

Hearing Date: June 26, 2012 at 11:00 a.m. (Eastern Time)

Objection Deadline: June 21, 2012 at 12:00 p.m. (Eastern Time)

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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.	: Jointly Administered
	:
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**DEBTORS' OMNIBUS OBJECTION TO COMMITTEE'S
APPLICATIONS FOR ORDERS AUTHORIZING THE INTERIM
AND/OR FINAL EMPLOYMENT AND RETENTION OF
(I) HOULIHAN LOKEY CAPITAL, INC. AS FINANCIAL ADVISOR
AND INVESTMENT BANKER AND (II) FTI CONSULTING, INC. AS
FINANCIAL ADVISOR, NUNC PRO TUNC TO APRIL 12, 2012**

Arcapita Bank B.S.C.(c) ("*Arcapita Bank*")¹ and certain of its subsidiaries and affiliates, as debtors and debtors in possession (collectively, the "*Debtors*" and each, a "*Debtor*"), each of which commenced a case under chapter 11 of title 11 of the United States Code (the "*Bankruptcy Code*"), hereby submit this objection (the "*Objection*") to the following two applications of the Official Committee of Unsecured Creditors (the "*Committee*") of the above captioned Debtors: (i) Application Pursuant To Fed. R. Bankr. P. 2014(a) for Order Under

¹ All capitalized terms not otherwise defined in this Opposition shall have the meanings set forth in the Motion.

Section 1103 of the Bankruptcy Code Authorizing the Employment and Retention of FTI Consulting, Inc. As Financial Advisor to the Official Committee of Unsecured Creditors *Nunc Pro Tunc* to April 12, 2012 [Dkt. 235] (the “**FTI Application**”) and (ii) Application of Official Committee of Unsecured Creditors for an Interim Order Under 11 U.S.C. §§ 328(a) and 1103, Fed. R. Bankr. P. 2014 and 2016, and S.D.N.Y. LBR 2014-1, Authorizing Employment and Retention of Houlihan Lokey Capital, Inc. As Financial Advisor and Investment Banker *Nunc Pro Tunc* to April 12, 2012 [Dkt. 246] (the “**Houlihan Application**”) and, together with the FTI Application, the “**Applications**”). In support thereof, the Debtors respectfully represent:

PRELIMINARY STATEMENT

1. The Debtors do not dispute the Committee’s need for a financial advisor or the qualifications and ability of either FTI Consulting, Inc. (“**FTI**”) or Houlihan Lokey Capital, Inc. (“**Houlihan**”) to serve in that role. However, as set forth in the Applications, the proposed scope of services overlap, and the Applications should be denied, or at least limited, unless the Committee can demonstrate that FTI and Houlihan perform necessary and non-duplicative services.

2. As the Committee argued in its opposition to the Debtors’ application to employ KPMG LLP as a valuation advisor, the retention of multiple financial advisors “raises the spectre of duplication and inefficiency,” and accordingly such applications must “be subjected to careful scrutiny and considered not only independently but collectively as well.” Dkt. 185 at 3. The Debtors agree with Committee counsel that the estates have limited resources that should be directed towards supporting the value of their assets and businesses for all stakeholders. *See* May 31, 2012 Hearing Tr. 57:18-22 (“[S]tarting with the committee’s primary concerns - - and this is going to be, I think, one of my mantra’s in the case - - is that this concern

deals with the overall fees and administrative expense costs in the estate when we're dealing with an estate with limited cash resources." Yet, despite the statements of Committee counsel in open court, the Committee fails to apply the same level of scrutiny to its own professionals as it demands for the Debtors' professionals. Pursuant to the Applications, there is substantial overlap in the services that FTI and Houlihan will perform for the Committee. Although the Committee represents that Houlihan and FTI have and will continue to coordinate closely to avoid duplication of services, such assurances provide insufficient comfort given the overlap in the scope of services described in the applications.

3. Furthermore, the Houlihan Application proposes indemnification provisions that are more favorable than those allowed to the Debtors' professionals. While the Houlihan Application states that it is not entitled to indemnification in the event that there is a judicial determination of bad faith, gross negligence, or willful misconduct, the Engagement Letter is not accordingly limited. Therefore, any order authorizing the retention of Houlihan should explicitly provide for this limitation. Further, Houlihan should be required to seek authorization by the Court and make a showing that the indemnification is reasonable prior to provision or payment of any indemnification

4. Finally, although Houlihan's proposed "Deferred Fee" is not yet before this Court, the Debtors note that the Committee will have an additional burden to prove that Houlihan is indeed entitled to a Deferred Fee. Given that the Committee has advocated for the vigilant policing of the Debtors' cash, the Debtors expect the Committee to demonstrate the propriety of any such Deferred Fee. In particular, the Committee must be able to demonstrate that Houlihan was a primary contributor to the confirmation of any chapter 11 plan of reorganization or liquidation.

OBJECTION

A. The Applications Pose a Risk of Unnecessary Duplication of Services

5. The Committee’s descriptions of the services to be provided by Houlihan, on the one hand, and FTI, on the other hand, intersect and overlap in numerous areas, as summarized below:

	HOULIHAN LOKEY CAPITAL, INC.	FTI CONSULTING, INC.
<i>Business Plan</i>	Analyzing business plans and forecasts [§ 15(A)] ²	Assistance in the review of other financial information prepared by the Debtors, including, but not limited to, cash flow projections and budgets, cash receipts and disbursement analysis, and assets and liability analysis. [p.3, 8th bullet point] ³
<i>Asset Analysis</i>	Evaluating Debtor assets and liabilities [§ 15(B)]	
<i>Sale and Plan</i>	Assessing sale of all assets and chapter 11 plan of reorganization or liquidation [§ 15(C)]	Assistance in the review and/or preparation of information and analysis necessary for confirmation of a plan and related disclosure statement in these chapter 11 proceedings. [p.4, 4th bullet point]
<i>Operations</i>	Analyzing and reviewing financial and operating statements [§ 15(D)]	Assistance in the review of the Schedules of Assets and Liabilities, the Statement of Financial Affairs and Monthly Operating Reports. [p.3, 1st bullet point] Assistance with the assessment and monitoring of the Debtors’ short term cash flow, liquidity and operating results. [p.3, 2nd bullet point]
<i>Employee Issues</i>	Assisting Review of Employee benefit plans, including retention, incentive, pension and other post-retirement benefit plans [§ 15(G)].	Assistance with the review of the Debtors’ proposed key employee retention and other employee benefit programs. [p.3, 3rd bullet point]

² References are to the numbered paragraphs in the Houlihan Engagement Letter.

³ References are to the Committee’s Application.

	HOULIHAN LOKEY CAPITAL, INC.	FTI CONSULTING, INC.
Strategy	Analyzing strategic alternatives [§ 15(H)]	Assistance with review of identification of potential cost savings, including overhead and operating expense reductions and efficiency improvements. [p.3, 5th bullet point]
Claims Reconciliation	Assist in review of claims and with the reconciliation, estimation, settlement and litigation with respect thereto [§ 15(J)]	Assist in review of claims reconciliation and estimation process. [p.3, 7th bullet point]
Catch-All	Providing such other financial advisory and investment banking services as may be agreed upon by the Houlihan and the Committee [§ 15(N)]	Render such other general business consulting or such other assistance as the Committee or its counsel may deem necessary. [p.4, 7th bullet point]

6. Although the Committee pledges that Houlihan and FTI will “undertake to coordinate all of their services to the Committee in order to minimize, wherever possible, any unnecessary duplication of services and any potential burden on the Debtors and their professional advisors,” it is readily apparent from the descriptions of the proposed services of Houlihan and FTI set forth in the Applications that many of the services to be provided by the two professional firms are, or have the potential to be, redundant and unnecessary.

7. The Committee’s objection to the retention application of KPMG LLP asserted that the retention of an investment banker or financial advisor “must explain how the investment banker/advisor will eliminate, or at least reduce, the duplication of effort” where there may other professionals “apparently doing the same thing as the investment banker/advisor” whose retention is sought. Dkt. 185 at 7 (citing *In re Drexel Burnham Lambert Group, Inc.*, 133 B.R. 13, 27 (Bankr. S.D.N.Y. 1991)). The Committee further asserted that where the application for the retention of a professional proposes that the professional will perform services duplicative of other professionals, it must be denied. Dkt. 185 at 7 (citing *In re*

Gillett Holdings, Inc., 137 B.R. 452 (Bankr. D. Colo. 1991) (retention of multiple firms denied where debtor could not demonstrate either benefits of hiring multiple firms or measures for limitations on duplicative work); *In re Am. Bantam Car Co.*, 103 F. Supp. 731, 733 (W.D. Penn. 1952) (multiple retentions not permitted because they would interfere with “an economical administration of the Debtor’s estate”). As set forth in the Applications, and as summarized in the chart above, the proposed services to be provided by Houlihan and FTI plainly overlap in many respects. Such duplication of services, as contemplated by the scope of services described in the Applications, would expose the Debtors to unnecessary requests for fees and reimbursement of expenses.

8. Not only does the proposed scope of work present a risk of overlap with Houlihan and FTI, it also risks unnecessarily recreating work already performed by the Debtors’ financial advisors. Although the Committee did not contest the qualifications of KPMG, Dkt. 185 at 2, it nevertheless proposes that its professionals should retrace the work completed by the Debtors’ professionals. The scope of Houlihan’s and FTI’s services should be limited so as to prevent them from recreating work already completed by the Debtors’ financial advisors without citing cause for doing so, and also limiting their recoverable fees. The availability of previously prepared financial information may be considered by the court in determining whether a retained professional’s services should be subject to a fee cap. *See In re Federal Mogul-Global, Inc.*, 348 F.3d 390, 404 (3rd Cir. 2003) (“[T]he Bankruptcy Court did not violate Section 1103(b) by considering the availability of financial information from the Debtors in determining the amount at which to set the fee cap.”).

9. Further deepening the Debtors’ concern is the fact that while Houlihan’s engagement letter (from which the Committee quoted verbatim the proposed scope of services to

be performed by Houlihan) is annexed to the Houlihan Application as Exhibit B, no similar engagement letter for FTI has been provided. In the absence of the engagement letter between FTI and the Committee, the Court, the Debtors and other parties in interest cannot assess directly whether further duplication of services is contemplated in the retention of Houlihan and FTI. The Committee's stated commitment to direct the work of the two professional firms to minimize duplication of efforts is not sufficient where FTI's engagement letter has not been provided.⁴

10. Therefore, the Debtors object to the proposed retention by the Committee of Houlihan and FTI to the extent there is a duplication of services, and respectfully request that the Court deny retention of FTI and Houlihan to the extent of any duplication.

B. Indemnification Sought by Houlihan is Improper

11. Even if the Committee can demonstrate that Houlihan will not provide duplicative work, the Houlihan Application should not be granted as currently set forth because it seeks impermissibly broad terms of indemnification. As the Committee has insisted for the Debtors' retention applications, the Committee's professionals should not be indemnified should there be a judicial determination of the existence of bad faith, self-dealing, breach of fiduciary duty (if any such duty exists), gross negligence or willful misconduct. The Houlihan Application states that the terms of the indemnification are so limited, but the Engagement Letter and order provide no explicit statement of this limitation.

⁴ Moreover, given that FTI is proposed to be retained as a "financial advisor" to the Committee, the failure to attach even the form of the retention agreement between the Committee and FTI is contrary to the holding of *In re Drexel Burnham Lambert*, in which this Court held that "the actual retention agreement between the investment banker/advisor and the client must be attached to the retention application." *In re Drexel Burnham Lambert*, 133 B.R. at 27; *see also In re Trans Nat'l Commc'ns*, 462 B.R. at 345.

CONCLUSION

Just as the Committee has demanded of the Debtors' retention applications, the Committee must analyze their Applications for potential duplication of services and eliminate or reduce the possibility of overlap. As currently set forth in the Applications, the Committee seeks to retain Houlihan and FTI for duplicative services. Such duplication would unnecessarily drain value from the Debtors' estate. Even if the Committee can demonstrate that there is no overlap between the services to be provided by Houlihan and FTI, the request for unreasonable terms of indemnification in the Houlihan Application should be rejected. For the reasons set forth herein, the Debtors respectfully request that the Court sustain this Objection.

Dated: New York, New York
June 21, 2012

Respectfully submitted,

/s/ Michael A. Rosenthal

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