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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

OBJECTION OF OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO DEBTORS' MOTION FOR ORDER CONFIRMING THE DEBTORS' AUTHORITY TO FUND NON-DEBTOR EUROLOG AFFILIATES

The Official Committee of Unsecured Creditors (the "Committee") of Arcapita Bank B.S.C.(c) ("Arcapita") and its affiliated debtors in possession in the above-captioned chapter 11 cases (collectively, the "Debtors") hereby objects to the *Debtors' Motion for Order*

Confirming the Debtors' Authority to Fund Non-Debtor EuroLog Affiliates [Docket No. 872] (the "Fee Motion")[1] and respectfully states as follows:

PRELIMINARY STATEMENT

1. The Debtors sought protection under chapter 11 of the Bankruptcy Code because they had significant undisputed obligations that they were, and still are, unable to meet. Nevertheless, by the Fee Motion, the Debtors seek to volunteer their estates (read, their creditors) to foot the bill – to the tune of more than $10 million – for the professional services rendered to their non-Debtor affiliates in connection with the failed EuroLog IPO, for which the Debtors are not legally liable.

2. The Debtors currently project that they will run out of cash within three months. Meanwhile, the Debtors propose to use approximately twenty percent of their limited cash balance to fund expenses that they are under no obligation to pay, suggesting such payment would constitute a "sound" exercise of their business judgment. However, as discussed below, apart from the fact that the "business judgment" is ***not*** the applicable standard here, even if it were, it could not be satisfied under the circumstances.

3. In an attempt to paint the Committee as the "bad guy" for trying to protect scarce estate resources from being further unnecessarily eroded, the Debtors claim that "[t]he IPO Professionals should not be punished for their good faith reliance on the Debtors' historical funding practices." Fee Motion ¶ 47. But it is the Debtors' creditors that should not be punished simply because the Debtors' management apparently views its perceived "moral obligation" to these professionals as more important than its fiduciary duties to the Debtors' creditors.

[1] Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Fee Motion.

4. As discussed in more detail below, none of the IPO Professionals' engagement letters, the Linklaters Fee Order, nor the IPO Launch Order authorizes or obligates the Debtors to pay the IPO Fees.[2] As a result, the Debtors' rationale for paying the IPO Fees relies almost entirely on the unsubstantiated suggestion that the IPO Professionals will force the non-Debtor affiliates into insolvency proceedings if the Debtors do not pay the IPO Fees.

5. The Debtors are, in fact, precluded from paying the IPO Fees under section 503(c) of the Bankruptcy Code because such payment is "outside the ordinary course of business and not justified by the facts and circumstances of the case." 11 U.S.C. § 503(c). The Committee does not dispute that the IPO Professionals rendered meaningful services in connection with the EuroLog IPO. However, those services were not rendered to the Debtors, but rather to two of their non-Debtor affiliates. Therefore, the Debtors do not have an obligation to pay for these services. The Debtors emphasize that the Committee's constituents would have benefitted from completion of the EuroLog IPO, had that occurred. This is irrelevant. The fact remains that the Debtors' estates have ***not*** received any tangible benefit from these services, and any future benefit is pure conjecture and irrelevant when evaluating the legal authority to make such payments.

6. Simply put, no reasonable justification exists for the Debtors to pay in excess of $10 million in fees that they are not obligated to pay, thereby further reducing their estates' already scarce cash balances and creating additional obstacles to confirmation of a

[2] After the Fee Motion was filed, the Debtors acknowledged to the Committee that the IPO Launch Order does not authorize the Debtors to pay the IPO Fees. Accordingly, the Debtors agreed to withdraw that argument.

chapter 11 plan that would allow the Debtors to address the claims that they ***are*** obligated to pay, i.e., those owed to creditors holding allowed claims against a Debtor.

7. Moreover, even if it were appropriate to fund the IPO Fees from the Debtors' estates (and it is not), the Debtors have failed to meet their burden to prove that the "discount" on these fees is consistent with industry custom under the circumstances, and they fail to provide any evidence to justify such a windfall to the IPO Professionals at the expense of their own creditors.

8. Finally, if the Court decides that it is appropriate for the Debtors to make any payments to the IPO Professionals, then the Debtors should be required to fund such payments through a credit facility that would earn the Debtors' creditors a reasonable return on the amounts that the Debtors loan to their non-Debtor affiliates for this purpose.

BACKGROUND

9. On March 20, 2012, the Debtors filed the Debtors' Motion for Interim and Final Orders (A) Authorizing Debtors to (I) Continue Existing Cash Management System, Bank Accounts, and Business Forms and (II) Continue Ordinary Course Intercompany Transactions; and (B) Granting an Extension of Time to Comply with the Requirements of Section 345(b) of the Bankruptcy Code [Docket No. 12] (the "Cash Management Motion"). The Court has not approved the Cash Management Motion on a final basis, but instead approved on roughly a monthly basis interim budgets pursuant to which the Debtors are allowed to fund operating expenses of their non-Debtor subsidiaries. [Docket Nos. 22, 62, 86, 133, 198, 310, 369, 472, 578, 631, 724, 787, 861]. On numerous occasions, the Debtors' advisors have represented that the Debtors would not transfer funds to third parties without first obtaining Committee approval or seeking authority from the Court. This has been the working understanding between the

Debtors and the Committee and has given rise to the monthly budget review and approval process. To date, the Debtors and the Committee have managed to reach agreement on all proposed funding of non-Debtor expenses by the Debtors, other than with respect to the IPO Fees.

10. On July 26, 2012, the Debtors filed the *Debtors' Motion for an Order Pursuant to Sections 105(a) and 363(b) of the Bankruptcy Code Authorizing the Debtors to Launch the EuroLog IPO* [Docket No. 350] (the "IPO Motion") requesting authority to enter into certain agreements and transactions necessary to launch and consummate the EuroLog IPO, subject to final consent from both the Committee and the Joint Provisional Liquidators of Arcapita Investments Holdings Limited. On August 8, 2012, the Committee filed a statement and reservation of rights with respect to the IPO Motion. [Docket No. 376]. The Court entered an order (the "IPO Launch Order") on September 10, 2012, authorizing the Debtors to execute documentation and carry out other actions in connection with the EuroLog IPO. [Docket No. 465].

11. On August 8, 2012, the Debtors filed the *Debtors' Motion for Order Confirming the Debtors' Authority to Pay Certain Transaction Expenses Incurred in Connection with the EuroLog Initial Public Offering* [Docket No. 377] (the "Linklaters Fees Motion"), seeking authority to pay Linklaters LLP ("Linklaters") approximately $2.36 million of fees and expenses incurred in its representation of Point Park Properties s.r.o ("P3") and Arcapita Limited (together with P3, the "EuroLog Non-Debtors") in connection with the proposed EuroLog IPO. The Committee filed an objection to the Linklaters Fees Motion [Docket No. 390] and the Debtors filed a reply to the Committee's objection [Docket No. 397].

12. Prior to the hearing on the Linklaters Fees Motion, the parties reached an agreement regarding the payment of the disputed fees, as reflected in the Court's order dated August 28, 2012 [Docket No. 445] (the "Linklaters Fee Order"). Upon entry of the Linklaters Fee Order, the Debtors were authorized to make a $1.5 million payment (the "Interim Payment") to Linklaters on behalf of the EuroLog Non-Debtors, in addition to making a $1.5 million payment upon certain designated termination events ("IPO Termination"), including withdrawal of the EuroLog IPO. Linklaters Fee Order ¶¶ 2-3. In addition, to the extent the fees incurred by Linklaters on or after August 1, 2012 exceeded $1.0 million as of the date of the IPO Termination, then the Linklaters Fee Order authorized the Debtors to pay 50% of the difference between $1.0 million and the fees incurred on or after August 1, 2012. Linklaters Fee Order ¶ 4. Pursuant to the Linklaters Fee Order, any further fees remaining unpaid to Linklaters are to be addressed as follows:

> 5. In the event of any IPO Termination, all IPO Legal Fees remaining unpaid after the Interim Payment ("***Remaining IPO Legal Fees***") shall be reduced by 15% and the Debtors, the Committee and the Joint Provisional Liquidators in the Provisional Liquidation of Arcapita Investment Holdings Limited shall negotiate, as soon as practicable after the date of the IPO Termination, with Linklaters in good faith as to the amount of funding the Debtors shall provide to pay the Remaining IPO Legal Fees, with the intent that Linklaters may expect that the total amount of IPO Legal Fees paid to Linklaters is consistent with market rates for terminated or significantly delayed initial public offerings (as reasonably adjusted for factors relevant to the EuroLog IPO) ("***Final Payment***").
> 6. If after negotiating in good faith, the parties are unable to reach agreement with respect to the amount of the Final Payment, then any party may file a motion with this Court pursuant to the provisions of the Case Management Order to obtain a resolution of the amount of any further funding to be provided by the Debtors to pay the Final Payment.

Linklaters Fee Order ¶¶ 5-6.

13. On January 14, 2013, pursuant to the Cash Management Motion, the Debtors filed their proposed budget for the period from January 20, 2013 through February 23,

2013 (the "Twelfth Budget"), to support their request for a twelfth interim cash management order. [Docket No. 776]. As part of the Twelfth Budget, the Debtors sought to pay $7.9 million to certain professionals for fees incurred in connection with the failed EuroLog IPO. In advance of the January 16, 2013 omnibus hearing, at which the Twelfth Budget was scheduled to be presented for approval, the Debtors agreed, in response to the Committee's objection, to withdraw such request and continue negotiating with the Committee.[3]

14. On February 20, 2013, pursuant to the Cash Management Motion, the Debtors filed their proposed budget for the period from February 24, 2013 through March 23, 2013 (the "Thirteenth Budget"), which included a request to pay $14.0 million for fees incurred in connection with the EuroLog IPO by Linklaters, KPMG LLP ("KPMG"), and Freshfields Bruckhaus Deringer LLP ("Freshfields" and, together with Linklaters and KPMG, the "IPO Professionals"). In advance of the February 20, 2013 omnibus hearing, at which the Thirteenth Budget was scheduled to be presented for approval, the Debtors agreed, in response to the Committee's objection, to withdraw the request to pay the IPO Professionals as part of the Thirteenth Budget and file a separate pleading seeking authorization to make such payment.

15. On February 27, 2013, the Debtors filed the Fee Motion, seeking authority to pay £4,218,544 (approximately $6.38 million) to Linklaters, €2,107,058 (approximately $2.76 million) to KPMG, and £1,060,276 (approximately $1.10 million) to Freshfields (collectively,

[3] Following such further negotiations, the Committee and the Debtors reached settlements with respect to at least thirteen professionals who incurred fees in connection with the EuroLog IPO. The Committee's agreement to not object to payment of these relatively small fees, at appropriate discounts, demonstrates the Committee's cooperation in narrowing the disputed issues with the Debtors and significantly reducing the expense of litigating, and should not be construed as any tacit acknowledgement that the Debtors' estates are required to pay the IPO Fees.

the "IPO Fees"). The Committee has negotiated in good faith with the Debtors to consensually resolve the Fee Motion. To date, no agreement has been reached.

OBJECTION

16. The Committee objects to the Debtors' payment of the IPO Fees as requested in the Fee Motion. First, the Debtors are not obligated to pay any of the IPO Fees because they are not party to any of the engagement letters pursuant to which the IPO Professionals were engaged. Rather, the Debtors are seeking authority to gratuitously pay the IPO Fees to the detriment of their estates and creditors. Second, the Debtors' proposed payment of the IPO Fees is outside the ordinary course of the Debtors' businesses and does not constitute an exercise of the Debtors' sound business judgment, as required by section 363(b) of the Bankruptcy Code.

17. Alternatively, if the Court determines that the Debtors may fund the IPO Fees (which the Committee respectfully submits it should not), then at a minimum the Debtors should be required to do so through a credit facility that would earn the Debtors' creditors a reasonable return on the amounts that the Debtors loan to their non-Debtor affiliates for payment of the IPO Fees.

I. The Debtors Should Not be Permitted to Pay IPO Fees For Which They Are Not Liable

18. By seeking to force the Debtors' estates (and their creditors) to bear an expense for which the Debtors are not contractually liable, the Fee Motion is little more than an attempt to prefer the EuroLog Non-Debtors' creditors (i.e., the IPO Professionals) over the Debtors' creditors. There is no dispute that the IPO Professionals were retained by non-Debtor

entities pursuant to engagement letters to which the Debtors were not party.[4] Even the Debtors themselves do not suggest that they are legally obligated (by contract or otherwise) to pay any portion of the IPO Fees. Yet the Fee Motion seeks to impermissibly shift the burden of the payment of the IPO Fees from the EuroLog Non-Debtors, by whom the IPO Professionals were retained and to whom the IPO Professionals rendered services, to the Debtors' creditors. The Debtors' sole "justification" for this bold request is their assertion that the Debtors have, for the time being, more cash than the EuroLog Non-Debtors – although the Debtors have not provided any substantive information regarding the EuroLog Non-Debtors' (in)ability to pay their own debts, despite explicit and repeated requests by the Committee's advisors for such information.

19. In an effort to impose an obligation to pay the IPO Fees where none exists, the Debtors suggest that the Linklaters Fee Order obligates the Committee to agree to the payment of Linklaters' fees from the Debtors' estates. Fee Motion ¶ 32. The Debtors' reading of the Linklaters Fee Order is incorrect. The Linklaters Fee Order provides only that any outstanding IPO Legal Fees incurred by Linklaters upon an IPO Termination would automatically be reduced by fifteen percent (irrespective of which entity or entities were funding such fees). The amount of any contribution from the Debtors to pay those fees was a matter specifically left open for later negotiation. Linklaters Fee Order ¶¶ 5-6. Of course, this is not a

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[4] Specifically, pursuant to an engagement letter dated July 19, 2012, Linklaters was retained by P3 and Arcapita Limited (i.e., the EuroLog Non-Debtors). See Declaration of Matthew Elliot in Support of the Fee Motion ¶ 11. KPMG was retained by P3 pursuant to an engagement letter dated August 11, 2011. See Declaration of Andy Pyle in Support of the Fee Motion ¶ 4. Finally, pursuant to an engagement letter dated April 30, 2012, Freshfields was retained by Credit Suisse Securities (Europe) Limited and Deutsche Bank AG London, as the prospective underwriters to the EuroLog IPO, who were, in turn, engaged by Arcapita Limited, Arcapita Industrial Management Sarl and P3 to act in such capacity. See Declaration of Sarah Murphy in Support of the Fee Motion ¶ 4.

new issue and, as the Debtors are undoubtedly aware, the language of the Linklaters Fee Order was carefully negotiated and the Committee specifically rejected the language proposed by the Debtors' counsel that would have imposed the payment obligation on the Debtors.

20. In addition, it should be noted that the Linklaters Fee Order pertained only to Linklaters' fees and did not in any way create any obligation for the Debtors to pay KPMG or Freshfields in connection with the EuroLog IPO or otherwise. Furthermore, the other IPO Professionals were fully aware of the dispute regarding payment of Linklaters' fees well in advance of the proposed EuroLog IPO launch, so the Debtors' suggestion that the Committee allowed the IPO Professionals to "continue working without complaint" is highly disingenuous. Fee Motion ¶ 32.[5] In fact, presumably as a direct result of the Linklaters fee dispute and their recognition that the Debtors were not directly obligated to pay their fees, immediately prior to the launch of the marketing process with respect to the EuroLog IPO, Freshfields sought to include in the underwriting agreement an undertaking by one of the Debtors to pay its fees in the event the EuroLog IPO failed. That request was rejected by the Debtors and the Committee.

21. The Debtors also suggest in the Fee Motion that the IPO Launch Order may have authorized payment of the IPO Fees. The Debtors have now acknowledged to the Committee that, notwithstanding the IPO Launch Order, the Debtors are not authorized to pay the professional fees incurred in connection with the EuroLog IPO without the Committee's consent or further order of the Court. As a result, the Debtors have agreed to withdraw their

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[5] As part of the negotiated compromise reflected in the Linklaters Fee Order, the Debtors represented that Linklaters was expected to bill only $1.5 million in additional fees for services rendered in connection with the EuroLog IPO. That the EuroLog Non-Debtors allowed Linklaters to exceed this projected amount several times over, while failing to disclose to the Committee this enormous increase in Linklaters' fees, can hardly support the Debtors' suggestion that the Committee tacitly accepted the amount of IPO Fees.

argument that the IPO Launch Order authorizes the Debtors to pay the IPO Fees and the Committee understands they will make such a representation to the Court at the hearing on the Fee Motion. See Fee Motion ¶¶ 9, 47. The Committee reserves all of its rights to supplement this response with respect to this argument if the Debtors fail to withdraw it.

II. Payment of the IPO Fees is Prohibited Under 11 U.S.C. § 503(c)(3)

22. Section 503(c)(3) of the Bankruptcy Code prohibits the making of "transfers or obligations that are outside the ordinary course of business and not justified by the facts and circumstances of the case". 11 U.S.C. § 503(c)(3). Payment of the IPO Fees is not within the ordinary course of the Debtors' businesses[6] nor is it justified by the facts and circumstances of these cases.

23. The Debtors have failed to demonstrate any justification for why their estates should bear the burden of the IPO Fees. Notably, the Debtors stop well short of asserting that the IPO Professionals conferred an actual and necessary benefit on the Debtors' estates and therefore should be paid as administrative expenses. Rather, the Debtors assert that "[e]ven though the EuroLog IPO was not completed after launch, each of the IPO Professionals provided valuable services that inured to the benefit of the Debtors' estates." Fee Motion ¶ 16. This statement is incorrect and, as a proffered justification for paying the IPO Fees, misses the point entirely. The Committee does not dispute that the services rendered by the IPO Professionals have value – indeed, the IPO Professionals have valued these services in excess of $10 million dollars. The issue, however, is not whether the IPO Professionals provided value, but whether that value inured to the benefit of *the Debtors' estates*. See In re Dana Corp., 358 B.R. 567, 576

[6] As discussed, infra, ¶¶ 27-33.

(Bankr. S.D.N.Y. 2006) (equating the test under section 503(c)(3) to the test for approving an administrative expense under section 503(b)(1)(A), which requires an "actual, necessary cost or expense of preserving the estate") (citing 4 Colliers on Bankruptcy § 503.17[3] (15th ed. 1982)); In re Adelphia Bus. Solutions, Inc., 296 B.R. 656, 662 (Bankr. S.D.N.Y. 2003) (stating that administrative claim status is only appropriate where there is a "concrete, discernible benefit" to the debtor's estate) (quoting In re Enron Corp., 279 B.R. 79, 86 (Bankr. S.D.N.Y. 2002)); see also In re Pilgrim's Pride Corp., 401 B.R. 229, 236-37 (Bankr. N.D. Tex. 2009) (finding that "the test of section 503(c)(3) should not be equated to the business judgment rule as applied under section 363(b)(1)" because "to do so would mean that section 503(c)(3) is redundant"); 4-503 Collier on Bankruptcy ¶ 503.17[4] (16th ed. 2012) (noting that "section 503(c)(3) . . . is a general restriction on postpetition transactions" and that, in enacting section 503(c)(3), Congress "probably intended greater scrutiny under section 503(c)(3) than simple deference to the debtor's business judgment").

24. It is undisputed that the IPO Professionals rendered their services to the EuroLog Non-Debtors and not the Debtors' estates. Furthermore, the Debtors have not made (and cannot make) any showing that the estates have received actual value in connection with these services. Because the EuroLog IPO was withdrawn, there has been no monetization of the EuroLog Assets and, accordingly, no demonstrable benefit to the Debtors' estates. The extent of the value of these services, if any, upon a future monetization event is purely speculative and impossible to quantify. See Adelphia Bus. Solutions, 296 B.R. at 662 (stating that "a speculative benefit or the mere potential for benefit is not enough to warrant an administrative claim priority"). In other words, while the Committee agrees that "[t]he fact that the EuroLog IPO was not completed does not in any way detract from the quality and importance of the services

rendered," Fee Motion ¶16, the fact that the EuroLog IPO failed completely negates any assertion that value was provided to the estates. Under these facts and circumstances, the proposed funding of the IPO Fees by the Debtors cannot be justified.[7]

25. In addition, the Debtors' precarious cash position further underscores that payment by the Debtors of the IPO Fees simply cannot be justified under the facts and circumstances of this case. Accordingly, the Fee Motion must be denied.

III. Debtors' Payment of IPO Fees Is Improper Under 11 U.S.C. § 363

a. Payment of the IPO Fees Is Not in the Ordinary Course of the Debtors' Businesses

26. The Debtors assert that they have authority to pay the IPO Fees pursuant to section 363(c) of the Bankruptcy Code because such payment is within the ordinary course of their business. Payment of over $10 million for fees incurred in connection with a failed transaction that the Debtors are not obligated to pay, and where the Debtors have provided no evidence of having ever made similar payments before, simply cannot be considered an "ordinary course" payment within the contemplation of section 363(c) of the Bankruptcy Code.

27. Courts apply two tests to determine whether a transaction is in the "ordinary course of business" for the purposes of section 363(c) of the Bankruptcy Code: (i) the vertical test, or the "creditor's expectation test," and (ii) the horizontal test, or the "industry-wide test." Med. Malpractice Ins. Ass'n v. Hirsch (In re Lavigne), 114 F.3d 379, 384 (2d Cir. 1997). In order for a transaction to be considered in the "ordinary course of business," it must meet ***both*** the vertical and the horizontal tests. See, e.g., In re Drexel Burnham Lambert Grp., Inc., 157

[7] To be clear, the Committee does not express a view on whether the EuroLog Non-Debtors are obligated to pay the IPO Professionals for services rendered in connection with the EuroLog IPO. The Objection is limited to payment of the IPO Fees out of the Debtors' estates.

B.R. 532, 537 (S.D.N.Y. 1993) (referring to the vertical and horizontal tests as a "two-part test"); In re Enron Corp., No. 01-16034 (AJG), 2003 WL 1562202, at *16 (Bankr. S.D.N.Y. Mar. 21, 2003) ("[I]f either dimension of the test is not satisfied, the disputed transaction is not in the ordinary course of business.") (quoting In re Crystal Apparel, Inc., 220 B.R. 816, 831 (Bankr. S.D.N.Y. 1998)). Applied in conjunction, the horizontal and the vertical tests afford the debtor flexibility to conduct its business, but *only to the extent* the debtor's actions remain within the confines of creditors' reasonable expectations. See In re Leslie Fay Cos., Inc., 168 B.R. 294, 304 (Bankr. S.D.N.Y. 1994) ("The Code is not meant to straitjacket the debtor and prevent it from responding quickly to normal business demands; neither, however, is the Code meant to allow the debtor the same freedom it had when it got into financial trouble in the first place. For the bankruptcy come certain obligations to creditors, including affording creditors the right to be heard when the debtor proposes to do something beyond the ordinary.").

28. A transaction satisfies the vertical test when "from the vantage point of a hypothetical creditor . . . the transaction subjects a creditor to economic risk of a nature different from those he accepted when he decided to extend credit." In re Nellson Nutraceutical, Inc., 369 B.R. 787, 797 (Bankr. D. Del. 2007) (quoting In re Roth Am. Inc., 975 F.2d 949, 953 (3d Cir. 1992)). Under the vertical test, the "touchstone of 'ordinariness'" is the interested parties' reasonable expectations of what transactions the debtor in possession is likely to enter in the course of its business. Lavigne, 114 F.3d at 384-85. A debtor's prepetition business practices and conduct are the primary focus of the vertical analysis. In re Nellson Nutraceutical, Inc., 369 B.R. at 797.

29. The Debtors seem to believe that the vertical test can be satisfied here merely because the Debtors' creditors were aware that the Debtors' business model included

supporting investments through funding working capital facilities until monetization and, accordingly, the Debtors' payment of the IPO Fees "does not expose their creditors to any more risk than they assumed when they first extended credit to the Debtors." Fee Motion ¶ 39. This argument fails because it is highly doubtful that the Debtors' unsecured creditors believed that they were assuming the risk that the Debtors' funding of their subsidiaries would directly compete with their own recoveries (which, as discussed above, is the case in this instance). Furthermore, if the Debtors' historical practice of accruing large intercompany funding deficits to their subsidiaries is deemed to be the appropriate reference point for the vertical test, then the Debtors could ostensibly make any payment to any non-Debtor affiliate, at any time, and for any reason.

30. Rather, under the legal standard discussed above, the Debtors must show that the specific type of transaction that they seek to fund, i.e., paying more than $10 million of IPO Fees on behalf of non-Debtor affiliates in connection with a transaction that has already failed and which the Debtors are not contractually or otherwise obligated to fund, is a transaction that the Debtors' creditors could reasonably expect the Debtors to engage in. See In re Enron Corp., No. 01-16034 (AJG), 2003 WL 1562202, *18-19 (Bankr. S.D.N.Y. Mar. 21, 2003) (debtor's general prepetition engagement with employee compensation issues as ordinary corporate transactions was insufficient to satisfy vertical test where debtor proposed to increase level of postpetition payments to employees as a result of developments during bankruptcy case, noting that "[t]he Court should not have been left to surmise from the general proposition that employee compensation issues are ordinary corporate transactions to the conclusion that the relief [the debtor] requests is also ordinary under the circumstances presented"). The Debtors have failed to offer any evidence that such practice is customary for them, and therefore have

failed to meet their burden to establish that the proposed payment satisfies the vertical test.

31. The Debtors' proposed payment of the IPO Fees also fails the "horizontal" test. A transaction satisfies the "horizontal" test when, "from an industry-wide perspective, the transaction is of the sort commonly undertaken by companies in that industry." In re Dana Corp., 358 B.R. 567, 580 (Bankr. S.D.N.Y. 2006) (quoting Crystal Apparel, Inc., 207 B.R. at 409). This test was adopted to "assure that neither the debtor nor the creditor do anything abnormal to gain an advantage over other creditors." In re Econ. Milling Co., 37 B.R. 914, 922 (D.S.C. 1983).

32. The Debtors' request to pay the IPO Fees is not an ordinary course transaction under the horizontal or "industry-wide" test. Again, the Debtors have framed the question in such an overbroad manner that it lacks any meaning. Although it is true that "the business of private equity firms similar to the Debtors is to invest in and support portfolio companies," Fee Motion ¶ 40, the Debtors (pre-petition) had a highly unusual organizational structure when compared to those of other private equity firms. It is not market practice for private equity firms to insulate their co-investors from the operating expenses of their portfolio investments. However, even if gratuitously bearing all funding costs of the operations of portfolio investments in this manner were common in the industry (which it is not), this cannot mean that private equity funds are immune from the prohibition on a debtor in possession transferring assets out of the estate without court approval simply because they are in the business of investing in their portfolio businesses. The test is, of course, more narrow, and turns on whether the specific relief requested is ordinary in the industry. The Debtors have not made any showing that their attempt to convert payments due under agreements with non-Debtor affiliates for fees incurred in connection with a failed transaction into payment obligations of the

Debtors is normal from an industry perspective. Therefore, the proposed payment by the Debtors of the IPO Fees fails the "horizontal" test.

b. Payment of the IPO Fees Is Not Within the Debtors' Sound Business Judgment

33. The Debtors argue that paying the IPO Fees constitutes an exercise of sound business judgment because the payment is in the best interests of the Debtors and their stakeholders as a means of preserving the assets of their estates. Fee Motion ¶ 44. The business judgment test requires, among other things, due care, good faith, and no abuse of discretion or waste of corporate assets. See In re Innkeepers USA Trust, 442 B.R. 227, 231 (Bankr. S.D.N.Y. 2010) (citing In re Integrated Res. Inc., 147 B.R. 650, 656 (S.D.N.Y. 1992)); In re Bidermann Indus. USA, Inc., 203 B.R. 547, 552 (Bankr. S.D.N.Y. 1997).

34. The Debtors assert that if the EuroLog Non-Debtors were forced to pay the IPO Fees themselves, they may be rendered insolvent and could be forced into liquidation, with disastrous consequences including the diminution in value of the EuroLog Assets and the loss of administrative fees for managing the EuroLog Assets. Fee Motion ¶¶ 33-34. However, the Debtors have offered no evidence that the IPO Professionals have threatened, or otherwise intend, to force the EuroLog Non-Debtors – i.e., the IPO Professionals' clients – into insolvency proceedings, nor do they offer any facts that would suggest that is a remotely likely outcome. For example, the Debtors provide no evidence that the IPO Professionals have previously or customarily forced their clients into insolvency proceedings in similar circumstances or that the IPO Professionals would have any reason to believe that forcing the EuroLog Non-Debtors into insolvency proceedings would improve their prospects of recovery.

35. Even assuming that denial of the Fee Motion would force the EuroLog Non-Debtors into insolvency, the Debtors have not demonstrated any reason why avoiding the

insolvencies of the EuroLog Non-Debtors is so important as to require actions that are clearly detrimental to the Debtors' creditors. In essence, the relief requested in the Fee Motion is tantamount to the Debtors preferring the EuroLog Non-Debtors' creditors (i.e., the IPO Professionals) over their own creditors. That preference simply does not bear the hallmarks of "due care, good faith, and no abuse of discretion or waste of corporate assets" that an exercise of sound business judgment requires. See Innkeepers USA Trust, 442 B.R. at 231. Accordingly, the Court should deny the Fee Motion.

36. Even if the Debtors' decision to pay were subject to a business judgment analysis (which it is not), the Debtors and the IPO Professionals have failed to offer ***any*** evidence to suggest that the fees requested reflect a customary discount for terminated IPOs, either within the industry or as customarily agreed to by the IPO Professionals.[8] And here, with a parent entity operating under bankruptcy protection, with very limited liquidity and a high cost of funds, above average discounts (or at least discounts at the high end of the customary range) would be expected (as well as additional flexibility regarding the timing of payments). The Debtors have failed to carry their burden to prove that the proposed discount is proper, and it is inappropriate to require the Debtors' creditors to foot the bill in the absence of such evidence.

37. The Fee Motion is misleading with respect to the amount of the discount sought to be applied toward the Linklaters Final Payment, providing that "[i]n light of the termination of the EuroLog IPO, Linklaters has agreed to apply a total discount of 30% to all of

[8] In this regard, the Linklaters Fee Order provides that "Linklaters may expect that the total amount of IPO Legal Fees paid to Linklaters is consistent with market rates for terminated or significantly delayed initial public offerings (as reasonably adjusted for factors relevant to the EuroLog IPO)." Linklaters Fee Order ¶ 5. Linklaters has not provided any evidence to suggest that its requested fees are in line with this expectation as contemplated by the Linklaters Fee Order.

its remaining unpaid IPO-related fees."[9] Fee Motion ¶ 20. In reality, Linklaters had already agreed at the outset to discount its standard billable rates by fifteen percent from those it allegedly regularly charges clients, and the Debtors now seek to credit that engagement discount as part of the discount for the termination of the IPO. See Linklaters Fees Motion ¶ 10. The remaining half of the thirty percent "discount" is mandated by the Linklaters Fee Order, which directs that, after accounting for the initial fifteen percent engagement discount, all Remaining IPO Legal Fees be reduced by an additional fifteen percent. Accordingly, the touted thirty percent discount does not reflect any concessions by Linklaters on account of the failed IPO from the minimum discount mandated by the Linklaters Fee Order.[10]

38. Accordingly, agreeing to pay the IPO Fees at above-market levels to avoid entirely speculative risks to their non-Debtor affiliates cannot constitute an exercise of the Debtors' sound business judgment.

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[9] In fact, the declaration executed by Linklaters in support of the Fee Motion does not support this misleading statement and provides instead that "[i]n consideration of the Debtors' chapter 11 cases, the failure of the EuroLog IPO to complete following its launch, and other factors, Linklaters has agreed to reduce its unpaid fees by 30%, to £4,218,544." Declaration of Matthew Elliott in Support of the Fee Motion ¶ 9.

[10] Linklaters included in an invoice to the Debtors approximately £200,000 of fees incurred between June 1, 2011 and December 31, 2011 that they had previously agreed to write off. Such error was uncovered by the Committee's professionals in connection with its review of the IPO Fees.

CONCLUSION

WHEREFORE, the Committee respectfully requests that the Court: (i) sustain this Objection; (ii) deny the Fee Motion; and (iii) grant the Committee such other and further relief as is just.

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