Hearing Date and Time: June 26, 2013 at 2:00 p.m.
Objection Deadline: June 19, 2013 at 4:00 p.m.

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11
ARCAPITA BANK B.S.C.(c), *et al.*,	Case No.: 12-11076 (SHL)
Debtors.	*Refers to Dkt. No. 1197*

OBJECTION TO MOTION OF OFFICIAL COMMITTEE OF UNSECURED CREDITORS FOR ENTRY OF ORDER UNDER 11 U.S.C. §§1103(c) AND 1109(b) GRANTING LEAVE, STANDING AND AUTHORITY TO PROSECUTE TURNOVER AND AVOIDANCE CLAIMS

BNY Mellon Corporate Trustee Services Ltd., as delegate ("**Delegate**") on behalf of Arcsukuk (2011-1) Limited (the "**Arcsukuk Trustee**"), an exempted company with limited liability incorporated in the Cayman Islands, acting pursuant to authority granted to Delegate by the Declaration of Trust ("**Declaration of Trust**") by and among the Arcsukuk Trustee, the Delegate and Arcapita Bank B.S.C. (c) ("**Arcapita Bank**"), dated September 7, 2011, by its undersigned attorneys, files this Objection (the "**Objection**") to the Motion of Official Committee of Unsecured Creditors For Entry of Order Under 11 U.S.C. §§1103(c) and 1109(b) Granting Leave, Standing and Authority to Prosecute Turnover and Avoidance Action Claims [Docket No. 1197] (the "**Standing Motion**")[1], and respectfully represents:

[1] Capitalized terms used but not defined herein have the meanings given to such terms in the Standing Motion.

SUMMARY OF OBJECTION

1. Following the filing of their bankruptcy petitions, the Debtors investigated alleged prepetition transfers to the trust administered by the Arcsukuk Trustee, an unaffiliated arms-length creditor, and concluded that the Debtors have no viable avoidance actions worthy of pursuit. Yet notwithstanding the Debtors' unbiased assessment, the Committee now seeks derivative standing to challenge two prepetition transfers to the Arcsukuk Trustee.

2. The entire basis for the Committee's motion is the purported "consent" of the Debtors (implied through inaction rather than through affirmative consent). However, consent by itself does not give the Committee the automatic right to obtain standing. Rather, under *Commodore Int'l Ltd v. Gould (In re Commodore Int'l Ltd.)*, 262 F.3d 96 (2d Cir. 2001) certain standards must be met even if the Debtors consent. The Committee has not met these standards.

3. The Committee fails to demonstrate that pursuit of the Arcsukuk Avoidance Actions by the Committee (as opposed to the Reorganized Debtors) is in the "best interest of the estate" as is required by *Commodore International*. Additionally, the Committee fails to demonstrate that its pursuit of the Arcsukuk Avoidance Actions is necessary and beneficial to the fair and efficient resolution of the bankruptcy proceedings, also required by *Commodore International*. The Committee's prosecution of these claims would be wasteful and inefficient because all of the information relevant to these claims is in the Reorganized Debtors' possession, meaning the Reorganized Debtors and their advisors will have to be involved in any litigation over the Arcsukuk Facility to almost the same extent (and cost) as if the Reorganized Debtors were the plaintiff. The Committee's involvement as plaintiff would only add an unnecessary layer of expense.

4. That the relief being sought by the Committee is both unnecesary and inefficient is starkly highlighted when viewed in light of how the Debtors' Confirmed Plan (as defined below) would otherwise deal with the prosecution of the Arcsukuk Claims, to the extent preserved thereunder. Under the Confirmed Plan, absent the relief sought by the Committee, the Reorganized Debtors (as defined in the Confirmed Plan) will have the right to evaluate and prosecute the Arcsukuk Claims to the extent preserved. Six of the seven members of the board of directors of the top-most Reorganized Debtor will be directly appointed by the Committee. Thus, the Committee's designees will have the ability, without regard to any prior analysis done by the Debtors, to evaluate the Arcsukuk Claims in light of their fiduciary duties and determine if they are viable. Nevertheless, the Committee seeks to take the control of the Arcsukuk claims away from the directors that the Committee members themselves have appointed. Nowhere in the Standing Motion does the Committee explain why the directors that the Committee appointed are not the right people to control the Arcsukuk Claims, and why the Reorganized Debtors must bear the increased expense of having the Committee prosecute those claims.

5. Because the Committee fails to meet the standards for derivative standing set forth in *Commodore International*, the Committee's request for standing to prosecute estate claims against the Arcsukuk Trustee and the Delegate should be denied.

BACKGROUND

6. The Delegate refers the Court to paragraphs 10-13 of the Committee's Standing Motion for a recitation of facts concerning the Arcsukuk Facility and the AIHL Guaranty and to

paragraph 16 of the Committee's Standing Motion for a recitation of facts concerning the March 2012 transfer to the Arcsukuk Trustee.[2]

A. Summary of Prepetition Capital Structure of Arcapita Bank and AIHL

7. As of the Petition Date (as defined below), the obligations of Arcapita Bank and Arcapita Investment Holdings, Ltd. ("**AIHL**") included:

a. Approximately $100 million of secured claims under two Master Murabaha Agreements dated March 30, 2011 and December 22, 2011, respectively, between Arcapita Bank and Standard Charter Bank as investment agent (the "**SCB Claims**"). Arcapita Bank's obligations were guaranteed by certain of its subsidiaries, including AIHL. *See*, Second Amended Disclosure Statement ¶ III.C.1 at 48-49.

b. Approximately $1.1 billion of unsecured claims under a Master Murabaha Agreement dated March 28, 2007 with WestLB, AG, London Branch as investment agent (the "**Syndicated Murabaha Claims**"). Arcapita Bank was the primary obligor under this agreement, and Arcapita Bank's obligations were guaranteed by AIHL. *See*, Second Amended Disclosure Statement ¶ III.C.2.a at 49.

c. Approximately $100 million of unsecured claims under a Murabaha and Wakala Agreement dated as of September 7, 2011 with the Arcsukuk Trustee as issuer and trustee, Arcapita Investment Funding Limited as wakeel and the Delegate (the "**Arcsukuk Claims**"). Arcapita Bank was the primary obligor under this

[2] For the purpose of the Standing Motion and this Objection only, the Delegate assumes that the factual allegations, but not legal conclusions, contained in the Standing Motion are true. The Delegate does not waive, and expressly reserves, its right to challenge any of the allegations set forth in the Standing Motion.

agreement, and Arcapita Bank's obligations were guaranteed by AIHL. *See*, Second Amended Disclosure Statement ¶ III.C.2.b at 49.

8. AIHL's guarantees of the SCB Claims, the Syndicated Murabaha Claims and the Arcsukuk Claims constituted the only material obligations of AIHL as of the Petition Date.

9. Under all iterations of the Debtors' plan of reorganization, the holders of secured SCB Claims were projected to recover 100% of the face amount of their claims. On the other hand, the holders of the unsecured Syndicated Murabaha Claims and Arcsukuk Claims are projected to recover significantly less than par.

B. Debtors File for Chapter 11, Review and Analyze Arcsukuk Avoidance Actions and Determine Such Claims are Not Viable

10. On March 19, 2012, (the "**Petition Date**"), the above-captioned debtors-in-possession ("**Debtors**") filed voluntary proceedings under Chapter 11 of the Bankruptcy Code. On April 5, 2012, the United Stated Trustee appointed the Official Committee of Unsecured Creditors (the "**Committee**").

11. On August 30, 2012, the Delegate, on behalf of the Arcsukuk, timely filed proof of claim number 519, asserting an unsecured claim in the amount of $100,263,769.29 against Arcapita Bank and AIHL.

12. On February 8, 2013, the Debtors filed their *Disclosure Statement in Support of the Joint Plan of Reorganization of Arcapita Bank B.S.C.(c) and Related Debtors Under Chapter 11 of the Bankruptcy Code* [Docket No. 827] (the "**Original Disclosure Statement**").

13. In the Original Disclosure Statement, the Debtors disclosed that they and their professionals reviewed each of the Debtors' potential avoidance actions, including a review of all prepetition transfers during the two years prior to the Petition Date for potential fraudulent

conveyance actions. Original Disclosure Statement at 86. The Debtors came to the conclusion that they had "not identified any credible fraudulent conveyances." *Id.*

14. On April 16, 2013, the Debtors filed their *First Amended Disclosure Statement in Support of the First Amended Joint Plan of Reorganization of Arcapita Bank B.S.C.(c) and Related Debtors Under Chapter 11 of the Bankruptcy Code* [Docket No. 983]. On April 25, 2013, the Debtors filed the *Second Amended Disclosure Statement in Support of the First Amended Joint Plan of Reorganization of Arcapita Bank B.S.C.(c) and Related Debtors Under Chapter 11 of the Bankruptcy Code* [Docket No. 1038] ("**Second Amended Disclosure Statement**").

15. In the Second Amended Disclosure Statement, the Debtors similarly concluded that the Debtors "**do not believe that there are any viable fraudulent conveyances that should be pursued**." Second Amended Disclosure Statement at 105 (emphasis added). However, the Disclosure Statement stated that the Committee believed (based on an initial review and analysis) that there may be viable fraudulent conveyance claims against the Arcsukuk arising from the Guaranty. Second Amended Disclosure Statement at 105.

16. The Second Amended Disclosure Statement stated that the Debtors agreed not to "oppose any attempt by the Committee to obtain standing to pursue" a "fraudulent conveyance claim against the Arcsukuk Trustee related to the Arcsukuk Guarantee." Second Amended Disclosure Statement at 186, n. 48.

17. With respect to potential preference causes of action, the Debtors concluded that the presumption against extraterritorial application of Section 547 of the Bankruptcy Code, as applied in the *In re Maxwell Commun. Corp. PLC* line of cases, could "operate as a bar" to the avoidance of any preferential transfers. Second Amended Disclosure Statement at 106.

Additionally, the Debtors concluded that "there is a strong argument that the safe harbor of 546(e) would apply to preclude the avoidance of any transfer out of a murabaha." *Id*. Nowhere in the Second Amended Disclosure Statement did the Debtors state that they agree not to oppose the Committee's standing to sue to avoid preferences (including the alleged preferential transfer to the Arcsukuk Trustee).

18. On June 11, 2013, the *Debtors filed the Second Amended Joint Plan of Reorganization of Arcapita Bank B.S.C.(c) and Related Debtors Under Chapter 11 of the Bankruptcy Code (with First Technical Modifications)* [Docket No. 1251] (the "**Confirmed Plan**"), which this Court confirmed at a hearing on June 11, 2013.

19. Following the effective date of the Confirmed Plan, the Reorganized Debtors will be controlled by New Arcapita Topco (as defined in the Confirmed Plan). *See Notice of Filing of Additional Plan Supplement Documents* [Docket No. 1251], Annex 7 at 5. Six of the seven members of the board of directors of New Arcapita Topco (the "**New Board**") will be directly selected by the members of the Committee and five of the New Board members will be selected by members of the Committee who hold claims against AIHL. *Id*.

20. The Confirmed Plan preserves the Reorganized Debtors' right to commence or prosecute all estate causes of action other than causes of action released under the Confirmed Plan. Confirmed Plan at § 7.18. Thus, to the extent the Confirmed Plan does not release an avoidance action, the New Board will have the opportunity to evaluate such avoidance action and determine whether prosecuting it is appropriate in light of the New Board's fiduciary duties.

C. Committee Files the Standing Motion, Seeking Derivative Standing to Sue on Estate's Behalf

21. On June 4, 2013 the Committee filed the Standing Motion. In it, the Committee requests derivative standing to prosecute, among other claims, two separate claims against the

Arcsukuk Trustee and Delegate on behalf of the Debtors' estates. First, the Committee seeks standing to sue to avoid the AIHL Guarantee as a fraudulent transfer (the "**Arcsukuk Fraudulent Transfer Claim**"). *See* Standing Motion at ¶¶ 10-15, 17. Second, the Committee seeks standing to sue to recover an alleged transfer of $1,263,889 to the Arcsukuk Trustee on March 6, 2012 as a preference (the "**Arcsukuk Preference Claim**" and, together with the Arcsukuk Fraudulent Transfer Claim, the "**Arcsukuk Avoidance Actions**"). *See id.* at ¶ 16-17.

ARGUMENT

22. The debtor-in-possession or trustee generally has the exclusive right to bring chapter 5 avoidance actions on behalf of the bankruptcy estate. *See In re STN Enters.*, 779 F.2d 901, 904 (2d Cir. 1985); *Official Comm. of Equity Sec. Holders v. Official Comm. of Unsecured Creditors (In re Adelphia Communs. Corp.)*, 544 F.3d 420, 424 (2d Cir. 2008) (debtors occupy the "central role in handling the estate's legal affairs"); 3 Alan N. Resnick & Henry J. Sommer, Collier Bankruptcy Manual P 1109.05[1] (Matthew Bender 4th Ed.). The Bankruptcy Code does not expressly authorize any party other than a debtor-in-possession or a trustee to commence adversary proceedings on behalf of an estate. Following the Bankruptcy Code's enactment, however, the Second Circuit recognized an "'implied, but qualified' right" under Bankruptcy Code sections 1103(c)(5) and 1109(b) for an official committee of unsecured creditors to bring avoidance claims. *See In re Adelphia Commc'ns Corp.*, 544 F.3d, 423-24 (citing *STN*, 779 F.2d at 904-05). To obtain derivative standing under *STN*, a movant must demonstrate that the debtor in possession or trustee "unjustifiably failed to bring suit or abused its discretion in not suing on colorable claims likely to benefit the [reorganized] estate." *See In re Adelphia Commc'ns Corp.*, 544 F.3d, 423-24 (citing *In re STN Enters.*, 779 F.2d at 904-05).

23. More recently, the Second Circuit Court of Appeals expanded the doctrine of derivative standing by granting official committees of unsecured creditors and individual creditors standing to pursue colorable claims in certain cases where the debtor-in-possession or trustee "consents" to such standing. *Commodore Int'l Ltd v. Gould (In re Commodore Int'l Ltd.)*, 262 F.3d 96, 100 (2d Cir. 2001) ("*Commodore*"); *see also Glinka v. Murad (In re Housecraft Indus. USA, Inc.)*, 310 F.3d 64, 70-72 (2d Cir. 2002) (granting creditor standing to sue as debtor's co-plaintiff). Under *Commodore*, if the debtor "consents" to standing, the movant need not show that the debtor unjustifiably refused to bring suit. *See Commodore*, 262 at 100.[3] Instead, the movant must demonstrate that the underlying claim is "colorable" and the movant's prosecution of the claim is both (a) "in the best interest of the bankruptcy estate" and (b) "'necessary and beneficial' to the fair and efficient resolution of the bankruptcy proceedings." *Commodore*, 262 F.3d at 100 (the "***Commodore* Standard**").[4]

24. The purpose of permitting a creditor or committee of creditors to bring estate causes of action with the debtor's consent under *Commodore* is to allow for a "reasoned and practicable division of labor between the creditors' committee and the debtor in possession or trustee." *Commodore*, 262 F.3d at 100. "Allowing the debtor in possession to coordinate litigation responsibilities with an unsecured creditors' committee can be an effective method for

[3] Where the debtor has simply not objected to the standing motion but has not provided its affirmative consent, at least one court in this district has raised the question of whether the lack of objection is sufficient to allow the movant to avoid the more stringent "unjustifiable refusal" test. *In re Adelphia Communications Corp.*, 330 B.R. 364, 368 n2 (Bankr. S.D.N.Y. 2005)("When the debtor does not itself sue, but consents to a suit on behalf of the estate by a committee or another, that gives rise to a Commodore situation, discussed below. In this case, the Debtors did not oppose the Equity Committee's assertion of the claims it wishes to bring, but neither did they expressly consent to it. While it **might** be that a non-opposition by a debtor should more appropriately be considered as a consent (and hence trigger a Commodore, rather than an STN, situation), the Equity Committee has treated its motion as an STN motion, and this Court will too." (emphasis added))

[4] The movant bears the burden of establishing the elements for derivative standing. *See In re Copperfield Invs., LLC*, 421 B.R. 604, 609 (Bankr. E.D.N.Y. 2010).

the debtor in possession to manage the estate and fulfill its duties." *Id*. at 99 (quoting *In re Spaulding Composites Co.*, 207 B.R. 899, 904 (9th Cir. BAP 1997)).

25. To fulfill the "fair and efficient resolution of the bankruptcy proceedings" element of the *Commodore* test, a movant must offer some justification as to why the movant, and not the debtor, is the appropriate plaintiff. Courts have granted derivative standing upon a showing that the debtor would be unable to effectively prosecute the estate cause of action without the movant's involvement, such as where:

a. the movant's prosecution of the litigation in the debtor's stead enables the debtor to focus on rehabilitating and reorganizing its business;[5]

b. the claims are against present or former insiders of the debtor, creating potential conflicts of interest;[6]

c. the debtor lacks funds and must rely on the movant to pay litigation costs;[7] or

d. the movant's involvement as plaintiff could overcome a potential defense to the debtor's cause of action.[8]

26. Finally, in assessing any motion for derivative standing, and particularly one to which the debtor consents, bankruptcy courts should be wary of the potential for abuse by the movant. *Commodore*, 262 F.3d at 100 (the approach articulated "provid[es] bankruptcy courts

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[5] *Spaulding Composites*, 207 B.R. at 904 (debtor "was able to concentrate its resources on rehabilitating the business while the Committee prosecuted the adversary complaint"); *Adelphia Communs. Corp. v. Bank of Am. (In re Adelphia Communs. Corp.)*, 330 B.R. 364, 382 (Bankr. S.D.N.Y. 2005) ("Suit by the Creditors' Committee has freed up the Debtors to address [] important concerns" including stabilizing business, marketing business for sale and negotiating with creditors).

[6] *In re Recoton Corp.*, 307 B.R. 751, 760-761 (Bankr. S.D.N.Y. 2004) ("As a practical matter, in many Chapter 11 cases, it may not be feasible for a debtor in possession to conduct an investigation into the activities of its own board or bring suit against board members, either present or past. Under such circumstances, *Commodore Int'l* teaches that allowing the debtor in possession to coordinate litigation responsibilities with an unsecured creditors' committee can be an effective method for the debtor in possession to manage the estate and fulfill its duties.") (internal quotations omitted); *see also In re Dewey & Leboeuf LLP*, 2012 Bankr. LEXIS 5536, *3-4, 25 (Bankr. S.D.N.Y. Nov. 29, 2012) (granting committee standing to sue debtor's former chairman, executive director and chief financial officer).

[7] *In re Housecraft Indus. USA, Inc.*, 310 F.3d at 70 (without creditor's participation in litigation as plaintiff and agreement to pay litigation costs, trustee would have been forced to abandon claims due to lack of resources).

[8] *In re Dewey & Leboeuf LLP*, 2012 Bankr. LEXIS 5536 at *9 (claims may have been subject to "insured versus insured" exclusion in insurance policies covering claims against defendants if debtor sued as plaintiff).

with significant authority . . . to check any potential for abuses by the parties.") The Second Circuit has cautioned that derivative standing should not serve as a means for the movant to advance the agenda of a particular creditor constituency at the expense of another. *Official Comm. of Unsecured Creditors of AppliedTheory Corp. v. Halifax Fund, L.P. (In re AppliedTheory Corp.)*, 493 F.3d 82, 86 (2d Cir. 2007) ("Requiring bankruptcy court approval conditioned upon the litigation's effect on the estate helps prevent committees and individual creditors from pursuing adversary proceedings that may provide them with private benefits but result in a net loss to the entire estate.")[9]

27. Here, the Committee fails to carry its burden. The sole basis on which the Committee rests its motion is the Debtors' lack of objection to the relief sought. But even assuming that the Debtors have "consented" to the Committee's standing within the meaning of *Commodore*, to gain derivative standing the Committee would still have to show that (1) the Committee's pursuit of the claims is in the best interest of the bankruptcy estate *and* (2) the Committee's pursuit of the claims is necessary and beneficial to the fair and efficient resolution of the bankruptcy proceedings. The Committee fails to carry its burden on these elements.

[9] In denying a committee of unsecured creditors and a secured creditor standing to sue an insider of the debtor, the Fourth Circuit Court of Appeals explained:

> A bankruptcy court must therefore ensure that a would-be derivative suit would not simply advance the interests of a particular plaintiff at the expense of other parties to the bankruptcy proceeding. The court's approval acts as a critical check upon creditor actions that might, for example, prejudice the estate and rival creditors, or would recover only enough to pay the lawyers. Although the debtor-in-possession or trustee must also have approved the suit, the additional disinterested evaluation of the bankruptcy court can prevent well-intentioned oversights or situations where a debtor is for some reason predisposed to favor particular creditors. Permitting a creditor to sue in such a circumstance would undermine not only the efficiency, but also the efficacy and fairness, of the bankruptcy proceeding.

Scott v. Nat'l Century Fin. Enters. (In re Balt. Emergency Servs. II), 432 F.3d 557, 562 (4th Cir. 2005).

A. The Committee's Pursuit of the Arcsukuk Avoidance Actions Is Not in the Best Interests of the Estate

28. The Committee's Standing Motion should be denied because pursuit of the Arcsukuk Avoidance Actions is not "in the best interest of the bankruptcy estate." Instead, pursuit of the Arcsukuk Avoidance Actions appears to advance the interests of a single creditor constituency – the holders of Syndicated Murabaha Facility claims – at the expense of another creditor constituency – the Arcsukuk.

29. The Debtors, as fiduciaries for the entire estate, independently analyzed the Arcsukuk Avoidance Actions, including the expected costs of litigation and potential benefits to the estate. *See* Second Amended Disclosure Statement at 105-106. The Debtors concluded that the Arcsukuk Fraudulent Transfer Claim lacks factual support and concluded that the Arcsukuk Preference Claim is subject to one or more complete defenses. *Id*. at 105-106. As a result, the Debtors determined that they "do not believe that there are any viable fraudulent conveyances that should be pursued." *Id*. at 105. Nowhere in the Standing Motion does the Committee suggest that conflicts of interest biased the Debtors' independent analysis of the Arcsukuk Avoidance Actions.

30. Nonetheless, under the Confirmed Plan the Debtors have appeared to allow the board of directors of the Reorganized Debtors to conduct its own analysis of the Arcsukuk Avoidance Actions, unfettered by the Debtors' analysis and conclusions, and to make its own decision in light of its fiduciary duties on whether to prosecute those claims. The members of the Committee directly appoint six of the seven members of the New Board, and thus their designees would be tasked with conducting that analysis and making that decision. But apparently that outcome is not sufficient for the Committee, as the Committee is seeking to divest its own designees of that authority and take it for itself.

31. Nowhere in its Standing Motion does the Committee explain why it is in the best interests of the entire estates of the Reorganized Debtors for the Committee, rather than the Reorganized Debtors, to have control over the Arcsukuk Avoidance Actions. Why is it that the Committee believes that its own designees on the board are somehow incapable of a proper and objective analysis of the claims in light of their fiduciary duties? The Standing Motion is mum on that question.

32. It may be that the answer lies in examining who benefits from the prosecution of the Arcsukuk Avoidance Actions. Avoidance of the Arcsukuk Guaranty would only advance the interests of a single creditor constituency: the holders of Syndicated Murabaha Facility Claims. Avoidance of the Arcsukuk Guaranty would reduce the dollar amount of the claims against AIHL, thereby increasing the percentage recovery of the other AIHL creditors (namely, the holders of Syndicated Murabaha Facility claims). *See* Second Amended Disclosure Statement at 185-86.

33. This Court should not sanction "a would-be derivative suit [that] would [] simply advance the interests of a particular plaintiff at the expense of other parties to the bankruptcy proceeding." *Balt. Emergency Servs. II*, 432 F.3d at 562; *see also AppliedTheory Corp.*, 493 F.3d at 86 (bankruptcy court approval helps "prevent committees and individual creditors from pursuing adversary proceedings that may provide them with private benefits but result in a net loss to the entire estate.") Absent the relief sought in the Standing Motion the New Board will have the ability to investigate and evaluate the Arcsukuk Avoidance Actions in light of their fiduciary duties. Because the Committee cannot demonstrate that its pursuit of the Arcsukuk Avoidance Actions in derogation of the rights and obligations of the New Board is in the best

interests of the estates, but instead is in the interests of a single constituency, its request for standing to pursue the Arcsukuk Avoidance Actions should be denied.

B. The Committee's Pursuit of the Arcsukuk Avoidance Actions Is Not Necessary and Beneficial to the Fair and Efficient Resolution of the Bankruptcy Proceedings

34. Additionally, the Committee's request should be denied because its pursuit of the Arcsukuk Avoidance Actions is not "necessary and beneficial to the fair and efficient resolution of the bankruptcy proceedings." The Committee has offered no explanation for why the Committee, and not the Reorganized Debtors, is the appropriate plaintiff here and how the Committee's pursuit of these claims would serve the ends of fairness and efficiency. To the contrary, the Committee's pursuit of these claims would be incredibly inefficient.

35. In order to assess the cost to the estate of the proposed Arcsukuk Avoidance Actions, the Court must consider the Committee's fee arrangements with its professional. *See STN*, 544 F2d. at 905; *In re Dewey & Leboeuf LLP*, 2012 Bankr. LEXIS 5536 at *18-19. Although the Standing Motion fails to disclose to Committee's fee arrangements, the Delegate believes the Committee's litigation costs in this matter would be substantial. Litigating the Arcsukuk Fraudulent Transfer Claim to conclusion would, by the Committee's own admission, require that the Committee prove, among other things, AIHL's insolvency in September of 2010. Standing Motion ¶¶ 30 and 33. Proving insolvency at trial would require not only substantial attorney hours but (presumably) substantial efforts by a solvency and valuation expert to analyze the Debtors' contemporaneous financial information and testify as to the value of the numerous AIHL portfolio companies on a given date nearly three years ago.

36. In light of the substantial expenses that any such litigation will entail, entrusting any party other than the Reorganized Debtors with the Arcsukuk Avoidance Actions would be inefficient and wasteful of the Reorganized Debtors' resources (in particular, their cash). The

Reorganized Debtors are the ones in possession of all the information that would be relevant to the Arcsukuk Avoidance Actions, including facts concerning the use of proceeds of the 2011 and 2010 Arcsukuk Transactions, the alleged March 2011 transfer to the Arcsukuk Trustee and the solvency of AIHL at relevant times. Therefore, the Reorganized Debtors will have to be deeply involved in any prosecution of the Arcsukuk Avoidance Actions even if they are not the plaintiff, and the Committee's prosecution of these causes of action would simply add an unnecessary layer of professional expenses. The Committee has not, and cannot, demonstrate that its pursuit of the Arcsukuk Avoidance Actions would be more efficient than allowing the Reorganized Debtors to retain control over them.

37. Additionally, none of the other justifications that have satisfied the "fair and efficient" element of the *Commodore* Standard (*see supra* at ¶ 17) are applicable. For example, this is not a case where the Committee's involvement will "free up" the Debtors to rehabilitate their business and reorganize successfully – the Debtors' plan of reorganization has already been confirmed. *Contra Spaulding Composites*, 207 B.R. at 904; *Adelphia Communs. Corp.*, 330 B.R. at 382. And the Arcsukuk Avoidance Actions are not claims against former insiders of the Debtors that would be more appropriately pursued by representatives of the Committee. *Contra In re Recoton Corp.*, 307 B.R. at 760-761. The Committee simply offers no justification for why it is the appropriate plaintiff here or why its pursuit of the Arcsukuk Avoidance Actions (as opposed to the Reorganized Debtors) would be "necessary and beneficial to the fair and efficient resolution of the bankruptcy proceedings." Because the Committee fails to carry its burden, its request for derivative standing to prosecute the Arcsukuk Avoidance Actions should be denied.

38. The Reorganized Debtors will have a new board of directors, almost all of whom have been appointed by the Committee. Those directors will have the ability, without regard to

any analysis done, or conclusions reached, by the Debtors to look at all preserved causes of action with a fresh eye, and to come to their own conclusion in light of their fiduciary duties as to whether those actions should be pursued. The Committee is seeking to take control over the Arcsukuk Avoidance Actions out of the hands of its own designess. Quite simply, the Committee has not explained why that course of action is the best and most efficient way to address the Arcsukuk Avoidance Actions. In the absence of any such explanation the Debtors' abdication on this issue is not by itself enough to justify the relief sought.

CONCLUSION

39. For these reasons, acting on behalf of Arcsukuk, the Delegate objects to the Committee's request for standing to prosecute the Arcsukuk Avoidance Actions set forth in the Standing Motion.

Dated: New York, New York
June 19, 2013

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