

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

MBIA INSURANCE CORPORATION,

Plaintiff,

-against-

FEDERAL DEPOSIT INSURANCE CORPORATION  
(in its corporate capacity and as conservator and receiver for  
INDYMAC FEDERAL BANK, F.S.B.),

Defendants.

Case No. 1:09-cv-01011-CKK

Hon. Colleen Kollar-Kotelly

**Oral Argument Requested**

**MBIA INSURANCE CORPORATION'S MEMORANDUM OF POINTS  
AND AUTHORITIES IN OPPOSITION TO THE MOTION TO DISMISS  
OF THE FDIC IN ITS CORPORATE CAPACITY**

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Plaintiff MBIA Insurance Corporation (“MBIA”) files this memorandum of points and authorities in opposition to the motion to dismiss its Amended Complaint filed by Defendant Federal Deposit Insurance Corporation in its Corporate Capacity (“FDIC Corporate”).<sup>1</sup>

### **PRELIMINARY STATEMENT**

MBIA’s Amended Complaint against FDIC Corporate arises from two discrete, unlawful actions by FDIC Corporate. First, FDIC Corporate placed itself at the front of the creditor line and received a preferential payment from its sister entity, FDIC Receiver for IndyMac Federal Bank, F.S.B. (“IndyMac Federal”) without any legal basis. Second, having drained the assets of the receivership through this unlawful preferential payment, FDIC Corporate (acting through the FDIC Board of Directors) then short circuited the administrative claims process and effectively disallowed MBIA’s claims without any determination as to whether MBIA’s claims were administrative expenses that should have been paid either before or at least *pari passu* with the satisfaction of any obligation to FDIC Corporate.<sup>2</sup>

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<sup>1</sup> The Memorandum of Points and Authorities In Support Of Motion to Dismiss By FDIC In Its Corporate Capacity, filed May 21, 2010, is referred to herein as “FDIC Corporate Memo” The FDIC, in its capacity as receiver (“FDIC Receiver,” and together with FDIC Corporate, the “FDIC”), also has moved to dismiss MBIA’s claims against it and has submitted a Memorandum of Points and Authorities (the “FDIC Receiver Memo”). MBIA responds to FDIC Receiver’s motion to dismiss in a separate opposition brief filed concurrently herewith (“MBIA Opp. to FDIC Receiver”). To the extent necessary, MBIA incorporates the arguments set forth in its response to FDIC Receiver in its response herein with respect to FDIC Corporate.

<sup>2</sup> Critically, the nature of the obligation owed by FDIC Receiver to FDIC Corporate is unexplained in FDIC Corporate’s motion to dismiss and only vaguely referenced in FDIC Receiver’s motion to dismiss. Without a clear understanding of the nature of the obligation owed to FDIC Corporate, it is not possible to determine what relative priority (or priorities) it should have been assigned for distribution of assets in the resolution of IndyMac Federal. For example, FDIC Receiver variously categorizes the obligation to FDIC Corporate as “full reimbursement of any monetary assistance provided to IndyMac Federal by FDIC Corporate,” FDIC Receiver Brief at 9, “required repayment of capital assistance and operating expense advances to FDIC Corporate,” *id.* at 12, and a claim by virtue of its subrogation to the rights of insured depositors, *id.* at 10 n.12.

FDIC Corporate's actions were wrongful. MBIA's Amended Complaint sufficiently alleges that they were wrongful. FDIC Corporate's motion to dismiss should, therefore, be denied.

In particular, the Amended Complaint alleges that the FDIC: (1) marshaled the assets of IndyMac Federal by virtue of its status as the appointed receiver of that institution, (2) paid an undefined obligation owed to itself in its corporate capacity, thereby depleting the assets of the receivership estate that could have been used to satisfy the claims of other creditors and (3) once its own obligation was satisfied, issued a Determination of Insufficient Assets To Satisfy Claims Against Financial Institution in Receivership (the "No Value Determination"), which asserted that the IndyMac Federal receivership had insufficient assets to satisfy any general unsecured creditor claims. FDIC Corporate argues that its No Value Determination, coupled with FDIC Receiver's subsequent decision to "cease reviewing" MBIA's claims, completed the claims process and is completely immunized from review.

This self-dealing, closed loop process was both unlawful and based on an intentional mischaracterization of MBIA's claims. MBIA had submitted two administrative expense claims entitled to either superior or equal priority to whatever unspecified obligation FDIC Corporate claimed it was owed. MBIA did not submit "general unsecured creditor claims" subject to the No Value Determination. Nevertheless, the FDIC refused to review MBIA's claims or afford MBIA an opportunity to "prove" them.

The assorted arguments advanced by FDIC Corporate in support of its motion to dismiss have no merit. Chiefly, FDIC Corporate contends that its acceptance of the preferential payment from its sister entity (resulting in the depletion of the receivership's assets and the subsequent "No Value Determination") is subject to FDIC Receiver's own unfettered, unreviewable discretion under the Financial Institutions Reform Recovery and Enforcement Act ("FIRREA").

The FDIC's interpretation of FIRREA is wrong as a matter of law, and it is based on a false premise. FIRREA obligates the FDIC to pay all proved claims in a given class, including claims for administrative expenses of the receiver, on a pro rata basis. The FDIC circumvented this statutory requirement. Specifically, FDIC Corporate accepted "first in line" preferential payment of its own claim, presumably as an administrative expense, while ignoring all other legitimate administrative expense claims, including MBIA's claims; then disallowed MBIA's claim by incorrectly treating it as a general unsecured claim subject to the No Value Determination; and now says that these self-dealing acts based on a fundamentally false premise are committed to its sole discretion and are not subject to review by this Court. FDIC Corporate's aggressive interpretation of FIRREA would eviscerate MBIA's statutory right to *de novo* review of its claim -- a right guaranteed by Congress which, if breached, would raise serious constitutional due process concerns recognized in a landmark decision of the Supreme Court.

FDIC Corporate's remaining contentions based on the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* ("APA"), and on its alleged lack of liability separate from that of FDIC Receiver, are also without merit. The Amended Complaint properly pleads discrete final agency action by FDIC Corporate with all the requisite specificity for such claims required by the liberal pleading rules. FDIC Corporate's motion to dismiss should be denied in its entirety.

### **BACKGROUND**

On July 11, 2008, the Office of Thrift Supervision closed IndyMac Bank, F.S.B. ("IndyMac"), appointed the FDIC as receiver for IndyMac, and chartered a new "bridge" bank, IndyMac Federal, to manage certain assets and liabilities of IndyMac that were transferred to

IndyMac Federal through the execution of a Purchase and Assumption Agreement.<sup>3</sup> Am. Compl., ¶¶ 46-47.

The FDIC served as conservator of IndyMac Federal (“FDIC Conservator”) from July 11, 2008, until March 19, 2009, when the assets of IndyMac Federal were sold to OneWest Bank, F.S.B. for \$1.5 billion. Am. Compl., ¶¶ 69, 71. Thereafter, FDIC became the receiver of IndyMac Federal and instituted an administrative claims process on May 28, 2009, pursuant to FIRREA, to resolve creditor claims against that institution. Am. Compl., ¶ 185. FDIC Receiver established August 26, 2009, as the bar date for submittal of claims against IndyMac Federal. Am. Compl., ¶ 186.

In compliance with the administrative claims process, MBIA submitted two timely claims to FDIC Receiver of IndyMac Federal on June 17, 2009, and August 26, 2009.<sup>4</sup> Both claims, in part, related to the FDIC’s own breaches of contract with respect to its failures to perform various obligations as mortgage loan servicers under contracts approved by FDIC Conservator for IndyMac Federal. *See* Am. Compl., Ex. A and B. MBIA filed both of its claims as “administrative expenses of the receiver or conservator” and, therefore, was entitled to priority distribution. *See* Am. Compl., Ex. A at ¶¶ 46, 67, 79, 91, 102, 109, 115, and Ex. B at ¶ 42; 12 U.S.C. § 1821(d)(11)(A). Section 1821(d)(11)(A) establishes a claims distribution scheme in order of priority, with administrative expense claims entitled to payment first, followed by

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<sup>3</sup> For a comprehensive discussion of the background of this action, reference is made to the Background section of MBIA’s Memorandum of Points and Authorities in Opposition to the Motion to Dismiss of the FDIC in its capacity as Conservator and Receiver of IndyMac Federal Bank, F.S.B., also filed today. For the convenience of the Court, this memorandum focuses on the facts pertinent to Plaintiff’s claim against FDIC Corporate.

<sup>4</sup> In its Amended Complaint, MBIA referred to the proofs of claim by the dates they were received and filed with the FDIC, June 17, 2009, and August 26, 2009, respectively. In its motion to dismiss brief, FDIC Receiver refers to the proofs of claim by the dates on the proofs of claim themselves, June 16, 2009, and August 25, 2009.

depositor claims, then general unsecured claims, and then two final categories of other types of claims.<sup>5</sup> Pursuant to FIRREA, FDIC Receiver was obliged to review MBIA's claims and "determine whether to allow or disallow" them within 180 days. 12 U.S.C. § 1821(d)(5). It failed to do so. *See* Am. Compl., ¶ 79.

Instead, on November 12, 2009, the FDIC Board of Directors issued the No Value Determination, which stated that the IndyMac Federal receivership had insufficient assets to satisfy any general unsecured creditor claims. Am. Compl., ¶ 77. According to FDIC Receiver, the No Value Determination was issued because: "[t]he FDIC determined that while the IndyMac Federal receivership estate had total assets of \$5.3 billion, the administrative expenses of the IndyMac Federal receivership alone amounted to \$7.964 billion (a figure that includes the required repayment of capital assistance and operating expense advances to FDIC Corporate)." FDIC Receiver Memo, at 12 (citing Ex. 3 thereto, November 12, 2009, FDIC Board Resolution at 2). According to FDIC Receiver's moving papers, therefore, FDIC Receiver paid, and FDIC

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<sup>5</sup> 12 U.S.C. § 1821(d)(11)(A) provides:

Subject to section 1815(e)(2)(C) of this title, amounts realized from the liquidation or other resolution of any insured depository institution by any receiver appointed for such institution shall be distributed to pay claims (other than secured claims to the extent of any such security) in the following order of priority:

- (i) Administrative expenses of the receiver.
- (ii) Any deposit liability of the institution.
- (iii) Any other general or senior liability of the institution (which is not a liability described in clause (iv) or (v)).
- (iv) Any obligation subordinated to depositors or general creditors (which is not an obligation described in clause (v)).
- (v) Any obligation to shareholders or members arising as a result of their status as shareholders or members (including any depository institution holding company or any shareholder or creditor of such company).

Corporate accepted, some (or all) of the \$5.3 billion IndyMac Federal estate as an administrative expense, with complete indifference and disregard for all other administrative expense claims, including MBIA's claims. *See id.*; Am. Compl., ¶ 83.

The exact nature of the alleged contractual obligations owed to FDIC Corporate is unclear due to the vague and differing ways they are described by the FDIC. FDIC Corporate's motion to dismiss (at 3) merely refers to it as a "valid obligation," without any further characterization. The FDIC Receiver's motion to dismiss (at 9) alludes to the fact that FDIC Corporate provided "monetary assistance" to IndyMac Federal pursuant to 12 U.S.C. § 1823(c)(1), and, as noted above, also refers (at 12) to "capital assistance and operating expense advances" asserted to be administrative expenses of the IndyMac Federal receivership. Elsewhere, the FDIC Receiver's motion to dismiss also notes that "the FDIC has estimated that the Deposit Insurance Fund incurred a total loss of \$10.7 billion to protect IndyMac's insured depositors," and that "when FDIC Corporate pays the claims of insured depositors, it becomes subrogated to the rights of those depositors to make claims against the assets of the depository institution, making it the largest depositor claimant of a receivership estate." *Id.* at 10 n.12.<sup>6</sup> Accordingly, the FDIC appears to view the payment to FDIC Corporate as an administrative expense, or payment of a subrogated depositor claim, or some combination of both.

On December 10, 2009, FDIC Receiver notified MBIA that, on the basis of the No Value Determination, it had "ceased reviewing" MBIA's then pending two claims because the "payment of depositor claims is preferred over all other creditor claims including the non-

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<sup>6</sup> Of course, it is not really the FDIC itself that funded these depositor payments. Any funds advanced by FDIC Corporate to capitalize IndyMac Federal or to reimburse IndyMac's insured depositors necessarily came "from premiums that banks and thrift institutions pay for deposit insurance coverage and from earnings on investments in U.S. Treasury securities," not the federal treasury. *See* FDIC: Who is the FDIC? available at <http://www.fdic.gov/about/learn/symbol/index.html> (last visited June 28, 2010).

depositor claim that [MBIA] filed.” Am. Compl., ¶ 79. This statement flatly mischaracterizes both the nature of MBIA’s claims (which are administrative expense claims, not general creditor claims), as well as the priority distribution scheme specified in 12 U.S.C. § 1821(d)(11)(A) (administrative expense claims are entitled to payment before depositor claims).

### **ARGUMENT**

The Amended Complaint states a single claim against FDIC Corporate under the APA. *See* Am. Compl., ¶¶ 182-193. FDIC Corporate’s liability to MBIA under the APA arises from two discrete and unlawful agency actions: first, FDIC Corporate’s acceptance of a preferential and disproportionately large share of IndyMac Federal’s assets, and second, the FDIC Board of Directors’ No Value Determination, which improperly was the basis for FDIC Receiver’s rejection of MBIA’s claims.

FDIC Corporate raises four arguments for dismissal of the Amended Complaint under Federal Rule of Civil Procedure 12(b)(6): (1) MBIA’s claim is barred by 12 U.S.C. § 1821(d)(10)(B); (2) MBIA has failed to allege that FDIC Corporate’s actions constituted “final agency action”; (3) MBIA has failed to allege that FDIC Corporate acted unlawfully; and (4) MBIA’s Amended Complaint somehow violates the “separate capacities” doctrine. None of these arguments has any merit.

#### **I. MBIA’s Claim Is Not Barred By 12 U.S.C. § 1821(d)(10)(B)**

In an attempt to shield its unlawful acceptance of receivership assets from any judicial scrutiny, FDIC Corporate argues that § 1821(d)(10)(B) of FIRREA grants absolute discretion to FDIC Receiver to pay claims and pay dividends on claims at any time. But, it is elemental that this power cannot exceed the limits of the FDIC’s governing statute, and it cannot justify paying junior claims instead of senior claims, or paying some senior claims while leaving others totally unpaid and worthless. In the event that § 1821(d)(10)(B) even applies – an unproven assumption

on the part of FDIC Corporate – this construction of the subsection cannot withstand a fair reading of FIRREA. FDIC Receiver’s discretion to pay claims and dividends (and, necessarily, FDIC Corporate’s discretion to accept such funds) must be governed by the requirements of the claims procedure and the priority of payments established by Congress, and it is not committed to agency discretion by law. Further, FDIC Corporate’s improperly expansive reading of § 1821(d)(10)(B) would impermissibly render a claimant’s right to seek *de novo* judicial review of its claim effectively worthless, in derogation of Supreme Court precedent and FIRREA itself.

**A. FDIC Corporate Fails To Demonstrate That 12 U.S.C. § 1821(d)(10)(B) Applies To This Action**

Section 1821(d)(10)(B) grants FDIC Receiver “sole discretion” to “pay dividends on proved claims at any time” and provides that “no liability shall attach” to FDIC Corporate or FDIC Receiver “by reason of any such payment, for failure to pay dividends to a claimant whose claim is not proved at the time of any such payment.” As a threshold matter, it is not evident that § 1821(d)(10)(B) even applies to the payment to FDIC Corporate at issue here. By its terms, the subsection applies only to dividends paid on “proved claims.” In its motion to dismiss, however, FDIC Corporate does not characterize its asserted rights to receivership assets as a “claim,” much less a “proved claim.” *See* FDIC Corporate Memo, at 3 (asserting that FDIC Receiver “owed valid obligations to FDIC Corporate”).<sup>7</sup> There is no indication that the “obligation” owed to FDIC Corporate referenced in its motion to dismiss and the Amended Complaint was ever the subject of a claim, or that such a claim was “proved” in connection with the FIRREA

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<sup>7</sup> In its motion to dismiss, FDIC Receiver likewise does not characterize the alleged obligation owed FDIC Corporate as a “claim” or a “proved claim.” As noted above, *supra* n.2, FDIC Receiver’s motion to dismiss vaguely characterizes the obligation to FDIC Corporate as “monetary assistance” provided to IndyMac Federal and FDIC Corporate’s right as subrogee to make claims on behalf of IndyMac depositors.

administrative claims procedure. FDIC Corporate's reliance on § 1821(d)(10)(B) is therefore entirely misplaced as a threshold matter.

**B. 12 U.S.C. § 1821(d)(10)(B) Does Not Grant FDIC Receiver Absolute Discretion Over The Administrative Claims Process**

FDIC Corporate, without reference to any authority beyond the words of § 1821(d)(10)(B) itself, contends that the discretion and protection afforded by that subsection entirely shield it from the allegations in the Amended Complaint. *See* FDIC Corporate Memo, at 7-8. The statutory interpretation urged by FDIC Corporate, however, is completely incompatible with the remainder of FIRREA and must be rejected.

Section 1821(d)(10)(B), like any statutory subsection enmeshed in a larger structure, “do[es] not exist in isolation, but [is] embedded within a complex statutory framework.” *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 573 (1989) (citation omitted); *see also Homeland Stores, Inc. v. Resolution Trust Corp.*, 17 F.3d 1269, 1273-74 (10th Cir. 1994) (holding “Sec. 1821(d)(13)(D) . . . is one part of an integrated administrative claims process under FIRREA” and cannot be interpreted in a “vacuum”), *cert. denied*, 513 U.S. 928 (1994).

Under the statute, the FDIC “shall pay all valid obligations of the insured depository institution in accordance with the prescriptions and limitations of this chapter.” 12 U.S.C. § 1821(d)(2)(H). Sections 1821(d)(3)-(13), of which § 1821(d)(10)(B) is a part, “establishes a claims procedure, with specific deadlines for both creditors and for the FDIC” to allow it to process and pay all valid obligations of the institution. H.R. Rep. No. 101-54(I) (1989), 101st Cong., 1st Sess., *reprinted in* 2 1989 U.S.C.C.A.N. 86, 127; *see also id.* at 214-15 (“The claims determination procedure . . . creates a system which . . . enables the FDIC to dispose of the bulk of claims against failed financial institutions expeditiously and fairly.”).

To carry out its statutory mandate, the FDIC acting as receiver “shall determine whether to allow or disallow” claims within 180 days of their filing. 12 U.S.C. § 1821(d)(5)(A)(i). Further, the FDIC “may disallow any portion of any claim by a creditor or claim of security, preference, or priority which is not proved to the satisfaction of the receiver.” *Id.* at § 1821(d)(5)(D)(i). Importantly, if any claim is disallowed by the FDIC, the claimant may file “suit on such a claim” in federal district court. *Id.* at § 1821(d)(6).

With respect to the payment of claims, Congress has made clear that claimants with proved claims are “entitled to their pro rata share of the institution’s estate.” H.R. Rep. No. 101-54(I) (1989), 101st Cong., 1st Sess., *reprinted in* 2 1989 U.S.C.C.A.N. 86, 130; 12 U.S.C. § 1821(i). That share must be distributed in conformance with the priority scheme established by Congress and codified at 12 U.S.C. § 1821(d)(11)(A), which states that “amounts realized from the liquidation or other resolution of any insured depository institution by any receiver appointed for such institution *shall* be distributed to pay claims . . . in the following order of priority: (i) Administrative expenses of the receiver. (ii) Any deposit liability of the institution.”<sup>8</sup> To that end, creditors of the receivership estate with proved claims are entitled to receive a share of the receivership’s assets on a pro rata basis with other claimants of the same priority. Further, only after administrative expense creditors’ claims are fully paid may subsequent classes of creditors be paid. Like any other creditor of the receiver, FDIC Corporate may not “jump the line, recovering more than [its] pro rata share of the liquidated assets, [when] the financial

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<sup>8</sup> “Shall” constitutes mandatory statutory language that an agency may not disregard. *See Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661-62 (2007) (citing *Lopez v. Davis*, 531 U.S. 230, 241 (2001) (noting Congress’s “use of a mandatory ‘shall’ ... to impose discretionless obligations”); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (“[T]he mandatory ‘shall’ ... normally creates an obligation impervious to judicial discretion”); *Ass’n of Civilian Technicians v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) (“The word ‘shall’ generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive”); *Black’s Law Dictionary* 1375 (6th ed. 1990) (“As used in statutes . . . this word is generally imperative or mandatory”).

institution's debts exceed its assets." *Battista v. FDIC*, 195 F.3d 1113, 1116-17 (9th Cir. 1999) (internal quotation omitted), *cert. denied*, 531 U.S. 812 (2000).

Statutory mandates prescribe how claims may be paid, and the Receiver necessarily acts in derogation of its statutory authority by failing to pay claims consistent with the statutorily established claims process. For example, despite the claimed "sole discretion" of the receiver, it may not approve a depositor claim or a general unsecured claim and pay dividends on that claim before satisfying administrative expense claims. *See id.* at § 1821(d)(10)(A) (creditor claims that are allowed by the receiver may be paid "to the extent funds are available" and "in such manner and amounts as are authorized under this chapter") and § 1821(d)(11)(A) ("amounts realized . . . by any receiver . . . shall be distributed to pay claims . . . in the following order of priority . . .") To the extent that the obligation to FDIC Corporate is a subrogated depositor claim, payment on that obligation, while ignoring MBIA's superior administrative expense claims, indisputably violates the payment preferences established by § 1821(d)(11)(A).

By the same token, the FDIC may not avoid the strictures of § 1821(d) by simply refusing to process certain priority claims in favor of satisfying other obligations (especially to itself). However, that is precisely what FDIC Corporate asks the Court to sanction here. FDIC Corporate accepted a preferential payment that does not appear to have been a "proved claim," and now seeks to take advantage of the short-circuiting of the claims process for MBIA through the No Value Determination and the mischaracterization of MBIA's administrative expense claims as general creditor claims, to argue that MBIA's claim is "not proved." The self-dealing circularity of FDIC Corporate's argument, while impressive in its creativity, does not save FDIC Corporate from judicial review. Because the receiver's "sole discretion" does not allow it to pay claims and distribute dividends without regard to other mandatory provisions of FIRREA, §

1821(d)(10)(B) does not preclude this Court's jurisdiction to review FDIC Corporate's unlawful receipt of IndyMac Federal assets under the APA.

Further, FDIC Corporate's reliance on § 1821(d)(10)(B) is particularly inappropriate in light of FDIC Receiver's acknowledgment that IndyMac Federal was formed pursuant to 12 U.S.C. § 1821(d)(2)(F) and, accordingly, is governed by § 1821(m). *See* FDIC Receiver Memo, at 7 (citing OTS Order No. 2008-24 (July 11, 2008) at 2-4; 12 U.S.C. § 1821(d)(2)(F); 12 U.S.C. § 1821(m)(1)). Section 1821(d)(2)(F) provides, in relevant part, that "[t]he Corporation may, as receiver, with respect to any insured depository institution, organize a new depository institution under subsection (m)." Subsection (m), entitled "New depository institutions," clearly establishes in a subpart entitled "Losses" that

[i]f any new depository institution, during the period it continues its status as such, sustains any losses with respect to which it is not effectively protected except by reason of being an insured depository institution, the Corporation shall furnish to it additional funds in the amount of such losses.

12 U.S.C. § 1821(m)(13). As such, Congress has explicitly directed that any losses sustained by IndyMac Federal (such as damages stemming from the claims asserted against the receivership by MBIA) shall be paid by FDIC Corporate. It would make no sense for Congress to have obligated FDIC Corporate to make payments to IndyMac Federal to cover its losses and expenses, if IndyMac Federal did not have to disburse those funds to pay counterparties to account for these losses. And it would make even less sense for Congress to have crafted a statutory scheme that would have allowed the same funds paid to the IndyMac Federal conservatorship to be diverted by the subsequent IndyMac Federal receivership back to FDIC Corporate, and immunized from review by § 1821(d)(10)(B), without the conservatorship's administrative expenses and other losses being paid, pursuant to § 1821(m)(13).

**C. FDIC’s Management Of The Administrative Claims Process Is Not Committed To Agency Discretion By Law**

In section III-C of FDIC Corporate’s motion to dismiss, FDIC Corporate incorrectly contends that because § 1821(d)(10)(B) provides the receiver with “sole discretion” to pay dividends on proven claims at any time, any such payment is unreviewable under a provision of § 701 of the APA limiting reviewability. *See* 5 U.S.C. § 701(a)(2) (judicial review of final agency action under the APA is available “except to the extent that . . . agency action is committed to agency discretion by law.”); FDIC Corporate Memo, at 11-12.

The Supreme Court has repeatedly emphasized that “judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.” *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967); *Lincoln v. Vigil*, 508 U.S. 182, 190 (1993) (“we have read the APA as embodying a basic presumption of judicial review.”) Section 701(a)(2) constitutes a “narrow exception” to that basic presumption of reviewability and is applicable only where “statutes are drawn in such broad terms that in a given case there is no law to apply.” *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (internal quotations omitted). As the D.C. Circuit has explained, “§ 701(a)(2) encodes the principle that an agency cannot abuse its discretion, and thus violate § 706(2)(A), where its governing statute confers such broad discretion as to essentially rule out the possibility of abuse.” *Drake v. FAA*, 291 F.3d 59, 70 (D.C. Cir. 2002), *cert. denied*, 537 U.S. 1193 (2003). In other words, agency action is committed to agency discretion and shielded from judicial review only when “the statute is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion.” *Heckler v. Chaney*, 470 U.S. 821, 830 (1985).

As discussed above, this is plainly not the case with respect to the FDIC's management of the claims and payment process.

Section 701's limitation on reviewability does not apply to the FDIC's authority to pay claims under § 1821(d)(10) because the rest of the statute limits the FDIC's discretion and provides the court with a clear standard to evaluate whether the FDIC was acting within its statutory authority. For example, 12 U.S.C. § 1821(d)(10)(A) provides that creditor claims allowed by the receiver may be paid "to the extent funds are available" and "in such manner and amounts as are authorized under this chapter" and § 1821(d)(11)(A) requires that "amounts realized . . . by any receiver . . . shall be distributed to pay claims . . . in the following order of priority . . . ." Furthermore, as the court in *Bank of America National Association v. Colonial Bank* explained "§ 1821(d)(3) grants the receiver the power to determine all claims against the institution in accordance with the comprehensive administrative claims procedures set forth in § 1821(d)(3)-(13)." 604 F.3d 1239, 1243 (11th Cir. 2010). FDIC's payment of claims under the FIRREA administrative claims procedure is not committed to agency discretion by law. *Cf. Getty v. FSLIC*, 805 F.2d 1050, 1058 (D.C. Cir. 1986) (rejecting the Federal Savings and Loan Insurance Corporation's argument that interpretation of the statutory term "acceptable" was committed to agency discretion and unreviewable because it would allow the FSLIC to render a statutorily mandated rebidding process optional rather than mandatory. "That . . . is the flaw in FSLIC's argument: Congress made the rebidding procedure mandatory, and thereby deliberately restricted FSLIC's flexibility.").

**D. FDIC Corporate’s Interpretation Of 12 U.S.C. § 1821(d)(10)(B) Eviscerates The Statutorily Mandated Administrative Claims Process Including MBIA’s Right To Judicial Review**

In addition to the arguments above, FDIC Corporate’s construction of § 1821(d)(10)(B), if accepted, would virtually negate a claimant’s right to *de novo* judicial review of its claim, rendering the FIRREA administrative claims process constitutionally suspect under the Supreme Court’s decision in *Coit*.

In *Coit*, the Supreme Court considered whether Congress had granted the Federal Savings and Loan Insurance Corporation (“FSLIC”) exclusive authority to adjudicate claims against a savings and loan institution under its receivership. In ruling that Congress’s pre-FIRREA law had not granted FSLIC such authority, the Supreme Court determined that a claimant was entitled to a *de novo* review in federal court of its claim. The Supreme Court also held that a claimant could not be compelled to exhaust the administrative claims process before filing suit on its claim in federal court because that process (as then constituted) placed no clear and reasonable time limit on the FSLIC’s consideration of claims. *Id.* at 586 (““These procedures give FSLIC virtually unlimited discretion to bury large claims like *Coit*’s in the administrative process, and to stay judicial proceedings for an unconscionably long period of time given FSLIC’s purportedly limited objectives of centralizing the claims process and deciding whether claims should be paid or not.””) (quoting Reply Brief for Petitioner at 18). The Court explained:

The lack of a reasonable time limit in the current administrative claims procedure renders it inadequate for several reasons. First, it allows FSLIC to delay the administrative processing of claims indefinitely, denying a litigant its day in court, while the statute of limitations runs. Second, it may enable FSLIC to coerce claimants to enter into unfair settlements by virtue of the fact that *the receiver’s assets may be depleted by interim distributions to other claimants by the time a claimant finally has access to the courts. These concerns are only exacerbated by the fact that FSLIC itself is often the main creditor against the assets of a failed savings and loan association, and thus may well have an incentive to delay*

*decision on large claims against an insolvent's assets* such as the claim filed by Coit.

*Id.* at 587 (emphasis added). Finally, although the Court declined to consider Coit's constitutional challenges to the FSLIC's administrative claims process, the Court expressly observed that the claims raised by Coit "involve 'private rights' which are at the core of 'matters normally reserved to Article III courts.'" *Id.* at 579 (quoting *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 853 (1986) and *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69-72 (1982)). Accordingly, the Court stressed that the decision below, holding that Congress had granted adjudicatory authority to the FSLIC, raised "serious constitutional difficulties." *Id.*

Congress drafted FIRREA with the express purpose of rewriting the claims process to be "responsive to the constitutional and statutory concerns . . . outlined by the Supreme Court in *Coit* . . ." H.R. Rep. No. 101-54(I) (1989), 101st Cong., 1st Sess., reprinted in 2 1989 U.S.C.C.A.N. 86, 214. The House Report explained that "the Court noted that 'serious constitutional difficulties' would be presented" if an administrative claims process granted "only limited judicial review, to adjudicate certain categories of State law claims . . . [such a claims process] may invade the domain reserved for Article III courts provided by the U.S. Constitution." *Id.* at 214-15.

As legislative history and caselaw make clear, 12 U.S.C. § 1821(d) passes constitutional muster because it provides for *de novo* judicial review of the administrative claims process. *Office & Prof'l Employees Int'l Union, Local 2 v. FDIC*, 962 F.2d 63, 65 (D.C. Cir. 1992) ("Congress was concerned . . . about the constitutionality of entrusting to executive agency adjudication claims that ordinarily lie within the province of the courts. Accordingly, Congress instructed district courts to 'determine' claims against failed banks *de novo*, rather than merely to

review, for error or abuse, FDIC's initial decisions."); *see also*, House Rep. No. 101-54(V), 101st Cong., 1st Sess. at p. 12, reprinted in 2 1989 U.S.C.C.A.N. 86, 405 ("The Committee amendment provides that after an initial decision on a claim, every claimant has the right to bring an action on that claim in a United States District Court."); *Rosa v. Resolution Trust Corp.*, 938 F.2d 383, 397 (3d Cir. 1991) (finding "no due process violation" in the application of the FIRREA administrative claims process "because the receiver's determination is not a binding adjudication and because, if plaintiffs so choose, a court will evaluate their claims *de novo*."), *cert. denied*, 502 U.S. 981 (1991); *Glenborough New Mexico Assocs. v. Resolution Trust Corp.*, 802 F. Supp. 387, 391 (D.N.M. 1992) ("Since this statutory scheme affords *de novo* court review, the process provided in 12 U.S.C. § 1821(d) is constitutional.") (citations omitted).

FDIC Corporate's construction of § 1821(d)(10)(B), however, fatally undermines a claimant's right to have an Article III court adjudicate its claims. Under FDIC Corporate's interpretation of the law, any judicial review of this process is wholly illusory. If the FDIC may pay claims and dividends at any time, unencumbered by the obligation to pay administrative expenses and other dictates of the statutory claims process, and if the FDIC is the largest creditor of the failed institution (as it almost always is) such that distribution on the FDIC's claim entirely depletes the receivership assets, any after-the-fact challenge to the process in court is subject to summary dismissal as moot. This is hardly the sort of "judicial review" mandated by *Coit* and FIRREA.

The Supreme Court, in fact, anticipated the danger posed by FDIC Corporate's position when it criticized the FSLIC's "black hole" claim adjudication process that effectively precluded judicial review. *Coit*, 489 U.S. at 586, 587 ("FSLIC itself is often the main creditor against the assets of a failed savings and loan association, and thus may well have an incentive to delay decision on large claims against an insolvent's assets," and such "assets may be depleted by

interim distributions to other claimants by the time a claimant finally has access to the courts.”). The danger recognized in *Coit* is no less present here where the FDIC claims the unreviewable discretion to (1) ignore the claims process altogether while satisfying obligations to itself, (2) make distributions that deplete the assets of the receivership without regard to the statutorily mandated claim preference, and finally, (3) contend that those *ultra vires* acts moot any judicial review of its actions. That position is just as untenable as the FSLIC’s position in *Coit* and must be rejected here.

## **II. MBIA Has Stated A Claim Against FDIC Corporate Under The Administrative Procedure Act Pursuant To Federal Rule Of Civil Procedure 8**

As discussed above, MBIA has challenged two “final agency actions” by FDIC Corporate: (1) the receipt of funds from the receiver and (2) the No Value Determination. FDIC Corporate argues in section III-B of its Motion that neither of these qualifies as a “final agency action” that could subject FDIC Corporate to liability under the APA. *See* FDIC Corporate Memo, at 8-11. It is revealing that FDIC Corporate fails to describe the legal standard applicable to pleading a “final agency action” under the APA or to articulate any basis for determining that the Amended Complaint fails to adequately allege final agency action on the part of FDIC Corporate. When measured against the standard for a *prima facie* claim, it is evident that MBIA’s complaint more than satisfies the Rule 8 standard for a “short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8.

Under the APA, “[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.” 5 U.S.C. § 704. Agency action is defined as “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.” 5 U.S.C. § 551(13). That definition was broadly formulated to “assure the complete coverage of every form of agency power,

proceeding, action, or inaction.” S. Rep. No. 248, 79th Cong., 2d Sess., 255 (1946); *see also*, *Nat’l Ass’n of Home Builders v. Norton*, 298 F. Supp. 2d 68, 76 (D.D.C. 2003) (noting the term “action . . . is meant to cover comprehensively every manner in which an agency may exercise its power.”) (citing *FTC v. Standard Oil Co.*, 449 U.S. 232, 238, n.7 (1980)), *aff’d*, 415 F.3d 8 (D.C. Cir. 2005).

In determining whether a particular agency action qualifies as “final”, “[t]he core question is whether the agency has completed its decision-making process, and whether the result of that process is one that will directly affect the parties.” *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992); *see also*, *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (an agency action is considered “final” when the action “marks the ‘consummation’ of the agency’s decision-making process” and the “action is one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’”) (internal citations omitted).

There can be no doubt that the conduct MBIA has alleged constitutes “final agency action” on the part of FDIC Corporate. FDIC Corporate cannot credibly claim that its acceptance of the funds from the IndyMac Federal receivership was anything other than discrete agency action that represents the consummation or completion of the agency decision-making process with respect to the disposition of the assets of the IndyMac Federal receivership. In short, once FDIC Corporate received the funds, there was no further action for it to take. Moreover, FDIC Corporate’s receipt of the receivership assets directly affected MBIA by leading to the No Value Determination and the resulting failure of FDIC to complete the administrative claims process and to review MBIA’s timely filed proofs of claim.

Likewise, MBIA challenges the No Value Determination to the extent it was based on the improper satisfaction of the asserted contractual obligation owed to FDIC Corporate. The No Value Determination clearly is a final agency action subject to challenge under the APA. *See*

*Adams v. Resolution Trust Corp.*, 927 F.3d 348, 355 n. 15 (8th Cir. 1991) (“A Bank Board determination of [No Value] is a ‘final agency action, which is reviewable under the provisions of the Administrative Procedure Act [ ] in an action against the Bank Board . . . .’”) (quoting *FSLIC v. Locke*, 718 F. Supp. 573, 586 (W.D. Tex. 1989)), *cert denied*, 502 U.S. 815 (1991). Moreover, the FDIC’s No Value Determination harmed MBIA by causing FDIC Receiver to abandon the administrative claims process prior to the consideration of MBIA’s claim.

FDIC Corporate’s protestations that the Amended Complaint does not allege facts to “show the circumstances, form, manner, or process by which FDIC Corporate accepted the payments” ring hollow. Nothing requires a complaint to do so. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (noting the Court did not “require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.”). Nor would such specific allegations be possible without the benefit of discovery. *See Bridges Public Charter School v. Barrie*, Civil Action No. 10-0108 (JDB), 2010 WL 1803735 (D.D.C. May 6, 2010) (noting the “notice pleading rules are not meant to impose a great burden on a plaintiff.”) (citing *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)). Rather, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’ ‘A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.’” *York v. McHugh*, Civil Action No. 09-075 (CKK), 2010 WL 1037949, \*2 (D.D.C. Mar. 22, 2010) (quoting *Twombly*, 550 U.S. at 570, and *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009)). MBIA’s allegations against FDIC Corporate easily satisfy that standard.

Finally, for all of the reasons discussed above, MBIA has properly alleged that FDIC Corporate’s actions, specifically its acceptance of assets from the receivership and the No Value Determination, exceeded its authority under FIRREA, and were “arbitrary, capricious, an abuse

of discretion, or otherwise not in accordance with law” and “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C. § 706(2)(A), (C). The Amended Complaint properly alleges, and MBIA will prove, that FDIC Corporate unlawfully accepted payment in satisfaction of the asserted contractual obligation owed to it in violation of the claims review process and distribution priority scheme mandated by 12 U.S.C. § 1821(d) and, on the basis of the assets remaining after accepting that improper payment, arbitrarily and capriciously made the No Value Determination. Nothing more is required to state a claim against FDIC Corporate under the Federal Rules.

### **III. The Amended Complaint Does Not Implicate The Separate Capacities Doctrine**

FDIC Corporate devotes the final section of its Motion to an argument that the Amended Complaint fails to allege sufficient facts to render it, as opposed to FDIC Receiver, liable, and thus, runs afoul of the separate capacities doctrine. *See* FDIC Corporate Memo, at 12-14; *see also Nat’l Trust for Historic Pres. v. FDIC*, 21 F.3d 469, 471 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1065 (1994). This argument is a complete red herring. As noted above repeatedly, the Amended Complaint alleges agency actions sufficient to state a claim against the FDIC defendants in each of their capacities. Far from attempting to hold FDIC Corporate liable for the actions of FDIC Receiver, the Amended Complaint alleges that FDIC Corporate acted unlawfully by (1) its improper acceptance of funds from the IndyMac Federal receivership estate at the expense of MBIA, and (2) its improper issuance of the No Value Determination on the basis of the unlawful distribution, thereby pre-empting the administrative claims process. The fact that FDIC Corporate undertook both of these actions in tandem with FDIC Receiver does not diminish FDIC Corporate’s culpability and does not insulate its conduct from review.

**CONCLUSION**

For all the foregoing reasons, Plaintiff MBIA requests that the Motion to Dismiss by the Federal Deposit Insurance Corporation in its Corporate Capacity be denied.

Dated: July 1, 2010

Respectfully submitted,

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Certificate of Service

I hereby certify that on July 1, 2010, a copy of the foregoing MBIA Insurance Company's Opposition to Motion to Dismiss by the Federal Deposit Insurance Corporation in its Corporate Capacity was filed electronically with the Court's Electronic Case Filing ("ECF") system. I understand that notice of this filing will be sent to all parties by operation of the Court's ECF system.

/s/ David F. Williams  
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