review is *de novo. In re Universal Serv. Fund Tel. Billing Practice Litig.*, 619 F.3d 1188, 1203 (10th Cir. 2010).

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[1] The FDIC moved for oral argument. (ECF No. 13.) This Court reviewed the transcript of the parties' oral argument before the Bankruptcy Court and found that it answered all of the questions this Court would ask. The Court therefore denies the request for oral argument.

II. BACKGROUND & PROCEDURAL HISTORY[2]

A. The Holding Company and the Bank

The Holding Company owned thirteen subsidiaries. (App. 41, 45–46.) One of those subsidiaries was the Bank, which the Holding Company wholly owned, and which was the Holding Company's principal asset. *UWBI*, 558 B.R. at 416. The Bank operated eight branches and a loan servicing office in Colorado. *Id.*

B. The Tax Allocation Agreement (TAA)

The Internal Revenue Code permits an "affiliated group" of corporations (those with a common parent and a chain of sufficient stock ownership) to file a "consolidated [tax] return" that aggregates the gains and losses of all of them as if one corporation. *See* 26 U.S.C. §§ 1501–04. To facilitate such consolidated filing, eligible affiliated groups often enter into a written agreement amongst themselves known as a tax sharing agreement or a tax allocation agreement. Here, the Holding Company and its subsidiaries entered into a "Tax Allocation Agreement" ("TAA").[3]

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[2] Oddly, this appeal contains both a Record on Appeal (ECF No. 6) as well as an Appendix (ECF Nos. 10– 2 through 10–5). The parties' briefs generally cite to the Appendix, so the Court will as well, using the abbreviation "App."

[3] The TAA is in the record at App. 41–46. Whenever possible, the Court will cite to the TAA by its internal section numbers, *e.g.*, "TAA § H.4," but a few important matters bear no section numbers. In that case, the Court will cite directly to the "App." page number.

The TAA is dated January 1, 2008, and was signed by representatives of the Holding Company and its thirteen subsidiaries, including the Bank. (App. 41, 45–46.) It refers to all of the subsidiaries combined as "the Group," and also sometimes as "the Affiliates." (App. 41.) The TAA's recitals announce its purpose as follows: "to establish a method for (i) allocating the consolidated tax liability of the Group among its members, (ii) reimbursing [the Holding Company] for the payment of such tax liability, and (iii) compensating each member of the Group for the use of its losses by any other member of the Group." (*Id.*)

To accomplish this purpose, the TAA first proclaims the following "General Rule" for federal tax filings:

> Except as specifically set forth herein to the contrary, each Affiliate shall pay [the Holding Company] an amount equal to the federal income tax liability such Affiliate would have incurred were it to file a separate return (or, if appropriate, a consolidated return with its subsidiary affiliates). If [the Bank] incurs a net operating loss or excess tax credits, the [Bank] is entitled to a refund [from the Holding Company] equal to the amount that it would have been entitled to receive had it not joined in the filing of a consolidated return with [the Holding Company]. Similar treatment is optional at [the Holding Company's] discretion for [other] Affiliates. Any refund shall generally not exceed the amount claimed or received as a refund resulting from a carryback claim filed by [the

> Holding Company]. However, this shall not prevent [the Holding Company] from the ability to make a refund over the amount received or claimed as a refund or carryback, if in its sole discretion it believes such payment is in its best interest.

(TAA § A.1.) Having proclaimed this general rule, the TAA then goes on to re-proclaim its purpose, although with a different focus than that evident in the recitals:

"In essence, this Agreement requires that each [Affiliate] be treated as a separate taxpayer with [the Holding Company] merely being an intermediary between an Affiliate and the Internal Revenue Service ('IRS')." (*Id.* § A.2.)

The details of actual cash flow to and from the Holding Company and the Affiliates are addressed later in the TAA, and here the TAA starts to become somewhat convoluted. As best the Court can discern, each Affiliate was required to pay to the Holding Company the Affiliate's "hypothetical estimated income tax liability" on a quarterly basis at around the same time that the Holding Company was required to make estimated quarterly payments to the IRS. (*Id.* §§ F.1, F.2.) However, "[p]ayments [from the Holding Company] to an Affiliate for net operating losses or similar items shall not to be made under this [quarterly] provision, but rather on an annual basis pursuant to Section A." (*Id.* § F.3.)

While the cross-referenced "Section A" certainly discusses refunds from the Holding Company for an Affiliate's net operating losses, it actually says

nothing about the *timing* of those refunds, *e.g.*, on an annual basis or otherwise. Rather, that seems to come from Section E. That section first instructs Affiliates that they must make "[p]reliminary tax settlement payments ... on or before March 15 following the end of the appropriate taxable year." (*Id.* § E.1.) The Court presumes this refers to any amounts over those already paid on a quarterly estimated basis during the previous year. In any event, the various parties' obligations are trued-up towards the end of each year: "Final tax settlement payments or refunds are due on or before November 15." (*Id.* § E.2.) This appears to be the "annual basis" referred to for refunds based on quarterly net losses.

The TAA actually contains three distinct refund provisions. One such provision is that just discussed, *i.e.*, the "[f]inal tax settlement ... refund[ ]" that is "due on or before November 15" of each year, with reference to the previous taxable year. This refers to a payment from the Holding Company to the Affiliate, likely from monies received from other Affiliates that owed taxes. The second refund provision is simply an accelerated process to obtain the same payment: "an Affiliate with a taxable loss for the year may recover [from the Holding Company] estimated taxes paid for that year before final settlement if an 'expedited refund' claim is filed with [the Holding Company] by February 15 following the end of the tax year." (*Id.* § E.1.)

The third refund provision is of the most interest here, as it refers to refunds received by the Holding Company from the IRS, not any sort of refund of amounts paid by the Affiliates to the Holding

Company. It establishes a 10- business-day deadline for distributing such refunds:

> In the event of any adjustment to the tax returns of the Group as filed (by reason of an amended return, claim for refund, or an audit by a taxing authority), the liability of the parties to this Agreement shall be redetermined to give effect to any such adjustment as if it had been made as part of the original computation of tax liability, and payments between the appropriate parties shall be made within 10 business days after any such payments are made [to the IRS] or refunds are received [from the IRS], or, in the case of contested proceedings, within 10 business days after a final determination of the contest.

(*Id.* § H.1.)[4] In other words, although an Affiliate with net losses may make a claim on the Holding Company for a refund of estimated tax payments, it appears the Holding Company has a self-executing duty to distribute to the Affiliates any actual refund received from the IRS.

Three other provisions of the TAA are notable. First, it "shall be governed by and construed in accordance with the laws of the State of Colorado and the applicable laws of the United States of America." (*Id.* § H.6.) Second, through the TAA,

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[4] The drafters of the TAA inserted this provision, of all places, in the final section of the document under the heading "Miscellaneous." (App. 44.)

> [e]ach Affiliate hereby appoints [the Holding Company] as its agent ... for the purpose of filing such consolidated Federal Income tax returns for the [Group] as [the Holding Company] may elect to file and making any election, application or taking any action in connection therewith on behalf of the Affiliates. Each such Affiliate hereby consents to the filing of any such returns and the making of any such elections and applications.

(*Id.* § G.1.) Third, the TAA contains yet another statement of its purpose (*i.e.*, in addition to those statements found in its recitals and in § A.2), followed by an "ambiguity favors the Bank" clause: "The intent of this Agreement is to provide an equitable allocation of the tax liability of the Group among [the Holding Company] and the Affiliates. Any ambiguity in the interpretation hereof shall be resolved, with a view to effectuating such intent, in favor of any insured depository institution." (*Id.* § H.4.)

C. The Origin of This Dispute

In January 2011, the Office of Thrift Supervision closed the Bank and appointed the FDIC as its receiver. *UWBI*, 558 B.R. at 416. Thus, the FDIC assumed the role of marshaling the Bank's assets as best as possible to pay the Bank's obligations.

Later in 2011, apparently, the Holding Company filed its consolidated 2010 tax return on behalf of the Affiliates, including the Bank. In fact, the Bank was particularly important to this tax return. Whereas the Bank had generated taxable income in 2008 (on

which the Holding Company paid taxes), the Bank generated an even larger taxable loss in 2010. *Id.* at 417. [5] The Internal Revenue Code permits corporations to "carryback" net operating losses for up to two taxable years. *See* 26 U.S.C. § 172. Thus, the Holding Company was permitted to carryback the Bank's 2010 losses to offset the taxes paid in 2008. It therefore claimed a refund on its 2010 tax return of about $4.8 million. *UWBI*, 558 B.R. at 417. There is no dispute that, to whatever extent a refund was due, it was entirely the result of revenue generated by the Bank in 2008 and losses incurred by the Bank in 2010—or in other words, neither the Holding Company itself nor any Affiliate generated any gains or losses relevant to the requested refund.

While that refund claim was still pending, the Holding Company found itself insolvent—because the Bank was its only real source of operating income—and so the Holding Company filed for Chapter 11 reorganization in March 2012. (App. 17.) About a year later, the Bankruptcy Court converted the proceeding to a Chapter 7 liquidation. (*Id.*) Thus, the Trustee was appointed to perform essentially the same role for the Holding Company that the FDIC was performing for the Bank: to realize as much value as possible from the Holding Company's assets so that creditors could receive at least some compensation.

D. The Adversary Proceeding

"After learning of the anticipated Tax Refund, the Trustee (acting on behalf of the [Holding Company's

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[5] The record does not reveal what happened in 2009.

bankruptcy] estate) filed [an] adversary proceeding against the FDIC (acting as receiver of the Bank)" to settle the question of whether the refund would belong to the Holding Company (the Trustee's position) or the Bank (the FDIC's position). *UWBI*, 558 B.R. at 412. The parties agreed "that the underlying facts [were] undisputed and the contest [could] be decided as a matter of law." *Id.* They accordingly filed cross-motions for summary judgment.

The crux of the dispute was whether the anticipated refund would be considered property of the Holding Company's bankruptcy estate. If so, the Bank could make "a general unsecured claim against [the Holding Company's] bankruptcy estate for some or all of the Tax Refund, which should share *pari passu* with other general unsecured claims against [the estate]." *UWBI*, 558 B.R. at 415. On the other hand, the Bankruptcy Code recognizes that a debtor might possess "only legal title and not an equitable interest" in certain property. 11 U.S.C. § 541(d). If this is the case, the property in question "becomes property of the estate ... only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold." *Id.* Naturally, the Trustee argued that the Holding Company would possess both legal title and the equitable interest in the anticipated refund, while the FDIC argued that the Holding Company would lack at least an equitable interest, if not legal title as well.

While the parties' cross-motions were pending, the IRS issued the refund in the adjusted amount of approximately $4.1 million ("Tax Refund" or

"Refund"). It deposited that sum into the Bankruptcy Court's registry pending resolution of the adversary proceeding. *UWBI*, 558 B.R. at 412, 417 n.21.

E. The Bankruptcy Court's Decision

On September 16, 2016, the Bankruptcy Court resolved the parties' cross-motions in a lengthy, thorough, and thoughtful opinion. Various portions of the Bankruptcy Court's analysis will be examined in detail below. For present purposes, it is enough to state that the Bankruptcy Court held:

- the Holding Company "has *at least bare legal title* to the Tax Refund," *id.* at 423 (emphasis in original), a matter that the FDIC does not challenge on appeal and therefore will not be discussed further;
- the TAA is unambiguous, *id.* at 424 & n.26; and
- the TAA's unambiguous terms establish that the relationship between the Holding Company and the Bank was that of debtor and creditor, not that of agent and principal or trustee and beneficiary, meaning that the Holding Company possesses an equitable interest in the Refund in addition to legal title, *id.* at 424–36.

Thus, the Bankruptcy Court concluded, the Refund was a part of the Holding Company's bankruptcy estate and the Bank could only seek it through a general unsecured claim. *Id.* at 436–38.

The Bankruptcy Court entered final judgment based on this order, and the FDIC timely appealed. (App. 406.) This Court has jurisdiction to hear the appeal under 28 U.S.C. § 158(a)(1).

III. ANALYSIS

A. Preliminary Observation

There is an air of unreality about this litigation. Under normal circumstances, it would never have been brought. If the directors of a wholly-owned subsidiary elected to sue the parent company for a refund wrongly withheld under a tax allocation agreement, it is inconceivable that the parent would do anything other than replace the subsidiary's directors with those who would cause the subsidiary to withdraw the lawsuit. Only in situations where an independent fiduciary takes control of the parent or the subsidiary—or where separate fiduciaries take over both, as in this case—is such a lawsuit likely to exist. Not surprisingly, then, every case cited by either party in which a court addresses ownership of a tax refund under a tax sharing or allocation agreement involved either a bankruptcy trustee or the FDIC as a failed bank's receiver.

Yet the parties here agree (as do the various cases they cite) that the question of refund allocation is ultimately a matter of contractual intent. But in what sense can a court analyze contractual intent in these circumstances? How can a court say there was a "meeting of the minds" in any true sense between a parent company and a wholly owned subsidiary? How does the subsidiary have any intent apart from that of its parent? Or to put it in concrete terms applicable to this case, imagine a parent company's officers considering a draft tax allocation agreement and asking themselves, "Should this company or one of its subsidiaries end up in bankruptcy or receivership, and therefore pass out of our control,

would we want any outstanding tax refund to remain the property of the parent, or to be distributed to the subsidiaries as usual?" It is difficult to imagine the parent company's officers electing the latter course—and therefore difficult to imagine, in the present circumstances, how the TAA could require the refund to flow to the Bank in violation of the Holding Company's near-certain contrary intent otherwise.

But these musings prove too much. The corporate fiction is deeply ingrained in American law. Formal agreements between parents and subsidiaries, and between subsidiaries themselves, are routine. Abiding by such formalities is generally a legal requirement, even if subsidiaries are really only carrying out the will of the parent. Thus, the analysis below proceeds as if the parties have always had their own respective purposes and interests to protect. But, as will become clear, the analysis below also will not stray far from the reality that these potentially conflicting purposes and interests will likely manifest themselves only in proceedings related to bankruptcy and receivership.[6]

B. General Principles

"The commencement of a [bankruptcy action] creates an estate." 11 U.S.C. § 541(a). This estate comprises, among many other things, "all legal or equitable interests of the debtor in property as of the

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[6] Considering the many cases cited by the parties where refund allocation has been litigated in bankruptcy or receivership proceedings, it is rather astonishing that the tax bar has not yet agreed upon some sort of standard clause to address these precise circumstances.

commencement of the case." *Id.* § 541(b)(1). But, as noted above, the estate does not include property in which the debtor possesses "only legal title and not an equitable interest." *Id.* § 541(d).

"In the absence of any controlling federal law, 'property' and 'interests in property' are creatures of state law." *Barnhill v. Johnson*, 503 U.S. 393, 398, 112 S.Ct. 1386, 118 L.Ed.2d 39 (1992). Thus, whether the Holding Company possesses both a legal and an equitable interest in the Refund (thus making it a part of the bankruptcy estate) or only a legal interest (thus excluding it from the bankruptcy estate) should be a question of what sort of property interest the TAA created under Colorado law, which governs that agreement.

C. The *Bob Richards* Rule

The Court says "*should* be a question ... under Colorado law" for good reason. Whether Colorado law actually applies (as opposed to some sort of federal common law) has been complicated by the "*Bob Richards* rule," on which the FDIC relied heavily in the Bankruptcy Court and which it continues to press here.

1. *Bob Richards* and *Barnes v. Harris*

The *Bob Richards* rule comes from *In re Bob Richards Chrysler–Plymouth Corp., Inc.*, 473 F.2d 262 (9th Cir. 1973). That case, like this one, involved a dispute over whether a parent or a subsidiary was owed a tax refund resulting from the consolidated tax filing. *Id.* at 263. In that case, like this one, it was acknowledged that the refund was due solely to losses incurred by the subsidiary. *Id.* In that case,

however, the subsidiary was the party in bankruptcy, and its trustee was suing the parent to obtain the refund for the bankruptcy estate—in contrast to the present case, where the Trustee speaks for the parent and is suing to prevent the Refund from *leaving* the bankruptcy estate.

But *Bob Richards* nonetheless presented the same basic question: to whom does the tax refund belong? The Ninth Circuit observed that "as a matter of state corporation law the parties are free to adjust among themselves the ultimate tax liability" through "an explicit agreement, or where an agreement can fairly be implied." *Id.* at 264. "But in the instant case," however,

> the parties made no agreement concerning the ultimate disposition of the tax refund. Absent any differing agreement we feel that a tax refund resulting solely from offsetting the losses of one member of a consolidated filing group against the income of that same member in a prior or subsequent year should inure to the benefit of that member. Allowing the parent to keep any refunds arising solely from a subsidiary's losses simply because the parent and subsidiary chose a procedural device to facilitate their income tax reporting unjustly enriches the parent.

Id. at 265. This is what the parties here refer to as the *Bob Richards* rule.

The Ninth Circuit cited no authority for this proposition. It recognized that "state corporation law" permitted the affiliated corporations to

explicitly allocate tax matters amongst themselves, but when it came to the lack of such an agreement, the Ninth Circuit did not say whether the unjust enrichment rule it announced flowed from state law, federal law, or something else. This is significant because, as noted, property interests included within a debtor's bankruptcy estate ordinarily "are creatures of state law." *Barnhill*, 503 U.S. at 398, 112 S.Ct. 1386.

This has led the Sixth and Eleventh Circuits to conclude that the *Bob Richards* rule could only be an announcement of federal common law. *FDIC v. AmFin Fin. Corp.*, 757 F.3d 530, 535 (6th Cir. 2014) ("*AmFin* "); *In re NetBank, Inc.*, 729 F.3d 1344, 1352 n.3 (11th Cir. 2013). And the Sixth Circuit has rejected *Bob Richards* on this basis, finding it an unnecessary exercise of federal common law authority. *AmFin*, 757 F.3d at 535–36.

If writing on a clean slate, this Court would be inclined to agree with the Sixth Circuit—the *Bob Richards* rule can only be grounded, if anywhere, in federal common law, and yet *Bob Richards* does not explain the need for a federal common law rule with respect to ownership of tax refunds, as compared to other sums of money whose ownership has been effectively analyzed under state law. *See, e.g.*, *Lubin v. Cincinnati Ins. Co.*, 677 F.3d 1039, 1041–42 (11th Cir. 2012) (analyzing under applicable state law whether an insurance payout was property of the bankrupt holding company or of a subsidiary failed bank). Thus, at a minimum, *Bob Richards* should not be reflexively applied. At oral argument before the Bankruptcy Court, the bankruptcy judge displayed similar concern. (*See, e.g.*, App. at 275– 76, 292.) *Cf.*

Danforth v. Minnesota, 552 U.S. 264, 289– 90, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008) ("while there are federal interests that occasionally justify ... development of common-law rules of federal law, our normal role is to interpret law created by others and not to prescribe what it shall be" (internal quotation marks and footnote omitted)); *United States v. City of Las Cruces*, 289 F.3d 1170, 1186 (10th Cir. 2002) ("The reluctance to create common law is a core feature of federal court jurisprudence. Federal courts should only fashion common law in a few and restricted circumstances." (internal quotation marks and citations omitted)).

But this Court does not write on a clean slate, due to the Tenth Circuit's recent decision in *Barnes v. Harris*, 783 F.3d 1185 (10th Cir. 2015). *Barnes* was a shareholder derivative action against a failed bank's holding company. *Id.* at 1188. Among the plaintiffs' theories of liability against the holding company's directors was that the holding company should have held onto at least a portion of a $9 million tax refund received on behalf of the holding company and its subsidiaries. *Id.* at 1189, 1195. The district court dismissed this theory of derivative liability and the Tenth Circuit affirmed, relying on *Bob Richards*:

> As the district court explained, a tax refund due from a joint return generally belongs to the company responsible for the losses that form the basis of the refund. *See* [*Bob Richards*]. Plaintiffs did not allege that the Holding Company possessed any business interests other than the Bank that might have generated losses....

> Plaintiffs counter that companies may agree to alter the default allocation rule by agreement. *See Bob Richards*, 473 F.2d at 265 .... Yet plaintiffs have not alleged the existence of any agreement to allocate the refund....

Id. at 1195–96. The Tenth Circuit therefore found the plaintiffs' claim inadequately pleaded in this regard.

The Court cannot deem *Barnes*'s adoption of *Bob Richards* to be dicta. "Dicta are statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand." *Thompson v. Weyerhaeuser Co.*, 582 F.3d 1125, 1129 (10th Cir. 2009) (internal quotation marks omitted). The *Bob Richards* rule was essential to the Tenth Circuit's decision to affirm the district court. Moreover, the Tenth Circuit was explicitly presented with the argument—albeit for the first time in the appellant's reply brief—that the *Bob Richards* rule was unnecessary federal common law. *See* 2014 WL 3795344, at *18–19. Thus, this Court cannot say that the Tenth Circuit was unaware of *Bob Richards*'s questionable status. For whatever reason, it chose to say nothing about the federal common law argument, but the argument was certainly before the court, the court did not announce that the argument had been forfeited (*e.g.*, as untimely),[7] and the court applied the *Bob Richards* rule as if beyond question.

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[7] The appellant based its argument on the Sixth Circuit's *AmFin* decision, which had been announced after the appellant's opening brief was filed. But the Eleventh Circuit's *NetBank* decision, which predated the appellant's opening brief,

2. Effect of *Bob Richards* Here

But what, precisely, is the scope of the *Bob Richards* rule? The FDIC argued in the Bankruptcy Court, and continues to argue here, that *Bob Richards* mandates its default presumption unless there exists an inter-corporate agreement that unambiguously allocates the refund away from the party incurring the relevant losses. (App. 91–92, 354; ECF No. 10 at 27–28, 37, 39.)[8] The Trustee argued in the Bankruptcy Court, and continues to argue here, that *Bob Richards* only applies in cases where there is no tax allocation agreement of any kind, which is not the case here. (App. 238–39; ECF No. 11 at 15–16.)

The Bankruptcy Court interpreted *Bob Richards* to fall essentially halfway between these two positions. *See UWBI*, 558 B.R. at 432–34. The Bankruptcy Court did not endorse the Trustee's claim that any tax allocation agreement of any kind overcomes the *Bob Richards* presumption, whether the agreement addresses refunds or not. But the Bankruptcy Court also rejected the Trustee's argument that the agreement in question must clearly allocate the refund away from the party incurring the losses.

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also characterized the *Bob Richards* rule as federal common law; and in any event, the federal common law issue should be obvious to any lawyer reasonably experienced in federal choice-of-law questions. Thus, there was a basis to reject the argument as untimely. But the Tenth Circuit never announced as much.

[8] All ECF page citations are to the page number in the ECF header, which does not always match the document's internal pagination, especially where the document has prefatory material such as a table of contents or table of authorities.

Rather, the Bankruptcy Court strictly interpreted the language from *Bob Richards* where the Ninth Circuit announced that "the parties made no agreement concerning the ultimate disposition of the tax refund." *Bob Richards*, 473 F.2d at 265. In this case, said the Bankruptcy Court, "the TAA is an agreement 'concerning ultimate disposition of the tax refund'—the exact type of agreement that was absent in *Bob Richards.* Since such an agreement is present, the *Bob Richards* default rule is facially inapplicable." *UWBI*, 558 B.R. at 433. The Bankruptcy Court therefore stood by its analysis of what this Court will call the "*IndyMac* factors" (discussed further below), which led the Bankruptcy Court to conclude—as an *IndyMac* analysis essentially always does —that the agreement in question created nothing more than a debtor-creditor relationship, thus leaving both legal and equitable title to the Refund in the Holding Company's hands. *Id.* at 424–28.

This Court agrees with the Bankruptcy Court that, under any reasonable definition of "concerning," the TAA is an agreement concerning ultimate disposition of tax refunds. Ironically, however, interpreting the *Bob Richards* rule in this manner will usually put the subsidiary in a *worse position than if no tax allocation agreement ever existed.* That is aptly illustrated here. When the Holding Company receives a refund from the IRS, the TAA imposes upon the Holding Company a self-executing duty to "re-determine[ ]" the Affiliates' tax liability "as if [the refund] have been made as part of the original computation," and then the Holding Company must distribute that refund to the Affiliates within ten

business days. (TAA § H.1.) So, yes, the TAA "concerns" the "ultimate disposition" of the refund, and in fact declares that the refund *belongs to the Affiliate that incurred the relevant losses.* But by so declaring, it turns out that the Affiliates have actually weakened their claim to any refund. They have now given a Bankruptcy Court—one of the only venues in which the TAA might be litigated— an opening to disregard *Bob Richards*, apply the *IndyMac* factors, and hold that the refund *does not belong* to the Affiliates, at least not any more than any other creditor can claim that money in debtor's possession belongs to it.

Concerned as it was for the problem of unjust enrichment, it is almost inconceivable that the Ninth Circuit meant the *Bob Richards* rule to apply this way. *See* 473 F.2d at 262 ("Allowing the parent to keep any refunds arising solely from a subsidiary's losses simply because the parent and subsidiary chose a procedural device to facilitate their income tax reporting unjustly enriches the parent."). This Court is convinced that if the scenario at issue here had been presented to the Ninth Circuit in the *Bob Richards* appeal, that court would have phrased its ruling in a manner consistent with the FDIC's position here, *i.e.*, that the tax allocation agreement must *contradict* the default rule. Indeed, the Ninth Circuit's language already suggests that it had this very idea in mind. Immediately after the "agreement concerning the ultimate disposition of the tax refund" sentence on which the Bankruptcy Court relied, the Ninth Circuit said the following: "Absent any *differing* agreement we feel that a tax refund resulting solely from offsetting the losses of one

member of a consolidated filing group against the income of that same member in a prior or subsequent year should inure to the benefit of that member." *Id.* (emphasis added). "Differing" in this context can only sensibly refer to the general rule announced later in the sentence.

If *Bob Richards* created a federal common law rule, then this Court may conceivably invoke its own federal common law authority to clarify the meaning of *Bob Richards* within the District of Colorado, or even to refine the rule if needed. As noted above, however, there has been no analysis either from the Ninth Circuit or the Tenth Circuit regarding the need for, or federal interests served by, *Bob Richards* as a rule of federal common law. *Cf. Resolution Trust Corp. v. Heiserman*, 856 F.Supp. 578, 581 (D. Colo. 1994) (courts considering creation of federal common law must evaluate "whether the federal program, which by its nature is and must be uniform throughout the nation, necessitates formulation of controlling federal rules," "whether application of state law would frustrate specific objectives of the federal program," and whether "application of a federal rule would disrupt commercial relationships predicated on state law"). Therefore it would be difficult for this Court to declare with confidence that any clarification or extension of *Bob Richards* fits within those uniquely federal purposes.

As it turns out, the Court thankfully need not engage in any such inquiry. As explained below, even if the Bankruptcy Court applied *Bob Richards* correctly, both in letter and in spirit, the ensuing analysis of the property interest created by the TAA

ultimately favors the FDIC. The Court therefore turns to that analysis.

D. The TAA as Construed Under Colorado Law

Given its interpretation of *Bob Richards*, the Bankruptcy Court announced that "the unambiguous terms of the TAA as construed under Colorado law govern the rights and obligations of [the Holding Company] and the Bank and also dictate the ultimate entitlement to the Tax Refund on a beneficial basis." *UWBI*, 558 B.R. at 424 (footnote omitted). Whether those terms are unambiguous is this Court's ultimate disagreement with the Bankruptcy Court, but this Court, like the Bankruptcy Court, must first work through the terms of the TAA to reach a conclusion about ambiguity.

1. *IndyMac*

The Bankruptcy Court approached this analysis through what this Court has dubbed the *IndyMac* factors, given their origin as an analytical test in *In re IndyMac Bancorp, Inc.*, 2012 WL 1037481 (Bankr. C.D. Cal. Mar. 29, 2012).[9] Just like the present dispute, *IndyMac* involved a subsidiary bank in FDIC receivership demanding tax refund proceeds possessed by its bankrupt holding company. *Id.* at

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[9] This opinion was a report and recommendation, which was subsequently adopted by the Central District of California in an unpublished disposition, *see* 2012 WL 1951474 (C.D. Cal. May 30, 2012), which was in turn affirmed by the Ninth Circuit also in an unpublished disposition, *see* 554 Fed.Appx. 668 (9th Cir. 2014).

*1–2. The court explained its analytical approach to the problem as follows:

> 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. 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....
>
> * * *
>
> 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.

Id. at *13 (footnotes omitted). The court then proceeded to discuss these three factors.

The first factor was whether the tax sharing agreement (as it was called in that case) "create[d] fungible payment obligations"—or in other words, whether the agreement created a right to the refund itself or to "amounts [paid by the holding company] equal to what the subsidiary would have received if it hypothetically were a standalone tax filer." *Id.* at *13–15. The *IndyMac* court derived this rule from other bankruptcy court decisions (some of which have since been overruled) but also stated that it

"fully accords with the Ninth Circuit's application of California law in the bankruptcy context." *Id.* at *13. With respect to the tax sharing agreement under consideration, the court found that it frequently contained the words "reimbursement" and "payment," which "are indicative of a debtor-creditor relationship and, in comparison, are completely inconsistent with the existence of a trust or agency relationship." *Id.* at *14.

The second factor was whether the tax sharing agreement contained "provisions requiring the parent to segregate or escrow any tax refunds" or "restrictions on the parent's use of the funds while in the parent's possession." *Id.* at *15. It is not clear why *IndyMac* treated this as just one factor to consider, given that the case law the court cited in support was essentially unequivocal regarding the result:

> 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. [Citing cases.]

Id. In any event, the court found that no such restrictions existed in the tax sharing agreement. *Id.* at *16.

The third and final factor was whether the agreement gave the parent company "sole discretion to prepare and file consolidated tax returns and to elect whether or not to receive a refund." *Id.* In *IndyMac*, it did. *Id.* Thus, all three factors favored finding that the tax sharing agreement created a debtor-creditor relationship, and so the tax refunds in question remained property of the holding company's bankruptcy estate. *Id.* at *17–20.

2. <u>The Bankruptcy Court's Application of *IndyMac*</u>

In this case, the Bankruptcy Court announced at the outset that it would follow the three *IndyMac* factors. *UWBI*, 558 B.R. at 424–25.

As to the first factor (fungibility), the Bankruptcy court found that "the TAA is peppered throughout with terminology evidencing a debtor-creditor relationship including: 'allocating,' 'reimbursing,' 'compensating,' 'pay,' 'refund,' 'liability,' 'reimburse,' 'liable,' 'payments,' 'refunded,' and 'liability.' " *Id.* at 425. As to the portion of the TAA specifically addressing tax refund payments received from the IRS, the Bankruptcy Court emphasized that it required " 'payments between the appropriate parties' " within ten business days after " 'redetermination' " of the parties' tax liability, and therefore nothing "suggest[ed] that the Bank had a direct interest in any IRS tax refunds." *Id.* at 426 (quoting TAA § H.1).

As to the second factor (escrow, segregation of funds, etc.), the Bankruptcy Court stated that "[o]ne could search the TAA in vain for days trying to locate any express, or even implied, requirement for [the

Holding Company] to escrow or segregate any funds that it might receive as a tax refund from the IRS." *Id.* at 427.

As to the third factor (delegation of decision-making authority to the parent), the Bankruptcy Court emphasized TAA § G.1, by which the Affiliates appointed the Holding Company as their "agent" empowered to "elect to file and mak[e] any election, application or tak[e] any action in connection therewith on behalf of the Affiliates." *Id.*

"In sum," said the Bankruptcy Court, "under the terms of the TAA, [the Holding Company] is the beneficial owner of the Tax Refunds." *Id.* at 427–28.

3. Whether *IndyMac* Provides Appropriate Guidance

Many bankruptcy courts since *IndyMac* have adopted its analysis. *See, e.g.*, *In re Downey Fin. Corp.*, 499 B.R. 439, 455 (Bankr. D. Del. 2013), *aff'd*, 593 Fed.Appx. 123 (3d Cir. 2015); *In re Imperial Capital Bancorp, Inc.*, 492 B.R. 25, 29–30 (S.D. Cal. 2013); *FDIC v. AmFin Fin. Corp.*, 490 B.R. 548, 554 (N.D. Ohio 2013), *rev'd and remanded*, 757 F.3d 530 (6th Cir. 2014). Its appeal is obvious: it is easy to apply to an otherwise complicated situation—a highly salutary feature in our perpetually congested court system. But the Court is troubled with two aspects of *IndyMac*.

First, the idea that there are three factors to weigh is illusory. As already noted, if lack of escrow or segregation provisions automatically dictates a debtor-creditor relationship, then the Court sees little sense in treating the second factor as just one

more data point to consider. Moreover, whether the parent company has complete control over the tax filing (the third factor) will likely favor the parent in every case because it is essentially mandated by an IRS regulation concerning consolidated tax filings. *See* 26 C.F.R. § 1.1502–77(a)(1) ("one entity (the agent) is the sole agent that is authorized to act in its own name regarding all matters relating to the federal income tax liability for the consolidated return year for each member of the group"). A provision affirming as much may not appear in every tax allocation agreement, but surely any attorney representing a parent company would, in such a situation, fill that gap by citation to this regulation.

Second, *IndyMac* is not a one-size-fits-all test. The *IndyMac* bankruptcy court itself recognized that its task was to determine *under state law* "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." *Id.* at *13. And it attempted, in some instances more successfully than others, to ground its three factors in the law of the applicable state (California). But subsequent courts, including the Bankruptcy Court here, have applied *IndyMac* as if its three factors represent a federal common law of tax allocation agreements—or in other words, they apply *IndyMac* without reference to whether the applicable state's law supports the factor in question. To be sure, it seems unlikely that California law on these issues differs significantly from any other state's laws. Nonetheless, the fact that subsequent bankruptcy courts have not tied the *IndyMac* factors

into their own states' laws raises the possibility, with some justification, that *IndyMac* is being adopted for its own sake, not because it actually satisfies a court's obligation to determine the property status of the refund under state law.

Despite all this, *IndyMac* certainly *starts* by asking the right question: does the agreement in question "establish[ ] 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." *Id.* This Court would phrase it in somewhat the reverse fashion: Does the agreement create a trust relationship, agency relationship, or some other relationship under state law that conveys only legal title, not equitable title, to property? If not, it is a typical commercial (debtor-creditor) contract, meaning the party that receives property under the contract holds both legal and equitable title to that property. The Court accordingly turns to these questions.

4. <u>The Importance of TAA § A.2</u>

"The primary goal of [contract] interpretation is to determine and give effect to the intention of the parties." *Cache Nat'l Bank v. Lusher*, 882 P.2d 952, 957 (Colo. 1994). Whether the parties intended the TAA to create a trust relationship, agency relationship, or anything like either of these cannot be analyzed without keeping in mind TAA § A.2: "In essence, this Agreement [*i.e.*, the TAA] requires that each [Affiliate] be treated as a separate taxpayer with [the Holding Company] merely being an intermediary between an Affiliate and the [IRS]." Nothing in the TAA gives the key words here—

”merely being an intermediary”—any specialized meaning. The Court therefore must read them according to their plain and ordinary meaning. *Cache Nat'l Bank*, 882 P.2d at 957. “Intermediary” is generally defined as “a mediator or go-between; a third-party negotiator.” Black's Law Dictionary, *s.v.* “intermediary” (10th ed. 2014); *see also* Merriam–Webster Online, *s.v.* “intermediary” (offering similar definitions), *at* https://www.merriam-webster.com/dictionary/intermediary (last accessed July 3, 2017). “Merely” is the adverbial form of “mere,” which is generally defined as “being nothing more than.” *Id.*, *s.v.* “merely,” *at* https://www.merriamwebster.com/dictionary/merely (last accessed July 3, 2017). Thus, TAA § A.2 declares that the purpose of the TAA is to set up an arrangement in which the Holding Company acts as nothing more than a go-between, as between the subsidiaries and the IRS. This purpose must be kept in mind in the ensuing analysis.

5. <u>Trust</u>

The Bankruptcy Court noted that “what the FDIC seems to be attempting is to suggest an argument sounding primarily in trust rather than agency.” *UWBI*, 558 B.R. at 431. But the Bankruptcy Court was “quite confused as to the FDIC's position regarding possible trust issues.” *UWBI*, 558 B.R. at 431–32. The confusion is understandable. The FDIC's summary judgment briefing below focused on establishing that an express trust is unnecessary if the Holding Company can be deemed a “conduit,” which the FDIC equated to the “intermediary” language already in the TAA. (*See, e.g.*, App. 86, 254– 55.) In other words, the FDIC appeared to be

seeking recognition of some sort of generic trust-like relationship, without really identifying what that relationship was. This did not comport with the three types of trusts that the Bankruptcy Court found to exist under Colorado law (express trusts, constructive trusts, and resulting trusts), and the Bankruptcy Court therefore rejected the possibility of a trust relationship. *UWBI*, 558 B.R. at 432.

In this appeal, the FDIC has not specifically argued that the Bankruptcy Court's analysis was error. Rather, in a footnote, the FDIC argues that the Bankruptcy Court's "discussion of trust law ... was another diversion." (ECF No. 10 at 35 n.13.) This footnote goes on to claim that "[t]he circumstances in which Colorado law will impose a resulting trust are far broader than the bankruptcy court suggested" (*id.*), but it does not argue that a resulting trust would cover the situation at hand, or that the Bankruptcy Court's analysis should be overturned. Accordingly, the FDIC has forfeited any argument sounding in trust law. *See, e.g.*, *United States v. Hunter*, 739 F.3d 492, 495 (10th Cir. 2013) (arguments inadequately developed in the opening brief are forfeited).[10]

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[10] To be clear, the Court is not convinced that Colorado law requires a party to fit any trust-like relationship into the labels of "express," "constructive," or "resulting." The Colorado Supreme Court has held, for example, that a public utility company holds overcharges recovered from wholesalers "in trust" pending refund to the ratepayers, without fitting the relationship into a predefined category of trust. *See Colo. Office of Consumer Counsel v. Pub. Serv. Co. of Colo.*, 877 P.2d 867, 873 (Colo. 1994). The FDIC actually cited this case below (*see* App. 255), but has not continued to press the argument here.

6. Agency

Unlike its trust argument, the FDIC certainly continues to press an agency argument. (*See* ECF No. 10 at 29–36.) The FDIC's main argument in favor of an agency relationship is that TAA § G.1 explicitly declares one:

> [e]ach Affiliate hereby appoints [the Holding Company] as its agent ... for the purpose of filing such consolidated Federal Income tax returns for the [Group] as [the Holding Company] may elect to file and making any election, application or taking any action in connection therewith on behalf of the Affiliates.

Building on this, the FDIC notes that "[a]n agent is duty-bound to protect and turn over any property the agent receives for its principal." (ECF No. 10 at 30.) *See also* Restatement (Third) of Agency § 8.12 cmt. b (2006) ("If the agent receives property for the principal, the agent's duty is to use due care to safeguard it pending delivery to the principal."); *cf. Moore & Co. v. T–A–L–L, Inc.*, 792 P.2d 794, 798 (Colo. 1990) (declaring a real estate broker to be an "agent," and as such, owing to the seller a duty to "account ... for all money and property received"). The Bankruptcy Court had two responses to this argument.

a. *"Limited and Procedural" Agency*

The Bankruptcy Court first concluded that this grant of agency "is limited and procedural only," meaning that it only extends to precisely what it says—and it says nothing about the Holding

Company "being an agent for holding any tax refunds for the Bank's benefit." *UWBI*, 558 B.R. at 430–31. The Bankruptcy Court's notion of a "limited and procedural agency" comes from other bankruptcy cases interpreting 26 C.F.R. § 1.1502–77(a) (1), the IRS regulation discussed above which declares that one entity among a consolidated filing group (usually the parent) must be the agent for the whole vis-à-vis the IRS: "one entity (the agent) is the sole agent that is authorized to act in its own name regarding all matters relating to the federal income tax liability for the consolidated return year for each member of the group." Other bankruptcy courts have faced an argument that the IRS regulation itself (not some provision of the relevant tax allocation agreement) creates an agency relationship that entitles the subsidiary to any refund. These courts have, not surprisingly, rejected this argument, considering that whatever "agency" this regulation establishes is for the convenience of the IRS and has nothing necessarily to do with a consolidated filing group's internal affairs. Thus, courts have deemed such agency to be "procedural." *See, e.g.*, *Bob Richards*, 473 F.2d at 265 ("[T]he refund is made payable to the parent and the acceptance of the refund by the parent discharges any liability of the government to any subsidiary. But these regulations are basically procedural in purpose and were adopted solely for the convenience and protection of the federal government."); *In re First Cent. Fin. Corp.*, 269 B.R. 481, 489 (Bankr. E.D.N.Y. 2001) ("this agency is purely procedural in nature, and does not affect the entitlement as among the members of the Group to any refund paid by the I.R.S."); *see also Jump v. Manchester Life & Cas. Mgmt. Corp.*, 579 F.2d 449,

452 (8th Cir. 1978) ("Though IRS regulations provide that the parent corporation is the agent for each subsidiary in the affiliated group, this agency relationship is for the convenience and protection of IRS only and does not extend further." (citation omitted)).

Again, these cases involved an argument in which the regulation itself was deemed relevant to determining whether an agency relationship had been created. Here, the FDIC argues from the explicit language of TAA § G.1. The Bankruptcy Court's rejection of the FDIC's argument hinged on the belief that TAA § G.1 was intended as nothing more than a contractual recognition of the relevant IRS regulations. *See UWBI*, 558 B.R. at 418 (describing § G.1 as "mimicking the requirements of [the] IRS regulation"); *id.* at 430 (referring to "the agency referenced in the TAA (and included in the IRS regulations)"); *id.* at 431 ("While the TAA did identify [the Holding Company] as an agent for the Affiliated Group for purposes of filing consolidated federal income tax returns, it did so using language very similar to the IRS regulations.").

The Bankruptcy Court's view is reasonable, but the Bankruptcy Court cited no evidence to support such an intent. The language of TAA § G.1 ("agent ... for the purpose of filing such consolidated Federal Income tax returns for the [Group] as [the Holding Company] may elect to file and making any election, application or taking any action in connection therewith on behalf of the Affiliates") is not the same as the language of the IRS regulation ("agent ... authorized to act in its own name regarding all matters relating to the federal income tax liability

for the consolidated return year for each member of the group"). If the Holding Company and the Affiliates truly wished to do nothing more than import the regulatory requirement into the TAA, one might expect that they would adopt the regulation's language verbatim. They did not. Thus, it is equally reasonable that the parties meant something more than a basic affirmance of IRS regulatory requirements. And if so, "taking any action in connection therewith on behalf of the Affiliates" is broad enough to encompass accepting a refund on behalf of the Affiliates who might be entitled to it (or to a portion of it) if treated as separate taxpayers—as TAA § A.2 commands that they be treated vis-à-vis each other and the Holding Company, which acts "merely" as an "intermediary" with the IRS.

On the other hand, the Bankruptcy Court was correct to observe that the TAA contains none of the usual indicia of a relationship beyond a typical commercial transaction, such as restrictions on comingling of funds. *UWBI*, 558 B.R. at 427. The Sixth and Eleventh Circuits have noted, however, that such an observation may result in a wash when the tax agreement at issue similarly lacks indicia of a normal debtor-creditor relationship, such as an interest rate or collateral. *AmFin*, 757 F.3d at 535; *NetBank*, 729 F.3d at 1351. This argument may not go as far as the Sixth and Eleventh Circuits seem to take it, given that typical commercial contracts are the default and may be governed by numerous default rules in the absence of expected terms, whereas trust and agency relationships normally require some evidence of intent to create such a relationship. Nonetheless, those courts' reasoning is

well taken here when compared to the language of the TAA, which lacks any indicia of a debtor-creditor relationship and, in fact, affirmatively characterizes the Holding Company as a "mere[ ] ... intermediary."

Given all this, there are at least two reasonable interpretations of TAA § G.1.

b. *Subsidiary as Principal, Parent as Agent*

The Bankruptcy Court's second reason for rejecting the FDIC's interpretation of TAA § G.1 is a conclusion that a subsidiary can never appoint a parent as its agent:

> ... the agency referenced in the TAA is not consistent with Colorado common law agency. In Colorado, there can be no agency relationship where the alleged agent is not subject to the control of the alleged principal. The FDIC is turning agency on its head because the Bank did not control [the Holding Company] (or at least the FDIC produced no evidence that the Bank controlled [the Holding Company]). Subsidiaries generally do not control their parents. So, the agency argument does not work.

UWBI, 558 B.R. at 431 (citations omitted).

As stated in the Court's preliminary observation above (Part III.A), reasoning such as this proves too much. Although it may be true in a practical sense that a wholly owned subsidiary-principal could never direct a parentagent contrary to the parent's wishes, that does not mean that the subsidiary and the parent are not separate legal entities with at least

nominally separate directors and management. When corporate formalities are properly observed, courts nearly always respect them, and thus there seems to be no reason that a subsidiary cannot efficaciously designate its parent as its agent. Accordingly, there remain at least two reasonable interpretations of TAA § G.1 regarding the scope of the Holding Company's agency on behalf of the Bank.

E. Ambiguity

In Colorado, "ambiguity of a contract ... is a question of law." *Cheyenne Mountain Sch. Dist. No. 12 v. Thompson*, 861 P.2d 711, 715 (Colo. 1993). "In determining whether an ambiguity exists, [the court] must ask whether the disputed provision is reasonably susceptible on its face to more than one interpretation." *Allen v. Pacheco*, 71 P.3d 375, 378 (Colo. 2003). The Court has concluded that the TAA could be reasonably interpreted both to create an agency relationship (in which case the Holding Company was required to act toward the Refund as a fiduciary for the Bank) or a standard commercial relationship (in which case the Holding Company has no greater obligation to the Bank than it does to any other creditor).

The TAA, by its express terms, breaks the tie in favor of the Bank: "The intent of this Agreement is to provide an equitable allocation of the tax liability of the Group among [the Holding Company] and the Affiliates. Any ambiguity in the interpretation hereof shall be resolved, with a view to effectuating such intent, in favor of any insured depository institution." (TAA § H.4.) There can be no question

that the "equitable allocation" in this matter is to remit the Refund to the Bank. At oral argument below, the Trustee's counsel commendably acknowledged, "Absent bankruptcy ... the parent wouldn't have the right to keep this refund." (App. 348.) Because the TAA can reasonably be interpreted to require the Holding Company to act as agent on behalf of the Bank in obtaining and remitting the refund, the TAA requires that this Court so construe it.

The Bankruptcy Court partially sidestepped the ambiguity argument by announcing that the parties both agreed that the TAA was unambiguous. *UWBI*, 558 B.R. at 424 n.26. The FDIC indeed asserted below that the TAA's terms unambiguously favored the FDIC's position, but the FDIC also argued in the alternative based on TAA § H.4. (App. 251, 331–36.) Thus, the FDIC preserved the argument, and continues to urge it here in the alternative. (*See* ECF No. 10 at 22, 40, 41.)

The Bankruptcy Court also determined, of its own accord, that the TAA was unambiguous, but it did so because the rule of *IndyMac* is that an agreement with supposedly fungible obligations, a lack of comingling restrictions, and a full delegation of tax-related authority to the parent is, by definition, "unambiguously" a typical commercial contract, not a contract creating any heightened relationship. The Court need say nothing further about the validity of that rule as a general matter. It appears that no other case applying the *IndyMac* approach has faced a tax allocation agreement with language such as that contained in TAA § A.2: "In essence, this Agreement requires that each [Affiliate] be treated

as a separate taxpayer with [the Holding Company] merely being an intermediary between an Affiliate and the [IRS].” This language must be weighed against any inferences drawn out of the *IndyMac* analysis, and it at least creates an ambiguity—thus triggering TAA § H.4.

Accordingly, the Court concludes that the Holding Company, construed as an agent under TAA §§ A.2, G.1, and H.4, held no more than legal title to the Refund, while the Bank held equitable title. The Refund is not part of the Holding Company’s bankruptcy estate. *See* 11 U.S.C. § 541(d).

IV. CONCLUSION

For the reasons set forth above, the Court ORDERS as follows:

1. The judgment of the Bankruptcy Court is REVERSED and this matter is REMANDED to the Bankruptcy Court for further proceedings consistent with this opinion;

2. The FDIC’s Request for Oral Argument (ECF No. 13) is DENIED AS MOOT; and

3. This appeal (ECF No. 6) is TERMINATED.

APPENDIX C

UNITED STATES BANKRUPTCY COURT,
D. COLORADO

IN RE: UNITED WESTERN BANCORP, INC.,
Debtor.

SIMON E. RODRIGUEZ, IN HIS CAPACITY AS
CHAPTER 7 TRUSTEE FOR THE BANKRUPTCY ESTATE OF
UNITED WESTERN BANCORP, INC.,
Plaintiff,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
IN ITS CAPACITY AS RECEIVER OF
UNITED WESTERN BANK,
Defendant.

Case No. 12-13815 TBM

Adv. Pro. No. 14-1191 TBM

Signed September 16, 2016

OPINION AND ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

Thomas B. McNamara, United States Bankruptcy Judge

Everyone wants a tax refund—especially a tax refund of $4,081,335. That is the amount that the Internal Revenue Service agreed should be returned (the "Tax Refund") based upon the offset of net operating losses and past income from the operations of United Western Bank (the "Bank"), a failed Colorado financial institution currently in receivership under the watchful eye of the Federal Deposit Insurance Corporation (the "FDIC"). But, even though the Tax Refund indisputably stems from the Bank's business loss carrybacks, entitlement to the Tax Refund is complicated by virtue of how the Bank filed its federal income tax returns. Prior to being closed by the Office of Thrift Supervision, the Bank joined with its parent bank holding company, United Western Bancorp, Inc. ("UW Bancorp"), and certain other affiliated entities to form a consolidated group for federal income tax purposes. As the parent bank holding company, UW Bancorp filed consolidated federal income returns for the entire corporate group pursuant to a tax allocation agreement. The bank holding company corporate structure and federal income tax consolidation utilized by UW Bancorp and its subsidiaries are common in the banking industry—but also inadvertently created the legal conundrum posed by this case.

Closure of the Bank by federal regulators ultimately caused its parent, UW Bancorp, to fail too. UW Bancorp filed for protection under Chapter 11 of the Bankruptcy Code. Later, this Court converted the bankruptcy reorganization case to a Chapter 7 liquidation and Simon E. Rodriguez was appointed as the Chapter 7 Trustee (the "Trustee") for UW

Bancorp. After learning of the anticipated Tax Refund, the Trustee (acting on behalf of the UW Bancorp estate) filed this adversary proceeding against the FDIC (acting as receiver of the Bank). The Trustee claims that the Tax Refund is property of the UW Bancorp bankruptcy estate. The FDIC counters that the Tax Refund belongs to the Bank. Both sides contend that the underlying facts are undisputed and the contest can be decided as a matter of law. Given the competing claims to the Tax Refund, the IRS recently deposited the $4,081,335 Tax Refund into the Registry of this Court where it waits pending final adjudication of the legal dispute. Ultimately, the case boils down to this simple-sounding binary question: Which party (the Trustee or the FDIC) is entitled to the Tax Refund?

I. Jurisdiction and Venue.

A. Nature of the Case.

On April 16, 2014, the Trustee initiated this adversary proceeding by filing his "Complaint Asserting Objection to Claim and Counterclaims for Declaratory Relief and Recovery of Assets of the Estate." (Docket No. 1, the "Complaint.") The Trustee purports to act "in his capacity as Trustee for the bankruptcy estate of United Western Bancorp, Inc.," while suing the FDIC "in its capacity as Receiver for United Western Bank." (*Id.* at 1.) The fundamental claim asserted in the Complaint is for declaratory judgment under Section 541[1] of the Bankruptcy

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[1] 1 Unless otherwise indicated, all references to "Section" are to Sections of the United States Bankruptcy Code, 11 U.S.C. §§ 101 *et. seq.*

Code and 28 U.S.C. § 2201. Noting the "actual, real and immediate controversy" concerning entitlement to the Tax Refund, the Trustee requests that this Court enter a declaratory judgment determining that the Tax Refund is property of the bankruptcy estate of UW Bancorp. (*Id.* at 4-5.) From this premise, the Trustee added two subsidiary causes of action. First, the Trustee demands that the Tax Refund be turned over to him under Section 542, because the Tax Refund is property of the estate. Second, the Trustee objects to the FDIC's proof of claim against UW Bancorp under Section 502(b) because the proof of claim had asserted that the FDIC (not the Trustee) was entitled to the Tax Refund. The Trustee asserts that the FDIC's proof of claim should be disallowed "except to the extent that it presents a nonpriority, general unsecured pre-petition claim" against UW Bancorp. (*Id.* at 5.) So, although three claims are asserted by the Trustee in the Complaint, all of which are uniquely based on the Bankruptcy Code, they all depend on whether or not the Tax Refund is property of the estate of UW Bancorp.

The FDIC contested the Complaint through its "Answer and Counterclaim." (Docket No. 25, the "Answer.") In addition to denying the Trustee's claims and asserting various affirmative defenses, the FDIC stated a counterclaim. (*Id.* at 20.) But the FDIC's counterclaim is merely the mirror-image of the Trustee's declaratory judgment cause of action. The FDIC asserts that the Tax Refund is its property (as receiver for the Bank) and should be turned over to the FDIC. (*Id.*)

B. <u>Jurisdiction and Venue</u>.

Based upon the nature of the Complaint, this Court would appear to have jurisdiction to enter final judgment on all of the claims advanced by the Trustee and the FDIC's counterclaim pursuant to 28 U.S.C. § 1334(b). Furthermore, all of the Trustee's claims are core proceedings under 28 U.S.C. § 157(b)(2)(A) ("matters concerning administration of the estate"), (b) (2)(B) ("allowance or disallowance of claims against the estate"), (b)(2)(C) ("counterclaims by the estate"), (b)(2) (E) ("orders to turn over property of the estate"), and (b)(2)(O) ("other proceedings affecting liquidation of the assets of the estate").

But, there was an initial jurisdictional hiccup. The FDIC is an independent agency of the United States government. 12 U.S.C. §§ 1811(a) (establishment of FDIC) and 1819 (the FDIC "shall be an agency of the United States"). The FDIC has two main missions: (1) to act as an insurer or regulator of banks and savings associations; and (2) when appointed as a receiver, to liquidate failed banks and savings associations. *Id.*; 12 U.S.C. §§ 1811(b), 1814-1822, and 1828. And, as an agency of the United States government, the FDIC enjoys special statutory protections and privileges including federal jurisdiction in the district courts. 12 U.S.C. § 1819(b). Relying primarily on 12 U.S.C. §§ 1819(b) and 1821(d), the FDIC initially asserted its special status and challenged this Court's subject matter jurisdiction to adjudicate the claims and counterclaims and enter final judgment. (Docket No. 25 at 1, 2, and 15.)

Thus, the FDIC's defenses raised complicated jurisdictional issues involving constitutional law and statutory interpretation. Most courts considering such matters have determined that bankruptcy courts do have jurisdiction to fully and finally adjudicate the types of claims asserted by the Trustee. *See Zucker v. FDIC (In re BankUnited Fin. Corp.)*, 727 F.3d 1100, 1104 n. 5 (11th Cir.2013) ("Section 1821(d)(13)(D)... does not preclude the Bankruptcy Court from determining the threshold question of whether tax refunds are an asset of the bankruptcy estate."); *Giuliano v. FDIC (In re Downey Fin. Corp.)*, 499 B.R. 439 (Bankr.D.Del.2013), *aff'd Cantor v. FDIC (In re Downey Fin. Corp.)*, 593 Fed.Appx. 123 (3rd Cir.2015) (unpublished) (bankruptcy court entered final judgment on Chapter 7 trustee's claims against FDIC related to disputed tax refund; appellate court held: "The Bankruptcy Court had jurisdiction pursuant to 28 U.S.C. § 157."). And, filing a proof of claim (as the FDIC did) ordinarily submits the claimant to the "equitable jurisdiction of the Bankruptcy Court"—at least with respect to issues concerning adjudication of the proof of claim. *Langenkamp v. Culp*, 498 U.S. 42, 44, 111 S.Ct. 330, 112 L.Ed.2d 343 (1991); *see also Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 58, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989).

Fortunately, the Court need not delve too deeply into the jurisdictional abyss since the FDIC changed its position. On December 18, 2015, the FDIC filed a "Statement of Position" wherein the FDIC stated unequivocally that the FDIC "withdraws its jurisdictional reservations" and "consents to entry of final orders or judgment by the Bankruptcy Court in

this adversary proceeding." (Docket No. 53.) The FDIC also withdrew its affirmative defenses based upon its jurisdictional arguments. (*Id.*) The FDIC's express, knowing, and voluntary consent to final adjudication by this Court is sufficient for this Court to exercise jurisdiction and issue a final judgment. *Wellness Int'l Network, Ltd. v. Sharif*, —— U.S. ——, 135 S.Ct. 1932, 1947, 191 L.Ed.2d 911 (2015) ("Adjudication based upon litigant consent has been a consistent feature of the federal court system since its inception.").

Based upon the Court's own jurisdictional assessment coupled with the FDIC's express consent, the Court determines that it has jurisdiction to enter final judgment on all of the claims advanced by the Trustee and the FDIC's counterclaim pursuant to 28 U.S.C. § 1334(b). All of the Trustee's claims are core proceedings under 28 U.S.C. § 157(b)(2). Further, venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

II. Procedural Background.

A. The Main Case.

UW Bancorp filed for protection under Chapter 11 of the Bankruptcy Code on March 2, 2012 in the case captioned: *In re United Western Bancorp, Inc.*, Case No. 12–13815 (Bankr.D.Colo.) (the "Main Case"). (Main Case Docket No. 1.) A little over a year later, on April 15, 2013, the Court entered its "Order Converting Case Under Chapter 11 to Case Under Chapter 7." (Main Case Docket No. 290.) Promptly after the conversion, Simon E. Rodriguez was appointed as the Chapter 7 Trustee and has

remained in that role continuously thereafter. (Main Case Docket No. 291.)

B. The Adversary Proceeding.

The Trustee initiated this adversary proceeding by filing the Complaint against the FDIC on April 16, 2014. The FDIC responded with the Answer. The core dispute framed by both the Complaint and the Answer is whether the Tax Refund is property of the UW Bancorp bankruptcy estate or, alternatively, whether the Tax Refund belongs to the FDIC as receiver for the Bank. The $4,081,334 Tax Refund already has been deposited into this Court's Registry pending the entry of judgment in this adversary proceeding. (Main Case Docket No. 529.)

C. The Cross Motions for Summary Judgment.

Both the Chapter 7 Trustee and the FDIC agree that this case should be decided by summary judgment under Fed. R. Civ. P. 56, as incorporated by Fed. R. Bankr. P. 7056. The FDIC struck first and submitted its "Motion for Summary Judgment" (the "FDIC MSJ") and "Memorandum of Law in Support of Motion for Summary Judgment" (the "FDIC Memorandum"). (Docket Nos. 39 and 40.) The Trustee responded in opposition to the FDIC MSJ. (Docket No. 47.) And, after receiving Court authorization, the FDIC replied in support of the FDIC MSJ. (Docket No. 52.)

Meanwhile, the same day that the FDIC filed the FDIC MSJ, the Trustee filed his own "Motion for Summary Judgment" (the "Trustee MSJ") and "Brief in Support of Plaintiff's Motion for Summary Judgment" (the "Trustee Memorandum"). (Docket

Nos. 44 and 45.) The FDIC responded in opposition to the Trustee MSJ. (Docket No. 48.) And, after receiving Court authorization, the Trustee replied in support of the Trustee MSJ. (Docket No. 54.) The FDIC MSJ and the Trustee MSJ are effectively inverse images of each other. Each party requests that the Court enter summary judgment in its favor determining entitlement to the Tax Refund.

The Trustee's principal argument is that a "Tax Allocation Agreement," dated January 1, 2008 (the "TAA"), created a debtor-creditor relationship as between UW Bancorp and the Bank. The Trustee contends that the UW Bancorp bankruptcy estate owns the Tax Refund under the TAA but acknowledges that the Bank is entitled to a general unsecured claim against the UW Bancorp bankruptcy estate for some or all of the Tax Refund, which should share only *pari passu* with other general unsecured claims against UW Bancorp.

Contrawise, the FDIC urges that it owns the Tax Refund (as receiver for the Bank) because UW Bancorp allegedly was only a conduit for the Tax Refund. Further, the FDIC argues that the TAA established an agency relationship (not a debtor-creditor relationship) as between UW Bancorp and the Bank, whereby UW Bancorp is merely an intermediary between the IRS and the Bank with respect to tax matters. Alternatively, the FDIC suggests if the TAA is silent as to ownership of the Tax Refund, then the Tax Refund should be awarded to the FDIC because the Bank alone generated the income and net operating losses resulting in the Tax Refund.

Thus, both the Trustee and the FDIC focus on the terms and meaning of the TAA. Suffice to say that both the FDIC and the Trustee submitted thorough, professional, and persuasive arguments in support of their respective opposing positions. The parties complied with all of the requirements of L.B.R. 7056-1. The Court commends the work of legal counsel for both sides of the dispute. The matters are fully briefed. Further, the Court conducted a lengthy hearing to receive additional oral argument concerning the FDIC MSJ, the Trustee MSJ, and the respective oppositions. The very challenging issues presented by the Trustee and the FDIC are ripe for decision.

III. **Findings of Fact**.

It is axiomatic that summary judgment may not enter unless the movant "shows that there is no genuine dispute as to any material facts and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In this case, the parties agree on virtually all the basic material facts but contest the legal implications.[2] Thus, this case is especially

[2] For example, in the FDIC MSJ, the FDIC identified 29 alleged undisputed material facts. (FDIC Memorandum at 4-8.) The Trustee took exception to only one of the FDIC's alleged undisputed material facts. (Docket No. 47.) But that dispute was only about characterization of the TAA, a document upon which both parties rely. Similarly, in the Trustee MSJ, the Trustee identified seven alleged undisputed material facts. (Trustee Memorandum at 2-4.) Most of the alleged undisputed material facts advanced by the Trustee overlapped with the almost simultaneous submission by the FDIC. And, the FDIC did not dispute the actual underlying facts. Instead, the few objections made by the FDIC to the alleged undisputed material facts proposed by the Trustee focused on the materiality,

suited for the entry of summary judgment without the necessity of a contested trial. For purposes of both the FDIC MSJ and the Trustee MSJ, the Court finds that the following material facts are undisputed and accepted:[3]

A. UW Bancorp and the Bank.

UW Bancorp was a bank holding company.[4] UW Bancorp's principal wholly-owned subsidiary was the Bank.[5] The Bank operated a community-based banking network, comprised of eight banking locations and a loan servicing office, across Colorado's Front Range market and selected mountain communities.[6]

B. The FDIC Receivership of the Bank.

On January 21, 2011, the Office of Thrift Supervision closed the Bank and appointed the FDIC

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relevance, and characterization of some of the undisputed material facts. (Docket No. 48.) Under L.B.R. 7056-1, all proposed undisputed material facts advanced by a movant in a motion for summary judgment are deemed admitted unless specifically controverted. So, given the foregoing, the bottom line is that the parties agree on the core facts.

[3] The Court identifies only the undisputed facts that the Court deems to be relevant and material (except for procedural facts identified previously). The parties also have proposed that certain passages from the TAA be deemed as undisputed material facts. The terms of the TAA are undisputed and will be noted as appropriate through this Opinion and Order.

[4] Complaint ¶ 15; Answer ¶ 15; FDIC Undisputed Fact No. 3.

[5] Complaint ¶¶ 12 and 15; Answer ¶¶ 12 and 15; FDIC Undisputed Fact No. 4.

[6] FDIC Undisputed Fact No. 4 and FDIC Exhibit B.

as receiver.[7] Upon its appointment, the FDIC succeeded to the rights, titles, powers, and privileges of the Bank, and the FDIC is empowered, among other things, to take over assets of and operate the Bank, collect all obligations and money due to the Bank, preserve and conserve the assets and property of the Bank, and place the Bank in liquidation and proceed to realize upon its assets.[8]

C. The UW Bancorp Bankruptcy.

After the Bank was placed into FDIC receivership, UW Bancorp filed for protection under Chapter 11 of the Bankruptcy Code in the Main Case.[9] Subsequently, this Court converted the case to a liquidation under Chapter 7 and Simon E. Rodriguez was appointed as the Chapter 7 Trustee.[10] The FDIC filed a protective proof of claim (Claim 28-1, the "FDIC Claim") against UW Bancorp in the Main Case in the amount of $4,847,000 asserting, *inter alia*,[11] a claim of ownership in the Tax Refund.[12]

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[7] Complaint ¶ 11; Answer ¶ 11; FDIC Undisputed Fact No. 5; FDIC Exhibit B. A federally-insured bank may not be a debtor under the Bankruptcy Code. 11 U.S.C. § 109(b)(2) and (d). Thus, bank liquidations generally are conducted under the supervision of the FDIC.

[8] FDIC Undisputed Fact No. 6.

[9] Main Case Docket No. 1; Complaint ¶ 7; Answer ¶ 7; FDIC Undisputed Fact No. 7.

[10] Main Case Docket Nos. 290 and 291; Complaint ¶¶ 8-9; Answer ¶ 8-9; FDIC Undisputed Fact Nos. 7–8.

[11] In the FDIC's "Statement of Position," it withdrew its claims asserted in Sections C, D, and E of the FDIC Claim.

D. <u>The Tax Allocation Agreement, Consolidated Tax Returns, and Tax Refund</u>.

Prior to the Bank being placed into FDIC receivership and UW Bancorp filing for bankruptcy protection, UW Bancorp and its 13 affiliated subsidiaries (the "Affiliates"), including the Bank, were members of an "affiliated group" for tax purposes within the meaning of Section 1504(a) the Internal Revenue Code, 26 U.S.C. § 1 *et seq.* (the "Affiliated Group").[13] The Affiliated Group, including UW Bancorp and the Bank, entered into the TAA (Tax Allocation Agreement), dated January 1, 2008.[14]

UW Bancorp filed consolidated federal income tax returns as agent for and on behalf of itself and its subsidiaries (including the Bank), pursuant to the TAA.[15] In accordance with the TAA, the parties computed the tax liabilities and tax benefits on a separate-entity basis for each Affiliate of UW

(Docket No. 53.) Thus, the only remaining claim in the FDIC Claim is to the Tax Refund.

[12] Complaint ¶ 13 and Exhibit A; Answer ¶ 13; FDIC Undisputed Fact No. 23

[13] Complaint ¶ 16; Answer ¶ 16; FDIC Undisputed Fact No. 9.

[14] Complaint ¶ 17 and Exhibit B; Answer ¶ 17; FDIC Undisputed Fact No. 10; Trustee Undisputed Fact No. 1. Copies of the TAA are attached as Exhibit B to the "Notice of Filing of Exhibits to Complaint" filed by the Trustee (Docket No. 17), Exhibit A to the Trustee Memorandum, and Exhibit C to the FDIC Memorandum.

[15] Complaint ¶¶ 17-18 and 24; Answer ¶ 17-18 and 24; FDIC Undisputed Fact No. 11; Trustee Undisputed Fact No. 3.

Bancorp, although the federal income tax returns filed with the IRS were on a consolidated basis.[16]

For the tax year 2008, UW Bancorp filed a consolidated federal income tax return for the Affiliated Group and reported that the Bank generated $34,397,709 in taxable income.[17] By contrast, UW Bancorp did not generate any taxable income in 2008.[18] In 2010, the Bank suffered at least $35,351,690 in net operating losses.[19]

Based upon the Bank's 2010 net operating losses, the Affiliated Group filed a tax refund request for $4,846,625 to recover a portion of the taxes paid by the Bank on its 2008 taxable income.[20] In other words, the Affiliated Group sought a loss carryback tax refund—an offset of the Bank's 2010 net operating losses against the Bank's 2008 income. The amount ultimately refunded by the IRS was less than the amount requested. The $4,081,334 Tax Refund has been deposited into this Court's Registry

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[16] FDIC Undisputed Fact No. 14; FDIC Memorandum Exhibit D.

[17] FDIC Undisputed Fact No. 17; FDIC Memorandum Exhibit D.

[18] FDIC Undisputed Fact No. 18; FDIC Memorandum Exhibit D.

[19] FDIC Undisputed Fact No. 19; FDIC Memorandum Exhibit D.

[20] FDIC Undisputed Fact No. 20; FDIC Memorandum Exhibit D.

pending the entry of judgment in this adversary proceeding.[21]

IV. <u>The Tax Allocation Agreement</u>.

On January 1, 2008, UW Bancorp (the bank holding company corporate parent) and all of its 13 subsidiary Affiliates, including the Bank, entered into the TAA.[22] The parties recited that they entered into the TAA for the following purposes:

> ... to establish a method for (i) *allocating* the consolidated tax liability of the Group among its members, (ii) *reimbursing* [UW Bancorp] for the payment of such tax liability, and (iii) *compensating* each member of the Group for the use of its losses by any other member of the Group.

TAA at Second Preamble (emphasis added). This expression of intention is similar to many tax sharing agreements. *See Downey Fin*., 499 B.R. at 447 (tax sharing agreement utilizing almost identical intention language). The TAA also states that "[t]he intent of this Agreement is to provide an equitable allocation of the tax liability of the Group among UWBI [UW Bancorp] and the Affiliates. Any ambiguity in the interpretation hereof shall be resolved, with a view to effectuating such intent, in

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[21] Main Case Docket No. 529. The Tax Refund was deposited with this Court's Registry after the FDIC MSJ and the Trustee's MSJ were filed.

[22] Although the operative agreement in this case is a "Tax Allocation Agreement," similar such agreements frequently are labelled as "Tax Sharing Agreements."

favor of any insured depository institution." TAA § H.4.

The TAA creates a system of payment obligations between UW Bancorp and the Affiliates. The heart of the TAA is contained in Section A "General Rules—Federal" which provides:

> Except as specifically set forth herein to the contrary, each Affiliate shall pay UWBI [UW Bancorp] an amount equal to the federal income tax liability such Affiliate would have incurred were it to file a separate return (or, if appropriate, a consolidated return with its subsidiary affiliates). If a regulated first-tier Affiliate [the Bank] incurs a net operating loss or excess tax credits, the regulated Affiliate is entitled to a refund equal to the amount that it would have been entitled to receive had it not joined in the filing of a consolidated return with UWBI. Similar treatment is optional at UWBI discretion for nonregulated first-tier Affiliates. Any refund shall generally not exceed the amount claimed or received as a refund resulting from a carryback claim filed by UWBI. However, this shall not prevent UWBI from the ability to make a refund over the amount received or claimed as a refund or carryback, if in its sole discretion it believes such payment is in its best interest.

TAA § A.1.

Section A also characterizes the relationship between the parties:

> In essence, this Agreement requires that each first-tier subsidiary [the Bank] be treated as a separate taxpayer with UWBI [UW Bancorp] merely being an intermediary between an Affiliate and the Internal Revenue Service ("IRS").

TAA § A.2. In language mimicking the requirements of an IRS regulation (26 C.F.R. § 1.1502–77(a)), the TAA also confirms the "intermediary" concept and states:

> Each Affiliate hereby appoints UWBI [UW Bancorp] as its agent, as long as such Affiliate is a member of the UWBI group, for the purpose of filing such consolidated Federal Income tax returns for the UWBI group as UWBI may elect to file and making any election, application or taking any action in connection therewith on behalf of the Affiliates. Each such Affiliate hereby consents to the filing of any such returns and the making of any such elections and applications.

TAA § G.1.

The TAA contemplates that UW Bancorp pay to the IRS the consolidated income tax of the Affiliated Group. In order to do so, the TAA requires the Affiliates to pay UW Bancorp annual "preliminary tax settlement payments" before the April 15 deadline for the consolidated federal income tax return:

> Preliminary tax settlement payments are due on or before March 15 following the end of the appropriate taxable year. Although

> overpayments of estimated taxes made by Affiliates are not refunded until final tax settlement is done, an Affiliate with a taxable loss for the year may recover estimated taxes paid for that year before final settlement if an "expedited refund" claim is filed with UWBI [UW Bancorp] by February 15 following the end of the tax year.

TAA § E.1. The TAA also has a mechanism for final annual calculations and true-up within the Affiliated Group after the payment of annual estimated taxes:

> Each first-tier Affiliate shall compute its final tax settlement liability based upon the amounts included for that Affiliate... in the consolidated federal income tax return filed. A copy of such computation will be prepared by October 31, and any differences shall be resolved. Final tax settlement payments or refunds are due on or before November 15.

TAA § E.2. Similar TAA provisions required further quarterly payments of "hypothetical estimated income tax" to UW Bancorp by the Affiliates. TAA § F.1 and 2. But payments by UW Bancorp to an Affiliate relating to possible net operating losses by an Affiliate were required only annually, not quarterly: "Payments to an Affiliate for net operating losses or similar items shall not be made under this provision, but rather on an annual basis pursuant to Section A." TAA § F.3.

The TAA contains a provision regarding refunds from the IRS:

> In the event of any adjustment to the tax returns of the Group as filed (by reason of an amended return, claim for refund, or an audit by a taxing authority), the liability of the parties to this Agreement shall be re-determined to give effect to any such adjustment as if it had been made as part of the original computation of tax liability, and payments between the appropriate parties shall be made within 10 business days after any such payments are made or refunds are received, or, in the case of contested proceedings, within 10 business days after a final determination of the contest.

TAA § H.1. The Section H.1 text about refunds is additional to other language concerning refunds contained in Sections A.1, E.1 and E.2 of the TAA.

The TAA vests UW Bancorp with broad authority concerning the preparation, filing, and manner of prosecution of consolidated income tax returns. *See* TAA §§ A.1 (UW Bancorp has option to make refunds to nonregulated first-tier Affiliates in its discretion; UW Bancorp may make a refund over the amount received or claimed in its sole discretion); C.5 (UW Bancorp receives certain benefits); D.4 (settlement calculations are to be made by UW Bancorp); F.2 (hypothetical estimated income tax liability is determined by UW Bancorp); and G.1 (UW Bancorp has general powers over tax matters). Finally, all of the provisions of the TAA are governed by Colorado law. TAA § H.6.

V. General Legal Standards.

A. Legal Standard for Summary Judgment.

Motions for summary judgment are governed by Fed. R. Civ. P. 56, as incorporated herein by Fed. R. Bankr. P. 7056. Summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories, admissions, or affidavits show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The moving party bears the initial burden of identifying the basis for its motion and designating those portions of the record which it believes entitles it to judgment. Fed R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

In reviewing a motion for summary judgment, the Court must "view the facts and evidence in the light most favorable to the nonmoving party." *Morris v. City of Colo. Springs,* 666 F.3d 654, 660 (10th Cir.2012). One of the principal purposes of summary judgment "is to isolate and dispose of factually unsupported claims or defenses." *Celotex*, 477 U.S. at 324, 106 S.Ct. 2548. Therefore, unsupported, conclusory allegations will not create an issue of fact, and the moving party must do more than provide its subjective interpretation of the evidence. *Tran v. Sonic Indus. Serv., Inc.*, 490 Fed.Appx. 115, 118 (10th Cir.2012). "A party cannot rely entirely on pleadings, but must present significant probative evidence to support its position." *Hansen v. PT Bank Negara Indonesia (Persero)*, 706 F.3d 1244, 1247 (10th Cir.2013) (citing *Anderson v. Liberty Lobby,*

Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

"If the nonmoving party fails to make a sufficient showing on an essential element with respect to which [it] has the burden of proof, judgment as a matter of law is appropriate." *Id.* However, "when the evidence could lead a rational fact-finder to resolve the dispute in favor of either party, summary judgment is improper." *C.L. Frates & Co. v. Westchester Fire Ins. Co.*, 728 F.3d 1187 (10th Cir.2013).

In this case, the common set of undisputed material facts already identified by the Court serves as the basis for summary adjudication. Neither the Trustee nor the FDIC requested an evidentiary hearing to challenge facts or provide additional extrinsic evidence. Further, the Court determines that no evidentiary hearing is necessary. Instead, the Court may apply the common set of undisputed facts within the applicable legal framework.

B. Section 541 and State Law.

The Bankruptcy Code provides the basic structure for determining whether the Trustee is entitled to the Tax Refund as property of the UW Bancorp bankruptcy estate. Section 541 is titled, "Property of the Estate," and states that the commencement of a bankruptcy case "creates an estate." The estate includes: "*all legal or equitable interests of the debtor* in property as of the commencement of the case" "wherever located and by whomever held." 11 U.S.C. § 541(a) (emphasis added). The text of the statute is exceedingly broad and encompassing. *U.S. v. Whiting*

Pools, Inc., 462 U.S. 198, 103 S.Ct. 2309, 76 L.Ed.2d 515 (1983); *Parks v. Dittmar (In re Dittmar),* 618 F.3d 1199, 1207 (10th Cir.2010) ("the scope of § 541 is broad and should be generously construed, and [ ] an interest may be property of the estate even if it is 'novel or contingent.' ").[23] However, if the bankruptcy debtor holds "only legal title and not an equitable interest," then the property "becomes property of the estate... only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold." 11 U.S.C. § 541(d).

In the main, Section 541(a) dictates that all of the debtor's "legal or equitable interests" as of the bankruptcy petition date (whatever such interests were) become property of the debtor's bankruptcy estate to be administered under the Bankruptcy Code. And, the bankruptcy estate receives only those property rights that the debtor had pre-petition—nothing more and nothing less. That is because "[a] bankruptcy estate cannot succeed to a greater interest in property than the debtor held prior to bankruptcy." *Redmond v. Rainstorm, Inc. (In re Lone Star Pub Operations, LLC)*, 465 B.R. 212, 216 (Bankr.D.Kan.2010). So, federal law (*i.e.,* Section 541(a)) determines the extent to which existing property interests may become property of the estate upon bankruptcy.

A long line of bankruptcy cases (even pre-dating the modern Bankruptcy Code) dictate that if a debtor

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[23] Section 541(b) also contains a list of certain discrete and limited types of property that are not "property of the estate."

owns or is entitled to a federal loss carryback tax refund, such refund generally becomes property of the debtor's bankruptcy estate. *Segal v. Rochelle*, 382 U.S. 375, 380, 86 S.Ct. 511, 15 L.Ed.2d 428 (1966); *Kokoszka v. Belford*, 417 U.S. 642, 648, 94 S.Ct. 2431, 41 L.Ed.2d 374 (1974); *Barowsky v. Serelson (In re Barowsky)*, 946 F.2d 1516, 1517–19 (10th Cir.1991). *Segal*, a Bankruptcy Act decision, is particularly instructive. In that case, individual debtors "had both prior net income and a net loss when their petitions were filed" thus entitling them to federal income tax refunds. The question was whether "the potential claims for loss-carryback refunds constituted 'property' [under Section 70a(5) of the Bankruptcy Act]." *Id.* at 379, 86 S.Ct. 511. The United States Supreme Court held:

> The main thrust of § 70a(5) [of the Bankruptcy Act] is to secure for creditors everything of value the bankrupt may possess in alienable or leviable form when he files his petition. To this end 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.
>
> ....
>
> Turning to the loss-carryback refund claim in this case, we believe it is sufficiently rooted in the pre-bankruptcy past and so little entangled with the bankrupts' ability to make an unencumbered fresh start that it should be regarded as "property" [under the Bankruptcy Act].

Id. at 379–80, 86 S.Ct. 511. When Congress later enacted Section 541(a) of the Bankruptcy Code, it expressly endorsed the *Segal* analysis and result. S. Rep. No. 989, 95th Cong., 2nd Sess. 82, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5868; H. Rep. No. 595, 95th Cong., 1st. Sess. 367, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6323 ("The result in *Segal*... is followed, and the right to a [tax] refund is property of the estate.")

But this case presents a somewhat more complicated issue. Unlike *Segal*, in this case the Tax Refund is based upon consolidated corporate federal income tax returns and a net operating loss carryback against prior income generated by a subsidiary of the bankrupt debtor. The FDIC asserts that the Bank, not UW Bancorp, is the real owner of the Tax Refund such that the Tax Refund never became property of the UW Bancorp bankruptcy estate at all. Alternatively, the FDIC suggests that if UW Bancorp had an interest in the Tax Refund, it was only a legal interest (not an equitable interest) so the UW Bancorp bankruptcy estate cannot recover the Tax Refund.

The dispute certainly involves federal law under Section 541(a), but also implicates state property law as well. According to the United States Supreme Court:

> Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law. Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an

> interested party is involved in a bankruptcy proceeding.

Butner v. U.S., 440 U.S. 48, 54–55, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979); *see also Dittmar*, 618 F.3d at 1204 ("For most bankruptcy proceedings, property interests are created and defined by state law."); *Parks v. FIA Card Serv., N.A. (In re Marshall)*, 550 F.3d 1251, 1255 (10th Cir.2008) (same).

C. Burden of Proof.

In cases where the bankruptcy debtor's ownership of property is challenged, the debtor has the initial burden to prove that it has legal title to the property. *Lone Star Pub*, 465 B.R. at 216. Thereafter, the burden shifts to the party challenging the bankruptcy estate. The challenger must show that it holds beneficial interest in the property and that the bankruptcy debtor holds solely legal (not equitable) title. *Id.*; *see also Amdura Nat'l Distribution Co. v. Amdura Corp., Inc. (In re Amdura Corp.)*, 75 F.3d 1447, 1451 (10th Cir.1996). The FDIC expressly concedes the respective burdens. FDIC Memorandum at 3-4.

VI. Legal Conclusions.

A. UW Bancorp Has A Legal Interest in the Tax Refund.

Prior to bankruptcy, UW Bancorp was a bank holding company[24] that wholly-owned the Bank and

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[24] *See* 12 U.S.C. § 1841(a)(1) (defining "bank holding company" as "any company which has control over any bank or over any company that is or becomes a bank holding company").

the other 12 Affiliates. This type of corporate organization for financial institutions is not at all unique and creates certain advantages in raising capital and also allowing flexibility for the corporate group to engage in a broader range of business activities than just traditional banking. As a result, "[l]arge banking organizations in the United States are generally organized according to a bank holding company structure" under the Bank Holding Act, 12 U.S.C. § 1841. Dafna Avraham et al., *A Structural View of U.S. Bank Holding Companies,* FEDERAL RESERVE BANK OF NEW YORK ECONOMIC POLICY REVIEW 65 (July 2012).

The bank holding company structure allowed UW Bancorp and its Affiliates to file consolidated federal income tax returns and enjoy the beneficial tax treatment[25] afforded to affiliated companies that file tax returns on a consolidated basis. 26 U.S.C. § 1501 ("An affiliated group of corporations shall... have the privilege of making a consolidated return with respect to income tax ...."). The Trustee and the FDIC agree that UW Bancorp and its Affiliates, including the Bank, were members of an "affiliated group" for tax purposes. 26 U.S.C. § 1504(a) (defining "affiliated group"); *see also* 26 C.F.R. § 1.1502–1(a) (defining "group"). The "common parent corporation and each subsidiary which was a member of the group" generally are severally liable for the tax due for the consolidated return. 26 C.F.R. § 1.1502– 6; see also Dale L. Ponikvar and Russell J.

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[25] Consolidated tax returns allow a consolidated group "to utilize losses by one group member to reduce the consolidated group's overall tax liability." *Downey Fin.*, 499 B.R. at 447.

Kestenbaum, *Aspects of the Consolidated Group in Bankruptcy: Tax Sharing and Tax Sharing Agreements,* 58 TAX LAWYER 803, 824 (Summer 2005) ("the Treasury Regulations take the easy route, making each member of the consolidated tax group liable for the entire tax liability of the group.").

IRS regulations govern the procedural mechanics for filing consolidated federal income tax returns. Consolidated income tax returns may only be filed if each member of the affiliated group consents. 26 C.F.R. § 1.1502–75(a). Consent may be manifested by joining in the making of a consolidated income tax return. 26 C.F.R. § 1.1502–75(b). In order to streamline the process, the IRS requires that there be a "sole agent" for the consolidated group. 26 C.F.R. § 1.1502–77(a)(1). That "one entity (the agent) is the sole agent that is authorized to act in its own name regarding all matters relating to the federal income tax liability for the consolidated return year for each member of the group." *Id.* In general, the agent must be the "common parent" for the affiliated group. 26 C.F.R. § 1.1502–77(c)(1). Although the IRS regulations require the use of an "agent" for filing consolidated federal income tax returns, the agency is "purely procedural in nature." *Superintendent of Ins. of N.Y. v. First Cent. Fin. Corp. (In re First Cent. Fin. Corp.)*, 269 B.R. 481, 489 (Bankr. E.D.N.Y.2001), *aff'd* 377 F.3d 209 (2nd Cir.2004).

The common parent effectively is the exclusive point of contact for interaction with the IRS. 26 C.F.R. § 1.1502– 77(a) and (d). For example, the common parent files the consolidated income tax return, makes all elections, files all extensions and "all correspondence concerning income tax liability ...

is carried on directly with the agent." *Id.* In fact, the members of the affiliated group generally are prohibited from representing themselves separately from the common parent for the consolidated tax return. 26 C.F.R. § 1.1502–77(e).

IRS regulations expressly address the refund process for consolidated federal income tax returns:

> The agent files claims for refund, and *any refund is made directly to and in the name of the agent* and discharges any liability of the Government to any member with respect to such refund.

26 C.F.R. § 1.1502–77(d)(5) (emphasis added); *see also Western Dealer Mgmt., Inc. v. England (In re Bob Richards Chrysler–Plymouth Corp.)*, 473 F.2d 262, 265 (9th Cir.1973)("the refund is made payable to the parent and the acceptance of the refund by the parent discharges any liability of the government to the subsidiary").

Applying the foregoing statutes and regulations to this case, UW Bancorp was the holding company and corporate parent of the Bank. UW Bancorp and the Affiliated Group, including the Bank, filed consolidated federal income tax returns in 2008 and 2010. UW Bancorp and the Affiliates all consented to the filing of consolidated income tax returns. UW Bancorp was the "sole agent" (within the meaning of the IRS regulations) for the Affiliated Group. Based upon the applicable IRS regulations, UW Bancorp was "authorized to act in its own name regarding all matters relating to the federal income tax liability for the consolidated return year for each member of

the [the Affiliated Group].” With respect to any refund, the IRS was required to make such refund “directly to and in the name of” UW Bancorp.

The TAA is entirely consistent with the Internal Revenue Code and IRS regulations regarding the procedure for consolidated federal income tax returns. Among other things, the TAA establishes “a method for ... reimbursing UWBI [UW Bancorp] for the payment of [consolidated] tax liability. ...” TAA at Second Preamble. In other words, the TAA confirms that UW Bancorp has the obligation to pay federal income taxes due for the entire Affiliated Group to the IRS. And, if a federal income tax loss carryback refund claim is warranted, such a claim for refund is to be filed by UW Bancorp. TAA § A.1 and G. Any refunds are payable to UW Bancorp (but refunds will lead to a “re-determin[ation]” of liability among the members of the Affiliated Group). TAA § A.1, G, and H.

Thus, the TAA, the Internal Revenue Code, and the IRS regulations all dictate that UW Bancorp, as the bank holding company for the Affiliated Group has *at least bare legal title* to the Tax Refund. After all, 26 C.F.R. § 1.1502– 77(d)(5) requires that the Tax Refund be made “directly to and in the name of” UW Bancorp. *See First Cent. Fin.*, 269 B.R. at 487 (bankruptcy trustee for corporate parent “has a legal interest in the Tax Refund” for loss carrybacks of subsidiary based upon consolidated federal income tax returns).

B. The FDIC Fails to Establish That It Has Equitable Ownership of the Tax Refund.

Since the Trustee has shown that he has legal title to the Tax Refund, the burden shifts to the FDIC to establish that it holds the beneficial interest in the Tax Refund (and the Trustee does not). *Lone Star Pub*, 465 B.R. at 216; *Amdura*, 75 F.3d at 1451. But, neither the Internal Revenue Code nor the IRS regulations establish which entity, UW Bancorp or the Bank, has equitable or beneficial ownership of the Tax Refund. *Bob Richards,* 473 F.2d at 264 (quoting *Western Pac. R.R. Corp. v. Western Pac. R. Co.*, 197 F.2d 994, 1004 (9th Cir.1951) ("there is nothing in the [Internal Revenue] Code or Regulations that compels the conclusion that a tax saving must or should inure to the benefit of the parent company or of the company which has sustained the loss that makes the tax savings possible"); *First Cent. Fin.*, 269 B.R. at 489 ("the I.R.C. does not address the issue of which member of the consolidated group is ultimately entitled to receive a consolidated tax refund.").

In the absence of a directly applicable statute or regulation, parties are free to address tax allocation issues contractually. Such tax sharing agreements are common among corporate families. "Normally, where there is an explicit agreement, or where the agreement can fairly be implied, as a matter of state corporation law the parties are free to adjust among themselves the ultimate tax liability." *Bob Richards*, 473 F.2d at 264. That is exactly what happened in this case—UW Bancorp, the Bank, and the other 12 members of the Affiliated Group entered into the

TAA (Tax Allocation Agreement). Thus, the unambiguous terms[26] of the TAA as construed under Colorado law govern the rights and obligations of UW Bancorp and the Bank and also dictate the ultimate entitlement to the Tax Refund on a beneficial basis.[27] *First Cent. Fin.*, 269 B.R. at 489 ("the parties' rights and obligations are governed by the Tax Allocation Agreement").

1. The TAA Embodies a Debtor-Creditor Relationship between UW Bancorp and the Bank for the Tax Refund.

Although there is no binding precedent in this jurisdiction regarding competing claims in a bankruptcy case to ownership of a net operating loss carryback federal income refund based upon consolidated federal income tax returns and an existing tax allocation agreement, the issue has caused quite a stir nationally. Under the dominant approach, courts examine three key factors when considering whether a particular tax sharing agreement "establishes a debtor-creditor relationship or a different relationship (such as trust, mere

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[26] Both the Trustee and the FDIC contend that the TAA is unambiguous. (Docket No. 47 at 10; Docket No. 52 at 9.) Both parties also confirmed their positions that the TAA is unambiguous at oral argument.

[27] In the absence of an agreement, a federal income tax loss carryback refund based upon a consolidated federal income tax return may most appropriately belong to the subsidiary that generated the income and net operating losses. That is the lesson of the *Bob Richards*. 473 F.2d at 264. But, as set forth below, the *Bob Richards* default rule does not apply in this case.

agency, or bailment)." *Downey Fin.*, 499 B.R. 439. The factors are:

- Does the TAA create fungible payment obligations?
- Does the TAA contain escrow obligations, segregation obligations, or use restrictions for tax refunds?
- Does the TAA delegate the tax filer under the agreement with sole discretion regarding tax matters?

See Siegel v. FDIC (In re Indymac Bancorp, Inc.), 2012 WL 1037481, at *13–17 (Bankr.C.D.Cal. Mar. 29, 2012), *adopting report and recommendation,* 2012 WL 1951474, at *3 (C.D.Cal. May 30, 2012), *aff'd*, 554 Fed.Appx. 668, 670 (9th Cir.2014) (unpublished); *Downey Fin*., 499 B.R. at 455. Although the issues are not entirely clear-cut, the Court determines that each of the factors favor a determination that the TAA creates a debtor-creditor relationship between UW Bancorp and the Bank.

a. <u>The TAA Creates Fungible Payment Obligations</u>.

"Courts across the country have repeatedly held that terms such as 'reimbursement' and 'payment' in a tax sharing agreement evidence a debtor-creditor relationship." *Imperial Capital Bancorp v. FDIC (In re Imperial Capital Bancorp, Inc.)*, 492 B.R. 25, 30 (S.D.Cal.2013); *see also Downey Fin.*, 499 B.R. at 455; *IndyMac*, 2012 WL 1037481, at *13. The reason "is that such terms create 'ordinary contractual obligations' or 'an account, a debtor-creditor relationship, which is the quintessential business of

bankruptcy.' " *IndyMac*, 2012 WL 1037481, at *13; *see also Team Fin., Inc. v. FDIC (In re Team Fin., Inc.)*, 2010 WL 1730681, at *10–11 Bankr.D.Kan. Apr. 27, 2010) (focusing on terms "pay," "payment," and "compensate").

In this case, the TAA is peppered throughout with terminology evidencing a debtor-creditor relationship including: "allocating," "reimbursing," "compensating," "pay," "refund," "liability," "reimburse," "liable," "payments," "refunded," and "liability." *See* TAA §§ Preamble ("allocating the consolidated tax liability"; "reimbursing UWBI for the payment of such tax liability"; "compensating each member of the Group for the use of its losses"); A.1 ("each Affiliate shall pay UWBI"; "Affiliate is entitled to a refund"; "any refund shall generally not exceed the amount claimed"; UW Bancorp may "make a refund over the amount received or claimed ... if in its sole discretion it believes such payment is in its best interest"; "such item shall not enter into the calculation of liability"); C.1 (UW Bancorp "will not reimburse the Affiliate for the related tax benefit"); C.3.a ("an Affiliate shall be reimbursed"); C.3.b ("an Affiliate ... shall be reimbursed"); C.5 ("liable for payments to UWBI"); E.1 ("preliminary tax settlement payments are due"; "overpayments of estimates taxes made by Affiliates are not refunded until final tax settlement is done"); E.2 ("Final tax settlement payments or refunds are due"); F.1. ("Estimated payments of Federal and State taxes shall be made by Affiliates"); F.2 ("Affiliates shall pay to UWBI"); F.3 ("Payments to an Affiliate for net operating losses"); H.1 ("payments between the

appropriate parties”); H.4 (“liability of the Affiliates”).

But, of course, words can only be understood in context. Contract interpretation requires that courts “examin[e] the entire instrument, and not ... view [ ] clauses or phrases in isolation.” *Level 3 Commc'ns, LLC v. Liebert Corp.*, 535 F.3d 1146, 1154 (10th Cir.2008) (citing *Allstate Ins. Co. v. Huizar*, 52 P.3d 816, 819 (Colo.2002)). As in *IndyMac* and *Downey Financial*, the TAA in this case “creates a system of intercompany ‘payments’ and ‘reimbursements’ that may differ from the amount of any tax refund actually received by UW Bancorp.” *Downey Fin.*, 499 B.R. at 456.

First, there is the payment side of the ledger. The TAA required the Bank and all other Affiliates to pay UW Bancorp. On a quarterly basis, each Affiliate was obligated to “pay” to UW Bancorp “an amount equal to the amount of any estimated federal income taxes which the Affiliate would have been required to pay” if filing separately. TAA § F.1 and F.2. UW Bancorp determined the amounts required to be paid for such “hypothetical estimated income tax liability.” *Id.* Similarly, on an annual basis, the Affiliates were obligated to make “payments” to UW Bancorp for “preliminary tax settlement payments” TAA § E.1. The general rule was that Affiliates needed to pay UW Bancorp the amounts that would have been due if each Affiliate had filed separate tax returns. TAA § A.1

Second, there is the obligation to make reimbursements or refunds. If an Affiliate overpaid estimated annual preliminary tax settlement

payments to UW Bancorp, the overpayment would be addressed through a "refund" when "final tax settlement is done." TAA § E.1. And, "final tax settlement payments or refunds" were due on or before November 15 of each year. TAA § E.2. With respect to "payments to an Affiliate for net operating losses or similar items," such payments were to be made on an "annual basis." TAA § E.3. That is, the Affiliate with a net operating loss was "entitled to a refund [from UW Bancorp] equal to the amount that it would have been entitled to receive had it not joined in the filing of the joint return." TAA § A.1. The TAA also provided a mechanism for earlier payment of refunds or reimbursements to Affiliates in certain circumstances. The Affiliate could "file[ ]" an " 'expedited refund' claim" with UW Bancorp. TAA § E.1. All of the foregoing refund and reimbursement obligations did not depend on UW Bancorp actually receiving a tax refund from the IRS. In other words, irrespective of whether or not UW Bancorp received a refund from the IRS, it was still obligated to make such payments to its Affiliates.

The TAA also addressed the issue of "any adjustment to the tax returns of the Group." TAA § H.1. If there was any adjustment "by reason of an amended return, claim for refund, or by an audit by the taxing authority," then the TAA mandated that "**the liability** *of the parties to this Agreement* **shall be re-determined to give effect to any such adjustment** *as if it had been made as part of the original computation of tax liability.*" TAA § H.1 (emphasis added). Put another way, if UW Bancorp successfully prosecuted a claim for a tax refund with

the IRS for a prior consolidated federal income tax return, then the TAA required a "redetermination" of intercompany liability based upon such adjustment. Then, based upon the "re-determination" of liability, "payments between the appropriate parties [were to] be made within 10 business days after any such payments are made or refunds are received ...." TAA § H.1. Thus, if and when UW Bancorp received a tax refund from the IRS, it would have ten days after receipt of the refund from the IRS in which to pay the Affiliates according to the "re-determination" of liability.

Nothing in the TAA suggests that the Bank had a direct interest in any IRS tax refunds. Further, nothing in the TAA requires or even remotely suggests that any tax refund received by UW Bancorp from the IRS had to be handed over to an Affiliate, such as the Bank. Additionally, nothing in the TAA expressly or implicitly suggests that the Bank owns any tax refunds made by the IRS to UW Bancorp.

The foregoing provisions regarding IRS refund claims by UW Bancorp are very similar to the tax sharing agreement in *Downey Financial*. The *Downey Financial* tax sharing agreement provided that:

> [I]f adjustments of the consolidated tax liability occur as a result of the filing of an amended return, claim for a refund or an audit, 'the liability of the Affiliate Group members shall be **recomputed by Financial** to give effect to such adjustments. In the case of a refund, Financial shall make **payment** to

> each Affiliated Group member for its share of the refund ... within seven (7) business days after the refund is received by Financial.

Downey Fin., 499 B.R. at 456 (emphasis in original). The *Downey Financial* court correctly characterized these provisions as creating a system of intercompany payments and refunds "indicative of a debtor-creditor relationship." *Id.* at 457. Similar provisions and terminology also led to the *IndyMac* court to the same conclusion. *IndyMac*, 2012 WL 1037481, at *14 ("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 and specific *refunds* upon receipt .... The overall system of intercompany 'payments' or 'reimbursements' established by the TSA strongly evidence the parties' creation of a debtor-creditor relationship."); *see also Team Fin.*, 2010 WL 1730681, at *11 (reaching same conclusion of debtor-creditor relationship based on terms of tax sharing agreement).

The Court concludes that the TAA created fungible payment obligations through an intercompany account of payments and reimbursements. The repeated use of words like "payment" and "reimbursement" throughout the TAA indicates that the parties were creating a debtor-creditor relationship. And, more than just the words themselves, the entire TAA, in context, supports the Court's conclusion.

b. The TAA Contains No Escrow, Segregation, or Use Restrictions for Tax Refunds.

As explained in *IndyMac*, "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 funds while in the parent's possession further evidences a debtor-creditor relationship." 2012 WL 1037481, at *15. Consideration of this factor is fairly simple in this case. One could search the TAA in vain for days trying to locate any express, or even implied, requirement for UW Bancorp to escrow or segregate any funds that it might receive as a tax refund from the IRS. The reason is that the TAA contains absolutely no such provisions. And, neither are there any restrictions in the TAA on UW Bancorp's use of any tax refunds. The lack of any such provisions strongly supports the Trustee's position.

c. The TAA Delegates Decision-Making on Tax Matters to UW Bancorp.

Consistent with IRS regulations for consolidated federal income tax returns, the TAA vests UW Bancorp with the exclusive power to file consolidated federal income tax returns. TAA § G.1. Furthermore, UW Bancorp has the power to make "any election, application, or tak[e] any action" in connection with the consolidated federal income tax returns on behalf of the Affiliates. TAA § G.1. UW Bancorp also is the entity charged with making payment to the IRS. With respect to quarterly tax settlement payments, the TAA provides that "hypothetical estimated income tax liability shall be determined by UWBI

[UW Bancorp] by any reasonable manner ....” TAA § F.2. The Affiliates, including the Bank, have no express decision-making authority under the TAA. Instead, the role of the Affiliates is to make payments to UW Bancorp and receive potential reimbursements. The foregoing further counsels in favor of the Trustee.

d. The TAA Creates a Debtor-Creditor Relationship.

In sum, the Court finds that under the terms of the TAA, UW Bancorp is the beneficial owner of the Tax Refunds. UW Bancorp was obligated to pay all federal income taxes for the Affiliated Group. UW Bancorp collected tax payments from its Affiliates. To the extent that any Affiliate overpaid, UW Bancorp was obligated to make a reimbursement to such Affiliate. In the event of any tax refund from the IRS, like the Tax Refund in this case, UW Bancorp was obligated to re-determine the parties' liability to account for such adjustment and then make appropriate payments. The undisputed facts dictate that the Tax Refund belongs to the Trustee (as Trustee of the UW Bancorp bankruptcy estate). The Court's legal conclusion is consistent with compelling precedent from the Second, Third and Ninth Circuit Courts of Appeals.[28] *First Cent. Fin.*, 377 F.3d 209; *Downey Fin.*, 593 Fed.Appx. 123; *IndyMac*, 554 Fed.Appx. 668. Numerous District Courts and Bankruptcy Courts have reached similar conclusions. *Sharp v. FDIC (In re Vineyard Nat'l*

[28] Decisions from the Sixth and Eleventh Circuit Courts of Appeal have reached contrary results. The Court distinguishes those decisions below.

Bancorp), 508 B.R. 437 (Bankr.C.D.Cal.2014); *Downey Fin.*, 499 B.R. at 439; *Imperial Capital*, 492 B.R. 25; *IndyMac*, 2012 WL 1951474; *First Cent. Fin.*, 269 B.R. 481; *Team Fin.*, 2010 WL 1730681; *Franklin Sav. Corp. v. Franklin Sav. Ass'n (In re Franklin Sav. Corp.)*, 159 B.R. 9 (Bankr.D.Kan.1993).

2. The FDIC's Conduit Argument Is Unavailing.

The FDIC argues that UW Bancorp is only a "conduit" for the Tax Refund and thus has no beneficial interest in the property under Colorado law. FDIC Memorandum at 9-11. The linchpin of the argument is a single word contained in the TAA: "intermediary." TAA § A.2 states:

> In essence, this Agreement requires that each first-tier subsidiary [the Bank] be treated as a separate taxpayer with UWBI [UW Bancorp] merely being an *intermediary* between an Affiliate and the Internal Revenue Service ("IRS").

(Emphasis added). The FDIC equates the alleged mere intermediary status of UW Bancorp to a "conduit that lacks beneficial title." FDIC Memorandum at 10-11. The FDIC's position has some initial surface allure—but little real substance. The FDIC MSJ relies principally on two supporting decisions: *In re West Central Housing Development Organization*, 338 B.R. 482 (Bankr.D.Colo.2005) and *Wadsworth v. High Speed Aggregate, Inc. (In re Trick Technologies, Inc.)*, 2013 WL 3865592 (Bankr.D.Colo.

July 22, 2013). Neither case is particularly instructive for the circumstances of this dispute.

The FDIC cites *West Central Housing* for the proposition that:

> Colorado law further provides that the funds in debtor's possession need not be subject to express trust in order to be excluded from property of the bankruptcy estate. Rather, the funds are excluded from the bankruptcy estate's property in any situation in which a debtor was intended to serve as a mere "conduit" of the funds in its possession and was not intended to have a beneficial interest.

FDIC Memorandum at 10. The FDIC's characterization of *West Central Housing*, while technically accurate, ignores the context of that decision. In *West Central Housing*, the fight was over ownership of about $1.9 million of "Revolving Loan Assets." 338 B.R. at 485. The debtor, a non-profit company providing loans for low income housing projects and residential rehabilitation, held the Revolving Loan Assets. But, the State of Colorado claimed the Revolving Loan Assets because they were "derived from block grant monies given to the State by the federal government for the purpose of supporting housing rehabilitation and home ownership." *Id.* The State argued that the Revolving Loan Assets were held in trust by the debtor and never became property of the debtor's bankruptcy estate. The Bankruptcy Court agreed and ruled that "an express trust has been created by contract provisions and federal regulations with respect to the bulk of the Revolving Loan Assets. Those funds are

very clearly excluded from the bankruptcy estate." *Id.* at 490. That is the central holding. Obviously, the present circumstances are entirely different. The TAA did not create a trust, express or otherwise. The FDIC also cites *West Central Housing* for the proposition that:

> An "intermediary" is someone "who lacks beneficial title and is merely an agent for disbursal of funds belonging to another." *Id.* (quoting *In re Joliet–Will County Cmty. Action Agency,* 847 F.2d 430 (7th Cir.1988)).

FDIC Memorandum at 10. It is true that Judge Tallman's *West Central Housing* decision quoted the following passage from Judge Posner's *Joliet–Will* decision:

> The answer depends on the terms under which the grants were made. Did they constitute JolietWill a trustee, custodian, or other intermediary, who lacks beneficial title and is merely an agent for the disbursal of fund belonging to another? If so, the funds ... were not assets of the bankruptcy estate.

West Cent. Hous., 338 B.R. at 493 (quoting *Joliet–Will*, 847 F.2d at 432). So, the sentence quoted by the FDIC in support of its argument is only a question, not a holding. Read fairly, neither *West Central Housing* nor *Joliet–Will* stand for the proposition that using the word "intermediary" magically negates any claim to beneficial ownership by the Trustee.

Similarly, the FDIC reads too much into *Trick Technologies.* That decision did not involve a Section

541 property of the estate issue. Instead, the principal issue in *Trick Technologies* was whether a law firm that had received funds in its client trust fund account could be considered an "initial transferee" under Section 550. The Bankruptcy Court seemed to use the phrase "intermediary party" as a synonym for "initial transferee." *Trick Techs.*, 2013 WL 3865592, at *2. This is the real holding of *Trick Technologies.*:

> The term "initial transferee" is not defined in the Bankruptcy Code, but the Tenth Circuit has adopted the "dominion and control test .... Under the dominion and control test. A party is not considered an initial transferee of a transfer received directly from a debtor unless that party gains actual dominion or control over the funds. When an intermediary party receives but does not gain actual control over the funds, that party is considered a mere conduit or agent for one of the real parties to the transaction. Here, the Court concludes that neither the Law Firm [which received funds into its client trust fund account] nor the Clerk of the State Court had sufficient dominion or control over the transferred funds to be considered initial transferees.

Id. (citations omitted). So, put in context, *Trick Technologies* does not add much to this case and instead stands only for the sound proposition that a law firm receiving money in its client trust account is not an initial transferee under Section 550.

But even though the FDIC's legal support for the "conduit" argument seems quite thin, what to make

of the use of the word "intermediary" in Section A.2 of the TAA? The word is certainly there in black and white. The Court simply construes the word in a more benign and limited fashion than the FDIC. That UW Bancorp was an "intermediary" between the Bank and the IRS, appears to the Court to mean nothing more than that UW Bancorp is the corporate parent of the Affiliated Group under the IRS regulations governing consolidated federal income tax returns and fulfills the regulatory obligations of the common parent. For example, UW Bancorp was the exclusive point of contact for interaction between the Affiliated Group and the IRS. 26 C.F.R. § 1.1502–77(a) and (d). And, UW Bancorp was required to file the consolidated income tax return, make all elections, file all extensions, and engage in all communications since the Bank was itself generally prohibited from representing itself separately before the IRS for the consolidated tax return. 26 C.F.R. § 1.1502–77(a), (d) and (e). The Court does not believe that use of the word "intermediary" somehow dispositively establishes that the Tax Refund belongs to the FDIC instead of the Trustee.

3. The FDIC's Agency Argument Fails.

The FDIC contends that the corporate parent, UW Bancorp, was an agent acting on behalf of its principal, the Bank, for purposes of ownership of the Tax Refund. FDIC Memorandum at 11. The argument continues that since UW Bancorp was only an agent, in cannot have a beneficial interest in the Tax Refund. The argument has some visceral pull.

The FDIC is correct that the TAA designates UW Bancorp as an agent for the Bank and the other members of the Affiliated Group. The TAA states:

> Each Affiliate hereby appoints UWBI [UW Bancorp] as its agent... for the purpose of filing such consolidated Federal Income tax returns for the UWBI group as UWBI may elect to file and making any election, application or taking any action in connection therewith on behalf of the Affiliates.

TAA § G.1. Although the text of the TAA nowhere states that UW Bancorp is an agent for purposes of ownership of the Tax Refund, the FDIC contends that "it is logical that the Debtor must also be an agent when it recovers the tax refunds." FDIC Memorandum at 11. For further support, the FDIC also relies on the IRS regulations governing the procedure for consolidated federal income tax returns. Again, the FDIC is correct inasmuch as the IRS requires that there be a "sole agent" for the consolidated group. 26 C.F.R. § 1.1502–77(a). The IRS requires that "one entity (the agent) is the sole agent that is authorized to act in its own name regarding all matters relating to the federal income tax liability for the consolidated return year for each member of the group." *Id.* And, in general, the agent must be the "common parent" for the affiliated group. 26 C.F.R. § 1.1502–77(c). There can be no doubt whatsoever that UW Bancorp was indeed an "agent" under the TAA and IRS regulations.

But what was the import of such agency? Was it limited or was it unrestricted? And did it somehow equate with common law agency or a trust under

Colorado law? These are all difficult questions. Ultimately, the Court believes that the FDIC argument misapprehends the type of agency contained in the TAA and the IRS regulations. By its terms, the agency referenced in the TAA (and included in the IRS regulations) is limited and procedural only. TAA § G.1 does not appoint UW Bancorp as an agent for all purposes. Instead, the agency is limited to "filing such consolidated Federal Income tax returns for the UWBI group as UWBI may elect to file and making any election, application or taking any action in connection therewith ...." The agency language says nothing about UW Bancorp being an agent for holding any tax refunds for the Bank's benefit, nor that the Bank owns the Tax Return.

The Court also observes that the FDIC's agency argument appears to be too expansive. While the TAA did identify UW Bancorp as an agent for the Affiliated Group for purposes of filing consolidated federal income tax returns, it did so using language very similar to the IRS regulations. 26 C.F.R. § 1.1502–77(a) and 77(c). In other words, whether the agency designation was included in the TAA or not, UW Bancorp still would have been an agent for filing consolidated federal income tax returns under the IRS regulations. Effectively, all parent bank holding companies filing consolidated federal income tax returns are agents in the same sense that UW Bancorp is an agent. Taking the FDIC's argument to its logical conclusion, this means that all parent bank holding companies filing consolidated federal income tax returns are precluded from recovering such tax refunds (or at least do not have any

beneficial interest in such tax returns) even if a tax sharing agreement exists. But this cannot be, especially in the face of a strong line of appellate and trial court decisions finding that parent bank holding companies may be entitled to tax refunds under Section 541 and the terms of tax sharing agreements. The foregoing suggests that the FDIC's argument misapprehends the nature of the agency used in the IRS regulations and tax sharing agreements. *See Imperial Capital*, 492 B.R. at 32 (rejecting argument that 26 C.F.R. § 1.1502–77(a) means that the bank holding company receives tax refunds only as agent"); *Team Fin.*, 2010 WL 1730681, at *6 (the "agent" under the IRS regulations is akin to a "spokesman" for the group).

In any event, the agency referenced in the TAA is not consistent with Colorado common law agency. In Colorado, there can be no agency relationship where the alleged agent is not subject to the control of the alleged principal. *Montano v. Land Title Guarantee Co.*, 778 P.2d 328, 331 (Colo.App.1989); *Amdura*, 75 F.3d at 1451; *see also Downey Fin.*, 593 Fed.Appx. at 126 (under California law, the tax sharing agreement did not create a principal/ agent relationship because the subsidiary bank did not exercise control over the parent bank holding company). The FDIC is turning agency on its head because the Bank did not control UW Bancorp (or at least the FDIC produced no evidence that the Bank controlled UW Bancorp). Subsidiaries generally do not control their parents. So, the agency argument does not work.

But what the FDIC seems to be attempting is to suggest an argument sounding primarily in trust

rather than agency (*i.e.*, that the Tax Refund must be held in trust by UW Bancorp for the benefit of the Bank). The argument does not fare well. In the FDIC MSJ, the FDIC did not allege any sort of trust. Further, the FDIC provided no evidence of the existence of a trust relationship between UW Bancorp and the Bank. Nevertheless, for the first time in a reply, the FDIC asserted that "[t]he Tax Allocation Agreement shows the intent that the tax refund be held in trust." (Docket No. 458 and 14.) But then, later, the FDIC turned around and expressly disclaimed that it was trying to assert a constructive trust under Colorado law. (Docket No. 52 at 5) ("the FDIC-Receiver is not asserting that the Court should impose a constructive trust over the Tax Refund"). All of this leaves the Court quite confused as to the FDIC's position regarding possible trust issues. But, even if the FDIC were asserting a trust theory under Colorado law (which it seems to have discarded), the effort would fail.

Colorado recognizes three main types of trusts: express trusts; constructive trusts; and resulting trusts. "Colorado law provides the following elements are required to establish an express private trust: '(1) the settlor's capacity to create a trust; (2) his intention to create a trust; (3) a declaration of trust or a present disposition of the res; (4) an identifiable trust res; (5) a trustee; and (6) identifiable beneficiaries.' " *Connolly v. Baum (In re Baum)*, 22 F.3d 1014, 1017–1018 (10th Cir.1994) (quoting *Sims v. Baker (In re Estate of Granberry)*, 30 Colo.App. 590, 498 P.2d 960, 963 (Colo.App.1972). The FDIC has not established the existence of an express trust. There is no declaration of trust. And, the TAA

neither mentions the word "trust" nor incorporates any express trust concepts. The FDIC appears to concede the lack of an express trust. (Docket No. 48 at 14) ("While the Tax Allocation Agreement does not contain the word 'trust,' under Colorado law the FDIC-Receiver does not have to show the creation of the express trust ....").

A constructive trust "arises in the presence of fraud, duress, abuse of confidence, or some other form of questionable or unconscionable conduct by which the trustee obtained the property. In all such situations, however, a constructive trust is appropriate only if there has been wrongful conduct by the party charged with the trust." *Wirt v. Prout*, 754 P.2d 429, 430 (Colo.App.1988). In *Shepler v. Whalen*, 119 P.3d 1084, 1089 (Colo.2005), the Colorado Supreme Court clarified the scope of constructive trusts and characterized them as "fraudrectifying trusts" that are imposed in cases of fraudulent transfers, breach of contractual or fiduciary obligation, fraud, or other wrong doing. "The remedy of constructive trust is generally disfavored in bankruptcy." *First Cent. Fin.*, 269 B.R. at 499. In this case, there simply is no allegation and certainly no evidence of fraud or malfeasance by UW Bancorp or the Trustee. Further, the FDIC also disclaimed the existence of any constructive trust. So, no constructive trust can be imposed.

That leaves a resulting trust. "A resulting trust is a trust implied by law when the circumstances surrounding the transfer of property raise the inference that the parties intended to create a trust." *Mancuso v. United Bank of Pueblo*, 818 P.2d 732, 738–39 (Colo.1991). The circumstances justifying the

imposition of a resulting trust are fairly limited. The Colorado Supreme Court has identified three situations in which a resulting trust may be appropriate:

> (1) where an express trust fails in whole or in part; (2) where an express trust is fully performed without exhausting the trust estate; (3) where property is purchased and the purchase price is paid by one person and at his direction the vendor conveys the property to another person.

Shepler, 119 P.3d at 1089 (quoting *Page v. Clark*, 197 Colo. 306, 592 P.2d 792, 797 (Colo.1979)). In this case, there was no express trust and the *Shepler* circumstances are absent. Although the FDIC hinted at a possible resulting trust (in one citation in its opposition to the Trustee MSJ), the FDIC failed to establish any evidence of intent to create a trust between UW Bancorp and the Bank. Accordingly, imposing a resulting trust is not warranted.

4. The *Bob Richards* Default Rule Does Not Apply Because the Affiliated Group Agreed to the TAA.

The Ninth Circuit Court of Appeals established an important default rule for distribution of loss carryback tax refunds based upon consolidated income tax returns in the absence of any agreement amongst the members of a consolidated group. *Bob Richards*, 473 F.2d at 265. The appellate court stated:

> Normally, where there is an explicit agreement, or where an agreement can fairly

> be implied, as a matter of state corporation law the parties are free to adjust among themselves the ultimate tax liability. But in the instant case the parties made no agreement concerning ultimate disposition of the tax refund. Absent any differing agreement we feel that a tax refund resulting from offsetting losses of one member of a consolidated filing group against the income of that same member in a prior or subsequent year should inure to the benefit of that member.

Bob Richards, 473 F.2d at 265. The *Bob Richards* default rule makes good equitable sense and has been endorsed by the Tenth Circuit Court of Appeals and many other courts. *Barnes v. Harris*, 783 F.3d 1185, 1196 (10th Cir.2015) ("plaintiffs have not alleged the existence of any agreement to allocate the refund").

As one of its alternative arguments, the FDIC contends that the *Bob Richards* default rule should apply in this case because the TAA allegedly does not "determine the ownership issue." FDIC Memorandum at 15. The FDIC position stretches *Bob Richards* too far. In *Bob Richards* there simply was "no agreement concerning ultimate disposition of the tax refund." *Bob Richards*, 473 F.2d at 265. But in this case, and unlike in *Bob Richards*, there is such an agreement. UW Bancorp, the Bank and the other 12 members of the Affiliated Group entered into a detailed and express agreement (the TAA) that specifically addresses tax allocation issues. The TAA governs both the payment of taxes and the disposition of possible tax refunds. Since UW

Bancorp paid federal income taxes to the IRS for the Affiliated Group on a consolidated basis, the members of the Affiliated Group were required to pay UW Bancorp their respective shares quarterly and annually in advance. TAA §§ A.1, E.1, E.2, F.1, and F.2. The TAA provided for later true-ups. With respect to net operating loss carryforwards, generally, UW Bancorp was obligated to pay to the respective Affiliate annually. TAA § F.3. If refunds were received, UW Bancorp was required to "re-determine" the "liability of the parties" to "give effect to any such adjustment." TAA § H.1.

So, the TAA is an agreement "concerning ultimate disposition of the tax refund"—the exact type of agreement that was absent in *Bob Richards*. Since such an agreement is present, the *Bob Richards* default rule is facially inapplicable. *Downey Fin.*, 499 B.R. at 455 (rejecting application of the *Bob Richards* default rule because of the existence of a tax sharing agreement); *First Cent. Fin.*, 269 B.R. at 489 (declining to apply the *Bob Richards* holding where the parties had a tax allocation agreement); *Indymac*, 2012 WL 1037481, at *26–27 (same).

The *Indymac* cases are particularly instructive since they addressed the import of *Bob Richards* within the jurisdictional boundaries of the Ninth Circuit Court of Appeals. The *Indymac* Bankruptcy Court determined that the *Bob Richards* holding is only "a gap-filling rule limited to circumstances when no tax sharing agreement— express *or* implied—exists between the parties." *Indymac*, 2012 WL 1037481, at *26. Since there was a tax sharing agreement, the *Indymac* Bankruptcy Court easily found the *Bob Richards* default rule inapposite. At

the first level appeal, the *Indymac* District Court concurred and held: "*Bob Richards* is inapplicable to the present case because the parties signed the TSA [tax sharing agreement]." *Indymac*, 2012 WL 1951474, at *3. Finally, and most importantly, the Ninth Circuit Court of Appeals, which itself had issued the *Bob Richards* decision, confirmed its narrow application. The *Indymac* Court of Appeals noted that there was a tax sharing agreement which required the bank to pay the bank holding company its share of taxes and also described "the process by which Bancorp will allocate tax refunds." *Indymac*, 554 Fed.Appx. at 670. The Ninth Circuit Court of Appeals rejected the *Bob Richards* default rule as inapplicable because of the presence of the tax sharing agreement. *Id.* To decide the case, the *Indymac* Court of Appeals relied on the tax sharing agreement and affirmed that the federal income tax refund belonged to the bankruptcy estate of the parent bank holding company. *Id.*

Given the existence of the TAA in this case, the *Bob Richards* default rule is facially inapplicable. Instead, the Court is obligated to use the terms of the TAA to determine the beneficial interest issue within the Section 541 framework.

5. <u>Contrary Case Law Is Distinguishable and Not Binding</u>.

The FDIC hangs its hat on a trilogy of recent appellate decisions ruling in its favor on similar tax refund issues in bankruptcy: *BankUnited*, 727 F.3d 1100; *FDIC v. Zucker (In re NetBank, Inc.)*, 729 F.3d 1344 (11th Cir.2013), *cert. denied*, —— U.S. ——, 135 S.Ct. 476, 190 L.Ed.2d 357 (2014); and *FDIC v.*

AmFin Fin. Corp., 757 F.3d 530 (6th Cir.2014), *cert. denied*, —— U.S. ——, 135 S.Ct. 1402, 191 L.Ed.2d 361 (2015). But, the Court concludes that each of these decisions is distinguishable and not persuasive in the circumstances of this case.

a. *BankUnited*.

In *BankUnited*, "the sole issue ... [was] whether the Bankruptcy Court erred in declaring the tax refunds [pursuant to consolidated federal income tax returns] an asset of the bankruptcy estate [of the parent bank holding company]." *BankUnited*, 727 F.3d at 1104. So, the question was very similar to this case, but the tax sharing agreement in *BankUnited* was quite different from the TAA in this case. In *BankUnited*, the tax sharing agreement provided that the principal subsidiary bank (not the parent bank holding company) was required to pay the taxes for the entire consolidated group to the IRS. *Id.* at 1103. All of the affiliated companies in *BankUnited* (including the corporate parent) were obligated to pay their portion of taxes to the subsidiary bank. And, the *BankUnited* subsidiary bank was required to pay any tax refunds to the members of the affiliated group. The subsidiary bank argued that it was entitled to the tax refunds because it had a "contractual obligation to distribute them [the tax refunds] to the members of the Group." *Id.* Ultimately, the Eleventh Circuit Court of Appeals reversed the trial court and determined that the $48 million in tax refunds belonged to the subsidiary bank, not the bankrupt parent holding company.

In the Court's view, the *BankUnited* appellate result was driven almost entirely by the very

unusual terms of the tax sharing agreement. The subsidiary bank (not the parent bank holding company) was required to make all tax payments, collect all taxes from the consolidated group, and distribute any refunds to the other affiliates. That is simply not the situation in this case. And, *BankUnited* made no mention of the Bankruptcy Code at all. Accordingly, the Court gives the *BankUnited* decision, which is not binding precedent in this jurisdiction, little weight.

b. *NetBank*.

Right on the heels of *BankUnited*, the Eleventh Circuit Court of Appeals again addressed another similar dispute. *NetBank*, 729 F.3d 1344. In *NetBank*, the bankrupt parent bank holding company sued its subsidiary bank over a $5.7 million tax refund based upon the net operating loss carrybacks generated from the operations of the subsidiary bank. *Id.* at 1346. The bankrupt bank holding company won at the trial level. On appeal, as in *BankUnited*, the Eleventh Circuit Court of Appeals did not delve into bankruptcy law. Instead, the focus was solely on the tax sharing agreement between the bankrupt parent bank holding company and its affiliates. Although many of the provisions of the *NetBank* tax sharing agreement were similar to the TAA in this case, there was one very critical difference.

The *NetBank* tax sharing agreement provided that "[t]his Agreement is intended to allocate the tax liability in accordance with the Interagency Statement on Income Tax Allocation in a Holding Company Structure [the Policy Statement] ...." 63

Fed. Reg. 64,757 (Nov. 23, 1988). According to the appellate court, "[t]he Policy Statement contains language specifically stating that the parent receives refunds from a taxing authority as 'agent' on behalf of group members." *NetBank*, 729 F.3d at 1349. The Policy Statement also states: "an organization's 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." 63 Fed. Reg. at 64,759. Ultimately, the *NetBank* appellate court reversed and determined that the subsidiary bank, not the parent bank holding company, was entitled to the tax refund.

In the Court's assessment, the incorporation of the Policy Statement into the *NetBank* tax sharing agreement was dispositive (or at least nearly so) in that case. However, the TAA in this case is meaningfully different. The TAA does not reference, and certainly does not incorporate, the Policy Statement. Thus, the Court finds that the *NetBank* decision, which is not binding in this jurisdiction, is so factually distinguishable that it offers little guidance in this case.

c. *AmFin*.

In *AmFin,* the question was "who owns a $170 million tax refund: a parent corporation that filed a consolidated tax return on behalf of its subsidiaries and to whom the IRS issued the refund, or the subsidiary whose net operating loss generated the refund?" *AmFin*, 757 F.3d at 532. Relying on a tax sharing agreement, the *AmFin* trial court

determined that the tax refund belonged to the bankrupt parent corporation. However, in reaching that conclusion, the trial court denied the FDIC's motion to amend its complaint and introduce additional extrinsic evidence of intent beyond the mere terms of the tax sharing agreement. The Sixth Circuit Court of Appeals reversed and remanded. The appellate court determined that the tax sharing agreement was ambiguous and extrinsic evidence should have been permitted to establish the parties' intentions. *Id.* at 534–38.

The Court believes that the *AmFin* decision is distinguishable in several respects. First, the appellate panel appeared primarily troubled by the trial court's refusal to hear extrinsic evidence of intent regarding a tax sharing agreement that was ambiguous. But that is not the present case. Both the Trustee and the FDIC contend that the TAA is unambiguous. The Court agrees. And, the FDIC has not sought to introduce any additional extrinsic evidence of intent. So, the problematic evidentiary issue that animates the entire *AmFin* decision is absent in this case. Second, in *AmFin* the FDIC directly presented a resulting trust argument. That argument also depended on extrinsic evidence which had been barred. In this case, the FDIC has not raised expressly a resulting trust argument necessitating additional evidence. Finally, the Court also notes that the *AmFin* decision is not binding precedent in this jurisdiction. Under the circumstances, and also because the Sixth Circuit Court of Appeals did not directly address the central bankruptcy issues (Section 541 is not even

mentioned), the Court believes that *AmFin* is not especially persuasive.

C. <u>The Trustee Is Entitled to a Declaration that the Tax Refund Is Property of the UW Bancorp Bankruptcy Estate</u>.

In the Complaint, the Trustee requested a declaration (under Section 541 and 28 U.S.C. 2201) that the Tax Refund is property of the UW Bancorp bankruptcy estate. Based upon the foregoing, the Trustee is entitled to such declaration. Further, the FDIC is not entitled to the declaration that it requested through its mirror-image counterclaim.

D. <u>The Trustee's Turnover Claim Is Moot</u>.

In the Complaint, the Trustee requested an order directing the FDIC to turn over the Tax Refund to the Trustee under 11 U.S.C. § 542. But, it is now undisputed that the FDIC does not have possession of the Tax Refund. Instead, the Tax Refund is in the Registry of this Court pending the Court's adjudication of the issues. Accordingly, the Trustee's Section 542 claim is moot.

E. <u>The Trustee's Objection to the FDIC Claim Is Sustained</u>.

Through the FDIC Claim, the FDIC originally claimed four categories of amounts allegedly owed by UW Bancorp to the FDIC: (1) Section B asserted "tax-related claims"; (2) Section C asserted "fraudulent transfers/ unlawful dividends"; (3) Section D asserted entitlement to "insurance proceeds"; and (4) Section E asserted "other claims."

FDIC Claim at 3-7.[29] Thereafter, the FDIC withdrew its claims asserted in Section C, D, and E of the FDIC Claim. (Docket No. 53.) So, the only remaining claim asserted in the FDIC Claim is Section B "tax related claims."

Section B of the FDIC Claim states:

> The FDIC Receiver asserts claims arising from consolidated tax returns filed by UWB [UW Bancorp] on behalf of ... United Western Bank [the Bank] and for tax related intercompany balances held by the Debtor, including those that may have arisen under law or pursuant to any tax allocation agreement or tax sharing agreement between United Western Bank and UWB .... In filing tax returns and receiving tax refunds and other tax payments, the Debtor acts as agent and fiduciary for United Western Bank.
>
> The FDIC-Receiver asserts claims arising from tax returns filed by UWB on behalf of United Western Bank and for tax related

[29] The FDIC Claim also included Section A ("introduction") and Section F ("reservation of rights"). In Section A, the FDIC primarily asserted this Court's alleged lack of subject matter jurisdiction to adjudicate issues relating to the FDIC Claim. FDIC Claim at 1-3. Subsequently the FDIC withdrew its jurisdictional defenses in this Adversary Proceeding and stated: "The FDIC-Receiver consents to entry of final orders or judgment by the Bankruptcy Court in this adversary proceeding." (Docket No. 53.) Furthermore, the Court also has determined that it has jurisdiction to adjudicate the matters framed by the Complaint and Answer. Accordingly, Section A is of no remaining moment. And Section F only purports to make reservations, not assert separate claims.

> intercompany balances held by UWB in an amount of approximately $4,847,000. In filing tax returns and receiving tax refunds and other tax payments, UWB acts as agent and fiduciary for United Western Bank. These refunds are owned by United Western Bank and are not assets of UWB. As such, United Western Bank's entitlement to such refunds is based on an ownership interest rather than as a claim against UWB. Alternatively, to the extent that United Western Bank's asserted right to such refunds is determined to be a claim against UWB, then United Western Bank does hereby assert a claim against UWB on account of any such refunds.

Through the Complaint, the Trustee objected to Section B of the FDIC Claim, except "to the extent that it presents a non-priority, general unsecured pre-petition claim for all or a portion of the [Tax] Refund." In other words, with respect to the "tax-related claims," the Trustee's only objection was to the asserted ownership or priority asserted by the FDIC. Subsequent to both the FDIC Claim and the Complaint, the IRS deposited the Tax Refund in the amount of $4,081,335 (which amount is somewhat less than estimated in both the FDIC Claim and the Complaint).

After careful review of the FDIC Claim, the Court believes that the FDIC asserted entitlement to the full amount of any tax refund which ultimately would be returned by the IRS in relation to the consolidated federal income tax returns of the Affiliated Group. That amount now has been determined to be $4,081,335. And, the Trustee did

not object to the dollar amount of the FDIC Claim. Instead, the Trustee only asserted that the Tax Refund belonged to the UW Bancorp estate while conceding that the FDIC should be permitted a non-priority general unsecured claim for the Tax Refund.

Based upon the foregoing, the Court sustains the Trustee's objection to the priority of the FDIC Claim. The FDIC Claim shall be allowed in the amount of $4,081,335 as a non-priority, general unsecured claim against the UW Bancorp bankruptcy estate.

VII. <u>Conclusion</u>.

The IRS issued a $4,081,335 Tax Refund as a result of net operating loss carrybacks generated by the operations of the Bank and offset against prior income in consolidated federal income tax returns filed by UW Bancorp. The Tax Refund is in the Court's Registry. This difficult case required the Court to identify the owner of the Tax Refund within the framework of Section 541: the Trustee or the FDIC. The Court has determined that the Trustee established a legal interest in the Tax Refund. However, the FDIC did not meet its burden to prove that the FDIC (not the Trustee) had the beneficial or equitable interest in the tax refund. Accordingly, the Court determines that the Trustee is entitled to the Tax Refund. But, this does not leave the FDIC without a remedy. The FDIC still is a general unsecured creditor of the UW Bancorp bankruptcy estate and may share *pari passu* with any other allowed general unsecured claims.

In light of the foregoing, the Court:

ORDERS that the FDIC's Motion for Summary Judgment (Docket No. 39) is DENIED;

FURTHER ORDERS that the Trustee's Motion for Summary Judgment (Docket No. 44) is GRANTED;

FURTHER ORDERS and DECLARES that the Tax Refund, along with accrued interest, if any, is property of the UW Bancorp estate; and

FURTHER ORDERS that the Trustee's objection to the FDIC Claim is SUSTAINED. The FDIC Claim shall only be allowed as a non-priority, general unsecured claim in the amount of $4,081,335; and

FURTHER ORDERS that the Trustee's Section 542 claim for turnover is MOOT; and

FURTHER ORDERS that Judgment shall enter in favor of the Trustee and against the FDIC in accordance with this Opinion and Order; and

FURTHER ORDERS that in the absence of an appeal of this Opinion and Order and the entry of a stay pending that appeal, upon proper application by the Trustee, the Court may enter an Order directing the Clerk of the Court to disburse the Tax Refund amount deposited in the Registry of the Court, along with accrued interest, if any, to the Trustee.

APPENDIX D

TAX ALLOCATION AGREEMENT

This Agreement (the "Agreement") dated as of January 1, 2008, by and among United Western Bancorp, Inc. ("UWBI"), a Colorado corporation and unitary thrift holding company, United Western Bank, a federal savings bank, Matrix Financial Services Corporation, an Arizona corporation, Matrix Insurance Services Corporation, an Arizona corporation, Matrix Bancorp Trading, Inc., a Colorado corporation, First Matrix Investment Services Corp., a Texas corporation, Matrix Funding Corp., a Colorado corporation, UW Asset Corp., a Colorado corporation, UWBI Fund Management, Inc., a Colorado corporation, The Vintage Group, Inc., a Texas corporation, Vintage Delaware Holdings, Inc., a Delaware corporation, Sterling Trust Company, a Texas nonbank trust company, MSCS Ventures, Inc., a Colorado corporation, Equi-Mor Holdings, Inc., a Nevada corporation, are hereinafter sometimes collectively referred to as the "Affiliates", provides as follows:

WHEREAS, the Affiliates are members of an affiliated group (the "Group") within the meaning of Section 1504(a) of the Internal Revenue Code of 1986, a amended (the "Code"), and have filed in the past and will file a consolidated federal income tax return for the tax years 2004 and thereafter; and

WHEREAS, UWBI and the Affiliates desire to establish a method for (i) allocating the consolidated tax liability of the Group among its members, (ii)

reimbursing UWBI for the payment of such tax liability, and (iii) compensating each member of the Group for the use of its losses by any other member of the Group;

NOW, THEREFORE, UWBI and the Affiliates agree as follows:

A. General Rule – Federal

1. Except as specifically set forth herein to the contrary, each Affiliate shall pay UWBI an amount equal to the federal income tax liability such Affiliate would have incurred were it to file a separate return (or, if appropriate, a consolidated return with its subsidiary affiliates). If a regulated first-tier Affiliate incurs a net operating loss or excess tax credits, the regulated Affiliate is entitled to a refund equal to the amount that it would have been entitled to receive had it not joined in the filing of a consolidated return with UWBI. Similar treatment is optional at UWBI discretion for nonregulated first-tier Affiliates. Any refund shall generally not exceed the amount claimed or received as a refund resulting from a carryback claim filed by UWBI. However, this shall not prevent UWBI from the ability to make a refund over the amount received or claimed, as a refund or carryback, if in its sole discretion it believes such payment is in its best interest. Additionally, if part of all of an unused consolidated net operating loss, net capital loss, tax credit or similar type item is allocated to an Affiliate pursuant to Regulations Section 1.1502-21, and it is carried back, if utilized, or it is carried forward, whether or not utilized, to a year in which such Affiliate filed a separate income tax return or a consolidated federal income tax

return with another group, any refund or reduction in tax liability arising from the carryback or carryforward shall be retained by such Affiliate and such item shall not enter into the calculation of liability to or from UWBI.

2. In essence, this Agreement requires that each first-tier subsidiary be treated as a separate taxpayer with UWBI merely being an intermediary between an Affiliate and the Internal Revenue Service ("IRS").

B. General Rule – State

1. This Agreement covers settlements with Affiliates for state income taxes and franchise taxes based on income for all states in which combined returns are filed.

2. Each first-tier Affiliate is required to pay UWBI an amount equal to the state income tax liability such Affiliate would have incurred if it filed a separate return (or, if appropriate, a combined return with its subsidiary affiliates).

3. This Agreement treats each first-tier Affiliate as a separate taxpayer, with UWBI serving as an intermediary between the Affiliate and the applicable state taxing authority. Only Affiliates with sufficient nexus, which would have required filings in the respective states will be included in the settlement.

C. Specific Policies

Set forth below are specific policies designed to cover certain factual scenarios:

1. Charitable contributions: Unless charitable contributions made by an Affiliate, including carryovers, can be utilized by the Affiliate on its separate company return, UWBI will not reimburse the Affiliate for the related tax benefit of the contribution deduction.

2. Dividends received deduction: The limitations on the dividends received deduction will be applied on a separate company basis.

3. Capital gains and losses: Several scenarios may arise affecting UWBI's general tax settlement policy. The problem is further compounded as the organization has both bank and nonbank affiliates, and different tax rules may be applicable. Although the capital gains and the ordinary income tax rates are currently the same, capital loss limitation rules continue to apply. Policies relating to capital gains and losses are set forth as follows:

a) An Affiliate shall be reimbursed for capital losses only to the extent it can utilize such losses on a separate company basis taking into account the capital loss carryover and carryback rules. For example, if an Affiliate with no capital gain income in the past three years incurs a capital loss, it will receive a tax benefit in the year it generates sufficient capital gain income. (Note: for capital losses there is a 5-year carryover period and 3-year carryback period.) The reimbursement rate shall be the maximum capital gain tax rate imposed in the year such losses are utilized on a separate company basis. The minimum tax implications shall be taken into account in determining the actual amount of the separate company benefit.

b) An Affiliate having capital gain net income in a year in which it incurs a net operating loss shall be reimbursed as though the capital gain is ordinary income.

c) An Affiliate is entitled to the benefit of capital gain treatment only if the alternative tax computation results in a lower tax computed on a separate company basis.

4. Alternative minimum tax: For tax settlement purposes only, the alternative minimum tax ("AMT") shall be imposed on an affiliate-by-affiliate basis without regard to the consolidated AMT position. Any AMT imposed general shall be treated as an AMT credit carryover and can be used by an Affiliate to offset its future regular tax, but not below its AMT in the future year.

5. Benefits attributable only to UWBI: The Code contains several provisions to limit an affiliated group of corporations to only one exclusion or benefit. Except for Affiliates that are insured depository institutions (which shall never be liable for payments to UWBI under this Agreement in excess of what their tax liability would be computed on a separate-entity basis), where such provisions apply, the entire exclusion or benefit shall be attributed to UWBI in determining tax settlement.

The more common exclusions or benefits include, but are not limited to, the following:

a) Corporate tax brackets: The benefits, if any, of the reduced tax rates attributable to the lower brackets of taxable income belong to UWBI. Thus, tax payments due to, and refunds to be

received from, UWBI will be computed at the applicable maximum tax rate.

b) Alternative minimum tax exemptions: The $40,000 AMT exemption will be ignored. Thus, an Affiliate may not reduce its alternative minimum taxable income by any portion of the exemption.

6. Inter-company transactions: The tax consequences (i.e. the recognition of gains and losses, bad debt deductions or charge-offs, investment tax credit recapture, etc.) of inter-company transactions shall not be recognized for tax settlement purposes unless and until such consequences can be recognized on UWBI's consolidated return as provided in the appropriate income tax regulations.

7. Separate return limitation year tax benefit: From time to time, Affiliates acquire other companies and in the process, the Affiliates may be entitled to certain tax benefits (i.e. net operating losses, tax credits, etc.) previously generated by the acquired companies. UWBI shall not reimburse Affiliates for these acquired tax benefits until such time as these benefits are utilizable by the acquiring company on a separate return basis.

D. Specific Policies – State

Set forth below are specific policies designed to cover all state settlements:

1. Federal settlement taxable income shall be the starting point for computing state taxable income.

2. State taxable income for each affiliate shall be computed using the same factors and methods used

on the combined return actually filed by UWBI and Affiliates.

3. Regulated first-tier Affiliates shall receive the benefit for any individual state credits or net operating losses (NOLs) generated, providing they could have been used on a separate company basis (or mini-consolidated) under applicable state law. Similar treatment for nonregulated first-tier Affiliates is optional at UWBI's discretion.

4. Settlement calculations shall be made by UWBI no later than November 30. No interest shall be paid or charged on settlement payments.

E. Tax Settlement Payments – Federal

1. Preliminary tax settlement payments are due on or before March 15 following the end of the appropriate taxable year. Although overpayments of estimated taxes made by Affiliates are not refunded until final tax settlement is done, an Affiliate with a taxable loss for the year may recover estimated taxes paid for that year before final settlement if an "expedited refund" claim is filed with UWBI by February 15 following the end of the tax year.

2. Each first-tier Affiliate shall compute its final tax settlement liability based on the amounts included for that Affiliate (and its subsidiaries, if applicable) in the consolidated federal income tax return filed. A copy of such computation will be prepared by October 31, and any differences will be resolved. Final tax settlement payments or refunds are due on or before November 15.

F. Tax Settlement Payments – Federal and State

1. Estimated payments of Federal and State-taxes shall be Made by Affiliates on designated due dates as follows:

1st quarter	—	April 15
2nd quarter	—	June 15
3rd quarter	—	September 15
4th quarter	—	December 15

2. For every designated due date, beginning on the date hereof and thereafter no later than 10 business days following the day on which UWBI gives notice to the Affiliates that payments of estimated federal and state income tax are due, but no earlier than 10 business days prior to the due date for the payment of such estimated taxes to the federal government, the Affiliates shall pay to UWBI an amount equal to the amount of any estimated federal income taxes which the Affiliate would have been required to pay on or before such dates if the Affiliate had filed its own separate income tax return for such taxable period. Such hypothetical estimated income tax liability shall be determined by UWBI by any reasonable manner consistent with the group's estimated annual or quarterly tax liability and in accordance with methods outlined in the Code and Treasury regulations, as in effect from time to time, governing the calculation of estimated income tax, including such rules regarding payment of estimated tax in taxable years of less than 12 months.

3. Payments to an Affiliate for net operating losses or similar items shall not be made under this provision, but rather on an annual basis pursuant to Section A.

G. Filing of Returns, Payment of Tax, UWBI as Agent

1. Each Affiliate hereby appoints UWBI as its agent, as long as such Affiliate is a member of the UWBI group, for the purpose of filing such consolidated Federal income tax returns for the UWBI group as UWBI may elect to file and making any election, application or taking any action in connection therewith on behalf of the Affiliates. Each such Affiliate hereby consents to the filing of any such reruns and the making of any such elections and applications.

H. Miscellaneous

1. In the event of any adjustment to the tax returns of the Group as filed (by reason of an amended return, claim for refund, or an audit by a taxing authority), the liability of the parties to this Agreement shall be re-determined to give effect to any such adjustment as if it had been made as part of the original computation of tax liability, and payments between the appropriate parties shall be made within 10 business days after any such payments are made or refunds are received, or, in the case of contested proceeding, within 10 business days after a final determination of the contest.

2. This Agreement shall apply to both federal income taxes and state income taxes for those states

in which a determination of tax is made on a combined basis.

3. All subsidiaries of UWBI shall be subject to this Agreement. If at any time UWBI acquires or creates one or more subsidiary corporations that are includable corporation of the Group, they shall be subject to this Agreement.

4. The liability of the Affiliates as established under this Agreement shall be computed in a manner consistent with the provisions of Sect. 1.I552-1(a)(2)(i) of the regulations of the Internal Revenue Service. The intent of this Agreement is to provide an equitable allocation of the tax liability of the Group among UWBI and the Affiliates. Any ambiguity in the interpretation hereof shall be resolved, with a view to effectuating such intent, in favor of any insured depository institution.

5. This Agreement shall be binding on and inure to the benefit of any successor, by merger, acquisition of asset or otherwise, to any of the parties hereto to the same extent as if such successor had been an original party to this Agreement.

6. THIS AGREEMENT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF COLORADO AND THE APPLICABLE LAWS OF THE UNITED STATES OF AMERICA.

7. The headings, captions, and arrangements used in this Agreement are for convenience only and shall not affect the Interpretation of this Agreement.

8. The invalidity or unenforceability of any provision of this Agreement shall not affect the validity or enforceability of any other provisions of this Agreement, which shall remain in full force and effect.

IN WITNESS WHEREOF, the undersigned have executed this Agreement by authorized officers thereof as of the date first above written.

UNITED WESTERN BANCORP, INC.

By: [Redacted]
William D. Snider
Chief Financial Officer

UNITED WESTERN BANK

By: [Redacted]
Scot T. Wetzel
President & Chief Executive Officer

MATRIX FINANCIAL SERVICES CORPORATION

By: [Redacted]
William D. Snider, President

MATRIX INSURANCE SERVICES CORPORATION

By:___[Redacted]____________________________
William D. Snider, President

MATRIX BANCORP TRADING, INC.

By:___[Redacted]____________________________
Michael J. McCloskey President

FIRST MATRIX INVESTMENT SERVICES CORP.

By:___[Redacted]____________________________
Benjamin C. Hirsh, President

MATRIX FUNDING CORP.

By:___[Redacted]____________________________
Michael J. McCloskey President

UW ASSET CORP.

By:___[Redacted]____________________________
Michael J. McCloskey President

UWBK FUND MANAGEMENT, INC.

By: [Redacted] ____________________
Michael J. McCloskey, President

VINTAGE-DELAWARE HOLDINGS
~~THE VINTAGE GROUP~~, INC.

By: [Redacted] ____________________
Michael J. McCloskey, President

STERLING TRUST COMPANY

By: [Redacted] ____________________
Paul E. Skretny, President

MSCS VENTURES, INC.

By: [Redacted] ____________________
Paul E. Skretny, President

EQUI-MOR HOLDINGS, INC.

By: [Redacted]______________________________
Michael J. McCloskey President

THE VINTAGE GROUP
~~VINTAGE DELAWARE HOLDINGS~~, INC.

By: [Redacted]______________________________
Paul E. Skretny, President

3-13-2008

Ben,

Changed as we discussed.

[Redacted]