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Unsecured Creditors of Arcapita Bank B.S.C.(c), et al.*

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

-----X	:	
	:	
In re:	:	
	:	Chapter 11
ARCAPITA BANK B.S.C.(c), <u>et al.</u> ,	:	Case No. 12-11076
	:	(Jointly Administered)
Debtors.	:	
	:	
-----X	:	
	:	
OFFICIAL COMMITTEE OF UNSECURED	:	
CREDITORS OF ARCAPITA BANK B.S.C.(C),	:	
<u>ET AL.</u> ,	:	
	:	Adv. Pro. No. _____
v.	:	
	:	
TADHAMON CAPITAL B.S.C.	:	
	:	
-----X	:	

COMPLAINT

The Official Committee of Unsecured Creditors (the "Committee") of Arcapita Bank B.S.C.(c) ("Arcapita") and each of its affiliated debtors-in-possession (collectively, the

“Debtors,” with the bankruptcy estate being the “Arcapita Estate”), by and through its attorneys, Milbank, Tweed, Hadley & McCloy LLP, and on behalf of the Debtors, alleges as follows:

NATURE OF PROCEEDING

1. This adversary proceeding for breach of contract, turnover, the avoidance of preferential transfers, violation of the automatic stay, and claim disallowance arises from two short-term debt investments for \$10 million each (as amended or rolled-over from time to time, the “Placements”) that Arcapita made with Tadamon Capital B.S.C. (“Tadamon”) on March 15, 2012—just four days prior to Arcapita’s bankruptcy filing on March 19, 2012.

2. Arcapita and Tadamon entered into the Placements pursuant to an agreement (the “Placement Agreement”) that the parties executed that same day. Under the Placement Agreement, Tadamon was required to pay Arcapita the Placement funds, plus generated proceeds, less agency fees (the “Placement Proceeds”), upon maturity. The Placements matured on March 30, 2012 and April 16, 2012, respectively, resulting in more than \$20 million owed by Tadamon to Arcapita. Tadamon paid a small fraction of this debt, but continues to owe Arcapita \$18,480,269 in outstanding Placement Proceeds. Despite Arcapita’s demands, Tadamon has refused to turn over these funds.

3. The Placements—and resulting creation of \$20 million worth of debt owed to Arcapita by Tadamon—did not occur on a blank financial slate. At the time of the Placements, Arcapita owed more than \$18 million in unmatured debt to Tadamon (the “Antecedent Debt”) as a result of certain investment transactions entered into by the parties between September 2009 and January 2012. The \$20 million that Arcapita transferred to Tadamon pursuant to the Placements was thus sufficient to cover the Antecedent Debt.

4. Tadamon and Arcapita entered into the Placements on the eve of Arcapita's bankruptcy filing, while Arcapita was insolvent. To the extent that the Placements were made on account of the Antecedent Debt, they are avoidable preferences.

5. Before entering into the Placement Agreement on March 15, 2012, Arcapita and Tadamon had never before executed or operated under any similar Placement Agreement, nor had Arcapita entered into any Placement or made any similar investment with Tadamon. As a result of the Placements, Tadamon was able to recover its entire claim to the Antecedent Debt rather than be exposed to the lengthy bankruptcy process and suffer the same decreased recoveries that all of Arcapita's non-preferred creditors received through Arcapita's chapter 11 proceedings.

6. The Committee, on behalf of the Arcapita Estate, brings this adversary proceeding to, among other things, compel Tadamon to comply with its obligations under the Placement Agreement and turn over the outstanding funds currently due and owing to the Arcapita Estate or, alternatively, to have the Placements avoided and recovered as an improper payment of the Antecedent Debt under sections 547(b) and 550 of the United States Bankruptcy Code.

JURISDICTION, VENUE AND STATUTORY PREDICATES

7. On March 19, 2012, the Debtors filed petitions for relief under chapter 11 of the Bankruptcy Code.

8. On April 5, 2012, the U.S. Trustee appointed the Committee pursuant to section 1102(a) of the Bankruptcy Code.

9. On August 2, 2013, the Court entered the Order Granting Committee's Motion for Leave, Standing and Authority to Prosecute Avoidance Claims [Docket No. 1411],

which, *inter alia*, authorized the Committee to pursue the claims asserted herein against Tadamon.

10. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b).

11. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

PARTIES

12. Plaintiff is the Official Committee of Unsecured Creditors for Arcapita and each of its affiliated debtors-in-possession. Arcapita was licensed as an Islamic wholesale bank by the Central Bank of Bahrain. Founded in 1996, Arcapita (collectively, with its affiliates, the “Arcapita Group”), was a leading global manager of *Shari’ah*-compliant alternative investments and operated as an investment bank. Prior to its bankruptcy filing, the Arcapita Group employed 268 people and, together with the other Debtors and their non-Debtor subsidiaries, had offices in Atlanta, London, Hong Kong, and Singapore in addition to its headquarters in Bahrain.

13. Defendant Tadamon is a Bahraini corporation and a subsidiary of Tadamon International Islamic Bank (“TIIB”). TIIB was established in 1995 and is the largest bank in Yemen that offers Islamic banking and investment services to its customers in Yemen and abroad. Defendant Tadamon, as the investment arm of TIIB, offers Islamic financial services and alternative investments.

14. TIIB maintains correspondent bank accounts in the United States at Mashreq Bank and the Bank of New York Mellon. In connection with these accounts, TIIB has

designated an agent for service of process in the United States as required under the Patriot Act and participates in the Clearing House Interbank Payments System, located in New York.

FACTUAL BACKGROUND

A. Tadhamon Agreements

15. Between September 2009 and January 2012, Arcapita entered into multiple agreements with Tadhamon (the “Tadhamon Agreements”), pursuant to which Tadhamon would transfer funds to Arcapita for investment in certain commodities on Tadhamon’s behalf.

16. Immediately after acquiring the commodities for Tadhamon, Arcapita was required under the Tadhamon Agreements to re-purchase the commodities from Tadhamon in exchange for deferred payment on an agreed-upon maturity date. On the maturity date, Arcapita would transfer the deferred payment to Tadhamon, thereby returning to Tadhamon the value of its investment, plus an agreed upon return.

17. Between September 2009 and January 2012, Tadhamon transferred a total of approximately \$18 million to Arcapita for the purchase of commodities under the Tadhamon Agreements.

18. As of March 15, 2012—the date of the Placements—Arcapita had not re-purchased the commodities and transferred the deferred payment to Tadhamon as required by the Tadhamon Agreements.

19. Tadhamon was thus a creditor of Arcapita to whom Arcapita owed the Antecedent Debt of \$18,497,734.48.

20. All of the Antecedent Debt was scheduled to mature within approximately two months or less of the Placements.

21. The Tadhamon investments made pursuant to the Tadhamon

Agreements are identified below.

Tadhamon Investment Amount	Investment Date	Maturity Date	Total Amount of Antecedent Debt as of March 15, 2012
\$5,000,000	Between September 24, 2009 and January 9, 2012 ¹	April 9, 2012	\$18,497,734.48
\$12,000,000	November 17, 2011	May 17, 2012	
\$1,000,000	January 9, 2012	April 9, 2012	

B. Placement Agreement

22. On or about March 15, 2012—just four days before Arcapita filed for bankruptcy—Tadhamon and Arcapita entered into a Master *Wakala* Agreement for Investment (previously defined as the “Placement Agreement”).

23. This marked the first time in the parties’ relationship that they had ever executed such a Placement Agreement.

24. Pursuant to the Placement Agreement, Arcapita appointed Tadhamon to serve as its agent with respect to the investment of Arcapita funds in certain treasury securities (each such investment a “placement”). Upon maturity of each placement, Tadhamon would be obligated to return to Arcapita the value of the investment, plus an agreed upon return, minus Tadhamon’s agency fee.

25. Section 6 of the Placement Agreement states, in pertinent part, that, “Each party represents and warrants for the benefit of the other party from the date of this

¹ Approximately \$5 million was invested by Tadhamon with Arcapita at various times between September 24, 2009 and January 9, 2012. Upon information and belief, all such investments were continually rolled over for subsequent periods.

Agreement and on each Investment Date that . . . this Agreement and each [placement] contemplated hereunder will be binding and enforceable upon it. . . .”

26. Furthermore, section 8.2 of the Placement Agreement states: “[n]o expiry or early termination . . . shall affect the rights and obligations of either party hereunder in relation to any outstanding [placement] upon which the conditions of this Agreement shall remain applicable until such [placement] is completed and each party has received all amounts due to it pursuant to the [placement].”

C. Placements

27. Upon executing the Placement Agreement, Arcapita entered into the two Placements on March 15, 2012, each for \$10 million. The Placements had prescribed maturity dates of March 30, 2012 and April 16, 2012, respectively.

28. To execute the Placements, Arcapita transferred a total of \$20 million in funds from its account at JP Morgan Chase Bank in New York to an account designated by Tadamon at HSBC Bank in New York. The funds were then transferred from the HSBC Bank account to an account held by Tadamon at Khaleeji Commercial Bank B.S.C.

29. Upon maturity of the Placements, Tadamon agreed to deposit the Placement Proceeds into Arcapita’s account at JP Morgan Chase Bank in New York.

30. Arcapita was insolvent on March 15, 2012 when it transferred the \$20 million in Placements to Tadamon.

31. Just four days later, on March 19, 2012, Arcapita filed petitions for relief under chapter 11 of the Bankruptcy Code.

32. On March 30, 2012, Tadamon was required pursuant to the Placement Agreement to return to Arcapita its Placement of \$10 million, plus a profit at the rate of 1.25%

per annum, minus Tadhamon's agency fee, resulting in Placement Proceeds in the amount of \$10,005,208.33.

33. On April 16, 2012, Tadhamon was required pursuant to the Placement Agreement to return to Arcapita its other Placement of \$10 million, plus a profit at the rate of 2.0% per annum, minus Tadhamon's agency fee, resulting in Placement Proceeds in the amount of \$10,017,777.78.

34. The Placements, and the resulting Placement Proceeds owed to Arcapita, can be summarized as follows:

Placed Funds	Investment Date	Maturity Date	Expected Return	Total Placement Proceeds Due At Maturity
\$10,000,000	March 15, 2012	March 30, 2012	1.25% per annum	\$10,005,208.33
\$10,000,000	March 15, 2012	April 16, 2012	2% annum	\$10,017,777.78

D. Tadhamon's Failure to Complete the Placements Upon Maturity

35. Notwithstanding its binding obligations under the Placement Agreement, Tadhamon failed to deliver any of the Placement Proceeds due to Arcapita upon maturity of the Placements.

36. On March 28, 2012 and April 15, 2012, respectively, Arcapita and Tadhamon purported to reinvest or "roll-over" each of the \$10 million Placements for an additional term. The new maturity dates of the Placements were April 30, 2012 and May 16, 2012. The Placement Proceeds were not remitted to Arcapita on such maturity dates.

37. On or about April 30, 2012, Arcapita, through its counsel, Gibson, Dunn & Crutcher LLP, sent a letter addressed to Waleed Rashan, chief executive officer of Tadhamon. The letter demanded payment of the Placement Proceeds, noting that the funds "are property of

the bankruptcy estate of Arcapita and must immediately be remitted to Arcapita . . . pursuant to the provisions of section 542 of the Bankruptcy Code” and Tadamon’s “failure immediately to turnover these funds to Arcapita will force us to commence an action to compel turnover.”

38. On or about June 25, 2012, Tadamon, through its counsel, K&L Gates LLP, sent a letter addressed to Arcapita’s counsel refusing to turn over the Placement Proceeds. Tadamon claimed to be taking a “setoff” on account of the Antecedent Debt.

39. Tadamon has neither sought nor obtained an order of the Court allowing it to set off the Antecedent Debt against the Placement Proceeds.

40. In or about December 2012, Tadamon returned to Arcapita that portion of the Placement Proceeds that exceeded Tadamon’s purported setoff. The outstanding balance of Placement Proceeds due and owing from Tadamon to the Arcapita Estate is at least \$18,480,269. Tadamon has failed to turn over any portion of these funds to the Arcapita Estate.

41. To the extent that Arcapita and Tadamon entered into the Placements as a means of paying the Antecedent Debt, they allowed Tadamon to recover more on its claim against Arcapita than it otherwise would have been able to recover had the claim been resolved through Arcapita’s chapter 11 proceedings or through a chapter 7 liquidation.

COUNT I

(Breach of the Placements and the Placement Agreement)

42. The Committee repeats, re-alleges and incorporates by reference each and every allegation contained in paragraphs 1 through 41 as though fully set forth herein.

43. The Placements are valid, enforceable, and legally binding contracts between Arcapita and Tadamon.

44. Tadamon is in default under the Placements and the Placement Agreement for failing to transfer the Placement Proceeds as required.

45. Notwithstanding the Debtors' bankruptcy, under section 8.2 of the Placement Agreement, "[n]o expiry or early termination . . . shall affect the rights and obligations of either party hereunder in relation to any outstanding [Placement] upon which the conditions of this Agreement shall remain applicable until such [Placement] is completed and each party has received all amounts due to it pursuant to the [Placement]."

46. Thus, Tadhamon has breached its obligations to Arcapita under the Placements.

47. The Court granted the Committee standing to prosecute claims relating to the Placements on behalf of the Arcapita Estate. As such, the Committee, on behalf of the Arcapita Estate, is entitled to (i) an award of damages equal to \$18,480,269, plus interest, and (ii) reimbursement of, among other things, fees and costs (including reasonable attorneys' fees) expended in effecting compliance with the Placements, as well as fees and costs expended in any proceeding to recover sums owed under the same.

COUNT II

(Turnover of Assets – 11 U.S.C. §§ 541, 542 and 550)

48. The Committee repeats, re-alleges and incorporates by reference each and every allegation contained in paragraphs 1 through 47 as though fully set forth herein.

49. The Placements are valid, enforceable, and legally binding contracts between Arcapita and Tadhamon.

50. The Placements are specific in their terms as to both the maturity dates of Tadhamon's obligations and the amounts of those obligations. The Placements matured on March 30, 2012 and April 16, 2012, respectively. At maturity, Tadhamon owed Arcapita \$10,005,208.33 and \$10,017,777.78, respectively, on account of each Placement.

51. By virtue of the Placements, after accounting for amounts previously remitted, Tadhamon is wrongfully in possession of property of the Arcapita Estate in the amount of \$18,480,269, plus accrued interest thereon from the Placement maturity dates.

52. The amount owed by Tadhamon to the Arcapita Estate on account of the Placements is payable immediately without legitimate offset of any kind.

53. As a result of the foregoing, the Committee, on behalf of the Arcapita Estate, is entitled to (i) an award of damages equal to \$18,480,269, plus interest, and (ii) reimbursement of any and all fees and costs (including reasonable attorneys' fees) expended in effecting compliance with the Placements, as well as fees and costs expended in any proceeding to recover sums owed under the same.

COUNT III

(Preferential Transfer – 11 U.S.C. §§ 547 and 550)

54. The Committee repeats, re-alleges and incorporates by reference each and every allegation contained in paragraphs 1 through 53 as though fully set forth herein.

55. Arcapita transferred \$20 million to Tadhamon under the Placements (the "Placement Transfers") on March 15, 2012.

56. At the time of the Placement Transfers, Tadhamon was a "creditor" of Arcapita within the meaning of section 101(10) of the Bankruptcy Code.

57. Each of the Placement Transfers was to or for the benefit of Tadhamon.

58. Each of the Placement Transfers was made on account of the Antecedent Debt owed by Arcapita to Tadhamon.

59. Each of the Placement Transfers was made while Arcapita was insolvent and within 90 days before it filed petitions for relief under chapter 11 of the Bankruptcy Code.

60. The Placement Transfers enabled Tadamon to receive more than it would receive if (i) this case was a case under chapter 7 of the Bankruptcy Code; (ii) the transfers had not been made; and (iii) Tadamon received payment of such debt to the extent provided by the provisions of the Bankruptcy Code.

61. Each of the Placement Transfers constitutes a preferential transfer avoidable pursuant to section 547(b) of the Bankruptcy Code and recoverable from Tadamon pursuant to section 550(a).

62. As a result of the foregoing, the Committee, on behalf of the Arcapita Estate, is entitled to a judgment pursuant to sections 547(b) and 550 of the Bankruptcy Code: (i) avoiding the Placement Transfers; (ii) directing that the Placement Transfers be set aside; and (iii) recovering the amounts due and owing under the Placements for the benefit of the Arcapita Estate.

COUNT IV

(Violation of Automatic Stay – 11 U.S.C. §362)

63. The Committee repeats, re-alleges and incorporates by reference each and every allegation contained in paragraphs 1 through 62 as though fully set forth herein.

64. Pursuant to section 362(a)(3) of the Bankruptcy Code, upon the commencement of a chapter 11 case, “any act to . . . exercise control over property of the estate” constitutes a violation of the automatic stay.

65. Pursuant to section 362(a)(7) of the Bankruptcy Code, “the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor” also constitutes a violation of the automatic stay.

66. Tadamon has and continues to exercise control over the Placement Proceeds, which are property of the Arcapita Estate.

67. On or about June 25, 2012, Tadhamon informed Arcapita by letter that it would not relinquish control over the Placement Proceeds. Tadhamon claimed to be taking a setoff on account of the Antecedent Debt.

68. Tadhamon has neither sought nor obtained an order of the Court allowing it to set off the Antecedent Debt against the Placement Proceeds.

69. Tadhamon's actions are in direct violation of the automatic stay.

70. As a result of the foregoing, the Committee, on behalf of the Arcapita Estate, is entitled to (i) an award of damages equal to \$18,480,269, and (ii) reimbursement of any and all fees and costs (including reasonable attorneys' fees) associated with Tadhamon's violation of the automatic stay.

COUNT V

(Claim Objection – 11 U.S.C. § 502(d))

71. The Committee repeats, re-alleges and incorporates by reference each and every allegation contained in paragraphs 1 through 70 as though fully set forth herein.

72. The Committee has asserted causes of action, enumerated above, against Tadhamon that seek turnover of the Placement Proceeds pursuant to sections 542 and 550 of the Bankruptcy Code or, alternatively, avoidance of the Placement Transfers and recovery of the Placement Proceeds pursuant to sections 547 and 550 of the Bankruptcy Code.

73. Arcapita included on its Schedule F aggregate liabilities in the amount of \$18,497,734.48 owing to Tadhamon on account of the Antecedent Debt. Absent objection by a party in interest or an amendment to Schedule F, Tadhamon will have allowed claims against Arcapita in the amount of \$18,497,734.48.

74. The Committee is entitled to a judgment under section 502(d) of the Bankruptcy Code disallowing all claims held by Tadamon, including claims on account of the Antecedent Debt, pending payment or turnover of the Placement Proceeds.

PRAYER FOR RELIEF

WHEREFORE, the Committee respectfully prays that the Court award the following relief:

- (i) payment of \$18,480,269 plus all interest that may be earned thereon from the March 30, 2012 and April 16, 2012 maturity dates of the Placements, as applicable;
- (ii) disallowance of any and all claims that Tadamon holds against the Arcapita Estate;
- (iii) reimbursement of, among other things, fees and costs (including reasonable attorneys' fees) expended in effecting compliance with the Placements, as well as fees and costs expended in any proceeding to recover sums owed under the same; and
- (iv) such other and further relief as the Court deems just.

Dated: August 26, 2013
New York, New York

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