Hearing Date and Time: August 27, 2013 at 11:00 a.m.

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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' RESPONSE TO STATEMENT OF COMMITTEE AS TO EIGHTEENTH INTERIM BUDGET

While the Debtors have normally avoided responding to the Committee's self-serving statements claiming credit for progress and blaming others for delay, the patently erroneous and inflammatory allegations of the *Statement of the Committee in Connection With Debtors' Eighteenth Interim Budget* [Docket No. 1458] (the "***Statement***"), filed after close of business on August 26, 2013, simply cannot go unanswered.

THE PREMISE OF THE COMMITTEE'S STATEMENT IS SIMPLY UNTRUE

The Committee knows full well that the underlying premise of its Statement related to the Eighteenth Interim Budget—that all of the conditions precedent to implementation of the Plan will be satisfied by August 30th—is patently false. Rather than bother the Court with the facts, the Committee's Statement reeks of false statements, ulterior motives, and unsubstantiated

allegations. This is particularly galling when, at this late stage of the case with only weeks to go and when the parties should be working cooperatively to finish the final details necessary to implement the Plan, the Committee's diatribe accepts no responsibility whatsoever for the delay in achieving the Effective Date of the Plan. In fact, much of the delay is the result of endless negotiations over overreaching positions taken by the Committee. Instead of trying to solve the remaining problems cooperatively, the Committee apparently could not resist a last-minute salvo at the Debtors and their counsel. And, the Court should rightly ask: what purpose, other than vindication of some personal antipathy that has no place in these reorganization cases, has been served by the Committee's incendiary submission?

The Debtors freely admit that the Plan implementation process has been excruciatingly time consuming and often frustrating. Much of the work had to be accomplished during the highly religious month of Ramadan (July 9 through August 7) and the Eid-al-Fitr holiday that follows the end of Ramadan (beginning August 8). Work also had to occur amid the summer plans and commitments, particularly in August, of numerous parties, including not surprisingly members of, and advisors to, the very Committee that is so quick to throw stones about delay. Indeed, for several days the Debtors have not heard from the Committee on numerous open issues that the Committee knows must be resolved prior to the Effective Date. Although the Debtors understand that others have commitments and even personal lives outside of these now long pending chapter 11 cases, those tending to other responsibilities cannot simply ignore their role in any delay. That approach is neither fair or motivating to those that are working their fingernails to the bone to effectuate this closing, nor productive to the closing process or consistent with the professional way that the parties have thus far dealt with each other.

Despite these obstacles, the Debtors have been working diligently and virtually non-stop with the Committee, the Exit Lenders, key third-party investors, landlords and employees in several countries to complete over a hundred-page checklist of "to-do" items and to negotiate and prepare the myriad documents required for the Effective Date of the Plan to occur. The Debtors will bring the to-do checklist to the August 27 Court hearing and would be happy to submit it, in camera, to the Court. The Committee can then explain to the Court its disingenuous position that every document and item on that checklist has been completed—including those that the Committee is responsible for drafting and has yet to even circulate a draft, the many on which the Committee has yet to comment, and the many on which the Committee's comments have yet to be agreed.

THE TRUE FACTS AS TO WHAT IS LEFT TO ACCOMPLISH

In fact, the true status of the Plan implementation progress to date, and a description of some of the most important items left to accomplish (out of many) before the Effective Date of the Plan, are set forth below:

1. The Debtors have set a closing date of September 17th. This represents a date by which the Debtors believe that the remaining open issues will be resolved and an orderly closing may occur. This date also rationally accounts for the Labor Day holiday, the Jewish Holidays occurring throughout the first half of September, and the lead time required to set in motion some of the Plan implementation steps (such as the five (5) business days required by the Exit Lenders to be in a position to close the Exit Facility and the four (4) days required by the Arcapita Bank share registrar in Bahrain to transfer the Arcapita Bank shares).

2. Although a tremendous amount has already been accomplished, there is still extensive work necessary to complete, review, conform, and finalize all of the documentation, board resolutions, and corporate transactions necessary to implement the

Plan, including finalizing the thirty-one (31) Shareholders' Agreements (all of which have been drafted by Debtors' counsel) implementing the Cooperation Settlement Term Sheet arrangements, and the numerous forms of internal and external management services and delegation agreements. The Committee has yet to comment on many of these documents. And, while the statements in the Statement filed by the Committee make for good theatre, it is pure poppycock for the Committee to argue that it is prepared to approve the documents in their current form and before the Committee has had an opportunity to complete its review, comment on, and fully negotiate them.

3. In its zeal to ignore reality, the Committee conveniently ignores that the Plan provides that, on the Effective Date, the new members of the board of directors of Arcapita Bank cannot assume office because they have not yet been approved by the Central Bank of Bahrain (the "***CBB***"). The CBB must approve the candidates whose names have been provided to the Court, but the very Committee which claims that the Debtors are delaying closing has not even submitted to the CBB the required qualification materials in a form acceptable to the CBB. For the efforts of the Debtors and their advisors to assist the Committee with this task, which the Committee has been unable to accomplish on its own, they have been rewarded with the Committee's inflammatory Statement.

4. On the Effective Date, AIM is to enter into a series of "Management Services Agreements" with RA Holding Corp. and its affiliates, the newly formed entities which will be owned by the Debtors' creditors. In quite a sleight of hand, the Committee proclaims everything necessary to a closing will be complete by August 30th, yet the Committee fails to tell the Court that the Management Services Agreements themselves are not yet in a form acceptable to the Committee.

5. The Committee has also failed to tell the Court two important facts about the very employees of the Debtors that the Plan contemplates will be employed by AIM to enable it to perform under the Management Services Agreements: first, through no

fault of AIM or the Debtors, these employees have not yet agreed to the terms of their separation from the Debtors so that they can enter into employment agreements with AIM. Second, and more important, while the Debtors had negotiated a form of "separation agreement" with these employees over a month ago (which would have put the Debtors in a position to terminate the employees and free them to enter into employment contracts with AIM), the Committee refused to agree to the form of separation agreement. The Committee delayed the separation process by more than two weeks while the Committee rewrote the separation agreements. To make up this lost time, the Debtors are moving as quickly as possible to conclude negotiations with the remaining employees, but as the Debtors had repeatedly advised the Committee, these discussions take time and, in some jurisdictions (the UK, for example), it is mandatory that the employees obtain their own legal advice before signing a separation agreement. To mitigate any further delay, the Debtors and the Committee have recently agreed on, but not yet documented, a transition agreement that would permit the Effective Date of the Plan to occur even though Arcapita had not formally terminated all employees that AIM requires to perform under the Management Services Agreements.

6. On the Effective Date, D&O insurance must be in place to protect the board of RA Holding and its affiliates and to provide tail coverage for the old Arcapita board and to provide tail coverage for the old Arcapita board whose indemnification claims were assumed by the Debtors in the Plan. The Committee failed to mention that, while negotiations with insurers are proceeding apace, they have not concluded; they also failed to mention that their own designated directors will not agree to assume office without proper, bound D&O coverage. Plus, in any event, the Committee has not approved the payment of the premiums required to put the D&O insurance in place.

7. On the Effective Date, AIM is to purchase assets from the reorganized Debtors and to lease space in the reorganized Debtors' offices in Atlanta and London; all of which is necessary so that AIM will have the facilities and capability to provide the

services that it has contracted to provide under the Management Services Agreements. While AIM has made a proposal as to the price it will pay for the assets, the Committee has not yet agreed to the purchase price. Also, the Committee apparently forgot that, although AIM and the Committee have agreed on the terms of the subleases, the parties with express consent rights—the third party landlords in Atlanta and London—have not yet approved the subleases.

8. While blindly advocating an immediate closing, the Committee conveniently overlooks numerous critical "details" that would have potentially significant, adverse consequences if not addressed prior to the Effective Date. For example, prior to the Effective Date, the Debtors must issue a replacement guarantee, referred to in the Plan as the Fountains Guarantee. That guarantee relates to an important portfolio asset. The Fountains Guarantee has not yet been negotiated with the lender to which it relates, and the failure to execute that Guarantee on the Effective Date may cause a default on the loan, which would potentially erase tens of millions of dollars in value. In its rush to close, the Committee would just overlook this Guarantee. The Debtors should not be castigated for attending to these kinds of details before pushing the button on closing with respect to the Plan. There are also other open financing issues, including those relating to the Shari'ah committee's approval of the Sukuk and amendments to the Exit Facility, that the Committee ignores but that must be resolved before a Plan closing.

9. A key part of implementation of the Plan is distribution of the Plan consideration. Because of the importance of this element of the Plan to creditors, the Committee assumed responsibility to prepare the initial drafts of many of the key distribution documents. Yet, despite seeking a draft for weeks now, the Debtors have not received even a preliminary version of the primary document that will govern how distributions are calculated and made—the Allocation Agent Agreement.

11. Due to disputes with the Committee that have now finally been resolved, implementation of the transactions related to the Arcapita Incentive Plan Limited restructuring has been delayed. These transactions are relevant for the Key Employee and Senior Management Global Settlement, which the Plan requires to be implemented on the Effective Date; they are also integrally related to the separation discussions ongoing with the employees.

12. Although the Debtors have been working hand in glove with the Committee to resolve the mechanics for the asset and share transfers related to the Plan, including (a) when to conduct a shareholders' meeting to approve the new Arcapita Bank directors and (b) consideration of the Committee's recent request for a number of the Bank's existing directors to remain on the board of Arcapita Bank after the Effective Date pending the shareholders' meeting, issues still remain to be resolved.

The Debtors could go on for many more pages, but the foregoing truncated list should give the Court a more honest assessment of the myriad factors that, despite its Statement to the Court, the Committee knows have to be resolved before the Effective Date can occur. While the parties are addressing these issues as swiftly as possible, they cannot be resolved at the snap of a finger, nor by pointing that same finger at others.

THE DEBTORS HAVE SET A PRACTICAL AND REALISTIC CLOSING DATE

Even if the parties were close to a resolution, there are a number of timing issues and other mechanics that have led the Debtors to schedule September 17th for the Plan closing. First, as previously indicated, various parties that are critical to the Plan closing require a minimum amount of lead time that a September 17th closing will allow. Thus, the Exit Lenders want at least five business days' notice of any closing; other key parties require similar advance notice. Second, the next two weeks present challenging planning hurdles due to Labor Day and the Jewish Holidays. Setting a September 17th closing date leaves time for the remaining documents to be completed and the remaining issues to be resolved, and allows for an orderly

closing, on proper notice to the parties entitled to advance notice, realistically planned around national and religious holidays. But meeting this schedule will require cooperation among all parties

THE COMMITTEE'S STATEMENT THAT COMPLAINS ABOUT THE DATE OF A CLOSING IS WHOLLY UNRELATED TO BUDGET ISSUES

Arcapita Bank and its related Debtors are still debtors in possession under chapter 11 with the power to conduct business in the ordinary course of their business and to carry out the several orders of the Court governing the Debtors expenditures. Neither the Committee nor the new board of Reorganized Arcapita has yet taken over the management of the Debtors. The board, the management, and the officers of the Debtors are imbued with fiduciary obligations to protect all stakeholders.

Nothing in the Committee's Statement undermines the basic point that these cases must proceed in the normal course until the Effective Date or unless and until the Committee makes a proper showing *with admissible evidence* why the Debtors' management should be displaced and an examiner or trustee appointed. The Committee's suggestion that suddenly (with no notice to any party in interest), and with only three weeks to go, it must replace the Debtors and approve every expense, however large or small, is totally unworkable and is inconsistent with chapter 11 and the prior orders of this Court.

As it has since the First Interim Cash Management Order, the budget process reflects the continued negotiations between the parties as to the Debtors' use of cash and an effort—successful to date—to avoid litigation over the scope of the ordinary course of business of these Debtors. Without exception, the Debtors and their advisors have continued to provide extensive materials to the Committee on the Debtors' finances, as well as upcoming investment funding needs. As noted in paragraph 9 of the previous 17 Cash Management Orders, this process solely governs intercompany transfers and not the ordinary course expenses of the Debtors. There is no provision of the Cash Management Orders that somehow override sections 107 or 108 of the Bankruptcy Code or any of the other orders of this Court.

Indeed, the very premise of the process that has resulted in the many Interim Cash Management Orders was to avoid a fight not over what everyone concedes is the ordinary course of business of the Debtors—paying salaries, keeping the lights on, etc.—but, rather to avoid a fight over the Debtors view, on the one hand, that intercompany transfers and funding non-Debtors and portfolio companies is also in the ordinary course of the Debtors' business and the Committee's view, on the other hand, that these activities are not in the ordinary course of the Debtors' business. Rather than litigate that issue, the Committee, the JPLs, and the Debtors have, throughout these cases, worked tirelessly and cooperatively to resolve issues as to portfolio company funding and intercompany transfers. With only three weeks to go, the Committee not only wants to change those dynamics for no good reason, but also now contends it must approve all ordinary course expenditures even as to the Debtors themselves.

In the past, the Debtors have expressly agreed on a month-to-month basis that the Debtors will not make certain specified expenditures as expressly reported to the Court at the monthly Cash Management hearings unless the Committee later agreed. Only as to those specified expenses did the Debtors agree they would return to Court and seek Court authority if an agreement could not be reached. But the Debtors have never agreed that the Committee has any general right of consent as to any expenditure and certainly not the ordinary course expenses of the Debtors. Further, the Court has never ordered and the Debtors have never agreed that they will obtain Court permission before making some expenditure the Debtors believe to be in the ordinary course but with which the Committee disagrees. In other words, the Committee is now claiming a consent right that neither the Debtors nor the Court have granted, and the Committee is seeking to impose on the Debtors an obligation that has never been required by this Court.

THE PRIOR ORDERS OF THE COURT ALREADY CONTROL THE MAJORITY OF THE BUDGET ITEMS

Throughout the case the Court has already entered the following orders which apply to several of the items in the Eighteenth Interim Budget:

- Order Granting Debtors' Motion for Order Establishing Procedures for Interim Compensation and Reimbursement of Expenses for Professionals and Committee Members [Docket No. 159] (the "***Interim Compensation Order***")

- Final Order (A) Authorizing the Debtors to Continue Insurance Coverage Entered into Prepetition and to Pay Obligations Relating thereto; and (B) Authorizing Financial Institutions to Honor and Process Related Checks and Transfers [Docket No. 139] (the "***Insurance Order***")

- Final Order Authorizing the Debtors to (A) Pay Certain Prepetition Wages, Salaries, and Reimbursable Employee Expenses, (B) Pay and Honor Employee Medical and Similar Benefits, and (C) Continue Employee Compensation and Employee Benefit Programs [Docket No. 136] (the "***Employee Wage Order***")

- Order pursuant to Section 105(a) of the Bankruptcy Code and Bankruptcy Rule 9019, Authorizing and Approving the Settlement with Standard Chartered Bank [Docket No. 587] (the "***SCB 9019***")

- Final Order Pursuant to 11 U.S.C. §§ 105, 362, 363(b)(1), 363(m), 364(c)(1), 364(c)(2), 364(c)(3), 364(e) and 552 and Bankruptcy Rules 4001 and 6004 (I) Authorizing Debtors (A) to Enter into and Perform Under Murabaha Agreement, and (B) to Obtain Credit on a Secured Superpriority Basis, and (II) Granting Related Relief [Docket No. 1304] (the "***Final DIP Order***")

- Order pursuant to Sections 363(b) and 503(c) of the Bankruptcy Code and Bankruptcy Rule 9019 Authorizing Debtors to Implement Employee Programs and Global Settlement of Claims [Docket No. 303] (the "***Global Settlement Order***")

As outlined in detail below, the foregoing orders authorize most of the payments subject to the Eighteenth Interim Budget, including payments over which the Committee erroneously asserts a consent right going forward.

The Eighteenth Interim Budget disaggregates expenses into three basic disbursement types: Operating Disbursements, Restructuring Costs, and Debt Service.

Operating Expenses

- Deal Funding: The sole open issue cited in the Committee Statement relates to one deal funding in favor of AGUD I. Because, as noted above, the cash management process relates to intercompany funding, deal funding has always been subject to Committee approval and remains so. The Statement, therefore, does not seek to increase Committee oversight over the deal funding process.
- Staff Expenses: Staff expenses consist of general wages. The Employee Wage Order directly authorizes the Debtors to pay $537,000 (the Bahrain wages) of the total $911,000 of employee payroll expenses in the eighteenth interim period. The Debtors intend to complete intercompany transfers to pay the remaining approximately $374,000 in payroll expenses (and cannot understand why the Committee would seek to shackle employees' bi-weekly payments at this critical juncture when the full investment of the employees in the Plan closing process is so important).
- G&A Expenses: G&A Expenses approximate to $5.25 million. Of that amount, payment of over 60% is authorized by prior orders of this Court. The Debtors have Court authority to make pay $2.4 million of insurance costs (subject to the Committee's review rights under the Insurance Order), and $298,000 of travel expenses (under the express terms of the Employee Wage Order). Another $583,000, a payment to Ernst & Young, is the subject of a pending motion (adjourned to September 17, 2013) and will not be paid until approved by the Court. The Employee Wage Order unquestionably provides the Debtors with authority to pay reimbursable travel expenses. Indeed, paragraph 11 of the related motion makes reference to travel expenses as being the main reimbursable expense governed by the order. In addition, based on the Debtors' review of the Committee's Statement, it does not appear that the Committee takes issue with any of the remaining 40% of the G&A costs. In any case, over 80% of the G&A costs will be borne by Arcapita Bank, require no intercompany transfer or deal funding and therefore, are not subject to the cash management process.

Restructuring Costs

- Restructuring Fees: Restructuring fees are governed by the Interim Compensation Order and not the cash management process.
- Payroll Adjustments: Payroll adjustments represent remaining payments in respect of the Debtors' key employee incentive plan, key employee retention plan and severance plan as well as withholding taxes due in connection with the global settlement of claims under the Debtors' prepetition incentive plans, all as approved by the Global Settlement Order and Plan Confirmation Order.
- Other Restructuring: The Eighteenth Interim Budget includes placeholders for Hong Kong and Singapore wind-down costs. The Debtors previously estimated these costs at approximately $1 million but agreed with the Committee that payment remained subject to Committee consent (particularly because they did not fall in the first two weeks of this interim period). The Committee cannot therefore complain about these budget items.

Debt Service

- Debt Service: Debt service consists of financing costs due Standard Chartered Bank and Goldman Sachs International, payment of which is required of the Debtors under the SCB 9019 and Final DIP Order, respectively.

Therefore, the Debtors respectfully request that the Court disregard the Committee's last-minute, self-serving, and patently false Statement, overrule any purported objection by the Committee to the Eighteenth Interim Budget and approve the expenditures set forth therein.

Dated: August 27, 2013
New York, New York

Respectfully submitted,

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