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**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**

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In re:	: Chapter 11
	:
ARCAPITA BANK B.S.C.(c), <i>et al.</i> ,	: Case No. 12-11076 (SHL)
	:
Debtors.	: (Jointly Administered)
	:
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**AL BARAKA BANK TUNISIA’S RESPONSE TO THE  
DEBTORS’ SECOND OMNIBUS OBJECTION TO CLAIMS**

Al Baraka Bank Tunisia (as successor to Bank Ettamwil Tounsi Saudi) (“ABT”) hereby files its response (the “Response”) to the Debtors’ Second Omnibus Objection To Claims (the “Objection”) filed by Arcapita Bank B.S.C.(c) (“Arcapita” and, together with certain of its subsidiaries and affiliates, the “Debtors”) in the above-captioned Chapter 11 cases, and states as follows:

## **BACKGROUND**

1. On August 29, 2012, ABT timely filed its Proof of Claim in Arcapita's bankruptcy case, Claim No. 255 (the "ABT Proof of Claim"), asserting a secured claim for \$3,625,212.41, representing amounts (converted into US dollars) placed with Arcapita and due under two purchase and sale transactions for the purchase of commodities from a third party (the "Funds"), pursuant to a certain Tunisian Investment Agreement dated May 17, 2006 (the "TIA," attached as Exhibit 1 to the ABT Proof of Claim). The transactions are governed by Sharia'a law, and both Arcapita and ABT act as a principal and as an agent on behalf of the other at various points in the transactions.

2. The "Basic Transaction" described under the TIA calls for Arcapita to act as agent on behalf of ABT "in buying commodities on cash basis for immediate delivery and in selling such commodities to [Arcapita,] as principal, with immediate delivery on deferred payment terms." *Id.* § 3.

3. The "Purchase" side of the transaction calls for Arcapita to offer to ABT an Investment Offer for the purchase of commodities; upon acceptance of the Investment Offer by ABT, "the Principal shall transfer to the Agent such funds to enable the Agent to purchase the commodities on behalf of the Principal. Once such payment reaches the Agent's account, the Agent shall complete the purchase of the commodities and notify the Principal of such purchase . . . whereupon title to the commodities shall pass to the Principal who shall thereupon become the owner of those commodities." *Id.* §§ 4.3, 4.4.

4. The "Sales" side of the transaction takes place immediately after Arcapita concludes the purchase of the commodities for ABT and title to the commodities transfers to

ABT. The TIA calls for Arcapita, now acting as principal, to extend an offer to ABT to purchase the same commodities “for [Arcapita’s] own account for immediate delivery on a deferred payment basis.” *Id.* § 5.1, 5.2. Payment may be deferred for up to 180 days. *Id.* § 5.3. There is a rate of return (profit) on each transaction, set as a net rate specified in the offer and acceptance exhibits to the TIA. *See id.*, Exs. A and B.

5. Two transactions under the TIA are at issue here. Under the first transaction, ABT purchased €700,000 worth of commodities on September 30, 2011 from a third party (with Arcapita as agent), then sold the commodities to Arcapita with a deferred payment date of March 30, 2012 (182 days deferred), and a profit of €9,550. Under the second transaction, ABT purchased €2,000,000 worth of commodities on December 28, 2011, which ABT subsequently sold to Arcapita, with a deferred payment date of June 28, 2012 (183 days deferred) and a profit of €28,466.67. *See* Exhibits 2 and 3 to ABT Proof of Claim.

6. On March 19, 2013, Arcapita and four affiliates filed for chapter 11 bankruptcy protection in the United States Bankruptcy Court of the Southern District of New York (the “Court”). The deferred payment of the Funds on account of the commodities sold to Arcapita was never made to ABT, and ABT filed its Proof of Claim on account of its secured claim in the commodities.

7. The Debtor objected to ABT’s Proof of Claim on April 26, 2013, asserting that there is no evidence of a security interest in favor of ABT over the commodities purchased by Arcapita and that there is no evidence that ABT or its affiliates hold any monies of Arcapita with which to effectuate a setoff. Debtors’ Second Omnibus Objection to Claims, at 16-18 [Dkt. No. 1050]. Arcapita seeks to reclassify ABT’s claim to an unsecured claim. The deadline for ABT

to respond to Arcapita's objection is July 1, 2013 and this Response is therefore timely [Dkt. No. 1073]. Notably, the Debtors do not object to the amount of the ABT Proof of Claim.

### RESPONSE

#### **I. The Debtors' Objection Impermissibly Seeks To Reclassify ABT's Claim In Violation Of The Bankruptcy Rules**

8. The essence of the Debtors' Objection is that ABT's claim is improperly classified. On its face, the stated basis for the Debtors' Objection does not fall within one of the permissible enumerated provisions set forth in Bankruptcy Rule 3007(d), which governs omnibus objections. Bankruptcy Rule 3007(d) provides:

(d) *Omnibus Objection.* Subject to subdivision (e), objections to more than one claim may be joined in an omnibus objection if all the claims were filed by the same entity, or the objections are based solely on the grounds that the claims should be disallowed, in whole or in part, because:

- (1) they duplicate other claims;
- (2) they have been filed in the wrong case;
- (3) they have been amended by subsequently filed proofs of claim;
- (4) they were not timely filed;
- (5) they have been satisfied or released during the case in accordance with the Code, applicable rules, or a court order;
- (6) they were presented in a form that does not comply with applicable rules, and the objection states that the objector is unable to determine the validity of the claim because of the noncompliance;
- (7) they are interests, rather than claims; or
- (8) they assert priority in an amount that exceeds the maximum amount under §507 of the Code.

Fed.R.Bankr.P. 3007(d). The Debtors' stated rationale for disallowance of ABT's Proof of Claim—that the claim is unsecured, rather than secured—clearly falls outside the categories set forth in Bankruptcy Rule 3007(d), and as such, the Objection should be overruled.

**II. The Debtors Do Not Address Applicability Of Sharia'a Law To The Transactions At Issue In ABT's Proof Of Claim**

9. The TIA, and both transactions that are the subject of ABT's Proof of Claim, are governed by English law, but only to the extent such laws do not conflict with Sharia'a law, which controls in the event of a conflict. TIA § 12. The Debtors do not even address the requirements for a security interest under Sharia'a law, and there is no basis for the Debtors' Objection to ABT's asserted secured Proof of Claim. The Debtors do not question that Sharia'a law may provide different security rights and a different scheme of priority relating to transactions under the TIA, particularly where, as here, there is an agency relationship between the parties. Because of Arcapita's status as a fiduciary arising out of the two transactions at issue here, Arcapita holds the Funds for the benefit of ABT. This status establishes ABT's secured claim. A proof of claim is prima facie evidence of validity and amount of a claim, and a filed proof of claim is "deemed allowed, unless a party in interest . . . objects." 11 U.S.C. § 502(a); Fed.R.Bankr.P. 3001(f); *see In re White*, 168 B.R. 825, 828-29 (Bankr.D.Conn. 1994). The Debtors have not refuted this aspect of ABT's Proof of Claim and the Objection cannot be sustained.

**III. ABT Has An Equitable Lien Or A Constructive Trust Over The Commodities Or The Proceeds Thereof**

10. At a minimum, given the Sharia'a standards that may apply, ABT has an equitable lien in the commodities or their proceeds equal to the amounts stated in the ABT Proof of Claim. Even under U.S. law, ABT has established an equitable lien or, in the alternative, a constructive trust. An "equitable lien" is substantively similar to a constructive trust; the

traditional distinction between the two is that the beneficiary of a constructive trust receives complete title to the asset whereas the holder of an equitable lien receives only a lien on the asset through which it may satisfy a money claim. *See In re Flanagan*, 503 F.3d 171, 183 (2d Cir. 2007) (applying Connecticut law); *see also Great-West Life And Annuity Ins. Co v. Knudson*, 534 U.S. 204, 213 (2002). A constructive trust requires four elements: “(1) a confidential or fiduciary relationship; (2) a promise, express or implied; (3) a transfer of the subject res made in reliance on that promise; and (4) unjust enrichment.” *In re First Central Financial Corp.*, 377 F.3d 209, 212 (2d Cir. 2004) (citing *United States v. Coluccio*, 51 F.3d 337, 340 (2d Cir.1995)).

11. Here, the first requirement is met, as there is a fiduciary, principal/agent relationship between Arcapita and ABT. Second, there was both an express promise (the TIA) made by Arcapita to make the deferred payments on the commodities, as well as an implied promise that once Arcapita received the Funds, Arcapita held the Funds in trust for the benefit of al Baraka. The transfer of the commodities was made in reliance upon these promises and Arcapita was unjustly enriched as a result. *See In re Howard’s Appliance Co.*, 874 F.2d 88, 94-95 (2d Cir. 1989) (imposing constructive trust under similar New Jersey law).

12. Given that Sharia’a law ultimately controls the commodities transactions under the TIA, and that the commodities purchased and sold under the transactions were specifically traced throughout the “Purchase” side and the “Sales” side of the transactions, ABT asserts an equitable lien in the commodities or the proceeds thereof, *see, e.g., In re Lapes*, 254 B.R. 501 (Bankr. S.D. Fla. 2000); *In re Carpenter*, 252 B.R. 905, (E.D. Va. 2000), *aff’d*, 36 Fed. Appx. 80, (4th Cir. 2002), or, in the alternative, a constructive trust on the commodities and/or their proceeds.

**IV. ABT Asserts and Reserves Its Right To Setoff Arising From A Demand Made Upon Al Baraka Bank Bahrain**

13. Arcapita seeks approximately \$5 million in funds from al Baraka Bank Bahrain (“ABB”) based on monies allegedly held by ABB arising out of a similar commodities transaction, namely, transactions under two Master Investment Wakala Agreements, each dated June 8, 2010, between Arcapita and al Baraka Bahrain (collectively the “Bahrain Master Agreements”). ABT asserted a right of setoff with respect to the \$5 million allegedly held by ABB in the ABT Proof of Claim. The only basis for the Debtors’ Objection to this asserted right of setoff is that ABT has not offered evidence or documentation to substantiate this right. The ABT Proof of Claim is documented evidence of ABT’s claim of approximately \$3.6 million. Bankruptcy Code § 553 preserves a creditor’s rights of setoff of mutual debts. 11 U.S.C. § 553. The debts owed between ABT, ABB and Arcapita provide the basis for a valid setoff.

**CONCLUSION**

WHEREFORE, ABT respectfully requests that this Court deny the Debtors’ Objection to the ABT Proof of Claim in all respects, and allow the ABT Proof of Claim as a secured claim.

*[signature on following page]*

Dated: July 1, 2013  
New York, New York

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