Hearing Date and Time: June 26, 2013 at 2:00 p.m. (prevailing U.S. Eastern Time)
Objection Date and Time: June 19, 2013 at 4:00 p.m. (prevailing U.S. Eastern Time)

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

NOTICE OF HEARING ON MOTION OF OFFICIAL COMMITTEE OF UNSECURED CREDITORS FOR ENTRY OF ORDER UNDER 11 U.S.C. §§ 1103(c) AND 1109(b) GRANTING LEAVE, STANDING AND AUTHORITY TO PROSECUTE TURNOVER AND AVOIDANCE CLAIMS

PLEASE TAKE NOTICE that a hearing (the "Hearing") to consider the Motion of the Official Committee of Unsecured Creditors for Entry of an Order Under 11 U.S.C. §§ 1103(c) and 1109(b) Granting Leave, Standing and Authority to Prosecute Turnover and Avoidance Claims (the "Motion") will take place before the Honorable Sean H. Lane, United States Bankruptcy Judge, in Room 701 of the United States Bankruptcy Court, One Bowling

Green, New York, New York 10004-1408 (the "Bankruptcy Court") on **June 26, 2013 at 2:00 p.m. (prevailing U.S. Eastern Time)**, or as soon thereafter as counsel may be heard.

PLEASE TAKE FURTHER NOTICE that any responses or objections to the Motion (the "Objections") shall be filed electronically with the Court on the docket of *In re Arcapita Bank B.S.C.(c), et al.*, Ch. 11 Case No. 12-11076 (SHL) pursuant to the Case Management Procedures approved by this Court[1] and the Court's General Order M-399 (available at http://nysb.uscourts.gov/orders/orders2.html) by registered users of the Court's case filing system and by all other parties in interest on a 3.5 inch disk, preferably in portable document format, Microsoft Word, or any other Windows-based word processing format (with a hard copy delivered directly to Chambers), in accordance with the customary practices of the Bankruptcy Court and General Order M-399, to the extent applicable, and served in accordance with General Order M-399 on (i) counsel for the Debtors, Gibson, Dunn & Crutcher LLP, 200 Park Avenue, New York, New York 10166 (Attn: Michael A. Rosenthal, Esq., Craig H. Millet, Esq. and Matthew K. Kelsey, Esq.); (ii) the Office of the United States Trustee for the Southern District of New York, 33 Whitehall Street, 21st Floor, New York, New York 10004 (Attn: Richard Morrissey, Esq.); (iii) counsel for the Committee, Milbank, Tweed, Hadley & M^{c}Cloy LLP, 1 Chase Manhattan Plaza, New York, New York 10005 (Attn: Dennis F. Dunne, Esq., Evan R. Fleck, Esq. and Andrew M. Leblanc, Esq.); (iv) counsel for Goldman Sachs International, as proposed debtor in possession lender, Latham & Watkins LLP, 885 3rd Avenue, New York, New York 10022 (Attn: Mitchell Seider, Esq. and Adam Goldberg, Esq.); (v) counsel for Fortress Credit Corp., as current debtor in possession lender, Skadden, Arps, Slate, Meagher

[1] See *Order (A) Waiving the Requirement That Each Debtor File a List of Creditors and Equity Security Holders and Authorizing Maintenance of Consolidated List of Creditors in Lieu of a Matrix; (B) Authorizing Filing of a Consolidated List of Top 50 Unsecured Creditors; and (C) Approving Case Management Procedures* [Docket No. 21].

& Flom LLP, 4 Times Square, New York, New York 10036 (Attn: Kenneth S. Ziman, Esq.); (vi) counsel for Al Baraka Islamic Bank, SNR Denton US LLP, 1301 K Street, NW, Suite 600, East Tower, Washington, DC 20005 (Attn: Sam J. Alberts, Esq.); (vii) counsel for Bahrain Islamic Bank B.S.C., K&L Gates LLP, 599 Lexington Avenue, New York, NY 10022 (Attn: Jeffrey N. Rich, Esq.); (viii) counsel for Tadhamon Capital B.S.C., K&L Gates LLP, 599 Lexington Avenue, New York, NY 10022 (Attn: Jeffrey N. Rich, Esq.); and (ix) counsel for BNY Mellon Trustee Services Limited and Arcsukuk (2011-1) Limited, Reed Smith LLP, 599 Lexington Avenue, New York, NY 10022 (Attn. Michael J. Venditto, Esq.) so as to be received no later than **June 19, 2013 at 4:00 p.m. (prevailing U.S. Eastern Time)** (the "Objection Deadline").

PLEASE TAKE FURTHER NOTICE that if no Objections are timely filed and served with respect to the Motion, the Committee may, on or after the Objection Deadline, submit to the Bankruptcy Court an order substantially in the form of the proposed order annexed to the Motion, which order may be entered with no further notice or opportunity to be heard.

Dated: June 4, 2013
New York, New York

MILBANK, TWEED, HADLEY & M^{c}CLOY LLP

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UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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

MOTION OF OFFICIAL COMMITTEE OF UNSECURED CREDITORS FOR ENTRY OF ORDER UNDER 11 U.S.C. §§ 1103(c) AND 1109(b) GRANTING LEAVE, STANDING AND AUTHORITY TO PROSECUTE TURNOVER AND AVOIDANCE CLAIMS

The Official Committee of Unsecured Creditors (the "Committee") of Arcapita Bank B.S.C.(c) ("Arcapita") and each of its affiliated debtors in possession (collectively, the "Debtors") hereby submits this motion (this "Motion") requesting entry of an order in the form attached hereto as Exhibit A pursuant to sections 1103(c) and 1109(b) of title 11 of the United States Code (11 U.S.C. §§ 101-1532, as amended, the "Bankruptcy Code") granting the Committee leave, standing and authority to prosecute certain claims on behalf of the Debtors'

estates against (a) three banks – Al Baraka Islamic Bank ("Al Baraka"), Tadhamon Capital ("Tadhamon"), and Bahrain Islamic Bank ("BisB," together with Al Baraka and Tadhamon, the "Banks," and each individually, a "Bank"); and (b) Arcsukuk (2011-1) Limited (the "Arcsukuk Trustee") and BNY Mellon Corporate Trustee Services Limited ("BNYM," and together with the Arcsukuk Trustee, the "Arcsukuk Defendants").[1]

PRELIMINARY STATEMENT

1. The Committee seeks standing to prosecute three categories of claims against the Banks and the Arcsukuk Defendants. First, the Committee seeks authority to pursue claims (the "Placement Claims") against the Banks for, among other things, turnover of $33 million in proceeds that the Banks owe to Arcapita under certain prepetition short-term investment transactions (the "Placements"), pursuant to which Arcapita deposited funds with the Banks in exchange for a promised return. Second, the Committee seeks authority to pursue claims (the "Arcsukuk Claims") against the Arcsukuk Defendants to avoid a guarantee issued by Arcapita Investment Holdings Limited ("AIHL"), a subsidiary of Arcapita. Finally, the Committee seeks authority to pursue a claim (the "Preference Claim," and together with the Placement Claims and the Arcsukuk Claims, the "Claims") against the Arcsukuk Trustee with respect to transfers of cash from Arcapita to the Arcsukuk Trustee within the 90 days prior to the filing of the Debtors' chapter 11 petitions. The Debtors do not oppose the Committee's pursuit of the Claims.[2]

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[1] BNYM, which is a member of the Committee, has not participated in any Committee discussions regarding the Arcsukuk Claims.

[2] *See* Second Amended Disclosure Statement in Support of the First Amended Joint Plan of Reorganization of Arcapita Bank B.S.C.(c) and Related Debtors Under Chapter 11 of the Bankruptcy Code [Docket No. 1038] (the "Disclosure Statement") at 108 n. 39, 185 n. 48 (with respect to the Placement Claims and the Arcsukuk Claims).

2. The Committee should be granted standing to prosecute the Claims, because they are (i) colorable and (ii) in the best interests of the Debtors' estates and necessary and beneficial to the fair and efficient resolution of the Debtors' cases. First, the Claims are colorable in that the Placement Claims state a claim for turnover under section 542(b) of the Bankruptcy Code, the Arcsukuk Claims state a claim for constructive fraudulent transfer under section 548(a) of the Bankruptcy Code, and the Preference Claim states a claim to avoid preferential transfers under section 547(b) of the Bankruptcy Code. Second, the Claims are in the best interest of the estates and will benefit the chapter 11 cases because the potential value of the Claims far exceeds their likely costs. Indeed, the estates may recover more than $33 million on account of the Placement Claims, may reduce the estates' liabilities by up to $100 million in connection with the Arcsukuk Claims, and may recover more than $1.2 million on account of the Preference Claim. The costs that the Committee will likely incur in litigating the Claims are relatively minor by comparison.

3. For these reasons, the Court should grant the Motion and authorize the Committee to pursue the Claims on the Debtors' behalf.

JURISDICTION, VENUE AND STATUTORY PREDICATES

4. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory predicates for this Motion are §§ 1103(c) and 1109(b) of the Bankruptcy Code.

BACKGROUND

5. The Debtors filed petitions for relief under chapter 11 of the Bankruptcy Code on March 19, 2012 (the "Petition Date"),[3] and the U.S. Trustee thereafter appointed the Committee pursuant to section 1102 of the Bankruptcy Code. Since its appointment, the Committee, in accordance with its statutory duties, has investigated, among other things, causes of action that the Debtors may possess against third parties for the benefit of unsecured creditors. Through this investigation, the Committee has identified, among other things, potential causes of action relating to the Placements and the Arcsukuk transaction.

A. The Placements

6. As the Court is aware, on July 10, 2003, June 8, 2010, and March 15, 2012, respectively, Arcapita entered into separate investment agreements with Al Baraka, BisB, and Tadhamon (collectively, the "Investment Agreements"). Each Investment Agreement permitted the parties thereto to enter into individual placement agreements, pursuant to which Arcapita would deposit a certain amount of funds with a Bank (each, an "Investment Amount") in exchange for a promise by the Bank, acting as Arcapita's agent, to invest those funds and provide a fixed return or profit (the "Placement Maturity Proceeds") on an agreed upon payment date (each, a "Maturity Date").

7. Arcapita and the Banks entered into the following Placements just days before the Petition Date:

3 Falcon Gas Storage Company, Inc. filed a petition for relief under chapter 11 of the Bankruptcy Code on April 30, 2012.

Bank	Placed Funds	Investment Date	Maturity Date	Expected Return	**Funds Owed to Arcapita**
Al Baraka	$10,000,000	March 14, 2012	March 28, 2012	0.17% per annum	**$5,017,574**[4]
BisB	$10,000,000	March 14, 2012	March 29, 2012	0.55% per annum	**$10,002,292**
Tadhamon	$10,000,000	March 15, 2012	March 30, 2012	1.25% per annum	**$8,467,769**[5]
	$10,000,000	March 15, 2012	April 16, 2012	2% per annum	**$10,012,500**

The Placements are the basis for the actions against the Banks contemplated in this Motion.

8. As noted in the table in the preceding paragraph, each of the Placements matured in either March or April of 2012, resulting in over $40 million in Placement Maturity Proceeds being owed to Arcapita. The Banks did not remit the entirety of the proceeds owed to Arcapita on the applicable Maturity Dates. Indeed, although Al Baraka and Tadhamon have repaid a portion of the Placement Maturity Proceeds, the Banks continue to owe more than ***$33 million*** to Arcapita on account of the Placements.

9. On April 30, 2012, the Debtors delivered demand letters to the Banks, asking the Banks to remit the remaining Placement Maturity Proceeds and stating that their failure to do so violated various provisions of the Bankruptcy Code. In response, each Bank asserted that it was withholding the funds as an offset against claims that it purportedly held against Arcapita under other transactions. None of the Banks requested relief from the automatic stay to effect such an offset.

B. The Arcsukuk Transaction

10. The Debtors entered into a *murabaha* and *wakala* agreement dated as of September 7, 2011, among the Arcsukuk Trustee, Arcapita Investment Funding Limited, and

4 Al Baraka wired approximately $5 million to Arcapita on March 28, 2012 in partial satisfaction of the amount it originally owed upon maturity of this Placement.

5 This amount reflects a deduction for Tadhamon's partial repayment of the Placement obligation in December 2012.

BNYM, and various related documents (as amended, restated, supplemented and modified, the "2011 Arcsukuk Facility"), including a guarantee by AIHL in favor of the Arcsukuk Trustee and BNYM (the "AIHL Guarantee"). Arcapita and AIHL entered into the 2011 Arcsukuk Facility to satisfy their respective obligations under a predecessor facility (the "2010 Arcsukuk Facility," and together with the 2011 Arcsukuk Facility, the "Arcsukuk Facility"), which matured at the time that the 2011 Arcsukuk Facility closed.

11. The Arcsukuk Facility, in both its 2010 and 2011 incarnations, was comprised of a *shari'ah*-compliant bond issuance known as a *sukuk* and a *murabaha* loan facility. Both the *sukuk* and the *murabaha* were implemented through a special purpose entity created for such purposes called, in 2011, Arcsukuk (2011-1) Limited (i.e., the Arcsukuk Trustee) and, in 2010, Arcsukuk (2010) Limited (each such entity, an "Issuer"). Each Issuer appointed BNYM, or one of its affiliates, as (i) the paying agent under the *sukuk*; (ii) the registrar for authentication and maintenance of the certificates issued by the Issuer under the *sukuk* (the "Certificates"); and (iii) the delegate of the Issuer in its capacity as both the *sukuk* trustee and the *murabaha* lender.

12. Under the Arcsukuk Facility, the Issuer issued certificates in an aggregate amount of $100 million to third-party investors[6] and used the proceeds to make available $100 million to Arcapita under the *murabaha* agreement (the "Arcsukuk Proceeds"). While the documentation for the Arcsukuk Facility is silent on the matter, upon information and belief: (i) the proceeds of the 2010 Arcsukuk Facility were intended to be used for the general corporate purposes of the Debtors; and (ii) the 2011 Arcsukuk Facility was intended to be a refinancing of

6 Upon information and belief, one investor, which is located in the Middle East, holds all of the Certificates.

the 2010 Arcsukuk Facility, with the Certificates, by virtue of a nominal payoff, extended to a final redemption date of September 7, 2013 (i.e., for an additional two years).

13. The AIHL Guarantee is "a continuing guarantee" that extends to the "ultimate balance of the sums payable by Arcapita under or in connection with the [Arcsukuk Facility]."[7] Pursuant to the AIHL Guarantee, which is substantially similar under both facilities, AIHL agreed, in relevant part, to: (i) guarantee to the Issuer the punctual performance by Arcapita of all of its obligations; (ii) immediately pay on demand by the Issuer any amount due under or in connection with the Arcsukuk Facility if Arcapita did not pay such amount; and (iii) indemnify the Issuer for any cost, loss, or liability that the Issuer incurs as a result of Arcapita not paying any amount under the Arcsukuk Facility. As of the Petition Date, the aggregate obligations arising under the Arcsukuk Facility were $100.2 million.[8]

14. To date, the evidence available to the Committee supports the conclusion that a material portion of the $100 million in proceeds from the Arcsukuk Facility was not used for the direct or indirect benefit of AIHL, thereby depriving it of reasonably equivalent value for the obligations it incurred under the AIHL Guarantee.

15. In addition, the information currently available to the Committee suggests that, at the time that it entered into the AIHL Guarantee, AIHL may have been insolvent, left with an unreasonably small amount of capital, or left with debts that would be beyond AIHL's ability to pay as such debts matured.

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7 *See* Guarantee by Arcapita Investment Holdings Limited (the Guarantor) in Favour of Arcsukuk (2011-1) Limited (the Trustee) and BNY Mellon Corporate trustee Services Limited (as Delegate), dated September 7, 2011 at § 2.2. The provision is identical in guarantees issued under both of the Arcsukuk Facilities.

8 *See* Disclosure Statement at 49.

C. The Arcsukuk Trustee's Preferential Transfer

16. Under the terms of the 2011 Arcsukuk Facility, Arcapita is obligated to make periodic payments to the Arcsukuk Trustee in accordance with the *murabaha* agreement. Such payments include, among other things, a "Deferred Sale Price," with respect to the sale of certain commodities as contemplated by the 2011 Arcsukuk Facility, and a certain amount of profit with respect to the same commodities sales. On March 6, 2012, Arcapita made a single transfer to the Arcsukuk Trustee in the amount of $1,263,889 (the "Preferential Transfer"). Upon information and belief, this transfer was in satisfaction of certain amounts owing under the 2011 Arcsukuk Facility.

RELIEF REQUESTED

17. The Committee hereby requests that this Court grant leave, standing, and authority to the Committee to prosecute the Claims on behalf of the Debtors' estates.

ARGUMENT

18. In the Second Circuit, it is "permissible, not uncommon, and often desirable" for official committees to assert claims on behalf a debtor's estate. *Adelphia Commc'n. Corp. v. Rigas (In re Adelphia Commc'n. Corp.)*, 285 B.R. 848, 855 (Bankr. S.D.N.Y. 2002) (internal citations omitted). The right of committees to assert such claims is an "implied, but qualified" right, under sections 1103(c)(5) and 1109(b) of the Bankruptcy Code. *Official Comm. Of Equity Sec. Holders v. Official Comm. Of Unsecured Creditors (In re Adelphia Commc'n. Corp.)*, 544 F.3d 420, 423-24 (2d Cir. 2008) (citing *Unsecured Creditors Comm. of Debtor STN Enters., Inc. v. Noyes (In re STN Enters.)*, 779 F.2d 901, 904-05 (2d Cir. 1985)). A committee may assert claims on a debtor's behalf where the debtor is unable or unwilling to bring the suit on its own or where the debtor consents.

19. Where the debtor consents to the committee bringing the suit, "the Court must decide (1) whether the committee presents a colorable claim or claims for relief that on appropriate proof would support a recovery and (2) whether an action is (a) in the best interest of the bankruptcy estate and (b) necessary and beneficial to the fair and efficient resolution of the bankruptcy proceedings." *See In re Dewey & LeBoeuf LLP*, No. 12-12321, 2012 Bankr. LEXIS 5536, at *15-16 (Bankr. S.D.N.Y. Nov. 29, 2012) (citing *Commodore Int'l Ltd. v. Gould (In re Commodore Int'l Ltd.)*, 262 F.3d 96, 100 (2d Cir. 2001)); *see also Adelphia Commc'n. Corp. v. Bank of Am. (In re Adelphia Commc'n. Corp.)*, 330 B.R. 364, 374 (Bankr. S.D.N.Y. 2005) (same).

20. The requisite showing for demonstrating that a claim is "colorable" is a "relatively easy one to make." *Adelphia*, 330 B.R. at 376. The court need not engage in an extensive merits review or conduct an extensive mini-trial. *Id.*; *see also STN*, 779 F.2d at 905. Rather, the Committee need only show that the claims are not "facially defective." *Adelphia*, 330 B.R. at 376 (likening inquiry to that undertaken by courts when evaluating motion to dismiss for failure to state a claim) (citing *Official Comm. of Unsecured Creditors of America's Hobby Ctr. v. Hudson United Bank (In re America's Hobby Ctr., Inc.)*, 223 B.R. 275, 288 (Bankr. S.D.N.Y. 1998)).

21. In addition to showing that its claims are colorable, the Committee must demonstrate that pursuit of the claims is "in the best interest of the bankruptcy estate" and "necessary and beneficial to the fair and efficient resolution of the bankruptcy proceedings." *Commodore*, 262 F.3d at 100. In determining whether these requirements are met, courts conduct a cost-benefit analysis and will find that such analysis favors pursuit of the claims if there is a "fair chance that the benefits to be obtained from the litigation [will] outweigh its

costs." *America's Hobby Ctr.*, 223 B.R. at 284; *see also Adelphia*, 33 B.R. at 383 (framing inquiry as whether proposed litigation "is consistent with the maximization of the estate"). Applying this analysis, courts have granted standing where the proposed action, if successful, "would result in a money judgment for the estate." *Dewey & LeBoeuf LLP*, 2012 Bankr. LEXIS 5536, at *17; *see also Adelphia* 330 B.R. at 383 (granting standing because "substantial sums to be recovered . . . more than justify the substantial sums that prosecuting the litigation would cost").

22. In accordance with the foregoing, the Committee's motion for standing to pursue the Claims, which motion is not opposed by the Debtors, should be granted because the Claims are (i) colorable on their face, (ii) in the best interest of the Debtors' estates, and (iii) necessary and beneficial to the fair and efficient resolution of their chapter 11 cases.

I. The Placement Claims Are Colorable

23. The Committee possesses colorable claims against the Banks under section 542(b) of the Bankruptcy Code for turnover of all unpaid Placement Maturity Proceeds. Section 542(b) provides:

> Except as provided in subsection (c) or (d) of this section, an entity that owes a debt that is property of the estate and that is matured, payable on demand, or payable on order, shall pay such debt to, or on the order of, the trustee, except to the extent that such debt may be offset under section 553 of this title against a claim against the debtor.

11 U.S.C. § 542(b).[9] Thus, a turnover claim under section 542(b) exists where: (i) an entity owes a debt that is property of the estate and (ii) the debt has matured. These two elements are readily satisfied here.

[9] Subsection (c) of the statute relates to entities having neither actual notice nor actual knowledge of the commencement of the case concerning the debtor, while subsection (d) relates to life insurance. 11 U.S.C. § 542(c)-(d). Neither subsection is applicable here.

24. First, the funds being withheld by the Banks are property of the Arcapita estate. Under the Bankruptcy Code, property of the estate is defined expansively to include "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1); *see also McHale v. Boulder Capital LLC (In re 1031 Tax Group, LLC)*, 439 B.R. 47, 70 (Bankr. S.D.N.Y. 2010) ("The Bankruptcy Code provides an expansive view of an estate's property."). Here, Arcapita possesses a "legal interest" in the Placement Maturity Proceeds, because the Banks contractually agreed under the Investment Agreements and Placements to deliver such proceeds to Arcapita on the Maturity Date. *See Chartschlaa v. Nationwide Mut. Ins. Co.*, 538 F.3d 116, 122 (2d Cir. 2008) ("Contractual rights clearly fall within the reach of [the definition of property of the estate].").

25. Second, the debts that the Banks owe to Arcapita have plainly "matured" by their terms in accordance with section 542(b). "Whether a claim for an overdue account can be described as a matured debt depends on whether it is 'specific in its terms as to amount due and date payable.'" *F & L Plumbing & Heating Co., Inc. v. N.Y. University (In re F & L Plumbing and Heating Co., Inc.)*, 114 B.R. 370, 376 (E.D.N.Y. 1990) (internal citations omitted). Here, pursuant to the Investment Agreements, Arcapita made four Placements totaling $40 million to the Banks. The documents governing the Placements expressly designated Maturity Dates in March and April of 2012, at which time the Banks were required to remit the deposited funds, plus interest, to Arcapita. The documents were unequivocally "specific in [their] terms" as to both these Maturity Dates and the amounts due. *See In re F & L Plumbing and Heating Co., Inc.*, 114 B.R. at 376. Accordingly, the Committee also satisfies the second element of section 542(b).

26. Notwithstanding the Committee's colorable claim to recover the Placement Maturity Proceeds under section 542(b), the Banks may argue that they had a right under Bahraini law to set off the obligations under the Placements against claims they purportedly held against Arcapita under certain other, unrelated transactions. A prerequisite to effecting setoff under section 553 of the Bankruptcy Code, however, is that the creditor first seek authority from the bankruptcy court to effect rights of setoff. *See* 11 U.S.C. § 362(a)(7) (providing that unilaterally effecting setoff constitutes violation of automatic stay); *see also Bank of Am., N.A. v. Lehman Bros. Holdings Inc. (In re Lehman Bros. Holdings Inc.)*, 439 B.R. 811, 834 (Bankr. S.D.N.Y. 2010) (noting that proper procedure for creditor-bank seeking to effect setoff is to place temporary hold on debtor's account while promptly seeking relief from stay). Here, the Banks never sought the Court's permission to effect setoff with respect to the Placements. Thus, any purported setoff would itself constitute a violation of the automatic stay.

27. Even assuming the Banks had sought relief from the automatic stay to effect setoff, the mere existence of a potential setoff defense is insufficient to defeat the Committee's request for standing. *See America's Hobby Ctr.*, 223 B.R. at 285 (holding that *STN* motion is not motion for summary judgment; thus, existence of defense is not enough to prevent committee from bringing claim); *Adelphia*, 330 B.R. at 377 (granting standing to committee to pursue avoidance claims even though "the Defendants have already asserted numerous defenses, and undoubtedly will have those and more things to say as the litigation goes on"). Accordingly, the Court need not assess the merits of a potential setoff defense at this time.

28. But even if the Court were to consider the merits of such a defense, the Committee respectfully submits that setoff is not available to the Banks, either because the Banks do not possess a setoff right under Bahraini law or because one or more of the Bankruptcy

Code's exceptions to setoff applies. For example, section 553(a)(3) contains an exception which provides that setoff is not permitted where, *inter alia*, the creditor accrued its obligation to the estate "for the purpose of obtaining a right of setoff against the debtor." *See* 11 U.S.C. § 553(a)(3). The circumstances surrounding the Placements strongly indicate that they were entered into to create a setoff right against the Debtors. The Placements occurred (i) on the eve of Arcapita's chapter 11 filing, (ii) outside the ordinary course of its business, and (iii) in amounts that either exceeded or were nearly identical to value of Arcapita's outstanding obligations to the Banks. [10] Faced with such facts, the Court would likely reject any setoff defense raised by the Banks.

II. The Arcsukuk Claims Are Colorable

29. The Committee also has colorable fraudulent transfer claims against the Arcsukuk Defendants to avoid the AIHL Guarantee, because AIHL did not receive reasonably equivalent value in return for the AIHL Guarantee, and AIHL was insolvent at the time that it entered into the AIHL Guarantee.

30. The Committee may seek the avoidance of obligations incurred prior to the petition date by a debtor, including the issuance of guarantees, upon a showing of either actual fraud or constructive fraud. In the case of a constructive fraud, a party with standing must establish both that the debtor (i) did not receive "reasonably equivalent value" in exchange for obligation incurred and (ii) was insolvent at the time of the relevant transaction. *See* 11 U.S.C. § 548(a)*; see also Official Comm. of Unsecured Creditors v. JP Morgan Chase Bank, N.A. (In re*

10 Alternatively, the Committee may also assert a claim against the Banks to recover the placed funds as avoidable preferential transfers under section 547 of the Bankruptcy Code. *See* 11 U.S.C. § 547(b) (permitting avoidance of transfers made to creditor within 90 days of petition date on account of "antecedent debt" owed to such creditor). Here, the Placements are avoidable preferential transfers because they were actually disguised repayments of the antecedent obligations that Arcapita allegedly owed to the Banks under other transactions.

M. Fabrikant & Sons, Inc.), 394 B.R. 721, 735 (Bankr. S.D.N.Y. 2008) (listing elements of constructive fraudulent transfer claim under § 548(a)(1)(B)).[11] A guarantee is an "obligation" within the meaning of section 548 of the Bankruptcy Code, the incurrence of which may be avoided under the statute. *See, e.g.*, *Rubin v. Mfrs. Hanover Trust*, 661 F.2d 979, 990–91 (2d Cir. 1981) ("[Debtor- guarantors] 'incurred' an 'obligation' of repayment, although admittedly a contingent one, whenever [Principals] borrowed under the loan line."); *In re Asia Global Crossing, Ltd.*, 333 B.R. 199, 204 (Bankr. S.D.N.Y. 2005) (holding that guarantee was an "obligation" within the meaning of § 101(54)).

31. When determining whether a debtor-guarantor has received "reasonably equivalent value" for a guarantee by a subsidiary of the obligations of its parent, known as an "upstream" guarantee,[12] courts will subject the guarantee to greater scrutiny because it is generally perceived to "invariably give no consideration to the transferor." *Leibowitz v. Parkway Bank & Trust Co. (In re Image Worldwide)*, 139 F.3d 574, 578 (7th Cir. 1998). The Second Circuit has explained that "[i]f the debt secured by the transaction is not the debtor's

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11 Section 548 provides, in relevant part, that a party with standing may avoid:

> any obligation . . . that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily –
>
> (B) (i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
>
> (ii) (I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;
> (II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;
> (III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or
> (IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

11 U.S.C § 548(a).

12 Kenneth J. Carl, *Fraudulent Transfer Attacks on Guarantees in Bankruptcy*, 60 AM. BANKR. L.J. 109, 115 (1986).

own, then his giving of security will deplete his estate without bringing in a corresponding value from which his creditors can benefit, and his creditors will suffer just as they would if the debtor had simply made a gift of his property or obligation." *Rubin*, 661 F.2d at 991 (internal citations and quotations omitted).

32. Nevertheless, indirect benefits received by the guarantor may, in some circumstances, serve as reasonably equivalent value. *See id.* (holding that while "transfers *solely* for the benefit of third parties do not furnish fair consideration . . . , the transaction's benefit to the debtor need not be direct; it may come indirectly through benefit to a third person.") (internal citations and quotations omitted). Thus, a debtor-guarantor receives reasonably equivalent value where the "consideration given to the third person has ultimately landed in the debtor's hands, or . . . otherwise confers an economic benefit upon the debtor" that approximates the value of the obligation the debtor incurred.[13] *Id.* at 991-92.

33. The AIHL Guarantee is an upstream guarantee pursuant to which AIHL, a subsidiary of Arcapita, guaranteed all of Arcapita's obligations under the Arcsukuk Facility, and AIHL received less than reasonably equivalent value in return. Neither of the Arcsukuk Facilities states how the proceeds of the *murabaha* were to be used. However, because the entire $100 million under the 2010 Arcsukuk Facility was provided directly to Arcapita, the only value that AIHL could have received in return for the guarantee would have been in the form of either transfers of value to AIHL or its subsidiaries or indirect benefits from Arcapita. Upon

13 The Bankruptcy Court for the Southern District of New York has listed the following examples of potential indirect benefits that may constitute reasonably equivalent value: (i) consideration flowing from the debtor to the guarantor, (ii) increased access to capital, safeguarding a source or supply, and (iii) protection of customer relationships. *Silverman v. Paul's Landmark, Inc. (In re Nirvana)*, 337 B.R. 495, 502 (Bankr. S.D.N.Y. 2006) (citing *In re Images Worldwide*, 139 F.3d at 578-79 (7th Cir. 1998)). In addition, courts outside of the Second Circuit have adopted and expanded the *Rubin* court's holding that indirect benefits can constitute reasonably equivalent value. *Mellon Bank, N.A. v. Metro Commc'n. Inc.*, 945 F.2d 635, 646 (3d Cir. 1991).

information and belief, however, a material portion of the proceeds from the Arcsukuk Facilities was not transferred to AIHL or its subsidiaries or used by Arcapita for AIHL's indirect benefit.[14] Accordingly, the Committee has a colorable claim that AIHL received something less than reasonably equivalent value in return for issuing the AIHL Guarantee.

34. In addition, the Committee expects to be able to establish that at the time of the issuance of the AIHL Guarantee, AIHL was insolvent, left with an unreasonably small amount of capital, or left with debts beyond AIHL's ability to pay as they matured. As suggested by the valuation reports prepared by KPMG LLP,[15] the Debtors had materially overstated the value of AIHL's portfolio companies in the years leading up to the commencement of their chapter 11 cases. Indeed, the Debtors' plan of reorganization and the Disclosure Statement provide that (i) the Debtors, as a whole, faced serious liquidity issues and an inability to obtain relief from the capital markets in the years leading to the chapter 11 filings; and (ii) holders of claims against AIHL will receive less than the full amount of their allowed claims, thereby suggesting that AIHL is insolvent today.

35. As a result of the overstatement of the value of AIHL's portfolio companies and in light the debts it had otherwise incurred, the Committee has a colorable argument that AIHL was insolvent at the time of the incurrence of the AIHL Guarantee. *See Adelphia*, 330 B.R. at 364 (granting standing even though committee's "allegations have not yet been proven, if they ever will be, and some of its claims (such as those premised on insolvency) may turn out to rest on predicates that may not be established").

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14 Importantly, the Committee need not, at this time, possess evidence sufficient to ultimately prevail on the Arcsukuk Claims in litigation in order to obtain standing. *See Adelphia*, 330 B.R. at 377 (granting standing to committee where "the great bulk of the matters that underlie the [committee's] claims will involve issues of fact and context, all requiring further factual development and inquiry, and, quite possibly, trial.").

15 KPMG LLP was retained by the Debtors as their valuation advisor [Docket No. 335] for the purpose of providing valuations of portfolio companies held, either directly or indirectly, by each of AIHL and

III. The Preference Claim Is Colorable

36. The Committee has a colorable claim against the Arcsukuk Trustee under section 547(b) of the Bankruptcy Code because the Arcsukuk Trustee received one or more preferential transfers during the ninety days before the Petition Date.

37. Section 547(b) of the Bankruptcy Code provides, in relevant part, that the Committee may avoid a transfer of an interest of the Debtors in property so long as such transfer: (i) was to or for the benefit of a creditor; (ii) was for or on account of an antecedent debt owed by the debtor before such transfer was made; (iii) was made while the debtor was insolvent; (iv) was made on or within 90 days before the Petition Date; and (v) enables such creditor to receive more than such creditor would receive if the case were a case under chapter 7 of the Bankruptcy Code, the transfer had not been made, and such creditor received payment of such debt.[16] 11 U.S.C. § 547(b). The Preferential Transfer meets the elements of section 547(b), and, therefore, the Preference Claim is are colorable.

a. Benefit of a Creditor

38. The Arcsukuk Trustee is a creditor and was a creditor at the time of the Preferential Transfer. Under the terms of the 2011 Arcsukuk Facility, the Debtors are obligated to make certain payments to the Arcsukuk Trustee on account of the money borrowed by Arcapita pursuant to the *murabaha* portion of the facility. Additionally, the Arcsukuk Trustee has filed proofs of claim against the Debtors.

Arcapita LT Holdings Limited.

16 Section 101(54) defines "transfer" as each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or an interest in property, among other things. *See* 11 U.S.C. § 101(54). The Preferential Transfer was in the form of a wire transfer of cash, and therefore, was a transfer in property of the Debtors.

b. Antecedent Debt

39. The trustee may avoid a transfer of an interest of the Debtors in property "on account of an antecedent debt owed by the debtor before such transfer was made." *See* 11 U.S.C. § 547(b)(2). The term "antecedent debt" is not defined in the Bankruptcy Code; however, courts have defined the term as "a debt which is incurred prior to the relevant transfer." *See In re Durant's Rental Ctr.*, 116 B.R. 362, 366 (Bankr. D. Conn. 1990); *see also Warsco v. Preferred Technical Grp.*, 258 F.3d 557, 569 (7th Cir. 2001) ("An antecedent debt exists when a creditor has a claim against the debtor, even if the claim is unliquidated, unfixed or contingent").

40. The Preferential Transfer is on account of antecedent debt. Upon information and belief, the Preferential Transfer was in satisfaction of amounts owing under the *murabaha* component of the Arcsukuk Facility. Therefore, the transfer is on account of antecedent debt that was incurred by the Debtors prior to the date of the Preferential Transfer.

c. Insolvency

41. In order for the Committee to have a colorable claim with respect to the Preferential Transfer, the Debtors must have been insolvent at the time of the transfers. *See* 11 U.S.C. § 547(b)(3); *see also Cellmark Paper Inc. v. Ames Merch. Corp. (In re Ames Dep't Stores, Inc.)*, No. 12-1269-bk, 2012 U.S. App. LEXIS 26335, at *1-2 (2d Cir. Dec. 26, 2012) ("Cellmark Paper"). The Committee is not required to prove insolvency at this time because "[t]here is rebuttable presumption that the debtor was insolvent during the ninety days preceding the filing of its bankruptcy petition." *See Cellmark Paper*, 2012 U.S. App. LEXIS 26335, at *2 (citing 11 U.S.C. § 547(f)); *see also Lawson v. Ford Motor Co. (In re Roblin Indus., Inc.)*, 78 F.3d 30, 34 (2d Cir. 1996). Here, each of the Preferential Transfer was made during ninety days

prior to the Petition Date.[17] Accordingly, the presumption of insolvency applies. Nevertheless, information currently available to the Committee supports the conclusion that, at the time of the Preferential Transfer, Arcapita was insolvent.

d. Value Received

42. Under section 547(b), the value received as a result of the Preferential Transfer must exceed the value that the creditor would have received under the distribution provisions of chapter 7 of the Bankruptcy Code if such transfer had not been made prior to the Petition Date. *See* 11 U.S.C. § 547(b)(5); *see also Goldberg v. Such (In re Keplinger)*, 284 B.R. 344, 346 (N.D.N.Y. 2002) (citing *Elliott v. Frontier Props., Inc. (In re Lewis W. Shurtleff, Inc.)*, 778 F.2d 1416, 1421 (9th Cir. 1985)) (internal quotations omitted) ("[W]hether a particular transfer is preferential should be determined not by what the situation would have been if the debtor's assets had been liquidated and distributed among his creditors at the time the alleged preferential payment was made, but by the actual effect of the payment as determined when bankruptcy results."). Therefore, "as long as the distribution in bankruptcy is less than one-hundred percent, *any* payment on account to an unsecured creditor during the preference period will enable that creditor to receive more than he would have received in liquidation had the payment not been made." *In re Keplinger*, 284 B.R. at 347 (internal quotations and citations omitted) (emphasis in original).

43. As a result of the Preferential Transfer, the Arcsukuk Defendants realized 100% of value on account of their alleged claim against the Debtors to recover the periodic payment owing under the *murabaha* agreement. According to the liquidation analysis provided in the Disclosure Statement, general unsecured creditors of Arcapita would receive 4.1% of their

17 For this reason, the Preferential Transfer also satisfies the requirement of section 547(b) that the transfers occur within 90 days prior to the Petition Date.

total claim amount in a chapter 7 liquidation. Therefore, as a result of the Preferential Transfer, the Arcsukuk Defendants realized nearly 96% more value than they would have realized but for such preferential treatment by the Debtors during the ninety days before the petition date. Accordingly, the Committee is able to satisfy each of the elements of section 547(b) for the avoidance of the Preferential Transfer.

IV. Pursuit of the Claims is in the Best Interests of the Debtors' Estates and is Necessary and Beneficial to the Fair and Efficient Resolution of the Chapter 11 Proceedings

44. In addition to being colorable, the Claims satisfy the remaining requirements for Committee standing, because pursuit of the Claims is "in the best interest of the bankruptcy estate" and "necessary and beneficial to the fair and efficient resolution of the bankruptcy proceedings." *See Commodore*, 262 F.3d at 100. As discussed above, courts will generally determine that a suit satisfies these requirements if there is a "fair chance that the benefits to be obtained from the litigation will outweigh its costs." *America's Hobby Ctr.*, 223 B.R. at 284; *see also Adelphia*, 330 B.R. at 383 (granting standing to committee where proposed litigation "is consistent with the maximization of the estate").

45. Here, the Placement Claims, the Arcsukuk Claim, and the Preference Claim satisfy these requirements, because there is far more than a "fair chance" that the potential benefits of the Claims will outweigh their costs. *America's Hobby Ctr.*, 223 B.R. at 284. As discussed above, the Committee believes the Claims are meritorious and, if successful, would yield hundreds of millions of dollars in value for the estates, including significant money judgments on account of the Placement Claims and the Preference Claim.[18] *See Dewey &*

[18] Specifically, the Placement Claims may result in a judgment of more than $33 million, and the Preference Claim may result in a judgment of more than $1.2 million for the benefit of the Debtors estates. These recoveries will be proportionately redistributed to creditors pursuant to the reorganization plan. In addition, the Arcsukuk Claims may reduce the liabilities of the AIHL estate by up to $100 million if successful.

LeBoeuf LLP, 2012 Bankr. LEXIS 5536, at *17 (granting standing where proposed action, if successful, "would result in a money judgment for the estate"). Meanwhile, the potential costs to the estates to litigate the Claims are modest as compared to these potential returns.[19]

46. For these reasons, the Committee's pursuit of the Claims is both in the best interest of the estate and necessary and beneficial to the fair and efficient resolution of the Debtors' chapter 11 cases. Accordingly, the Court should grant the Committee standing to prosecute the Claims on the Debtors' behalf.

NOTICE

47. Notice of this Motion has been given to: (a) counsel to the Debtors; (b) the Office of the United States Trustee; (c) Goldman Sachs International, as proposed debtor in possession lender; (d) Fortress Credit Corp., as current debtor in possession lender; (e) the Banks; (f) the Arcsukuk Defendants; and (g) all parties requesting notice and service in these cases pursuant to Bankruptcy Rule 2002. In light of the nature of the relief requested, the Committee submits that no further or other notice is required.

NO PRIOR REQUEST

48. No prior application for the relief requested in this Motion has been made to this or any other Court.

CONCLUSION

Based on the foregoing, the Committee respectfully requests that the Court (a) grant the Motion and (b) grant the Committee such other and further relief as this Court deems appropriate.

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[19] Although it is true that the Claims remain subject to proof and may be met by alleged defenses, the proposed litigation is far from a "hopeless fling" and certainly represents a "sensible expenditure of estate resources." *See Adelphia*, 330 B.R. at 386, 377 (granting standing to committee to pursue avoidance claims even though claims required further factual development and many potential defenses had been raised by defendants).

Dated: June 4, 2013
New York, New York

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EXHIBIT A

Proposed Order

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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

ORDER GRANTING COMMITTEE'S MOTION FOR LEAVE, STANDING AND AUTHORITY TO PROSECUTE AVOIDANCE CLAIMS

Upon the motion (the "Motion")[1] of the Official Committee of Unsecured Creditors (the "Committee") appointed in the above-captioned jointly administered chapter 11 cases of Arcapita Bank B.S.C.(c) ("Arcapita") and each of its affiliated debtors in possession (collectively, the "Debtors"), for entry of an order pursuant to sections 1103(c) and 1109(b) of title 11 of the United States Code (11 U.S.C. §§ 101-1532, as amended, the "Bankruptcy Code") granting the Committee leave, standing and authority to prosecute certain claims on behalf of the Debtors' estates against (i) the Banks and (ii) the Arcsukuk Defendants; it appearing that this Court has jurisdiction to consider the Motion pursuant to 28 U.S.C. §§ 157 and 1334; it appearing that venue of these chapter 11 cases and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; it appearing that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b); this Court having determined that the relief requested in the Motion is in the best interests of the Debtors, their estates, their creditors and other parties in interest; it appearing that proper and adequate notice of the Motion has been given and that no other or further notice is necessary; after due deliberation thereon; and good and sufficient cause appearing therefor;

1 All capitalized terms not otherwise defined herein are to be given the meanings ascribed to them in the Motion.

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED as set forth herein;

2. All objections, if any, to the Motion or the relief requested therein, that have not been withdrawn, waived, or settled, are overruled;

3. The Committee shall be, and hereby is, granted, on behalf of the Debtors' estates, leave, standing, and exclusive authority to prosecute the claims specified in the Motion; and

4. The Court shall retain jurisdiction to hear and determine all matters arising from or related to the construction, performance, enforcement, and implementation of the terms of this Order.

Dated: June ____, 2013
New York, New York

HONORABLE SEAN H. LANE
UNITED STATES BANKRUPTCY JUDGE