

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

In re:	)	Chapter 11
	)	
	)	Case No. 10-26881 (PSH)
CORUS BANKSHARES, INC., <sup>1</sup>	)	
	)	
Debtor.	)	Objection Deadline: November 25, 2011, 4:00 p.m., C.T.

**NOTICE OF FEE APPLICATION OF U.S. BANK NATIONAL ASSOCIATION,  
IN ITS CAPACITY AS SUCCESSOR TOPrS INDENTURE TRUSTEE,  
FOR PAYMENT OF TOPrS INDENTURE TRUSTEE FEES (TOPRS TRUST XI)**

**PLEASE TAKE NOTICE** that on November 4, 2011, the **Fee Application of U.S. Bank National Association in its Capacity as Successor TOPrS Indenture Trustee for Payment of TOPrS Indenture Trustee Fees (TOPrS Trust XI)** (the “**Application**”) was filed by U.S. Bank National Association (through counsel) with the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division, 219 South Dearborn, Chicago, IL 60604.

**PLEASE TAKE FURTHER NOTICE** that, pursuant to Article IV.D.3 of *The Debtor’s Third Amended Plan of Reorganization Under Chapter 11 of the Bankruptcy Code (With Technical Modifications)* [ECF No. 689-1] (the “**Plan**”), the TOPrS Indenture Trustee seeks allowance of its TOPrS Indenture Trustee Fees, as reasonable, in the amount of \$328,993.76.

**PLEASE TAKE FURTHER NOTICE** that any objection must be filed with the Court by **November 25, 2011 at 4:00 p.m., C.T.** and served by such time on: (a) Shipman & Goodwin LLP, One Constitution Plaza, Hartford, Connecticut 06103, Attn: Marie Pollio, Esq.; Kaye Scholer LLP, 3 First National Plaza, 70 West Madison Street, Suite 4100, Attn: Michael Messersmith, Esq. and Jason J. Ben, Esq.; (c) counsel to the Official Committee of Unsecured Creditors, Attn: Todd C. Meyers, Esq. and Deborah M. Gutfeld, Esq.; (d) the Debtor: Corus Bankshares, Inc., 10 S. Riverside Plaza, Suite 1800, Chicago, IL 60606, Attn: Chief Financial Officer; (e) counsel to the Debtor; and (f) the Office of the United States Trustee for the Northern District of Illinois, 219 South Dearborn Street, Suite 873, Chicago, Illinois 60604, Attn: M. Gretchen Silver.

**PLEASE TAKE FURTHER NOTICE** that a hearing on the Application will be held on **December 1, 2011 at 10:30 a.m., C.T.** at the Everett McKinley Dirksen Building, 219 South Dearborn Street, Chicago, Illinois 60604 before the Honorable Pamela S. Hollis, or any judge sitting in her stead, in Room 644, at which time and place you may attend and be heard with respect to the Application. Should you wish to review the Application, please be advised that the

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<sup>1</sup> 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). Prior to the Effective Date, the location of the Debtor’s corporate headquarters and the service address for the Debtor was: 10 S. Riverside Plaza, Suite 1800, Chicago, IL 60606.

Application has been filed with the U.S. Bankruptcy Court and you may review the Application through the court's electronic docket or by contacting the undersigned counsel at (312) 583-2300 for a copy of the Application.

Dated: November 4, 2011

Respectfully submitted,

By: /s/ Michael D. Messersmith

Michael D. Messersmith (ARDC #6270267)  
Jason J. Ben (ARDC #6281014)  
KAYE SCHOLER LLP  
3 First National Plaza  
70 West Madison Street, Suite 4100  
Chicago, Illinois 60602  
(312) 583-2300

and

Ira H. Goldman  
Marie C. Pollio (*pro hac vice*)  
SHIPMAN & GOODWIN LLP  
One Constitution Plaza  
Hartford, Connecticut 06103  
(860) 251-5000  
mpollio@goodwin.com

*Attorneys for U.S. Bank National Association (as  
successor to Bank of America, N.A.)*

**CERTIFICATE OF SERVICE**

I, Michael D. Messersmith, an attorney, certify that on November 4, 2011, I caused the **Fee Application of U.S. Bank National Association in its Capacity as Successor TOPrS Indenture Trustee for Payment of TOPrS Indenture Trustee Fees (TOPrS Trust XI)** (the **“Application”**) to be served electronically through the Court's CM/ECF filing system to those parties on the list to receive e-mail notice for this case, and by e-mail to the following individuals not included on the Court's CM/ECF notice list:

Frank F McGinn	ffm@bostonbusinesslaw.com
W. Curchack	wchurchack@loeb.com
V. Rubinstein	vrubinstein@loeb.com
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J. Rice	jrice@rgrdlaw.com
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Lea A. Ament	W_Amentbbc@att.net
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John Robert Weiss	jrweiss@duanemorris.com
Peter Addei	paddei@cohenandcompany.com
Illinois Student Assistance Commission - Bankruptcy Department	collegezone@isac.org
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Illinois Department of Employment Security - Benefit Payment Control Division	joseph.mueller@illinois.gov
Richard L Nagle	nagle.richard@epa.gov
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In addition, the Application was served by facsimile upon the following parties:

Department of Justice Attorney General of the United States 950 Pennsylvania Ave, NW Washington, D.C. 20530-0001 Facsimile: 202-307-6777	Bloomberg Debt Collector Marie Ferguson Vengroff Williams & Associated Inc PO Box 4155 Sarasota, FL 34230-4155 Facsimile: 631-670-2241
Dept of the Treasury - IRS P.O. Box 21126 Philadelphia, PA 19114 Facsimile: 312-566-2826	SEC Headquarters Securities and Exchange Commission Michael Berman 100 F Street NE Washington, D.C. 20549 Facsimile: 202-772-9260
Office of the United States Attorney Northern District of IL, Eastern Division 219 S Dearborn St Chicago, IL 60604 Facsimile: 312-353-2067	

By: /s/ Michael D. Messersmith

Michael D. Messersmith (ARDC #6270267)  
Jason J. Ben (ARDC #6281014)  
KAYE SCHOLER LLP  
3 First National Plaza  
70 West Madison Street, Suite 4100  
Chicago, Illinois 60602  
(312) 583-2300

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

<b>In re:</b>	)	<b>Chapter 11</b>
	)	
	)	<b>Case No. 10-26881 (PSH)</b>
<b>CORUS BANKSHARES, INC.,<sup>1</sup></b>	)	
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<b>Debtor.</b>	)	<b>Objection Deadline: November 25, 2011, 4:00 p.m., C.T.</b>

**APPLICATION OF U.S. BANK NATIONAL ASSOCIATION, IN  
ITS CAPACITY AS SUCCESSOR TOPrS INDENTURE TRUSTEE,  
FOR PAYMENT OF TOPrS INDENTURE TRUSTEE FEES (TOPRS TRUST XI)**

U.S. Bank National Association (“U.S. Bank”), in its capacity as successor TOPrS Indenture Trustee (as defined below), hereby files its Application (the “Application”), pursuant to section 1129(a)(4) of title 11 of the United States Code (the “Bankruptcy Code”) and Article IV.D.3 of *The Debtor’s Third Amended Plan of Reorganization Under Chapter 11 of the Bankruptcy Code (With Technical Modifications)* [ECF No. 689-1] (the “Plan”), for allowance and payment of its TOPrS Indenture Trustee Fees (as defined below), incurred in connection with the chapter 11 case of the above-caption debtor (the “Debtor”).

In this Application, U.S. Bank respectfully requests that this Court enter an order, substantially in the form attached hereto as “Exhibit A”, determining as reasonable and awarding the allowance and payment of its TOPrS Indenture Trustee Fees (as herein after defined) in the sum of \$328,993.76. The additional exhibits attached to this Application are:

“Exhibit B” – Summary of TOPrS Indenture Trustee Fees

“Exhibit C” – Invoices of U.S. Bank

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<sup>1</sup> 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). Prior to the Effective Date, the location of the Debtor’s corporate headquarters and the service address for the Debtor was: 10 S. Riverside Plaza, Suite 1800, Chicago, IL 60606.

“Exhibit D” – Invoices of Shipman & Goodwin LLP

“Exhibit E” – Invoices of Kaye Scholer LLP

In support of its Application, U.S. Bank respectfully represents as follows:

### **JURISDICTION**

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. In addition, this Court retained jurisdiction to consider this Application pursuant to Article X.1 of the Plan and paragraph 18 of the Order Confirming the Debtor’s Third Amended Plan of Reorganization Under Chapter 11 of the Bankruptcy Code [ECF No. 689] (the “Confirmation Order”).

2. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B) and (O). Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The statutory predicate for the relief requested herein is section 1129(a)(4) of the Bankruptcy Code.

### **BACKGROUND**

4. On June 15, 2010 (the “Petition Date”), the Debtor filed a voluntary petition with this Court under chapter 11 of the Bankruptcy Code.

5. Following extensive discussions between the Debtor and the official committee of unsecured creditors (the “Committee”) regarding the terms of a plan of liquidation, the Debtor filed the *Debtor’s Amended Plan Under Chapter 11 of the Bankruptcy Code* [ECF No. 285] on December 15, 2010, which proposed the orderly wind down and liquidation of the Debtor. On December 16, 2010, the Bankruptcy Court approved the disclosure statement for this proposed liquidation plan [ECF No. 303], and on December 23, 2010, the Debtor commenced solicitation for the liquidation plan [ECF No. 322]. Subsequently, six creditors holding claims in the principal amount of approximately \$166 million (including Tricadia CDO Management, LLC

and Mariner – Tricadia Credit Strategies Master Fund, Ltd. (collectively, “Tricadia”)) voted to reject the Debtor’s proposed liquidation plan.

6. In the wake of this rejection of the proposed liquidation plan by the Debtor’s creditors, extensive discussions ensued amongst the Debtor, the Committee and Tricadia about the propriety of a plan of liquidation, and proposed plan modifications. Ultimately, after numerous discussions and extensive analysis of costs and benefits of a plan of liquidation and a plan of reorganization, Tricadia and a majority of the other creditors who had voted to reject the liquidation plan, plus one additional creditor (collectively, the “Plan Support Parties”), determined that a plan of reorganization would best maximize value for the Debtor’s estate. On May 3 and May 4, 2011, the Plan Support Parties delivered to the Debtor letters informing the Debtor that they supported a reorganization and attached a term sheet setting forth the material terms of that reorganization.

7. The Debtor, Tricadia and the Committee thereafter negotiated the terms of a reorganization plan and, on July 26, 2011, the Debtor filed a disclosure statement (as amended, the “Disclosure Statement”) and attached, as an exhibit, a draft of the negotiated plan of reorganization (i.e., the “Plan”) [ECF. No. 553]. Thereafter, on July 28, 2011, the Bankruptcy Court entered the *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 Forms of Various Ballots and Notices in Connection therewith; and (D) the Scheduling of Certain Dates With Respect Thereto* [ECF No. 575] (the “Disclosure Statement Order”). In accordance with the Disclosure Statement Order and the solicitation procedures approved thereunder, the Debtor provided ballots to certain of its stakeholders to

solicit votes to accept or reject the Plan. A majority of the stakeholders who submitted ballots voted in favor of the Plan. See [ECF No. 663].

8. Following a hearing held on September 27, 2011, the Court entered the Confirmation Order confirming the Plan. The effective date of the Plan was October 27, 2011 (the “Effective Date”).

**The TOPrS Indentures**

9. Between June 2003 and June 2007, the Debtor created thirteen unconsolidated subsidiary trusts (collectively, the “TOPrS Trusts”), each of which issued trust originated preferred securities (the “TOPrS”) to investors and then used the proceeds of the issuances to purchase debentures (the “TOPrS Debentures”) from the Debtor with terms essentially identical to the TOPrS. Each of the TOPrS Trusts was governed by a declaration of trust (a “TOPrS Trust Indenture”) and an indenture trustee (the “TOPrS Trust Indenture Trustee”) was appointed for each TOPrS Trust. Similarly, each issuance of TOPrS Debentures was governed by an indenture (the “TOPrS Debenture Indentures”) and an indenture trustee (the “TOPrS Debenture Indenture Trustee”) was appointed for each series of TOPrS Debentures.

10. Prior to the Petition Date and for a portion of the post-petition period, Bank of America, N.A., as successor to LaSalle Bank National Association (“Bank of America”), was the TOPrS Trust Indenture Trustee with respect to the TOPrS Trust XI pursuant to that certain Amended and Restated Declaration of Trust, dated as of December 19, 2005. Bank of America was also the TOPrS Debenture Indenture Trustee under that certain Indenture, dated as of December 19, 2005 (the “Indenture”), pursuant to which the TOPrS Debentures due March 15, 2036 were issued.<sup>2</sup>

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<sup>2</sup> Because the documents relating to the TOPrS and the TOPrS Debentures are voluminous they have not been attached hereto. However, copies are available upon the Court’s request.



11. On December 31, 2010, U.S. Bank purchased substantially all of the structured corporate trust business of Bank of America, including the business related to the TOPrS Debenture and TOPrS Trust XI. U.S. Bank and Bank of America, as both TOPrS Debenture Indenture Trustee and as TOPrS Trust Indenture Trustee for TOPrS Trust XI, are collectively referred to herein as the “TOPrS Indenture Trustee.”

12. U.S. Bank (not as successor to Bank of America) also serves as TOPrS Indenture Trustee for TOPrS Trusts I, III and V. A separate fee application is being filed contemporaneously herewith for TOPrS Indenture Trustee Fees accrued on account of those transactions. None of the amounts requested hereunder are duplicative of the amounts requested in the other application.

13. The Indenture provides that the TOPrS Debenture Indenture Trustee is entitled to payment of reasonable, documented fees and expenses (including professional fees and expenses). Section 6.06 of the Indenture. In particular, pursuant to the Indenture, the TOPrS Indenture Trustee is entitled to the following:

... the Company covenants and agrees to pay to the Trustee from time to time, and the Trustee shall be entitled to, such compensation as shall be agreed to in writing between the Company and the Trustee (which shall not be limited by any provision of law in regard to the compensation of a trustee of an express trust), and the Company will pay or reimburse the Trustee upon its written request for all documented reasonable expenses, disbursements and advances incurred or made by the Trustee in accordance with any of the provisions of this Indenture (including the reasonable compensation and the reasonable expenses and disbursements of its counsel and of all Persons not regularly in its employ) except any such expense, disbursement or advance that arises from its negligence, willful misconduct or bad faith. The Company also covenants to indemnify each of the Trustee (including in its individual capacity) and any predecessor Trustee (and its officers, agents, directors and employees) for, to hold it harmless against, any and all

loss, damage, claim, liability or expense including taxes (other than taxes based on the income of the Trustee), except to the extent such loss, damage, claim, liability or expense results from the negligence, willful misconduct or bad faith of such indemnitee, arising out of or in connection with the acceptance or administration of this Trust, including the costs and expenses of defending itself against any claim or liability in the premises. The obligations of the Company under this Section 6.06 to compensate and indemnify the Trustee and to pay or reimburse the Trustee for documented expenses, disbursements and advances shall constitute additional indebtedness hereunder.

Indenture at Section 6.06. In addition, the Indenture provides the TOPrS Indenture Trustee with a lien with respect to such fees and expenses:

Such additional indebtedness shall be secured by a lien prior to that of the Debentures upon all property and funds held or collected by the Trustee as such, except funds held in trust for the benefit of the holders of particular Debentures.

Id.

14. The foregoing provisions extend to U.S. Bank, as current TOPrS Indenture Trustee, and Bank of America, as predecessor TOPrS Indenture Trustee.

**The Plan and the TOPrS Indenture Trustee Fees**

15. On the Effective Date of the Plan, substantially all instruments and agreements executed in connection with the TOPrS were deemed automatically canceled and of no further force or effect, except for certain limited purposes. See Plan at Article IV.D.1. The relevant TOPrS instrument or agreement remained in effect for the purpose of, among other things, “permitting such TOPrS Indenture Trustee to maintain any rights or Liens it may have under the applicable TOPrS Documents to receive TOPrS Indenture Trustee Fees . . . .” Id. The Plan defines “TOPrS Indenture Trustee Fees” as follows:

reasonable, documented fees, disbursements, advances and expenses (including, without limitation, professional fees

and expenses, and payments made or to be made in connection with indemnity Claims) of each TOPrS Indenture Trustee (including, without limitation, in connection with service on the Committee, and in connection with Distributions under the Plan.)

Plan at Article I.A.101.

16. In addition, the Plan establishes a specific process to allow the TOPrS Indenture Trustee to apply for and receive payment of its TOPrS Indenture Trustee Fees. In particular, pursuant to the Plan, “as soon as practicable after the Effective Date, the Reorganized Debtor shall pay the TOPrS Indenture Trustee Fees.” Id. at Article IV.D.3. However, to receive payment of the TOPrS Indenture Trustee Fees, the Plan requires the TOPrS Indenture Trustee to comply with the following process:

As a precondition to payment of any TOPrS Indenture Trustee Fees incurred prior to the Effective Date, each TOPrS Indenture Trustee shall, after the Effective Date, submit to the Bankruptcy Court its invoices and an application for payment of such TOPrS Indenture Trustee Fees in accordance with Article XI.A. of the Plan. The Bankruptcy Court shall review each application for payment of TOPrS Indenture Trustee Fees for reasonableness, as required by section 1129(a)(4) of the Bankruptcy Code.

Id. The Plan provides that the deadline for submission of applications by TOPrS Indenture Trustees for the payment of TOPrS Indenture Trustee Fees incurred on or before the Effective Date is 60 days after the Effective Date. Id. at Article XI.A.

**U.S. Bank’s Proofs of Claim**

17. On August 12, 2010, Bank of America, as the then current TOPrS Indenture Trustee, timely filed a proof of claim with respect to TOPrS Trust XI (the “Claim”), which was assigned claim number 299. The Claim included a liquidated claim for principal and interest. Upon agreement with the Debtor and pursuant to the Plan, the Claim was deemed to be an

Allowed Claim (as such term is defined in the Plan) in the amount of \$26,896,674.00. Plan at Article IV.Q.

18. In addition, the Claim included an unliquidated claim for all fees and expenses incurred by and any other amounts owing to the TOPrS Indenture Trustee, including the fees and expenses of any professionals retained by the TOPrS Indenture Trustee in connection with the TOPrS and this chapter 11 case. Claim No. 299 at ¶ 4.B. The Claim further invoked Section 6.06 of the Indenture, which grants the TOPrS Indenture Trustee the right to assert a charging lien with respect to any unpaid fees and expenses.<sup>3</sup> *Id.* at ¶ 12. As set forth above, the Plan provides that the unliquidated portion of the Claim, constituting the TOPrS Indenture Trustee Fees, is subject to further consideration by this Court for reasonableness, pursuant to section 1129(a)(4) of the Bankruptcy Code. Plan at Article IV.D.3. Upon approval of the TOPrS Indenture Trustee Fees, the Plan provides that the Debtor shall “as soon as practicable thereafter, reimburse the TOPrS Indenture Trustee in Cash for such TOPrS Indenture Trustee Fees.” *Id.*

**Bank of America and U.S. Bank’s Role in This Bankruptcy Case**

19. On June 28, 2010, pursuant to section 1102 of the Bankruptcy Code, the United States Trustee appointed five creditors to serve on the Committee in connection with this chapter 11 case. Bank of America, in its capacity as TOPrS Indenture Trustee, was one of the five TOPrS Indenture Trustees appointed as a member of the Committee. On March 21, 2011, in connection with Bank of America’s sale of the business related the TOPrS Debenture and TOPrS Trust XI, resigned as a member of the Committee [ECF No. 385], and U.S. Bank, as successor to Bank of America, assumed responsibility on the Committee and in this chapter 11 case for

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<sup>3</sup> The charging liens of the TOPrS Indenture Trustee are preserved in the Plan pursuant to, among other things, Article IV.D.2 and Article IV.D.4.

TOPrS Trust XI. Pursuant to the Plan, the Committee dissolved on the Effective Date. See Plan at Article IV.M.

20. On or around December 2, 2009, Bank of America retained the law firm of Kaye Scholer LLP (“Kaye Scholer”) to represent it in connection with TOPrS Trust XI. On or around March 21, 2011, U.S. Bank succeeded to Bank of America as the TOPrS Indenture Trustee with respect to TOPrS Trust XI. In conjunction with the succession, the law firm of Shipman & Goodwin LLP (“Shipman”, and together with Kaye Scholer, “Counsel”), which had previously been retained by U.S. Bank in connection with TOPrS Trust I, III and V, expanded its representation of U.S. Bank to include TOPrS Trust XI.

21. Prior to the Petition Date, Counsel engaged in such activities as, among other things, analyzing the documents governing the TOPrS and TOPrS Debentures, monitoring for defaults under those documents, negotiating with Debtor’s representatives in an effort to achieve a consensual out-of-court restructuring, participating in numerous teleconferences for such purposes and communicating with holders of the TOPrS. In addition, attention was given to issues raised by the succession from Bank of America to U.S. Bank.<sup>4</sup> Of particular note, during the period prior to the Petition Date (the “Prepetition Period”), Kaye Scholer took the lead in organizing the various other institutions serving as indenture trustee for the Debtor’s TOPrS and negotiating with the Debtor.

22. After the Petition Date, this representation extended to Bank of America’s and U.S. Bank’s service on the Committee and this chapter 11 case, generally. The majority of Shipman’s services were performed by Ms. Marie Pollio, an associate at the firm. Ms. Pollio has

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<sup>4</sup> Fees and expenses incurred by both U.S. Bank and Shipman with respect to the succession are charged exclusively to TOPrS Trust XI. These costs are included in the aggregate sum presented in this Application and are not duplicative of amounts requested in the other application filed by U.S. Bank.

substantial experience representing indenture trustees in large, complex chapter 11 cases and, especially, bank holding company cases. The majority of Kaye Scholer's services were performed by Mr. Michael Messersmith and Mr. Daniel Hartnett, partners at Kaye Scholer. Mr. Messersmith, bankruptcy counsel, and Mr. Hartnett, structured finance counsel, have extensive experience with the structure and enforcement of TOPrS and were uniquely qualified to represent Bank of America. In light of the complexities of this case, the unique structure of the TOPrS and the numerous issues that arose during Kaye Scholer's representation of Bank of America and Shipman's representation of U.S. Bank, other attorneys assisted as was required for the representation. Mr. Robert Cruse, Vice President of Bank of America, and Mr. James Byrnes, Vice President of U.S. Bank, performed the majority of work on behalf of Bank of America or U.S. Bank, as the case may be, in consultation with their counsel.

23. The activities performed first by Bank of America and then by U.S. Bank and Counsel during the chapter 11 case include, but are not limited to:

- (a) Seeking membership on the Committee, attending the organizational meeting of the Committee, interviewing and selecting Committee counsel and financial advisor;
- (b) participating in regular Committee calls as well as numerous telephonic or in-person meetings with the Debtor, and other significant parties throughout the case, including Tricadia, the Plan Support Parties and the Federal Deposit Insurance Corporation (the "FDIC");
- (c) reviewing, analyzing and providing input on significant pleadings filed in the chapter 11 case and related litigation actions;
- (d) participating in the negotiation and formulation of a plan of liquidation and related disclosure statement and solicitation documents and related pleadings, which ultimately was rejected by voters;
- (e) participating in the negotiation and formulation of the Plan and related Disclosure Statement and solicitation documents and all related pleadings;
- (f) negotiating the inclusion of several features into the Plan to provide creditors with additional alternatives and protections, including, but not

limited to: (i) the “liquidation option,” which provides eligible creditors with the option to receive a distribution of cash rather than a distribution of stock in the reorganized debtor;<sup>5</sup> (ii) the Plan Committee, made up of independent members of the reorganized debtor’s board of directors with fiduciary duties to parties entitled to distributions under the Plan, to oversee and have decision-making authority with respect to the reorganized debtor’s ongoing litigation and causes of action; (iii) the Plan Committee Consultant, a former federal judge, tasked with overseeing and consulting with the Plan Committee regarding any material decision in connection with ongoing litigation and related settlements; (iv) the Litigation Trust, a trust created to hold causes of action against certain of the Debtor’s former officers; (v) the Creditors Designee, an individual appointed by the Committee and tasked with consulting with the Plan Committee and the Plan Committee Consultant regarding ongoing litigation and related settlements, to take positions in connection with the litigation between the Debtor and the FDIC regarding subordination issues and to monitor the Debtor with respect to distributions under the Plan; (vi) periodic reporting requirements, requiring the Debtor to publicly file periodic reports detailing the costs of administration of the estate and the amounts available for distribution, including the requirement to provide to the Creditors Designee any information that is withheld from the filed report out of concerns for the sensitivity or confidentiality of the information; (vii) prohibition against pledging assets, which prohibits the reorganized debtor from pledging any interest in various assets specifically reserved, in part or in whole, for parties that elected the Liquidation Option; (viii) the Cash Election Entitlement Segregated Account, a segregated account established to hold the amounts distributable to parties electing the Liquidation Option, governed by extremely conservative investment guidelines; (ix) refinements to the definition of “Free Cash,” the term used to establish the actual and potential assets that will be available to parties entitled to distributions, designed to enlarge and clarify the scope of the definition; and (x) refinements to the definition of “Net Free Cash,” the term used to describe the deductions from Free Cash that will be made to arrive at the amount of a distribution, designed to make clear that only those costs that otherwise would have been incurred in connection with a liquidation will be applied to reduce the Net Free Cash available to those parties that elected a cash distribution pursuant to the Liquidation Option;

- (g) regularly consulting with Committee counsel and extensively commenting on numerous drafts of the liquidation plan, the Plan, related disclosure statements and solicitation materials regarding, among other things,

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<sup>5</sup> In fact, a significant number of creditors, including certain of the Plan Support Parties, elected to receive a distribution of cash pursuant to the liquidation option rather than a distribution of equity under the Plan.

description, structure and treatment of the Debtor's pre-petition capital structure, including the TOPrS and TOPrS Debentures;

- (h) analyzing the complex legal, intercreditor and subordination issues and reviewing various corporate documents relevant to the Debtor's bankruptcy case;
- (i) calculating, preparing and filing the Claims and reconciling the Claims with the Debtor;
- (j) preparing various notices to holders and engaging in other communications with holders regarding this case; and
- (k) participating in teleconferences and correspondence with the Debtor and Committee professionals regarding distribution mechanics, solicitation mechanics, post-confirmation securities issues and related Plan implementation issues.

24. With respect to general case issues, whenever possible and appropriate, the TOPrS Indenture Trustee and Counsel relied primarily on counsel to the Committee to perform the necessary due diligence and legal research in order to avoid duplication of services. In this regard, the TOPrS Indenture Trustee and Counsel reviewed significant pleadings, reports and legal memoranda prepared by counsel and advisors to the Committee on a weekly basis, relating to the wide-ranging issues in these bankruptcy proceedings. Additionally, Mr. Cruse, Mr. Byrnes and Counsel analyzed various pleadings and plan-related documents prepared or filed in the case, reported its analysis to the TOPrS Indenture Trustee and provided input to Committee counsel where appropriate.

**The TOPrS Indenture Trustee Fees**

25. U.S. Bank is submitting this Application seeking reimbursement on behalf of itself and Bank of America for TOPrS Indenture Trustee Fees in the aggregate amount of \$328,993.76. Of this total, \$6,179.13 constitutes the total fees and non-legal expenses of U.S.



Bank<sup>6</sup>, \$13,760.49 constitutes the total fees and expenses of Shipman and \$309,054.14 constitutes the total fees and expenses of Kaye Scholer.

26. U.S. Bank incurred an aggregate amount of \$6,179.13 in fees and expenses, all of which were incurred after the Petition Date (the “Postpetition Period”). Of this amount, \$6,179.13 was fees and \$0.00 was expenses.

27. Shipman incurred an aggregate amount of \$13,760.49 in fees and expenses, all of which were incurred during the Postpetition Period. Of this amount, \$13,718.07 was fees and \$42.42 was expenses.

28. Kaye Scholer incurred an aggregate amount of \$309,054.14 in fees and expenses. Of this amount, \$79,243.60 was fees and \$27.34 was expenses incurred during the Prepetition Period and \$227,939.40 was fees and \$1,843.80 was expenses incurred during the Postpetition Period.

29. Attached hereto as Exhibit B is a chart summarizing the TOPrS Indenture Trustee Fees. In addition, attached hereto as Exhibits C, D and E, and incorporated by reference herein, are copies of the invoices of U.S. Bank, Shipman and Kaye Scholer, redacted to preserve privilege where appropriate. Because the succession of TOPrS Trust XI from Bank of America to U.S. Bank became effective on or about March 21, 2011, the U.S. Bank and Shipman invoices from and after that date are allocated among the four trusts for which U.S. Bank serves as TOPrS Indenture Trustee (TOPrS Trusts I, III, V and XI). This Application only relates to TOPrS Trust XI. The balance of the invoices is the subject of a separate Application relating to TOPrS Trusts I, III and V. The amounts set forth in the invoices remain unpaid and outstanding.

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<sup>6</sup> Bank of America has no accrued unpaid fees or non-legal expenses.

30. In accordance with industry practice and as reflected in the invoices appended to this Application as Exhibit C, U.S. Bank bills for the time spent by Mr. Byrnes and its other professional administrators providing default administration services at an hourly rate. Similarly, and as reflected in the invoices appended to this Application as Exhibits D and E respectively, Shipman and Kaye Scholer's Shipman's fees are billed at an hourly rate and represent the customary fees and expenses that each of Shipman and Kaye Scholer, respectively, charges to its clients. U.S. Bank, Shipman and Kaye Scholer have prepared and maintained their records and invoices in a manner that is consistent with their ordinary business practices and those of others in the same industry. As is further discussed below, it is respectfully submitted that the TOPrS Indenture Trustee Fees reflected in those invoices are reasonable and should be approved in full.

#### **REQUESTED RELIEF**

31. U.S. Bank, in its capacity as successor TOPrS Indenture Trustee, hereby seeks a determination that the TOPrS Indenture Trustee Fees sought herein are reasonable, pursuant to section 1129(a)(4) of the Bankruptcy Code and Article IV.D.3 of the Plan, and requests that the Debtor be authorized and directed to pay, in cash, the sum of \$328,993.76 for its TOPrS Indenture Trustee Fees incurred in connection with the TOPrS and this chapter 11 case, from December 2, 2009 through and including the Effective Date.

#### **Section 1129(a)(4) of the Bankruptcy Code and the Plan Authorize Payment of "Reasonable" TOPrS Indenture Trustee Fees**

32. As set forth above, the Plan imposes an obligation on the Debtor to pay, in cash, the TOPrS Indenture Trustee Fees, subject only to this Court's consideration of whether such fees are "reasonable," pursuant to section 1129(a)(4) of the Bankruptcy Code. See Plan at Article IV.D.C. Section 1129(a)(4) of the Bankruptcy Code provides that in order for a court to

confirm a plan, “[a]ny payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to approval of, the court as reasonable.” 11 U.S.C. § 1129(a)(4).

33. Though the payment of fees, such as the TOPrS Indenture Trustee Fees, by a debtor through a chapter 11 plan is not uncommon, very little case law exists to confirm and explain this practice. However, several bankruptcy courts have confirmed that, where the provision of payment of fees is an element of a chapter 11 plan, section 1129(a)(4) may serve as the basis for payment of such fees, independent of any other provision of the Bankruptcy Code. In re Adelphia Communications Corp., 441 B.R. 6, 9 (Bankr. S.D.N.Y. 2010) (holding that reasonable fees may be paid, pursuant to section 1129(a)(4) of the Bankruptcy Code, where the provision for payment of such fees is an element of a chapter 11 plan, over objection of United States Trustee who argued that such payment could only be made upon demonstration of “substantial contribution,” pursuant to section 503(b)(3)(D) of the Bankruptcy Code); see also In re Washington Mutual, Inc., 442 B.R. 314, 365 (Bankr. D. Del. 2011) (in assessing whether to confirm a chapter 11 plan that provided for, among other things, payment of the fees of various settling parties (including indenture trustees), bankruptcy court held that such fees can be paid only after they are subject to court review under the “reasonableness” standard of Section 1129(a)(4)).

34. Moreover, in interpreting what is “reasonable” under section 1129(a)(4) of the Bankruptcy Code, one bankruptcy court has observed that: (a) fees incurred protecting the applicant’s personal recovery (even without a benefit to the estate) may be reasonable, whereas

(b) fees incurred undertaking abusive or “scorched earth” tactics are not reasonable. Adelphia, 441 B.R. at 9 (concluding that “‘reasonable’ in the context of fees awarded under section 1129(a)(4) permits payment for fees (otherwise reasonable) that have been incurred solely to increase the applicant's personal recovery on a long position in claims against the estate (even without benefit to the estate), but does not permit payment for fees to advance interests unrelated to recovering on claims (such as short positions or competitive advantage), or for activities that go beyond normal advocacy or negotiation, that represent scorched earth tactics, or that are abusive, irresponsible, or destructive to the estate.”). Here, U.S. Bank (and Bank of America before it) is TOPrS Indenture Trustee for approximately \$25,774,000 worth of the Debtor’s TOPrS issued in connection with TOPrS Trust XI and the TOPrS Debenture Indenture, and has at all times sought to maximize recoveries not for itself but rather for the investors in such securities and all other unsecured creditors.

**The TOPrS Indenture Trustee Fees are Reasonable**

35. As described above, U.S. Bank, Bank of America and Counsel have undertaken significant efforts in this case to assure that Bank of America and U.S. Bank complied with their duties both as a TOPrS Indenture Trustee and as a member of the Committee. In discharge of its duties, U.S. Bank, through Mr. Byrnes, Bank of America, through Mr. Cruse and Counsel, gave significant attention to complex legal analysis, including analyzing, commenting on and negotiating: (a) drafts of a plan of liquidation, disclosure statement and related solicitation documents which was proposed but ultimately rejected by voters; (b) drafts of the Plan, Disclosure Statement and related solicitation documents; (c) the various additional options and protections included in the Plan, including, but not limited to, the Liquidation Option, the Plan Committee, the Litigation Trust, the Creditors Designee, the periodic reporting requirements, the

restrictions on the pledging of assets, the Cash Election Entitlement Segregated Account and the refinements and clarifications to the definitions of “Free Cash” and “Net Free Cash,” each as described in more detail above; (d) complex intercreditor and subordination issues, particularly in connection with the FDIC’s arguments as asserted in connection with its objections to the Plan and Disclosure Statement; and (e) complex distribution issues, particularly in light of the unusual structure of the Plan and the TOPrS, most of which are held by and through collateralized debt obligation trusts. The services rendered by Bank of America and U.S. Bank were necessary and appropriate to carry out their contractual and fiduciary duties and to protect the interests of their holders and creditors generally.

36. Moreover, absent Bank of America and U.S. Bank’s participation in this case as TOPrS Indenture Trustee, each holder would have had to assert its own claims, requiring the Debtor to respond to dozens or hundreds of TOPrS holders’ inquiries, claims and perhaps objections. Bank of America and U.S. Bank’s role as TOPrS Indenture Trustee thus protected both the TOPrS holders and the Debtor, and facilitated the administration of this bankruptcy case by providing the Debtor with one creditor representative instead of many.

37. While the TOPrS Indenture Trustee Fees sought herein were incurred, in part, as an effort to advance and protect the interests of its holders, neither Bank of America nor U.S. Bank’s efforts were related to attempts to obtain a competitive advantage or for activities that go beyond normal advocacy or negotiation, that represent scorched earth tactics, or that are abusive, irresponsible, or destructive to the estate. Adelphia, 441 B.R. at 9. To the contrary, first Bank of America, then U.S. Bank conducted itself at all times with the legitimate purpose of assuring that all holders of the TOPrS, and other unsecured creditors, would maximize their recoveries in this

case. Under these circumstances, the TOPrS Indenture Trustee Fees sought herein are reasonable, as such term is used in section 1129(a)(4) of the Bankruptcy Code.

38. Moreover, payment of the TOPrS Indenture Trustee Fees through this Application is preferable to other alternatives available in the Indenture and the Plan. In particular, the Plan explicitly contemplates the exercise by U.S. Bank of the charging lien granted to it pursuant to Section 6.06 of the Indenture. Plan at Article IV.D.4.<sup>7</sup> While this process would allow U.S. Bank (on behalf of itself and Bank of America) to recover all of its TOPrS Indenture Trustee Fees, it is (a) a complex and cumbersome process; (b) would create undue delay in making distributions to holders; and (c) would dilute recoveries to holders. Exercise of the charging lien is made even more difficult in this case as a result of the complex structure in which the TOPrS are held and the fact that a portion of the holders elected to receive a cash distribution while other holders elected to receive an equity distribution under the Plan. Exercise of the charging lien in this case would result in significant delay in distributions as a result of the need to determine the appropriate manner to exercise the lien uniformly among holders, and the need, in some cases, to hold and liquidate securities.

39. For all of the reasons set forth herein, the TOPrS Indenture Trustee Fees are “reasonable” as such term is used in section 1129(a)(4) of the Bankruptcy Code and should be allowed in full and paid, in cash, by the Debtor as soon as practicable.<sup>8</sup>

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<sup>7</sup> Article IV.D.4 provides as follows: “If the TOPrS Indenture Trustee Fees are not allowed pursuant to the above paragraph, and to the extent that, under the TOPrS Documents, the TOPrS Indenture Trustees are entitled to charging liens on account of unpaid TOPrS Indenture Trustee Fees, recoveries under the Plan will be adjusted so that sufficient Cash distributions are available to allow the TOPrS Indenture Trustees to exercise their charging liens against Cash distributed under the Plan.”

<sup>8</sup> U.S. Bank reserves its right to submit requests for the payment of TOPrS Trustee Fees incurred after the Effective Date directly to the Reorganized Debtor (as defined in the Plan) as is necessary and appropriate. See Plan at Article IV.D.3.

**NO PRIOR REQUEST**

40. U.S. Bank (on behalf of itself and Bank of America) has not made a previous application for the relief requested herein to this or any other Court.

**NOTICE**

41. In accordance with the Plan, U.S. Bank has served notice of this Application upon: (a) the Debtor: Corus Bankshares, Inc., 10 S. Riverside Plaza, Suite 1800, Chicago, IL 60606, Attn: Chief Financial Officer; (b) counsel to the Debtor, Kirkland & Ellis LLP, 300 North LaSalle Street, Chicago, Illinois 60654, Attn: Jeffrey W. Gettleman; (c) the Office of the United States Trustee for the Northern District of Illinois, 219 South Dearborn Street, Suite 873, Chicago, Illinois 60604, Attn: Richard C. Friedman and (d) parties identified on the master service list filed in this case (collectively, the "Notice Parties"). U.S. Bank submits that such notice is appropriate and proper.

**WHEREFORE**, U.S. Bank respectfully requests that the Court enter an order:

- (a) approving as reasonable, its requested TOPrS Indenture Trustee Fees relating to TOPrS Trusts XI in the aggregate amount of \$328,993.76 comprised of: (1) with respect to U.S. Bank \$6,179.13 in fees and expenses incurred during the Postpetition Period;
- (2) with respect to Shipman \$13,760.49 in fees and expenses during the Postpetition Period; and (3) with respect to Kaye Scholer: (A) \$79,270.94 in fees and expenses during the Prepetition Period; and (B) \$229,783.20 in fees and expenses during the Postpetition Period;
- (b) approving and directing payment, in cash, by the Debtor to (or at the direction of) U.S. Bank of the amounts so awarded as soon as practicable; and
- (c) granting such other and further relief as is just and proper under the circumstances.

Dated: November 4, 2011

Respectfully submitted,

By: /s/ Michael D. Messersmith

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