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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK  
Case No. 12-11076(SHL)

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In the Matter of:

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

Debtors.

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U.S. Bankruptcy Court  
One Bowling Green  
New York, New York

October 2, 2013  
10:31 AM

B E F O R E :  
HON SEAN H. LANE  
U.S. BANKRUPTCY JUDGE

ECR OPERATOR: S. Hibbert

1 Hearing re: Doc. # 1322 Ernst & Young's Application  
2 Pursuant to Sections 327(a) and 328(a) of the Bankruptcy  
3 Code for an Order Updating the Terms of its Retention by the  
4 Debtors as Auditors.

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25 Transcribed by: Jamie Gallagher

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P R O C E E D I N G S

THE COURT: Arcapita Bank.

MR. FLECK: Hi, good morning, Your Honor. Evan Fleck of Milbank Tweed on behalf of --

THE COURT: Good morning.

MR. FLECK: -- the reorganized debtors, RA Holding Corp., and the additional new holding companies.

Your Honor, we have just one matter, it's uncontested, on the agenda for today, but with the Court's permission, I would like to give a brief update. We haven't met in a while on this case --

THE COURT: Sure.

MR. FLECK: -- and there have been some very positive developments.

THE COURT: I hadn't heard from you all, and given where things were the last time we spoke, that sounded like that was a good thing because if there were going to be some problems getting to the effective date, I anticipated hearing from you. So, I assume you've gone effective?

MR. FLECK: We have gone effective, Your Honor. It's with great pleasure that we announce that to the Court. We did file a notice on the effective date announcing that all but one of the debtors is now out. If Your Honor is aware, the Falcon case is still sub judice with respect to the subordination issue and at the appropriate time we'll

1 move that forward to a confirmation process.

2 The effective date occurred on September 17th and  
3 we appreciate Your Honor's help with respect to the order  
4 that set out milestones. Each milestone was met either on  
5 the date or in advance of that date. And so thanks to the  
6 hard work of many parties, including the debtors' management  
7 team, their advisors, as well as the new board, the  
8 creditor's committee, and all the parties involved. It was  
9 a lot of hard work and it was work well done, and we are now  
10 effective with respect to those pieces.

11 THE COURT: All right. Well, congratulations.

12 MR. FLECK: Thank you, Your Honor. As a final  
13 step in the consummation process of the plan, I also wanted  
14 to update you that the Arcapita Bank entity that's the  
15 closed stock corporation, company that's in Bahrain, that is  
16 having a meeting of its shareholder. It will take place at  
17 11:00 a.m. Bahrain time tomorrow, in Bahrain. I think it's  
18 4:00 a.m. New York time. That is the last legal step in the  
19 formalities of having that entity take care of the  
20 consummation of the plan so that they'll ratify certain  
21 steps. We expect the shareholders to do that.

22 Also, the current board of the Arcapita Bank  
23 entity will resign at that meeting and the new board, which  
24 is comprised of the same members that are at the holding  
25 company, and all the other RA entities will then assume

1 responsibility for that entity as well. So, that's expected  
2 to take place, as I said, tomorrow morning Bahrain time.

3 The Central Bank of Bahrain will be present, as  
4 well as the Industry of Commerce, as is customary, they will  
5 be there on hand for that meeting. And as I said, we expect  
6 that will be the final step in the legal formalities of  
7 having that entity, as well, recognize the plan, steps, and  
8 consummation of the plan.

9 THE COURT: All right.

10 MR. FLECK: With respect to claimants, the  
11 distribution process has also commenced. On the effective  
12 date, we closed the transactions with respect to Goldman  
13 Sachs. The DIP was taken out and we converted to the exit  
14 facility. All of the administrative expense payments that  
15 were due and owing on the effective date were made on the  
16 effective date. There are other administrative expenses  
17 that we expect to be sought by claimants. There's a bar  
18 date. And we expect to receive claims as well, and we'll  
19 handle that through the usual process.

20 The securities under the plan were also issued on  
21 the effective date. Early last week Garden City Group  
22 mailed out to some 3,000 claimants the eligibility forms.  
23 That's for them to provide information to comply with the  
24 securities laws that we talked about shortly before the  
25 effective date at a hearing. The Wilmington Trust is the

1 dispersing agent. They'll be collecting those forms from  
2 the claimants. And FTI has been retained by the new  
3 entities, the new Arcapita entities to -- to process those  
4 forms. They'll also be available to answer questions, as  
5 will Milbank, to the extent they come in from claimants.

6 We do expect the distributions on those plan  
7 securities will commence the middle of the month of  
8 November, assuming we've received a critical mass of  
9 responses from those claimants. So far, based upon the  
10 questions, it appears that claimants understand the process  
11 and are eager to get the forms in to allow for distributions  
12 to take place.

13 The claims reconciliation process also began  
14 before the effective date, as Your Honor knows, with the  
15 filing of a number of omnibus objections. We are continuing  
16 to work with the new board to reconcile those claims. Some  
17 of those objections will be heard, we expect, at the  
18 upcoming omnibus hearing on October 24th. We'll keep in  
19 touch with chambers to advise with respect to the types of  
20 matters and whether they'll be evidence or we expect any --

21 THE COURT: All right.

22 MR. FLECK: -- significant matters to come  
23 forward.

24 Also at that hearing, we expect final fee  
25 applications to be heard. And in connection with that

1 matter, the professionals are expected to file their  
2 applications this week by the 3rd. We've also provided  
3 notice to the Office of the United States Trustee with  
4 respect to that timing. In light of the events in  
5 Washington, I'm not sure if they've received the message  
6 yet, but we'll follow up with Mr. Morrissey.

7 THE COURT: Yeah, I would wait until we get much  
8 closer. If, in fact, somebody's been furloughed as a result  
9 of events in Washington, people are often, having done this  
10 drill in former life, are often willing to come into work,  
11 but they're actually not allowed. And so, I would wait  
12 until you get much closer. And since there is, I guess,  
13 that October 17th debt ceiling showdown, let's hope that  
14 that injects a degree of sanity into the political processes  
15 to resolve it, but it's anybody's guess.

16 MR. FLECK: Agreed. Lastly, Your Honor, as you're  
17 aware, there are two appeals that are pending in the  
18 District Court by Captain Alsohaibi. That's with respect to  
19 the financing order and the confirmation order. Those  
20 matters have been consolidated before Judge Shineland (ph)  
21 in the District Court. Oral argument has not been set, but  
22 the matters have been fully briefed before the District  
23 Court.

24 I said lastly, but there are two other points. I  
25 just wanted to mention the new board is well underway in its



1 activities. It's meeting in New York next week with its  
2 asset manager, ADAM, to talk about the portfolio. And with  
3 respect to the creditor's committee, Your Honor, the  
4 creditor's committee does still exist under the plan and the  
5 confirmation order for limited purposes, the litigation for  
6 which standing has been granted, as well as review of final  
7 fee application.

8 So, we'll be back in that capacity in connection  
9 with the hearing on final fee applications on behalf of the  
10 committee as well.

11 THE COURT: All right.

12 MR. FLECK: I'm now prepared to move on to the  
13 agenda for today which is, as I said, limited.

14 THE COURT: Yes.

15 MR. FLECK: Okay.

16 THE COURT: Please do.

17 MR. FLECK: Thank you, Your Honor.

18 THE COURT: Thank you for the update.

19 MR. FLECK: There is -- there's just one item,  
20 it's the Ernst & Young application to update the terms of  
21 its retention. I'm pleased that we have an agreement with  
22 Ernst & Young, and I'm happy to turn the podium over to  
23 Mr. Riela to speak to those terms. And, as I said, it is  
24 supported by the reorganized debtors.

25 THE COURT: All right.

1 MR. RIELA: Good morning, Your Honor.

2 THE COURT: Good morning.

3 MR. RIELA: Michael Riela, Latham & Watkins for  
4 Ernst & Young.

5 Ernst & Young filed the application on July 3rd to  
6 update the terms of increase its audit fee by a total of  
7 200,000 Bahraini dinars, which is about \$583,000.

8 Since the application was filed, Ernst & Young had  
9 a lot of constructive conversations with UCC and its  
10 financial advisor, (indiscernible - 00:21:09) to address the  
11 questions that it had. As a result of those discussions,  
12 Ernst & Young has agreed with the UCC to perform additional  
13 services for the reorganized company.

14 First of all, to perform audit procedures, which  
15 we expect will result in the reissuance of its 2012 audit  
16 opinion. The current, or the last, audit opinion was  
17 basically a no opinion. They didn't get enough information  
18 from the company, so they couldn't opine on the financial  
19 statements.

20 There's also going to be a 2013 audit that's going  
21 to be done by Ernst & Young. The terms, the fees of those  
22 audits, those work streams (ph) have been agreed upon, my  
23 understand is that engagement letters have been signed. So,  
24 this leaves us with the UCC's consent to the relief sought  
25 in this particular application. We've agreed to some

1 modifications to the form of order that was first presented  
2 to the Court, or filed with the application. They're kind  
3 of minor in scope, basically mentioning the two additional  
4 work streams, but everything else basically stays the same.

5 THE COURT: My question is this, and I had this  
6 come up in the American Airlines case as well when there was  
7 a request to revise the actual agreement in a 328  
8 application, is my understanding -- and there's not a  
9 discussion of legal standard in the motion, it's actually a  
10 fact based, well we didn't know whether this is how things  
11 worked out --

12 MR. RIELA: Right.

13 THE COURT: -- and essentially what's fair.

14 Is the 320 -- 330 is Court reviews it for  
15 reasonableness. People can weigh in and you would all see  
16 how that works out, but there's certainly -- it's all in the  
17 context of the scope of the retention.

18 328 is even more so the scope of the retention  
19 such that a Court doesn't review it and there's some times  
20 when it works to somebody's benefit, and there's some times  
21 when it doesn't work to somebody's benefit. And as I  
22 expressed in another case where this came up, I'm very  
23 loathe to have courts be in the business of treating 328  
24 applications to say, well, that's the understanding  
25 (indiscernible - 00:23:27) or may not, because it's a flat

1 fee and therefore, we're asking the Court to keep its nose  
2 out of it, but we're going -- but we're only going to do  
3 that if it works to our benefit, because if it works to our  
4 detriment, we're going to come back and revise it.

5 I don't know what authority there is for that.  
6 And I didn't see anything in the motion here that fits my  
7 understanding of what the law says about amending a 328 for  
8 some things that are unforeseen. There's a discussion about  
9 bankruptcy and the challenges of bankruptcy. And you had me  
10 at hello in terms of the challenges of this very complex  
11 bankruptcy.

12 But since there was originally a retention and  
13 there was a retention sought in this case, at which point  
14 the bankruptcy was an obvious event. People knew it.  
15 That's what the retention was all about, being retained  
16 during the course of the bankruptcy. I have a concern about  
17 whether it's appropriate for me to grant this.

18 I reach that conclusion reluctantly because  
19 there's an agreement here, and I'm not saying it's not fair  
20 in the colloquial use of the word, but I'm very mindful of  
21 what a Court's role is and isn't in 330 versus 328  
22 applications. So, what can you tell me on that score?

23 MR. RIELA: Well, I think, you know, the first  
24 part when we made it in the motion, the engagement letter  
25 had the -- the flat fee in the engagement letter was an

1 estimate subject to change -- subject to increase based on  
2 various things that may come up.

3 THE COURT: I know, but you're -- the -- that was  
4 the fee, and if somebody wanted to put something in the 328  
5 application and say it was an estimate subject to change  
6 based on this, that, and the other thing, you could have  
7 done it, but all I got was this. And so, if it turned out  
8 that the fee that was charged was X and the amount that  
9 actually it turned out that you needed was X minus some  
10 other number, I highly doubt anybody would be in here  
11 saying, well, we should amend it downward because our  
12 estimate was high.

13 MR. RIELA: Well, maybe the debtor is going to  
14 come and said, you know --

15 THE COURT: I've never seen one of those and I  
16 don't expect --

17 MR. RIELA: Nor have I, but perhaps you never  
18 know.

19 THE COURT: And again, I'm not trying to be  
20 pejorative about it.

21 MR. RIELA: I understand.

22 THE COURT: It's sort of the nature of a 328  
23 application. So, if there's something that's unforeseen,  
24 that's what I understand the law is, you just said well, you  
25 know, we were going to do this, but then everything went

1 sideways, which is an event that sometimes happens in cases.

2 MR. RIELA: Sure.

3 THE COURT: And retentions, but just has this  
4 looked like a matter of course, well, things took more time  
5 and they cost more. Again, I'm not happy to be -- to be in  
6 this position because I certainly understand there's lots of  
7 metrics and information you provide about how -- what's  
8 requested here, sort of what put it in line with the  
9 traditional compensation that E&Y has gotten and the way  
10 it's handled these things. So, I really -- I'm sort of  
11 reluctant to bring it up, but I need more because I'm not --

12 MR. RIELA: I'd just state one more thing and if  
13 Your Honor still has concerns, remit perhaps a suggestion.  
14 The one more thing I would bring up is obviously the US  
15 Trustee retains 330 review over this. The parties, other  
16 than the US Trustee or the old debtors with whom E&Y  
17 negotiated the fee (indiscernible - 00:26:56) by Gibson Dunn  
18 and now the UCC, the reorganized debtors represented by  
19 Milbank, we came to our agreement. I'm not sure that  
20 there's any other party that would be prejudiced by this  
21 application being approved.

22 THE COURT: No, this would be coming out of estate  
23 funds, so it's coming out of creditors. Again, I'm not --  
24 the US Trustee's Office isn't here --

25 MR. RIELA: Sure.

1 THE COURT: -- in light of the current excitement  
2 in Washington, I don't think I can take anything from that  
3 one way or the other. Even when Washington -- everything's  
4 normal in Washington, the Government's silence on an issue  
5 doesn't -- is often difficult to discern what it means.

6 MR. RIELA: They retain their 330 review under  
7 this construct anyway.

8 THE COURT: No, I understand that, but again I've  
9 been told by various people, well what you in this case, it  
10 has no effect on any other case, it's not precedential. And  
11 then I've had that decision cited to me less than two weeks  
12 later. So, nothing is done in a vacuum. And, again, if I'm  
13 going to grant something in a 328 retention that is an  
14 amendment and an increase, I need to know that it fits  
15 within the confines of the law, just because that's the way,  
16 and that's how it goes.

17 So, again, I'm not particularly happy about it in  
18 this factual circumstance. I don't think -- I'm not saying  
19 that your request is unreasonable in a generic sense, but I  
20 have concerns and maybe you can alleviate them, maybe you  
21 can't. I certainly am happy to give you a chance. You  
22 might not have seen this coming given that it was a  
23 consensual situation. And if you want to mull it over, and  
24 think about it, and file something that's supplemental or  
25 discuss it, however you want to do it. But I do have that

1 concern that's --

2 MR. RIELA: I understand, Your Honor, and I -- I  
3 basically have had everything that I can think of said  
4 already. I guess my suggestion would be given that final  
5 fee applications will be filed, and actually Ernst & Young  
6 filed its final fee application yesterday. It includes this  
7 fee anyway. Hopefully we'll have an October 24th hearing  
8 date with respect to that, depending on what happens in  
9 Washington.

10 Perhaps my suggestion ought to be, let's deal with  
11 the entire fees --

12 THE COURT: That's fine.

13 MR. RIELA: -- at the final fee hearing. We will  
14 have 328 apply to, you know, what's already been approved by  
15 the Court, 330 applied to the additional fee, and whatever  
16 else --

17 THE COURT: Well, again, but this is -- I mean,  
18 the application and the retention is a 328 application. I  
19 know that the US Trustee always has that 330 carve-out. But  
20 from my point of view, it's a 328. So, yeah, if you want to  
21 submit something or address it at the hearing, however you  
22 want to handle it, I'll essentially table this until that  
23 time and we can deal with it then.

24 MR. RIELA: And, Your Honor, I think my stitch  
25 would just be, as I said, we've already filed the fee



1 application yesterday which includes this fee. We can deal  
2 with all fees, you know, (indiscernible - 00:29:56) block of  
3 time, you know, during the final fee hearing.

4 THE COURT: All right. That's fine. Anything  
5 that you want to add, Mr. Fleck?

6 MR. FLECK: No, that approach is fine. Thank you,  
7 Your Honor.

8 THE COURT: All right. Anything else we need to  
9 address today?

10 MR. FLECK: That's all we have from Arcapita.

11 THE COURT: All right, we'll see you all on the  
12 24th.

13 MR. FLECK: Thank you very much, Your Honor.

14 THE COURT: Thank you.

15 (Whereupon these proceedings were concluded at 10:48  
16 AM)

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

I, Jamie Gallagher, certify that the foregoing transcript is  
a true and accurate record of the proceedings.

Jamie  
Gallagher

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Date: October 3, 2013