EXHIBIT 1

Corus Bankshares, Inc.'s Memorandum in Support of Motion for Judgment on the Pleadings

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Chapter 11
	)	
CORUS BANKSHARES, INC.,	)	Case No. 10-26881 (PSH)
	)	
Reorganized Debtor.	)	Honorable Pamela S. Hollis
	)	Relates to Docket Nos. [

CORUS BANKSHARES, INC.'S MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

Now comes the Reorganized Debtor, Corus Bankshares, Inc. ("Reorganized Debtor"), by and through its undersigned counsel, and hereby seeks an order of this Court for judgment on the pleadings pursuant to Fed. R. Bank. P. 9014 and 7012(c), denying the *Amended Motion of the Federal Deposit Insurance Corporation, as Receiver for Corus Bank, N.A., to Establish Priority Senior to TOPrS Debt* (the "Priority Motion") (Dkt. No. 790), and in support thereof states as follows:

INTRODUCTION

The FDIC's tax refund claim is not entitled to priority over claims on behalf of holders of TOPrS debt as a matter of law. Indeed, the FDIC's strained argument—that its claim is entitled to priority over the TOPrS because it somehow amounts to a claim for "money borrowed," and thus constitutes "Senior Indebtedness" under the Reorganized Debtor's pre-petition indentures—is fatally flawed. 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 pre-petition TOPrS indentures. Indeed, as Bankruptcy Judge Adler recently held in a priority dispute virtually identical to this one:

> [t]he types of debts embodied in the FDIC-R's tax refund claim do not qualify as "money borrowed" applying the ordinary meaning of these words. Simply put: none of the debts arise from the act of the Debtor's borrowing money from [Corus Bank] with the promise to repay, nor do they arise from the Bank's act of advancing money to the Debtor upon the Debtor's promise to pay.

See Imperial Capital Bancorp, Inc., Case No. 09-19431-LA11, Dkt. #866, at 3 (Bankr. S.D. Cal. Apr. 23, 2012), Tentative Ruling, incorporated and affirmed in Order of Confirmation (Dkt. # 894), attached hereto as **Exhibit A**.

In sum, a straightforward construction of the relevant indentures demonstrates that the FDIC's disputed claim for tax refunds is not entitled to priority treatment as a matter of law and without the need for the examination of extrinsic evidence. *See id.* (rejecting the FDIC's erroneous subordination argument while analyzing identical subordination provisions in analogous bank holding company bankruptcy). Accordingly, the Reorganized Debtor is entitled to judgment on the pleadings on the FDIC's Priority Motion.

BACKGROUND

I. The Disputed Tax Refunds

Prior to filing for bankruptcy, the Reorganized Debtor was the parent of Corus Bank, N.A. (the "Bank"). Up to and until banking regulators closed the Bank and appointed the FDIC as receiver 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. In connection with that relationship, 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 (the "Tax Sharing Agreement"), attached hereto as **Exhibit B**.

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").

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. 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 (the "Tax Refund Claim").[1]

II. <u>The TOPrS Indentures</u>

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

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[1] The FDIC states in its Priority 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* Priority 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.).

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 a limited subset of precisely defined categories of obligations. One of those categories is "the principal, premium, if any, and interest in respect 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 C** (emphasis added).

In its Priority Motion, the FDIC maintains that its Tax Refund Claim is for "money borrowed," such that it is "Senior Indebtedness" under the Indentures and therefore senior in priority to claims on behalf of holders of TOPrS debt. (*See* Priority Motion at 4). The FDIC also argues that "the receivable" forming 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 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 on behalf of TOPrS debt holders somehow "must be" junior to the FDIC's claim pursuant to the Tax Sharing Agreement. *Id*. at 4.

As explained below, each of the FDIC's arguments for why its Tax Refund Claim constitutes a claim for "money borrowed" are fatally deficient as a matter of law. Accordingly, the Reorganized Debtor now seeks judgment on the pleadings denying the FDIC's priority arguments to allow for an ultimate distribution to creditors of the estate, who have been denied distributions thus far because of the pendency of the FDIC's meritless claims.

STATEMENT OF LAW AND ARGUMENT

I. Standard for Judgment on the Pleadings

Under Federal Rule of Bankruptcy Procedure 7012(c), a party may move for judgment on the pleadings "[a]fter the pleadings are closed—but early enough not to delay trial." Fed. R. Bankr. P. 7012(c). The test for judgment on the pleadings is "whether or not, when viewed in the light most favorable to the party against whom the motion is made, genuine issues of material fact remain or whether the case can be decided as a matter of law." *See, e.g.*, *Med–Trans Corp. v. Benton*, 581 F. Supp. 2d 721, 728 (E.D.N.C. 2008) (citations omitted). "When there are no genuine issues of material fact raised by the pleadings, judgment on the pleadings should be granted where the moving party is entitled to the judgment it seeks as a matter of law." *Id.* (citations omitted).

In the present case, the FDIC's attempt to elevate the Tax Refund Claim's priority (where no such priority exists) fails as a matter of law. Thus, judgment on the pleadings should be granted to the Reorganized Debtor in this matter.

II. The Subordination Dispute Turns On the Plain Meaning of the Indentures

The FDIC does not suggest, let alone allege, that the Indentures are ambiguous such that resort to extrinsic evidence is necessary to interpret the text of their respective subordination provisions. The Reorganized Debtor agrees that the Indentures are unambiguous, that no extrinsic evidence is necessary or appropriate, and that this Court can and should interpret the plain language of the relevant subordination provisions as a matter of law.

The Indentures each provide that they are made under the law of the State of New York, and for all purposes shall be governed by and construed in accordance with New York law, without regard to conflicts-of-law principles thereof.[2] Illinois courts will apply a contract's choice-of-law clause to disputes that arise from that contract. *Kohler v. Leslie Hindman, Inc.*, 80 F.3d 1181, 1185 (7th Cir. 1996); *see also Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A.*, Inc., 199 Ill. 2d 325, 264 Ill. Dec. 283, 770 N.E.2d 177, 194 (2002) ("Generally, choice of law provisions will be honored."). Accordingly, this Court should apply New York law pursuant to the New York choice-of-law provisions of the Indentures.

Under New York law, the interpretation of an indenture is a question of contract interpretation. *See, e.g.*, *Law Debenture Trust Co. v. Maverick Tube Corp.*, 595 F.3d 458 (2d Cir. 2010). And, under New York law, "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" and without resort to materials outside the four-corners of the contract. *See, e.g.*, *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 (2002).[3] "Thus, under New York law, when a contractual subordination agreement is unambiguous, the parties' rights are governed exclusively by that agreement and the words of that agreement are given their plain, ordinary and usual meaning." *In re Best Prods. Co.*, 168 B.R. 35, 69 (Bankr. S.D.N.Y. 1994) (footnote omitted); *see also In re Discon Corp.*, 346 F. Supp. 839 (S.D. Fla. 1971) (holding subordination clause must be interpreted according to the plain meaning of its terms).

Further, subordination provisions should be narrowly construed, especially where, as here, the contracts are governed by New York law. *See RTC v. BVS Dev., Inc.*, 42 F.3d 1206, 1214 (9th Cir. 1994) (noting how "the law is well settled that rights of priority under an

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[2] *See, e.g.*, Floating Rate Junior Subordinated Deferrable Interest Debentures between Corus Bankshares, Inc. and U.S. Bank National Association, dated June 26, 2003, § 14.5, attached hereto as **Exhibit C**.

[3] Whether a contract is ambiguous is a question of law to be resolved by the courts. *W. W. W. Assocs., Inc. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990). It is noteworthy here that the FDIC has not alleged that the Indentures are ambiguous.

agreement of subordination extend to and are limited strictly by the express terms and conditions of the agreement" (citation omitted)); *Marriott Family Rest., Inc. v. Lunan Family Rest. (In re Lunan Family Rest.)*, 194 B.R. 429, 445 (Bankr. N.D. Ill. 1996) (quoting and following *BVS Development*); *First Fid. Bank v. Midlantic Nat'l Bank (In re Ionosphere Clubs, Inc.)*, 134 B.R. 528, 533-34 (Bankr. S.D.N.Y. 1991) (explaining the "Rule of Explicitness," a New York contract interpretation doctrine that prevents a senior lienholder from obtaining post-petition interest pursuant to a subordination or intercreditor agreement unless there is language in the agreement that is "precise, explicit and unambiguous" with respect to the ability of the senior lender to collect such amounts); *Chem. Bank v. First Trust of N.Y. (In re Se. Banking Corp.)*, 93 N.Y.2d 178, 184-86 (1999) (confirming that the "Rule of Explicitness" applies to New York contracts, and observing that the Rule is necessary to ensure "reliance, definiteness and predictability" in subordinated-debt contracts); *see also In re Wash. Mut., Inc.*, 461 B.R. 200, 248-49 (Bankr. D. Del. 2011) (holding that Rule of Explicitness remains valid under New York law).

Thus, whether or not the TOPrS claims are contractually subordinated to claims held by the FDIC is a question answered solely by determining whether the FDIC's claims fall within the Indentures' definitions of Senior Indebtedness. As a leading authority on indentures explains: "It should go without saying that a careful analysis of what is or is not included in the definition of 'Senior Debt' is of paramount importance to any potential lender, senior or junior. The ***exact wording*** of the definition will determine the type and amount of senior debt which will be entitled to the benefits of the subordination." American Bar Foundation, *Commentaries on Model Debenture Indenture Provisions*, at 567 (1971) (emphasis added).

The principle that subordination provisions must be strictly construed makes eminent sense. The subordinated debt market is an important source of financing.[4] Subordinated debt lenders provide capital based on a precise understanding of the limited categories of debt that will be entitled to priority over the subordinated debt. To expand the definition of "Senior Indebtedness" in the Indentures beyond their precise terms—for example, to include simple contractual claims—would create significant uncertainty and alter expectations in the marketplace, and could chill the subordinated debt market. *See Southeast Banking*, 93 N.Y.2d at 186 ("Parties to subordination agreements undoubtedly relied on the [Rule of Explicitness]" when entering into subordinated debt contracts); *see also Leverso v. Southtrust Bank*, 18 F.3d 1527, 1531 (11th Cir. 1994) ("[T]rust indenture boilerplate provisions . . . were developed in order to standardize debenture indenture contractual rights and provide uniformity to the financial market. It is therefore imperative that the terms of the indenture govern the parties' contractual rights as determined by the judiciary." (citation omitted)); *In re Credit Indus Corp.*, 366 F.2d 402, 410 (2d Cir. 1966) (explaining how erroneous interpretations of subordination provisions "would not only place in jeopardy literally billions of dollars of outstanding loans, but in all probability would prompt lending institutions to reconsider and possibly curtail their subordinated debt-financing activities to the detriment of the entire financial community").

III. <u>The Term "Money Borrowed" Has a Usual and Ordinary Meaning</u>

In the instant matter, the terms "borrowed" and "money" used in the definition of Senior Indebtedness have plain, ordinary and usual (indeed, obvious) meanings. There can be no

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[4] Even the trust preferred securities market—a subset of the overall subordinated debt marketis significant in size. For example, as of December 31, 2008, there were almost 1,400 bank holding companies that had issued approximately $148.8 billion in outstanding trust preferred securities. Jennifer Salutric and Joseph Willcox, Emerging Issues Regarding Trust Preferred Securities, Federal Reserve Bank of Philadelphia (SRC Insights, First Quarter, 2009), available at http://www.philadelphiafed.org/ bank-resources/publications/src-insights/2009/first-quarter/ qlsi4_09.cfm.

serious suggestion that the term "money" is ambiguous, unclear or lacking in a plain, ordinary or usual meaning. The Uniform Commercial Code (§ 1-201(24)) defines money as "a medium of exchange currently authorized or adopted by a domestic or foreign government." "In usual and ordinary acceptation, [money] . . . does not embrace notes, bonds, evidences of debt, or other personal or real estate." BLACK'S LAW DICTIONARY 906 (5th ed. 1979) (citing *Lane v. Railey*, 133 S.W.2d 74, 79, 81 (Ky. 1939)).

The word "borrowed" also is subject to a shared understanding. *See, e.g.*, BLACK'S LAW DICTIONARY 209 (9th ed. 2009) (defining "borrow" as "[t]o take something for temporary use" or to "receive money with the understanding or agreement that it must be repaid, usually with interest"); *id*. at 985 (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). "In common everyday language the term 'borrower' is generally understood to mean someone who has, with the permission of the owner, possession and use of the property of another for his own purposes." *Broome Cnty. Co-Operative Fire Ins. Co. v. Aetna Life & Cas. Co.*, 347 N.Y.S.2d 778, 784 (1973) (citation omitted); *see also* Webster's Third New Int'l Dictionary of the English Language (Unabridged) 256 (2002) ("borrow" is defined as "to receive temporarily from another, implying or expressing the intention either of returning the thing received or of giving its equivalent to the lender").

What one borrows is a thing that another lends. Thus, another way to interpret the meaning of the term "money borrowed" is to analyze the related term "money loaned." "A 'loan' is a contract by which one party advances monies to the other upon a promise to repay." *Haveron v. Kirkpatrick*, 824 N.Y.S.2d 704 (2006) (citation omitted); *In re Goodman*, 790 N.Y.S.2d 837, 843 (2005) (citation omitted).

In contrast, amounts due on other contracts, in cases where "one party [does not advance] monies to the other upon a promise to repay" (*id*.), are not "loans" under New York law. For example, in *Citipostal, Inc. v. Unistar Leasing*, 724 N.Y.S.2d 555 (2001), the court held that a so-called "finance lease" for communications equipment was not a loan for purposes of New York's usury statute. The court ruled that "[n]either a lease nor a sale on credit constitutes a loan. . . ." *Id*. at 559 (citation omitted). Likewise, in *C & M Air Systems, Inc. v. Custom Land Development Group II*, 692 N.Y.S.2d 146 (1999), the court distinguished a contractual claim from a "loan" for purposes of New York's usury statute.

Although it is true that loans and other contractual liabilities are "claims" and "debts" under the Bankruptcy Code, it is not true that all contractual liabilities are loans simply because they share, with loans, the definition of "claim" and "debt." Indeed, the broad definitions of "debt" and "claim" illustrate that a debt can arise from innumerable circumstances other than the borrowing of money. Section 101(12) defines "debt" as "liability on claim." Section 101(5), in turn, broadly defines "claim" to include contingent, unmatured, or unliquidated rights to payment. 11 U.S.C. § 101(5).

Indeed, even "extensions of credit" can arise from innumerable circumstances other than the borrowing of money. Cases such as *Citipostal, Inc. v. Unistar Leasing, supra*, and *C & M Air Systems, Inc. v. Custom Land Development Group II, supra*, further make clear that an "extension of credit", which itself is a subset of "liabilities" and "claims," is not the same thing as a loan, much less a loan for money. In both of those cases, contracts that unquestionably involved the extension of credit were held ***not*** to constitute loans. *Haveron v. Kirkpatrick, supra; In re Goodman, supra*.

In fact, the virtually limitless interpretation of "money borrowed" that the FDIC now propounds to this Court has been expressly rejected in another dispute identical to this one in all material respects. In *Imperial Capital*, the FDIC objected to the claims filed by indenture trustees under certain indentures containing subordination provisions identical to provisions at issue here. The FDIC argued, as it does here, that its tax refund claim constituted a claim for "money borrowed," thus rendering its claim "Senior Indebtedness" under the indentures' subordination provisions. The court flatly rejected this argument finding that, as a matter of law, a straightforward interpretation of the unambiguous indentures mandated the opposite conclusion. As noted in the Introduction above, the court held that:

> [t]he types of debts embodied in the FDIC-R's tax refund claim do not qualify as "money borrowed" applying the ordinary meaning of these words. Simply put: none of the debts arise from the act of the Debtor's borrowing money from Imperial Capital Bank with the promise to repay, nor do they arise from the Bank's act of advancing money to the Debtor upon the Debtor's promise to pay.

Imperial Capital Bancorp, Inc., Case No. 09-19431-LA11, at 3 (Bankr. S.D. Cal. Apr. 23, 2012).[5]

Notably, after rejecting the FDIC's contention that its claim was entitled to priority treatment over the holders of TOPrS debt, the court granted summary judgment against the FDIC, finding that, given the unambiguous meaning of the indentures, there was no need to examine extrinsic evidence or otherwise examine the FDIC's policy-based arguments to arrive at a final ruling on the invalidity of the FDIC's erroneous subordination argument. *Id.* at 3. Precisely the same result should occur here.

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[5] The FDIC has appealed the confirmation order in the *Imperial Capital* case, which appeal is pending as *FDIC v. Imperial Capital Bancorp, Inc.*, Case No. 3:12-cv-01404-CAB-WMC (S.D. Cal.). The appeal is in its early stages and has yet to be fully briefed.

At the conclusion of its ruling, the *Imperial Capital* court noted "a recent decision out of the Bankruptcy Court for the Central District of California" that also concluded that the FDIC's claim under a tax sharing agreement was "not a claim for 'money borrowed.'" *See id.* at 4 (citing *Siegel v. FDIC (In re IndyMac Bancorp, Inc.)*, Adv. Proc. No. 2:09-ap-01698-BB, 2012 WL 1037481 (Bankr. C.D. Cal. Mar. 29, 2012), *adopted by In re IndyMac Bancorp, Inc.*, No. 12-02967-RGK, 2012 WL 1951474 (C.D. Cal. May 30, 2012)[6]). As the *Imperial Capital* court observed, the reasoning in *IndyMac* is sound and instructive in resolving the instant dispute.

In *IndyMac*, Bankruptcy Judge Bluebond examined whether 12 U.S.C. § 371c, which governs the terms of loans between a regulated bank and its affiliates, operated to invalidate a tax sharing agreement between a failed bank and its holding company. As it does here, the FDIC argued that the tax sharing agreement created a loan of tax refunds from the bank to the holding company in violation of section 371c. *See* 2012 WL 1037481, at *36. The *IndyMac* court disagreed, and explained that the tax sharing agreement could not create a loan from the bank to the holding company because, as the Court and the parties must assume is true here, the bank never owned the tax refunds in the first instance:

> Until funds are paid over to the Bank by [Bancorp – i.e., the debtor-parent], the Bank has no property interest or other rights with respect to the tax refunds. Instead, the Bank merely has a right to receive payment under the TSA [i.e., a tax sharing agreement] after the TSA's 15-business-day period actually runs. The import of this is manifest: Any loan or extension of credit could not occur until the Bank first obtained a vested right to payment, which it then might grant to Bancorp for some future period. Having ownership rights in the first instance is an inherent part of any loan . . . . Here, Bancorp, not the Bank, has ownership rights to the tax refunds under the TSA, which means those refunds cannot form the basis for any 'loan' because there never is any borrowing event.

Id. at *36. The *IndyMac* court went on to explain that the contractual debt owed by the holding company to the bank did not constitute an "extension of credit" under the banking regulations

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6 Copies of the Westlaw versions of the two *IndyMac Bancorp* decisions are attached hereto as a collective **Exhibit D**.

even if it created a "claim" under the Bankruptcy Code:

> The Court does not agree with the FDIC's suggestion that the mere fact that Bancorp would eventually be obligated to pay some money to the Bank – i.e., the debtor-creditor relationship that is central to this case – also means that there must be a prohibited extension of credit. This sweeps far too broadly. Many relationships are of a debtor-creditor nature without involving any extension of credit. For example, tort victims, judgment creditors, and employees all have 'claims' that establish a debtor-creditor relationship for bankruptcy purposes . . . . It is untenable to suggest these parties extended credit to the debtor, however.

Id. at *37; *see also id.* at *34 & *37 n.26. Then, in language directly applicable and dispositive here, the court explained that the tax sharing agreement

> is not structured as a "loan" or an "extension of credit." There is no borrowing event. There is no money or other property of the Bank ever borrowed by Bancorp. ***Instead of a claim for money borrowed, the TSA creates a general contractual obligation that may be triggered by external events.***

Id. at *37 (emphasis added).

Judge Bluebond's reasoning comports with all relevant case law. Indeed, the court specifically noted that the FDIC failed there (as it did here) to provide "*any* case law" supporting its construction of the tax sharing agreement and the tax refund receivable created thereunder. *Id*. at *36 (emphasis in original). Moreover, upon extensive challenge by the FDIC and *de novo* review by a federal district court, Judge Bluebond's report and recommendation was adopted in its entirety. *See* 2012 WL 1951474, at *1.[7] Of particular relevance here, the district court agreed with the conclusion that the tax sharing agreement did not create "a loan or other extension of credit" between the parent company and the bank. *See id.* at *4. The district court noted that the FDIC was unable to provide any support for its logically fallacious argument that every contract creating a simple payment obligation somehow is akin to a "loan." *See id.*

[7] The FDIC has appealed the district court's order adopting Judge Bluebond's report and recommendation to the Ninth Circuit Court of Appeals, which appeal is pending as *FDIC v. Siegel (In re IndyMac Bancorp, Inc.)*, No. 12-56218 (9th Cir.).

As in *IndyMac*, here the FDIC cannot support its blanket misconstruction of the tax refund receivable created under the Tax Sharing Agreement as a "loan" or "money borrowed." Rather, the Tax Sharing Agreement simply creates a general contractual obligation – a general unsecured claim – that is entitled to no more than *pari passu* treatment with the TOPrS debt.

The *Imperial Capital* and *IndyMac* courts' refusal to improperly expand the ordinary meaning of "money borrowed" is entirely consistent with prior decisions on similar questions. For example, in *Adler v. Suntrust Bank, N.A. (In re Am. Capital Corp.),* 425 B.R. 714, 716 (Bankr. S.D. Fla. 2010), the court held that fees owed by the debtor to an insider on account of the insider's agreement to guarantee certain debt obligations of the debtor were not indebtedness for money borrowed. As in this case, the indenture in *American Capital* defined "Senior Indebtedness" as "the principal of, and premium, if any, and interest of indebtedness . . . for borrowed money. . . ." *Id*. at 720. The court rejected the insider's argument that the guarantee fees constituted "borrowed money," stating that the insider "fail[ed] to allege that there existed a borrowing event between the [insider] and the [d]ebtor," and that "the 'guarantee fee' does not represent money loaned by [the insider] to [the debtor], but is rather an amount [the debtor] agreed to pay the insider [] for making a guarantee." *Id*. Just as the insider in *American Capital* failed to present any evidence of a borrowing event between the insider and the debtor, the FDIC here has failed to present any evidence of a borrowing event between the Reorganized Debtor and the Bank. And just as the guarantee fees in *American Capital* were not indebtedness for borrowed money, the Reorganized Debtor's contingent, contractual obligation under the Tax Sharing Agreement cannot be considered indebtedness for "money borrowed."

Similarly, in *In re Discon Corp.*, 346 F. Supp. 839, 843 (S.D. Fla. 1971), the court analyzed the meaning of "money borrowed" in a subordination clause to determine if all existing unsecured claims against the debtor constituted "senior indebtedness" entitled to priority over debentures issued by the debtor. Rather than applying the FDIC's catch-all approach, the court applied hornbook law and looked to the plain meaning of the word "borrow"—defined as "to receive temporarily from another, implying or expressing the intention either of returning the thing received or giving its equivalent to the lender." *Id*. at 844 (citing Webster's New Third Int'l Dictionary, Unabridged (1967)). In light of that definition, the court found that the concept of "money borrowed" was not limitless and, as an example, stated that "money borrowed" could not "be defined to include money owed for goods purchased, except where [expressly provided] . . . ." *Id*. at 844-45. Accordingly, *Discon*, like *Imperial Capital*, *IndyMac*, and *American Capital*, establishes that the phrase "money borrowed" cannot be defined to include obligations outside of the literal borrowing of money.[8]

In sum, courts consistently hold that claims for "money borrowed" must involve the actual borrowing of a lender's money, and that such claims are a subset of the larger universe of extensions of credit, contract obligations, or other debts or claims. And, as expressly held in the recent rulings by the *Imperial Capital* and *IndyMac* courts, the FDIC's misguided attempt to characterize its contingent contractual claim under the Tax Sharing Agreement as a claim for "money borrowed" does not pass the common sense test and finds no support in the law.

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8 Numerous other courts have reached the same conclusion. For example, in *In re Payless Cashways, Inc.*, 215 B.R. 409 (Bankr. W.D. Mo. 1997), the court held that executives' claims for deferred compensation were not senior to subordinated notes under an indenture whose "Senior Debt" definition included claims for "money borrowed." In *In re Leasing Consultants, Inc.*, 2 B.R. 165 (Bankr. E.D.N.Y. 1980), the court held that the claim of an equipment lessor was senior to subordinated notes, but expressly rejected the notion that the claim was for "money borrowed" because there was no financing or loan giving rise to such claim. Rather, the debt was a contractual claim that fell within a different part of the "Senior Debt" definition. In *In re Explorer Pipeline Co.*, 781 A.2d 705 (Del. Ch. 2001), the court repeatedly stated that a lease obligation was not "indebtedness for borrowed money." The court's ruling was based upon the fact that the lease obligation did not fall within the plain meaning of "borrowed money" despite the fact that it may "have substantially the same economic impact on the company" as a direct borrowing of money.

IV. Had the Parties Intended to Subordinate the TOPrS Debt to Claims of the FDIC, Alternate Language Would Have Been Use to Define Senior Indebtedness

As explained in the leading treatise on indentures, the phrase "principal, premium, if any, and interest in respect of indebtedness for money borrowed" (which is identical to language in the Indentures) is a common phrase intended to cover traditional forms of commercial debt—in particular, issuances of public debt, loans from banks and other lending institutions, and other formal indebtedness that is evidenced by a debt instrument that bears interest—*i.e.*, not contingent contractual claims like the FDIC's Tax Refund Claim. *See* American Bar Foundation, *Commentaries on Model Debenture Indenture Provisions*, at 93-95, 566 (1965) (providing various definitions for "Senior Debt" that include the phrase "the principal, premium, if any, and interest for money borrowed," each expressly relating to bonds, promissory notes, bank loans, and other borrowings evidenced by a note or other debt instrument that bears interest). The same treatise provides model language for subordination provisions intended to encompass less formal debt obligations, such as the payment obligations that might be incurred under the Tax Sharing Agreement. In doing so, rather than using the phrase "money borrowed" for a subordination provision that "covers all outstanding and all future debt and obligations, i.e., any liability of the Company," the Commentaries recommend defining "Senior Debt" as "the principal of, premium (if any) and interest on ***any and all Debt and obligations of the Company***. . . . ." *Id*. at 94-95, 556-67 (emphasis added).

Simply put, if the drafters of the TOPrS Indentures had intended to include contractual debt obligations like that of any claim (or the so-called borrowing equivalent) under the Tax Sharing Agreement, they had model language specifically designed to do so at their disposal. The drafters, however, chose instead to use the more restrictive term "money borrowed" aimed at public and formalized debt instruments, and the FDIC cannot now artificially expand the breadth of that subordination. In short, the TOPrS Indentures' express inclusion of "for money borrowed" rather than "any and all Debt and obligations of the Company," further underscores how the FDIC is reading provisions into the definition of "Senior Indebtedness" that simply are not there.

V. The FDIC's Contingent and Disputed Claims Are Not For "Money Borrowed" Because the Reorganized Debtor Never Borrowed the Bank's Money

It is clear from the foregoing discussion of the definition of "money borrowed" that none of the transactions relied upon by the FDIC satisfy that definition. As discussed above, this subordination dispute is relevant only if the FDIC's Tax Refund Claim is allowed, which is possible only if the Disputed Tax Refunds are deemed to be property of the estate and the Tax Sharing Agreement is deemed only to provide the FDIC (as successor to the Bank) with an unsecured claim against the Reorganizing Debtor as calculated via that contract. In such a scenario, there could never be any loan or extension of credit associated with the Disputed Tax Refunds because those Disputed Tax Refunds were never property that the Bank owned (as this scenario assumes that the Reorganized Debtor owns the Refunds), let alone that it could lend to others. *See IndyMac Bancorp*, 2012 WL 1037481, at *34, *36 & *42. Put simply, only after an owner of money agrees to lend that money to another can that lender possess a claim for "money borrowed," and here the Tax Refund Claim arises only if the money in question is deemed to be owned by the Reorganized Debtor and not by the Bank (who the FDIC suggests is the lender). Conversely, only if the FDIC is deemed to be the owner of the Disputed Tax Refunds, and only if thereafter the Reorganized Debtor received from the FDIC the Disputed Tax Refunds for its own use under a promise to repay in the future, could the Reorganized Debtor conceivably be considered a borrower of money who, "with the permission of the owner [i.e., the FDIC], [has retained] possession and use of the property of another [the Disputed Tax Refunds] for his own purposes." *Broome Cnty. Co-Operative Fire Ins. Co., supra*. This hypothetical scenario is not a possibility here and it did not occur here.

Along these same lines, and not surprisingly, the Priority Motion fails completely to identify a borrowing event, and there was none. ***The Reorganized Debtor has never even received the Disputed Tax Refunds from the Bank, or from the IRS for that matter***. To the contrary, the Disputed Tax Refunds were actually received by the FDIC directly from the IRS and subsequently placed into an escrow account by the FDIC pursuant to an agreement between the parties that specifically preserved all parties' rights. Furthermore, the Disputed Tax Refunds themselves were generated not by a loan from the Bank, but rather, by business losses "carried back" by the Reorganized Debtor to offset taxable income from prior years. The FDIC never advanced any money to the Reorganized Debtor, much less in return for the Reorganized Debtor's promise to repay that money, and thus, whatever else the Tax Sharing Agreement may be or do, it was not structured to, nor could it, involve a "borrowing of money" under New York or other law. *Haveron v. Kirkpatrick, supra*; *In re Goodman, supra*. Consequently, given the complete absence of any transaction or event where money was received, lent and/or borrowed, no claim for "money borrowed" can possibly exist and there is no need to consider any policy statements, federal regulations, or other extrinsic evidence raised by the FDIC. Simply put, the absence of a borrowing event disposes of the FDIC's argument that it has any claim that constitutes Senior Indebtedness under the Indentures.

While the FDIC never even attempts to identify a borrowing event to support its claim, based upon the FDIC's arguments in the indistinguishable *Imperial Capital* case, the Reorganized Debtor can only assume that the "event" upon which the FDIC might rely is that the Reorganized Debtor purportedly failed to "immediately" satisfy its payment obligations arising under the Tax Sharing Agreement. In *Imperial Capital*, the FDIC argued, "[t]he Debtor's failure to immediately distribute the Tax Refunds to the FDIC as successor to the Bank . . . results in an extension of credit for money borrowed that the Debtor expressly agreed to distribute to Bank and is senior in priority to the . . . TOPrS Debenture holders under the Indentures." But, the necessary precondition to this nonsensical leap of logic—namely that the Reorganized Debtor breached an obligation to "immediately distribute the Tax Refunds to the FDIC as successor to the Bank"—never occurred with respect to the *Imperial Capital* case, nor did it occur here (putting aside the fact that no such obligation existed or was approved by the Court pursuant to 11 U.S.C. §§ 363 and 364). *See Imperial Capital Bancorp, Inc.*, Case No. 09-19431-LA11, at 3-4 (holding that "[t]he Debtor could not 'borrow' money without an order of this Court"). Indeed, well before the Disputed Tax Refunds were ever received by the ***FDIC***, the Reorganized Debtor and the FDIC entered into a stipulation (the "Escrow Stipulation"), which was approved by this Court and in which the parties agreed that "the Debtor and the FDIC believe that it is in their best interests to place [the Disputed Tax Refunds] in an appropriate segregated bank account, without prejudice to either party's position" and, further, that such funds would be held in escrow "without any admission or presumption being raised as to whether such funds are property of the bankruptcy estate of the Debtor or the FDIC as Receiver." Escrow Stipulation at 2-3 (Dkt. 175), attached hereto as **Exhibit E**. Consistent with this Escrow Stipulation, the FDIC (not the Reorganized Debtor) received the Disputed Refunds from the IRS several months later, and the FDIC thereafter deposited the refunds into the aforementioned reserve account in accordance with the Escrow Stipulation.

Against this undisputed background, it would be shocking for the FDIC to suggest that the Reorganized Debtor failed to immediately distribute the Disputed Tax Refunds given that:

(i) it was the FDIC that actually received the Disputed Tax Refunds from the IRS in the first place; and (ii) the FDIC waived its alleged right to "immediate" payment of the Disputed Tax Refunds when it entered into the Escrow Stipulation with the Reorganized Debtor before the FDIC received them (and then proceeded to comply with the precise obligations of the Escrow Stipulation). The fact that the Reorganized Debtor never had possession of the Disputed Tax Refunds and the operation of the Escrow Stipulation again belies the notion that the Reorganized Debtor ever "borrowed" anything from the FDIC or the Bank. As the court in *Imperial Capital* concluded based on a nearly identical record:

> the Escrow Stipulation entered into by the Debtor and the FDIC-R gives the Debtor the right to receive the tax refunds (consistent with the Tax Administration Agreement), and requires the Debtor to deposit the tax refunds into a segregated account until ownership is determined. The Escrow Stipulation nullifies any possible argument that the Debtor breached its obligation to promptly pay over the tax refunds, and that this failure to promptly pay constituted the "borrowing event."

Imperial Capital Bancorp, Inc., Case No. 09-19431-LA11, at 4.

If anything, the FDIC's argument is even more preposterous in the present case. Unlike in *Imperial Capital*, where the debtor actually received the money in the first instance before depositing it into escrow, here ***the FDIC*** received the funds from the IRS and deposited those funds into escrow, per the parties' stipulation. In other words, the Disputed Tax Refunds in this case were ***never*** in the Reorganized Debtor's possession, let alone for a period that could result in those refunds not being "repaid" to the FDIC within an appropriate amount of time.

Wholly apart from the Escrow Stipulation, the FDIC's argument is also flawed because it is predicated on the notion that a post-petition action can elevate the priority of a pre-petition claim. The nature and extent of the FDIC's claims against the Reorganized Debtor were fixed "as of the date of the filing of the petition" by Bankruptcy Code section 502(b). *See also, e.g.*, *Sexton v.Dreyfus*, 219 U.S. 339, 344-45 (1911) (adopting rule that "everything stops" on the petition date); *Addison v. Langston (In re Brints Cotton Mktg., Inc.)*, 737 F.2d 1338, 1342 (5th Cir. 1984) (reaffirming "the historical fiction that such date 'simply fixes the moment when the affairs of the bankrupt are supposed to be wound up', as if 'the whole matter could be settled in a day' (quoting *Sexton*)); *In re Enron Corp.*, 330 B.R. 387, 392 (Bankr. S.D.N.Y. 2005) ("[D]etermining the amount of damages as of the petition date is consistent with the historical fiction that a debtor's affairs are to be wound up as if settled on the date of the petition with all of the debtor's assets ratably distributed on that date."), *aff'd*, 354 B.R. 652 (S.D.N.Y. 2006). On the petition date, the FDIC would have held a contingent, unliquidated, and unmatured claim for future amounts that might become payable under the Tax Sharing Agreement, all of which would be pre-petition unsecured claims. *See, e.g.*, *SNTL Corp. v. Ctr. Ins. Co. (In re SNTL Corp.)*, 571 F.3d 826, 843-44 (9th Cir. 2009); *In re Chicago, M. & St. P. & Pac. R.R.*, 6 F.3d 1184, 1192 (7th Cir. 1993). The FDIC's claim would not have been one for "money borrowed" on the petition date, and the subsequent details regarding the actual timing associated with the receipt and escrow of the Disputed Tax Refunds are not relevant under section 502(b) and the cleavage date rule articulated in *Sexton v. Dreyfus*.

In particular, the text of section 502(b) and the rule of *Sexton v. Dreyfus* foreclose the FDIC's misguided efforts to enhance the relative priority of its claim in bankruptcy through post-petition events. *See, e.g.*, *United States v. Marxen*, 307 U.S. 200, 207 (1939) (explaining that a bankruptcy filing fixes the rights of all creditors "both as to the bankrupt and among themselves"); *Carrieri v. Jobs.com, Inc.*, 393 F.3d 508, 528 (5th Cir. 2004) (noting how "[u]nder § 502(b), the rights of holders of claims and interests are fixed as of the Petition Date," and concluding that a party "improperly attempted to take a postpetition step to change the nature of its pre-petition equity interests" and thereby enhance its bankruptcy priority). Accordingly, due to this "historical fiction," *In re Brints Cotton Mktg.*, 737 F.2d at 1342, any claim against the Reorganized Debtor on account of the Tax Sharing Agreement is deemed to arise on the petition date and, thus, under the FDIC's logic, there was no delay in payment and thus no "extension of credit" occurring due to the Reorganized Debtor's alleged failure to remit payment immediately when otherwise due under the Tax Sharing Agreement.

In sum, 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. 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 any "money borrowed," and the FDIC's argument to the contrary is nonsense as a matter of law.

VI. Although the Absence of a Borrowing Event is Itself Dispositive, the Tax Sharing Agreement Plainly Creates No Loan Between the Bank and the Reorganized Debtor

The Tax Sharing Agreement (or, for that matter any other agreement) cannot create a claim for "money borrowed" if there was no borrowing event. Therefore, consideration of the language of the Tax Sharing Agreement is not necessary to resolve the subordination dispute.

That said, the Tax Sharing Agreement does not even remotely suggest an arrangement that could be characterized as a loan from the Bank to the Reorganized Debtor, and in fact it clearly indicates otherwise. The Tax Sharing Agreement simply provides that the Reorganized Debtor is contractually obligated to allocate funds to the Bank based on a hypothetical calculation of tax refunds the Bank might otherwise have been entitled to had it been a standalone company unaffiliated with the Reorganized Debtor (which is not nor ever was the case and is therefore merely hypothetical). In relevant part, the Tax Sharing Agreement says: "In the event that any tax refunds are received, they will be allocated to the respective entities based on the individual tax allocations relative to amounts previously paid (once again as if the entities filed separate tax returns)." As discussed above, this generalized contractual obligation, which is clearly not a *re*payment obligation, cannot be distorted to fit with the plain dictionary meaning of *to borrow*, namely, to "receive money with the understanding or agreement that it must be repaid, usually with interest." The Tax Sharing Agreement cannot be read as a loan agreement or a promissory note; there is no contemplation of the Reorganized Debtor receiving money from the Bank with a promise to repay; there is no principal component; and there is no interest component. *See, e.g.*, *IndyMac Bancorp*, 2012 WL 1037481, at *36-37.

VII. <u>The FDIC's Other Arguments Are Meritless</u>

The FDIC makes additional extra-contractual arguments in its Priority Motion. All of them are meritless, as the analysis below indicates.

A. The FDIC Mistakenly Argues that, Because A Specific Debt Is Excluded From the Definition of "Senior Indebtedness," Everything Else Must *Ipso Facto* Fall Within the Definition.

In its Priority Motion the FDIC avers that "[t]he language of the indentures excluding certain obligations from senior debt does not include the obligations of the type that give rise to the claim of the FDIC-R." Priority Motion ¶ 7(c). This argument is pure sophistry. It is true that under the TOPrS Indentures, certain specifically enumerated debts are excluded from the definition of "Senior Indebtedness," which is itself a narrowly defined term that includes "money borrowed." However, just because a particular debt is not specifically excluded from the definition of "Senior Indebtedness" does not mean automatically and *ipso facto* that it must be included in the definition. The exclusions from the definition of "Senior Indebtedness" are relevant only if, as a threshold matter, the FDIC's Tax Refund Claim is "money borrowed" and thus within the definition in the first instance. The FDIC's argument does not change the simple fact that its contingent claim still is not for "money borrowed" and thus is not within the scope of the definition of "Senior Indebtedness." Because the FDIC cannot clear this first hurdle, the extent of the exclusions is completely irrelevant.

B. Contrary to the FDIC's Assertions, the Indentures and Not Banking Regulations Governs the Subordination Analysis, but in Any Event the Banking Regulations are Consistent With the Plan's Treatment.

The FDIC gets it exactly backwards when it argues that Federal Reserve regulations, and the treatment of the TOPrS proceeds as Tier I capital under these regulations, somehow requires that the Tax Refund Claim be treated as Senior Indebtedness. The FDIC cites no case law for its curious reading of the relevant regulations and, upon close inspection, the defects in the FDIC's argument become apparent. The Federal Reserve regulations upon which the FDIC relies: (i) are improperly submitted extrinsic evidence to contradict the unambiguous language of the Indentures, and should not be considered; (ii) do not operate in any event to rewrite the Indentures, assuming *arguendo* that the Indentures are inconsistent with such regulations; and (iii) do not conflict with, and are entirely consistent with, the Indentures in any event.

In 2004 and 2005, the Federal Reserve completed a process of proposed and final rulemaking regarding the conditions upon which trust preferred securities could qualify as Tier 1 capital. This rulemaking process led to modifications of the Federal Reserve's "Regulation Y," most notably in the form of revisions to the guidelines contained in Appendix A to 12 C.F.R. part 225 ("Appendix A"[9]).

Appendix A is a lengthy document providing capital adequacy guidelines for bank holding companies, much of which is irrelevant to the Priority Motion. Two portions are relevant. First, section II.A.1.c.iv. outlines the requirements for "qualifying trust preferred

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[9] A copy of Appendix A is attached as **Exhibit F**.

securities." Second, section II.A.2.d.ii. provides four requirements with regard to subordination attributes that such debt must have to be treated in a particular tier of capital.

The fourth requirement of Section II.A.2.d.ii. sets forth principles for the scope and extent of subordination (with added emphasis):

> Subordinated debt ***issued by a subsidiary U.S. depository institution*** . . . of a bank holding company must be subordinated in right of payment to the claims of all the institution's ***general creditors*** and depositors, and generally must not contain provisions permitting debt holders to accelerate payment of principal or interest upon the occurrence of any event other than receivership of the institution. Subordinated debt ***issued by a bank holding company*** . . . must be subordinated to all senior indebtedness of the issuer; that is, ***the debt must be subordinated at a minimum to all borrowed money***, similar obligations arising from off balance sheet guarantees and direct credit substitutes, and obligations associated with derivative products . . . .

Thus, Appendix A makes clear that although a subsidiary ***bank***'s qualifying subordinated debt must be subordinated to "general creditors," the same is ***not*** true for subordinated debt issued directly by a bank holding company such as the Reorganized Debtor. For TOPrS issued by a bank holding company to qualify as capital, the underlying debentures must only be "subordinated at a minimum to all borrowed money," which matches the language in the Indentures. The TOPrS debt issued pursuant to the Indentures, and entirely consistently with section II.A.2.d.ii., is subordinated only to "money borrowed" - and no more. The Federal Reserve's construct whereby subordinated debt issued by the Reorganized Debtor's banking subsidiaries may have been required to be junior to "general creditors" while bank holding company subordinated debt is not indicates that the regulators themselves drew a distinction between general contract claims (such as the FDIC's claims under the Tax Sharing Agreement) and the far more limited concept of "borrowed money."

In addition, a different banking regulation, 12 C.F.R. § 250.166 (copy attached as **Exhibit G**), which was subsequently supplemented by the Federal Reserve Board's SR 92-37 letter (copy attached as **Exhibit H**),[10] similarly is consistent with the limited subordination provisions in the TOPrS Indentures. In full accord with the language in Appendix A described above, the TOPrS Indentures comport with how the SR 92-37 letter clarifies the Federal Reserve's intentions regarding the subordinated debt requirements of 12 C.F.R. § 250.166. The clarifying letter includes the following paragraph regarding the "extent of subordination" that is required, which harmonizes the regulation with the language of Appendix A and with the TOPrS Indentures (with added emphasis):

> In order to be included in capital, subordinated debt of a bank must be subordinated in right of payment to the claims of all the issuer's **general creditors** and depositors. For bank holding companies, such debt must be subordinated to senior indebtedness. To meet this requirement, bank holding company debt ***must be subordinated at a minimum to: (1) all borrowed and purchased money***, (2) similar obligations arising from off- balance sheet guarantees and direct credit substitutes, (3) and obligations associated with derivative products. . . .

Thus, (i) Appendix A and (ii) 12 C.F.R. § 250.166 as revised by SR 92-37 both distinguish between the subordinated debt of an affiliated *bank* (which must be subordinated to general creditors and depositors in order to qualify as capital) and subordinated debt of a *bank holding company* such as the Reorganized Debtor (which must be subordinated to "borrowed money" in order to qualify as capital). The Indentures are entirely consistent with these regulations, since they provide that the debentures are subordinated to "money borrowed" but ***not*** to the Reorganized Debtor's "general creditors." The FDIC's contrary interpretation is wholly in error.

10 The SR 92-37 letter explains, "This SR letter is being issued to clarify three points raised by several banking organizations and others with respect to [12 C.F.R. § 250.166] concerning criteria subordinated debt must meet to be included in risk-based capital." Likewise, the Federal Reserve's March 2005 final rule permitting TOPrS to be treated as Tier I capital confirms that 12 C.F.R. § 250.166 has been "supplemented by SR 92-37."

Furthermore, and perhaps most importantly, whether the Indentures are consistent with these regulations is irrelevant. These regulations do *not* purport to override or render unenforceable agreements such as the Indentures. Both Appendix A and the SR 92-37 letter make clear that their purpose is to provide certain attributes that subordinated debt must have to be treated in a certain fashion by banking regulators. The Indentures "must comply" with these regulations to qualify as Tier 1 capital by banking regulators; but if the Indentures do not so comply, then the only consequence is that *banking regulator*s may *choose* not to treat those TOPrS as Tier 1 capital. Nothing about this fact would rewrite the terms of the Indentures or alter the subordination provisions contained therein. Simply put, whether the TOPrS were properly classified by regulators as "Tier 1" capital is a different question than the one at issue here, which is the entirely separate question whether the TOPrS debt is contractually subordinated to the FDIC's claims. The former question is governed by the applicable regulations. The latter question is governed by the plain terms of the Indentures.

In summary, the Federal Reserve regulations alluded to by the FDIC (i) are improperly submitted extrinsic evidence to contradict the unambiguous language of the Indentures, which should not be considered; (ii) do not operate in any event to rewrite the Indentures, assuming *arguendo* that the Indentures are inconsistent with such regulations; and (iii) do not conflict with, and are entirely consistent with, the Indentures.

CONCLUSION

The FDIC's Priority Motion fails as a matter of law. There is no credible interpretation of the Indentures that would result in the TOPrS claims being subordinated to any claims held by the FDIC, nor is there any other basis for subordination in the FDIC's favor. The FDIC's Priority Motion should be denied in its entirety and with prejudice.

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Respectfully Submitted,
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