UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Chapter 11
	)	
	)	Case No. 10-26881 (PSH)
CORUS BANKSHARES, INC.,[1]	)	
	)	
Reorganized Debtor.	)	Hon. Pamela S. Hollis
	)	
	)	

REORGANIZED DEBTOR'S RESPONSE AND OBJECTION TO THE AMENDED MOTION OF THE FDIC, AS RECEIVER FOR CORUS BANK, N.A., TO ESTABLISH PRIORITY SENIOR TO TOPrS DEBT

Now comes the Reorganized Debtor, Corus Bankshares, Inc. ("Reorganized Debtor"), by and through its undersigned counsel, and hereby objects and responds to the Amended Motion of the Federal Deposit Insurance Corporation, as Receiver for Corus Bank, N.A. ("FDIC"), to Establish Priority Senior to TOPrS Debt (the "Amended Motion"), and in support thereof, states as follows:

INTRODUCTION

The FDIC's claim is not entitled to priority over claims filed by indenture trustees on behalf of holders of TOPrS debt. Simply put, nothing about the FDIC's contingent and unliquidated contractual claim on account of disputed tax refund proceeds constitutes a claim for "money borrowed" or otherwise renders the claim "Senior Indebtedness" under any of the Reorganized Debtor's pre-petition TOPrS indentures. For this reason, and for the additional

[1] The Reorganized Debtor in this chapter 11 case, along with the last four digits of the Reorganized Debtor's federal tax identification number is: Corus Financial Corporation (3592). The location of the Reorganized Debtor's corporate headquarters and the service address for the Reorganized Debtor is: 32 Broadway, Suite 1104, New York, NY 10004.

reasons set forth herein, the FDIC's Amended Motion fails as a matter of law.

OBJECTION

The Disputed Tax Refunds

1. Prior to filing for bankruptcy, the Reorganized Debtor was the parent of Corus Bank, N.A. (the "Bank"). Up to and until the FDIC seized the Bank on September 11, 2009, the Reorganized Debtor and the Bank were members of a single consolidated tax group, with the Reorganized Debtor possessing the exclusive right to file consolidated tax returns on behalf of the group.

2. On April 23, 2007, prior to the Bank receivership and well before the Reorganized Debtor's bankruptcy filing, the Reorganized Debtor and the Bank entered into a tax sharing agreement setting forth their rights and obligations with respect to tax payments and refunds. *See* Intra-company Payment Policy, dated April 23, 2007, attached hereto as **Exhibit A** (the "Tax Sharing Agreement"). Among other things, the Tax Sharing Agreement set forth how any tax refunds would be allocated between the Reorganized Debtor and the Bank. *See id*. at 1.

3. In 2008 and 2009, the residential and commercial real estate markets nose-dived and both the Reorganized Debtor and the Bank sustained substantial losses. Meanwhile, on November 6, 2009, President Obama signed into law the Worker, Homeownership, and Business Assistance Act of 2009, which allowed certain taxpayers to "carry back" current operating losses to offset income from five (as opposed to two) previous tax years. Following these events, the Reorganized Debtor filed tax returns showing losses that generated tax refunds of approximately $265 million (the "Disputed Tax Refunds").

4. It has always been the Reorganized Debtor's position that, pursuant to the Tax Sharing Agreement and applicable law, 100% of the Disputed Tax Refunds are property of the

Reorganized Debtor's estate.[2] Likewise, it has always been the Reorganized Debtor's position that, to the extent the FDIC, as receiver of the Bank, is entitled to anything on account of the Disputed Tax Refunds, the FDIC has nothing more than a general unsecured claim against the Reorganized Debtor's estate for unspecified and unliquidated amounts payable pursuant to the Tax Sharing Agreement.[3]

The TOPrS Indentures

5. Unrelated to the Tax Sharing Agreement, prior to the Petition Date, the Reorganized Debtor entered into thirteen different TOPrS indentures with similar, and in some cases identical, subordination provisions (the "TOPrS Indentures").

6. Pursuant to the TOPrS Indentures, the TOPrS debt is subordinated to so-called "Senior Indebtedness," which is described in detail in each of the Indentures. Under the plain terms of those definitions, "Senior Indebtedness" does not include all other obligations of the Reorganized Debtor; rather, it covers only a limited subset of precisely defined categories of obligations. One of those categories is "the principal, premium, if any, and interest in respect

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[2] The FDIC states in its Amended Motion that, while the Reorganized Debtor claims ownership of the Disputed Tax Refunds, the Reorganized Debtor also acknowledges that the FDIC is owed at least something as an unsecured claim based on the Tax Sharing Agreement. (*See* Amended Motion at 1- 4.) The FDIC also asserts that this "debt" arises at least in part from the fact that "the refunds are due to the tax losses of Corus Bank." (*Id.* at 3.) These assertions are inaccurate. The Reorganized Debtor is entitled to 100% of the Disputed Tax Refunds based on its own losses and worthless stock deductions, which by themselves were sufficient to generate the $265 million in Disputed Tax Refunds. In any event, the Reorganized Debtor's ownership of the Disputed Tax Refunds is being assumed by the parties for purposes of this litigation, so the Court need not address the ownership issue, which will be resolved in a separate proceeding in the District Court styled *Corus Bankshares, Inc. v. Federal Deposit Ins. Corp.*, Case Nos. 10-5654, 11-0053 (N.D. Ill.).

[3] *See, e.g.*, *In re First Cent. Fin. Corp.*, 377 F.3d 209, 211 (2d Cir. 2004) (when parent and its consolidated subsidiary tax group members enter into a written tax sharing agreement, subsidiary members relinquish any property rights they possess in the consolidated group's tax attributes in exchange for rights under tax sharing agreement); *In re Franklin Sav. Corp.*, 159 B.R. 9, 29 (Bankr. D. Kan. 1993), *aff'd*, 182 B.R. 859 (D. Kan. 1995) (same); *In re BankUnited Fin. Corp.*, Adv. Proc. No. 10-02872, 2011 WL 5884925, at *12 (Bankr. S.D. Fla. Nov. 23, 2011) (holding that tax refunds belong to estate of parent-debtor in consolidated tax group, and subsidiary members of the consolidated tax group are mere creditors to the parent-debtor); *In re NetBank, Inc.*, 459 B.R. 801, 823 (Bankr. M.D. Fla. 2010) (same); *In re Team Financial*, Adv. Proc. No. 09-5084, 2010 WL1730681, at *11 (Bankr. D. Kan. Apr. 27, 2010) (same).

of . . . [i]ndebtedness of the [Reorganized Debtor] for ***money borrowed***." *See, e.g.*, Floating Rate Junior Subordinated Deferrable Interest Debentures between Corus Bankshares, Inc. and U.S. Bank National Association, dated June 26, 2003, Article I, at 5, attached hereto as **Exhibit B** (emphasis added).

The FDIC's Flawed Priority Argument

7. In its Amended Motion, the FDIC maintains that its claim for an unspecified amount allegedly due under the Tax Sharing Agreement is for "money borrowed," such that it is "Senior Indebtedness" under the TOPrS Indentures and therefore senior in priority to claims filed by indenture trustees on behalf of holders of TOPrS debt. (*See* Amended Motion at 4) The FDIC also argues that "the receivable" that forms the basis for this claim pursuant to the Tax Sharing Agreement does not fall within any of the exclusions to "Senior Indebtedness" that are listed in the TOPrS Indentures. *Id.* at 3. Finally, the FDIC suggests that, because TOPrS are "hybrid equity and debt securities" that are "generally" considered to be a "junior form of indebtedness," and because the Reorganized Debtor classified certain TOPrS proceeds as "Tier 1" capital for regulatory purposes, the claims of the indenture trustees on behalf of TOPrS debt holders somehow "must be" junior to the FDIC's claim pursuant to the Tax Sharing Agreement. *Id*. at 4.

8. These strained arguments are fatally flawed for several reasons, including but not limited to the following:[4]

- ***First***, the FDIC's claim pursuant to the Tax Sharing Agreement is not "Senior

[4] The Reorganized Debtor reserves the right to further brief the arguments set forth herein and to respond to the arguments raised in the Amended Motion in connection with its pre-trial briefing, currently set to be filed with the Court by April 5, 2012. The Reorganized Debtor further reserves the right to submit evidence in support of its positions.

Indebtedness" under the TOPrS Indentures because the "receivable" upon which it is based does not represent "money borrowed" by the Reorganized Debtor. Webster's Dictionary defines "borrow" as follows: "to receive temporarily from another, implying or expressing the intention either of returning the thing received or of giving its equivalent to the lender."[5] In this case, the undisputed facts clearly demonstrate that no money was ever "borrowed," under the plain and ordinary meaning of that term, by the Reorganized Debtor from the Bank:

– As an initial matter, the Disputed Tax Refunds were never property that belonged to the Bank, and the FDIC simply assumes that the Bank owned all those tax refunds (*i.e.*, the putative loaned or extended property) in the first instance. But this is one of the central questions to be decided by the separate proceeding in the District Court. *See* note 2, *supra*. If the Tax Sharing Agreement only provides the Bank with an unsecured claim as calculated via that contract, then there never could be any loan or extension of credit associated with the Disputed Tax Refunds because those refunds were never property that the Bank owned, let alone that it could lend to others.

– Furthermore, the FDIC's Amended Motion fails completely to identify a borrowing event, and there was none. The Reorganized Debtor did not "borrow" or receive the Disputed Tax Refunds from the Bank, when it filed its initial consolidated returns for 2004 through 2007, the relevant years at issue. Indeed, at the time, the Disputed Tax Refunds (and the losses and change in federal tax law that gave rise to them) were not

[5] WEBSTER'S THIRD NEW INT'L DICTIONARY OF THE ENGLISH LANGUAGE (Unabridged) 256 (2002); *see also* BLACK'S LAW DICTIONARY 985 (9th ed. 2009) (defining "lend" as allowing another the temporary use of one's property or money "on condition that the thing or its equivalent be returned" or that the money be repaid).

even contemplated.

- Nor did the Reorganized Debtor "borrow money" from the Bank more recently when the Disputed Tax Refunds were paid by the IRS. By agreement, the IRS paid the Disputed Tax Refunds to the FDIC and, thereafter, the FDIC and the Debtor placed the disputed funds into escrow pending resolution of the parties' separate "ownership" dispute.

- Thus, the Reorganized Debtor never received, possessed or used the Bank's money, as the FDIC seems to suggest, and it never promised to repay such money or its equivalent. At bottom, and as a practical matter, there was never any loan agreement. There was never a promissory note. There was never a promise to pay interest. There was never an agreement to repay "principal" in any given amount. In short, there was never a loan.

- ***Second***, the Disputed Tax Refunds themselves were generated not by a loan but, rather, by business losses in 2008 and 2009, and by a 2009 change in the federal tax law that permitted those losses to be "carried back" by the Reorganized Debtor to offset income from the years 2004 through 2007. Thus, the question whether the FDIC, as receiver of the Bank, is entitled to anything on account of the Disputed Tax Refunds is governed solely by the Tax Sharing Agreement and the tax refund allocation provision contained therein. The FDIC may have a "claim" for an unspecified amount pursuant to this contract, 11 U.S.C. § 101(5), but it is certainly not a claim resulting from "money borrowed" or a loan.

- ***Third***, neither the Reorganized Debtor nor the Bank ever booked or reported any of the

tax payments made pursuant to the Tax Sharing Agreement (or, for that matter, the Disputed Tax Refunds that materialized years later) as a loan, and none of the regulators with oversight responsibility for the Reorganized Debtor and the Bank deemed them "loans." In fact, both the Reorganized Debtor and the Bank explicitly represented in regulatory and public filings that there were ***no*** intercompany loans between them. Significantly, the FDIC itself reviewed and approved the terms of the Tax Sharing Agreement in connection with its regulatory reviews of the Bank. In doing so, the FDIC necessarily found that, to the extent the Tax Sharing Agreement allowed the Reorganized Debtor to receive tax refunds and to hold them for a period of time before making any required payment to the Bank (a scenario that never even occurred here), such an arrangement would ***not*** result in a "borrowing" between the Reorganized Debtor and the Bank. Indeed, the FDIC has taken the position in other cases that similar tax sharing arrangements did not and could not have created loans because any such loans supposedly would have violated federal laws prohibiting uncollateralized loans between banks and their parent holding companies. *See, e.g.*, *Team Financial*, 2010 WL 1730681, at *10; *In re IndyMac Bancorp, Inc.*, Adv. Proc. No. 09-01698, *tentative ruling*, at page 30 (Bankr. C.D. Cal. Dec. 13, 2011). At a minimum, the FDIC's argument in those cases cannot be squared with its argument here.

- ***Fourth***, that the FDIC's claim for the Disputed Tax Refunds may not fall within any of the specifically enumerated exclusions to the definition of "Senior Indebtedness" in the TOPrS Indentures is beside the point since the claim does not fall within any of the specifically enumerated categories of "Senior Indebtedness" in the first place. Unless the FDIC's claim falls within the initial definition of "Senior Indebtedness" (and it does not),

the exclusions to that definition are irrelevant.

- ***Fifth***, the FDIC's suggestion that the TOPrS "must be" junior to its claim because TOPrS are a "hybrid equity and debt security" that "by its nature is junior debt," and because the Reorganized Debtor classified certain TOPrS proceeds as "Tier 1 Capital," misses the following fundamental points, among others:

  – Under the applicable regulations, to be classified as "Tier 1" capital, the proceeds of the TOPrS need not have been junior to a claim for Disputed Tax Refunds such as the one at issue here, as the FDIC seems to suggest.

  – The FDIC's argument that TOPrS are a "hybrid equity and debt security" widely considered to be "junior debt" invokes a useless label and combines it with a useless generalization. There is no question that TOPrS debt is just that—debt. And, for present purposes, the relevant question is whether that debt is contractually subordinated to the FDIC's claim here. Generalities do not answer that question; only the TOPrS Indentures' subordination provisions do that.

  – The FDIC's "Tier 1" capital argument likewise sidesteps the real issue. Simply put, whether Corus Bankshares properly classified the TOPrS proceeds as "Tier 1" capital is a different question than the one at issue here, which is the entirely separate question whether the claims of the indenture trustees are subordinated to the FDIC's claim under the Tax Sharing Agreement. The former question is governed by the applicable Federal Reserve regulations. The latter question is governed by the plain terms of the TOPrS Indentures. Here, the plain terms of the TOPrS Indentures do ***not*** grant the FDIC priority over the TOPrS debt. Indeed, nothing in the subordination

> provisions at issue comes close to suggesting that the TOPrS debt would be subordinated to a remote and wholly unforeseen contract claim like the one asserted by the FDIC here, let alone that such subordination would apply in the context of claims allowance in bankruptcy. In short, the FDIC has things backward. The classification of bank capital under applicable Federal Reserve regulations does not determine the rights of the holders of the instruments that generated that capital. It is the other way around. And even if the proceeds of certain TOPrS debt were misclassified as "Tier 1" capital here (which they were not), that would not change the priority status under the TOPrS Indentures.

For all of these reasons, the FDIC's claim does not constitute "Senior Indebtedness" under the TOPrS Indentures, and accordingly, such claim (if otherwise allowable) is entitled only to *pari passu* treatment with the TOPrS Unsecured Claims under (and as defined in) the Reorganized Debtor's confirmed chapter 11 plan.

WHEREFORE, the Reorganized Debtor respectfully requests that the FDIC's Amended Motion be denied and for any and all other relief that this Court deems just and fair.

Date: January 12, 2012

Respectfully submitted,

/s / *Jeffrey W. Gettleman*

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