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

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

**NOTICE OF THE FDIC-RECEIVER'S MOTION FOR SUMMARY JUDGMENT**

**TO:** Annexed Service List

**PLEASE TAKE NOTICE** that on Tuesday, October 2, 2012, at the hour of 10:00 a.m. or as soon thereafter as counsel may be heard, we shall appear before the Honorable Pamela S. Hollis or another judge sitting in her stead at the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division, located at 219 S. Dearborn Street, Courtroom 644, Chicago, Illinois, and then and there present the ***FDIC-Receiver's Motion for Summary Judgment*** a copy of which is hereby served upon you.

Dated: September 27, 2012
Chicago, Illinois

Respectfully submitted,

*/s/ Alan P. Solow*

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## CERTIFICATE OF SERVICE

I, Oksana Koltko, an attorney, hereby certify that on the 27th day of September 2012, I caused a true and correct copy of the foregoing ***FDIC-Receiver's Motion for Summary Judgment*** to be electronically filed. Notice of this filing will be sent by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF system.

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

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

**FDIC-RECEIVER'S MOTION FOR SUMMARY JUDGMENT**

By this *Motion for Summary Judgment* (the "Motion"),[1] the Federal Deposit Insurance Corporation, as Receiver for Corus Bank, N.A. (the "FDIC-Receiver"), by and through its undersigned counsel, moves this Court for a summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, made applicable to this contested matter through Rules 7056 and 9014(c) of the Federal Rules of Bankruptcy Procedure. In support of its Motion and as required by Rule 7056-1 of the Local Bankruptcy Rules for the Northern District of Illinois, the FDIC-Receiver also submits a (I) *Memorandum of Law in Support of the Motion* (the "Memorandum of Law") attached hereto as **Exhibit A**, (II) *Declaration of Richard Spillenkothen in Support of the Motion* ("Spillenkothen Declaration") attached hereto as **Exhibit B,** (III) *Statement of Uncontested Facts Related to the Motion* (the "Statement of Uncontested Facts") attached hereto as **Exhibit C,** and (IV) exhibits listed below.

1. As more fully set forth in the Memorandum of Law, on December 9, 2011, the FDIC-Receiver commenced this contested matter (the "Priority Dispute") pursuant to Rule 9014 of the Federal Rules of Bankruptcy by filing its *Amended Motion to Establish Priority Senior to*

[1] Contemporaneously herewith, the FDIC-Receiver has also filed the *Motion to Strike the Debtor's Motion for Judgment on the Pleadings or, in the Alternative, to Convert It to a Motion for Summary Judgment* due to the Debtor's improper application of Rule 7012 of the Federal Rules of Bankruptcy Procedure to this contested matter initiated pursuant to Rule 9014 of the Federal Rules of Bankruptcy Procedure.

*TOPrS Debt* [Dkt. No. 790]. In this Priority Dispute, the FDIC-Receiver asserts a claim to certain tax refunds generated by Corus Bank, N.A. (the "Bank"), one of the Debtor's subsidiaries, and argues that its claim is senior in priority to claims of the holders of subordinated equity-like instruments, trust preferred securities (the "TOPrS"), issued for purposes of being included in the Debtor's Tier 1 capital to meet strict regulatory requirements.

2. Prior to this bankruptcy case, the Debtor, as the parent and agent of an affiliated group of business entities, including the Bank, (the "Consolidated Group"), prepared and filed consolidated tax returns on behalf of itself and the Consolidated Group pursuant to the procedures set forth in the Internal Revenue Code. In 2007, the Debtor's Board of Directors approved an Intra-Company Payment Policy (the "Payment Policy"), which established certain intra-company income tax payment procedures. Due to the losses suffered by the Bank during the tax years 2008 and 2009, the Consolidated Group received tax refunds of approximately $265 million (the "Tax Refunds"). The Tax Refunds are currently held in the FDIC's National Liquidation Fund pursuant to a stipulation approved by the Court. Because the Tax Refunds are attributable to the Bank's payments, per the Payment Policy, and were generated as a result of the Bank's income, funding of tax payments and operating losses, the Debtor has an obligation to remit the Tax Refunds to the Bank. Solely for purposes of this Priority Dispute, the FDIC-Receiver's arguments are based on the assumption that the Payment Policy established a debtor-creditor relationship between the Debtor and the Bank with respect to the Tax Refunds,[2] giving

[2] The FDIC-Receiver, of course, contests this conclusion. The Payment Policy was not signed by any party and was not approved by the Bank's Board of Directors. Further, the Payment Policy states that tax refunds, following receipt, "will be allocated to the respective entities based on the individual tax calculations relative to amounts previously paid (once again as if the entities filed separate tax returns)." Even if the Bank had approved and signed the Payment Policy, it cannot be interpreted as conveying any interest in the Bank's tax refunds or establishing a debtor-creditor relationship regarding the refunds. These issues, however, are not before this Court, and instead will be resolved in a proceeding currently pending before the United States District Court for the Northern District of Illinois. Nothing contained herein shall constitute an admission or waiver on the part of the FDIC-Receiver.

rise to the FDIC-Receiver's claim to the Tax Refunds. Therefore, solely for purposes of the Priority Dispute, the FDIC-Receiver's right to the Tax Refunds can be viewed as an unsecured claim resulting from the District Court's determination that the Debtor and the Bank share a debtor-creditor relationship, and the Tax Refunds are property of the estate.

3. The TOPrS are governed by 13 indentures (the "Indentures") executed for each structured issuance of the TOPrS. Specifically, the Indentures provide that the indebtedness owed thereunder is junior to "Senior Indebtedness." The Indentures define "Senior Indebtedness" to include certain debts and obligations, and they also enumerate certain obligations that are *not* included in Senior Indebtedness. All Indentures state that the payments to the TOPrS holders are junior to, among other things, Debtor's indebtedness for "money borrowed."

4. The debt owed to the FDIC-Receiver by the Debtor on account of the Tax Refunds constitutes "money borrowed" and, thus, "Senior Indebtedness" under the Indentures. The Debtor acknowledges that it is holding money that ultimately belongs to the FDIC-Receiver. The Payment Policy that, according to the Debtor, gives rise to the FDIC-Receiver's claim to the Tax Refunds by its own terms establishes a mechanism for inter-corporate loans and the basis on which they shall be repaid. In the absence of the Bank's consent to allow the Debtor to file the consolidated tax return and receive any refund on its behalf, the Tax Refunds would have come directly to the Bank. Therefore, the Debtor holds the Tax Refunds temporarily with the Bank's permission until it pays them to the Bank. There is no other explanation for how the Debtor obtained the money or why it should turn it over to the FDIC-Receiver other than as a borrowing.

5. The regulatory environment in which the Bank and the Debtor operated further supports the conclusion that the claims of the TOPrS holders are subordinated to the FDIC-Receiver's claim. Bank holding companies may include trust preferred securities in their Tier 1

capital, but the Federal Reserve mandates that the junior subordinated debt underlying trust preferred securities be deeply subordinated to all general creditors, with few clearly delineated exceptions.

6. With the clear intent of qualifying for Tier 1 capital behind each TOPrS issuance, the Indentures adhere to the Federal Reserve's requirements that the claims of the TOPrS holders must be subordinate to all general creditors of the Debtors, with certain narrow exceptions not applicable here. The Debtor's intent is evidenced by the fact that before issuing the TOPrS, the Debtor sought confirmation from the Federal Reserve that the TOPrS would qualify for Tier 1 treatment. The Indentures themselves expressly recognized the importance of the TOPrS proceeds in qualifying for Tier 1 capital by providing that the debentures underlying the TOPrS are subject to "special event redemption" if the TOPrS do not receive Tier 1 status. Various accounting records and press releases show that the Debtor did, in fact, include the TOPrS proceeds in its Tier 1 capital.

7. As summarized above and more fully discussed in the Memorandum of Law, the nature and basis of the FDIC-Receiver's claim, the terms of the Indentures governing the TOPrS, and the regulatory scheme underlying the TOPrS unequivocally dictate that the claim to the Tax Refunds of the FDIC-Receiver constitutes "money borrowed" and, therefore, is senior in priority to the claims of the TOPrS holders. Accordingly, the FDIC-Receiver's Motion for Summary Judgment should be granted.

8. In addition, by this Motion, the FDIC-Receiver seeks leave of this Court to file its Memorandum of Law that is twenty-four (24) pages in length, exceeding the fifteen-page (15) limitation imposed by Rule 5005-3 of the Local General Rules for the Northern District of Illinois (the "Local Rule 5005-3") by eight (9) pages. Local Rule 5005-3 provides that "[n]o

brief may exceed fifteen pages without prior approval of the court." In order to address thoroughly the complex issues pertinent to this dispute, the FDIC-Receiver finds it necessary to file a brief that exceeds the fifteen-page limitation imposed by Local Rule 5005-3. Therefore, the Court's approval to exceed page limitation is warranted in the instant case

WHEREFORE, based on the Statement of Uncontested Facts and for the reasons set forth in the Memorandum of Law, the FDIC-Receiver respectfully requests that this Court

i. allow the FDIC-Receiver to file its Memorandum of Law that exceeds the fifteen-page limitation imposed by Local Rule 5005-3;

ii. grant the FDIC-Receiver's Motion, finding that, as a matter of law, the FDIC-Receiver's claim to the Tax Refunds is senior in priority to the claims of the holders of the TOPrS issued by the Debtor; and

iii. grant such other and further relief as this Court may deem just and proper in light of the facts and circumstances and applicable law in this case.

Dated: September 27, 2012
Chicago, Illinois

Respectfully submitted,

*/s/ Alan P. Solow*

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***In re Corus Bankshares, Inc.***
United States Bankruptcy Court
Northern District of Illinois
Case No. 10-bk-26881

**INDEX OF EXHIBITS**


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