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

)	
In re:)	Chapter 11
)	
ARCAPITA BANK B.S.C.(c), <i>et al.</i> ,)	Case No. 12-11076 (SHL)
)	
Debtors.)	Jointly Administered

**MAYHOOLA FOR INVESTMENT Q.S.P.C.’S LIMITED OBJECTION TO
CONFIRMATION OF THE SECOND AMENDED JOINT PLAN OF
REORGANIZATION**

Mayhoola for Investment Q.S.P.C. (“MFI”), a creditor and party-in-interest in the above-captioned consolidated cases, objects in limited part to confirmation of the *Debtors’ Second Amended Joint Plan of Reorganization* [Docket No. 1036] (the “Plan”), and states as follows:

I. Background

1. On August 24, 2012, MFI timely filed proofs of claims (the “Original Proofs of Claim”) against all seven (7) of the Debtors. On February 19, 2013, MFI filed an amended proof of claim (the “Amended Proof of Claim”, and with the Original Proofs of Claim, the “Proofs of Claim”) against Debtor Arcapita Bank B.S.C. (“Arcapita Bank”)

2. As set forth in the Proofs of Claim, MFI invested \$7,000,000 in one of Arcapita Bank's "investment opportunities", as described in the Section III(A) of the *Second Amended Disclosure Statement* (the "Disclosure Statement"). MFI's investment was made on or around January 26, 2012, a mere seven (7) weeks before all of the Debtors, except for Falcon Gas Storage Company, Inc., filed their bankruptcy petitions. As a result of the timing of the solicitation of MFI's investment and the placement of MFI's invested funds into what appears to have been a non-segregated account held at Arcapita Bank, MFI believes that in addition to its claims against Arcapita Bank it has viable causes of action against non-debtor third parties involved in the transaction. MFI intends to assert such claims outside of this bankruptcy proceeding.

3. As set forth below, MFI objects to confirmation of the Plan solely on the grounds that the discharge, discharge injunction and indemnification provisions, contained in Sections 9.1.1, 9.1.2 and 9.9 of the Plan, respectively, are exceedingly broad and could be used affirmatively to preclude MFI from asserting insurance-covered claims against Arcapita Bank and claims against Arcapita Bank's employees. MFI therefore requests that the order confirming the Plan (the "Confirmation Order") be amended to clarify the scope of these provisions.

II. Objection

A. **The Plan's Terms Setting Forth The Effect Of Confirmation Are Impermissibly Broad**

4. Section IX of the Plan, entitled "Effect of Confirmation of Plan", contains broad and far-reaching provisions which were designed to protect the Debtors and their estates. However well-intentioned, these provisions could be read to impermissibly expand the scope of the discharge injunction provided for in 11 U.S.C. § 524(a) and to thereby prevent MFI from both proceeding nominally against Arcapita Bank in order to recover under Arcapita Bank's insurance policies, and proceeding against non-debtor third parties.

5. Specifically, Section 9.1.1 of the Plan provides that the confirmation of the Plan discharges the Debtors of any claims arising before the Effective Date, and Section 9.1.2 enjoins any action or other proceeding with respect to such discharged claims. MFI has no issue with a discharge of the Debtors. However, the discharge and the related discharge injunction should not preclude MFI from proceeding nominally against any of the discharged Debtors in order to establish liability solely to recover from the Debtors' insurers. *See In re Werness*, Case No. 10-8397-8-SWH, 2012 Bankr. LEXIS, 5745, *10 (Bankr. E.D. N.C. Dec. 13, 2012) (“[B]oth the discharge and the permanent injunction arising therefrom are exclusive to the debtor, and do not otherwise affect the enforcement of any underlying debtor, or any nondebtor liability thereon.”) (citations omitted).

6. Instead, the Confirmation Order must make clear that neither the discharge nor the discharge injunction shall act as a bar to actions brought nominally against Arcapita Bank in order to seek recovery from third parties, such as Arcapita Bank's insurers. *See Green v. Welsh*, 956 F.2d 30, 35 (2nd Cir. 1992) (“[W]e believe that § 524 permits a plaintiff to proceed against a discharged debtor solely to recover from the debtor's insurer.”); *In re Jet Fla. Systems, Inc.*, 883 F.2d 970, 976 (11th Cir. 1989) (court reversed denial of a motion for relief from the § 524(a) permanent injunction, even though moving party failed to file a proof of claim, holding that “pursuant to section 524(e), a plaintiff may proceed against the debtor simply in order to establish liability as a prerequisite to recover from another, an insurer, who may be liable.”); *In re Fine Air Svcs., Corp.*, No. 00-18671-BKC-AJC, 2005 WL 3190398, *6 (Bankr. S.D. Fla. May 17, 2005) (holding that § 524(e) allows the creditor to proceed in a state court action against the debtor to establish the debtor's liability so that the creditor may proceed against the debtor's insurer); *In re Jason Pharms*, 224 B.R. 315, 322 (Bankr. D. Md. 1998) (noting that courts are in “nearly unanimous agreement that Section 524(e) permits a creditor to bring, and proceed in, an

action nominally directed against a discharged debtor for the sole purpose of proving liability on its part as a prerequisite to recovering from its insurer” and citing numerous cases in support thereof) (citations omitted).

7. Furthermore, Section 9.9 of the Plan provides that the Debtors’ indemnification obligations owed to officers, directors, employees and others shall not be discharged by confirmation of the Plan. Again, MFI has no quarrel with such provision, except to the extent that the Debtors seek to use such continuing indemnification obligations as a shield against actions brought by MFI against third party non-debtors.

B. MFI’s Proposed Modification Of The Confirmation Order

8. MFI’s limited objections to the Plan would be addressed by the inclusion of language in the Confirmation Order which expressly preserves MFI’s rights to proceed against third-party non-debtors, including the Debtors’ insurers. MFI therefore requests that the following provision be included in the Confirmation Order:

Notwithstanding Sections 9.1.1 and 9.1.2 of the Plan, nothing in the Plan or Confirmation Order shall operate to enjoin or impede any creditor or other party in interest from commencing a lawsuit against any of the Debtors before a tribunal of competent jurisdiction or taking other action for the sole purpose of establishing the Debtor’s liability as a prerequisite to recovering from the Debtor’s insurance carriers. The recovery of the creditor or other party in interest in any such action against any of the Debtors shall be limited to recovery of the proceeds of any applicable insurance policies, and in no event shall such creditor or other party in interest collect any debt or judgment obtained in connection with such action against the assets of the Reorganized Debtors. Furthermore, notwithstanding Section 9.9 of the Plan, nothing in the Plan or the Confirmation Order shall operate to enjoin or impede the ability of a creditor or other party in interest to establish liability and collect upon that liability against the Debtors’ officers, directors, managers, agents, employees, representatives, and professionals, notwithstanding the effect that the Debtors’ obligation to indemnify such individuals would have upon the assets of the Reorganized Debtors.

WHEREFORE, MFI respectfully asks that the Court condition confirmation of the Plan on the inclusion of the language set forth above in the Confirmation Order.

Dated: May 29, 2013

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CERTIFICATE OF SERVICE

I certify that on May 29, 2013, I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of New York and on May 29, 2013 by First Class Mail and e-mail to the parties listed below.

/s/ Mark A. Salzberg

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