**Hearing Date**: July 30, 2013 at 10:00 a.m.

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**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. | *Refers to Dkt. Nos. 1197 and 1341* |

**RESPONSE TO 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**

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 Response (the "**Response**") to the Supplemental Brief (the "**Supplement**")[1][Docket No. 1341] filed by the Official Committee of Unsecured Creditors in further support of the Motion of Official Committee of Unsecured Creditors For Entry of Order

[1] Capitalized terms used but not defined herein have the meanings given to such terms in the Supplement and in the Motion (as defined in the Supplement).

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], and respectfully represents:

**SUMMARY OF RESPONSE**

1. Following the initial hearing on the Motion on June 26 (the "**Hearing**"), the Court expressed concern over two issues that are critical to the Court's analysis of the relief sought in the Motion: (i) whether the Debtors had in fact taken a formal position on the Preference Claim and whether that position, and indeed the Debtors' position on the Arcsukuk Claims as well, constituted "consent" for the purposes of determining which test is applicable to the relief sought in the Motion and (ii) what the likely costs to the Debtors' estates would be in pursuing the Preference Claim and the Arcsukuk Claim so that the Court had credible evidence on which to rely in conducting a cost-benefit analysis of those claims.

2. The Supplement vindicates the Court's concerns about those issues. In the Supplement the Committee acknowledges that the Debtors in fact had not publicly addressed the Preference Claim prior to the Hearing, much less consented to the Committee's prosecution of that claim. The Supplement then compounds this admission by providing an estimate of expenses that fails to put even the "little bit of flesh on the bones" that this Court requested. (Hearing Transcript 17: 23)[2] The Committee's estimate lacks any analysis; but rather seems pulled out of thin air, and even then fails to take into account the significant costs that the Debtors' professionals will incur in connection with the Arcsukuk Claims and the Preference Claim.

3. Rather than supporting the Motion, the Supplement demonstrates that the Committee fails to meet the standards for derivative standing set forth in applicable law. As a

[2] "Hearing Transcript" refers to the transcript of the June 26, 2013 oral argument of the Motion.

result, the Committee's request for standing to prosecute estate claims against the Arcsukuk Trustee and the Delegate should be denied.

## ARGUMENT

### A. The Committee Fails to Demonstrate Consent by the Debtors

4. At the Hearing, the Court noted the Debtors' very deliberate position on the Motion – namely, that the Debtors refused to say that they consented to the relief sought, but instead would state only that they did not object to the relief sought. (Hearing Transcript 28: 22-24). The presence or absence of consent by the Debtors in this matter is critical in determining which standard properly applies to the Committee's request. In particular, if the Debtors have not consented to the relief the Committee must meet the so-called *STN* standard, which would require the Committee to demonstrate that the Debtors' refusal to prosecute the Arcsukuk Claims was unreasonable. *See In re STN Enters.*, 779 F.2d 901, 904-905 (2d Cir. 1985); *Official Comm. of Equity Sec. Holders v. Official Comm. of Unsecured Creditors (In re Adelphia Communs. Corp.)*, 544 F.3d 420, 423-424 (2d Cir. 2008)(Citing *STN*).

5. The Court's concern about whether the Debtors' have in fact consented to the Committee's request for standing was highlighted by the Debtors' position, publicly stated in the Disclosure Statement, that the estates had no viable fraudulent conveyance actions against the Arcsukuk Trustee. (Disclosure Statement at page 102.) As a result, the Court was particularly focused on whether the Debtors made public disclosure of their deliberations with the Committee about the Arcsukuk Claims and the Preference Claim, so as to demonstrate "a consideration by the debtors in an active way, as opposed to simply a passive not weighing in at all." (Hearing Transcript 14:9-11.) The Court noted that while the Disclosure Statement appeared to describe, albeit only in a footnote, the Debtors' decision not to object to the Committee's request for

standing to pursue the Arcsukuk Claims, there seemed to be no discussion at all of the Debtors' position on the Committee's request for standing to pursue the Preference Claim.

6. As the Committee acknowledges in the Supplement, the Court's concern was well taken. In fact there was no public disclosure, in the Disclosure Statement or anywhere else, of whether the Debtors had even thought about, much less actively considered, the Committee's request with respect to the Preference Claim. Indeed, based upon the Supplement it appears that the Debtors and the Committee did not address this issue at all until almost two months after the Disclosure Statement was approved, on the eve of the confirmation hearing. Even then the discussion was limited to a private e-mail between counsel to the two parties, without any public disclosure at all (at least not until the Supplement was filed, well after confirmation had already occurred).

7. This belated discussion and after-the-fact disclosure is simply too little, too late. Given the Debtors' firmly stated views that these claims do not have merit,[3] their carefully worded position is no more than "a passive not weighing in at all." This is particularly the case with respect to the Preference Claim where there was never any public disclosure of the Debtors' non-position. In this context there is simply no basis to treat non-objection as the equivalent of consent. Thus, it is the standard enunciated in *STN* that is properly applicable to the Motion, not the *Commodore* Standard.

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[3] *See*, Disclosure Statement at 105. ("[T]he Debtors and their professionals have reviewed all prepetition transfers for the two-year period immediately prior to the Petition Date, and do not believe that there are any viable fraudulent conveyances that should be pursued.").

**B. The Supplement Fails to Provide any Evidence to Support a Cost-Benefit Analysis**

8. At the conclusion of the Hearing, the Court asked the Committee to "provide some evidence of the litigation costs here and the parameters." (Hearing Transcript 49:19-20.) The Court stated that even the *Commodore* Standard "seems to impose a requirement of the Court, that the Court spend some time thinking about" the costs of pursuing the Arcsukuk Claims and the Preference Claim as compared to the benefit the be received from those claims. (Hearing Transcript 19:3-5.)

9. In the Supplement, the Committee states only that it "asked its professionals to estimate the fees and expenses that they might incur in litigating the Claims through trial." (Supplement, ¶13.) The Supplement then just throws out a number -- $4.6 million[4] – without any support for how that estimate was determined. Instead, the estimate comes with a full paragraph of caveats and qualifications.

10. This lack of support for the estimate is particularly troubling in light of statements made at the hearing. At that time, the Committee stated that "the committee effectively has claims that are trial ready, and as a result, believe [sic] that the additional expenditure at this point to be able to move forward with the claims would not be significant." (Hearing Transcript 16:9-13.) The Committee also stated that "looking at the litigation, we don't think that this is the type of matter that would significant – additional expenditure of attorney or financial advisor time." (Hearing Transcript 17:3-6.) Upon further reflection the Committee has retreated from

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[4] The Supplement states that the $4.6 million estimate applies to litigating the "Arcsukuk Claims." In the Motion, that term is used solely in reference to the fraudulent conveyance claims, and does not include the separately defined "Preference Claim." Nonetheless, the Arcsukuk Trustee assumes that the estimate in fact applies to both sets of claims. If that assumption is incorrect, the estimate is further deficient. Nonetheless, given the small amount involved in the Preference Claim it must be the case that the vast majority of the estimated costs relate to the Arcsukuk Claim.

that position. But providing an unsupported guesstimate is no more reliable, and does not provide a sufficient record upon which this Court can make a decision.

11. Two points highlight this inadequacy. First, to pursue the Arcsukuk Claims the Committee will bear the burden of proving that AIHL was insolvent at potentially multiple relevant dates. However, this will not be a simple task of valuing one company and comparing its obligations to its assets. AIHL was a holding company for Arcapita's investment portfolio; its primary assets were equity in literally dozens of different companies. Thus, to prove insolvency, the Committee will first need to conduct independent valuations of as many as 68 different companies.[5] As the Court is no doubt well aware, one contested valuation is an expensive proposition; the cost for 68 will be simply astronomical. While the Delegate recognizes the difficulty of predicting litigation costs, nonetheless the Committee should be able to outline the various considerations that went into its $4.6 million estimate, including whether the professionals factored in the costs of 68 separate valuations of investments in "various countries including Hong Kong, Singapore, Malaysia, multiple European countries, and the United States" (plus the fact that each valuation may have to be done as of multiple different times).

12. Second, to conduct a valuation as of an historical date, the Committee will not be able to rely upon subsequent performance of those companies, but rather will have to resurrect the historic balance sheets and projections of each company as of each relevant date. *See, e.g., In*

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[5] AIHL's Schedules identified 68 businesses in which AIHL held a valuable stock or other investment interest. *See*, Schedule B.13 attached to Schedule A, Schedule B, Schedule D, Schedule E, Schedule F, Schedule G, Schedule H for Arcapita Investment Holdings Limited [ECF No. 214]. The task of valuing these investments is further complicated by the fact that they are located in "various countries including Hong Kong, Singapore, Malaysia, multiple European countries, and the United States." Declaration of Steven Kotarba in Support of (i) Debtors' Motion for Order Further Extending the Time To File Schedules and Statements of Financial Affairs and (ii) 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), ¶17 at 6-7. [ECF No. 93]

*re Coated Sales, Inc.*, v. First E. Bank, N.A., 144 B.R. 663, 668 (Bankr. S.D.N.Y. 1992)( in valuing assets in the context of a fraudulent conveyance claim, the assets must be valued at "the time of the alleged transfer and not at what [the assets] turned out to be worth at some time after the bankruptcy intervened."). The data necessary to undertake that analysis lies with the Debtors, and thus conducting and defending those valuations will require substantial involvement by the Debtors' professionals as well as the Committee's. However, the Supplement does not provide any analysis of what fees and expenses the Debtors themselves will incur. It is therefore not possible for this Court to determine, based on the Supplement, what the estimated total costs to the estate will be.

13. In contrast to the lack of reliable and complete information about costs, it is clear that the actual benefit to the Debtors' estates will be minimal – at most $1.2 million if the preference claim is successfully prosecuted, or roughly one quarter of the Committee's estimated litigation costs. The Supplement acknowledges that the real purpose of the Arcsukuk claims (and indeed the only effect they could have) is to reallocate asset values – to take distributions away from the Arcsukuk Defendants and give those distributions instead to other creditors of AIHL. That reality begs a question: why should the estate pay for that litigation, if the estate itself receives no benefit? Why don't the parties who would actually benefit from the action – almost entirely the holders of the Syndicated Murabaha Facility Claims – pay for them? Requiring the estate to pay for the prosecution of the Arcsukuk Claims, claims that the estate affirmatively believes are without merit, simply means that the claims can be pursued relentlessly without regard to likely outcome, as the beneficiaries of the claims will not bear their costs.

## CONCLUSION

14. For these reasons, acting for and 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
July 19, 2013

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