

Response deadline: July 1, 2013 at 4:00 p.m.
Hearing Date and Time: July 18, 2013 at 11:00 a.m.

[Related Docket Number: 1050]

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

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

**RESPONSE TO DEBTORS’ SECOND OMNIBUS OBJECTION
TO CLAIMS SEEKING TO RECLASSIFY, REDUCE, DISALLOW AND/OR
EXPUNGE CERTAIN FILED PROOFS OF CLAIM**

Creditors and parties-in-interest, Dr. Ahmad Hashem, Salma Mohammed S. Al-Mahassni, Nada Nashaat Z. Hashem and the Heirs of Nashaat Zaki A. Hashem (collectively, the “Hashem Investors”), by and through their undersigned counsel, hereby respond to the *Debtors’ Second Omnibus Objection to Claims* [Doc. 1050] seeking the entry of an order to reduce, disallow and/or expunge certain filed proofs of claim (the “Claims Objections”), and state the following:

BACKGROUND

1. On March 19, 2012, Arcapita Bank B.S.C.(c) (“Arcapita Bank”), Arcapita Investment Holdings Limited, Arcapita LT Holdings Limited, WindTurbine Holdings Limited,

AEID II Holdings Limited, and RailInvest Holdings Limited (collectively, the “Initial Debtors”) filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code with the Bankruptcy Court. On April 30, 2012 Falcon Gas Storage Company, Inc. filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code with the Bankruptcy Court (collectively, with the Initial Debtors, the “Debtors”). These cases have been consolidated for procedural purposes and are being jointly administered pursuant to Bankruptcy Rule 1015(b).

2. The Debtors are operating their businesses and managing their properties as debtors in possession pursuant to §§ 1107(a) and 1108 of the Bankruptcy Code.

3. On August 29, 2012, the Hashem Investors timely filed proofs of claim against Windturbine Holdings Limited and Arcapita Bank (the “Hashem Claims”).

Hashem Honiton Claims

4. As set forth in their Proofs of Claim against WindTurbine Holdings Ltd., the Heirs of Nashaat Zaki A. Hashem filed a claim in the amount of \$101,000.00 [Claim No. 289], Salma Mohammed S. Al-Mahassni in the amount of \$80,800.00 [Claim No. 291] and Dr. Ahmad Hashem in the amount of \$20,200.00 [Claim No. 293], each representing the value of their investments *vis-à-vis* their participations in Wind Turbine Capital Limited’s Honiton Energy Caymans Limited as well as their respective placement and/or arrangement fees (“Hashem Honiton Claims”).

5. Each of the Hashem Honiton Claims contained a reservation of rights, stating as follows:

Debtor Arcapita Bank B.S.C.(c) has represented that Wind Turbine Capital Limited has also filed a global claim on behalf of all investors in Honiton [Energy Caymans Limited] (“Global Claim”) for some \$1.5M, which may include this portion of Creditor’s Claim. Because Creditor’s interest in such Global Claim cannot be verified, this Claim has been included herein.

6. Debtors voluntarily scheduled a claim against Arcapita Bank on behalf of Wind Turbine Capital Limited in the amount of \$1,514,292.46 [GCG No. 1007303].

7. Debtors voluntarily scheduled a claim against Arcapita Bank on behalf of Wind Turbine Capital II Limited in the amount of \$982,978.83 [GCG No. 1007304].

8. Debtors voluntarily scheduled a claim against Arcapita Bank on behalf of Wind Turbine Holding Company Limited in the amount of \$622,677.19 [GCG No. 1007305].

9. Debtors voluntarily scheduled a claim against Arcapita Bank on behalf of Honiton Energy in the amount of \$98,916.25 [GCG No. 1007306].

10. Upon information and belief, Debtors scheduled additional claims arising from or related to Honiton.

Hashem Arcapita Claims

11. As set forth in their Proofs of Claim against Arcapita Bank, Nada Nashaat Z. Hashem filed a claim in the amount of \$247,159.84 [Claim No. 290], Salma Mohammed S. Al-Mahassni in the amount of \$306,869.17 [Claim No. 292] and Dr. Ahmad Hashem in the amount of \$253,185.64 [Claim No. 294], each representing the value of their investments *vis-à-vis* their participations in Saudi Industrial Capital I Limited's ("SIC") KSA Industrial Development I ("AKID I"), as well as their respective placement and/or arrangement fees ("Hashem AKID I Claims") and with respect to Nada Nashaat Z. Hashem, as a direct participant in the Arcapita rights offering ("Ms. Hashem's Rights Offering Claim").

12. Each of the Hashem AKID I Claims contained a reservation of rights, stating as follows:

Debtor Arcapita Bank B.S.C.(c) has represented that Saudi Industrial Capital Limited has also filed a global claim on behalf of all AKID I investors ("Global Claim"), which may include this portion of Creditor's Claim. Because Creditor's interest in such Global Claim cannot be verified, this Claim has been included herein.

13. Arcapita Bank voluntarily scheduled a claim against Arcapita Bank on behalf of SIC in the amount of \$21,298,130.84 [GCG No. 1007350].

14. Arcapita Bank voluntarily scheduled Ms. Hashem’s Rights Offering Claim in the amount of \$45,000.00 [Doc. 821].

Debtors’ Claims Objections

15. On April 26, 2013, Debtors filed *Debtors’ Second Omnibus Objection to Claims* [Doc. 1050], seeking, among other relief, to reclassify, reduce, disallow and/or expunge certain “Investment Account Claims” listed on its Schedule 1 to Exhibit A, including the Hashem Investors’ Claims nos. 289-294 (“Hashem Claims Objections”).

16. For ease of reference, the Hashem Claims Objections are summarized as follows:

Objection #	Investor #	Claim #	Asserted Debtor Name	Asserted Class	Asserted Amount	Modified Debtor Name	Modified Class	Modified Amount	Reason
5	50228	293	WindTurbine Holdings Ltd.	Unsecured	\$20,200.00	Arcapita Bank	Unsecured	\$00.00	A ¹
6	50228	294	Arcapita Bank	Unsecured	253,185.64	Arcapita Bank	Unsecured	685.64	A, B
51	51259	289	WindTurbine Holdings Ltd.	Unsecured	101,000.00	Arcapita Bank	Unsecured	00.00	A
52	51259	290	Arcapita Bank	Unsecured	247,159.84	Arcapita Bank	Unsecured & Equity	159.84	A, B, C
65	51470	291	WindTurbine Holdings Ltd.	Unsecured	80,800.00	Arcapita Bank	Unsecured	00.00	A
66	51470	292	Arcapita Bank	Unsecured	306,869.17	Arcapita Bank	Unsecured	3,869.17	A, B

17. Debtors’ reason for seeking modification and/or disallowance is summarized as follows:

Reason A: The Claimant asserts a claim for its equity investments in non-Debtor entities. The Debtors do not have any liability for such interests.

Reason B: The books and records of the Debtor indicate that the Claimant’s URJA balance as of the petition date is the amount reflected in the modified unsecured claim amount.

Reason C: The Claimant asserts a claim for shares in Arcapita Bank. By this Objection, the Debtors seek to reclassify such claim as an equity

¹ See Paragraph 17.

interest in Arcapita. The Debtors reserve all rights to object to such interest at a future date as necessary.

For the avoidance of doubt, equity interests in a Debtor do not constitute a “claim,” as such term is defined in section 101(5) of the Bankruptcy Code.

RESPONSE

18. Pursuant to 11 U.S.C. § 502, if an objection is made, the court “shall determine the amount of such claim . . . and shall allow such claim in such amount, except to the extent that . . . such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured”

19. Each of the Hashem Claims are enforceable and should be allowed without modification.

Debtors’ Reason A

Reason A: The Claimant asserts a claim for its equity investments in non-Debtor entities. The Debtors do not have any liability for such interests.

20. Debtors contend that “to the extent the Investment Account Claims reflect ownership of equity interests of non-Debtor affiliates, the Debtors have no liability in respect of such equity interests” (Claims Objections ¶ 23.) And, finally, “[d]istributions on such equity interests will come from the applicable non-Debtor portfolio company or investment in the form of Deal Proceeds” (Id.)

21. Debtors contend that third party investments are maintained within Unrestricted Investment Accounts (“URIAs”) and Restricted Investment Accounts (“RIAs” and, together with URIAs, the “Investment Accounts”), and particularly that “[d]eposited funds in a URIA may be transferred in and out of Arcapita portfolio company and Debtor equity interests” (Claims Objections ¶14) and that “RIAs, on the other hand, are Investment Accounts established by

investors for a limited purpose: the investment of deposited funds in a specific Arcapita portfolio company and/or investment” (Claims Objections ¶ 16.)

22. Debtors further contend that each of the proofs of claim filed in the Chapter 11 Cases against Debtors and particularly here, the Hashem Investor Claims, have been compared with “the Debtors’ books and records and the Schedules and Statements to determine the validity and amounts of the asserted claims” (Claims Objections ¶ 17) and that the Investment Account Claims on Schedule 1 to Exhibit A “exceed the actual cash balances remaining in the applicable Investment Accounts or otherwise conflict with the Debtors’ books and records” (Claims Objections ¶ 18.)

23. Specifically, Debtors contend that “certain Investment Account Claims seek recovery of funds previously exchanged for equity interests of one or more Debtors or Arcapita portfolio companies or investments” (Claims Objections ¶ 18.)

24. Debtors have not made their books and records available to the Hashem Investors or other similarly situated investors for independent review, nor do they disclose the manner and method by which Arcapita Bank determined the claim values of any of its various investment vehicles and specifically, the Wind Turbine Capital Limited and SIC claims (“Investment Vehicle Claims”).

25. Whether the review was performed with any independence is uncertain. Upon information and belief, Debtors Investment Vehicle Claims were scheduled by insider management of Arcapita Bank and without any independence or transparency.

26. Debtors have not provided adequate assurances that “funds previously exchanged for equity interests of one or more Debtors or Arcapita portfolio companies or investments” have in fact been voluntarily scheduled by Debtors.

27. Simply put, the Hashem Investors are not able to confirm whether or not their investments *vis-à-vis* their participations in Wind Turbine Capital Limited's Honiton Energy Caymans Limited and SIC's AKID I, are included within Debtors' voluntarily scheduled claims such that they could ever be returned, in whole or in part, in the form of Deal Proceeds.

28. Debtors have not demonstrated in a form acceptable to the Hashem Investors that the value of their investments are aggregated within the Investor Claims. Should Debtors adequately substantiate that they are included; or alternatively, should the Court determine that the Hashem Honiton Claims and/or Hashem AKID I Claims are duplicative, in whole or in part, to their respective Investment Vehicle Claims (and that such Investment Vehicle Claims are allowed claims), then the Hashem Investors would not oppose Debtor's proposed modifications to the extent they reflect reductions in value attributable to their share of allowed Investment Vehicle Claims.

Debtors' Reason B

Reason B: The books and records of the Debtor indicate that the Claimant's URIA balance as of the petition date is the amount reflected in the modified unsecured claim amount.

29. Debtors seek to modify each of the Hashem Honiton Claims and Hashem AKID I Claims such that they are reduced solely to reflect the cash values maintained in their Investment Accounts.

30. As set forth above at Paragraphs 24-28, Debtors have not provided substantiation in a form acceptable to the Hashem Investors that the value of their investments are included within Debtors' otherwise allowed Investment Vehicle Claims.

Debtors' Reason C

Reason C: The Claimant asserts a claim for shares in Arcapita Bank. By this Objection, the Debtors seek to reclassify such claim as an equity interest in Arcapita. The Debtors reserve all rights to object to such interest at a future date as necessary.

For the avoidance of doubt, equity interests in a Debtor do not constitute a "claim," as such term is defined in section 101(5) of the Bankruptcy Code.

31. Debtors seek to reclassify that portion of Ms. Nada Nashaat Z. Hashem's Arcapita Claim which constitutes her Rights Offering Claim (in the amount of \$45,000.00) from an unsecured creditor claim to an equity claim ("Rights Offering Claim")

32. In so doing, Debtors effectively seek subordination of a portion of her Arcapita Claim from Class 5(a) to Class 8(a).

33. Pursuant to Rule 3007(d)(7) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), an objection that claims "are interests, rather than claims" may be set forth in an Omnibus Objection but only by "stat[ing] the grounds of the objection to each claim and [by] provid[ing] a cross-reference to the pages in the omnibus objection pertinent to the stated grounds."

34. Debtors sole stated grounds for subordinating Ms. Hashem's Rights Offering Claim is that "to the extent claims were filed in respect of equity interests of a Debtor, only a creditor may file a proof of claim, and a holder of an equity interest is not a creditor" (Claims Objections ¶ 22.) And, "[w]here possible based upon currently available information, the Debtors have identified on Schedule 1 to Exhibit A the Investment Account Claims that seek recovery for amounts previously converted into equity interests of one or more of the Debtors or their non-Debtor affiliates."

35. Simply put, Ms. Hashem is not a holder of an equity interest nor does her Investment Account Claim seek recovery for amounts previously converted into equity interests. The cash maintained in her Investment Account and allocated for the rights offering never converted into equity interests. Thus, Debtors' grounds are not sufficient to maintain their objection to that portion of her claim which constitutes Ms. Hashem's Rights Offering Claim.

36. Specifically, Debtors did not issue shares pursuant to the Rights Offering. Instead, as confirmed by the annexed Exhibit A, Arcapita Bank merely assented to an offer to purchase shares of Arcapita ("Purchase Agreement") and Arcapita Bank allocated her a portion of the participation. She did not in fact purchase any shares.

37. On the date of petition, the Rights Issue and Third Party Offerings had not yet closed, final clearance of the rights subscriptions from the Ministry of Industry and Commerce and the Central Bank of Bahrain had not been obtained and Arcapita had not updated its share register or issued the shares certificates to Ms. Hashem.

38. On the date of petition, Ms. Hashem was not a holder of an equity interest nor had the cash in her Investment Account converted into an equity interest. Instead, it was merely transferred to Arcapita upon acceptance of her offer.

39. Notwithstanding, it is expected that Debtors will argue that Ms. Hashem's Rights Offering Claim should be subordinated as a "claim . . . for damages arising from the purchase or sale of . . . a security [or the debtor]" pursuant to 11 U.S.C. §510(b). Section 501(b) provides, in pertinent part, as follows:

a claim arising from rescission of a purchase or sale of a security of the debtor or of an affiliate of the debtor, *for damages arising from the purchase or sale of such a security*, or for reimbursement or contribution allowed under section 502 on account of such a claim, shall be subordinated to all claims or interests that are senior to or equal the claim or interest represented by such security

(emphasis added.)

40. In *Rombro v. Dufrayne (In re Med Diversified, Inc.)*, the Second Circuit affirmed an order of the bankruptcy court granting summary judgment to appellee trustee and subordinating an employee-shareholder claim against debtor employing an expansive reading of “damages arising from the purchase or sale of such a security.” 416 F.3d 251 (2d Cir. 2006). In *In re Med Diversified*, surveyed the courts confronted with Section 510(b) and after much discussion of the legislative history and policy rationales for mandatory subordination, found that a claimant who bargains for status as a shareholder, rather than a creditor, should be properly subordinated under Section 510(b). *Id.* at 257. However, in making its determination, the Second Circuit stated that:

In reaching this conclusion, we are influenced by what appears to be the uniform determination of courts presented with similar claims that those who conclude the bargain to become investors or shareholders should be treated as such.

Id. Further, relying upon “the recent and extraordinarily thorough decisions in *In re Enron*”, the *In re Med Diversified* court found that “because [the] claim for damages is not a fixed amount but rather connected to the value of debtor’s stock, we are inclined to read section 501(b) broadly to include his claim for damages.” *Id.*

41. On the date of petition, the Arcapita Rights Offering had not yet closed and Ms. Hashem’s purchase rights had not yet vested. In accordance with the rights offering plan, if the rights offering did not close, all such affected amounts would remain in her Investment Account of would earn Islamically acceptable profits in accordance with Arcapita’s current standard terms and conditions pertaining to such Investment Accounts. By subscribing for shares, she was making an offer for purchase and by accepting her offer, Arcapita Bank allocated her a portion of the participation should they issue. However, a bargain for actual purchase never took place because several conditions prerequisite did not occur.

42. Ms. Hashem had not concluded the bargain to become a shareholder because the Arcapita Bank rights offering did not close. Her damages were not caused by debtor's failure to issue her stock certificates as in *In re Med Diversified*, but because the securities were not legally authorized under Bahrain law, such that they could not and did not issue.

43. Debtors voluntarily scheduled Nada Nashaat Z. Hashem's Rights Offering Claim in the amount of \$45,000.00 [Doc. 821]. Debtors did not set the value of her claim as an unliquidated claim based upon the value of Arcapita Bank stock because she is not a shareholder. Instead, her claim represents the sum certain amount of money allocated by her for purchase in conjunction with her offer for participation. It does not represent the value of any equity interest in those shares because no such equity interest exists.

44. Because the Arcapita Bank rights offering was not authorized pursuant to the laws of the Kingdom of Bahrain, pursuant to U.S. bankruptcy law, Debtors' motion to reclassify Ms. Hashem's Offering Rights Claim from an unsecured creditor claim into a subordinated equity interest should be denied.

WHEREFORE, for each of the reasons set forth above, the Hashem Investors request that the Court deny Debtors' motion to modify and/or disallow the Hashem Claims.

DATED: New York, New York
June 28, 2013

KERR & KATZ, LLP

By: /s/ William B. Kerr

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28 March 2011

Mrs. Nada Nashaat Z. Hashem

P.O. Box 107
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Kingdom of Saudi Arabia

Tel: 009662-6512028
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Dear Ms. Hashem,

**Shareholder Name: Nada Nashaat Z. Hashem
allocation of shares of Arcapita Bank B.S.C.(c)
in connection with the Right Issue**

On behalf of Arcapita, we would like to thank you for participation in the Rights Issue. We are pleased to inform you that we hereby accept your offer to purchase shares of Arcapita upon the terms and conditions of your Subscription Agreement, the Private Placement Memorandum and offering materials relating to the offering of the Rights Issue.

You have been allocated **15,000** shares at a price of \$3.00 per share for a total amount of **\$45,000.00**. The funds have been transferred to Arcapita from your investment account.

Once the Rights Issue and Third Party offerings are closed, we will seek final clearance of the rights subscriptions from the Ministry of Industry and Commerce and the Central Bank of Bahrain, and will be updating the share register and issuing the shares certificates once the clearance has been received.

We thank you for your participation in the share offering and look forward to building on our long and mutually beneficial relationship.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Fadi Z. Ghazzawi", enclosed within a large, loopy oval shape.

Fadi Z. Ghazzawi
Associate
Investment Placement