Hearing Date and Time: July 30, 2013 at 10:00 a.m. (Prevailing Eastern Time)

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UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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

SUPPLEMENTAL BRIEF IN FURTHER 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") submits, at the request of the Court, this supplemental brief in further 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].

PRELIMINARY STATEMENT

1. For the reasons discussed in the Motion and the Reply,[1] the Committee believes that it has fully satisfied all Second Circuit requirements for derivative standing to pursue the Claims on the Debtors' behalf. Following the hearing on June 26, 2013, however, the Court declined to rule on the Motion and requested a supplemental submission addressing two topics: (i) how the Debtors had evidenced their agreement to not object to the Committee's request for standing to pursue the Preference Claim against the Arcsukuk Trustee, and (ii) the projected costs and benefits of litigating the Claims. The Committee submits this brief in response to the Court's requests and in further support of the Motion.

2. With respect to the first topic, as counsel to the Debtors confirmed on the record of the June 26, 2013 hearing, the Debtors agreed not to object to the Committee's request for standing to pursue each of the Claims, including the Preference Claim. As a result, all of the relief requested in the Motion is properly reviewed under the Second Circuit's decision in *Commodore Int'l Ltd. v. Gould (In re Commodore Int'l Ltd.)*, 262 F.3d 96 (2d Cir. 2001), which applies whenever the debtor has either consented to or decided not to object to a request for standing. The Debtors' agreements with respect to the Placement Claims and the Arcsukuk Guarantee Claim were noted in the Disclosure Statement, while their agreement to not oppose the Committee's standing to pursue the Preference Claim came after the Committee determined (and the Debtors agreed) that the Debtors' plan should be revised to eliminate any argument that the Preference Claim had been released. Since the solicitation process had already begun, the arrangements with respect to the Preference Claim were evidenced by e-mail correspondence between counsel regarding the standing issue and confirmed through modifications to the

[1] All capitalized terms used but not defined herein shall have the meanings ascribed to them in the Motion or the Committee's reply brief, dated June 21, 2013 (the "Reply"), as applicable.

Debtors' plan that caused the Preference Claim to be preserved. The fact that the Preference Claim was not specifically referenced in the Disclosure Statement like the other two claims is not relevant; the *Commodore* standard applies regardless of the form that a debtor's consent takes.

3. With respect the second topic, the potential benefits of the Claims are substantial and will greatly exceed the anticipated costs of pursuing them. If successful, the Placement Claims will result in a money judgment of more than $33 million. If successful, the Arcsukuk Claims will increase the recoveries of unsecured creditors, perhaps by tens of millions of dollars, by eliminating the guarantee claim of the Arcsukuk Trustee and obtaining a money judgment for the estate on account of the Preference Claim. Meanwhile, the Committee estimates that litigation costs may be approximately $3 million for the Placement Claims and $4.6 million for the Arcsukuk Claims.[2] Thus, the litigation should have significant net benefits for the Debtors' estates.

ARGUMENT

I. The *Commodore* Standard Applies to the Motion Because the Debtors Agreed to Not Object to the Committee's Request for Standing to Pursue the Claims

4. The *Commodore* standard applies to a committee's motion for derivative standing if the debtor has either formally consented to the motion or affirmatively decided not to object to it. *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) (stating that "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)"); *PW Enterprises, Inc. v. North Dakota Racing Commission (In re Racing Services, Inc.*), 540 F.3d 892, 902 (8th Cir. 2008) (adopting Second Circuit approach to

[2] As discussed in greater detail below, these estimates are only approximations and actual costs may vary materially as the litigation proceeds.

derivative standing and holding that "a creditor may proceed derivatively when the trustee (or debtor-in-possession) consents (***or does not formally oppose***) the creditor's suit") (emphasis added). Notably, in evaluating whether the debtor has agreed to not oppose the motion, the timing and form of that agreement are irrelevant:

> Lest a bankruptcy court be tempted by form over substance . . . we note that neither the timing nor form of a trustee's (or debtor-in-possession's) consent should affect its determination of whether a creditor (creditors' committee) has in fact obtained the necessary consent. The only pertinent consideration with respect to consent is whether the trustee's representations can be fairly understood as either affirmatively consenting to or affirmatively not opposing a proposed derivative action. That the trustee's "consent" pre-dates or post-dates a creditor's motion for "consensual" derivative standing is irrelevant.

Racing Services, 540 F.3d at 903 n. 12.

5. Here, the Debtors have agreed to not object to the Motion with respect to all of the Claims, including the Preference Claim. For the Placement Claims and the Arcsukuk Guarantee Claim, this agreement was expressly noted in the Disclosure Statement. Specifically, with respect to the Placement Claims, the Disclosure Statement provided that "[t]he Debtors have agreed that they will not oppose any attempt by the Committee to obtain standing to pursue any Avoidance Actions against the Placement Banks . . . ." (Disclosure Statement at 108 n. 39.) Similarly, for the Arcsukuk Guarantee Claim, the Disclosure Statement provided that "[t]he Debtors have agreed that they will not oppose any attempt by the Committee to obtain standing to pursue [a fraudulent conveyance claim against the Arcsukuk Trustee related to the Arcsukuk Guarantee]." (*Id.* at 185 n. 48.)

6. Unlike the Placement Claims and the Arcsukuk Guarantee Claim, the Disclosure Statement did not specifically address the Preference Claim.[3] The Debtors did,

[3] During the hearing on the Motion, the Court asked counsel for the Committee whether the Disclosure Statement included an express statement by the Debtors that they would not object to the Committee's

however, confirm in an e-mail to the Committee on May 21, 2013 that they would not object to its pursuit of this claim.[4] Moreover, at the Committee's request, the Debtors specifically revised the mutual release set forth in section 9.2.2 of the Second Amended Joint Plan of Reorganization (the "Plan") to make clear that the Debtors were not releasing any avoidance claims against the Arcsukuk Trustee.[5] After obtaining both e-mail confirmation of this agreement and the requested modification to the Plan, there was no need to amend the Disclosure Statement, which had already been approved by the Court and sent to all creditors in connection with the Plan solicitation process.

7. In any event, the form taken by the Debtors' agreement to not object to the Committee's pursuit of the Preference Claim is irrelevant. As long as the Debtors made a deliberate decision to not file an objection, the *Commodore* standard applies. *See Racing Services*, 540 F.3d at 903 n. 12 (ignoring form of debtors' decision to not oppose motion for derivative standing); *see also Commodore*, 262 F.3d 96 (containing no specific requirements concerning form of debtor's "consent"); *In re Dewey & LeBoeuf LLP*, No. 12-12321, 2012 Bankr. LEXIS 5536, at *16-17 (Bankr. S.D.N.Y. Nov. 29, 2012) (same).

8. Accordingly, because the Debtors decided that they would not oppose any aspect of the Motion, the Court should evaluate the entire Motion under *Commodore*.

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pursuit of the Preference Claim. In response, counsel stated that, subject to further verification, he believed that such a statement was included within footnote 48 on page 185 of the Disclosure Statement. Upon further review, however, the Disclosure Statement does not address this issue.

[4] This e-mail contains other confidential content; however, the Committee will provide a redacted version of this e-mail to the Court and other interested parties upon request.

[5] The revised version of the Plan reflecting the modification to section 9.2.2 was filed with the Court on June 11, 2013, along with a blackline. (*See* Second Amended Joint Plan of Reorganization (With First Technical Modifications) [Docket No. 1251], at 33; Notice of Filing of Blackline of Second Amended Joint Plan of Reorganization (With First Technical Modifications) [Docket No. 1252], at 33.)

II. Potential Benefits of Claims Far Exceed Their Estimated Costs

9. In applying *Commodore*, a court must compare the anticipated costs of pursuing the proposed claims with the likely benefits in order to determine whether the claims are (i) in the best interest of the bankruptcy estate and (ii) necessary and beneficial to the fair and efficient resolution of the bankruptcy proceedings. This comparison, however, need not be exhaustive. Rather, the court need only determine that there is a "fair chance" that the claims' benefits will exceed their costs. *Am.'s Hobby Ctr., Inc.*, 223 B.R. at 284. Here, even a cursory review of the potential benefits of the Claims demonstrates that such benefits have far more than a fair chance of exceeding any reasonable litigation costs that the Committee may incur in pursuing them.[6]

10. As discussed in the Motion, the Placement Claims, if successful, would result in combined money judgments for the Debtors' estates of more than $33 million. This $33 million recovery includes potential judgments of approximately $5 million against Al Baraka, approximately $10 million against BisB, and more than $18 million against Tadhamon. No reasonable possibility exists that the litigation required to obtain these judgments would cost anywhere close to $33 million.

11. The same is true for the Arcsukuk Claims, which, if successful, would also result in significant benefits to the Debtors' estates. Through the Arcsukuk Guarantee Claim, the Committee will seek to reduce the pool of unsecured claims against AIHL by tens of millions of

[6] The same is true even if the Court were to apply the standard from *Unsecured Creditors Comm. of Debtor STN Enters., Inc. v. Noyes (In re STN Enters.)*, 779 F.2d 901, 904-05 (2d Cir. 1985)). Although a committee must show under *STN* that the debtor unreasonably failed to pursue the claims in question, the test for determining whether the committee has made such a showing is essentially the same as the test under *Commodore*. *See Am.'s Hobby Ctr., Inc. v. Hudson United Bank (In re Am.'s Hobby Ctr., Inc.)*, 223 B.R. 275, 282 (Bankr. S.D.N.Y. 1998) ("To determine . . . whether the debtor has unjustifiably failed to bring suit [under *STN*], courts in this Circuit apply a two-part test: i) whether the 'committee presents a colorable claim or claims for relief that on appropriate proof would support a recovery . . .'; and ii) 'whether an action asserting such claim[s] is likely to benefit the reorganization estate.') (quoting *STN*, 779 F.2d at 905). The Committee has satisfied both of these requirements.

dollars by arguing that, among other things, AIHL did not receive reasonably equivalent value when it issued the AIHL Guarantee. If the Committee succeeds, and a court determines that the Arcsukuk Guarantee Claim is not valid (in whole or in part), creditors who hold valid, allowed claims against AIHL will receive materially greater recoveries. For example, assuming, conservatively, that the Committee succeeds in avoiding only one quarter of the guarantee (*i.e.*, an obligation worth approximately $25 million), the Committee estimates that the recoveries of AIHL's other creditors would increase by between $14 and $20 million, depending on the value the Debtors realize from the monetization of their assets.[7] In addition, the Preference Claim, which the Committee would pursue in tandem with the Arcsukuk Guarantee Claim, could result in a money judgment for the estate of approximately $1.3 million, further increasing recoveries on allowed claims.

12. During the hearing, counsel for the Delegate argued at length that the Arcsukuk Guarantee Claim would provide no benefit to the estate because avoidance of the guarantee would merely redistribute creditor recoveries by reducing the recoveries of the Arcsukuk Trustee and increasing the recoveries of other creditors. This argument is incorrect. If the Arcsukuk Guarantee Claim is successful, the Arcsukuk Trustee will not be a creditor of AIHL as it will not have a valid claim against that Debtor. Indeed, the Committee believes it is important to pursue avoidance of the Arcsukuk Guarantee so that the Arcsukuk Trustee (on behalf of its beneficial holder) is not permitted to be unjustly enriched by distributions on an approximately $100 million claim against AIHL's estate, to the detriment of creditors holding

[7] Unsecured creditors with valid claims against AIHL would receive an additional recovery of approximately $14 million if the Debtors' investment portfolio is monetized for aggregate consideration of $1.3 billion, and an additional recovery of approximately $20 million if the investment portfolio is monetized for aggregate consideration of $2.0 billion. The value recoverable from the Debtors' assets is uncertain; the above range of outcomes is based on the recovery sensitivity analysis filed by the Debtors as Exhibit M to the Disclosure Statement.

valid claims against AIHL. Apart from the manifest economic benefits, the estates and the chapter 11 process plainly benefit from ensuring that only valid claims are permitted to share in the limited pool of value available to unsecured creditors.

13. Based on the magnitude of the anticipated benefits for the estates and their creditors, there should be no doubt that the benefits of the Claims will dwarf the costs of pursuing them. In light of the Court's request for additional information, however, the Committee asked its professionals to estimate the fees and expenses that they might incur in litigating the Claims through trial, not including any appeals. These estimates are based on the information currently available to the Committee and are subject to material variation based on the unpredictable nature of litigation and other factors. Most significantly, given that complaints have not been filed or answered, the Committee cannot predict the issues that the putative defendants may contest in the claims. In developing these estimates, the Committee tried to account for economies of scale and other efficiencies that the Committee's advisors could realize by pursuing certain Claims together and by leveraging their past experience in these cases. If the Committee's advisors were to pursue the Claims without having performed substantial preliminary investigations, the estimated costs would be much greater.

14. Subject to these qualifications, the Committee estimates that it will cost approximately $3 million total to litigate the three Placement Claims and approximately $4.6 million total to litigate the two Arcsukuk Claims.[8] These estimates are based on the same billing rates and fee arrangements that Milbank and FTI Consulting have used throughout the chapter 11 cases.

8 The estimate for the Arcsukuk Claims includes both legal and financial expertise fees. The estimate for the Placement Claims includes only legal fees and related expenses. Given the nature of the Placement Claims, the Committee believes it is reasonable not to include expenses for a financial expert for such claims, although that belief is subject to change depending on the nature of the defenses raised.

15. Although these estimated fees and expenses are not *de minimis*, they are substantially outweighed by benefits that the estates and their unsecured creditors will realize if the Claims are successful. Accordingly, the Committee has provided ample support for its request for standing to pursue the Claims. *See Adelphia*, 330 B.R. at 385 (granting motion for standing despite substantial litigation costs because such costs were "relatively modest" as compared to potential recovery); *Dewey*, 2012 Bankr. LEXIS 5536, at *16-17 (granting motion upon showing of "'fair chance that the benefits to be obtained from the litigation will outweigh its costs'") (citations omitted). Thus, the Court should grant the Motion and authorize the Committee to pursue the Claims on the Debtors' behalf.

CONCLUSION

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

Dated: July 12, 2013
New York, New York

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