

No. 18-1269

IN THE
Supreme Court of the United States

SIMON E. RODRIGUEZ, IN HIS CAPACITY AS CHAPTER 7
TRUSTEE FOR THE BANKRUPTCY ESTATE OF UNITED
WESTERN BANCORP, INC.,

Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, IN ITS
CAPACITY AS RECEIVER FOR UNITED WESTERN BANK,

Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit**

JOINT APPENDIX

MITCHELL P. REICH
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
mitchell.reich@hoganlovells.com

*Counsel of Record
for Petitioner*

NOEL J. FRANCISCO
Solicitor General
DEPARTMENT OF JUSTICE
Washington, D.C. 20530
(202) 514-2217
SupremeCtBriefs@usdoj.gov

*Counsel of Record
for Respondent*

PETITION FOR WRIT OF CERTIORARI FILED: APRIL 1, 2019
CERTIORARI GRANTED: JUNE 28, 2019

TABLE OF CONTENTS

	Page
Relevant Docket Entries:	
Court of Appeals Docket Entries (No. 17-1281)	1
District Court Docket Entries (No. 1:16-cv-02475-WJM)	6
Bankruptcy Court Docket Entries (No. 12-13815)	10
Relevant Pleadings:	
Complaint Asserting Objection to Claim and Counterclaims for Declaratory Relief and Recovery of Assets of the Estate (Apr. 16, 2014)	24
Exhibit A – Proof of Claim (Aug. 28, 2012)	36
Answer (Nov. 25, 2014)	56

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Docket No. 17-1281

IN RE: UNITED WESTERN BANCORP, INC.,
Debtor,
SIMON E. RODRIGUEZ, IN HIS CAPACITY AS CHAPTER 7
TRUSTEE FOR THE BANKRUPTCY ESTATE OF UNITED
WESTERN BANCORP, INC.,
Plaintiff-Appellant,
v.
FEDERAL DEPOSIT INSURANCE CORPORATION, IN ITS
CAPACITY AS RECEIVER FOR UNITED WESTERN BANK,
Defendant-Appellee.

DOCKET ENTRIES

DATE	PROCEEDINGS
08/09/2017	[10489127] Civil case docketed. Preliminary record filed. DATE RECEIVED: 08/09/2017. Docketing statement, Transcript order form and Notice of Appearance due 08/23/2017 for Simon E. Rodriguez.. Notice of Appearance also due 08/23/2017 for Federal Deposit Insurance Corporation. [17-1281] [Entered: 08/09/2017 04:29 PM]

DATE	PROCEEDINGS
10/30/2017	[10509687] Appellant/Petitioner's brief filed by Mr. Simon E. Rodriguez. 7 (Counseled) paper copies to be provided to the court. Served on 10/30/2017 by email. Oral argument requested? Yes. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. --[Edited 11/01/2017 by SDS to attach errata to entry] [17-1281] MH [Entered: 10/30/2017 04:56 PM]
10/30/2017	[10509691] Appellant's appendix filed by Mr. Simon E. Rodriguez. Total number of volumes filed: 3. Served on 10/30/2017. Manner of Service: email. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. --[Edited 11/01/2017 by SDS to remove duplicate pdfs] [17-1281] MH [Entered: 10/30/2017 05:06 PM]
11/29/2017	[10517294] Appellee/Respondent's brief filed by FDIC. 7 (Counseled) paper copies to be provided to the court. Served on: 11/29/2017. Manner of service: email. Oral argument requested? Yes. This pleading complies with all required (privacy, paper copy and virus)

DATE	PROCEEDINGS
	certifications: Yes. [17-1281] MO [Entered: 11/29/2017 11:18 AM]
12/13/2017	[10521091] Appellant/Petitioner's reply brief filed by Mr. Simon E. Rodriguez. 7 (Counseled) paper copies to be provided to the court. Served on 12/13/2017. Manner of Service: email. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [17-1281] MH [Entered: 12/13/2017 05:08 PM]
05/15/2018	[10559074] Case argued by Mark Haynes for the appellant and by Joseph Brooks for the appellee and submitted to Judges Briscoe, Seymour and Holmes. [17-1281] [Entered: 05/15/2018 12:45 PM]
06/19/2018	[10567630] Affirming the judgment of the District Court and remanding to the bankruptcy court. Terminated on the merits after oral hearing; Written, signed, published; Judges Briscoe, author; Seymour and Holmes. Mandate to issue. [17-1281] The original PDF has been deleted - panel rehearing was granted in part to delete footnote 3 of the original opinion, but was otherwise denied per the 1/29/19 order.--[Edited 01/29/2019]

DATE	PROCEEDINGS
	by NA] [Entered: 06/19/2018 08:30 AM]
06/19/2018	[10567634] Judgment for opinion filed. [17-1281] [Entered: 06/19/2018 08:34 AM]
07/11/2018	[10573620] Mandate issued. [17-1281] [Entered: 07/11/2018 09:14 AM]
08/03/2018	[10579698] Petition for rehearing filed by Mr. Simon E. Rodriguez. 0 paper copies to be provided to the court. Served on 08/03/2018. Manner of Service: email. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [17-1281] MH [Entered: 08/03/2018 04:45 PM]
01/29/2019	[10622367] Order filed by Judges Briscoe, Seymour and Holmes granting in part the request for panel rehearing to the limited extent that footnote 3 of the original Opinion will be deleted. The petition is otherwise denied, as is the motion to clarify. A copy of the revised version is attached to this order. [17-1281] [Entered: 01/29/2019 11:08 AM]
01/29/2019	[10622377] Affirming the judgment of the District Court and

DATE	PROCEEDINGS
01/29/2019	Remanding to the Bankruptcy Court for further proceedings; Terminated on the merits after oral hearing; Written, signed, published; Judges Briscoe, authoring, Seymour and Holmes. Mandate to issue. [17-1281] [Entered: 01/29/2019 11:15 AM]
01/29/2019	[10622383] Judgment for opinion filed. [17-1281] [Entered: 01/29/2019 11:24 AM]
03/14/2019	[10633341] Motion filed by Appellant Mr. Simon E. Rodriguez to stay execution of the mandate. Served on: 03/14/2019. Manner of service: email. This pleading complies with all required (privacy, paper copy and virus) certifications: Yes. [17-1281] MH [Entered: 03/14/2019 04:49 PM]
03/22/2019	[10635187] Order filed by Judges Briscoe, Seymour and Holmes denying motion to stay mandate filed by Appellant Mr. Simon E. Rodriguez. Served on 03/22/2019. [17-1281] [Entered: 03/22/2019 12:01 PM]
03/25/2019	[10635426] Mandate issued. [17-1281] [Entered: 03/25/2019 08:16 AM]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(DENVER)

Case No. 1:16-cv-02475-WJM

IN RE: UNITED WESTERN BANCORP, INC.

FEDERAL DEPOSIT INSURANCE CORPORATION, IN ITS
CAPACITY AS RECEIVER FOR UNITED WESTERN BANK,
Appellant,

v.

SIMON E. RODRIGUEZ, IN HIS CAPACITY AS CHAPTER 7
TRUSTEE FOR THE THE BANKRUPTCY ESTATE OF
UNITED WESTERN BANCORP, INC.,
Appellee.

DOCKET ENTRIES

DATE	#	PROCEEDINGS
10/03/2016	<u>2</u>	Notice of APPEAL AND STATEMENT OF ELECTION FROM BANKRUPTCY COURT by Appellant Simon E. Rodriguez in re: Judgment (Docket #58), Opinion and Order on Cross Motion for Summary Judgment

DATE	#	PROCEEDINGS
		(docket #57) and Notice of Entry on Docket (Docket #59) of 10/3/2016, entered September 16 2016, modified and amended on September 26, 2016. (evana,) (Entered: 10/03/2016)
11/14/2016	<u>6</u>	BANKRUPTCY RECORD ON APPEAL. Number of Volumes: 3. Sealed/Restricted Volume Numbers:III. Appellant Brief due by 12/14/2016. Appellee Brief due by 1/13/2017. Appellant Reply Brief due by 1/27/2017. (Attachments: # <u>1</u> Volume I, # <u>2</u> Volume II, # <u>3</u> Volume III)(evana,) (Entered: 11/15/2016)
12/21/2016	<u>10</u>	Appellant's OPENING BRIEF by Appellant Federal Deposit Insurance Corporation (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Appendix Volume 1, # <u>3</u> Appendix Volume 2, # <u>4</u> Appendix Volume 3, # <u>5</u> Appendix Volume

DATE	#	PROCEEDINGS
		4)(Young, John) (Entered: 12/21/2016)
01/20/2017	<u>11</u>	BRIEF re <u>10</u> Appellant's Opening Brief by Appellee Simon E. Rodriguez. (Attachments: # <u>1</u> Exhibit A)(Haynes, Mark) (Entered: 01/20/2017)
02/03/2017	<u>12</u>	Appellant's REPLY BRIEF by Appellant Federal Deposit Insurance Corporation (Young, John) (Entered: 02/03/2017)
07/10/2017	<u>21</u>	ORDER REVERSING BANKRUPTCY COURT'S JUDGMENT: The judgment of the Bankruptcy Court is reversed and this matter is remanded to the Bankruptcy Court for further proceedings consistent with this opinion. Denying as moot <u>13</u> FDIC's Request for Oral Argument. Terminating <u>6</u> this appeal, by Judge William J. Martinez on 7/10/2017. (ebuch) (Entered: 07/10/2017)

DATE	#	PROCEEDINGS
		07/10/2017)
07/10/2017	<u>22</u>	FINAL JUDGMENT pursuant to <u>21</u> Order Reversing Bankruptcy Court's Judgment by Clerk on 7/10/2017. (ebuch) (Entered: 07/10/2017)
08/09/2017	<u>23</u>	NOTICE OF APPEAL as to <u>22</u> Judgment by Appellee Simon E. Rodriguez (Filing fee \$ 505, Receipt Number 1082-5655472) (Haynes, Mark) (Entered: 08/09/2017)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF COLORADO
(DENVER)

Adversary Proceeding No. 14-01191-TBM

SIMON E. RODRIGUEZ,

Plaintiff,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, IN ITS
CAPACITY AS RECEIVER FOR UNITED WESTERN BANK,

Defendant.

DOCKET ENTRIES

DATE	#	PROCEEDINGS
04/16/2014	<u>1</u>	Adversary case 14-01191. Complaint by Simon E. Rodriguez against Federal Deposit Insurance Corporation, in its capacity as Receiver for United Western Bank. Fee to be Deferred.. Adversary Status Deadline 08/14/2014 (91 (Declaratory judgment)),(11 (Recovery of money/property - 542 turnover of property)) (Tyson, Kimberley) (Entered: 04/16/2014)

DATE	#	PROCEEDINGS
06/26/2014	<u>12</u>	Motion to Dismiss Adversary Proceeding Filed by John F. Young on behalf of Federal Deposit Insurance Corporation, in its capacity as Receiver for United Western Bank (related document(s): <u>1</u> Complaint). (Attachments: # <u>1</u> Proposed/Unsigned Order) (Young, John) (Entered: 06/26/2014)
06/26/2014	<u>13</u>	Support Brief/Memorandum Filed by John F. Young on behalf of Federal Deposit Insurance Corporation, in its capacity as Receiver for United Western Bank (related document(s): <u>12</u> Motion to Dismiss Adversary Proceeding). (Attachments: # <u>1</u> Exhibit A) (Young, John) (Entered: 06/26/2014)
07/22/2014	<u>17</u>	Notice Re: Filing Exhibits to Complaint. Filed by Mark E. Haynes on behalf of Simon E. Rodriguez (related document (s): <u>1</u> Complaint)... (Attachments: # <u>1</u> Exhibit Exhibit A for Complaint # <u>2</u>

DATE	#	PROCEEDINGS
		Exhibit Exhibit A for Complaint) (Haynes, Mark) (Entered: 07/22/2014)
07/25/2014	<u>18</u>	Response Filed by Mark E. Haynes on behalf of Simon E. Rodriguez (related document(s): <u>12</u> Motion to Dismiss Adversary Proceeding). (Haynes, Mark) (Entered: 07/25/2014)
08/05/2014	<u>19</u>	Motion for Leave to File Reply in Support of Motion to Dismiss Filed by John F. Young on behalf of Federal Deposit Insurance Corporation, in its capacity as Receiver for United Western Bank (related document(s): <u>12</u> Motion to Dismiss Adversary Proceeding, <u>18</u> Response). (Attachments: # <u>1</u> Proposed/Unsigned Order) (Young, John) (Entered: 08/05/2014)
08/08/2014	<u>21</u>	Order Granting Motion For Leave to File Reply in Support of Motion to Dismiss (related document(s): <u>19</u> Motion for Leave to File). (saj)

DATE	#	PROCEEDINGS
		(Entered: 08/08/2014)
11/04/2014	<u>22</u>	Order Denying FDIC's Motion to Dismiss (related document (s): <u>12</u> Motion to Dismiss Adversary Proceeding). (saj) (Entered: 11/04/2014)
11/25/2014	<u>25</u>	Answer to Complaint, Counterclaim by Federal Deposit Insurance Corporation, in its capacity as Receiver for United Western Bank against Federal Deposit Insurance Corporation, in its capacity as Receiver for United Western Bank Filed by John F. Young on behalf of Federal Deposit Insurance Corporation, in its capacity as Receiver for United Western Bank (related document(s) <u>1</u> Complaint). (Young, John) (Entered: 11/25/2014)
12/16/2014	<u>26</u>	Reply Filed by Mark E. Haynes on behalf of Simon E. Rodriguez (related document(s): <u>25</u> Answer to Complaint, Counterclaim). (Haynes, Mark) (Entered: 12/16/2014)

DATE	#	PROCEEDINGS
		12/16/2014)
10/30/2015	<u>39</u>	Motion For Summary Judgment Filed by John F. Young on behalf of Federal Deposit Insurance Corporation, in its capacity as Receiver for United Western Bank. (Young, John) (Entered: 10/30/2015)
10/30/2015	<u>40</u>	Support Brief/Memorandum Filed by John F. Young on behalf of Federal Deposit Insurance Corporation, in its capacity as Receiver for United Western Bank (related document(s) <u>39</u> Motion for Summary Judgment). (Attachments: # <u>1</u> Exhibit A # <u>2</u> Exhibit B # <u>3</u> Exhibit C # <u>4</u> Exhibit D) (Young, John) (Entered: 10/30/2015)
10/30/2015	<u>41</u>	Supporting Document Filed by John F. Young on behalf of Federal Deposit Insurance Corporation, in its capacity as Receiver for United Western Bank (related document(s) <u>40</u> Support Brief/Memorandum).

DATE	#	PROCEEDINGS
		(Attachments: # <u>1</u> Exhibit D (rescanned)) (Young, John) (Entered: 10/30/2015)
10/30/2015	<u>44</u>	Motion For Summary Judgment Filed by Mark E. Haynes on behalf of Simon E. Rodriguez. (Haynes, Mark) (Entered: 10/30/2015)
10/30/2015	<u>45</u>	Support Brief/Memorandum Filed by Mark E. Haynes on behalf of Simon E. Rodriguez (related document(s) <u>44</u> Motion for Summary Judgment). (Attachments: # <u>1</u> Exhibit A # <u>2</u> Exhibit B # <u>3</u> Exhibit C # <u>4</u> Exhibit D # <u>5</u> Exhibit E # <u>6</u> Exhibit F) (Haynes, Mark) (Entered: 10/30/2015)
11/20/2015	<u>47</u>	Response Filed by Mark E. Haynes on behalf of Simon E. Rodriguez (related document(s): <u>39</u> Motion for Summary Judgment). (Haynes, Mark) (Entered: 11/20/2015)
11/20/2015	<u>48</u>	Response Filed by John F. Young on behalf of Federal Deposit Insurance Corporation, in its capacity

DATE	#	PROCEEDINGS
		as Receiver for United Western Bank (related document(s): <u>42</u> Motion for Summary Judgment). (Young, John) (Entered: 11/20/2015)
12/18/2015	<u>52</u>	Reply Filed by John F. Young on behalf of Federal Deposit Insurance Corporation, in its capacity as Receiver for United Western Bank (related document(s): <u>47</u> Response). (Young, John) (Entered: 12/18/2015)
12/18/2015	<u>53</u>	Statement of Position of Federal Deposit Insurance Corporation as Receiver for United Western Bank Filed by John F. Young on behalf of Federal Deposit Insurance Corporation, in its capacity as Receiver for United Western Bank (related document(s): <u>25</u> Answer to Complaint, Counterclaim). (Young, John) (Entered: 12/18/2015)
12/18/2015	<u>54</u>	Reply Filed by Mark E. Haynes on behalf of Simon E. Rodriguez (related

DATE	#	PROCEEDINGS
02/10/2016	<u>56</u>	document(s): <u>44</u> Motion for Summary Judgment). (Haynes, Mark) (Entered: 12/18/2015)
09/16/2016	<u>57</u>	Minutes of Proceedings Oral Argument on Cross Motions for Summary Judgment. (related document(s) <u>39</u> Motion for Summary Judgment, <u>42</u> Motion for Summary Judgment). (saj). Modified on 9/22/2016 (sd). SARD (Entered: 02/11/2016)
09/16/2016	<u>58</u>	Opinion and Order on Cross Motions for Summary Judgment (related document(s): <u>39</u> Motion for Summary Judgment, <u>44</u> Motion for Summary Judgment). (saj) (Entered: 09/16/2016)
09/16/2016	<u>58</u>	Judgment For Simon E. Rodrigues [sic], Chapter 7 Trustee Against Federal Deposit Insurance Corporation, in its capacity as Receiver of United Western Bank (related document(s) <u>57</u> Order on Motion For Summary

DATE	#	PROCEEDINGS
		Judgment, Order on Motion For Summary Judgment). (saj) (Entered: 09/16/2016)
09/23/2016	<u>60</u>	Motion to Amend Filed by John F. Young on behalf of Federal Deposit Insurance Corporation, in its capacity as Receiver for United Western Bank (related document(s): <u>57</u> Order on Motion For Summary Judgment, Order on Motion For Summary Judgment, <u>58</u> Judgment for AP Case). (Attachments: # <u>1</u> Exhibit A to Motion to Amend # <u>2</u> Proposed/Unsigned Order re Motion to Amend or Alter Judgment and Relief from Judgment and Order # <u>3</u> Proposed/Unsigned Order re Granting Stay Pending Disposition of the Motion to Alter or Amend Judgment) (Young, John) (Entered: 09/23/2016)
09/26/2016	<u>61</u>	Order Granting, in Part, Motion to Alter or Amend and Denying Request for a Stay Pending Ruling (related document(s): <u>60</u>

DATE	#	PROCEEDINGS
09/30/2016	<u>62</u>	<p>Motion to Amend). (saj) (Entered: 09/26/2016)</p> <p>Notice of Appeal and Statement of Election to District Court Filed by John F. Young on behalf of Federal Deposit Insurance Corporation, in its capacity as Receiver for United Western Bank (related document(s)<u>57</u> Order on Motion For Summary Judgment, Order on Motion For Summary Judgment, <u>58</u> Judgment for AP Case, <u>61</u> Order on Motion to Amend). Appellant Designation due by 10/14/2016. Appellee designation due by 10/28/2016. (Young, John) Modified on 10/3/2016 (mjp). (Entered: 09/30/2016)</p>
10/24/2016	<u>71</u>	<p>Transcript of Hearing Held on Status/Scheduling Conference. Date Of Hearing: 2/18/2015 before Judge A. Bruce Campbell. THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY</p>

DATE	#	PROCEEDINGS
10/24/2016	<u>73</u>	<p>AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING, TRANSCRIPT RELEASE DATE IS 1/23/2017. Until that time the transcript may be viewed at the Bankruptcy Court or a copy may be obtained from the official court transcriber. Requested by John F. Young on 10/10/2016. Transcribed and filed by eScribers, LLC. Total cost of Transcript \$157.25 (RE: related document(s) <u>29</u> Minutes of Proceedings/Minute Order). Notice of Intent to Request Redaction Deadline Due By 10/31/2016. Redaction Request Due By 11/14/2016. Redacted Transcript Submission Due By 11/25/2016. Transcript Access Will Be Restricted Through 1/23/2017. (mjp) (Entered: 10/24/2016)</p> <p>Transcript of Hearing Held on Status/Scheduling Conference. Date Of Hearing: 12/3/2015 before</p>

DATE	#	PROCEEDINGS
		<p data-bbox="764 489 1192 1715"> Judge Thomas B. McNamara. THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING, TRANSCRIPT RELEASE DATE IS 1/23/2017. Until that time the transcript may be viewed at the Bankruptcy Court or a copy may be obtained from the official court transcriber. Requested by John F. Young on 10/10/2016. Transcribed and filed by eScribers, LLC. Total cost of Transcript \$123.25 (RE: related document(s) <u>51</u> Minutes of Proceedings/Minute Order). Notice of Intent to Request Redaction Deadline Due By 10/31/2016. Redaction Request Due By 11/14/2016. Redacted Transcript Submission Due By 11/25/2016. Transcript Access Will Be Restricted Through 1/23/2017. (mjp) (Entered: 10/24/2016) </p>

DATE	#	PROCEEDINGS
10/24/2016	<u>75</u>	<p>Transcript of Hearing Held on Status/Scheduling Conference. Date Of Hearing: 2/10/2016 before Judge Thomas B. McNamara. THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING, TRANSCRIPT RELEASE DATE IS 1/23/2017. Until that time the transcript may be viewed at the Bankruptcy Court or a copy may be obtained from the official court transcriber. Requested by John F. Young on 10/10/2016. Transcribed and filed by eScribers, LLC. Total cost of Transcript \$467.50 (RE: related document(s) <u>56</u> Minutes of Proceedings/Minute Order). Notice of Intent to Request Redaction Deadline Due By 10/31/2016. Redaction Request Due By 11/14/2016. Redacted Transcript Submission Due By</p>

DATE	#	PROCEEDINGS
		11/25/2016. Transcript Access Will Be Restricted Through 1/23/2017. (mjp) (Entered: 10/24/2016)

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO

Case No. 12-13815-ABC
Chapter 7

Adv. Proc. No. 14-01191-TBM

IN RE:
UNITED WESTERN BANCORP, INC.
TAX ID/EIN: 84-1233715,

Debtor,

v.

SIMON E. RODRIGUEZ, IN HIS CAPACITY AS CHAPTER 7
TRUSTEE FOR THE BANKRUPTCY ESTATE OF UNITED
WESTERN BANCORP, INC.,

Plaintiff.

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, IN ITS
CAPACITY AS RECEIVER FOR UNITED WESTERN BANK,

Defendant.

**COMPLAINT ASSERTING OBJECTION
TO CLAIM AND COUNTERCLAIMS FOR
DECLARATORY RELIEF AND RECOVERY
OF ASSETS OF THE ESTATE**

Plaintiff Simon Rodriguez, in his capacity as Chapter 7 Trustee for the bankruptcy estate of United Western Bancorp, Inc. ("Plaintiff") states the following for his complaint and counterclaim against

Defendant Federal Deposit Insurance Corporation, in its capacity as Receiver for United Western Bank (“Defendant” or “FDIC-R”).

JURISDICTION AND VENUE

1. This adversary proceeding arises out of and is related to the bankruptcy case *In re United Western Bancorp, Inc.*, Case No. 12-13815 ABC (the “Bankruptcy Case”), which was commenced on March 2, 2012 and is currently pending in the United States Bankruptcy Court for the District of Colorado (the “Court”).

2. This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157(a) and 1334(b).

3. In addition, this adversary proceeding involves determinations as to the property of the Western Bancorp, Inc. bankruptcy estate (the “Bankruptcy Estate”), over which this Court has exclusive jurisdiction.

4. This adversary proceeding is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (B), (C), (E), and (O).

5. Venue is proper in this Court pursuant to 28 U.S.C. § 1408(a).

6. This Complaint Asserting Objection to Claim and Counterclaims for Declaratory Relief and Recovery of Assets of the Estate (“Complaint”) is properly brought by adversary proceeding pursuant to FRBP 3007(b) and 7001(9).

PARTIES

7. The Bankruptcy Case was filed on March 2, 2012 pursuant to Chapter 11 of the United States

Bankruptcy Code, 11 U.S.C. § 101, *et seq.* (the “Bankruptcy Code”).

8. The Bankruptcy Case was converted to a case under Chapter 7 of the Bankruptcy Code on April 15, 2013.

9. Plaintiff is the duly appointed Chapter 7 Trustee for the Bankruptcy Estate.

10. Plaintiff has standing to bring the claims and counterclaims asserted herein on behalf of the Bankruptcy Estate.

11. On January 21, 2011, the Office of Thrift Supervision closed United Western Bank and appointed FDIC-R as Receiver.

12. United Western Bank is a wholly owned subsidiary of United Western Bancorp, Inc. (the “Debtor”).

13. On August 30, 2012, FDIC-R filed Proof of Claim No. 29-1 in the Bankruptcy Case (the “Claim”), a copy of which is attached as Exhibit A.

14. Plaintiff sues FDIC-R to request that the Claim be disallowed, or the claim for a certain tax refund described below be allowed only as a non-priority, unsecured pre-petition claim. Plaintiff also brings claims to declare the tax refund described below an asset of the Bankruptcy Estate and to recover that asset.

FACTS COMMON TO ALL CLAIMS

15. The Debtor is a holding company with several subsidiaries, among these subsidiaries is United Western Bank (“Bank”), for which FDIC-R is Receiver.

16. The Debtor and its affiliate subsidiaries, including Bank, were members of an “affiliated group” within the meaning of Section 1504(a) of the Internal Revenue Code of 1986 and filed consolidated federal income tax returns.

17. The Debtor and its affiliates subsidiaries, including Bank, entered into a Tax Allocation Agreement dated January 1, 2008 (the “Agreement”), a copy of which is attached as Exhibit B. The Agreement provides that the Debtor will file the consolidated returns on behalf of itself and the affiliates, including Bank. As to the funding of tax payments, Section A of the Agreement provides as its “General Rule”:

Except as specifically set forth herein to the contrary, each Affiliate shall pay UWBI [the Debtor] an amount equal to the federal income tax liability such Affiliate would have incurred were it to file a separate return If a regulated first-tier Affiliate incurs a net operating loss or excess tax credits, the regulated Affiliate is entitled to a refund equal to the amount it would have been entitled to receive had it not joined in the filing of a consolidated return with UWBI.

18. The affiliates, including Bank, in Section G appointed the Debtor their agent “for the purpose of filing such consolidated Federal income tax returns for the UWBI group as UWBI may elect to file and making any election, application or taking any action in connection therewith on behalf of the Affiliates. Each such Affiliate hereby consents to the filing of

any such returns and the making of any such elections and applications.”

19. The Debtor is not appointed agent for any other purpose.

20. There is no principal agent relationship between the Debtor and Bank created by the Agreement or otherwise.

21. The Agreement provides the following as to refunds in Section H1:

In the event of any adjustment to the tax returns of the Group as filed (by reason of an amended return, claim for refund, or an audit by a taxing authority), the liability of the parties to this Agreement shall be re-determined to give effect to any such adjustment as if it had been made as part of the original computation of tax liability, and payments between the appropriate parties shall be made within 10 business days after any such payments are made or refunds are received, or in the case of contested proceedings, within 10 business days after a final determination of the contest.

22. Thus, by the terms of the Agreement, the Debtor’s sole obligation with regard to any tax refund received by the Debtor that results in an adjustment under the Agreement in favor of an affiliate, including Bank, results in an account payable reflecting the debtor/creditor relationship created by the Agreement for which payment is to be made within 10 business days.

23. The Debtor does not hold any such refunds in trust for its Affiliates.

24. The Debtor filed a federal income tax return for the consolidated group pursuant to the Agreement for tax year 2009 (the "Tax Return").

25. The Tax Return was examined by the Internal Revenue Service which will result, the Debtor is informed and believes, in a refund to the Debtor up to the approximate amount of \$4,652,361 (the "Refund").¹ Pursuant to the Tax Return and the Agreement, the Refund is to be paid to the Debtor.

26. The Claim filed by FDIC-R asserts that the Refund is the property of FDIC-R and that the Debtor would hold such a refund as its agent and fiduciary, which assertion is false. There is no trust or other fiduciary relationship between the Debtor and Bank. By using such terms as "liability," "adjustment" and "payments" the Agreement only establishes a debtor/creditor relationship between the Debtor and Bank in the event of a refund, just as it establishes a debtor/creditor relationship as to Bank's liability to remit its share of the taxes to the Debtor.

27. The Claim also asserts what appear to be several contingent claims for fraudulent transfers/unlawful dividends, insurance proceeds, and miscellaneous other claims. The Claim does not offer any evidence supporting such claims nor is Plaintiff aware of any such evidence.

¹ This issue is currently under administrative appeal within the IRS. The Debtor is informed and believes that this process will either result in a successful appeal or an agreed settlement.

28. All conditions precedent to the bringing of this adversary proceeding have occurred or been performed.

**FIRST CLAIM FOR RELIEF
(Declaratory Judgment)**

29. Plaintiff realleges and incorporates herein by reference the preceding allegations of this Complaint.

30. An actual controversy has arisen between the Plaintiff and the FDIC-R regarding the entitlement of the Debtor to the Refund. Plaintiff seeks a declaratory judgment pursuant to 28 U.S.C. § 2201 to resolve this actual, real and immediate controversy.

31. The Agreement does not create any trust running from the Debtor to the Affiliates concerning tax refunds received by the Debtor on consolidated returns filed for the group. Pursuant to the Agreement, any such refunds would not be held by the Debtor in any fiduciary capacity.

32. The Agreement creates a debtor-creditor relationship between the Debtor and any Affiliate entitled to all or a portion of a tax refund received by the Debtor pursuant to the Agreement.

33. Ownership of any tax refunds received pursuant to consolidated returns filed by the Debtor is vested in the Debtor. FDIC-R is a non-priority, general unsecured claimant as to any tax refunds all or a portion of which it is entitled to under the Agreement.

34. Pursuant to 11 U.S.C. § 541, any such tax refunds are property of the Bankruptcy Estate.

35. Accordingly, Plaintiff is entitled to a judgment declaring that any tax refunds it may receive under the Agreement pursuant to tax returns the Debtor filed for the Affiliates in the consolidated group, including Bank, are the property of the Bankruptcy Estate.

SECOND CLAIM FOR RELIEF
(Turnover of Property – 11 U.S.C. § 542)

36. Plaintiff realleges and incorporates herein by reference the preceding allegations of this Complaint.

37. The Refund is property of the Bankruptcy Estate pursuant to 11 U.S.C. §541.

38. FDIC-R is obligated by 11 U.S.C. § 542 to turn over the Refund or any part thereof it possesses or may become in possession of in the future.

THIRD CLAIM FOR RELIEF
(Objection to Claim of FDIC-R)

39. Plaintiff realleges and incorporates herein by reference the preceding allegations of this Complaint.

40. Plaintiff objects pursuant to 11 U.S.C. § 502(b) to FDIC-R Claim No. 28-1 in its entirety except to the extent that it presents a non-priority, general unsecured pre-petition claim for all or a portion of the Refund.

41. FDIC-R asserts that the Refund will be held by Plaintiff as an agent or fiduciary in trust for FDIC-R.

42. As stated above in the Complaint, the position of the FDIC-R is wrong; pursuant to the Agreement the Refund constitutes property of the Bankruptcy

Estate. Under the Agreement the FDIC-R at best has a pre-petition, unsecured contractual right to payment of its share of the Refund as computed pursuant to the Agreement.

43. Any claim of trust or fiduciary or agency capacity of the Debtor for Bank is false and unenforceable under the terms of the Agreement, which creates no such relationship.

44. Further, the Refund constitutes property of the Bankruptcy Estate that would be recoverable under 11 U.S.C § 542 if held by FDIC-R.

45. For the foregoing reasons the claim of ownership of the Refund by FDIC-R or the assertion of any property interest in the Refund or any interest other than an unsecured right of payment under the Agreement must be disallowed.

46. The Claim also asserts a claim to avoid fraudulent transfers or recover unlawful dividends made by Bank to the Debtor. FDIC-R fails to state a claim and does not allege that any fraudulent transfers or unlawful dividends were actually made to the Debtor. Plaintiff is aware of no evidence supporting such claims. That part of the Claim should be disallowed.

47. The Claim also asserts a claim of ownership of any unearned insurance premiums paid on any policy on which Bank was a named insured or intended beneficiary. The Claim fails to state a claim in that there is no allegation that any such unearned premiums actually exist. Plaintiff is not aware of any such unearned premiums.

48. To the extent unearned insurance premiums are or will be in the possession of the Bankruptcy

Estate on account of premiums paid by the Debtor, such premiums are property of the Bankruptcy Estate. This part of FDIC-R's Claim should be disallowed.

49. The Claim also asserts a claim as to any insurance payments paid on account of a covered loss that damaged Bank. The Claim fails to state a claim and does not allege that any such payment actually has been made. To the extent any insurance payment has been or will be made to the Debtor on account of policies the Debtor paid for such payment is the property of the Bankruptcy Estate, not FDIC-R. This part of the Claim should be disallowed.

50. FDIC-R also asserts "Other Claims," the first two of which it characterizes as "protective" claims for contingencies that have not occurred. These claims should be disallowed unless FDIC-R can produce evidence that these contingencies have occurred or will occur and that it would be entitled to the funds described.

51. The Claim asserts a claim for any assets owned by Bank but held by the Debtor. To the best of Plaintiff's knowledge, information and belief there are no such assets and this part of the Claim should be disallowed.

52. FDIC-R asserts it may have claims of breach of fiduciary duty against former officers and directors of the Debtor. Even if this may prove to be the case, it does not provide a basis for a claim against the Bankruptcy Estate. This part of the Claim should be disallowed.

53. The Claim asserts an “unliquidated claim” for indemnification or contribution with respect to unspecified future litigation. Plaintiff is aware of no circumstances that would give rise to claims of indemnification or contribution by Bank against the Bankruptcy Estate and this part of the Claim should be disallowed.

54. FDIC-R asserts a claim as to any restitution that may be ordered and paid to the Bankruptcy Estate and claims such payments would be held in trust by the Bankruptcy Estate. There is no legal or contractual basis for such a trust relationship and this part of the Claim should be disallowed.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests the following relief:

- A. Disallow the FDIC-R Claim in its entirety except for a non-priority, general unsecured, pre-petition claim for a share of the Refund to be determined in accordance with the Agreement;
- B. A Declaration that all tax refunds, including the Refund, are property of the Bankruptcy Estate;
- C. Order the FDIC-R to turn over any part of any tax refund, including the Refund, it may come into possession of in the future;
- D. An award of Plaintiff’s attorneys fees and other costs of prosecuting this proceeding as permitted by law;
- E. For such other and further relief as the Court deems appropriate in the circumstances.

Respectfully submitted April 16, 2014.

IRELAND STAPLETON
PRYOR & PASCOE, PC

/s/ Kimberley H. Tyson

Mark E. Haynes, #12312

Kimberley H. Tyson, #18592

717 17th Street, Suite 2800

Denver, CO 80202

Telephone: (303) 623-2700

Facsimile: (303) 623-2062

mhaynes@irelandstapleton.com

ktyson@irelandstapleton.com

Attorneys for Plaintiff Simon
Rodriguez, in his capacity as
Chapter 7 Trustee for the
bankruptcy estate of United
Western Bancorp, Inc.

PROOF OF CLAIM
B10 (OFFICIAL FORM 10) (12/11)

B10 (Official Form 10) (12/11)		PROOF OF CLAIM
UNITED STATES BANKRUPTCY COURT District of Colorado		
Name of Debtor: United Western Bancorp, Inc. Matrix Bancorp Trading, Inc. Matrix Funding Corp. JOINTLY ADMINISTERED UNDER	Case Number: 12-13815 12-13822 12-13824 12-13815	
NOTE: <i>Do not use this form to make a claim for an administrative expense that arises after the bankruptcy filing. You may file a request for payment of an administrative expense according to 11 U.S.C. § 503.</i>		
Name of Creditor (the person or other entity to whom the debtor owes money or property): Federal Deposit Insurance Corporation, as Receiver of United Western Bank		COURT USE ONLY
Name and address where notices should be sent: Alan P. Solow DLA Piper LLP (US) 203 North LaSalle Street, Suite 1900, Chicago, IL 60601 Telephone number: (312) 368-3370 email: alan.solow@dlapiper.com		<input type="checkbox"/> Check this box if this claim amends a previously filed claim. Court Claim Number: _____ (If known) Filed on: _____
Name and address where payment should be sent (if different from above): Telephone number: _____ email: _____		<input type="checkbox"/> Check this box if you are aware that anyone else has filed a proof of claim relating to this claim. Attach copy of statement giving particulars.
1. Amount of Claim as of Date Case Filed: \$ <u>See Attachment</u>		
If all or part of the claim is secured, complete item 4. If all or part of the claim is entitled to priority, complete item 5. <input type="checkbox"/> Check this box if the claim includes interest or other charges in addition to the principal amount of the claim. Attach a statement that itemizes interest or charges.		
2. Basis for Claim: <u>See Attachment</u> (See instruction #2)		

3. Last four digits of any number by which creditor identifies debtor: 	3a. Debtor may have scheduled account as: <hr style="width: 80%; margin-left: 0;"/> <small>(See instruction #3a)</small>	3b. Uniform Claim Identifier (optional): <hr style="width: 80%; margin-left: 0;"/> <small>(See instruction #3b)</small>
4. Secured Claim <small>(See instruction #4)</small> Check the appropriate box if the claim is secured by a lien on property or a right of setoff, attach required redacted documents, and provide the requested information.		Amount of arrearage and other charges, as of the time case was filed, included in secured claim, if any: \$ _____
Nature of property or right of setoff: <input type="checkbox"/> Real Estate <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Other Describe: Value of Property: \$ _____		Basis for perfection: _____ Amount of Secured Claim: \$ _____ Amount Unsecured: \$ _____
Annual Interest Rate _____ % <input type="checkbox"/> Fixed or <input type="checkbox"/> Variable (when case was filed)		
5. Amount of Claim Entitled to Priority under 11 U.S.C. § 507 (a). If any part of the claim falls into one of the following categories, check the box specifying the priority and state the amount.		
<input type="checkbox"/> Domestic support obligations under 11 U.S.C. § 507 (a)(1)(A) or (a)(1)(B).	<input type="checkbox"/> Wages, salaries, or commissions (up to \$11,725*) earned within 180 days before the case was filed or the debtor's business ceased, whichever is earlier - 11 U.S.C. § 507 (a)(4).	<input type="checkbox"/> Contributions to an employee benefit plan - 11 U.S.C. § 507 (a)(5).
<input type="checkbox"/> Up to \$2,600* of deposits toward services for purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. § 507 (a)(7).	<input type="checkbox"/> Taxes or penalties owed to governmental units - 11 U.S.C. § 507 (a)(8).	<input type="checkbox"/> Other - Specify applicable paragraph of 11 U.S.C. § 507 (a)(____)
		Amount entitled to priority: \$ _____
<i>*Amounts are subject to adjustment on 4/1/13 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.</i>		

<p>6. Credits. The amount of all payments on this claim has been credited for the purpose of making this proof of claim. (See instruction #6)</p>				
<p>7. Documents: Attached are redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, security agreements. If the claim is secured, box 4 has been completed, and redacted copies of documents providing evidence of perfection of a security interest are attached. (See instruction #7, and the definition of "redacted".)</p> <p>DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.</p> <p>If the documents are not available, please explain:</p>				
<p>8. Signature: (See instruction #8)</p> <p>Check the appropriate box.</p> <table style="width: 100%; border: none;"> <tr> <td style="width: 25%; vertical-align: top;"> <input type="checkbox"/> I am the creditor. </td> <td style="width: 25%; vertical-align: top;"> <input checked="" type="checkbox"/> I am the creditor's authorized agent. (Attach copy of power of attorney, if any.) </td> <td style="width: 25%; vertical-align: top;"> <input type="checkbox"/> I am the trustee, or their authorized agent. (See Bankruptcy Rule 3004.) </td> <td style="width: 25%; vertical-align: top;"> <input type="checkbox"/> I am a guarantor, surety, indorser, or other codebtor. (See Bankruptcy Rule 3005.) </td> </tr> </table> <p>I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.</p> <p>Print Name: <u>David Cooley</u></p> <p>Title: <u>Associate Director- DRR Business Operations Support</u></p> <p>Company: <u>Federal Deposit Insurance Corporation</u></p> <p>Address and telephone number (if different from notice address above):</p> <p style="margin-left: 40px;"><u>3501 Fairfax Drive</u></p> <p style="margin-left: 40px;"><u>Arlington, VA 22226</u></p> <p>Telephone number: (972) 761-8638 email: dacooley@fdic.gov</p>	<input type="checkbox"/> I am the creditor.	<input checked="" type="checkbox"/> I am the creditor's authorized agent. (Attach copy of power of attorney, if any.)	<input type="checkbox"/> I am the trustee, or their authorized agent. (See Bankruptcy Rule 3004.)	<input type="checkbox"/> I am a guarantor, surety, indorser, or other codebtor. (See Bankruptcy Rule 3005.)
<input type="checkbox"/> I am the creditor.	<input checked="" type="checkbox"/> I am the creditor's authorized agent. (Attach copy of power of attorney, if any.)	<input type="checkbox"/> I am the trustee, or their authorized agent. (See Bankruptcy Rule 3004.)	<input type="checkbox"/> I am a guarantor, surety, indorser, or other codebtor. (See Bankruptcy Rule 3005.)	

Penalty for presenting fraudulent: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

<p>INSTRUCTIONS FOR PROOF OF CLAIM FORM</p> <p><i>The instructions and definitions below are general explanations of the law. In certain circumstances, such as bankruptcy cases not filed voluntarily by the debtor, exceptions to these general rules may apply.</i></p> <p>Items to be completed in Proof of Claim form</p>
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<p>Court, Name of Debtor, and Case Number: Fill in the federal judicial district in which the bankruptcy case was filed (for example, Central District of California), the debtor's full name, and the case number. If the creditor received a notice of the case from the bankruptcy court, all of this information is at the top of the notice.</p> <p>Creditor's Name and Address: Fill in the name of the person or entity asserting a claim and the name and address of the person who should receive notices issued during the bankruptcy case. A separate space is provided for the payment address if it differs from the notice address. The creditor has a continuing obligation to keep the court informed of its current address. See Federal Rule of Bankruptcy Procedure (FRBP) 2002(g).</p> <p>1. Amount of Claim as of Date Case Filed: State the total amount owed to the creditor on the date of the bankruptcy filing. Follow the instructions concerning whether to complete items 4 and 5. Check the box if interest or other charges are included in the claim.</p> <p>2. Basis for Claim: State the type of debt or how it was incurred. Examples include goods sold, money loaned, services performed, personal injury/wrongful death, car loan, mortgage note, and credit card. If the claim is based on delivering health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information. You may be required to provide additional disclosure if an interested party objects to the claim.</p>	<p>4. Secured Claim: Check whether the claim is fully or partially secured. Skip this section if the claim is entirely unsecured. (See Definitions.) If the claim is secured, check the box for the nature and value of property that secures the claim, attach copies of lien documentation, and state, as of the date of the bankruptcy filing, the annual interest rate (and whether it is fixed or variable), and the amount past due on the claim.</p> <p>5. Amount of Claim Entitled to Priority Under 11 U.S.C. § 507 (a). If any portion of the claim falls into any category shown, check the appropriate box(es) and state the amount entitled to priority. (See Definitions.) A claim may be partly priority and partly non-priority. For example, in some of the categories, the law limits the amount entitled to priority.</p> <p>6. Credits: An authorized signature on this proof of claim serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.</p> <p>7. Documents: Attach redacted copies of any documents that show the debt exists and a lien secures the debt. You must also attach copies of documents that evidence perfection of any security interest. You may also attach a summary in addition to the documents themselves. FRBP 3001(c) and (d). If the claim is based on delivering health care goods or services, limit disclosing confidential health care information. Do not send original documents, as attachments may be destroyed after scanning.</p>
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<p>3. Last Four Digits of Any Number by Which Creditor Identifies Debtor: State only the last four digits of the debtor's account or other number used by the creditor to identify the debtor.</p> <p>3a. Debtor May Have Scheduled Account As: Report a change in the creditor's name, a transferred claim, or any other information that clarifies a difference between this proof of claim and the claim as scheduled by the debtor.</p> <p>3b. Uniform Claim Identifier: If you use a uniform claim identifier, you may report it here. A uniform claim identifier is an optional 24-character identifier that certain large creditors use to facilitate electronic payment in chapter 13 cases.</p>	<p>8. Date and Signature: The individual completing this proof of claim must sign and date it. FRBP 9011. If the claim is filed electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what constitutes a signature. If you sign this form, you declare under penalty of perjury that the information provided is true and correct to the best of your knowledge, information, and reasonable belief. Your signature is also a certification that the claim meets the requirements of FRBP 9011(b). Whether the claim is filed electronically or in person, if your name is on the signature line, you are responsible for the declaration. Print the name and title, if any, of the creditor or other person authorized to file this claim. State the filer's address and telephone number if it differs from the address given on the top of the form for purposes of receiving notices. If the claim is filed by an authorized agent, attach a complete copy of any power of attorney, and provide both the name of the individual filing the claim and the name of the agent. If the authorized agent is a servicer, identify the corporate servicer as the company. Criminal penalties apply for making a false statement on a proof of claim.</p>
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DEFINITIONS	INFORMATION
<p>Debtor A debtor is the person, corporation, or other entity that has filed a bankruptcy case.</p> <p>Creditor A creditor is a person, corporation, or other entity to whom debtor owes a debt that was incurred before the date of the bankruptcy filing. See 11 U.S.C. §101 (10).</p> <p>Claim A claim is the creditor's right to receive payment for a debt owed by the debtor on the date of the bankruptcy filing. See 11 U.S.C. §101 (5). A claim may be secured or unsecured.</p> <p>Proof of Claim A proof of claim is a form used by the creditor to indicate the amount of the debt owed by the debtor on the date of the bankruptcy filing. The creditor must file the form with the clerk of the same bankruptcy court in which the bankruptcy case was filed.</p> <p>Secured Claim Under 11 U.S.C. § 506 (a) A secured claim is one backed by a lien on property of the debtor. The claim is secured so long as the creditor has the right to be paid from the property prior to other creditors. The amount of the secured claim cannot exceed the value of the property.</p>	<p>A claim also may be secured if the creditor owes the debtor money (has a right to setoff).</p> <p>Unsecured Claim An unsecured claim is one that does not meet the requirements of a secured claim. A claim may be partly unsecured if the amount of the claim exceeds the value of the property on which the creditor has a lien.</p> <p>Claim Entitled to Priority Under 11 U.S.C. § 507 (a) Priority claims are certain categories of unsecured claims that are paid from the available money or property in a bankruptcy case before other unsecured claims.</p> <p>Redacted A document has been redacted when the person filing it has masked, edited out, or otherwise deleted, certain information. A creditor must show only the last four digits of any social-security, individual's tax-identification, or financial-account number, only the initials of a minor's name, and only the year of any person's date of birth. If the claim is based on the delivery of health care goods or services, limit the disclosure of the goods or services so as to avoid</p> <p>Acknowledgment of Filing of Claim To receive acknowledgment of your filing, you may either enclose a stamped self-addressed envelope and a copy of this proof of claim or you may access the court's PACER system (www.pacer.psc.uscourts.gov) for a small fee to view your filed proof of claim.</p> <p>Offers to Purchase a Claim Certain entities are in the business of purchasing claims for an amount less than the face value of the claims. One or more of these entities may contact the creditor and offer to purchase the claim. Some of the written communications from these entities may easily be confused with official court documentation or communications from the debtor. These entities do not represent the bankruptcy court or the debtor. The creditor has no obligation to sell its claim. However, if the creditor decides to sell its claim, any transfer of such claim is subject to FRBP 3001(e), any applicable provisions of the Bankruptcy Code (11 U.S.C. § 101 <i>et seq.</i>), and any applicable orders of the bankruptcy court.</p>

<p>Any amount owed to the creditor in excess of the value of the property is an unsecured claim. Examples of liens on property include a mortgage on real estate or a security interest in a car. A lien may be voluntarily granted by a debtor or may be obtained through a court proceeding. In some states, a court judgment is a lien.</p>	<p>embarrassment or the disclosure of confidential health care information.</p> <p>Evidence of Perfection</p> <p>Evidence of perfection may include a mortgage, lien, certificate of title, financing statement, or other document showing that the lien has been filed or recorded.</p>
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Addendum to Proof of Claim
The Federal Deposit Insurance Corporation, as
Receiver for United Western Bank,
Denver, Colorado

A. Introduction

1. This proof of claim is submitted by the Federal Deposit Insurance Corporation, as Receiver (the “FDIC-Receiver”) for United Western Bank headquartered in Denver, Colorado (“United Western Bank”). On January 21, 2011, United Western Bank was closed by the Office of Thrift Supervision, and the FDIC-Receiver was appointed as its receiver. Concurrently, the FDIC-Receiver entered into a Purchase and Assumption Agreement dated as of January 21, 2011 with First Citizens Bank & Trust Company (“First Citizens”), pursuant to which First Citizens purchased certain assets of United Western Bank and assumed liabilities (the “P&A Agreement”). A copy of the P&A Agreement is publicly available on the FDIC’s website, www.fdic.gov.

2. Debtor United Western Bancorp, Inc. (the “Debtor” or “UWB”) is the holding company of United Western Bank. The Debtor commenced this chapter 11 case on March 2, 2012 (the “Petition Date”).

3. In its capacity as receiver, the Federal Deposit Insurance Corporation (the “FDIC”) acts, *inter alia*, to protect insured depositors and creditors of failed depository institutions. Pursuant to 12 U.S.C. § 1821(d)(2), the FDIC-Receiver succeeded by operation of law to the rights, titles, powers, and privileges, including legal claims, of United Western Bank, and of any stockholder, member,

accountholder, depositor, officer or director of United Western Bank. The FDIC-Receiver is entitled to a superpriority with respect to any portion of its claims relating to the avoidance and recovery of fraudulent transfers under 12 U.S.C. § 1821(d)(17). In addition, some claims are entitled to priority under 11 U.S.C. § 507, including priority under 11 U.S.C. § 507(a)(9), and all or part of the FDIC-Receiver's claims may be secured under 11 U.S.C. §§ 506 and 553.

4. Certain of the claims asserted herein may have been sold to First Citizens under the P&A Agreement and, to that extent, are asserted by the FDIC-Receiver in accordance with the P&A Agreement. Nothing in this proof of claim (i) alters in any respect the terms of the P&A Agreement or the schedules or exhibits thereto or (ii) should be construed as reflecting the FDIC-Receiver's interpretation of the P&A Agreement, including without limitation the assets or rights related to claims that may have been sold, or that First Citizens may claim to have been sold, pursuant to the P&A Agreement.

5. This proof of claim is being filed in order to avoid any contention that the FDIC-Receiver somehow has waived any rights it may have that may conflict with claims to ownership that may be asserted by the Debtor. Under 12 U.S.C. § 1821(d)(13)(D), "no court shall have jurisdiction over" --

- (i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the [FDIC] has been

appointed receiver, including assets which the [FDIC] may acquire from itself as such receiver; or

(ii) any claim relating to any act or omission of such institution or the [FDIC] as receiver.

12 U.S.C. § 1821(d)(13)(D). To the extent any matter set forth by the FDIC-Receiver in this proof of claim falls within the scope of the foregoing, the United States Bankruptcy Court for Colorado (the “Bankruptcy Court”) does not have jurisdiction. Instead, subject matter jurisdiction is limited to the United States District Courts for Colorado or for the District of Columbia in the manner provided for in the 12 U.S.C. § 1821(d)(6)(A). Further, under 12 U.S.C. § 1821(j), “no court may take any action . . . to restrain or affect the exercise of powers or functions of the [FDIC] as a conservator or receiver.” This limitation includes the bankruptcy courts.

6. A defense of lack of subject matter jurisdiction cannot be waived, and the FDIC-Receiver expressly reserves that defense as to any proceeding with respect to such matters that the Debtor may seek to initiate against it, all of which must be adjudicated in specified district courts and solely to the extent permitted under the provisions of 12 U.S.C. § 1821. The filing of this proof of claim does not in any way alter this defense to jurisdiction.

B. Tax-Related Claims

7. The FDIC-Receiver asserts claims arising from consolidated tax returns filed by UWB on behalf of, among others, United Western Bank and for tax related intercompany balances held by the Debtor,

including those that may have arisen under law or pursuant to any tax allocation agreement or tax sharing agreement between United Western Bank and UWB, among others. In filing tax returns and receiving tax refunds and other tax payments, the Debtor acts as agent and fiduciary for United Western Bank.

8. The FDIC-Receiver asserts claims arising from tax returns filed by UWB on behalf of United Western Bank and for tax related intercompany balances held by UWB in an amount of approximately \$4,847,000.00. In filing tax returns and receiving tax refunds and other tax payments, UWB acts as agent and fiduciary for United Western Bank. These refunds are owned by United Western Bank and are not assets of UWB. As such, United Western Bank's entitlement to such refunds is based on an ownership interest rather than as a claim against UWB. Alternatively, to the extent that United Western Bank's asserted right to such refunds is determined to be a claim against UWB, then United Western Bank does hereby assert a claim against UWB on account of any such refunds.

9. Any tax refunds and other such amounts received by the Debtor are or will be held in trust for United Western Bank and are not property of the Debtor's estate as a matter of law. The FDIC-Receiver reserves all rights relating to its claim for turnover of such assets.

10. Should there exist any agreement that purports to allow UWB to retain such tax refunds, the FDIC-Receiver reserves its right to repudiate such an agreement pursuant to 12 U.S.C. § 1821(e)

for any reason that it deems appropriate in its sole discretion.

11. Further, pursuant to the Internal Revenue Code, regulations promulgated thereunder, and state tax laws, as applicable, United Western Bank and the FDIC-Receiver have an independent right to pursue, contest, compromise, or settle any tax related adjustment or deficiency relating to United Western Bank, and the FDIC-Receiver expressly reserves its right to do so.

12. The FDIC-Receiver specifically reserves the right to litigate, prosecute, dispute, contest, compromise or settle any dispute, including any purported right to set off or offset claimed by the Debtor, that relates to tax refunds or other tax-related assets in the proper venue under title 12 of the United States Code ("Title 12"). Such claims and defenses are not subject to the jurisdiction of the Bankruptcy Court but are, rather, subject to the exclusive jurisdiction provided for under Title 12.

C. Fraudulent Transfers/Unlawful Dividends

13. Although its investigation is not yet complete, the FDIC-Receiver may avoid and recover fraudulent transfers within five years before the receivership, see 12 U.S.C. § 1821(d)(17), and in some instances longer periods under state law.

14. The FDIC-Receiver reserves all rights to recover property transferred, or the value of such property, from the initial transferee, the institution-affiliated party, or the person for whose benefit the transfer was made, or from any immediate or mediate transferee of any such initial transferee. The FDIC-Receiver's rights under 12 U.S.C.

§ 1821(d)(17) are superior to any rights of the Debtor or any other party (other than any party which is a federal agency) under title 11 of the United States Code. See 12 U.S.C. § 1821(d)(17).

15. Similarly, to the extent the FDIC-Receiver's claims relate to unlawful dividends paid, or other unlawful distributions made by United Western Bank, the FDIC-Receiver reserves the right to recover such amounts as provided for under applicable state laws.

D. Insurance Proceeds

16. Prior to the receivership, UWB and/or United Western Bank purchased insurance for which United Western Bank was, at least in part, a named insured or an intended beneficiary. With respect to any such insurance policy as to which this is an unearned premium, the FDIC-Receiver asserts a claim to ownership of all unearned premiums to the extent that the source of the premium payments was United Western Bank.

17. To the extent that a covered loss within the meaning of the relevant insurance policies has been suffered by United Western Bank, the FDIC-Receiver is entitled to all proceeds paid under applicable insurance coverage for such loss. Without limiting the foregoing, the FDIC-Receiver claims any proceeds under the applicable insurance policies for insured wrongful acts that caused harm in any respect to United Western Bank.

18. To the extent that proofs of loss have been or may be filed with respect to such matters with the relevant insurer, the FDIC-Receiver hereby claims any payments in respect of such loss, which are not

property of the Debtor's estate and, to the extent paid to the Debtor, are held in trust for the FDIC-Receiver as the rightful recipient thereof.

19. The FDIC-Receiver reserves the right to tender to the insurers any insured matter that has been or may be asserted against the receivership notwithstanding any claim that proceeds under such insurance policies are, in whole or in part, property of the Debtor's estate.

20. The FDIC-Receiver also has succeeded to rights, claims, and causes of action by United Western Bank against directors, officers, and professionals and others who provided services to United Western Bank. The FDIC-Receiver reserves all of its rights and remedies in any to any insurance policies potentially covering the FDIC-Receiver's claims against such persons and entities, including policies pursuant to which the Debtor or United Western Bank are insureds or additional insureds.

E. Other Claims

21. The FDIC-Receiver asserts a protective unliquidated claim for matters as to which (i) First Citizens may assert a claim against the Debtor as the successor in interest to United Western Bank and the FDIC-Receiver under the P&A Agreement and (ii) the Debtor may object to such a claim due to First Citizen's lack of standing.

22. The FDIC-Receiver asserts a protective claim against the Debtor to the extent that United Western Bank was charged with expenses, including payroll expenses or allocated overhead expenses that were properly the responsibility of the Debtor or any of its non-bank subsidiaries.

23. The FDIC-Receiver asserts a claim, in accordance with 11 U.S.C. § 541(d) or otherwise, for any asset nominally held in the name of the Debtor to the extent that United Western Bank is the true owner of such asset.

24. The FDIC-Receiver has or may have claims based upon breaches of fiduciary duties owed by the directors and officers of UWB to United Western Bank and the liability of the Debtor in connection therewith. Such directors and officers may have failed to meet their lawful obligations and act in the best interests of United Western Bank. Further, to the extent that officers or directors (or any other persons as to whom the Debtor owes a duty of indemnification or advancement) assert claims against the FDIC-Receiver for indemnification or advancement, the FDIC-Receiver asserts a claim for reimbursement of such amounts against the Debtor.

25. The FDIC-Receiver also asserts an unliquidated claim for indemnity or contribution to the extent that United Western Bank is entitled to assert such claims against the Debtor with respect to any pending or future litigation in which United Western Bank or the FDIC-Receiver is or may be a named defendant.

26. To the extent any governmental authority obtains or enters an order directing restitution for the criminal or otherwise wrongful acts of the officers or directors of United Western Bank, such orders are for the benefit of the FDIC-Receiver as successor to United Western Bank. If the Debtor receives any payment in respect of such an order, it shall hold such amounts in trust for United Western Bank, and

the FDIC-Receiver demands that such funds be turned over to the receivership estate.

F. Reservation of Rights

27. As set forth above, the FDIC-Receiver is entitled to the statutory protections provided under its governing statute, including without limitation 12 U.S.C. § 1821(d)(13)(D) and the exclusive receivership claims process set forth in 12 U.S.C. § 1821(d). This proof of claim is filed solely to protect the FDIC-Receiver against a claim of waiver in the Debtor's bankruptcy case and does not alter or waive the foregoing statutory provisions in any respect.

28. Neither this proof of claim nor any subsequent appearance, pleading, claim, document, suit, motion nor any other writing or conduct, shall constitute a waiver by the FDIC-Receiver of any: (a) right of the FDIC-Receiver to assert a defense of sovereign immunity; (b) right to have any and all final orders entered only after appropriate administrative procedures and/or de novo review by a United States district court; (c) right to elect a trial by jury in any matters so triable; (d) right to have the reference of this matter withdrawn by the United States district court in any matter or proceeding subject to mandatory or discretionary withdrawal; or (e) other rights, claims, actions, defenses, setoffs, recoupments, or other matters to which the FDIC-Receiver is entitled under any agreements, at law or in equity or under the United States Constitution. All of the above rights are expressly reserved and preserved without exception and with no purpose of conceding jurisdiction in any way by this filing or by any other participation in this matter. The FDIC-

Receiver expressly reserves all rights to assert the preemption of the Bankruptcy Court's jurisdiction and the exclusive jurisdiction provided under Title 12.

29. The identification or enumeration of the FDIC-Receiver's rights and remedies set forth in this proof of claim is not intended to be exhaustive. In addition, the FDIC-Receiver's investigation and review of the books and records of United Western Bank is ongoing, and the FDIC-Receiver and its professional advisers have not yet had a sufficient opportunity to evaluate and determine all claims that the FDIC-Receiver may have against the Debtor. The FDIC-Receiver reserves the right to further amend, revise, or supplement this proof of claim in any respect, and to file such additional claims and requests for payment. Without limiting the foregoing, the FDIC-Receiver reserves the right to assert specific claims or counterclaims for as-yet unliquidated, unmatured or contingent claims currently known or unknown, including with limitation, claims for indemnification, contribution, subrogation, or reimbursement from the Debtor for any claims of third parties that may be asserted against the FDIC-Receiver or payments made by or on behalf of the FDIC-Receiver for which the Debtor is responsible.

30. The FDIC-Receiver further reserves the right to amend or supplement this proof of claim, including, without limitation, to: cure a defect in the original claim, correct the claim amount or priority status, include additional supporting documents, describe the claim in greater detail, or add additional claims presently unknown to the FDIC-Receiver

that, if known, could have affected this claim or results in the assertion of additional damages. In addition, nothing herein shall be deemed to waive or otherwise affect the right of any other person, including without limitation, First Citizens, to make claims similar to or parallel with this claim.

31. The FDIC-Receiver reserves all rights to setoff against the Debtor any interests that are subject to setoff under section 553 of the Bankruptcy Code. Accordingly, the FDIC-Receiver asserts and reserves all of its rights, if any, to setoff any sums due to the Debtor against sums due to the FDIC-Receiver from the Debtor or its non-debtor subsidiaries.

32. Nothing in this proof of claim describing or in any way relating to property in which the Debtor now or hereafter may assert an interest shall be construed or deemed in any way as evidence that such assets are property of the estate or an admission that the Debtor has any rights in such property. This claim is submitted to assert and preserve the rights of the FDIC-Receiver in the Debtor's pending bankruptcy case, and neither the submission of this proof of claim nor any provision in it shall be construed or deemed as evidence that the FDIC-Receiver has waived or intends to waive any rights or claims afforded it under applicable law. Without limiting the foregoing, the FDIC-Receiver reserves any rights at law or equity that it has or may have against any other entity, person or persons, including without limitation the insiders, director or officers of the Debtor, of United Western Bank or of their affiliated entities, or any of their insurers or indemnitors.

33. The proof of claim is not intended to be, and shall not be construed as: (a) an election of remedies; (b) waiver of any right to the determination or any issue or matter by a jury; (c) a waiver of any defaults; or (d) a waiver or limitation of any rights at law or equity, remedies, claims, or interests of the FDIC-Receiver.

G. Notices

34. All notices and requests for documents to the FDIC-Receiver relating to this proof of claim shall be served upon:

B. Amon James
Counsel – Legal Division
Federal Deposit Insurance Company
3501 Fairfax Drive, Room D-7074
Arlington, VA 22226-3500
Telephone: (703) 562-2631
bajames@fdic.gov

Alan P. Solow
DLA Piper LLP (US)
203 North LaSalle, Suite 1900
Chicago, Illinois 60601
Telephone: (312) 368-3370
alan.solow@dlapiper.com

35. The claims herein include (1) claims to funds that may be held by third parties, (2) claims to funds that are held, in whole or in part, by the Debtor or subject to express or equitable trust, (3) general unsecured claims, and (4) administrative and priority claims. Based on the state of the records currently available to the FDIC-Receiver, on the fact that many records were not available to the FDIC-

Receiver at the time of preparation and filing of this proof of claim, and on information derived from various records reviewed, it is possible that certain assets which the Debtor assert to own in their schedules or otherwise, may in fact be owned by the FDIC-Receiver, and may not be property of the Debtor's estate. The FDIC-Receiver is investigating the circumstances as thoroughly and expeditiously as possible. The FDIC-Receiver hereby asserts its claim to such assets and will submit more specific claims as soon as information is made available in order to evaluate, ascertain, and determine specific ownership interests.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO

Case No. 12-13815-ABC
Chapter 7

Adv. Proc. No. 14-01191-ABC

IN RE:
UNITED WESTERN BANCORP, INC.
TAX ID/EIN: 84-1233715,

Debtor,

SIMON E. RODRIGUEZ, IN HIS CAPACITY AS CHAPTER 7
TRUSTEE FOR THE BANKRUPTCY ESTATE OF UNITED
WESTERN BANCORP, INC.,

Plaintiff,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, IN ITS
CAPACITY AS RECEIVER FOR UNITED WESTERN BANK,

Defendant.

**ANSWER AND COUNTERCLAIM OF
THE FEDERAL DEPOSIT INSURANCE
CORPORATION, AS RECEIVER FOR
UNITED WESTERN BANK**

Upon knowledge as to itself and its own actions and upon information and belief as to all other matters, defendant Federal Deposit Insurance Corporation, as receiver of United Western Bank (the "FDIC-Receiver"), for its Answer to the complaint dated

April 16, 2014 in this adversary proceeding (the “Complaint”), filed by plaintiff Simon E. Rodriguez solely in his capacity as the chapter 7 trustee (“Trustee”) for the bankruptcy estate of United Western Bancorp, Inc. (“Debtor”), and for its Counterclaim, hereby states:

JURISDICTIONAL RESERVATION

The FDIC-Receiver respectfully submits that the United States Bankruptcy Court for the District of Colorado (the “Bankruptcy Court”) lacks subject matter jurisdiction over this adversary proceeding. A defense of lack of subject matter jurisdiction cannot be waived, and the FDIC-Receiver expressly asserts and reserves that defense as to all proceedings herein. The FDIC-Receiver’s protective proof of claim in the Debtor’s chapter 7 bankruptcy case expressly preserved the FDIC-Receiver’s subject matter jurisdiction defense.

Under 12 U.S.C. § 1821(d)(13)(D), “no court shall have jurisdiction” over, *inter alia*, “any action seeking a determination of rights with respect to[] the assets of any depository institution for which the [FDIC] has been appointed receiver” The Trustee’s request for a declaratory judgment indisputably seeks a determination of rights with respect to assets of United Western Bank, and the only permissible method for the Debtor or the Trustee to have sought such relief was by filing a receivership claim with the FDIC-Receiver as provided for under the Federal Deposit Insurance Act. *See* 12 U.S.C. §§ 1821(d)(3)-(13). Neither the Trustee nor the Debtor filed a receivership claim,

and they thereby waived the claim for declaratory relief asserted in the Complaint.

In addition, the Bankruptcy Court lacks the authority to enter final judgment in this adversary proceeding under the Constitution of the United States of America. This is a non-core proceeding under 28 U.S.C. § 157, and the FDIC-Receiver does not consent to entry of final orders or judgment by the Bankruptcy Court in this proceeding.

ANSWER

Any allegation in the Complaint that the FDIC-Receiver does not expressly admit in this Answer is denied. The FDIC-Receiver denies that the claim for relief in the Complaint has merit. Headings from the Complaint are repeated solely for the convenience of the reader, and any allegation express or implied in such headings is denied.

JURISDICTION AND VENUE

1. This adversary proceeding arises out of and is related to the bankruptcy case *In re United Western Bancorp, Inc.*, Case No. 12-13815 ABC (the “Bankruptcy Case”), which was commenced on March 2, 2012 and is currently pending in the United States Bankruptcy Court for the District of Colorado (the “Court”).

ANSWER: Admits that *In re United Western Bancorp, Inc.*, Case No. 12-13815 ABC (the “Bankruptcy Case”) was commenced on March 2, 2012 and that it is currently pending in the Bankruptcy Court. No response is required to the remaining allegations of paragraph 1 of the Complaint, but to the extent any response is required, the FDIC-Receiver denies any allegations

of fact or assertions of jurisdiction that are included or implied therein.

2. This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157(a) and 1334(b).

ANSWER: Denies the allegations in paragraph 2 of the Complaint.

3. In addition, this adversary proceeding involves determinations as to the property of the Western Bancorp, Inc. bankruptcy estate (the “Bankruptcy Estate”), over which this Court has exclusive jurisdiction.

ANSWER: Denies the allegations in paragraph 3 of the Complaint.

4. This adversary proceeding is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (B), (C), (E), and (O).

ANSWER: Denies the allegations in paragraph 4 of the Complaint. The FDIC-Receiver does not consent to entry of final orders or judgment in this non-core proceeding by the Bankruptcy Court.

5. Venue is proper in this Court pursuant to 28 U.S.C. § 1408(a).

ANSWER: Denies the allegations in paragraph 5 of the Complaint.

6. This Complaint Asserting Objection to Claim and Counterclaims for Declaratory Relief and Recovery of Assets of the Estate (“Complaint”) is properly brought by adversary proceeding pursuant to FRBP 3007(b) and 7001(9).

ANSWER: Paragraph 6 of the Complaint states a legal conclusion as to which no response is required, but to the extent any response is required, the FDIC-Receiver denies any allegations of fact or assertions of jurisdiction that are included or implied therein.

PARTIES

7. The Bankruptcy Case was filed on March 2, 2012 pursuant to Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. § 101, *et seq.* (the “Bankruptcy Code”).

ANSWER: Admits the allegations in paragraph 7 of the Complaint.

8. The Bankruptcy Case was converted to a case under Chapter 7 of the Bankruptcy Code on April 15, 2013.

ANSWER: Admits the allegations in paragraph 8 of the Complaint.

9. Plaintiff is the duly appointed Chapter 7 Trustee for the Bankruptcy Estate.

ANSWER: Admits the allegations in paragraph 9 of the Complaint.

10. Plaintiff has standing to bring the claims and counterclaims asserted herein on behalf of the Bankruptcy Estate.

ANSWER: Subject to the FDIC-Receiver’s reservation of the subject matter jurisdiction defense, admits the allegations in paragraph 10 of the Complaint.

11. On January 21, 2011, the Office of Thrift Supervision closed United Western Bank and appointed FDIC-R as Receiver.

ANSWER: Admits the allegations in paragraph 11 of the Complaint.

12. United Western Bank in [sic] a wholly owned subsidiary of United Western Bancorp, Inc. (the “Debtor”).

ANSWER: Admits the allegations in paragraph 12 of the Complaint.

13. On August 30, 2012, FDIC-R filed Proof of Claim No. 29-1 in the Bankruptcy Case (the “Claim”), a copy of which is attached as Exhibit A.

ANSWER: Admits that FDIC-Receiver filed its protective proof of claim No. 28-1 on August 30, 2012 (the “Proof of Claim No. 28-1”) and refers the Bankruptcy Court to the contents thereof. The FDIC-Receiver denies that the proof of claim filed by the FDIC-Receiver in this Bankruptcy Case is No. 29-1.

14. Plaintiff sues FDIC-R to request that the Claim be disallowed, or the claim for a certain tax refund described below be allowed only as a non-priority, unsecured pre-petition claim. Plaintiff also brings claims to declare the tax refund described below an asset of the Bankruptcy Estate and to recover that asset.

ANSWER: Admits that in this action the Trustee purports to seek relief as alleged in paragraph 14 of the Complaint and, in addition to the FDIC-Receiver’s reservation of the subject matter jurisdiction and other defenses, denies that there is any basis in fact or in law for the relief sought by the Trustee in the Complaint.

FACTS COMMON TO ALL CLAIMS

15. The Debtor is a holding company with several subsidiaries, among these subsidiaries is United Western Bank (“Bank”), for which FDIC-R is Receiver.

ANSWER: Admits the allegations in paragraph 15 of the Complaint.

16. The Debtor and its affiliate subsidiaries, including Bank, were members of an “affiliated group” within the meaning of Section 1504(a) of the Internal Revenue Code of 1986 and filed consolidated federal income tax returns.

ANSWER: Upon information and belief, admits the allegations in paragraph 16 of the Complaint.

17. The Debtor and its affiliates subsidiaries, including Bank, entered into a Tax Allocation Agreement dated January 1, 2008 (the “Agreement”), a copy of which is attached as Exhibit B. The Agreement provides that the Debtor will file the consolidated returns on behalf of itself and the affiliates, including Bank. As to the funding of tax payments, Section A of the Agreement provides as its “General Rule”:

Except as specifically set forth herein to the contrary, each Affiliate shall pay UWBI [the Debtor] an amount equal to the federal income tax liability such Affiliate would have incurred were it to file a separate return If a regulated first-tier Affiliate incurs a net operating loss or excess tax credits, the regulated Affiliate is entitled to a refund equal to the amount it would have been entitled to

receive had it not joined in the filing of a consolidated return with UWBI.

ANSWER: Admits that Exhibit B is attached to the Complaint. The FDIC-Receiver further states that Exhibit B, in its entirety, speaks for itself. The FDIC-Receiver, however, lacks knowledge or information sufficient to form a belief whether Exhibit B is a valid and binding tax sharing agreement. Except as admitted herein, denied.

18. The affiliates, including Bank, in Section G appointed the Debtor their agent “for the purpose of filing such consolidated Federal income tax returns for the UWBI group as UWBI may elect to file and making any election, application or taking any action in connection therewith on behalf of the Affiliates. Each such Affiliate hereby consents to the filing of any such returns and the making of any such elections and applications.

ANSWER: The FDIC-Receiver states that Exhibit B, in its entirety, speaks for itself. The FDIC-Receiver, however, lacks knowledge or information sufficient to form a belief whether Exhibit B is a valid and binding tax sharing agreement. Except as admitted herein, denied.

19. The Debtor is not appointed agent for any other purpose.

ANSWER: Denies the allegations in paragraph 19 of the Complaint.

20. There is no principal agent relationship between the Debtor and Bank created by the Agreement or otherwise.

ANSWER: Denies the allegations in paragraph 20 of the Complaint.

21. The Agreement provides the following as to refunds in Section H1:

In the event of any adjustment to the tax returns of the Group as filed (by reason of an amended return, claim for refund, or an audit by a taxing authority), the liability of the parties to this Agreement shall be re-determined to give effect to any such adjustment as if it had been made as part of the original computation of tax liability, and payments between the appropriate parties shall be made within 10 business days after any such payments are made or refunds are received, or in the case of contested proceedings, within 10 business days after a final determination of the contest.

ANSWER: The FDIC-Receiver states that Exhibit B, in its entirety, speaks for itself. The FDIC-Receiver, however, lacks knowledge or information sufficient to form a belief whether Exhibit B is a valid and binding tax sharing agreement. Except as admitted herein, denied.

22. Thus, by the terms of the Agreement, the Debtor's sole obligation with regard to any tax refund received by the Debtor that results in an adjustment under the Agreement in favor of an affiliate, including Bank, results in an account payable reflecting the debtor/creditor relationship created by the Agreement for which payment is to be made within 10 business days.

ANSWER: Denies the allegations in paragraph 22 of the Complaint.

23. The Debtor does not hold any such refunds in trust for its Affiliates.

ANSWER: Denies the allegations in paragraph 23 of the Complaint.

24. The Debtor filed a federal income tax return for the consolidated group pursuant to the Agreement for tax year 2009 (the "Tax Return").

ANSWER: Admits the allegations in paragraph 24 of the Complaint. The FDIC-Receiver, however, lacks knowledge or information sufficient to form a belief whether "the Agreement" referenced in paragraph 24 of the Complaint and attached thereto as Exhibit B is a valid and binding tax sharing agreement.

25. The Tax Return was examined by the Internal Revenue Service which will result, the Debtor is informed and believes, in a refund to the Debtor up to the approximate amount of \$4,652,361 (the "Refund").¹ Pursuant to the Tax Return and the Agreement, the Refund is to be paid to the Debtor.

ANSWER: Admits that tax returns that were examined by the Internal Revenue Service are expected to generate a tax refund in excess of \$3.6 million that might possibly be paid to the Debtor as agent for the affiliated group pursuant to regulation. Denies the remaining allegations in paragraph 25 of the Complaint.

¹ This issue is currently under administrative appeal within the IRS. The Debtor is informed and believes that this process will either result in a successful appeal or an agreed settlement.

26. The Claim filed by FDIC-R asserts that the Refund is the property of FDIC-R and that the Debtor would hold such a refund as its agent and fiduciary, which assertion is false. There is no trust or other fiduciary relationship between the Debtor and Bank. By using such terms as “liability,” “adjustment” and “payments” the Agreement only establishes a debtor/creditor relationship between the Debtor and Bank in the event of a refund, just as it establishes a debtor/creditor relationship as to Bank’s liability to remit its share of the taxes to the Debtor.

ANSWER: Admits that the FDIC-Receive asserted claims in the Bankruptcy Case except refers for their contents to the Proof of Claim No. 28-1, which speaks for itself. Denies the remaining allegations in paragraph 26 of the Complaint.

27. The Claim also asserts what appear to be several contingent claims for fraudulent transfers/unlawful dividends, insurance proceeds, and miscellaneous other claims. The Claim does not offer any evidence supporting such claims nor is Plaintiff aware of any such evidence.

ANSWER: Admits that the FDIC-Receive asserted claims in the Bankruptcy Case except refers for their contents to the Proof of Claim No. 28-1, which speaks for itself. Lacks knowledge about Plaintiff’s knowledge, information, and belief and denies the remaining allegations in paragraph 27 of the Complaint.

28. All conditions precedent to the bringing of this adversary proceeding have occurred or been performed.

ANSWER: Denies the allegations in paragraph 28 of the Complaint.

**FIRST CLAIM FOR RELIEF
(Declaratory Judgment)**

29. Plaintiff realleges and incorporates herein by reference the preceding allegations of this Complaint.

ANSWER: The FDIC-Receiver repeats and incorporates by reference its responses to paragraphs 1 through 28 of the Complaint as if fully restated herein.

30. An actual controversy has arisen between the Plaintiff and the FDIC-R regarding the entitlement of the Debtor to the Refund. Plaintiff seeks a declaratory judgment pursuant to 28 U.S.C. § 2201 to resolve this actual, real and immediate controversy.

ANSWER: Admits that an actual controversy has arisen and exists between the Trustee and the FDIC-Receiver concerning the ownership of the federal tax refunds at issue in the Complaint as to which the Trustee and the FDIC-Receiver have adverse interests. With respect to second sentence in paragraph 30 of the Complaint, no response is required, but to the extent any response may be deemed to be required, admits that the controversy is actual, real, and immediate. Denies that this Court has subject matter jurisdiction to adjudicate the Trustee's claim and further states that this Court does not have authority under the Constitution of the United States of America to enter any final order or judgment with respect to such controversy, which is a non-core proceeding seeking a determination of

rights with respect to assets of an insured depository institution for which the FDIC-Receiver has been appointed receiver. Denies any remaining allegations in paragraph 30 of the Complaint.

31. The Agreement does not create any trust running from the Debtor to the Affiliates concerning tax refunds received by the Debtor on consolidated returns filed for the group. Pursuant to the Agreement, any such refunds would not be held by the Debtor in any fiduciary capacity.

ANSWER: Denies the allegations in paragraph 31 of the Complaint.

32. The Agreement creates a debtor-creditor relationship between the Debtor and any Affiliate entitled to all or a portion of a tax refund received by the Debtor pursuant to the Agreement.

ANSWER: Denies the allegations in paragraph 32 of the Complaint.

33. Ownership of any tax refunds received pursuant to consolidated returns filed by the Debtor is vested in the Debtor. FDIC-R is a non-priority, general unsecured claimant as to any tax refunds all or a portion of which it is entitled to under the Agreement.

ANSWER: Denies the allegations in paragraph 33 of the Complaint, but to the extent the Trustee prevails on the claim that the tax refunds at issue in this case are property of Debtor's bankruptcy estate, the FDIC-Receiver is a general unsecured claimant as to any tax refunds all or a portion of which it is entitled to, and reserves the right to prosecute its previously filed proof of claim and to assert any additional claim against the bankruptcy estate on

account of the tax refunds, consolidated tax returns, special-case fiduciary loss year tax return, if any, or the priority of its unsecured claim.

34. Pursuant to 11 U.S.C. § 541, any such tax refunds are property of the Bankruptcy Estate.

ANSWER: Paragraph 34 of the Complaint states a legal conclusion as to which no response is required but, to the extent any response may be deemed to be required, denies the allegations in paragraph 34 of the Complaint.

35. Accordingly, Plaintiff is entitled to a judgment declaring that any tax refunds it may receive under the Agreement pursuant to tax returns the Debtor filed for the Affiliates in the consolidated group, including Bank, are the property of the Bankruptcy Estate.

ANSWER: Paragraph 35 of the Complaint states a legal conclusion as to which no response is required but, to the extent any response may be deemed to be required, denies the allegations in paragraph 35 of the Complaint.

SECOND CLAIM FOR RELIEF

(Turnover of Property – 11 U.S.C. § 542)

36. Plaintiff realleges and incorporates herein by reference the preceding allegations of this Complaint.

ANSWER: The FDIC-Receiver repeats and incorporates by reference its responses to paragraphs 1 through 35 of the Complaint as if fully restated herein.

37. The Refund is property of the Bankruptcy Estate pursuant to 11 U.S.C. §541.

ANSWER: Paragraph 37 of the Complaint states a legal conclusion as to which no response is required but, to the extent any response may be deemed to be required, denies the allegations in paragraph 37 of the Complaint.

38. FDIC-R is obligated by 11 U.S.C. § 542 to turn over the Refund or any part thereof it possesses or may become in possession of in the future.

ANSWER: Paragraph 38 of the Complaint states a legal conclusion as to which no response is required but, to the extent any response may be deemed to be required, denies the allegations in paragraph 38 of the Complaint.

THIRD CLAIM FOR RELIEF
(Objection to Claim of FDIC-R)

39. Plaintiff realleges and incorporates herein by reference the preceding allegations of this Complaint.

ANSWER: The FDIC-Receiver repeats and incorporates by reference its responses to paragraphs 1 through 38 of the Complaint as if fully restated herein.

40. Plaintiff objects pursuant to 11 U.S.C. § 502(b) to FDIC-R Claim No. 28-1 in its entirety except to the extent that it presents a non-priority, general unsecured pre-petition claim for all or a portion of the Refund.

ANSWER: No response is required to the allegations in paragraph 40 of the Complaint, but to the extent any response may be deemed to be required, admits that the FDIC-Receiver filed the Proof of Claim No. 28-1, which speaks for itself, in

the Bankruptcy Case but denies that the FDIC-Receiver holds a non-priority, general unsecured pre-petition claim for any portion of the tax refunds at issue. To the extent the Trustee prevails on the claim that the tax refunds at issue in this case are property of Debtor's bankruptcy estate, the FDIC-Receiver is a general unsecured claimant as to any tax refunds all or a portion of which it is entitled to, and reserves the right to prosecute the Proof of Claim No. 28-1 and to assert any additional claim against the bankruptcy estate on account of the tax refunds, consolidated tax returns, special-case fiduciary loss year tax return, if any, or the priority of its unsecured claim.

41. FDIC-R asserts that the Refund will be held by Plaintiff as an agent or fiduciary in trust for FDIC-R.

ANSWER: The Proof of Claim No. 28-1 and Counterclaim speak for themselves. Except as admitted therein, denied.

42. As stated above in the Complaint, the position of the FDIC-R is wrong; pursuant to the Agreement the Refund constitutes property of the Bankruptcy Estate. Under the Agreement the FDIC-R at best has a pre-petition, unsecured contractual right to payment of its share of the Refund as computed pursuant to the Agreement.

ANSWER: Denies the allegations in paragraph 42 of the Complaint, but to the extent the Trustee prevails on the claim that the tax refunds at issue in this case are property of Debtor's bankruptcy estate, the FDIC-Receiver is a general unsecured claimant as to any tax refunds all or a portion of which it is

entitled to, and reserves the right to prosecute the Proof of Claim No. 28-1 and to assert any additional claim against the bankruptcy estate on account of the tax refunds, consolidated tax returns, special-case fiduciary loss year tax return, if any, or the priority of its unsecured claim.

43. Any claim of trust or fiduciary or agency capacity of the Debtor for Bank is false and unenforceable under the terms of the Agreement, which creates no such relationship.

ANSWER: Denies the allegations in paragraph 43 of the Complaint.

44. Further, the Refund constitutes property of the Bankruptcy Estate that would be recoverable under 11 U.S.C § 542 if held by FDIC-R.

ANSWER: Paragraph 44 of the Complaint states a legal conclusion as to which no response is required but, to the extent any response may be deemed to be required, denies the allegations in paragraph 44 of the Complaint.

45. For the foregoing reasons the claim of ownership of the Refund by FDIC-R or the assertion of any property interest in the Refund or any interest other than an unsecured right of payment under the Agreement must be disallowed.

ANSWER: Paragraph 45 of the Complaint states a legal conclusion as to which no response is required but, to the extent any response may be deemed to be required, denies the allegations in paragraph 45 of the Complaint.

46. The Claim also asserts a claim to avoid fraudulent transfers or recover unlawful dividends

made by Bank to the Debtor. FDIC-R fails to state a claim and does not allege that any fraudulent transfers or unlawful dividends were actually made to the Debtor. Plaintiff is aware of no evidence supporting such claims. That part of the Claim should be disallowed.

ANSWER: Denies the allegations in paragraph 46 of the Complaint except it admits that the FDIC-Receiver filed the Proof of Claim No. 28-1, which speaks for itself, and refers to the contents thereof.

47. The Claim also asserts a claim of ownership of any unearned insurance premiums paid on any policy on which Bank was a named insured or intended beneficiary. The Claim fails to state a claim in that there is no allegation that any such unearned premiums actually exist. Plaintiff is not aware of any such unearned premiums.

ANSWER: Denies the allegations in paragraph 47 of the Complaint except it admits that the FDIC-Receiver filed the Proof of Claim No. 28-1, which speaks for itself, and refers to the contents thereof.

48. To the extent unearned insurance premiums are or will be in the possession of the Bankruptcy Estate on account of premiums paid by the Debtor, such premiums are property of the Bankruptcy Estate. This part of FDIC-R's Claim should be disallowed.

ANSWER: Paragraph 48 of the Complaint states a legal conclusion as to which no response is required but, to the extent any response may be deemed to be required, denies the allegations in paragraph 48 of the Complaint.

49. The Claim also asserts a claim as to any insurance payments paid on account of a covered loss that damaged Bank. The Claim fails to state a claim and does not allege that any such payment actually has been made. To the extent any insurance payment has been or will be made to the Debtor on account of policies the Debtor paid for such payment is the property of the Bankruptcy Estate, not FDIC-R. This part of the Claim should be disallowed.

ANSWER: Denies the allegations in paragraph 49 of the Complaint except it admits that the FDIC-Receiver filed the Proof of Claim No. 28-1, which speaks for itself, and refers to the contents thereof.

50. FDIC-R also asserts “Other Claims,” the first two of which it characterizes as “protective” claims for contingencies that have not occurred. These claims should be disallowed unless FDIC-R can produce evidence that these contingencies have occurred or will occur and that it would be entitled to the funds described.

ANSWER: Paragraph 50 of the Complaint states a legal conclusion as to which no response is required but, to the extent any response may be deemed to be required, denies any allegations in paragraph 50 of the Complaint except it admits that the FDIC-Receiver filed the Proof of Claim No. 28-1, which speaks for itself, and refers to the contents thereof.

51. The Claim asserts a claim for any assets owned by Bank but held by the Debtor. To the best of Plaintiff’s knowledge, information and belief there are no such assets and this part of the Claim should be disallowed.

ANSWER: Denies the allegations in paragraph 51 of the Complaint in part because it has no knowledge about Plaintiff's knowledge, information, or belief but admits that the FDIC-Receiver filed the Proof of Claim No. 28-1, which speaks for itself, and refers to the contents thereof.

52. FDIC-R asserts it may have claims of breach of fiduciary duty against former officers and directors of the Debtor. Even if this may prove to be the case, it does not provide a basis for a claim against the Bankruptcy Estate. This part of the Claim should be disallowed.

ANSWER: Denies the allegations in paragraph 52 of the Complaint except it admits that the FDIC-Receiver filed the Proof of Claim No. 28-1, which speaks for itself, and refers to the contents thereof.

53. The Claim asserts an "unliquidated claim" for indemnification or contribution with respect to unspecified future litigation. Plaintiff is aware of no circumstances that would give rise to claims of indemnification or contribution by Bank against the Bankruptcy Estate and this part of the Claim should be disallowed.

ANSWER: Denies the allegations in paragraph 53 of the Complaint, in part, because it has no knowledge about Plaintiff's knowledge, information, or belief but admits that the FDIC-Receiver filed the Proof of Claim No. 28-1, which speaks for itself, and refers to the contents thereof.

54. FDIC-R asserts a claim as to any restitution that may be ordered and paid to the Bankruptcy Estate and claims such payments would be held in trust by the Bankruptcy Estate. There is no legal or

contractual basis for such a trust relationship and this part of the Claim should be disallowed.

ANSWER: Denies the allegations in paragraph 54 of the Complaint except it admits that the FDIC-Receiver filed the Proof of Claim No. 28-1, which speaks for itself, and refers to the contents thereof.

WHEREFORE, the FDIC-Receiver prays that the Bankruptcy Court deny the relief requested in the Complaint.

DEFENSES

The FDIC-Receiver asserts the following defenses without assuming the burden of proof as to any issue for which the burden is placed on another party. The FDIC-Receiver lacks knowledge or information sufficient to form a belief as to whether it has other, yet unstated, defenses. The FDIC-Receiver reserves the right to assert, and hereby gives notice that it intends to rely upon, any other defense that may become available or appear during discovery or otherwise and reserves the right to amend its Answer to assert any such defense.

First Defense

This Court lacks subject matter jurisdiction over the claims asserted in the Complaint.

Second Defense

The Court lacks authority under the Constitution of the United States to enter final orders or judgment as to the claims asserted in the Complaint.

Third Defense

The Complaint, in whole or in part, fails to state a claim upon which relief can be granted.

Fourth Defense

To the extent applicable, the Trustee fails to satisfy the requirements for entry of a declaratory judgment.

Fifth Defense

The Trustee's claims are barred under 12 U.S.C. § 1821(j) to the extent they seek to restrain or affect the exercise of powers or functions of the FDIC-Receiver.

Sixth Defense

The Trustee's claims are barred, in applicable part, by 12 U.S.C. § 1821(d)(13)(D).

Seventh Defense

The Trustee's claims are barred, in applicable part, by 12 U.S.C. § 1825(b)(3).

Eighth Defense

To the extent the Trustee attempts to diminish the interest of the FDIC-Receiver in any tax refund, tax entitlement, or any claims to either, based on any alleged policy or agreement, the Trustee's claims are barred by 12 U.S.C. § 1823(e), 12 U.S.C. § 1821(d)(9), or the statute of frauds to the extent that such document (a) was not executed by the Bank and Debtor contemporaneously; (b) was not approved by the board of directors of the Bank, which approval must have been reflected in the minutes of said board; and (c) has not continuously been, from the time of its execution, an official record of the Bank.

Ninth Defense

The Trustee has never assumed any alleged tax sharing agreement between the Debtor and the

Bank, and any such agreement, therefore, has been rejected by operation of 11 U.S.C. § 365(d)(1) and cannot be the basis for any relief requested by the Trustee against the FDIC-Receiver.

Tenth Defense

To the extent any alleged tax sharing agreement or tax allocation agreement constitutes “a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of” the Debtor or the Trustee, 11 U.S.C. § 365(c)(2) prohibits the Trustee from assuming, assigning, or benefitting from any post-petition loans, debt financing, or other financial accommodations provided under such an alleged agreement.

Eleventh Defense

The Trustee’s claims with respect to tax refunds and entitlements are barred, in whole or in part, by 26 C.F.R. § 1.1502-77 and the applicable law of agency because the Debtor and the Trustee acted solely as agent for the Bank as a member of the affiliated group.

Twelfth Defense

To the extent that any alleged tax sharing or tax allocation agreement is construed as the Trustee asserts, the failure of the Debtor or the Trustee to immediately deliver the Bank’s tax refunds to the FDIC-Receiver would constitute an unsecured extension of credit from the Bank that would violate applicable federal law, regulations and policies, including sections 23A and 23B of the Federal Reserve Act, 12 U.S.C. §§ 371c and 371c-1, 12 U.S.C. § 1828(j), and 12 C.F.R. § 563.41.

Thirteenth Defense

The Trustee's claims and defenses are barred, in applicable part, by the *Interagency Policy Statement on Income Tax Allocation in a Holding Company Structure*, 63 Fed. Reg. 64757 (Nov. 23, 1998), and any further regulatory statements of policy with respect to the foregoing.

Fourteenth Defense

As a result of the Trustee's and the Debtor's failure to file a receivership claim with the FDIC-Receiver, any claim by the Trustee against the FDIC-Receiver, including any offset claim, is barred under 12 U.S.C. §§ 1821(d)(3)-(13).

Fifteenth Defense

Turnover is not an available remedy against the FDIC-Receiver under 11 U.S.C. § 542 because the Trustee has not identified any undisputed property of the estate that is in the FDIC-Receiver's possession.

Sixteenth Defense

The compulsory remedy of disallowance under section 542(d) of the Bankruptcy Code is not available against the FDIC-Receiver, which is not liable to the Trustee under section 522(i), 542, 543, 550 or 553 of the Bankruptcy Code.

Seventeenth Defense

The Trustee's claims are barred, in applicable part, under the Internal Revenue Code and the rules, regulations, rulings, and opinions promulgated thereunder, including without limitation 26 C.F.R. § 301.6402-7.

Eighteenth Defense

The Trustee's claims are barred, in whole or in part, by the applicable statute of limitations.

Nineteenth Defense

To the extent the Trustee is awarded any recovery on his claims, such recovery is subject, in whole or in part, to setoff.

Twentieth Defense

To the extent the Trustee is awarded any recovery on his claims, such recovery is subject, in whole or in part, to recoupment.

COUNTERCLAIM

Pursuant to Rule 7013 of the Federal Rules of Bankruptcy Procedure and Rule 13 of the Federal Rules of Civil Procedure, the FDIC-Receiver brings the following counterclaim (the "Counterclaim") against the plaintiff Trustee upon knowledge as to itself and the FDIC-Receiver's own actions and upon information and belief as to all other matters.

1. Pursuant to Bankruptcy Rule 7008, the FDIC-Receiver respectfully states that the Bankruptcy Court lacks the authority to enter final judgment in this adversary proceeding under the Constitution of the United States of America. This is a non-core proceeding under 28 U.S.C. § 157, and the FDIC-Receiver does not consent to entry of final orders or judgment by the Bankruptcy Court in this proceeding. The FDIC-Receiver asserts this Counterclaim, however, as an exercise of caution and to avoid any claim of waiver.

2. The Federal Deposit Insurance Corporation (the "FDIC") is an independent agency of the United

States government with its headquarters located in Washington, D.C. The FDIC acts in two legally distinct capacities when it acts (1) as insurer or regulator of depository institutions generally and (2) as the appointed receiver of specific failed depository institutions. This Counterclaim is asserted by the FDIC-Receiver.

JURISDICTION AND VENUE

3. The FDIC-Receiver respectfully submits that the Bankruptcy Court does not have subject matter jurisdiction over the Trustee's action that is the subject of the foregoing Answer. This Counterclaim is being asserted by the FDIC-Receiver pursuant to Bankruptcy Rule 7013 and Rule 13 of the Federal Rules of Civil Procedure subject to the FDIC-Receiver's reservation of rights with respect to its subject matter jurisdiction defense. Under 12 U.S.C. § 1819(b)(2) and 28 U.S.C. § 1331, subject matter jurisdiction exists in the Article III district courts of the United States for this Counterclaim.

4. Venue is proper for this Counterclaim in the United States District Court for the District of Colorado under 28 U.S.C. § 1391.

FACTUAL ALLEGATIONS

A. Parties to This Adversary Proceeding

5. United Western Bank (the "Bank") was a federally chartered savings and loan association, originally established in January 1960 as Dona Ana Savings and Loan Association, Inc. in Las Cruces, New Mexico. In 2002, the Bank moved its headquarters to Denver, Colorado, and became United Western Bank on September 1, 2006.

6. On January 21, 2011, the Office of Thrift Supervision closed the Bank and appointed the FDIC as its receiver. As a result, by operation of law, the FDIC-Receiver succeeded immediately to “all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder, member, accountholder, depositor, officer, or director of such institution with respect to the institution and the assets of the institution.” 12 U.S.C. § 1821(d)(2)(A).

7. On January 24, 2011, in accordance with the requirements under 26 U.S.C. § 6036 and 26 C.F.R. § 301.6402-7(d)(1), the FDIC-Receiver submitted an Internal Revenue Service (the “IRS”) Form 56-F, Notice Concerning Fiduciary Relationship of Financial Institution. Further, on October 20, 2011, the FDIC-Receiver requested agency status for the consolidated group pursuant to 26 C.F.R. § 301.6402-7(c). On October 31, 2011, the IRS granted the FDIC-Receiver’s agency status request, authorizing the FDIC-Receiver to act as an agent for the carryback year group, the loss year group, or any other group of which the FDIC-Receiver is a member for any matter pertaining to the determination of the refund or tentative carryback adjustment for the carryback and loss years of the consolidated group.

8. Upon information and belief, the Debtor is United Western Bancorp, Inc., a holding company with its principal place of business in Denver, Colorado. The Debtor, through the Bank, its principal wholly owned subsidiary, focused on operating and expanding its community-based banking network, comprised of eight banking locations and a loan servicing office.

9. On March 2, 2012, the Debtor filed a voluntary petition for relief under chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Colorado.

10. On August 30, 2012, the FDIC-Receiver filed a proof of claim No. 28-1 (the "Proof of Claim"), in the aggregate amount of \$4,847,000 for, among other things, ownership of the tax refunds, potential fraudulent transfers or unlawful dividends, unearned insurance premiums to the extent that the source of the premium payments was the Bank, insurance proceeds paid under applicable insurance coverage for any such losses, and other protective claims. A copy of the Proof of Claim is attached as Exhibit A to the Complaint.

11. On April 15, 2013, the Bankruptcy Case was converted to a case under Chapter 7 of the Bankruptcy Code.

12. Simon E. Rodriguez was appointed as the chapter 7 trustee ("Trustee") for the bankruptcy estate of United Western Bancorp, Inc.

13. On April 16, 2014, the Trustee filed the Complaint which asserts three claims: (i) declaratory relief for a determination that certain tax refund is the property of the Debtor rather than of the FDIC-Receiver, (ii) turnover of property to the extent that the FDIC-Receiver possesses the tax refund, or may come to possess the tax refund in the future; and (iii) an objection to the Proof of Claim. (Dkt. No. 1, Compl., ¶¶ 29-54.)

14. This Counterclaim is asserted against the Trustee solely in that capacity.

B. The Debtor's and the Trustee's Waiver of Any Claim to Tax Refunds

15. Following its appointment as receiver for the Bank, the FDIC-Receiver established a claims bar date of April 27, 2011 for the filing of claims against the receivership, including any claim seeking a determination of rights with respect to assets of the failed Bank.

16. Neither the Debtor nor the Trustee ever filed a claim with the receivership.

17. By failing to exhaust administrative remedies, the Debtor and the Trustee waived the right to bring, *inter alia*, "any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of" the Bank, and no court has jurisdiction over any such claim or action. 12 U.S.C. § 1821(d)(13)(D)(i). The Trustee's claim to have an entitlement to tax refunds that are payable to the Bank falls within this jurisdictional bar.

C. The Debtor's Role as Agent on Behalf of the Consolidated Group

18. As the parent corporation of a consolidated group, the Debtor prepared and filed federal and state tax returns on behalf of itself and the Bank, as its wholly owned subsidiary, pursuant to regulations promulgated by the United States Department of the Treasury.

19. In accordance with regulations promulgated by the United States Department of the Treasury, the Debtor and the Bank, among other of the Debtor's affiliates, elected to file federal income tax returns as members of an affiliated group of

corporations instead of filing separate returns. *See* Treas. Reg. § 1.1502-75, *et seq.*

20. The members of the group also filed Colorado state tax returns on a consolidated or combined basis.

21. The Debtor was the “common parent” for all of the members of the consolidated group. As a result, by operation of law, the Debtor was appointed the “sole agent” to act “with respect to all matters relating to the tax liability” of each member of the group for each consolidated return year. Treas. Reg. § 1.1502-77(a).

22. The Treasury Regulations specify the actions that the common parent must take on behalf of the members of the group; those regulations provide that the IRS generally will deal only with the common parent, as agent, for tax matters concerning the group members. As an example of matters that are “subject to [this] agency,” the Treasury Regulations explain that “[t]he common parent files claims for refund, and any refund is made directly to and in the name of the common parent and discharges any liability of the Government to any member with respect to such refund.” Treas. Reg. § 1.1502-77(a)(2)(v).

23. The ownership of a tax refund is not transferred to a common parent simply because it is interposed between one of its subsidiaries and a taxing authority in the receipt of the subsidiary’s tax refunds. Instead, the common parent acts as agent in receiving such a refund and is bound by the law of agency to turn the refund over to its subsidiary that owns it.

24. For banking organizations and their holding companies, this principal also implicates important prohibitions under federal banking law. Under sections 23A and 23B of the Federal Reserve Act, 12 U.S.C. §§ 371 and 371-1, as made applicable by 12 U.S.C. § 1828(j), an insured depository institution is strictly limited in making extensions of credit to its holding company or other affiliates; even when permitted, such extensions of credit must be secured by collateral valued up to 130% of the extension of credit and must be on arms-length terms regarding repayment, interest, and similar matters.

25. Federal banking regulators have warned banks and bank holding companies that a holding company's failure to turn over promptly to its bank subsidiary a tax refund that has been earned by the bank subsidiary will be viewed as a violation of these provisions that could subject both the holding company and the bank to enforcement actions. See *Interagency Policy Statement on Income Tax Allocation in a Holding Company Structure*, 63 Fed. Reg. 64757 (Nov. 23, 1998) (the "Interagency Policy Statement").

26. The Debtor and the Bank were aware of these restrictions and requirements. The Debtor understood that a delay in delivering tax refunds to the Bank would be seen by regulators as a violation of federal banking law and could subject it and its principal operating subsidiary, the Bank, to federal enforcement actions. At all times, the Debtor strived to avoid taking actions that could lead to enforcement actions relating to tax settlements between itself and its insured depository subsidiary, the Bank.

27. The Debtor also understood that any agreement or policy it might enter into with (or impose on) the Bank that purported to transfer ownership of the Bank's tax refunds to the Debtor would violate sections 23A and 23B and, therefore, also could subject the Debtor or the Bank to enforcement actions.

28. No agreement or policy ever was adopted by the Bank or by the Debtor that transferred ownership of the Bank's tax refunds from the Bank to the Debtor.

29. Even if the alleged Tax Sharing Agreement, attached to the Complaint as Exhibit B, is binding as asserted by the Trustee, to which assertion the FDIC-Receiver lacks knowledge at this time, the FDIC-Receiver owns the tax refunds. The alleged Tax Sharing Agreement did not purport to transfer ownership of the Bank's tax refunds from the Bank to its holding company. Nor did that document modify the agency relationship between the Debtor and the Bank or alter the Debtor's duties as agent to safeguard and turn over promptly any property of its principal—the Bank—that the Debtor might receive including tax refunds or returned tax overpayments.

30. To the contrary, the Debtor and the Bank intended to comply with the Interagency Policy Statement in entering into the alleged Tax Sharing Agreement, which includes several provisions that are obviously based on the regulators' stated views in that pronouncement.

31. In accordance with the aforementioned Treasury Regulations, the alleged Tax Sharing Agreement provides that "[e]ach Affiliate hereby

appoints [the Debtor] as its agent, as long as such Affiliate is a member of the . . . group, for the purpose of filing such consolidated Federal income tax returns . . .” (Exhibit B § G.) “In essence, this Agreement requires that each first tier subsidiary be treated as a separate taxpayer with [Debtor] merely being an intermediary between an Affiliate and the Internal Revenue Service” (*Id.* § A.2.) In addition, the alleged Tax Sharing Agreement (under the heading “General Rule – Federal”) provides that “[i]f a regulated first-tier Affiliate incurs a net operating loss or excess tax credits, the regulated Affiliate is entitled to a refund equal to the amount that it would have been entitled to receive had it not joined in the filing of a consolidated return with [the Debtor].” (*Id.* § A.1.)

32. The alleged Tax Sharing Agreement further provides, “In the event of any adjustment to the tax returns of the Group as filed (by reason of an amended return, claim for refund, or an audit by a taxing authority), the liability of the parties to this Agreement shall be re-determined to give effect to any such adjustment as if it had been made as part of the original computation of tax liability, and payments between the appropriate parties shall be made within 10 business days after any such payments are made or refunds are received” (*Id.* § H.1.)

33. In other words, the alleged Tax Sharing Agreement on its face shows that it was designed to ensure that intercompany tax settlements between the Debtor and the Bank are conducted in a manner that is no less favorable to the Bank than if it were a separate taxpayer.

34. The alleged Tax Sharing Agreement also ensures that the Bank, as insured depository institution “shall never be liable for payment to [the Debtor] under this Agreement in excess of what their tax liability would be computed on a separate-entity basis.” (*Id.* § C.5.)

35. Finally, the alleged Tax Sharing Agreement expressly provides that its intent “is to provide an equitable allocation of the tax liability of the Group among [the Debtor] and the Affiliates. Any ambiguity in the interpretation hereof shall be resolved, with a view to effectuating such intent, in favor of any insured depository institution.” (*Id.* § H.4.)

36. These provisions confirm the Debtor’s role as agent for the Bank and preclude any reading of the alleged Tax Sharing Agreement as resulting in a transfer of ownership of the Bank’s tax refunds arising from that role, just as the federal regulators instructed in the Interagency Policy Statement. See Interagency Policy Statement, 63 Fed. Reg. at 64759 (“[A] parent company that receives a tax refund from a taxing authority obtains these funds as agent for the consolidated group on behalf of the group members,” and any tax sharing agreement “should not purport to characterize refunds attributable to a subsidiary depository institution that the parent receives from a taxing authority as the property of the parent”).

37. As to the alleged Tax Sharing Agreement, the FDIC-Receiver reserves all rights under 12 U.S.C. § 1823(e) and 12 U.S.C. § 1821(d)(9).

D. The Tax Refunds

38. Upon information and belief, during the tax years ultimately giving rise to the tax refunds at issue in this Counterclaim, the Debtor had only net losses. In those tax years in which the affiliated group reported net income on a consolidated basis, all of the net income was attributable to the earnings of the Bank.

39. Upon information and belief, the Bank paid to the Debtor its estimated taxes to the federal government in an amount equal to the amount of any estimated federal income taxes that the Bank would have been required to pay if the Bank had filed its own separate income tax return for such taxable period.

40. Upon information and belief, the Bank also paid the Debtor during those years for the use of the Debtor's losses to reduce the consolidated tax liability of the affiliated group.

41. Upon information and belief, the amount of such payments to the Debtor was equal to the tax that was saved by the affiliated group by using the Debtor's losses to reduce the Bank's taxable income. As a result of those payments, the Debtor already received its share of the benefits of consolidation at the time that the group's tax liability was paid.

42. The Debtor filed federal income tax returns as an agent for the consolidated group.

43. As a result of net operating losses incurred by the Bank in 2010, on or about June 8, 2011, the FDIC-Receiver, as agent for the consolidated tax group, filed tax returns and requests for refunds of taxes paid for tax year 2008.

44. A tax refund in the amount ranging from \$3.6 million to \$4.8 million (the “Refund”) is expected to be generated as a result of the taxable income generated by the Bank in 2008 and net operating losses experienced by the Bank in 2010 tax year.

45. On August 28, 2014, the Bankruptcy Court entered an *Order Granting Request for Relief Set Forth in Agreed Motion by the Federal Deposit Insurance Corporation As Receiver and the Chapter 7 Trustee for an Order Requiring Tax Refunds to Be Deposited with This Court* [Dkt. No. 419].

46. As of the date hereof, the Refund has not been received.

47. To the extent there are any additional, unrecovered federal and state tax refunds, those refunds also are the property of the Bank and, therefore, the FDIC-Receiver for the same reasons.

COUNT I

Declaratory Relief

48. The FDIC-Receiver refers to and incorporates by reference the allegations in paragraphs 1 through 47 of this Counterclaim as if fully restated herein.

49. An actual and ripe case or controversy exists with respect to the ownership of federal income tax refunds that have been recovered or are recoverable by the affiliated group. The interests of the FDIC-Receiver and the Trustee are adverse with respect to that controversy.

50. The FDIC-Receiver, as the successor in interest to the Bank, is the owner of all federal and state income tax refunds recovered or recoverable by

or on behalf of the affiliated group since the Bank's failure.

51. Any federal and state income tax refunds of the affiliated group that are, or that come to be, in the Trustee's or the Debtor's possession, are the FDIC-Receiver's property and are held in trust by the Trustee or the Debtor, as the case may be, as the FDIC-Receiver's agent and fiduciary.

52. The FDIC-Receiver requests that this Court enter proposed findings of fact and conclusions of law declaring that:

a. The FDIC-Receiver, as successor to the Bank, is the owner of all federal and state income tax refunds that are recovered, have been recovered, or are recoverable by the affiliated group as the result of net operating loss carrybacks or overpayments in relevant years, together with interest accrued thereon;

b. Any of the foregoing federal and state income tax refunds that are, or that come to be, in the Debtor's or the Trustee's possession are held in trust for the benefit of the FDIC-Receiver and must be turned over to the FDIC-Receiver together with all interest accrued thereon.

PRAYER FOR RELIEF

WHEREFORE, the FDIC-Receiver respectfully requests that the Court issue a report and recommendation: (1) determining that the FDIC-Receiver as the successor to the Bank is the owner of all federal and state income or other tax refunds that are at issue in the Complaint and Counterclaim; (2) dismissing with prejudice all of the Trustee's claims against the FDIC-Receiver in the Complaint; (3)

awarding the FDIC-Receiver its costs and attorneys' fees incurred in this action; and (4) granting the FDIC-Receiver such other and further relief as the Court may deem just and proper.

[Signature Page Follows]

Dated: Denver, Colorado
November 25, 2014

Respectfully Submitted,

/s/ John F. Young
John F. Young
Markus Williams Young &
Zimmerman LLC
1700 Lincoln Street,
Suite 4550
Denver, CO 80203
(303) 830-0800
jyoung@markuswilliams.com

- and -

Alan P. Solow
Oksana Koltko
DLA Piper LLP (US)
203 North LaSalle Street,
Suite 1900
Chicago, IL 60601
(312) 368-4000
alan.solow@dlapiper.com
oksana.koltko@dlapiper.com

- and -

95

B. Amon James,
Senior Counsel
Dennis J. Early, Counsel
Federal Deposit Insurance
Corporation
3501 North Fairfax Drive
Arlington, Virginia 22226
Tel. (703) 562-2739
E-mail: dearly@fdic.gov

*Attorneys for the
Federal Deposit Insurance
Corporation, as Receiver for
United Western Bank, N.A*