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

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

**REPLY IN SUPPORT OF 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**

The Official Committee of Unsecured Creditors (the “Committee”) of Arcapita Bank B.S.C.(c) (“Arcapita”) and its affiliated debtors in possession (collectively, the “Debtors”) hereby submits this reply (this “Reply”) in support of its Motion 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 (the “Motion”) [Dkt. No. 1197] and, specifically, in response to the

objection (the “Objection”) [Dkt. No. 1269] filed by BNY Mellon Corporate Trustee Services Ltd. as delegate (the “Delegate”) on behalf of Arcsukuk (2011-1) Limited (the “Arcsukuk Trustee”).

PRELIMINARY STATEMENT

1. The facts on this Motion are simple and unrefuted. The proposed avoidance claims (the “Arcsukuk Claims”) ¹ against the Arcsukuk Trustee: (i) are colorable and would readily survive a motion to dismiss for failure to state a claim; (ii) would, if successful, greatly benefit AIHL’s ² estate by (a) resulting in the disallowance of up to \$100 million in claims against AIHL and (b) obtaining a money judgment of more than \$1.2 million; and (iii) should be prosecuted to promote the fair and efficient resolution of the estates.

2. The Delegate does not contest the Committee’s ability to pursue the Placement Claims against certain Bahraini banks, ³ nor does it contend that the Arcsukuk Claims are not colorable. The Delegate argues only that the Committee’s pursuit of the Arcsukuk Claims would not be a sound use of the estates’ resources. The Delegate stands alone in this claim. *Not a single other party in interest* has filed an objection. The fact that the claims have the potential to generate tens of millions of dollars in value for the Debtors’ unsecured creditors makes the Delegate’s claim incredible.

1 As discussed in the Motion, the Committee seeks standing to pursue two claims involving the Arcsukuk Trustee: (i) a claim to avoid as a constructive fraudulent transfer the AIHL Guarantee, and (ii) an unrelated claim to recover approximately \$1.2 million in payments made to the Arcsukuk Trustee on account of an antecedent debt. The Committee also seeks standing to pursue certain “placement” claims against three Bahraini banks, but those claims do not involve the Delegate or the Arcsukuk Trustee and are not addressed by the Objection.

2 Capitalized terms used but not defined herein shall have the meanings given to them in the Motion.

3 In fact, no objection has been filed to the Committee’s request for standing to pursue the Placement Claims. Accordingly, the Committee should be granted standing to pursue the Placement Claims regardless of how the Court rules on the Objection.

3. It is clear that the Delegate, through the Objection, is trying to prevent the Committee (and anyone else) from pursuing claims that, if successful, would avoid the substantial guarantee claims that the Arcsukuk Trustee purports to hold against AIHL. The Delegate and the Arcsukuk Trustee, on behalf of the certificateholders, are motivated by their personal pecuniary interests, not the interests of the unsecured creditors.

REPLY

4. The Delegate advances four, equally unavailing reasons why the Court should not grant the Motion. First, the Delegate asserts that the Debtors decided not to pursue the Arcsukuk Claims and have not affirmatively consented to the Motion. Second, the Delegate alleges that the Committee should allow the board of directors for the reorganized debtors to determine whether to pursue the Arcsukuk Claims. Third, the Delegate argues that the Arcsukuk Claims would inappropriately benefit one creditor constituency at the expense of the Arcsukuk certificateholders. Fourth, the Delegate asserts that it would be unnecessarily costly to have the Committee pursue the Arcsukuk Claims. Each of these arguments fails.

I. The Committee Does Not Need the Debtors' Affirmative Support to Obtain Standing to Pursue the Arcsukuk Claims

5. In *Commodore International Ltd. v. Gould (In re Commodore International Ltd.)*, 262 F.3d 96 (2d Cir. 2001) ("Commodore"), the Second Circuit held that where the debtor consents to a creditors' committee's prosecution of claims, the committee should be granted standing to pursue those claims if "the court finds that suit by the committee is (a) in the best interest of the bankruptcy estate, and (b) is 'necessary and beneficial' to the fair and efficient resolution of the bankruptcy proceedings." *See Commodore*, 262 F.3d at 100 (citations omitted). The Delegate argues that this standard is inapplicable here, where the

Debtors have agreed not to object to the Motion, but have not affirmatively expressed their “consent”. This argument should be rejected.

6. First, the Debtors’ decision not to object to the Motion is not meaningfully different from affirmative consent to the Motion. As at least one court has suggested, “it might be that a non-opposition by a debtor should more appropriately considered as a consent (and hence trigger *Commodore*, rather than an *STN*, situation).” See *Adelphia Comm. Corp. v. Bank of Am., N.A. (In re Adelphia Comm. Corp.)*, 330 B.R. 364, 368 n.2 (Bankr. S.D.N.Y. 2005). (See also Obj. ¶ 23 n.3.) The Delegate cites no case in support of its position that the *Commodore* standard does not apply where, as here, the Debtors agreed not to object, rather than affirmatively consent, to the Motion.

7. Second, even if *STN* rather than *Commodore* applies, the standard is plainly met. The requirements for standing under *STN* are substantially similar to those set forth in *Commodore*. Under *STN*, a committee should be granted standing where (i) it holds a colorable claim or claims for relief and (ii) an action asserting such claim(s) “is likely to benefit the reorganization estate.” See *Unsecured Creditors Comm. of Debtor STN Enters., Inc. v. Noyes (In re STN Enters.)*, 779 F.2d 901, 905 (2d Cir. 1985).

8. The Committee has made the necessary showing as to both elements. (See Mot. ¶¶ 29-46.) The Arcsukuk Claims are indisputably colorable. Indeed, the Delegate does not dispute that the claims are sufficiently colorable to survive a motion to dismiss, and that the first prong is satisfied. (*Id.* ¶¶ 29-43.) The Delegate instead questions the benefit to the reorganized estate. In evaluating this potential benefit, courts consider only whether there is at least a “fair chance” that the “benefits to be obtained from the litigation will outweigh its costs.” *Am.’s Hobby Ctr., Inc. v. Hudson United Bank (In re Am.’s Hobby Ctr., Inc.)*, 223 B.R. 275, 284

(Bankr. S.D.N.Y. 1998); *see also In re Dewey & LeBoeuf LLP*, No. 12-12321, 2012 Bankr. LEXIS 5536, at *16-17 (Bankr. S.D.N.Y. Nov. 29, 2012) (same). The Committee's showing satisfies this standard. (*See* Mot. ¶¶ 44-46.)

9. Accordingly, the Committee should be granted standing to pursue the Arcsukuk Claims regardless of which Second Circuit standard the Court applies.

II. The Committee, Rather Than the Board of Directors of the Reorganized Debtors, Should Pursue the Arcsukuk Claims

10. Unhappy with the Committee's decision to seek standing to pursue the Arcsukuk Claims against the Arcsukuk Trustee, the Delegate asks the Court to deny the Motion in the hope that the new board of directors will come to another decision regarding the value of pursuing the Arcsukuk Claims. The Court should reject this request. The Committee and its advisors, just like the board of directors, owe fiduciary duties to the Debtors' unsecured creditors. Moreover, the Committee is well-positioned to move forward on the claims expeditiously. In contrast, the reorganized debtors would have to begin anew evaluating and deciding whether to pursue the claims. This would be inefficient, wasteful and would lead to unnecessary delay.

11. The Committee and its advisors have already spent considerable time and effort investigating and analyzing the Arcsukuk Claims. After numerous telephone calls and meetings, the Committee made an informed decision, consistent with its fiduciary duties, to pursue these claims. These efforts will be wasted if, following the plan effective date, the board is forced to reanalyze these claims with its counsel and financial advisor. The best way to avoid significant wastefulness and duplication of effort is to grant the Committee standing to pursue the Arcsukuk Claims.

12. The Delegate suggests that the reorganized debtors are better positioned to pursue the claims should they elect to do so after their formation on the plan effective date, because the claims implicate factual questions about the Debtors, like solvency, and will require the reorganized debtors and their advisors to be actively involved in the litigation. This is inconsistent with the fact that in these cases, the reorganized debtors will be left without debtor employees as they will have been retained by AIM Group Limited (the management company for the reorganized debtors) or terminated. In addition, the Delegate's argument cannot be right as a matter of bankruptcy practice. The transfer of estate claims to a reorganized debtor is what happens as a matter of law with respect to all claims that are not released under the plan or otherwise. To hold that in all such circumstances only a new board has the right to pursue those causes of action would unduly restrict the rights of committees in this and all future cases.

III. The Arcsukuk Claims Will Not Improperly Benefit One Group of Creditors at the Expense of Other Creditors

13. The Delegate argues that the Motion should be denied because “[a]voidance of the Arcsukuk Guaranty would only advance the interests of a single creditor constituency: the holders of Syndicated Murabaha Facility Claims.” (Obj. ¶ 32.) This argument is both legally and factually flawed.

14. First, as a threshold matter, and contrary to the Delegate's allegations, the Committee does not represent “the interests of a single creditor constituency” (Ob. ¶ 28.). The Committee represents all of the unsecured creditors of each Debtor. The Delegate insinuates that the Committee is not acting in the best interests of all creditors because the Debtors have questioned whether the Arcsukuk Claims should be pursued. The Committee is expressly authorized by statute to investigate the assets and liabilities of the Debtors, and is empowered to perform such other services as are in the interests of the unsecured creditors generally. *See* 11

U.S.C. § 1103(c). The Committee, on behalf of its entire constituency, conducted an independent analysis of the Arcsukuk Claims and decided that it was in the estates' best interests to pursue those claims. Notably, only two of the five Committee members who participated in this decision-making process hold Syndicated Murabaha Facility Claims. Thus, contrary to the Delegate's implication, the Committee's decision to pursue the claims was not directed by creditors who stand to benefit from the litigation.

15. Second, pursuit of the Arcsukuk Claims would not result in a loss of value to the Debtors' estates. Indeed, the only creditors who will be materially harmed by the Arcsukuk Claims are the potential defendants in the litigation – *i.e.*, the Arcsukuk certificateholders. As the Committee intends to allege in its complaint, these creditors received an avoidable fraudulent transfer from AIHL in the form of the AIHL Guarantee, without which their claims against AIHL would not exist.⁴ Under these circumstances, the Arcsukuk Claims must proceed against these defendants to ensure that the claims of AIHL's creditors are not improperly diluted by claims asserted by recipients of fraudulent transfers.

16. In fact, fraudulent transfer actions, such as those contemplated by the Arcsukuk Claims here, are intended to serve this very purpose. It is well-established in the Second Circuit and in other jurisdictions that:

Fraudulent transfer law allows creditors to avoid transactions which unfairly or improperly deplete a debtor's assets or that unfairly or improperly dilute the claims against those assets . . . It aims to make available to creditors those assets of the debtor that are rightfully a part of the bankruptcy estate, even if they have been transferred away.

⁴ The Committee will also seek to recover from the Arcsukuk Trustee an avoidable preferential transfer in the amount of more than \$1.2 million.

Togut v. S.W. Bach & Co. v. RBC Dain Correspondent Servs. (In re S.W. Bach & Co.), 435 B.R. 866, 875-76 (Bankr. S.D.N.Y. 2010); *see, e.g., Bear, Stearns Sec. Corp. v. Gredd*, 275 B.R. 190, 194 (S.D.N.Y. 2002) (“The purpose of § 548 is to protect the estate itself for the benefit of all creditors.”). Accordingly, the Committee’s pursuit of the Arcsukuk Claims will not only result in substantial benefits to unsecured creditors but will also serve equity by ensuring that the requirements of the Bankruptcy Code are being properly enforced.

17. Third, the Delegate has provided no legal support for its argument that a creditors’ committee may not obtain standing to pursue litigation if the creditors who serve to benefit from the litigation are part of a single credit constituency. The Delegate purports to cite two cases in support of this argument: (i) *Scott v. National Century Financial Enterprises, Inc. (In re Baltimore Emergency Services II, Corp.)*, 432 F.3d 557 (4th Cir. 2005) (“Scott”); and (ii) *Official Committee of Unsecured Creditors of AppliedTheory Corp. v. Halifax Fund, L.P. (In re AppliedTheory Corp.)*, 493 F.3d 82 (2d Cir. 2007) (“AppliedTheory”). Both of these cases are inapposite.

18. The *Scott* case is a non-precedential decision from the Fourth Circuit, which at the time of the decision, had not decided the threshold question of whether it would permit derivative standing under any circumstances. *Scott*, 432 F.3d at 561-62. Even assuming that such a case could provide guidance to the Court, it does not support denial of the Motion. In *Scott*, the Fourth Circuit reversed the district court decision because the bankruptcy court below ***failed to even consider*** whether the proposed suit was either “in the best interest of the bankruptcy estate” or “necessary and beneficial to the fair and efficient resolution of the bankruptcy proceedings.” *Id.* at 563. Here, the Committee has provided the Court with ample facts on which it can rely in its findings.

19. *AppliedTheory* is equally irrelevant. In *AppliedTheory*, the committee, which had been denied standing by the bankruptcy court, argued that it did not need bankruptcy court approval to pursue claims for equitable subordination, because such claims are “direct” claims belonging to creditors and not derivative claims belonging to the debtor. *AppliedTheory*, 493 F.3d at 86-87. The Second Circuit rejected this argument, holding that such claims require court approval to pursue because they allege harm to the debtor generally. *Id.* There is no dispute in this case that the Court’s approval is required, as evidenced by the instant Motion.

IV. The Benefits of the Arcsukuk Claims Will Outweigh Their Costs

20. To prevail on the Motion, the Committee need only demonstrate that the proposed litigation represents a “sensible expenditure of estate resources,” *Adelphia*, 330 B.R. at 386, 377, and that its benefits have a “fair chance” of outweighing its costs. *Dewey*, 2012 Bankr. LEXIS 5536, at *16-17. In the Objection, the Delegate argues that the Arcsukuk Claims would be unnecessarily costly to litigate, both because (i) the Committee would have to work closely with representatives of the Debtors throughout the litigation and (ii) the litigation may entail expert testimony and proof of detailed factual issues. These arguments must be rejected because they simply are not compatible with the nature of committee standing or the case law in this Circuit.

21. First, contrary to the Delegate’s suggestion, it is simply not the law that claims are too costly for a committee to pursue whenever the committee must collaborate closely with debtors on litigation efforts. Indeed, such a rule would render it impossible for a committee to obtain standing under *STN* or *Commodore*. By definition, when a committee obtains standing to pursue claims on behalf of a debtor, it is pursuing claims that ***belong to the debtor***. Thus, in nearly every case, and especially in fraudulent transfer cases, the debtor (not the committee) will

likely possess much of the relevant documents and other factual knowledge that will be needed to develop legal strategies and participate in the discovery process. This does not, however, render such a litigation unduly difficult or expensive to pursue.

22. Second, although the Committee may incur some significant litigation costs in connection with the Arcsukuk Claims, such costs must be balanced against the size of the potential recovery. *See Adelpia*, 330 B.R. at 385 (granting standing even though litigation would cost “substantial sums” because such costs were “relatively modest” as compared to potential recovery); *Dewey*, 2012 Bankr. LEXIS 5536, at *16-17 (granting motion for standing upon showing of “a ‘fair chance that the benefits to be obtained from the litigation will outweigh its costs.’”) (citations omitted). Here, the litigation costs that the Committee may incur in trying this case – such as through expert witness testimony, fact discovery, and the fees of the Committee’s professionals – pale in comparison to the benefits that would result if the AIHL Guarantee is avoided. At a minimum, under these circumstances, the “prospective rewards [of litigating the Arcsukuk Claims] can reasonably be expected to be commensurate with the litigation’s foreseeable cost.” *Adelpia*, 330 B.R. at 385.

23. Accordingly, the Committee has demonstrated that its pursuit of the Arcsukuk Claims is in the best interests of the Debtors’ estates and is necessary for a fair and efficient resolution of these cases.

CONCLUSION

Based on the foregoing, the Committee respectfully requests that the Court (a) grant the Motion and (b) grant the Committee such other and further relief as this Court deems appropriate.

Dated: June 21, 2013
New York, New York

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