Hearing Date and Time: March 18, 2013 at 11:00 a.m. (prevailing U.S. Eastern Time)

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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**

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

INTRODUCTION

The Committee does not object to the necessity or value of the services provided by KPMG or Freshfields or the amount of the fees requested.[1] As to Linklaters, the Committee does not contend that its services were not needed or even that its fees were excessive or improper. The Committee simply argues that Linklaters should discount its fees even more than the 30% reduction it already agreed to in the Linklaters Fee Order. The Committee has presented no evidence to show that the fees expected by Linklaters as a Final Payment are not consistent with market. Clearly Linklaters is entitled to be paid something and the only evidence before the Court as to the proper amount is from Linklaters.

The Committee's only objection is that the prior orders of the Court obtained to avoid the very issues now raised in the Committee's Objection to the Motion do not mean what they plainly say. The Committee argues that the Debtors should not fund the payment of the EuroLog IPO Fees because the Debtors did not directly engage KPMG, Freshfields, or Linklaters and, therefore, the Debtors are not "legally" obligated to pay these particular operating costs (although the Committee has not objected to the Debtors' funding of other EuroLog IPO related costs incurred by these same EuroLog Affiliates). Both the express terms and the spirit of the IPO Approval Order and the Linklaters Fee Order show that this issue has already been resolved.

The amounts requested in the Debtors' Motion are:

- Linklaters: $2,731,282.47[2] (in addition to the unpaid $3,287,886.95 previously approved in the Linklaters Fee Order)

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

[2] Linklaters and Freshfields bill in British Pounds Sterling; KPMG bills in Euros. For ease of reference, all amounts herein have been converted into U.S. Dollars using the GBP to USD

- KPMG: $2,730,957.87
- Freshfields: $1,080,105

REPLY

THE LINKLATERS FEE ORDER GOVERNS THE DEBTORS' OBLIGATIONS AS TO LINKLATERS' FEES

In August of 2012, the parties litigated the Debtors' funding of Linklaters' IPO Fees. This litigation resulted in the resolution embodied in the agreed Linklaters Fee Order. Through the Debtors' Motion, Linklaters is simply pursuing the relief the parties expressly agreed to in the Linklaters Fee Order. Conversely, the Committee is attempting to re-litigate the issues already resolved.

The Linklaters Fee Order, which expressly authorized the Debtors to fund payments to the EuroLog Affiliates to pay Linklaters' IPO Fees, must be read as a whole to understand the Debtors' obligation to pay the disputed remainder of Linklaters' IPO Fees referred to as the "Final Payment" in the Linklaters Fee Order. Linklaters Fee Order ¶¶ 1, 5. The Linklaters Fee Order broke the payments due Linklaters into four steps.

Step One: Interim Payment

The Linklaters Fee Order authorized and directed the Debtors to pay Linklaters an "Interim Payment" of **$1.5 million** that was to be applied to those discounted IPO Fees due for services rendered prior to August 1, 2012. Linklaters Fee Order ¶ 2.

Step Two: IPO Termination Payment

Upon the termination of the EuroLog IPO, the Linklaters Fee Order authorized and directed the Debtors to pay Linklaters an "IPO Termination Payment" of an additional **$1.5**

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exchange rate of 1:1.4898 that was in effect on March 12, 2013 and the Euro to USD

million that was to be applied to the IPO Fees due for services rendered prior to August 1, 2012. Linklaters Fee Order ¶ 3. This payment has not yet been made, but the Debtors' obligation to make the IPO Termination Payment is not disputed and is not in issue in the Debtors' Motion.

Step Three: Second Interim Payment

The Linklaters Fee Order authorized and directed the Debtors to pay Linklaters a "Second Interim Payment" equal to 50% of the difference between $1.0 million and the full amount of IPO Fees (at the contractually discounted amount)[3] incurred on or after August 1, 2012 (*i.e.*, Second Interim Payment = (actual fees incurred on or after August 1, 2012 - $1.0 million) x 50%). Linklaters Fee Order ¶ 4. Based on this formula, the Second Interim Payment due is $1,787,886.98 (*i.e.*, (actual fees incurred on or after August 1, 2012 of $4,575,773.95 - $1,000,000) x 50%). This payment has not yet been made, but like the IPO Termination Payment, the Debtors' obligation to make the Second Interim Payment is not disputed and is not at issue in Debtors' Motion.

Step Four: The Final Payment

The Linklaters Fee Order provided that, after first subtracting the $1.5 million Interim Payment from the total of all outstanding IPO Fees (which include the contractual 15% discount), the remaining amount shall then be reduced by an additional "dead deal" discount of 15%. Linklaters Fee Order ¶ 5. After subtracting the $1.5 million Interim Payment, the total of all of Linklaters' outstanding IPO Fees was $7,308,991.50. Once the 15% additional discount contemplated by the Linklaters Fee Order is applied, the total amount is **$6,212,642.78.** The

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exchange rate of 1:1.2961 that was in effect on March 12, 2013.

[3] In its Engagement Letter, Linklaters had agreed to discount its rates by 15% for all services provided on the EuroLog IPO.

Court has already authorized and directed the Debtors to pay **$3,287,886.98** of this amount (the total of the $1.5 million IPO Termination Payment and the $1,787,886.98 Second Interim Payment). Thus, the final disputed amount of fees is $2,924,755.80 (the difference between the $6,212,642.78 owed and the $3,287,886.98 the Debtors have already have been directed to pay). With respect to Linklaters, **$2,924,755.80** is the only amount of fees in issue before the Court and Linklaters has agreed to seek only $2,731,282.47 of this amount.[4]

As to this final disputed amount, the Committee, the Debtors, and the JPLs were expressly ordered to negotiate "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***")." Linklaters Fee Order ¶ 5 (emphasis added).

This Court also ordered: "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 . . . 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 (emphasis added). This issue is only before the Court now because the Committee refused to negotiate refused to negotiate anything as to the KPMG, Freshfields and Linklaters fees.

[4] Linklaters is also seeking reimbursement of $265,617.57 in actual and necessary expenses incurred.

<u>Summary of Calculations Pursuant to Linklaters Fee Order</u>

IPO Fees Due For Services Rendered Prior to August 1, 2012

Total IPO Fees (incl. 15% disct.) for services rendered prior to August 1, 2012:	$4,233,217.55
Minus Interim Payment ($1,500,000):	$2,733,217.55
Total unpaid IPO Fees for services rendered prior to August 1, 2102:	$2,733,217.55

IPO Fees Due For Services Rendered On or After August 1, 2012

Total IPO Fees (incl. 15% disct.) for services rendered on or after August 1, 2012:	$4,575,773.95

Computation of Second Interim Payment (Linklaters Fee Order ¶ 4)

Total amount of IPO Fees for services rendered on or after August 1, 2012:	$4,575,773.95
Minus $1.0 million:	$3,575,773.95
Times 50%:	$1,787,886.98
Amount of Second Interim Payment due:	$1,787,886.95

Amount Subject to Good Faith Negotiation and Final Payment (Linklaters Fee Order ¶ 5)

Total of all IPO Fees (for services rendered both prior to and after August 1, 2012):	$8,808,991.00
Minus Interim Payment ($1,500,000):	$7,308,991.50
Minus additional 15% discount due to failure to launch:	$6,212,642.78
Minus IPO Termination Payment ($1,500,000):	$4,712,642.78
Minus Second Interim Payment ($1,787,886.98):	$2,924,755.80
Amount subject to negotiation pursuant to the Linklaters Fee Order:	$2,924,755.80

Amount requested by Linklaters (including additional negotiated discount): **$2,731,282.47**

A. The Committee Has Refused to Negotiate A Compromise as Required by the Linklaters Fee Order

The Debtors' estates could have saved the massive costs of again litigating this dispute as well as any stress placed on the Debtors budget because of the Final Payment had the Committee not utterly refused to negotiate any resolution or had the Committee even considered the compromises offered by Linklaters. Here, good faith is not simply the general standard expected in dealings between the parties. Instead, the Linklaters Fee Order imposed an express obligation on the Committee, the JPLs, and the Debtors and Linklaters to negotiate in good faith to try to resolve the amount of the Final Payment. Linklaters Fee Order ¶¶ 5, 6. The Committee pays lip service to the Order by simply stating that "[t]he Committee has negotiated in good faith with the Debtors to consensually resolve the Fee Motion. To date, no agreement has been reached." Obj. at ¶ 15. However, the Committee has completely refused to negotiate, to consider any of the

proposals made by Linklaters or to present any proposal of its own. The Committee simply says the Debtors themselves are not obligated to pay Linklaters any amount whatsoever.

The Committee first argues that it agreed to a "settlement" of the claims of several other law firms, consultants and others who provided services with respect to the EuroLog IPO. Obj. at 7 n.3. But there was no settlement; the Committee simply informed the Debtors that it had no objection to the Debtors funding the amounts requested by all those professionals owed fees for work done on the EuroLog IPO, other than KPMG, Freshfields and Linklaters, provided half of the claimants were paid in one month and the other half the next month.

The Committee's advisors several times requested information from the Debtors' advisors as to the bills and services provided by Linklaters and others, all of which was promptly provided. Linklaters made proposals to resolve the dispute, even bidding against themselves. The Committee refused to respond. When pressed, advisors for the Committee simply reported that "now was not the time" and that the reaction of the Committee chair was so negative to any payment at all that it would have been futile to present any of the proposals to the full Committee or to seek a counter proposal.

Contrary to the Committee's contentions, the Debtors are not before the Court seeking a payment to prefer Linklaters and is instead simply pursuing the rights and obligations the Committee already agreed to in the Linklaters Fee Order. This Motion would not have been necessary at all had the Committee adhered to the terms of the Order.

B. The Committee Contorts the Terms of the Linklaters Fee Order in an Effort to Re-litigate the Very Issues Settled by means of the Order

The Committee now argues that the compromise embodied in the Linklaters Fee Order left open for later resolution both the reasonable amount of the Final Payment and, even once the amount was determined, whether the Debtor was obligated to fund the Final Payment at all. *See,*

e.g., Obj. ¶¶ 4, 7. However, the Committee's position ignores the Linklaters Fee Order as whole which pertains to Debtors' funding of the IPO Fees and the express intent of the parties included within the definition of the "Final Payment." The Order was not intended to differentiate between the Debtors' funding of the first three parts of Linklaters' IPO Fees but then leave open the Debtors' funding of the Final Payment.

The compromise embodied in the Linklaters Fee Order expressly directs the Debtors to fund the Interim Payment, the IPO Termination Payment, and the Second Interim Payment. The amount that remained unpaid (and the amount now in dispute) was expressly defined as the "Final Payment." The Committee argues that the "amount of any contribution from the Debtors to pay [the Final Payment] was a matter specifically left open for later negotiation." Obj. ¶ 19. But paragraph 5 of the Linklaters Fee Order does not use the words "any contribution" and, instead, it expressly included what Linklaters may expect from the Debtors. The Final Payment is defined as "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 . . . ." Linklaters Fee Order ¶ 5 (emphasis added). Paragraph 5 plainly means the Court has already ordered that what Linklaters may expect pertains to "the amount of funding the Debtors shall provide to pay the Remaining IPO Legal Fees." *Id.* (emphasis added).

The amount of the Final Payment to be paid by the Debtors was left open and, if necessary, was to be resolved by the Court. But any issue as to whether the Debtors would fund the Final Payment, in either a negotiated amount or an amount determined by the Court, was resolved by the Linklaters Fee Order and is no longer open to dispute.

C. The Parties Did Not Negotiate Any Terms of the Order Intended to Modify Paragraph 5 or to Leave Open the Debtors Obligation to Fund the Final Payment

In an effort to contort the meaning of the Linklaters Fee Order, the Committee asserts:

> Of course, this is not a new issue, as the Debtors are undoubtedly aware, the language of the 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."

Obj. at ¶ 19. However, the Debtors and the Court are left to guess at the crucial provision in the Linklaters Fee Order allegedly rejected by the Committee.

On August 16, 2012, the Debtors and the Committee appeared before the Court and reported to the Court in some detail the terms of the compromise reached to resolve the pending Motion as to the Debtors' funding of the IPO Legal Fees. Prior to the 2:00 p.m. hearing, counsel for the Debtors sent a proposed order to counsel for the Committee and the Committee returned comments shortly before the hearing, which Debtors' counsel then reviewed in the courtroom before the commencement of the hearing. There were no discussions or negotiations as to the form of order or any provision intended to alter the agreement or to treat the funding of the Final Payment different from the funding of the other agreed payments.

At the hearing, counsel for the Debtors informed the Court of the terms of the agreement reached and that, after the Debtors funded the Interim Payment, the IPO Termination Payment, and the Second Interim Payment, the remaining Final Payment would be addressed as follows:

> And then that's going to obviously leave us with a – an amount due at the – at the end. The parties have agreed that they would address that at that time and that the JPL's, as well as the committee and Linklaters, would engage in good faith negotiations to discuss how much of that remaining part should be funded such that Linklaters can be reasonably expect to be paid, what would be paid normally or typically in an aborted IPO situation of this nature, and also that would take into account and the discounts and such that are already in the engagement letter would still apply. So, in other words, we're not going back and adding those back in. They would still apply. And if the parties cannot reach agreement, then the parties can bring it before the Court [to] seek resolution.

8.16.12 Hr'g Tr., 24-25:25-13 (attached hereto as **Exhibit A**).

When asked if the Committee wanted to be heard, counsel for the Committee informed the Court, "Just to say, Your Honor, that that's accurate." Tr. at 26:7-8. As it is often quick to do in most circumstances, the Committee did not inform the Court of any carve-out or clarification that the funding by the Debtors of the Final Payment would be treated any differently than the earlier payments.

In reliance on the Court's Order as to what Linklaters may expect at the end, Linklaters continued to work on the EuroLog IPO and assisted in bringing the EuroLog IPO to the market. The Committee was pleased to have Linklaters and others to work on the EuroLog IPO in the hope of achieving significant liquidity, while intending that, if the IPO failed, to later argue that the Debtors are under no obligation to pay any additional amounts to Linklaters and also to refuse to negotiate any compromise, despite the express order that it do so.

D. Linklaters has provided the Only Evidence of the Reasonableness of the Amount of the Final Payment it Seeks

The Linklaters Fee Order provides that the Committee shall negotiate the amount of the Final Payment "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). Linklaters Fee Order at ¶ 5 (emphasis added.) Contrary to the Committee's mere assumption, the Linklaters Fee Order does not assign the burden of proof to Linklaters as to its expectations or market.

Nevertheless, Linklaters has provided evidence in both the Declaration of Matthew Elliot attached to the Motion and the Reply Declaration attached to this Reply, as to Linklaters

expectations given its experience as counsel in European IPO's and under the circumstances of this case. *See* Reply Declaration of Matthew Elliot attached hereto as **Exhibit B**. This is the only evidence before the Court. The Committee has not presented any evidence to show that Linklaters expectations reflected in the fees it seeks as the Final Payment are not reasonable or the additional 15% discount applied by the terms of the Linklaters Fee Order after the IPO terminated results in a Final Payment that is not "consistent" with market adjusted by the specific facts of this case.

THE COMMITTEE'S OBJECTION IGNORES THE PURPOSE AND PLAN LANGUAGE OF THE ORDER APPROVING THE LAUNCH OF THE EUROLOG IPO

The Committee admits that the services rendered by KPMG, Freshfields and Linklaters were valuable and necessary, and the Committee does not object to the amount requested by KPMG or Freshfields. The Committee's only objection is that the Debtors should not fund the payment of these particular fees because (1) the Debtors did not directly engage these entities and, therefore, the Debtors are not "legally" obligated to pay these particular operating costs (although the Committee has not objected to the Debtors' funding of other EuroLog IPO-related costs incurred by these same EuroLog Affiliates); and (2) the payment of these fees (about $7 million in the aggregate), although already factored into the budget, may stress the Debtors' budget projections.[5]

[5] The Debtors' budget projections reflecting its cash requirements includes the $30 million Lusail payment due in June. The approximately $7 million at issue here, the payment of which is already included in the budget projections, will not materially impact the budget projections.

A. The Payment of the Fees of the EuroLog Affiliates is Not Only Within the Ordinary Course of the Debtors' Business Generally, But Also it is no Different Than the Nearly $80 Million in Post-Petition Portfolio Company Funding Supported by the Committee

As the Committee knows, the funding of the operating costs of portfolio companies is exactly what the Debtors are in the business of doing. Every month since the Petition Date, the Debtors' budget presented to this Court has included the funding of portfolio company operating costs and fees, none of which involve counter parties who contracted with the Debtors, and none of which the Debtors are "legally" obligated to pay.[6] Sometimes after discussion of a particular proposed expenditure, month after month the Committee has agreed that the deal company funding should proceed and the budgets presented have been approved. Since the Petition Date, the Debtors have provided nearly $80 million in portfolio company funding.

It is difficult to imagine how the Committee can now argue that the Debtors' funding of the costs and fees incurred by the EuroLog Affiliates is not within the ordinary course of the Debtors' business. Indeed, the Committee has not provided any explanation of why these operating costs in the form of the fees sought by KPMG, Freshfields and Linklaters should be treated any differently than the $80 million in portfolio company funding that the Committee did support and was therefore approved by the Court in prior budgets. Even the Committee agreed that it was acceptable for the Debtors' to fund the payment of the other 14 firms and entities that provided services on the EuroLog IPO despite no "legal" obligation.

B. The IPO Approval Order, On Which KPMG, Freshfields, and Linklaters Were Entitled to Rely, Further Demonstrates That Funding the Fees in Issue is Within the Ordinary Course of the Debtors' Business

Although the payment of the fees requested by KPMG, Freshfields and Linklaters are within of the ordinary course of the Debtors' business, and should be approved for that reason alone, the case for the Debtors' funding the payment of these particular fees is even stronger. All parties, including the Committee, acknowledged that, if successful, the EuroLog IPO would be a significant monetizing event which would benefit the creditors the Committee represents. The entry of an order of this Court authorizing the Debtors to take the actions necessary was prerequisite required by the underwriters and other to be able to launch the EuroLog IPO.

As the Debtors explained in the IPO Approval Motion, the EuroLog IPO would be beneficial to the estate and the cost justified because the Debtors and their investment partners expected to realize a premium from the EuroLog Assets in excess of the value that could be received through piecemeal sales or other monetization options. The EuroLog IPO was discussed at length with the Committee, JPLs, SCB and others, and all interested parties, including the Committee, believed that launching the EuroLog IPO was the best way to maximize the value of the EuroLog Assets. In fact, each of the Committee, the JPLs, and SCB expressly consented to launching the EuroLog IPO. *See* Docket No. 543.

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[6] The Committee Objection mentions that Freshfields asked for a provision to be added to the Underwriting Agreement specifically providing for their fees to be paid by the Debtors in the event the EuroLog IPO did not succeed. That provision ultimately was not included, because the Underwriting Agreement would only have been signed and that provision enforceable once the EuroLog IPO was priced, i.e. had succeeded. In that event, the provision was not necessary. In light of that and the IPO Approval Order, Freshfields was willing to proceed, but obtained a further explicit fee provision in the engagement letter between the underwriting banks and the EuroLog Affiliates obligating the EuroLog Affiliates for Freshfields' fees.

To launch the Eurolog IPO, the Debtors had to provide the necessary service providers (and the EuroLog portfolio companies) with comfort that they would be paid for their services. The IPO Approval Order was required because, as reported to the Court at the hearing on the IPO Approval Motion, Linklaters and others had ceased work at various stages for lack of comfort and were not willing to proceed without assurance from the Court that they would be paid by the Debtors. The directors of the EuroLog Affiliates required the same comfort, because, in the absence of a reasonable prospect of receiving funding from the Debtors it would have been inappropriate for them to take on financial commitments which required them to pay significant amounts to third parties when they had no reasonable prospect of being able to pay those amounts.

Here, with the support of the Committee and the JPLs, the Debtors first obtained the IPO Approval Order authorizing it to proceed with the EuroLog IPO and to cause the EuroLog Affiliates to incur the fees now at issue. The IP Approval Order was negotiated with the Committee, with the input from the service providers the EuroLog Affiliates would require, and KPMG, Freshfields and the other advisors relied upon paragraph 2 of the IPO Approval Order authorizing the Debtors to fund the necessary portfolio company fees and expenses to launch the EuroLog IPO

In connection with the more than 12 past monthly budgets, the Committee has raised concerns over certain portfolio company funding where the Committee believed the funding at issue might not preserve the value of the portfolio company asset owned indirectly by the Debtors or that the expenditure would not at least preserve the chance of retaining or creating value. On each occasion, the Debtors and the Committee reached agreement and the portfolio

company funding proceeded as agreed. As to the EuroLog IPO Fees, this discussion occurred at the outset.

At the hearing on the IPO Approval Motion, the prudence of the EuroLog IPO was further disclosed and discussed. Thereafter, the Court entered the IPO Approval Order which provides:

> [T]he Debtors are authorized to execute the EuroLog IPO Documentation and the Debtors are authorized and empowered to take any and all steps, <u>pay any required fees and expenses</u>, enter into any and all other agreements and transactions, and <u>to perform such other and further actions as are necessary or appropriate to carry out, effectuate, or otherwise complete the EuroLog IPO</u> without further order of the Court.

IPO Approval Order ¶ 2 (emphasis added).

Given the Committee's active participation in the steps leading up to the entry of the IPO Approval Order and the language of the IPO Approval Order itself, KPMG, Freshfields, and Linklaters were more than justified in concluding that the Debtors would fund properly incurred and reasonable costs and fees incurred by the EuroLog Affiliates to launch the EuroLog IPO.

After entry of IPO Approval Order, the Committee was all too happy to have the EuroLog IPO go forward. The Committee, the JPLs, and other creditors certainly knew of the services being provided by KPMG, Freshfields, Linklaters, and the other professionals working on the EuroLog IPO. In fact, the JPLs' and the Committee's counsel participated in numerous teleconferences with Linklaters regarding the EuroLog IPO. In addition, the Debtors and their professionals provided the Committee with regular reports regarding progress toward launch and the results of "pilot fishing." The Committee also agreed with the decision to withdraw the EuroLog IPO when the indications of price came in below expectations.

Before entry of the IPO Approval Order, the Committee agreed that the EuroLog IPO, and hence incurring the related fees, was an appropriate action taken to maximize the value of Debtors' assets for the benefit of the Debtors' estates. The Committee should not be allowed to

reconsider that decision now and, after the fact, object to the funding of the EuroLog IPO that it previously favored.

C. The IPO Approval Order Leaves Open Issues as to Amount of the Fees to be Funded, but Not the Debtors Authority or Obligation to Fund Those Fees

The Committee has not clearly stated the Debtors' position as to the operation of the IPO Approval Order. The Debtors do not contend that the IPO Approval Order pre-approved the Debtors funding of fees and costs of the EuroLog Affiliates in any amount whatsoever; the services provided must have been necessary to the EuroLog IPO and the amount to be paid must be reasonable. Just like the funding of all portfolio company operating expenses, in the event of a disagreement between the Debtors and the Committee as to the amount to be paid, then the dispute as to the amount should be resolved by the Court. However, paragraph 2 of the IPO Approval Order means that, once any dispute as to the amount of the fees is resolved by agreement or by the decision of this Court,

> the Debtors are authorized and empowered to . . . pay any required fees and expenses, enter into any and all other agreements and transactions, and to perform such other and further actions as are necessary or appropriate to carry out, effectuate, or otherwise complete the EuroLog IPO without further order of the Court.

IPO Approval Order at ¶ 2 (emphasis added.) Here, the Committee has admitted that, at least as to KPMG and Freshfields, there is no dispute as to the necessity or amount of the fees requested. As to Linklaters, the Committee appears to be pressing for an even bigger discount and asks Linklaters to "bid against" the terms of the Linklaters Fee Order.

Hence, by operation of the IPO Approval Order, only the necessity of the services and the amount of the fees or costs incurred are open to dispute. The Debtors' authority to pay those fees has already been resolved. Any other interpretation would render paragraph 2 of the IPO Approval Order meaningless.

PAYMENT OF THE IPO FEES IS IN THE ORDINARY COURSE OF THE DEBTORS' BUSINESS

The Debtors may engage in transactions that are in the ordinary course of business without the prior approval of the Committee or the Court. 11 U.S.C. § 363(c). The Committee acknowledges that courts apply a two-part test to determine whether a particular transaction is ordinary: (1) the "creditor's expectation test," also known as the "vertical test," and (2) the "industry-wide test," also called the "horizontal test." *See In re Lavigne*, 114 F.3d 379, 384 (2d Cir. 1997). Under the vertical test, the court "views the disputed transaction from the vantage point of a hypothetical creditor and inquires whether the transaction subjects a creditor to economic risks of a nature different from those he accepted when he decided to enter into a contract with the debtor." *Id.* at 385 (citation omitted).

Applying the vertical test, the Committee would have the Court inappropriately focus on the ultimate use of a particular funding request and whether the Debtors have ever provided funds to an affiliate for that exact same end use. Under the Committee's logic, a debtor in the business of owning and operating a portfolio of industrial buildings would need Court approval to repair a leaky roof if previously it had only repaired leaky sinks. This is not the law. Instead, courts appropriately focus on "the interested parties' reasonable expectations of what transactions the debtor in possession is likely to enter in the course of its business." *Id.* at 384-85 (citation omitted). In other words, courts look at "the debtor's prepetition business practices as compared to the debtor's postpetition conduct, in an effort to discern any significant variance in the debtor's activity." *In re Enron Corp*., 2003 WL 1562202, at *17 (Bankr. S.D.N.Y. Mar. 21, 2003).

The Debtors have historically provided the EuroLog Affiliates and other affiliates with funding to pay for professional fees and other expenses on an as-needed basis; with the intent

and understanding that the Debtors would be repaid when the applicable underlying assets are monetized. *See* Tan Decl. ¶¶ 7-8. In fact, prior to the petition date the Debtors provided more than $32 million in funding to the EuroLog Affiliates to pay for a variety of expenses, including professional fees. *Id.* ¶ 8. Since then, the Debtors have provided more than $10 million in additional funding to the EuroLog Affiliates. *Id.* The funding requested now is no different.

Applying the horizontal test, the Committee agrees that "the business of private equity firms similar to the Debtors is to invest in and support portfolio companies…." Obj. ¶ 32. Nonetheless, without explaining why, citing any cases, or providing any evidence whatsoever, the Committee jumps to the conclusion that "private equity firms [cannot fund the costs of operations of portfolio investments] . . . simply because they are in the business of investing in their portfolio businesses." *Id.* Again without citing any authority, the Committee boldly states that the "test is, of course, more narrow." The test is not more narrow. *Id.* The business of the Debtors and equity firms like them to support their portfolio investments until they can be monetized. Tan Decl. ¶ 8. That is exactly what the Debtors are seeking to do here—no more, no less and it is exactly what the Debtors' creditors reasonably expected the Debtors to do when they entered into their business relationships with the Debtors.

PAYMENT OF THE IPO FEES IS SUPPORTED BY SOUND BUSINESS JUDGMENT

A. Paying the IPO Fees Will Not Diminish the Assets Available for Distribution to Creditors

The Committee's Objection appears to be based on the false premise that paying the IPO Fees will diminish the assets available for distribution to the Debtors' creditors. According to the Committee, "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." Obj. ¶ 35. This is not the case. As stated in the Motion, the funding will result in a receivable due to

Arcapita Bank from Pointpark and Arcapita Limited. *See* Mot. ¶ 45; Tan Decl. ¶ 10. And, Pointpark and Arcapita Limited expect to execute reimbursement agreements with certain EuroLog Affiliates that have substantial enterprise value whereby Pointpark and Arcapita Limited will be reimbursed for the IPO Fees when the applicable EuroLog Assets are sold. *See* Mot. ¶ 45; Tan Decl. ¶ 10. In this way, every penny funded to pay the IPO Fees will be repaid to the Debtors.

B. Failing to Pay the IPO Fees May Diminish the Assets Available for Distribution to Creditors

If the IPO Fees are not paid, the obligors may be forced into insolvency or liquidation proceedings. *See* Tan Decl. ¶¶ 5-6. The Motion details the consequences that may result if the obligors are forced into insolvency or liquidation proceedings. *See* Mot. ¶¶ 33-34; *see also* Tan Decl. ¶¶ 5-6. The Committee's business judgment is to disregard these costly consequences simply because the IPO Professionals have not formally threatened to force any of the EuroLog Affiliates into insolvency proceedings if the IPO Fees are not paid. The Committee's position is naïve. First, the Committee seems to be suggesting that just because the EuroLog Affiliates are or were the IPO Professionals' clients, the IPO Professionals would not seek to exercise the same remedies to be paid that any other creditor would exercise. Second, if the IPO Fees are not paid certain EuroLog Affiliates may be required to file insolvency proceedings pursuant to local law irrespective of whether the IPO Professionals force them into such proceedings. The mere risk that any of the EuroLog Affiliates would be forced into a costly insolvency proceeding is sufficient justification for advancing the risk-free funding requested in the Motion.

C. Section 503(c)(3) Does Not Supply the Applicable Legal Standard

The Committee suggests that the Court should analyze the proposed funding under section 503 of the Bankruptcy Code (which governs the allowance of administrative claims),

rather than section 363 (which governs business transactions such as the one the Debtors are seeking to conduct). This makes no sense. As noted above, section 363 authorizes a debtor to engage in ordinary course transactions without court approval and to engage in transactions that are outside of the ordinary course of business where they are supported by business judgment. *See* 11 U.S.C. § 363; s*ee also, e.g.*, *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1071 (2d Cir. 1983). Section 503(c)(3) prohibits "transfers or obligations that are outside the ordinary course of business and not justified by the facts and circumstances of the case . . . ." Section 503(c)(3) is just the other side of section 363's coin; operating to prohibit transactions that are not authorized under section 363.

In any event, the standards for determining whether a proposed transaction should be allowed are the same under both sections. *See, e.g.*, *In re Borders Group, Inc*., 453 B.R. 459, 473-74 (Bankr. S.D.N.Y. 2011) ("[T]he 'facts and circumstances' language of section 503(c)(3) creates a standard no different than the business judgment standard under section 363(b).") (citing *In re Dana Corp*., 358 B.R. 567, 576 (Bankr. S.D.N.Y. 2006)); *see also Mesa Air Group*, 2010 WL 3810899, at *4 (Bankr. S.D.N.Y. Sep. 24, 2010) (holding that payments were authorized under section 503(c)(3) because they were within the "sound business judgment" of the debtors); *Global Home Prods., LLC*, 369 B.R. 778, 786 (Bankr. D. Del. 2007) (evaluating an incentive plan under the business judgment standard of section 363); *In re Nobex Corp*., 2006 WL 4063024, at *4 (Bankr. D. Del. Jan. 19, 2006) (same).

Apparently, the Committee is seeking to have the Court read a more stringent standard into section 503(c)(3) and to have the Court apply that standard here as if the Debtors are seeking approval of administrative expenses (which they are not). According to the Committee, for a transaction outside of the ordinary course of business to be approved, the movant must

demonstrate a concrete, direct benefit to the estate. *See* Obj. ¶¶ 23-24. The only case cited by the Committee that supports this proposition is *In re Pilgrim's Pride Corp.*, 401 B.R. 229, 236-37 (Bankr. N.D. Tex. 2009). Courts in the Second Circuit have consistently rejected the more stringent standard applied in *Pilgrim's Pride*. *See, e.g.*, *In re Velo Holdings Inc*., 472 B.R. 201, 212-13 (Bankr. S.D.N.Y. 2012) (rejecting the standard applied in *Pilgrim's Pride*); *In re Borders Group, Inc*, 453 B.R. at 474 (same); *see also Pilgrim's Pride*, 401 B.R. at 236 (disagreeing with *In re Dana Corp.*, 358 B.R. 567 (Bankr. S.D.N.Y. 2006), which it recognized as applying the business judgment standard to section 503(c)(3)).

Even assuming that the Debtors had to show that the services rendered by the IPO Professionals provided a tangible benefit to the Debtors' estates (which they do not), the services rendered clearly inured to the benefit of the Debtors' estates. The Committee "does not dispute that the services rendered by the IPO Processionals have value…." Obj. ¶ 23. Yet, the Committee makes the almost laughable argument that the value inured only to the EuroLog Affiliates and not to their ultimate equity owners—the Debtors. By providing the Debtors with the opportunity to monetize the EuroLog Assets through an IPO, the EuroLog Professionals provided a substantial value to the Debtors' estates.

WHEREFORE, the Debtors respectfully request that the Court enter an order, substantially in the form annexed to the Motion as Exhibit A, confirming the Debtors' ability to advance sufficient funds to the EuroLog Affiliates to enable them to pay the IPO Fees, and granting the Debtors such other and further relief as is just and proper.

Dated: New York, New York
March 13, 2013

Respectfully submitted,

/s/ Craig H. Millet

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ATTORNEYS FOR THE DEBTORS AND DEBTORS IN POSSESSION

EXHIBIT A

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 12-11076(SHL)

4 - x

5 In the Matter of:

6

7 ARCAPITA BANK B.S.C.(C), ET AL.,

8

9 Debtors.

10

11 - x

12

13 U.S. Bankruptcy Court

14 One Bowling Green

15 New York, New York

16

17 August 16, 2012

18 2:13 PM

19

20 B E F O R E :

21 HON SEAN H. LANE

22 U.S. BANKRUPTCY JUDGE

23

24

25

1 Hearing re: Doc. # 351 Motion to File Under Seal Debtors
2 Motion for Order Authorizing the Debtors to File Unredacted
3 EuroLog IPO Term Sheets Under Seal
4
5 Hearing re: Doc. #350 Motion to Authorize Debtors Motion
6 for an Order Pursuant to Sections 105(a) and 363(b) of the
7 Bankruptcy Code Authorizing the Debtors to Launch the
8 EuroLog IPO
9
10 Hearing re: Doc. #365 Debtor's Motion For Authorization for
11 Arcapita to Fund Lusail Joint Venture Lease Payment
12
13 Hearing re: Doc. #377 Motion to Authorize - Debtors Motion
14 for Order Confirming the Debtors Authority to Pay Certain
15 Transaction Expenses Incurred in Connection With the EuroLog
16 Initial Public Offering (related document(s) 351, 350)
17
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25 Transcribed by: Jamie Gallagher

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1 P R O C E E D I N G S

2 THE COURT: Good afternoon. Please be seated.

3 All right, we're here this afternoon for Arcapita Bank.

4 Good afternoon.

5 MR. ROSENTHAL: Good afternoon, Your Honor.

6 Michael Rosenthal with Craig Millet and Josh Weisser on

7 behalf of the Arcapita debtors. Also here, Your Honor, are

8 some various representatives of the IPO deal team for

9 Arcapita and several Linklater's lawyers.

10 THE COURT: All right. Begin appearances from

11 everybody else who intends to speak.

12 MR. DUNN: Good afternoon, Your Honor. Dennis

13 Dunn from Milbank, Tweed, Hadley & McCloy on behalf of the

14 official committee of unsecured creditors. And I'm here

15 with my partner, Evan Fleck.

16 MR. GREER: Good afternoon, Your Honor. Brian

17 Greer of Dechert LLP for Standard Chartered.

18 MR. ROSENTHAL: Your Honor, I'd like to start with

19 two thank you's and an apology.

20 The first thank you is to Mr. Millet who held down

21 the fort at last -- at the last hearing and he tells me that

22 I wasn't missed a bit.

23 (Laughter)

24 THE COURT: I didn't say that but I think

25 everything went exceedingly smoothly.

1 MR. ROSENTHAL: Second, Your Honor, thanks for
2 scheduling this hearing. We know it's not an omnibus
3 hearing date. These are very important matters that we need
4 to get resolved today.
5 THE COURT: Well, you had given me a preview that
6 there were certain deals and certain assets that were going
7 to require special treatment and decisions as to how to deal
8 with them, and that that was -- that was coming, so I had
9 gotten a preview that we were going to end up needing to
10 chat about some of these.
11 MR. ROSENTHAL: Okay, now the apology. You know,
12 we are -- we're very sorry that we cannot give you something
13 meaty to rule on and have argument about.
14 THE COURT: Well, I -- I have plenty of other
15 things that will keep me busy, so no apology required.
16 MR. ROSENTHAL: Yeah. I'm happy to report, Your
17 Honor, that as a result of the hard work of everybody in
18 this room, we have built a consensus and we're here to get
19 today once again on an uncontested basis and --
20 THE COURT: Well, I -- you know, folks call
21 chambers to let us know that. I appreciate the heads up
22 because it allowed me to read all the papers in a very
23 different light, but as I was reading the papers before I
24 knew that, I was struck by that the parties are obviously in
25 the best position to figure out the appropriate way to

1 resolve this kind of dispute. So, I'm very happy to hear

2 that you reached that conclusion.

3 MR. ROSENTHAL: Okay. Can I give you just a brief

4 update about the case?

5 THE COURT: Sure.

6 MR. ROSENTHAL: One matter that will be coming to

7 your attention is a matter involving the Cayman protocol.

8 The JPL's and the debtors entered into a procedural protocol

9 regarding the Cayman proceeding and it has some impact on --

10 on this proceeding. It's procedural -- it was required by

11 the Cayman order appointing the JPL's.

12 Yesterday the JPL's filed that -- that protocol

13 with a -- an -- you know, an approval request in the Cayman

14 Court, and we intend to file a motion in this Court for

15 approval of that. So that will be up, I believe it will be

16 up on the September 5 --

17 THE COURT: All right.

18 MR. ROSENTHAL: September 5 hearing.

19 We continue to work with the JPL's on a settlement

20 between the AIHL estate and the Arcapita Bank estate. We're

21 not there yet, but we're getting close, Your Honor. We've

22 involved the committee. I can't tell you we're going to

23 have a fully consensual deal, but in any event, I want the

24 Court to know that that's coming down the pipe.

25 We have -- as you know, we had committed to

1 provide valuation information, business plan information to
2 the committee as part of the exclusivity motions. KPMG was
3 doing the various valuation reports on the debtors'
4 principal assets.
5 I'm happy to report that all of the valuation
6 reports have been made available and uploaded to the data
7 room, with the exception of one which should be uploaded
8 today. And discussions have begun -- follow-up discussions
9 have begun between KPMG, the company, and the financial
10 advisors for the -- the various interested parties. And for
11 this purpose, Your Honor, it's the committee advisors,
12 Standard Chartered and the JPL's, that we're trying to bring
13 along. They are the ones who -- the only ones who've been,
14 you know, active -- active in the case.
15 There's still a lot of information to be provided
16 and a lot of work between -- between the committee, the
17 JPL's, Standard Chartered, and the debtors, and the various
18 teams that the debtors and our professional advisors to make
19 sure that everybody understands the KPMG report.
20 We still expect to be able to circulate a business
21 plan by the end of August, which is something that we had
22 mentioned to the Court. And this would be followed by
23 discussions in earnest on the terms of the plan.
24 We had previously talked about the DIP. We have
25 initiated a rigorous DIP marketing effort and have received

1 several proposals. Our current time table is to present the
2 financing to the Court at the October 2nd hearing.
3 And finally, we continue to be careful about the
4 use of our cash. Our cash position as of mid-August is
5 about $71 million. We are tracking better than budget by
6 about $32.5 million.
7 So, let's get down to what's -- what's on the
8 agenda. First matter, Your Honor, is the Lusail funding.
9 This Court knows this is the second motion we filed with
10 respect to authorizing the debtors to fund obligations
11 related to the Lusail Joint Venture.
12 As you will recall, the Lusail Joint Venture owns
13 a large, valuable piece of property in Lusail Qatar, which
14 is -- just happens to be adjacent to where the World Cup
15 Stadium for the 2022 World Cup will be.
16 Earlier in the case, we filed a motion for
17 approval of -- to authorize us to pay about $30.4 million to
18 make an underlying land payment. We presented that to the
19 Court ultimately on an unopposed basis and the Court
20 approved the order and that payment was made.
21 There's now a $10 million lease payment due on
22 September 5, and that's the subject of the second motion,
23 the motion up today. All of the parties have agreed this
24 payment should be made. It will ensure that the debtors
25 continue to receive the benefit of the repurchase option for

1 the Lusail land.

2 And just to -- I'm sure you may -- you've read it

3 in the papers, Your Honor, but as the Court will recall,

4 this was a form of Islamic financing. The property was sold

5 to Qatar Islamic Bank. In return there was a lease -- there

6 was a lease back, it was actually the shares that were sold.

7 The shares were leased back to us. The lease had

8 obligations, one of which is payment of this $10 million on

9 a semi-annual basis, and there was also a repurchase option.

10 And it's the repurchase option that allows us to protect the

11 underlying value of the land and preserve it for the benefit

12 of the estate.

13 Your Honor, payment of this semi-annual payment is

14 necessary to prevent a default in the lease, and we would

15 ask the Court to approve the debtors making this $10 million

16 payment on the same terms as were approved in the initial

17 order.

18 THE COURT: All right. Anyone want to be heard?

19 MR. DUNN: Your Honor, if I may be heard --

20 THE COURT: Sure.

21 MR. DUNN: -- just briefly.

22 For the record, Dennis Dunn from Milbank Tweed on

23 behalf of the creditors' committee.

24 The committee supports the payment today. I

25 wanted to note a couple of things for the Court. You'll

1 recall that last time we discussed Lusail, it was critically
2 important that the committee had comfort that the call
3 right, the ability to buy back the underlying property, was
4 still viable. And we had a -- an admission and a
5 recognition by QIB, the bank, that they -- that there was no
6 default at the time. They brought down that no default
7 statement as part of this deal, as well, recognizing that
8 the parties reserve all of their respective litigation and
9 other rights, including as to the propriety of the sale, the
10 appropriate characterization of the transaction, all of
11 which I think are -- are properly the subject of discussions
12 when we get into September on the plan and maybe they'll be
13 resolved and we all hope that we can reach a settlement as
14 part of the plan.
15 And the committee ultimately concluded, based on
16 its own financial advisor's review, that the potential value
17 of this property justified today's payment.
18 THE COURT: All right. Anyone else?
19 (Pause)
20 THE COURT: All right. I'm going to grant the
21 debtors' motion. I believe it's appropriate under Section
22 365 and 363, and given the value -- potential value here and
23 the way the repurchase option works.
24 MR. ROSENTHAL: Thank you very much, Your Honor.
25 The next matter, Your Honor, relates to -- we have

1 several matters, obviously relating to the EuroLog IPO. I
2 would like to take up the approval motion itself.
3 Your Honor, by the IPO -- EuroLog IPO motion, we
4 seek to obtain authority to engage in what will be the
5 single largest monetization transaction that has occurred or
6 will occur at least in the near future with respect to these
7 debtors. We seek authority to enter into this transaction
8 pursuant to Section 105 and 363 of the Bankruptcy Code.
9 In the EuroLog IPO, the debtors are offering for
10 sale their interest in a variety of warehousing assets
11 located in several countries in Europe. These assets are
12 intended to be transferred to a new entity that we've called
13 Lisco(ph) in the motion that will be listed on the London
14 Stock Exchange.
15 The debtors believe that the EuroLog IPO maximizes
16 the value of these assets. As the listed company, Lisco
17 will be a leading pan-European provider of warehouse
18 facilities from -- from the get-go.
19 Notably, all of the entities that are actually
20 sellers or transferees -- transferors in the IPO are non-
21 debtor subsidiaries. They're not -- they're not debtors.
22 We're seeking Court approval of the transaction,
23 Your Honor, even though these are non-debtors because
24 debtors, most notably AIHL will be asked to sign various
25 agreements, including the underwriting agreement to make

1 certain representations and warranties to give certain
2 indemnities. That's typical in an IPO transaction. We are
3 considered the sponsor of the properties that are being --
4 that are being sold.
5 We did receive, Your Honor, one objection to the
6 motion from Standard Chartered Bank that's been resolved.
7 And I'm going to talk about that. And a statement with
8 respect to the motion from the committee and it -- I'm going
9 to talk about that as well.
10 Your Honor, as a result of discussions with
11 Standard Chartered, we believe that Standard Chartered will
12 either withdraw, or has withdrawn its objection, or
13 certainly will not pursue it and it is -- it is in agreement
14 with the order to be entered today.
15 The committee statement was focused to some extent
16 on the IPO transaction. More importantly, I think the
17 committee's primary focus was on having sufficient
18 information to evaluate the IPO and wanting to be involved
19 in the process of the final documentation with respect to
20 the IPO. And we're prepared to address that and I'll talk
21 about that again.
22 THE JPL's are -- the joint provisional liquidators
23 are fully supportive of the order that the Court's asked to
24 enter today, as is the United States' Trustee.
25 Your Honor, the way we've set up this motion is

1 rather unique but we think it's -- it's absolutely necessary
2 in the context of the IPO. We're asking the Court to
3 approve -- authorize the debtors to enter into the IPO based
4 on the term sheets. Now, those term sheets have been
5 heavily negotiated, contain the principal economic terms of
6 the transaction. The committee and the joint provisional
7 liquidators, and to some extent Standard Chartered have been
8 involved in the negotiation of the term sheets. So, they've
9 had -- they've had involvement as well.
10 But as you know, you don't close a transaction on
11 term sheets. So, you close a transaction on definitive
12 documentation. For timing reasons, we believe and what we
13 have asked for in this motion is that the Court should
14 approve the transaction based on the term sheets, and then
15 leave the debtors with the interested parties, who I would
16 define as the committee, the joint provisional liquidators,
17 and Standard Chartered, to negotiate with the underwriters
18 the terms of the definitive documents.
19 Now, obviously the debtors are the ones doing the
20 negotiations, but what we have provided in the order is that
21 only if the underlying final documentation is acceptable to
22 Standard Chartered, the Joint Provisional Liquidators, and
23 the committee, can we go forward without coming back to this
24 Court. So, that is the safeguard, we believe, that protects
25 the interest of -- of these interested parties. And at the

1 same time, meets the time table that is required for an IPO.
2 When I say meets the time table, you know, this
3 proceeds very quickly. You often times have a very narrow
4 window for the marketing of an IPO. And it's also often the
5 case that the final documents aren't completed until shortly
6 -- shortly before the window -- you know, shortly before you
7 -- you go to market. So, this puts us in a position where
8 we have Court authority, we have the Court process out of
9 the way, if you will, and then we have a process that
10 doesn't require Court involvement unless we hit a glitch.
11 And that's where we are.
12 Now, based on the way we've set this up, Your
13 Honor, we fully understand that if we want to avoid coming
14 back to Court, we have to have sign-off from all the
15 interested parties on the documents. And we also understand
16 that in order to do that, we have to provide them with
17 enough information to make the decision and evaluate these
18 documents.
19 So, what I can say about that is the IPO is a very
20 complex transaction. The companies that are the subject of
21 it are complex. The distribution of proceeds is complex.
22 And we understand that -- that we have to share sufficient
23 information with the interested parties and we are, in fact,
24 committed to do that.
25 We acknowledge that they have, in various

1 occasions, made requests for information from us. We are
2 setting up a process so that we can consolidate all of those
3 information requests and respond to them in a timely manner,
4 recognizing that what keeps us on track is that we want to
5 do this in the most efficient way, and we want to do it
6 without having to come back to Court.
7 So, if I can hand up the -- a red-line of the
8 order, I can walk you through the changes that we have made.
9 THE COURT: That would be helpful. Thank you.
10 MR. ROSENTHAL: All right, Your Honor.
11 If you'd look at the top, paragraph 2 on page 2,
12 we have clarified that all of the debtors are authorized to
13 execute the documents needed to consummate the IPO. We had
14 -- had AIHL previously, but it may be that -- that
15 authorizations will be required from others of the -- of the
16 debtors.
17 Then if you go down to paragraph 4, I guess
18 paragraph 4, page 3, we have added in Standard Chartered as
19 a party whose approval would be necessary for the -- for the
20 documents to avoid a further hearing. We've provided that
21 if we cannot get the approval of all of the interested
22 parties, we can come back to Court, but we have to do it
23 upon at least seven business days' notice, and an
24 opportunity to be heard, obviously.
25 And then we've added a -- a lengthy sentence that

1 starts with for the avoidance of doubt. And this -- this
2 does nothing more than clarify what I just described to the
3 Court, that if everyone agrees with the provisions of the
4 IPO documentation, we can enter into it without any further
5 order of Court. If the interested parties do not agree, we
6 cannot enter into the documents or consummate the
7 transactions without coming back to the Court.
8 And then the final sentence, Your Honor, was added
9 at the request of Standard Chartered to confirm what we had
10 intended all along. Frankly, that we are -- everyone is
11 reserving the rights with respect to priority of proceeds,
12 pledge of collateral, and the like.
13 As you know, Standard Chartered is our only
14 secured creditor and has a pledge of some interest that --
15 that are involved in this transaction.
16 THE COURT: Yeah, I -- I saw that in their
17 objection.
18 MR. ROSENTHAL: Yes.
19 And then the -- the final -- the final sentence
20 that we added, again, something that we emphasized in my
21 opening that we will cooperate with the interested parties
22 regarding the IPO and provide them with the documentation
23 that -- and information they need in a timely manner.
24 Those are the changes, Your Honor. With those, we
25 -- as I stated, all of the objections we believe have been -

1 - have been resolved and we would ask the Court to approve
2 the IPO. We think it is a -- is a valuable transaction for
3 these estates.
4 THE COURT: All right. Anyone want to be heard?
5 MR. DUNN: Your Honor, briefly. Dennis Dunn for
6 the committee again.
7 We understand the need for the authority today.
8 We support it. We support the debtors' attempt to monetize
9 this asset at this time.
10 I think, in essence, as Mr. Rosenthal was saying,
11 basically the nature of IPO's is that the market window to
12 close may be of a short duration and we may all -- all the
13 reviewing parties may be in agreement to kind of lock down a
14 price and we need to do so quickly. And so that's the
15 reason to come to Your Honor in advance. But if we are not
16 satisfied with the price or the documentation, we'll be back
17 before Your Honor on an expedited basis, not less than 7
18 days.
19 Quickly, we did detail in our pleadings the need
20 to receive and review certain information in order to be in
21 a position to make an educated decision. The debtors have
22 not disputed the propriety or the relevance of our request.
23 We expect that the information will be forthcoming shortly
24 because I think we all share the objective that we want to
25 avoid a situation where we're back in front of Your Honor,

1 solely due to the lack of sufficient transparency into the
2 underlying data.
3 And with that, Your Honor, we support entering the
4 motion.
5 THE COURT: All right.
6 MR. GREER: Your Honor, Brian Greer of Dechert LLP
7 for Standard Chartered Bank.
8 We are supportive of the debtors' motion at this
9 point in time with the safeguards that have been put in
10 place in the order. I'll second the committee statement
11 that, you know, we also did highlight the various issues of
12 concern for us and we anticipate working in good faith with
13 the debtors, and if we cannot reach agreement, we'll be back
14 before Your Honor.
15 THE COURT: All right. Thank you. Anyone else?
16 (Pause)
17 THE COURT: All right. I'm happy to grant the
18 motion consistent with the agreement that the parties have
19 worked out and Section 363(b) and 105(a) of the Code, it's
20 clear that there's a need for authority to -- to seek the
21 opportunity to monetize these assets through this IPO and it
22 sounds like everyone agrees that it's appropriate to use
23 these term sheets as a basis subject to further agreement on
24 the final documentation by the interested parties as defined
25 in the papers, and also consistent with the needs of

1 transparency on that documentation, as well as on matters
2 such as price.
3 MR. ROSENTHAL: Yes, Your Honor, and you know the
4 -- with respect to Mr. Dunn's statement, I mean we -- we --
5 obviously as we said in our -- in our pleadings with the
6 Court, it's in our interest to make sure that everybody --
7 everybody gets sign off. You know, to the extent that there
8 are -- there are price discussions, those will be
9 discussions that take place, not at the final minute because
10 that's not the way -- we can't have a committee negotiating
11 price, but we will -- we will have discussions with the
12 committee in advance so we know -- we know the minimum price
13 that we're -- that all of us would be prepared to sell these
14 assets.
15 Your Honor, the next motion is the -- the motion
16 to seal. We've asked for very limited relief. I know the
17 Court's position on this, but we've asked for very limited
18 relief. One is to seal the indemnity provisions of the term
19 sheets. And the second is the names of the non-debtor
20 entities.
21 And I -- our basis for this, Your Honor, is that
22 it constitutes confidential commercial information. Let's
23 talk about the indemnity provisions. They were heavily
24 negotiated. And both the banks and the debtors -- the
25 underwriters and the debtors, have an interest in not making

1 those public. They may -- that we want to avoid any
2 precedential impact from something like that.
3 This is -- this is confidential commercial
4 information. And the way we were able to negotiate these
5 provisions was by agreeing to -- to keep them confidential.
6 The interested parties, as I defined them, the United
7 States' Trustee, the Court, have all been the recipient of
8 the information on the indemnity provisions.
9 To the identity of the non-debtor entities,
10 similarly, this is a pre-IPO process. And what we do not
11 want to do is undermine marketing efforts with respect to
12 the -- the entities that will be the subject of the IPO. We
13 don't want to give third parties an opportunity to lure
14 customers away. We don't want to give contract
15 counterparties the opportunity to exercise leverage because
16 of the proposed transaction. We don't want to give
17 competitors the opportunity to poach our employees. And it
18 is for that reason that we, at this point, believe that the
19 identity of the non-debtor -- non-debtor entities should be
20 sealed as well.
21 As we said in our motion, anyone who can
22 demonstrate a need to have access to this information has an
23 ability to come before the Court. The four parties who have
24 appeared in this case -- the only four parties that have
25 really appeared in this case since the first hearing, have

1 access to this information. We do not think there are any
2 -- we believe that there are commercial advantages to
3 sealing this information and that no party would be harmed.
4 We ask the Court to enter the order.
5 THE COURT: All right. Anyone want to be heard in
6 connection with this motion?
7 (Pause)
8 THE COURT: All right. I will grant that motion.
9 I think we've laid -- laid out a basis for treating the
10 subject information as confidential business information and
11 there's no objection to the treatment of that information as
12 such.
13 MR. ROSENTHAL: Thank you, Your Honor. Now the
14 final matter relates to the application that was filed with
15 respect to Linklater's fees, and I'd like to turn that over
16 to my partner, Mr. Millet.
17 MR. MILLET: Good afternoon again, Your Honor.
18 Craig Millet on behalf of the debtors.
19 Now that we have an IPO that is ready to go down
20 the tracks, we need our IPO lawyers to drive that train and
21 get it done. Without the engineers, we really wouldn't have
22 much of a prospect of delivering the IPO. That led us to
23 the dispute with respect to the Linklater's fees. When I
24 was here last time before the Court, I explained that there
25 was a budget item in our last budget of $2.35 million.

1 There was in the nature of (indiscernible - 00:25:42) --
2 THE COURT: Excuse me.
3 MR. MILLET: Bless you, Your Honor.
4 THE COURT: Thank you.
5 MR. MILLET: -- that was to be used as deal
6 funding, for the debtors to provide funds to the EuroLog
7 non-debtors, as they're phrased in the motion, which then in
8 turn would be used to pay the expenses of the IPO, and in
9 this specific case it was to be the Linklater's fees.
10 We, of course -- we had the dispute that we
11 discussed at the last hearing that led to this motion. The
12 budget item at that time was $2.35 million that was to be
13 funded down to the EuroLog non-debtors. Through
14 considerable discussions and the very hard work of
15 Mr. Fleck, who aided us in these discussions with his
16 constituents, we've reached an agreement as to how the fees
17 for Linklater should be handled, and I'll just briefly go
18 through those terms if I may. We will have an order for the
19 Court to consider at the end of all this, of course.
20 Right now, there is approximately $4.7 million in
21 fees and expenses that are owed Linklater for the work done
22 thus far. And whether -- and we had requested permission to
23 pay about 2.35 of that. Instead of doing that, the terms
24 are now going to be that there will be a payment upon entry
25 of the order of 1.5 million to be applied against the fees

1 due for work performed through August 1 of this year.
2 Now, if the IPO is successful, of course, all fees
3 are paid through the proceeds of the IPO. The further fees
4 of Linklater will be paid using IPO proceeds and this $1.5
5 million will be reimbursed to the debtor.
6 If we get into the situation, though, where the
7 IPO is not successful and aborts, then we have the situation
8 where there won't be any IPO proceeds. So, what do we do
9 then? The parties have agreed that in addition to the $1.5
10 million payment I just mentioned to get paid now, that upon
11 the IPO abort, which is defined in the order as either the
12 IPO being decided it just can't go forward or November 12th,
13 the sooner of those two events, that an additional $1.5
14 million will then be paid. That again is applied to the
15 outstanding fees.
16 Now with respect to fees, the -- the third
17 component -- with respect to fees that are incurred from
18 August 1 going forward, to the extent those fees exceed $1
19 million, then to the part that's in excess of $1 million,
20 50% of that excess will be added to that last payment.
21 So, for example, if the fees proved to be $1.5
22 million for the going forward period, we had $500,000 over
23 the 1 million, 50% of that, $250,000 that would be added to
24 the $1.5 million piece.
25 And then that's going to obviously leave us with a

1 -- an amount due at the -- at the end. The parties have
2 agreed that they would address that at that time and that
3 the JPL's, as well as the committee and Linklater, would
4 engage in good faith negotiations to discuss how much of
5 that remaining part should be funded such that Linklater can
6 be reasonably expect to be paid, what would be paid normally
7 or typically in an aborted IPO situation of this nature, and
8 also that would take into account and the discounts and such
9 that are already in the engagement letter would still apply.
10 So, in other words, we're not going back and adding those
11 back in. They would still apply. And if the parties cannot
12 reach agreement, then the parties can bring it before the
13 Court and the Court could seek resolution.
14 Hopefully if the track record we've established so
15 far works, we may have to have a hearing set to get us
16 there, but we get things worked out.
17 And with that then, we've agreed to resolve this
18 matter at this point. We have quickly here this morning
19 exchanged forms of an order. The JPL has agreed to the form
20 of the order. I talked to Mr. Morrissey(ph), he's fine. He
21 has no objection to what's going on here. And we did get a
22 couple of comments back from the committee when we were on
23 the way here. We've looked at those quickly. We don't see
24 any problem with those, so we may have a tiny amount of
25 word-smithing to do, but the concepts are all -- all agreed

1 upon.

2 So with that, we believe that we'll -- we have an

3 agreement we'll -- it will (indiscernible - 00:29:29) an

4 order shortly.

5 THE COURT: All right. Anyone want to be heard as

6 to this motion?

7 MR. DUNN: Just to say, Your Honor, that that's

8 accurate. I think all of our hermeneutical issues have been

9 resolved for the moment.

10 THE COURT: All right. That -- that's good to

11 hear. You hate to have any of those still hanging around.

12 All right. With that said, I'm happy to grant

13 that motion. It sounds like an eminently sensible way to

14 proceed, protecting everybody's rights, but also making sure

15 that the path forward can continue.

16 So, what I will do is if you would send me an

17 electronic copy of all of the orders. It sounds like I may

18 have to wait a little bit for that last one, but that's --

19 that's fine. You can either send the first -- first couple

20 first, and then send the last one, or you can wait and send

21 them all together, whatever works for you.

22 Anything else we need to chat about this

23 afternoon?

24 UNIDENTIFIED SPEAKER: Nothing else, Your Honor.

25 Thank you.

1 THE COURT: All right. Thank you very much and
2 again I appreciate everybody's efforts to work these --
3 these things out as to these transactions which are really
4 the central part of the case.
5 Thank you.
6 UNIDENTIFIED SPEAKER: Thank you, Your Honor.
7 (Whereupon these proceedings were concluded at 2:44 PM)
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1 I N D E X

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3 RULINGS

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21	Pay Certain Transaction Expenses Incurred		
22	in Connection With the EuroLog Initial		
23	Public Offering		
24			
25			

1 C E R T I F I C A T I O N

2

3 I, Jamie Gallagher, certify that the foregoing transcript is

4 a true and accurate record of the proceedings.

5

6 Jamie

7 Gallagher

Digitally signed by Jamie Gallagher
DN: cn=Jamie Gallagher, o, ou, email=digital1@veritext.com, c=US
Date: 2012.08.20 14:34:56 -04'00'

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Veritext

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200 Old Country Road

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Suite 580

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Mineola, NY 11501

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Date: August 20, 2012

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EXHIBIT B

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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**

REPLY DECLARATION OF MATTHEW ELLIOTT IN SUPPORT OF DEBTORS' MOTION FOR AN ORDER CONFIRMING THE DEBTORS' AUTHORITY TO FUND NON-DEBTOR EUROLOG AFFILIATES

Pursuant to 28 U.S.C. § 1746, I, Matthew Elliott, hereby declare as follows:

1. I am a partner in the law firm of Linklaters LLP ("***Linklaters***"), which maintains an office for the practice of law at, among other places, One Silk Street, London, EC2Y 8HQ, United Kingdom. I am a solicitor of the Senior Courts of England and Wales and am duly authorized to practice as such. I submit this Reply Declaration in further support of the motion of Arcapita Bank B.S.C.(c) and certain of its subsidiaries and affiliates, as debtors and debtors in possession (collectively, the "***Debtors***," and each a "***Debtor***"), for an order confirming the Debtors' authority to fund certain non-Debtor affiliates with funds (the "***Non-Debtor EuroLog Affiliates***") to pay certain professional fees incurred in connection with the EuroLog IPO (the "***Motion***").[1]

2. In its objection to the Motion (the "***Objection***"), the Official Committee of Unsecured Creditors (the "***Committee***") suggests that the 30% discount to which I refer in paragraph 9 of my original Declaration submitted in connection with the Debtors' Motion "does

1 Capitalised terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Motion.

not reflect any concessions by Linklaters on account of the failed IPO from the minimum discount mandated by the Linklaters Fee Order." Objection at 19. However, as the Committee is well aware, the additional 15% discount was incorporated into the Linklaters Fee Order *precisely because* that was the agreed-upon discount, as set forth in the Linklaters Engagement Letter, in the event the EuroLog IPO was terminated. *See* Motion Exhibit B, Declaration of Matthew Elliott, at Exhibit 3, p. 4 (providing for an additional 15% discount "to reflect the fact that the Transaction has been aborted"). The Committee offers no reason, and there is none, for applying a further discount above and beyond a 30% discount to Linklaters' regular fees.

3. As set forth in my Declaration accompanying the Motion, the EuroLog IPO was far from typical. Thus, while there is no standard "market" rate of recovery for legal fees incurred in connection with a terminated transaction of this type, any discount to be applied customarily would be adjusted for factors relevant to the proposed transaction, including the specific and unique complexities of the proposed transaction and the nature and extent of the work required. Indeed, the Linklaters Fees Order contemplates that such factors be considered in arriving at the amount of Linklaters' Final Payment under the Order.

4. In my opinion and based upon my experience, in light of the extensive effort required to launch the EuroLog IPO, the above-referenced discount is fair and reasonable, and is consistent with Linklaters' expected rate of recovery on its hourly rates for similar services rendered in connection with aborted transactions.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 13th day of March, 2013.

/s/ Matthew Elliott
Matthew Elliot