UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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

DEBTORS' REPLY IN SUPPORT OF THE DISCLOSURE STATEMENT MOTION AND IN RESPONSE TO THE FDIC'S OBJECTION THERETO

The above-captioned debtor and debtor in possession (the "Debtor") hereby submits this reply in support of the Debtor's Disclosure Statement Motion[2] and in response to the *Objection of the Federal Deposit Insurance Corporation, as Receiver for Corus Bank, N.A., to Disclosure Statement for the Debtor's Amended Plan of Reorganization* [Docket No. 561] (the "Objection"), and respectfully states as follows:

Background

1. On June 15, 2010 (the "Petition Date"), the Debtor filed a voluntary petition with this Court under chapter 11 of the Bankruptcy Code. The Debtor is operating its business and managing its property as a debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No request for the appointment of a trustee or examiner has been made in this chapter 11 case. On June 29, 2010, the United States Trustee for the Northern District of Illinois

[1] The Debtor in this chapter 11 case, along with the last four digits of the Debtor's federal tax identification number, is: Corus Bankshares, Inc. (3592). The location of the Debtor's corporate headquarters and the service address for the Debtor is: 10 S. Riverside Plaza, Suite 1800, Chicago, IL 60606.

[2] *Motion of the Debtor for Entry of an Order Approving: (a) the Adequacy of the Debtor's Disclosure Statement; (b) Solicitation and Notice Procedures with Respect to Confirmation of the Debtor's Proposed Plan of Reorganization; (c) the Form of Various Ballots and Notices in Connection Therewith; and (d) the Scheduling of Certain Dates with Respect Thereto* [Docket No. 516] (the "Disclosure Statement Motion").

(the "U.S. Trustee") appointed an official committee of unsecured creditors pursuant to section 1102 of the Bankruptcy Code (the "Committee") [Docket No. 39].

2. On July 26, 2011, the Debtor filed the *Disclosure Statement for the Debtor's Second Amended Plan of Reorganization Under Chapter 11 of the Bankruptcy Code* [Docket No. 555] (the "Disclosure Statement")[3] and the *Debtor's Second Amended Plan of Reorganization Under Chapter 11 of the Bankruptcy Code* (the "Plan") [Docket No. 553] with this Court.[4]

3. On July 27, 2011, the FDIC filed the Objection, alleging three categories of objections: (a) certain substantive objections to the Plan, and items in the Disclosure Statement as to which the FDIC alleges (b) inadequate disclosure or (c) inaccurate disclosure. The Debtor respectfully disagrees with the FDIC's assertions. The two objections in the first category are clearly objections to the Plan, rather than the Disclosure Statement, and consideration of these issues should be postponed until Plan confirmation. As to the second and third categories, the Objection was based on an earlier version of the Disclosure Statement (Objection, n.1). The Debtor believes the Disclosure Statement makes adequate and accurate disclosure of all the items listed in the second and third categories of the Objection. Thus the Debtor respectfully requests that the Court postpone the objections in the first category, and overrule the objections in the second and third categories.

[3] On July 27, 2011, the Debtor filed a *Notice of Filing Revised Disclosure Statement* [Docket No. 559], which included a version of the Disclosure Statement that contained minor corrections to the Disclosure Statement.

[4] All capitalized terms used but not otherwise defined herein shall have the meanings set forth in the Disclosure Statement Motion or Plan, as applicable.

Reply

I. The FDIC's Objection Is a Premature Confirmation Objection and, in Any Event, the Plan is Confirmable.

4. The FDIC's Objection is a premature Plan confirmation objection that should not be heard at the Disclosure Statement hearing. It is well-settled that substantive issues regarding confirmability of plan provisions and compliance with section 1129 of the Bankruptcy Code are issues properly reserved for confirmation. *See, e.g., In re Calpine Corp.*, No. 05-60200, 2007 WL 2908200, at *1 (Bankr. S.D.N.Y. Oct. 4, 2007) (noting the court will determine the debtor's enterprise value based on the evidence presented at the confirmation hearing, not earlier); *In re Copy Crafter Quickprint, Inc.*, 92 B.R. 973, 980 (Bankr. N.D.N.Y. 1988) ("[C]are must be taken to ensure that the hearing on the disclosure statement does not turn into a confirmation hearing, due process considerations are protected and objections are restricted to those deficits that could not be cured by voting."); *In re Monroe Well Serv.*, 80 B.R. 324, 333 (Bankr. E.D. Pa., 1987) (same).

5. Only in the rare circumstance where a proposed plan of reorganization is "patently" or "facially" unconfirmable may a court address confirmation issues at a disclosure statement hearing and avoid wasting estate assets by engaging in a futile solicitation process. *In re Phoenix Petroleum, Co.*, 278 B.R. 385, 394 (Bankr. E.D. Pa. 2001) ("[T]the disclosure statement should be disapproved at the threshold [disclosure statement hearing] only where the plan it describes displays fatal facial deficiencies or the stark absence of good faith."); *In re Cardinal Congregate I*, 121 B.R. 760, 764 (Bankr. S.D. Ohio 1990) ("Where objections relating to confirmability of a plan of reorganization raise novel or unsettled issues of law, the Court will

not look behind the disclosure statement to decide such issues at the hearing on the adequacy of the disclosure statement.").[5]

6. A creditor's dissatisfaction with its treatment under a plan is not enough to forestall approval of a disclosure statement. *In re Scioto Valley Mortgage Co.*, 88 B.R. 168, 172 (Bankr. S.D. Ohio 1988) ("If creditors oppose their treatment in the plan, but the Disclosure Statement contains adequate information, issues respecting the plan's confirmability will await the hearing on confirmation."). Here, the FDIC makes two confirmation arguments in the Objection: (a) that the treatment of its claims under the Plan is somehow inconsistent with the Debtor's position in separate tax refund litigation with the FDIC, and that such inconsistency renders the Plan unconfirmable on its face, and (b) that paying various fees called for in the Plan—including the Tricadia Fees, the TOPrS Indenture Trustee Fees, and other fees for the administration of the estate or parties' substantial contributions—ahead of the FDIC's unsecured claims somehow violates the absolute priority rule. Such objections—to the FDIC's treatment under the Plan—are not appropriately heard at this stage in the case.

7. Moreover, the Plan is confirmable. Indeed, the FDIC's objection is wrong on the merits for several reasons. ***First***, payment of the various fees about which the FDIC complains does not and cannot violate the section 1129(b)(2)(B)(ii) of the Bankruptcy Code, commonly referred to as the absolute priority rule, because such payments are not on account of claims against the Debtor. Section 1129(b)(2)(B)(ii) states that with respect to a class of unsecured claims, "the holder of any claim or interest that is junior to the claims of such class will not

[5] The FDIC cites *In re Highlands of Montour Run, LLC*, Case No. 10-21678, 2011 WL 2258628, at *2 (Bankr. N.D. Ill. June 8, 2011) and *In re Amigoni*, 109 B.R. 341, 341–42 (Bankr. N.D. Ill. 1989) for the proposition that "if the proposed plan is not confirmable, the supporting disclosure statement cannot be approved." Objection, ¶ 6. Both of these cases involve plans that, on their face, either defied court orders or proposed to pay creditors from assets that the debtor did not have, rendering such plans patently unconfirmable and facially invalid, and are therefore factually distinguishable from the circumstances here.

receive or retain under the plan ***on account of such junior claim or interest*** any property . . . ." 11 U.S.C. § 1129(b)(2)(B)(ii) (emphasis added). The Tricadia Fees and the TOPrS Indenture Trustee Fees are granted under the Plan as administrative claims for substantial contribution under section 503(b), ***not*** on account of any party's claim or interest, and any other fees are not even being paid to holders of claims against the Debtor.

8. ***Second***, under the Plan the Tricadia Fees and the TOPrS Indenture Trustee Fees must be reasonable. *See* Plan, Art. IV.D.3–4. In addition, the U.S. Trustee has the right to object to any such fees that it deems unreasonable. *See id*. As such, the FDIC's interests will be protected because amounts of such fees will be scrutinized for reasonableness by the U.S. Trustee, and FDIC's Objection to such fees is without merit.

9. ***Third***, regardless of the merits of the Debtor's arguments in the tax refund litigation, the FDIC has misread the TOPrS indentures to say that the Bank's contractual claim against the Debtor for its share of the tax refunds constitutes "money borrowed" that is entitled to priority over the TOPrS under the TOPrS indentures. The TOPrS indentures say no such thing. The TOPrS indentures each contain similar language regarding senior indebtedness and make it clear that only debt "for money borrowed" constitutes "senior indebtedness" that would be senior to the TOPrS:

> [W]ith respect to the Company, (i) the principal, premium, if any, and interest in respect of (A) ***indebtedness of the Company for money borrowed*** and (B) indebtedness evidenced by securities, debentures, notes, bonds or other similar instruments issued by the Company; (ii) all capital lease obligations of the Company; (iii) all obligations of the Company issued or assumed as the deferred purchase price of property, all conditional sale obligations of the Company and all obligations of the Company under any title retention agreement; (iv) all obligations of the Company for the reimbursement of any letter of credit, any banker's acceptance, any security purchase facility, any repurchase agreement or similar arrangement, any interest rate swap, any other hedging arrangement, any obligation under options or any similar credit or other transaction; (v) all obligations of the type referred to in clauses (i) through (iv) above of other

> Persons for the payment of which the Company is responsible or liable as obligor, guarantor or otherwise; and (vi) all obligations of the type referred to in clauses (i) through (v) above of other Persons secured by any lien on any property or asset of the Company (whether or not such obligation is assumed by the Company), whether incurred on or prior to the date of this Indenture or thereafter incurred. Notwithstanding the foregoing, ***"Senior Indebtedness" shall not include*** (1) any Additional Junior Indebtedness, (2) Debentures issued pursuant to this Indenture and guarantees in respect of such Debentures, (3) ***trade accounts payable of the Company arising in the ordinary course of business*** (such trade accounts payable being pari passu in right of payment to the Debentures), or (4) obligations with respect to which (a) in the instrument creating or evidencing the same or pursuant to which the same is outstanding, it is provided that such obligations are pari passu, junior or otherwise not superior in right of payment to the Debentures and (b) the Company, prior to the issuance thereof, has notified (and, if then required under the applicable guidelines of the regulating entity, has received approval from) the Federal Reserve (if the Company is a bank holding company) or the OTS (if the Company is a savings and loan holding company). Senior Indebtedness shall continue to be Senior Indebtedness and be entitled to the subordination provisions irrespective of any amendment, modification or waiver of any term of such Senior Indebtedness.

Indenture, dated as of June 26, 2003, U.S. Bank, N.A. as Trustee, Floating Rate Junior Subordinated Deferrable Interest Debentures Due 2033, at § 15.1 (emphasis added). The concept of "for money borrowed" refers to the situation when a lender transfers money to a debtor in exchange for a fixed right to repayment with interest. Here, the tax refunds at issue do not represent an amount "for money borrowed." The tax refunds come directly from the Internal Revenue Service as a result of losses that were generated by both the holding company and the Bank, and the Bank simply has a contractual claim against the Debtor for those refunds under that certain Intra-Company Payment Policy, by and between Corus Bankshares, Inc. and Corus Bank, N.A., dated as of April 23, 2007 (the "Tax Sharing Agreement"). This contractual claim against the Debtor thus is not entitled to any priority under the TOPrS indentures. The Tax Sharing Agreement governs the computation and payment of income taxes for the Debtor and the Bank, and says nothing about borrowed money. Rather, the Tax Sharing Agreement simply provides a mechanism for allocating tax refunds, stating that "[i]n the even that either entity's tax

calculation results in a loss (thereby resulting in a tax refund), that refund will be paid . . . by the other entity." Tax Sharing Agreement.

10. In addition, the definition of "Senior Indebtedness" highlighted above specifically carves out any "trade accounts payables . . . arising in the ordinary course of business." Here, the Tax Sharing Agreement has been in place since 2007 and has been part of the Debtor's ordinary course of business since that time. *See* BNA Tax Management Portfolios, U.S. Income Series, C Corporations, Art. XVIII(B)—The Role of Tax Sharing Agreements ("Most . . . affiliated groups filing consolidated returns enter into tax sharing agreements . . . [T]he tax sharing agreement may be nothing more than uncontroversial good housekeeping, a roadmap for reminding members of the tax and accounting departments how intercompany accounts should be adjusted to reflect the group's tax liability.") This is further evidence that the obligations under the Tax Sharing Agreement do not fit within the definition of "Senior Indebtedness" contained in the TOPrS Indentures.

11. ***Fourth***, the FDIC's argument presupposes a particular outcome of the tax refund litigation. Specifically, the FDIC presents its objection as if the district court had already found that the Tax Sharing Agreement created a debtor/creditor relationship between the Debtor and the Bank that entitles the Debtor to the tax refunds and entitles the FDIC to a claim against the Debtor for its share of such funds. While the Debtor believes that this argument is both legally correct and entirely consistent with the FDIC's treatment under the Plan, it is also merely one of several arguments that the Debtor is making in the tax refund litigation. The Debtor has also asserted that it is entitled to the tax refunds through an implied tax sharing agreement, which provides an independent basis for granting the Debtor the disputed tax refunds apart from the Tax Sharing Agreement. In addition, the Debtor has argued that certain "worthless stock

deductions" entitle the Debtor to the tax refunds. The FDIC has latched on to only one of the Debtor's many arguments in an attempt to hold up the solicitation and confirmation process. In reality, however, the district court presiding over the tax refund litigation could easily rule in favor of the Debtor on various grounds and allocate the tax refunds in many ways, none of which implicate the Plan or the FDIC's treatment thereunder.[6]

II. The Disclosure Statement Contains Accurate, Adequate Information and Should be Approved.

12. The Objection makes several claims about inadequate or inaccurate disclosures, which the Debtor believes have already been addressed in the recently filed, amended version of the Disclosure Statement. The chart below summarizes the Debtor's response to each such allegation.

[*Table on Following Page*]

[6] In addition, the FDIC's argument carries with it significant jurisdictional problems. The reference of the tax refund litigation was withdrawn from this Court to the district court. The FDIC would be asking this Court to rule on a substantive issue in the tax refund litigation in order to find the Plan unconfirmable, which would require this Court to rule on a legal issue that is before the district court.

Allegation of Inadequate or Inaccurate Disclosure	The Debtor's Response
The Disclosure Statement does not reveal who will be members of the management of the Reorganized Debtor.	Disclosed in Article V.C of the Disclosure Statement.
There is no liquidation analysis appended to the Disclosure Statement.	Disclosed in Exhibit B to the Disclosure Statement.
The term "Net Free Cash" is not discussed in the proposed Disclosure Statement. The definition too vague, and Net Free Cash will be reduced by fees paid to a wide variety of individuals and entities described in the proposed Plan, including the Creditors' Designee, the Creditors' Designee's attorney, the trustee of the Litigation Trust and his or her professionals, the new board and its officers and, perhaps, the employees of the Reorganized Debtor as well as the Plan Committee and its Professionals. In addition, the definition of Net Free Cash seems to include a deduction for fees paid to the Indenture Trustees for the TOPrS and Tricadia, neither of which is entitled to a priority or administrative claim under the Bankruptcy Code and neither of which is contractually superior to any amounts owed to the FDIC. The expenses described herein would not be absorbed in this fashion in a liquidation.	The definition of Net Free Cash is included in the Plan, which is Exhibit A to the Disclosure Statement. As a result, it is properly disclosed. The concept is designed to provide the Holders of Claims who elect the Cash Election Entitlement the same treatment such Claims would have received in a chapter 11 liquidation. The fees of the Indenture Trustees, Creditors' Designee, Litigation Trustee, Plan Committee, Tricadia and Plan Committee Consultant and related professionals do all operate to reduce Net Free Cash. However, all of these expenses, as substantial contribution claims, would also be incurred in a chapter 11 liquidation and are unrelated to Reorganized Corus's business operations. The amounts paid to employees of Reorganized Corus for their efforts are unrelated to generating Free Cash and do not operate to reduce Free Cash.
There are no disclosures regarding the redemption rights for stock issued in connection with the Cash Election Entitlement.	Disclosed in Article IX.B.6.b, with additional details to be provided in the Plan Supplement.
The Plan should expressly provide that there are no injunctions applicable to either of *Corus Bankshares, Inc. v. Federal Deposit Insurance Corp.*, Case No. 10-05654 (N.D. Ill.) or *Corus Bankshares, Inc. v. Federal Deposit Insurance Corp.*, Case No. 11-00053 (N.D. Ill.), and that the parties shall have available to them all claims, defenses, and counterclaims after confirmation.	Article IX.G.1 of the Plan provides for an injunction against the continuation of any suit or Cause of Action with respect to any Claim unless otherwise provided in the Plan. Article V.E.2 of the Plan specifically provides that the FDIC can file an amended Claim after the FDIC Cause of Action is resolved by a Final Order. As a result, the Plan clearly allows the reduction of the FDIC Cause of Action to judgment and then the filing of an amended Claim.

Allegation of Inadequate or Inaccurate Disclosure	The Debtor's Response
The Disclosure Statement fails to adequately inform those voting on the Plan of the true nature of the litigation because the Debtor describes a tax sharing agreement between the Debtor and its affiliated group when the FDIC believes that there no such agreement.	The Debtor disagrees with the FDIC's interpretation of the Tax Sharing Agreement, and the Disclosure Statement and the Disclosure Statement hearing are not the proper forums in which to litigate this issue. The Debtor has provided the caveat that "it is the Debtor's position" and "the Debtor believes" to these disclosures to make clear that these items are still in dispute.
The proposed Disclosure Statement states that a substantial amount of the refunds that are the subject of litigation with the FDIC arises from the Debtor's assertion of a worthless stock deduction. The FDIC believes that there is no evidence to support this conclusion and that the Internal Revenue Service will reject claims based on such a purported deduction.	The Debtor disagrees with the FDIC's interpretation of the Tax Sharing Agreement, and the Disclosure Statement and the Disclosure Statement hearing are not the proper forums in which to litigate this issue. The Debtor has provided the caveat that "it is the Debtor's position" and "the Debtor believes" to these disclosures to make clear that these items are still in dispute.
The proposed Disclosure Statement states that the Debtor is entitled to a reversionary interest in certain insurance premiums. Again, the FDIC-R contests the legal accuracy of this assertion.	The existence of a reversionary interest in the return premiums is a fact based on the provisions of the Debtor's insurance policies. The Debtor submits that this disclosure is accurate and does not need to be revised.

Conclusion

For the foregoing reasons and those stated in the Disclosure Statement Motion, the Debtors respectfully request that this Court overrule the Objection and approve the Disclosure Statement.

Dated: July 27, 2011

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