

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

In re:	)	
	)	Chapter 11
	)	
CORUS BANKSHARES, INC.,	)	Case No. 10-26881
	)	
Debtor.	)	Honorable Pamela S. Hollis
	)	
	)	
	)	

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**MOTION OF THE FEDERAL DEPOSIT INSURANCE CORPORATION,  
AS RECEIVER FOR CORUS BANK, N.A., TO  
ESTABLISH PRIORITY SENIOR TO TOPrS DEBT**

The Federal Deposit Insurance Corporation, as Receiver for Corus Bank, N.A. (the “FDIC-R”), by and through its undersigned counsel, hereby files its Motion to Establish Priority Senior to TOPrS Debt (the “Motion”). In support of its Motion, the FDIC-R states as follows:

1. Debtor was the parent of Corus Bank, N.A. ("Corus Bank"). The FDIC-R became the Receiver for Corus Bank on September 11, 2009. As such, pursuant to Title 12 of the United States Code, it succeeded to certain rights and interests of Corus Bank and obtained statutory authority to resolve claims against Corus Bank and collect debts owed to Corus Bank.

2. The FDIC-R and the Debtor are engaged in a dispute over the ownership of certain tax refunds. This dispute is the subject of two actions in the Federal District Court for the Northern District of Illinois, both pending before Judge Hibbler.<sup>1</sup> The amount in dispute is approximately \$265 million. The FDIC-R believes that the tax refunds are owned by it and are not property of the Debtor's estate. The Debtor disagrees, asserting that such refunds are

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<sup>1</sup> These cases are styled as *Corus Bankshares, Inc. v. Federal Deposit Insurance Corp.*, Case No. 10-05654 (N.D. Ill.) and *Corus Bankshares, Inc. v. Federal Deposit Insurance Corp.*, Case No. 11-00053 (N.D. Ill.) (collectively, the “District Court Litigation”).

property of the Debtor's estate, while acknowledging that the FDIC-R is owed some of the refunds as an unsecured claim. Whose position is correct is not an issue with respect to the Plan.

3. The Plan of Reorganization, which was confirmed on September 27, 2011, does not seek to resolve the aforementioned District Court Litigation. Instead, it provides that if the Debtor prevails on its theory that it owns the tax refunds, the FDIC-R will have a claim to be repaid for the amount that is due from the Debtor on account of the tax refunds. The Plan further provides that this Court will hold a hearing, subsequent to the Plan confirmation, to determine and enforce the priority of the FDIC-R's claim.

4. The TOPrS debenture holders hold so-called trust preferred securities, which by their nature are junior debt. Trust preferred securities were created as a hybrid equity and debt security, so that the holders could receive the equivalent of dividends, while the issuer could deduct interest on the debt. The Plan, as presented and confirmed, provides that the claims of the FDIC-R, the TOPrS debenture holders, and remaining unsecured creditors are given *pari passu* treatment. The FDIC-R objected to confirmation because the Plan did not recognize that the claim of the FDIC-R was senior to that of the TOPrS debenture holders. The objection was resolved by deferring the issue of the priority of the FDIC-R's claim until a post-confirmation hearing is held to resolve that issue. That is the purpose of this Motion. Thus, if the FDIC-R's position set forth in this Motion is upheld, the FDIC-R's claim will be treated as senior to TOPrS debt.

5. The TOPrS are governed by thirteen different indentures. Each provides that the indebtedness owed thereunder is junior to senior debt. The FDIC-R's claim based on the tax refunds constitutes senior debt.

6. The debt owed to the FDIC-R under the Plan arises from the fact that it was Corus Bank that provided the funding to pay the original taxes that are being refunded and that the refunds are due to the tax losses of Corus Bank. The Debtor itself argues that the purported agreement governing the internal tax policies of the Debtor and its subsidiary provides that, at a minimum, this is a debt owed by the Debtor to its subsidiary. (See Debtor's Complaint, ¶ 25, *Corus Bankshares, Inc. v. Federal Deposit Insurance Corp.*, Adv. P. No. 10-01362 (Bankr. N.D. Ill.), *removed*, Case No. 10-05654 (N.D. Ill.)). This debt is owed to the FDIC-R as the successor to Corus Bank. 12 U.S.C. § 1821(d)(2)(A).

7. The definitions contained in the indentures provide that the amounts owed to the FDIC-R are senior debt. The definitions of senior debt are expansive and inclusive, and contain only limited, specific exceptions. It is undisputed that, if the Debtor owns the tax refunds, the FDIC-R has an unsecured claim. The receivable that forms the basis for this claim is not trade debt as it does not arise from services rendered or goods delivered to Corus Bank. Nor does it fall within any of the other exclusions to senior debt. Rather, it is a debt for "money borrowed."

8. The fundamental basis of the Debtor's position in the District Court Litigation is that it owns the tax refunds, but that it owes Corus Bank's share of the money back to the FDIC-R as successor to Corus Bank. When one party has the right to use the money of another, and agrees that it must be paid back, it cannot be described in any other way than as a borrowing.

9. The claim of the FDIC-R is senior to those of the TOPrS holders. Reference to the indenture language makes it clear that this obligation to repay the refunds falls squarely within the definitions of senior debt, and an examination of the exclusions from senior debt contained in the indentures confirms this conclusion. The TOPrS holders are not entitled to more

than the benefit of their bargain, which included an express subordination. Such subordination agreements are enforceable in bankruptcy.

WHEREFORE, the FDIC-R requests that its claim be determined to be senior debt under the indentures and therefore senior in priority to the claims of the TOPrS debenture holders.

Dated: Chicago, Illinois  
November 22, 2011

Respectfully submitted,

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