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

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In re:	:	Chapter 11
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ARCAPITA BANK B.S.C.(C.), <i>et al.</i> ,	:	Case No. 12-11076 (SHL)
	:	
Debtors.	:	Jointly Administered
	:	
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**STANDARD CHARTERED BANK'S OBJECTION TO THE  
DEBTORS' MOTION FOR AN ORDER PURSUANT TO SECTIONS  
105(a) AND 363(b) OF THE BANKRUPTCY CODE AUTHORIZING  
THE DEBTORS TO LAUNCH THE EUROLOG IPO**

Standard Chartered Bank (“**Standard Chartered**”), through its undersigned counsel, hereby asserts this objection (this “**Objection**”) to the *Motion for an Order Pursuant to Sections 105(a) and 363(b) of the Bankruptcy Code Authorizing the Debtors to Launch the EuroLog IPO* [Dkt. No. 350] (the “**Motion**”) filed by the above-captioned debtors and debtors in possession (the “**Debtors**”) and respectfully represents and states as follows:<sup>1</sup>

<sup>1</sup> By filing this Objection, Standard Chartered is not acknowledging the propriety of these chapter 11 cases or that the Court should continue to exercise jurisdiction over each of the Debtors. Standard Chartered reserves the right to request that the Court dismiss, or abstain from, these chapter 11 cases.

**PRELIMINARY STATEMENT**

1. With no advance notice given to Standard Chartered, on July 26, 2012, the Debtors filed the Motion seeking approval of the EuroLog IPO<sup>2</sup> transaction that would involve the transfer of the assets of several non-Debtor subsidiaries (the “**Conveying Subsidiaries**”) of Arcapita LT Holdings Limited (“**Arcapita LT**”) and AEID II Holdings Limited (“**AEID II Holdings**”) -- Debtors whose equity shares are pledged to Standard Chartered as security -- to ListCo, a newly formed non-Debtor entity whose shares are not pledged to Standard Chartered.

2. The Motion contains no information about how or whether the Conveying Subsidiaries will be fairly compensated for the transfer of their valuable industrial real estate assets to ListCo, or how the proceeds of the EuroLog IPO will be allocated among the various parties with an interest in the transaction, including Standard Chartered. In fact, the Motion identifies the beneficiaries of the EuroLog IPO and the recipients of the proceeds of the EuroLog IPO as Arcapita Investment Holdings Limited (“**AIHL**”) and Arcapita Bank B.S.C. (c) (“**Arcapita Bank**”). Motion ¶10. The Motion is devoid of any information concerning how the Debtors will adequately protect Standard Chartered’s interests, as they are required to do.

3. Standard Chartered has made numerous requests for further information and documents about the EuroLog IPO, and the Debtors have started to provide a small sampling of the requested information. However, despite Standard Chartered’s numerous requests for the production of the KPMG valuation reports, the Debtors have refused to provide the valuation reports unless Standard Chartered agrees to indemnify KPMG. The Debtors’ position is entirely inappropriate. Valuation work performed by KPMG -- the Debtors’ court retained valuation

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<sup>2</sup> Capitalized terms not otherwise defined herein shall have the meaning ascribed to such terms in the Motion.

professionals -- must be disclosed to their creditors without condition (other than confidentiality) particularly in this circumstance where the Debtors have placed the value of their assets in issue.

4. Since Standard Chartered does not have sufficient information to evaluate the EuroLog IPO transaction, Standard Chartered cannot support the Debtors' pursuit of the EuroLog IPO at this time. In addition, the Debtors have failed to demonstrate how Standard Chartered's interests are adequately protected in connection with the closing of the EuroLog IPO. This Court should not grant the Debtors blanket authority to transfer assets regardless of the potential irrevocable impact on Standard Chartered's property interests.

5. Accordingly, unless and until Standard Chartered receives sufficient information to properly evaluate the EuroLog IPO and can be assured that its property interests are adequately protected, the Court should not grant the relief in the Motion.

#### **BACKGROUND**

##### *The Debtors' Corporate and Capital Structure*

6. Arcapita Bank is the ultimate parent of all of the entities in the Arcapita group. AIHL is its wholly-owned subsidiary. Arcapita Bank and AIHL have significant unsecured debt obligations, including a \$1.1 billion unsecured murabaha facility.

7. AIHL's wholly-owned subsidiary, Arcapita LT, has only one non-insider creditor: Standard Chartered. Arcapita LT has a 100% interest in a matrix of Cayman Islands holding companies that own substantially all of Arcapita's minority equity interests in long-term investments.

8. AEID II Holdings, WindTurbine Holdings Limited ("**WindTurbine**"), and RailInvest Holdings Limited ("**RailInvest**", together with AEID II Holdings, WindTurbine, and Arcapita LT, the "**SCB Subsidiaries**"), are wholly-owned subsidiaries of Arcapita LT. Standard Chartered is the sole creditor of each of the SCB Subsidiaries and, as described below, holds

equitable mortgages over the equity of each of the SCB Subsidiaries and is the sole beneficiary of an express trust with respect to all dividends or other distributions on account of the shares of the SCB Subsidiaries and any thereof.

9. Arcapita LT has an indirect equity interest in substantially all of the EuroLog Assets. Most significantly, AEID II Holdings' sole asset is an indirect 88.6% equity interest in AEID II Holding Company Limited, all of whose assets the Debtors propose to transfer to ListCo on terms that have not been disclosed or finalized.

*Standard Chartered Murabaha Facilities*

10. Standard Chartered extended two US\$50,000,000 murabaha facilities (the "**SCB Secured Facilities**") to Arcapita Bank, as borrower, pursuant to those certain Master Murabaha Agreements, dated as of (i) May 30, 2011, in the principal amount of US\$50,000,000 (as amended, restated, replaced, supplemented or otherwise modified from time to time, and together with such supporting and ancillary documents thereto, the "**SCB May Murabaha Agreement**") and (ii) December 22, 2011, in the principal amount of US\$50,000,000 (as amended, restated, replaced, supplemented or otherwise modified from time to time, and together with such supporting and ancillary documents thereto, the "**SCB December Murabaha Agreement**", and together with the SCB May Murabaha Agreement, the "**SCB Murabaha Agreements**").

11. The SCB Secured Facilities are Sharia-compliant murabaha facilities, which provide for the sale of precious metals from Standard Chartered to Arcapita at the cost price of the precious metals plus an agreed profit amount plus costs, on deferred payment terms. SCB Murabaha Agreements, ¶¶2.2, 5.2.

12. The obligations of Arcapita Bank under the SCB May Murabaha Agreement are jointly and severally guaranteed by AIHL, Arcapita LT, and WindTurbine in accordance with that certain Guaranty dated May 30, 2011 (the "**May Guaranty**"), and the obligations under the

SCB December Murabaha Agreement are jointly and severally guaranteed by AIHL, Arcapita LT, AEID II Holdings, RailInvest and WindTurbine in accordance with that certain Guaranty dated December 22, 2011 (the “**December Guaranty**”, together with the May Guaranty, the “**SCB Guaranties**”). Through the SCB Guaranties, Standard Chartered has a claim against each of the SCB Subsidiaries.

*Standard Chartered Mortgages and the Cayman Trusts*

13. Additionally, the loan obligations under the two SCB Secured Facilities are secured by eight equitable mortgages (the “**SCB Mortgages**”, and together with the SCB Murabaha Agreements, the SCB Guaranties, and the Finance Documents and Security Documents (each as defined in the SCB Murabaha Agreements) and any other documents related to the foregoing agreements, the “**SCB Murabaha Documents**”) over the shares (the “**Mortgaged Shares**”) in each of the SCB Subsidiaries -- Arcapita LT, AEID II Holdings, WindTurbine and RailInvest. The SCB Mortgages are governed by the law of the Cayman Islands. *E.g.*, Equitable Mortgage Over Shares in Arcapita LT Holdings Limited, dated December 22, 2011, ¶10 (“**December Arcapita LT Mortgage**”). The mortgagors under the SCB Mortgages are AIHL and Arcapita LT (together, the “**Mortgagors**”).

14. Moreover, the SCB Mortgages create express trusts (the “**Cayman Trusts**”) under Cayman Islands law with respect to all dividends and other distributions made on or in respect of the Mortgaged Shares or any thereof. *E.g.*, December Arcapita LT Mortgage, ¶8.3.

**OBJECTION**

*A. THE DEBTORS CANNOT USE THE BENEFITS OF THE AUTOMATIC STAY TO EVISCERATE STANDARD CHARTERED’S PROPERTY RIGHTS*

15. Courts in this District have refused to allow debtors to use the protection of bankruptcy to cause harm to the rights of their creditors. In fact, “[i]t is well established that the

automatic stay provision of § 362(a) is intended to preserve the status quo as of the date of commencement of bankruptcy proceedings.” *In re Policy Realty Corp.*, 242 B.R. 121, 129 (S.D.N.Y. 1999) (holding that a debtor’s attempt to extend a lease that had terminated by its terms would impermissibly alter the status quo as of the petition date to the detriment of the non-debtor party). The automatic stay is a shield, not a sword, and cannot be used by debtors to alter creditors’ rights. *See Int’l Distribution Centers, Inc. v. Walsh Trucking Co., Inc.*, 62 B.R. 723 (S.D.N.Y. 1986) (“Although Section 362 is a shield to protect the debtor to provide for a ‘fresh start,’ the automatic stay was not intended by Congress to be used as a sword.”) (citation omitted); *In re Texaco Inc.*, 81 B.R. 804, 806 (Bankr. S.D.N.Y. 1988) (“The purpose of the [automatic stay] is the protection of the debtor, but when the debtor is in the position of the assailant rather than the victim, the potential for abuse of that purpose is manifest.”) (citing *Bohack Corp. v. Borden, Inc.*, 599 F.2d 1160, 1168 (2d Cir. 1979)).

16. The Debtors are seeking complete authorization to take all actions they deem necessary to consummate the EuroLog IPO. Not only have the Debtors failed to provide Standard Chartered with sufficient information to support the Debtors’ business judgment to pursue the EuroLog IPO, but the Debtors have failed to provide sufficient protections to Standard Chartered to ensure that its collateral position is protected throughout all phases of the transaction.

17. In addition, any proceeds or other distributions on account of the Mortgaged Shares resulting from the EuroLog IPO are automatically impressed with the Cayman Trusts, and such proceeds are the property of Standard Chartered, not property of the Debtors or property of the estate. *See* 11 U.S.C. § 541(d) (where the debtor only holds “legal title and not an equitable interest,” the property becomes property of the estate “only to the extent of the debtor’s legal title

to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.”); *Owen v. Owen*, 500 U.S. 305, 308 (1991); *Begier v. I.R.S.*, 496 U.S. 53, 59 (1990) (“Because the debtor does not own an equitable interest in property he holds in trust for another, that interest is not ‘property of the estate.’”); *Premier Operations Ltd. v. David Morgan Fine Arts Int’l, Inc. (In re Premier Operations Ltd.)*, 2005 U.S. Dist. LEXIS 7164, \*7-15 (S.D.N.Y. 2005); *Gowan v. The Patriot Group, LLC (In re Dreier LLP)*, 452 B.R. 391, 416 (Bankr. S.D.N.Y. 2011).

18. By seeking this Court’s broad and complete approval of the EuroLog IPO, the Debtors are seeking authority for the Conveying Subsidiaries to transfer away their assets that constitute the value of Standard Chartered’s collateral in a way that could irrevocably diminish the value of Standard Chartered’s collateral and irreparably impair its rights as a secured creditor and as beneficiary of the Cayman Trusts. In addition, Standard Chartered should not be bound by any valuation of the EuroLog Assets without further proper notice and a hearing before this Court. Accordingly, this Court should not permit the Debtors to bind Standard Chartered to any valuation of the EuroLog Assets, transfer any of the EuroLog Assets, or distribute any of the EuroLog IPO proceeds without ensuring that the property rights of Standard Chartered are protected and that the status quo is maintained.

*B. THE RELIEF REQUESTED IN THE MOTION JUSTIFIES GRANTING STANDARD CHARTERED RELIEF FROM THE AUTOMATIC STAY*

19. The Debtors’ proposed actions under the EuroLog IPO constitute grounds for relief from stay for lack of adequate protection. Section 362(d)(1) of the Bankruptcy Code requires that the Court shall grant a party relief from stay upon a showing of “cause, including the lack of adequate protection of an interest in property . . . .” 11 U.S.C. § 362(d)(1); *see also id.* § 363(e) (on request of a party with an interest in property to be used, sold, or leased, the

court “shall prohibit or condition such use sale, or lease as is necessary to provide adequate protection of such interest.”); *In re Domestic Fuel Corp.*, 70 B.R. 455 (Bankr. S.D.N.Y. 1987) (granting relief from stay to a secured creditor whose collateral was privately held stock); *In re Munoz*, 83 B.R. 334 (Bankr. E.D. Pa. 1988) (same). If the Debtors are authorized to direct the Conveying Subsidiaries to transfer the EuroLog Assets to ListCo without providing Standard Chartered with adequate protection, Standard Chartered must be granted relief from stay in order to act immediately to protect its interests.

*C. TO LAUNCH THE EUROLOG IPO THE DEBTORS MUST PROVIDE SUFFICIENT INFORMATION AND PROTECTIONS TO STANDARD CHARTERED.*

20. Unless the Debtors can provide Standard Chartered with sufficient information to support their decision to pursue the EuroLog IPO, Standard Chartered submits that the Court must deny the Motion. Information which must be provided includes the following:

- Standard Chartered has requested certain general information regarding the EuroLog IPO, such as disclosure documents in respect of the offering, tax and corporate steps plan, and structure documents. To date, Standard Chartered has received some of this information, but certain of these documents and related information have not yet been prepared. Standard Chartered seeks such documentation to ascertain the overall structure of the EuroLog IPO, to identify any legal, commercial or disclosure issues and to have the ability to assess risk, expense, timeline and likelihood of success.
- Standard Chartered will need to monitor a limited number of agreements and commercial terms throughout the EuroLog IPO process and retain the authority to consent to such agreements and terms as they are fundamental to the rights of Standard Chartered and the preservation of the value of its collateral. This information has a directly impact on Standard Chartered and its interests in the Debtors and generally falls into three categories: (a) procedures for the use of proceeds, including flow of fund documentation and independent escrow arrangements, (b) valuation of assets, and (c) commercial terms of agreements involving assets transfers and indemnity from the sellers.
- *Flow of Funds.* Standard Chartered has requested documentation related to proceeds from the EuroLog IPO and flow of funds. To date, Standard Chartered has received a list of estimated amounts

for use of proceeds. Although this is a helpful starting point, it is important that Standard Chartered be able to consider this together with additional information. First, the list of proceeds needs to be reviewed in connection with the KPMG valuations which have not been provided. Second, the proposed flow of funds should be predicated on a process designed to ring-fence and protect the proceeds of the EuroLog IPO in the hands of an independent agent rather than ListCo until all funds for the assets transferred from the debtor entities have been received and preserved to ensure Standard Chartered's property interests are not adversely affected by the EuroLog IPO.

- *Valuation.* Standard Chartered has requested detailed valuation reports, discussions with the valuation experts and other documents related to the valuation of the ListCo and the specific values attributed to the assets being contributed to ListCo, including from Arcapita LT and AEID II Holdings. As noted above, these reports have not been provided.
- *Commercial terms of asset transfer agreements and indemnity arrangements.* Standard Chartered has requested and received general terms sheets related to the major agreements related to asset transfers and indemnity arrangements with the sellers of assets, the Debtors, and the underwriters. However, the actual agreements must be provided to ensure the major commercial terms reflect the points of principle agreed to concerning asset transfers and indemnity and to ensure that other commercial terms do not encroach upon the principle of preserving value of the assets and the priority positions of the Debtors' creditors.

21. In light of all of the foregoing, the Court should deny the Motion.

WHEREFORE, for the foregoing reasons, Standard Chartered respectfully requests that the Court (a) deny the Motion and (b) grant Standard Chartered such other and further relief as the Court deems appropriate.

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August 12, 2012

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