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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 12-02967-RGK	Date	May 30, 2012
Title	IN RE INDYMAC BANCORP INC.		

Present: The Honorable	R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE	
Sharon L. Williams	Not Reported	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

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

I. INTRODUCTION

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

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

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

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

payment of the consolidated tax return by Bancorp and distribute refunds received from the IRS.

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

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

II. LEGAL STANDARD

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

III. DISCUSSION

The FDIC objects to nearly every legal conclusion made by the Bankruptcy Court in the Proposed Order. Namely, the FDIC objects to the Bankruptcy Court's determinations that 1) the TSA creates a debtor/creditor relationship between Bancorp and the Bank rather than a principal/agent relationship or resulting trust, 2) the case *Western Dealer Management, Inc. v. England (In re Bob Richards Chrysler-Plymouth Corporation, Inc.)* ("*Bob Richards*"), 473 F.2d 262 (9th Cir. 1973) is inapplicable, and 3) the FDIC's defenses under federal banking law, bankruptcy law, and California common law fail.

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

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

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

According to both bankruptcy law and California contract law, the TSA creates a debtor/creditor relationship. Bancorp owned the tax refunds and the TSA entitled the Bank to

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

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

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

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

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

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

The Court need not reach the Bankruptcy Court's concerns over the present viability of *Bob Richards* as it finds the case inapplicable.

C. The FDIC's Banking Law Defenses Fail

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

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

The FDIC argues that the TSA is void as a matter of law because it fails to meet the requirements of 12 U.S.C. § 1823(e). The Bankruptcy Court found that the FDIC's defense

under § 1823(e) was inapplicable because the FDIC had waived its argument as it had not timely raised the defense, the requirements of § 1823(e) had been met, and alternatively that § 1823(e) was not applicable to the TSA. The Court agrees with the Bankruptcy Court's determination.

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

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

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

2. *<u>12 U.S.C. § 371c Is Not Applicable</u>*

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

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

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

D. <u>Trustee's Rejection of the TSA Does Not Alter The Outcome</u>

The FDIC challenges the consequences of the Bankruptcy Court's determination that the TSA was an executory contract that the Trustee rejected during the bankruptcy filing. The

Court finds that the FDIC's arguments are misplaced and do not accurately describe the legal realities of the tax refunds paid by the IRS to Bancorp.

The parties appear to agree that the TSA was an executory contract–one on which material performance remains due from both parties. When a party files for bankruptcy, it may either assume or reject its obligations under any executory contract. 11 U.S.C. § 365(a). Because the Trustee did not assume the TSA at the time of the bankruptcy filing, he is deemed to have rejected the contract. *See* 11 U.S.C. § 365(d)(1). The dispute here is over the consequences of that rejection.

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

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

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

E. The TSA Is Valid Under California Law

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

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

IV. CONCLUSION

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

IT IS SO ORDERED.

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