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Unsecured Creditors of Arcapita Bank B.S.C.(c), et al.*

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

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	:	
In re:	:	Chapter 11
	:	
ARCAPITA BANK B.S.C.(C), et al.,	:	Case No. 12-11076 (SHL)
	:	
Debtors.	:	(Jointly Administered)
	:	
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**OMNIBUS RESPONSE OF THE OFFICIAL COMMITTEE
OF UNSECURED CREDITORS TO DEBTORS' MOTIONS
AND APPLICATIONS TO BE HEARD ON MAY 7, 2012**

The Official Committee of Unsecured Creditors (the "Committee") of Arcapita Bank B.S.C.(c) ("Arcapita") and each of its affiliated debtors in possession (collectively, the "Debtors") in the above captioned jointly administered chapter 11 cases (the "Cases"), hereby submits this omnibus response (the "Response") to the matters (the "May 7 Motions and Applications") scheduled to be heard on May 7, 2012.¹

¹ The Debtors also noticed an application to retain Rothschild Inc. and N M Rothschild & Sons Limited (together, "Rothschild"), as financial advisors and investment bankers to the Debtors, for hearing on May 7,

PRELIMINARY STATEMENT

1. The Debtors are financial institutions. They manage investments.

Most of these investments take the form of private equity ownership stakes in various portfolio companies. Thus, this case is different than most. The Debtors are not a family of manufacturing or distribution companies; they do not rely on the sale of product for revenue. Instead, they decide whether to hold, sell, or buy various investments. In chapter 11, they no longer have the wherewithal or flexibility to purchase investments. As a result, the decisions they and the Committee will need to make will primarily revolve around whether to hold or sell existing interests. The decision to hold and maintain certain assets will necessarily involve whether and how to fund various obligations and expenses concomitant to the investment. The Debtors have limited cash funds available to them in this case. The Committee has been extremely focused on crucial determinations as to the best use of the estates' scarce resources.

2. In addition, the Debtors have many non-Debtor affiliates that they

routinely funded prepetition. Thus, there is also an obvious need in these Cases to safeguard the Debtors' cash for the benefit of the estates and to prevent the transfer of cash to entities in jurisdictions that may be outside of the effective jurisdiction of this Court.

3. These somewhat unusual aspects of these Cases emphasize the critical

need for productive collaboration between the Debtors and the Committee. A protocol governing decision-making is appropriate and necessary in these Cases. The protocol would (i) allow the cases to function without imposing on the Court with respect to each and every transaction; and (ii) assure the creditors that their fiduciaries are sufficiently involved in

2012. However, due to concerns raised by the Committee and the U.S. Trustee, the Debtors have agreed to adjourn this application until the May 31, 2012 hearing.

significant business decisions. Such protocols have been adopted in many large chapter 11 cases, and have facilitated efficient collaboration between debtors and official committees.

4. The Committee has evaluated the merits of each of the May 7 Motions and Applications with the foregoing principles in mind, starting from the proposition that, at this early stage of the Cases and given the nature of the Debtors' business and dearth of funds in the estate, few things are "in the ordinary course." However, many of the May 7 Motions and Applications, including especially the Employee Wage Motion,² the Critical/Foreign Vendor Motion, and the Insurance Motion, explicitly contend that all of the proposed uses of estate funds are in the "ordinary course," and seek a broad confirmation of the Debtors' "ordinary course" authority with respect to millions of dollars of projected future expenses.

5. The Committee's efforts to exercise reasonable and proper oversight, in light of the facts and circumstances of these Cases, have met with only partial success in that the Debtors have offered the Committee very limited rights of involvement.

6. As a result, the Committee is not in a position to fully support the relief requested in the May 7 Motions and Applications. As set forth below, the Committee and the Debtors have been able to resolve some of the Committee's concerns, and thus the Committee no longer has objections with respect to the relief requested in certain of these pleadings. As to others, however, the Committee can support the requested relief only if its oversight role and need for information is acknowledged and safeguarded.

7. Accordingly, the Committee respectfully requests that the May 7 Motions and Applications be, as set forth below and in Exhibit A hereto, (i) granted, subject to the agreed

² Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in Exhibit A hereto or the relevant pleading.

modifications reflected in the final versions of the orders submitted by the Debtors; and (ii) denied, unless and until the Committee is provided with the necessary information, oversight and consent rights.

BACKGROUND

8. On April 5, 2012, pursuant to section 1102 of the Bankruptcy Code, the Office of the United States Trustee for the Southern District of New York (the “U.S. Trustee”) appointed the Committee, which consists of seven members.³

9. The Court held initial hearings on certain of the May 7 Motions and Applications on March 21, 2012 (the “First Day Hearing”) and March 29, 2012 (the “Second Day Hearing”) and entered interim orders with respect to certain of the motions, as set forth in Exhibit A hereto.

10. In exercising its statutory mandate, the Committee had expressed to the Debtors its concerns with each of the May 7 Motions and Applications. Based on their discussions, the Committee and the Debtors have either (i) resolved the Committee’s initial concerns and/or agreed to a compromise with respect to the relief sought, as set forth below, or (ii) reached an impasse as to all or a portion of the relief sought by certain of the pleadings, and as to which judicial intervention is required.

³ The current members of the Committee are: (i) Arcsukuk (2011-1) Limited c/o BNY Mellon Corporate Trustee Services Limited; (ii) Barclays Bank PLC; (iii) Central Bank of Bahrain; (iv) Commerzbank AG; (v) Euroville S.à.r.l.; (vi) National Bank of Bahrain BSC; and (vii) VR Global Partners, L.P.

RESPONSE

I. CONTESTED MOTIONS

A. CASH MANAGEMENT MOTION [Docket No. 12]

11. The Committee has evaluated the relief requested in the Cash Management Motion. The Committee is, of course, aware that motions in which a debtor seeks authority to continue to use its existing cash management system are granted in many cases. Here, however, additional limitations and creditor protections are warranted because (i) the Debtors' corporate structure is complex, (ii) the Debtors have many non-Debtor affiliates that they have funded prepetition and may seek to fund postpetition with cash assets of these estates, and (iii) the uncertain nature of the Debtors' business and specifically its difficulty in either generating cash or predicting the future value of illiquid assets. Absent extraordinary and overwhelmingly persuasive circumstances, there is an obvious need to safeguard the Debtors' cash for the benefit of the estates and to prevent the transfer of cash to entities in jurisdictions that may be outside of the reach of the Court.

12. Moreover, allegations have been made that, prior to the petition date, cash flowed and intercompany claims were created in ways that do not accord with the Debtors' account of their cash management system. Among such suspect transactions are (i) the sale of the Lusail asset and the deposit of the proceeds with Arcapita; (ii) the booking of an intercompany receivable from Debtor Arcapita Investment Holdings Limited ("AIHL") in favor of Arcapita to replace what had previously been a \$188 million receivable in favor of AIHL, and (iii) the funding of the Debtors' portfolio companies by way of loans or equity investments, in ways that fail to recognize corporate formalities and/or the Debtors' existing capital structure.

13. While all of the foregoing allegations relate to prepetition transactions and do not necessarily have a bearing on postpetition cash management, they support the conclusion that the cash management procedures going forward should impose strict limitations on the Debtors' use of cash, so that the Committee and its advisors have the opportunity to review such proposed uses. The procedures established under the interim cash management orders have moved in this direction by providing the Court and creditors with greater visibility into, and control over, intercompany transfers, but they are insufficient. The parties must develop comprehensive protocols governing approval of the Debtors' use of cash.

14. The Committee's advisors have raised these and other concerns with the Debtors' advisors and hope to reach a consensual resolution of the outstanding issues with respect to the relief sought in the Cash Management Motion through the development of an appropriate cash management protocol. In this connection, the Committee would insist that the final Cash Management Order and any related protocol include, among other things: (i) a provision requiring the Debtors to provide the Committee with notice of opening any new bank accounts; (ii) a provision giving the Committee access to all records and accounting procedures with respect to intercompany transfers; (iii) a reservation of rights preserving the Committee's entitlement to contest the validity and amount of any payment made pursuant to the order and protocol; and (iv) a requirement that any intercompany transfer from a Debtor to a non-Debtor affiliate is properly documented as a loan (i.e., has the benefit of a written agreement and secured by a valid lien).

15. Discussions concerning the Cash Management Motion and the protocol continue, but resolution will not be reached on these issues prior to the May 7, 2012 hearing. Hence, the Debtors proposed, and the Committee has agreed, to seek entry of a further interim

order (the “Fourth Interim Cash Management Order”) predicated on a budget (the “Third Interim Budget”) detailing proposed disbursements through May 31, 2012.

16. Accordingly, subject to the completion of diligence as to the Third Interim Budget, the Committee does not object to the entry of the Fourth Interim Cash Management Order, on the understanding that it will otherwise be identical in all material respects to the Third Interim Cash Management Order.

B. CRITICAL/FOREIGN VENDOR MOTION [Docket No. 23]

17. The Committee’s initial concerns with the Critical/Foreign Vendor Motion echoed those of the Court. At the Second Day Hearing, the Court granted the motion on an interim basis, authorizing the Debtors to pay prepetition claims of the Critical and Foreign Vendors of up to \$2 million. In granting this relief, the Court (i) admonished the Debtors to use the authority thus granted only as necessary, and (ii) endorsed the U.S. Trustee’s suggestion that the list of Critical and Foreign Vendors should be further “scrubbed” by the Committee, once appointed.

18. Heeding the Court’s admonition, the Committee’s advisors have engaged in discussions with the Debtors and their advisors regarding the payment of the claims of Critical and Foreign Vendors. The Debtors have provided the Committee with detailed information regarding (i) the identity of the vendors; (ii) the nature of, and necessity for, the services rendered; and (iii) the amounts currently outstanding to each such vendor. Based on this information, it appears that (i) most of these vendors are located in the Gulf region and do not appear to have “minimum contacts” with the United States; (ii) all provide verifiably “essential” services to the Debtors; and (iii) approximately \$800,000 in claims have already been paid.

19. Based upon the Committee's advisors' review of the information furnished by the Debtors, most of the payments contemplated and already made to the Critical and Foreign Vendors appear to satisfy the criteria set forth in the applicable legal precedent. However, the Committee has requested that the form of final order on the Critical/Foreign Vendor Motion be modified to (i) provide the Committee with consent rights regarding (a) any modification of the Customary Trade Terms and (b) the payment of claims of any Critical or Foreign Vendor that has not executed the Critical Vendor Letter Agreements; and (ii) provide for periodic reporting regarding the individual and aggregate amounts paid to the Critical and Foreign Vendors. As with all Committee consent rights, the Debtors would retain the option of seeking specific Court approval if they did not seek or obtain the Committee's consent.

20. The Committee proposed changes to the final order on the Critical/Foreign Vendor Motion to reflect these requests, but the Debtors did not respond to this proposal prior to the objection deadline on the motion. While the amount at issue is not large (only \$1.2 million without further order of the Court), the principle at issue is important. There is nothing "ordinary course" about the payment of prepetition claims of "critical vendors." See In re Enron Corp., No. 01-16034 (AJG), 2003 WL 1562202, at *20 n. 31 (Bankr. S.D.N.Y. Mar. 21, 2003) ("The doctrine of necessity stands for the proposition that a bankruptcy court may allow payment outside of a plan of reorganization on account of a prepetition obligation where such payment is critical to the reorganization process."(emphasis added)). The Committee has now "scrubbed" the payments made to date; it should have the right to similarly "scrub" the amount, terms, and conditions of all future Critical/Foreign Vendor payments before they are made.

C. EMPLOYEE WAGE MOTION [Docket No. 24]

21. In the Employee Wage Motion, the Debtors seek authority to (i) satisfy certain employee-related obligations outstanding as of the petition date (the “Prepetition Obligations”); (ii) continue to make employee-related payments in the ordinary course during the Cases (the “Postpetition Payments”); and (iii) continue to make interest-free loans (the “Loans”) to employees, in the Debtors’ discretion.

22. Following the Second Day Hearing, the Court entered an order granting the Employee Wage Motion on an interim basis. Pursuant to the interim order, the Debtors were authorized to satisfy all Prepetition Obligations and to continue to make certain of the Postpetition Payments. However, the Debtors were explicitly not authorized to make payments on account of certain statutory “indemnity” obligations (the “Severance Obligations”) and Reimbursable Expenses in excess of \$1,000 per employee, unless and until such payments were approved in a final order.

23. Prepetition Obligations. In the weeks since entry of the interim order, the Committee’s advisors have conducted diligence with respect to all aspects of the Employee Wage Motion. The Debtors have provided the Committee’s advisors with additional information regarding the employees at issue, the compensation and benefit policies currently in effect, the Prepetition Obligations and the projected Postpetition Payments. Based upon its advisors’ review of this information, the Committee concluded that approval of most of the Prepetition Obligations was appropriate.

24. Among other things, the Committee conducted additional diligence with respect to the School Fees and Reimbursable Expenses in excess of \$1,000. As to the School Fees, in the approximate amount of \$100,000, the Committee’s financial advisors confirmed that

(i) the payment of such expenses is, in fact, a “market” term in employment contracts in the region, and is generally required to recruit expatriate employees; and (ii) the fees charged are consistent with fees charged by other private schools serving the children of expatriates in the Gulf region. Accordingly, the Committee does not object to the payment of these accrued Prepetition Obligations, with the caveat that the final order should provide that the School Fees can only be paid to the extent due and payable (i.e., no prepayments).

25. As to Reimbursable Expenses in excess of \$1,000, the Committee’s advisors have confirmed that each such expense was reasonable under the circumstances, and their aggregate amount was only approximately \$7,000. Thus, the Committee does not object to the payment of these Prepetition Obligations.

26. Postpetition Payments. The impasse between the Debtors and the Committee with respect to the Employee Wage Motion relates to the Postpetition Payments. The Debtors contend that the use of estate assets to make the Postpetition Payments is in the “ordinary course,” and (purportedly out of an abundance of caution) seek a broad confirmation of such “ordinary course” authority with respect to millions of dollars of projected future expenses.

27. Based upon experience to date, the Committee has reason to believe that the Debtors will, in fact, involve it and its advisors in future decisions regarding the propriety and timing of the Postpetition Payments. Indeed, many of the most significant of these projected payments, including the Severance Obligations, are the subject of ongoing discussions between the Committee and the Debtors. Procedures with respect to such matters are also anticipated to be included in the protocol under discussion with the Debtors. However, in the absence of a

protocol, the Committee seeks some assurances that it will have appropriate oversight and consent rights with respect to these Postpetition Payments.

28. The final order on the Employee Wage Motion should provide that (i) the Debtors must include, as individual line items in future budgets, any proposed Postpetition Payments; (ii) the Debtors must obtain either the consent of the Committee or further order of the Court with respect to any Postpetition Payment (or group of payments) in excess of \$100,000; and (iii) all Postpetition Payments must be reflected in the Debtors' monthly operating reports.⁴

D. INSURANCE COVERAGE MOTION [Docket No. 25]

29. The Debtors maintain a small number of insurance policies, including property and directors' and officers' liability insurance (collectively, the "Policies"). The Debtors requested authority to (i) pay, on an uninterrupted basis, consistent with their prepetition practices, all obligations in respect of the Policies, including premiums and deductibles (the "Deductibles"), whether relating to the period prior to or after the petition date; and (ii) renew or replace the Policies. The Committee's concerns with the Insurance Coverage Motion relate to the payment of Deductibles and the replacement of Policies.

30. Deductibles. Certain of the Policies provide that they will cover the entire obligation (up to the coverage limit), with the exception of a certain specified amount (i.e., the Deductible), which, as to the Debtors' directors and officers liability policy, run as high as \$250,000. The Policies do, as the Debtors contend and as is generally the case with indemnity policies, require that the Debtors pay the relevant Deductible before being entitled to collect the proceeds of the related Policy. However, the payment of any Deductible implicates the Debtors'

⁴ The Debtors have also agreed to make no additional Loans to employees. This understanding will also be reflected in the final order on the Employee Wage Motion.

business judgment with respect to the use of estate assets under section 363 of the Bankruptcy Code. Indeed, depending on the size and purpose of the Deductible payment, the Debtors may well be obligated to seek prior Court approval for the non-ordinary course use of estate assets.

31. With this concern in mind, the Committee requested that the Debtors modify the final order to require them to obtain either the consent of the Committee or a further order of the Court prior to paying any Deductible in excess of \$100,000. This consent right would permit the Committee to assess the context of the request to pay the Deductible (e.g., whether the payment relates to the repair or replacement of estate property, the settlement of third-party litigation, or some other contingency) and determine, based on the actual facts and circumstances, whether such payment would be in the best interest of the estate.

32. Replacement of Policies. The Committee also requested that the final order require that the Debtors either obtain the consent of the Committee or a further order of the Court prior to replacing any of the Policies. The Committee is concerned that “replacement,” as opposed to “renewal,” of any Policy could be understood to authorize the “purchase” of new policies, which the Committee believes should be subject Court approval if not consented to by the Committee. Of particular concern is the possibility that the Debtors’ board of directors could purchase additional director and office liability insurance for its own benefit without approval from the Court or key stakeholders in the case.

33. The Debtors’ sole rationale for denying the Committee the consent right it sought is that the postpetition purchase of insurance coverage was in the “ordinary course” of the Debtors’ business. For all the reasons set forth above, this is not the case. Accordingly, the final order on the Insurance Coverage Motion should require the Debtors to seek either the Committee’s consent or a further order of the Court prior to (i) the payment of any Deductible in

excess of \$100,000, (ii) the renewal or replacement of any of Policies as they expire, and (iii) the purchase of any new insurance policy.

E. ORDINARY COURSE PROFESSIONALS MOTION [Docket No. 49]

34. In the Ordinary Course Professionals Motion, the Debtors seek to continue to employ approximately eighteen “ordinary course professionals” (the “OCPs”), which rendered a wide range of legal, advisory and consulting services to the Debtors prior to the petition date. The proposed OCP Procedures provide that the Debtors would be permitted to retain each such OCP, to pay 100% of the fees and expenses incurred by such OCP, without filing a formal retention application, so long as such OCP’s compensation does not exceed (a) \$150,000 in any given month (the “OCP Monthly Cap”), or (b) \$1,000,000 in the aggregate during the course of these Cases (the “OCP Aggregate Cap”). The Debtors also would be permitted to designate additional OCPs by filing notices supplementing the approved OCP List.

35. While generally amenable to the relief requested in the Ordinary Course Professionals Motion, the Committee had three concerns with the proposed OCP Procedures. First, given the nature of the professionals at issue, the services they are expected to render, and the size of these Cases, the OCP Monthly Cap and the OCP Aggregate Cap appear high. Based upon an analysis of caps in comparable chapter 11 cases, the Committee believes that the OCP Monthly Cap and the OCP Aggregate Cap should be \$50,000 and \$500,000, respectively.

36. Second, although it is reasonable that the Debtors may need to supplement the OCP List from time to time, the proposed procedure, allowing the Debtors to expand the OCP List simply by giving notice (with such expansion automatically deemed approved with no further action of the Court or any other party) does not allow for appropriate monitoring to ensure that the Debtors do not seek to retain and compensate professionals not required for the

legitimate needs of the estates. The Committee should be provided with an express consent right or Court approval as to the addition of any professional to the OCP List.

37. Finally, the Debtors have proposed reporting the fees paid to the OCPs on a quarterly basis, but in order to monitor the Debtors' disbursements to the OCPs effectively, and in particular to ensure that the individual OCPs are complying with the OCP Monthly Cap, the Committee should receive monthly reports listing the OCPs and the fees paid to each during such month. Unless and until these changes to the OCP Procedures are made, the Committee is not prepared to support the relief requested in the Ordinary Course Professionals Motion.

II. CONTESTED RETENTION APPLICATIONS

A. ALVAREZ & MARSAL RETENTION APPLICATION [Docket No. 47]

38. The Debtors seek authority to (i) retain A&M as their financial advisors; (ii) pay A&M's customary hourly fees and reimburse A&M for reasonable out-of-pocket expenses; and (iii) pay A&M an incentive fee (the "Incentive Fee") in an amount equal to fifteen percent of the aggregate hourly fees earned during the pendency of the Cases.

39. The proposed A&M retention raises issues relating both to the scope of such retention, and to the proposed compensation. With respect to scope, A&M's proposed scope of services may overlap with the services to be provided by the Debtors' other financial advisors and investment bankers, Rothschild and KPMG LLP ("KPMG"), whose retention applications will not be before the Court until the May 31, 2012 hearing.

40. The Committee proposed, and the Debtors accepted, adding language in the order ultimately approving the A&M Retention Application on a final basis, that sets forth, in general terms, an appropriate allocation of responsibilities among the Debtors' various financial advisors.

41. With respect to compensation, A&M's hourly billing rates appear to be within a band of market fees for these types of services. However, the Committee is not in a position to approve the Incentive Fee. Discussions with A&M suggest that it would be amenable to further discussions regarding the structure and amount of the Incentive Fee.

42. To facilitate such discussions, the Committee and the Debtors have agreed that an interim order will be submitted for the Court's consideration at the May 7, 2012 hearing, which would authorize the Debtors to retain A&M on an hourly fee basis only. The modified form of interim order also contains a broad reservation of rights for the Committee and the Debtors with respect to the ultimate terms of A&M's compensation, including the right to assert that A&M is not entitled to any incentive fee.

B. LINKLATERS RETENTION APPLICATION [Docket No. 92]

43. The Debtors seek to retain Linklaters LLP ("Linklaters") as special counsel *nunc pro tunc* to the petition date. Linklaters has acted as counsel to the Debtors and certain of their portfolio companies in Europe, the Middle East and across Asia since 2003, primarily in connection with *Shari'ah*-compliant investments.

44. Although the application states that the services to be rendered by Linklaters will not be duplicative of any bankruptcy-related work performed by other law firms retained by the Debtors, it raises concerns with respect to such potential duplication.

45. In addition, Linklaters should not be authorized to charge the Debtors' estates for services it may perform directly for non-Debtor portfolio companies (as opposed to giving advice to the Debtors in connection with their investments).

46. Finally, even if Linklaters' policy of charging its clients the fees and expenses of barristers instructed by it is consistent with U.K. practice, the Debtors should

formally and separately retain Mr. Zacaroli, who is not a member of Linklaters. As such, Mr. Zacaroli must independently show that he meets the requirements for being retained as special counsel to the Debtors, including the “no adverse interest” standard of section 327(e) of the Bankruptcy Code.

47. Subject to Linklaters satisfactorily addressing the above concerns, the Committee will not object to the Court granting the Linklaters Retention Application.

III. UNCONTESTED MOTIONS AND APPLICATIONS

A. INTERIM COMPENSATION PROCEDURES MOTION [Docket No. 48]

48. The Debtors seek an order establishing procedures (the “Compensation Procedures”) for the compensation and reimbursement of expenses of professionals retained in these Cases (the “Professionals”), as well as reimbursement of certain expenses incurred by members of the Committee. The proposed Compensation Procedures are similar to procedures routinely granted by the bankruptcy courts in this and other judicial districts in large and/or complex chapter 11 cases.

49. The proposed Compensation Procedures raised just one issue: they set a deadline for the filing and service of quarterly fee applications, but they were unclear as to the precise consequences of a professional’s failure to file a quarterly fee application. The Debtors agreed to modify the Compensation Procedures to clarify that, although a Professional could not be paid any amounts on subsequent monthly fee statements if it failed to file quarterly fee applications, there would be no other consequences if a Professional failed to file the quarterly fee applications prior to the relevant deadline. The Committee has no objection to entry of an order approving the Compensation Procedures in this modified form.

50. The U.S. Trustee has indicated that it might object to the Interim Compensation Procedures Order to the extent that it permits the *monthly* (and not the *quarterly*) reimbursement of expenses for the members of official committees, which likely will be premised on the fact that there is no “hold-back” for committee members, making it difficult to recoup any amounts paid that should not have been. The Committee believes, and hereby reserves its right to argue in a reply and at the hearing, that this concern should be weighed against the fact that service on an official committee already imposes significant burdens on committee members, so saddling such committee members with the additional burden of carrying the accrued expenses associated with Committee service for up to four months is unreasonable and inappropriate.

B. SCHEDULES AND RULE 2015.3 EXTENSION MOTIONS [Docket Nos. 90 and 91]

51. The Debtors seek (i) an additional 45 days (after the period covered by a requested bridge order, *i.e.*, until June 21, 2012) to file Items 3 and 23 of their Statements of Financial Affairs (listing payments to creditors and distributions) and their Schedules D, E and F (listing their secured and unsecured debt and priority claims); and (ii) an additional fourteen (14) days (after the period covered by a requested bridge order, *i.e.*, until May 21, 2012) to file the remainder of the Schedules and Statements. The Debtors also seek, in a separate motion, an additional 45 days (after the period covered by a requested bridge order, *i.e.*, until June 21, 2012) to file their Rule 2015.3 Reports.

52. The Committee believes that it is in the best interest of all the Debtors’ stakeholders that the Debtors have sufficient time to accurately and thoroughly prepare their Schedules and Statements and comply with their obligations under Bankruptcy Rule 2015.3. The Committee understands that (i) the *Shari’ah*-compliant nature of the Debtors’ investments

creates unique legal issues and requires careful consideration of how certain aspects of investments should be characterized on the Schedules and Statements; and (ii) preparation of the Rule 2015.3 Reports is particularly burdensome here because the Debtors may hold a substantial or controlling interest in at least 150 non-Debtor entities, many of whom have separate businesses and separate credit facilities, and some of which have joint venture partners. The Committee's financial advisors have confirmed that the Debtors and their advisors are working diligently to compile the necessary information, and that the Debtors have been otherwise responsive to the Committee's advisors' inquiries.

53. Accordingly, the Committee does not object to either of these motions, but expressly reserves its right to take a different position with respect to any future extension requests.

C. CUSTOMER NAME REDACTION MOTION [Docket No. 52]

54. The Debtors seek authorization to redact the names of the entities that have made investments with the Debtors (the "Investors") in all disclosures, applications, motions, service lists and other pleadings (collectively, "Disclosures") to be filed publicly with the Court, and to file unredacted copies of such Disclosures with the Court under seal.

55. The Committee has no objection to the Customer Name Redaction Motion. The Committee agrees with the Debtors that, like any investment bank or private equity fund, Arcapita's greatest resource is its contacts with Investors, and that public disclosure of the Investors' names could damage the Debtors' businesses by enabling the Debtors' competitors to "poach" the Investors. To the extent any interested party has a need to learn the names of the Investors for any other purpose, it may seek an order from the Court.

56. The Committee's support of the relief requested in the Customer Name Redaction Motion is based on the understanding that, to the extent the Committee later seeks to investigate or pursue any avoidance claims against any of the Investors, nothing in the order granting this motion would restrict the Committee's rights to seek the associated discovery.

D. TROWERS RETENTION APPLICATION [Docket No. 46]

57. The Debtors seek an order approving their retention of Trowers & Hamlins LLP ("Trowers") as Bahraini counsel *nunc pro tunc* to the petition date. The Debtors have employed Trowers as their legal counsel in Bahrain since 2002 to assist them with compliance with Bahraini laws, ranging from basic legal transactions to employee relations.

58. The Committee has evaluated the Trowers Retention Application and concluded that (i) Trowers appears well-qualified for the engagement; (ii) its fees appear reasonable; and (iii) Trowers otherwise satisfies the requirement of section 327(e) of the Bankruptcy Code. Accordingly the Committee does not object to the Debtors' retention of Trowers.

D. GIBSON DUNN RETENTION APPLICATION [Docket No. 51]

59. The Debtors seek to retain Gibson, Dunn & Crutcher LLP ("Gibson Dunn") as their general bankruptcy and restructuring counsel *nunc pro tunc* to the petition date. The terms of Gibson Dunn's proposed retention appear to be reasonable and customary. Gibson Dunn will be compensated on an hourly basis, with no non-standard fee arrangements. Additionally, as the Debtors' long-time counsel, Gibson Dunn is unlikely to have any material conflicts. Those that have been identified should not impact Gibson Dunn's "disinterestedness," and could efficiently be handled by conflicts counsel if necessary. The prepetition engagement letter between Gibson Dunn and the Debtors contained indemnification provisions pursuant to

which the Debtors agreed to indemnify Gibson Dunn for any liability arising in connection with its representation of the Debtors, but Gibson Dunn has agreed to waive these indemnification rights.

60. Gibson Dunn acknowledges having received \$1,648,199.40 from the Debtors for services rendered during the twelve months preceding the commencement of these Cases. Some portion of these payments, received within ninety days of the petition date, may be subject to challenge as preferential transfers under section 547 of the Bankruptcy Code. However, this issue can be addressed as part of the avoidance claim process later in the Cases and need not stand in the way of Gibson Dunn's retention as the Debtors' lead bankruptcy counsel.

WHEREFORE, for the reasons stated herein, the Committee respectfully requests that (i) the May 7 Motions and Applications be, as set forth in Exhibit A hereto (a) granted, subject to the modifications agreed to by the Debtors and the Committee and reflected in the final orders submitted by the Debtors; (b) denied, unless and until the final orders are modified to provide the Committee with the necessary information, oversight and consent rights; (c) as to

A&M Retention Application, granted, to the extent modified to include the reservation of rights and other changes requested by the Committee; and (ii) the Court grant the Committee such other and further relief as it may deem just and proper.

Dated: New York, New York
May 2, 2012

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EXHIBIT A

EXHIBIT A

SUMMARY OF THE DEBTORS' MOTIONS AND THE COMMITTEE'S RESPONSES

DEBTORS' MOTION ¹	DEBTORS' REQUESTED RELIEF	COMMITTEE'S RESOLUTION, RESPONSE OR PROPOSAL
CONTESTED MOTIONS		
<p>1. Debtors' Motion for Interim and Final Orders (a) Authorizing Debtors to (i) Continue Existing Cash Management System, Bank Accounts, and Business Forms and (ii) Continue Ordinary Course Intercompany Transactions; and (b) Granting an Extension of Time to Comply with the Requirements of Section 345(b) of the Bankruptcy Code (the "<u>Cash Management Motion</u>")</p> <ul style="list-style-type: none"> ▪ Filed on March 20, 2012 ▪ Docket No. 12 ▪ Interim Orders at Docket Nos. 22, 62, 86 	<ul style="list-style-type: none"> ▪ Authority to maintain the Debtors' existing Cash Management System, which includes the creation of Intercompany Claims based on Intercompany Transfers among the various Debtor and non-Debtor Affiliates. ▪ Exemption from the requirements to: <ul style="list-style-type: none"> ○ close all existing Bank Accounts and open new debtor in possession bank accounts; and ○ use new Business Forms, including checks, with the designation of "Debtor In Possession" until their current supply is depleted. ▪ Authority to open new bank accounts and close existing bank accounts. ▪ An extension of time to comply with the investment guidelines of section 345(b) of the Bankruptcy Code, which generally requires a debtor's investments to be kept in a low risk depository institution. 	<ul style="list-style-type: none"> ▪ Committee proposed consensual resolution of outstanding issues through the development of an appropriate cash management protocol. ▪ Protocol under discussion, but no agreement on its terms is anticipated to be reached prior to the May 7, 2012 hearing. ▪ Pending agreement on the protocol, the Committee has agreed to the Debtors' proposal to seek entry of the Fourth Interim Cash Management Order predicated on the Third Interim Budget, which details proposed disbursements through May 31, 2012. <p>STATUS: Resolved (on interim basis)</p>
<p>2. Debtors' Motion for Interim and Final Orders (a) Authorizing Debtors to Pay Certain Prepetition Claims</p>	<ul style="list-style-type: none"> ▪ Authority to pay prepetition claims of the Foreign and Critical Vendors in the aggregate amount of \$2.0 million (effectively seeking authorization to pay \$1.2 million because Debtors paid \$800,000 	<ul style="list-style-type: none"> ▪ Committee proposed modification of the final order to provide the Committee with consent rights regarding: <ul style="list-style-type: none"> ○ any modification in Customary Trade Terms;

¹ Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the respective motion, application or order.

	<p>of Critical and Foreign Vendors; and (b) Authorizing Financial Institutions to Honor and Process Related Checks and Transfers (the “Critical/Foreign Vendor Motion”)</p> <ul style="list-style-type: none"> ▪ Filed on March 26, 2012 ▪ Docket No. 23 ▪ Interim Order at Docket No. 39 	<p>pursuant to the interim order).</p>	<ul style="list-style-type: none"> ○ the payment of a Critical or Foreign Vendor Claim held by a Critical or Foreign Vendor that has not executed a Critical Vendor Letter Agreement; and ○ weekly reports by the Debtors to the Committee regarding the individual and aggregate amounts paid to Critical and Foreign Vendors. <p>STATUS: Unresolved</p>
<p>3.</p>	<p>Debtors’ Motion for Entry of Interim and Final Orders Authorizing the Debtors to (a) Pay Certain Prepetition Wages, Salaries, and Reimbursable Employee Expenses, (b) Pay and Honor Employee Medical and Similar Benefits, and (c) Continue Employee Compensation and Employee Benefit Programs (the “Employee Wage Motion”)</p> <ul style="list-style-type: none"> ▪ Filed on March 26, 2012 ▪ Docket No. 24 ▪ Interim Order at Docket No. 40 	<ul style="list-style-type: none"> ▪ Authority to (i) satisfy certain employee-related Prepetition Obligations and (ii) continue to make employee-related Postpetition Payments. ▪ Prepetition amounts outstanding relate to: (i) Reimbursable Expenses in an unspecified amount, (ii) accrued Vacation Time and Sick Leave of approximately \$44,000; (iii) Employee Benefits (including Medical Insurance) of approximately \$102,000; (iv) School Fees of approximately \$100,000; and (v) Payroll Processor Fees of approximately \$5,700. ▪ Authority to continue to make Interest-Free Loans to employees, in the Debtors’ discretion when extenuating circumstances exist. ▪ Confirmation of postpetition “ordinary course” authority to make all Postpetition Payments. 	<ul style="list-style-type: none"> ▪ The Committee proposed modifying the final order to: <ul style="list-style-type: none"> ○ prohibit the granting of any additional Interest-Free Loans; ○ preclude the payment of School and Tuition Fees in excess of any amounts due on any specific payment date (i.e., no prepaid semesters or years in advance); ○ require the Debtors to reflect any proposed Postpetition Payments in future budgets; ○ require the Debtors to obtain either the consent of the Committee or a further order of the Court with respect to any Postpetition Payment (or group of payments) in excess of \$100,000; and ○ all Postpetition Payments must be reflected in the Debtors’ monthly operating reports. <p>STATUS: Unresolved</p>

<p>4.</p>	<p>Debtors’ Motion for Interim and Final Orders (a) Authorizing the Debtors to Continue Insurance Coverage Entered Into Prepetition and to Pay Obligations Relating Thereto; and (b) Authorizing Financial Institutions to Honor and Process Related Checks and Transfers (the “<u>Insurance Coverage Motion</u>”)</p> <ul style="list-style-type: none"> ▪ Filed on March 26, 2012 ▪ Docket No. 25 ▪ Interim Order at Docket No. 43 	<ul style="list-style-type: none"> ▪ Authority to pay all obligations in respect of the Debtors’ insurance Policies, including premiums and Deductibles. ▪ Aggregate annual premiums for all Policies are approximately \$507,883. 	<ul style="list-style-type: none"> ▪ The Committee proposed modification of the final order to require the Debtors to obtain either the consent of the Committee or a further order of the Court prior to: <ul style="list-style-type: none"> ○ paying any Deductible in excess of \$100,000; ○ renewing or replacing any of the Policies as they expire; and ○ the purchase of any new insurance policies. <p>STATUS: Unresolved</p>
<p>5.</p>	<p>Debtors’ Motion for an Order Pursuant to Sections 105(a), 327, 328 and 330 of the Bankruptcy Code Authorizing Debtors to Employ and Retain Certain Professionals Utilized in the Ordinary Course of the Debtors’ Business (the “<u>Ordinary Course Professionals Motion</u>”)</p> <ul style="list-style-type: none"> ▪ Filed on April 2, 2012 ▪ Docket No. 49 	<ul style="list-style-type: none"> ▪ Authority to continue to employ approximately eighteen OCPs, which render a wide range of legal, advisory and consulting services. ▪ The proposed OCP Procedures provide that: <ul style="list-style-type: none"> ○ the Debtors would be permitted to retain each OCP and to pay 100% of the fees and expenses incurred by such OCP, without filing a formal retention application, so long as the OCP’s compensation does not exceed: (i) the OCP Monthly Cap of \$150,000, or (ii) the OCP Aggregate Cap of \$1,000,000 during the course of these cases; ○ the Debtors may designate additional OCPs by filing a notice supplementing 	<ul style="list-style-type: none"> ▪ The Committee proposed modification of <ul style="list-style-type: none"> ○ the OCP caps as follows: <ul style="list-style-type: none"> ▪ OCP Monthly Cap reduced to \$50,000; and ▪ OCP Aggregate Cap reduced to \$500,000; ○ the final order to provide for a consent right or further Court order for the Committee as to addition by the Debtors of any professionals to the OCP List; and ○ the reporting period such that the Debtors provide the Committee with an OCP fee report on a monthly, rather than a quarterly, basis.

		<ul style="list-style-type: none"> the OCP List; and ○ the Debtors may report fees paid to OCPs on a quarterly basis. 	STATUS: Unresolved
CONTESTED RETENTION APPLICATIONS			
6.	<p>Debtors’ Application for Interim and Final Orders Approving the Employment and Retention of Alvarez & Marsal North America, LLC as Financial Advisors to Debtors and Debtors in Possession Pursuant to Sections 327(a) and 328 of the Bankruptcy Code (the “<u>Alvarez & Marsal Retention Application</u>”)</p> <ul style="list-style-type: none"> ▪ Filed on April 2, 2012 ▪ Docket No. 47 	<ul style="list-style-type: none"> ▪ Authority to: <ul style="list-style-type: none"> ○ retain A&M as financial advisors <i>nunc pro tunc</i> to the Petition Date to provide a broad range of services to the Debtors; ○ pay A&M’s customary hourly billing rates and reimburse A&M for reasonable out-of-pocket expenses; and ○ pay A&M the Incentive Fee in an amount equal to 15% of the aggregate hourly fees incurred during the pendency of these cases, pending a determination of the specific terms upon which the Incentive Fee will be paid. 	<ul style="list-style-type: none"> ▪ The Committee requires clarification of the scope of A&M’s proposed engagement to ensure that A&M’s proposed services do not overlap with services to be provided by Rothschild and KPMG. ▪ The Debtors and the Committee have agreed that an interim order may be entered at the May 7, 2012 hearing, authorizing the Debtors to retain A&M on an hourly fee basis only. <ul style="list-style-type: none"> ○ The interim order will contain a broad reservation of rights with respect to the ultimate terms of A&M’s compensation, including the right to contend that A&M is not entitled to any Incentive Fee. <p>STATUS: Resolved (on interim basis)</p>
7.	<p>Debtors’ Application Pursuant to Sections 327(e), 328(a), and 330(a) of the Bankruptcy Code for an Order Authorizing the Debtors to Retain and Employ Linklaters LLP as Special Counsel to the Debtors <i>Nunc Pro Tunc</i> to the Petition Date (the “<u>Application to Retain Linklaters LLP</u>”)</p>	<ul style="list-style-type: none"> ▪ Authority to retain Linklaters, who has acted as prepetition counsel to the Debtors primarily in connection with <i>Shari’ah</i>-compliant investments, as special counsel <i>nunc pro tunc</i> to the Petition Date. ▪ Linklaters seeks reimbursements for its instruction of Mr. Antony Zacaroli QC, an external U.K. barrister, at his customary rate of £650 per hour, for any representation by Mr. Zacaroli in connection with the ongoing provisional liquidation proceeding in the Cayman Islands. 	<ul style="list-style-type: none"> ▪ The Committee proposes that Linklaters clarify its anticipated role and show how such role is distinct from that of Gibson Dunn in order to ensure that there is no duplication of services. ▪ The Committee proposes that even if Linklaters’ policy of charging its clients the fees and expenses of barristers instructed by it is consistent with U.K. practice, the Debtors should formally retain Mr. Zacaroli, separately from their retention of Linklaters. <ul style="list-style-type: none"> ○ Mr. Zacaroli, who is not a member of Linklaters, must show that he meets the requirements for

	<ul style="list-style-type: none"> ▪ Filed on April 23, 2012 ▪ Docket No. 92 		<p>being retained as special counsel to the Debtors, including the “no adverse interest” standard of section 327(e) of the Bankruptcy Code, and that his services are in the best interest of the estate.</p> <ul style="list-style-type: none"> ▪ Linklaters should not be authorized to charge the Debtors’ estates for services it may perform directly for non-Debtor portfolio companies. <p>STATUS: Unresolved</p>
UNCONTESTED MOTIONS AND APPLICATIONS			
8.	<p>Debtors’ Motion for Order Establishing Procedures for Interim Compensation and Reimbursement of Expenses for Professionals and Committee Members (the “<u>Interim Compensation Motion</u>”)</p> <ul style="list-style-type: none"> ▪ Filed on April 2, 2012 ▪ Docket No. 48 	<p>Seeks entry of an order establishing Compensation Procedures for the compensation and reimbursement of expenses of professional retained in the Chapter 11 Cases, as well as the reimbursement of certain expenses incurred by members of the Committee.</p>	<p>The Debtors have agreed to the Committee’s proposal to modify the Compensation Procedures to clarify that, although a professional could not be paid any amounts on subsequent monthly fee statements if it failed to file quarterly fee applications, there would be no other consequences if a professional failed to file the quarterly fee applications prior to the relevant deadline.</p> <p>STATUS: Resolved</p>
9.	<p>Debtors’ Motion for an Order Further Extending the Time to File Reports of Financial Information Pursuant to Federal Rule of Bankruptcy Procedure 2015.3(a) (the “<u>Rule 2015.3 Extension Motion</u>”)</p> <ul style="list-style-type: none"> ▪ Filed on April 23, 2012 ▪ Docket No. 90 	<p>An additional 45 days, until June 21, 2012, to file the Rule 2015.3 Reports.</p>	<p>The Committee believes that the requested relief is reasonable and in the best interest of the Debtors’ estates, and does not require any modifications to the Debtors’ proposed order. However, the Committee reserves the right to object to any further request for an extension of time.</p> <p>STATUS: Resolved</p>

10.	<p>Debtors’ Motion for Entry of Order Further Extending the Time to File Schedules and Statements of Financial Affairs (the “<u>Schedules Extension Motions</u>”)</p> <ul style="list-style-type: none"> ▪ Filed on April 23, 2012 ▪ Docket No. 91 	<ul style="list-style-type: none"> ▪ An additional 45 days, until June 21, 2012, to file (i) Items 3 and 23 of statements of financial affairs; and (ii) Schedules D, E and F. ▪ An additional 14 days, until May 21, 2012, to file the remainder of the Schedules and Statements. 	<p>The Committee believes that the requested relief is reasonable and in the best interest of the Debtors’ estates, and does not require any modifications to the Debtors’ proposed order. However, the Committee reserves the right to object to any further request for an extension of time</p> <p>STATUS: Resolved</p>
11.	<p>Debtors’ Application Pursuant to Sections 327(e) and 328 of the Bankruptcy Code for an Order Authorizing the Debtors to Retain and Employ Trowers & Hamlins LLP as Bahraini Counsel <i>Nunc Pro Tunc</i> to the Petition Date (the “<u>Trowers Retention Application</u>”)</p> <ul style="list-style-type: none"> ▪ Filed on April 2, 2012 ▪ Docket No. 46 	<ul style="list-style-type: none"> ▪ Authority to retain Trowers & Hamlins, the Debtors’ prepetition legal counsel in Bahrain, to serve as the Debtors’ local counsel <i>nunc pro tunc</i> to the Petition Date and render postpetition legal services in connection with Bahraini law. ▪ Trowers & Hamlins holds nearly \$300,000 in prepetition claims against the Debtors for legal services rendered prior to the chapter 11 filing. 	<p>The Committee believes that the requested relief is reasonable and in the best interest of the Debtors’ estates, and does not require any modifications to the Debtors’ proposed order.</p> <p>STATUS: Resolved</p>
12.	<p>Debtors’ Application for an Order Approving the Employment and Retention of Gibson, Dunn & Crutcher LLP as Counsel for the Debtors in Possession <i>Nunc Pro Tunc</i> to the Petition Date (the “<u>Gibson Dunn</u>”)</p>	<ul style="list-style-type: none"> ▪ Authority to retain Gibson Dunn, who has served as the Debtors’ general outside counsel for more than ten years, as lead bankruptcy counsel <i>nunc pro tunc</i> to the Petition Date. ▪ As of the Petition Date, Gibson Dunn held no prepetition claims against the Debtors and the Advance Payment balance was \$118,878.07. 	<p>The Committee believes that the requested relief is reasonable and in the best interest of the Debtors’ estates, and does not require any modifications to the Debtors’ proposed order.</p>

	<u>Retention Application</u>) <ul style="list-style-type: none">▪ Filed on April 3, 2012▪ Docket No. 51		STATUS: Resolved
13.	Motion to Redact Customer Names <ul style="list-style-type: none">▪ Filed on April 3, 2012▪ Docket No. 52	Authority to redact the names of the entities that have made investments with the Debtors in all disclosures, applications, motions, service lists and other pleadings to be filed publicly with the Court, and to file unredacted copies of such pleadings with the Court under seal.	The Committee believes that the requested relief is reasonable and does not have any modifications to the Debtors' proposed order. STATUS: Resolved