Jonathan S. Henes
Nicole L. Greenblatt
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, New York 10022
Telephone: (212) 446-4800
Facsimile: (212) 446-4900

and

James H.M. Sprayregen, P.C.
Sienna R. Singer
KIRKLAND & ELLIS LLP
300 North LaSalle
Chicago, Illinois 60654
Telephone: (312) 862-2000
Facsimile: (312) 862-2200

*Counsel for Ad Hoc Group of Holders of the Arcapita Bank B.S.C.(c) Syndicated Facility*

**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 |

**AD HOC GROUP'S OBJECTION TO ARCAPITA'S SECOND REQUEST FOR EXTENSION OF EXCLUSIVITY**

Certain holders (the "Ad Hoc Group") of the $1.1 billion unsecured Murabaha, Shari'ah-compliant syndicated facility, dated as of March 28, 2007, issued by Arcapita Bank B.S.C.(c) file this objection to the *Debtors' Second Motion for Order Extending the Exclusive Periods To File a Plan or Plans of Reorganization and To Solicit Acceptances* [Docket No. 509] (the "Exclusivity Extension Motion").

## PRELIMINARY STATEMENT

1. The Debtors' request to extend the exclusive periods by 60 days should be denied. The Bankruptcy Code provides debtors an exclusive right to propose a chapter 11 plan and obtain acceptances thereon for a finite period of time. The purpose of this is to give debtors the time to propose a plan without the distraction of competing plans. Here, the Debtors do not need more time to propose a plan; indeed, they already have proposed a plan, the "toggle plan" − they simply have not filed it yet. To assert that they need more time to officially file the "toggle plan" is a red herring. The real intention of the requested extension of exclusivity is to provide their incumbent management team with more time to attempt to find "new money," which, despite assurances that they would already have a commitment by this time, looks like a fool's errand. If the extension is granted, the Debtors will not be getting a 60 day extension to file a plan, they will be given 120 days to see if anyone will invest new money in their investment company. Will anyone invest, begs the question: even if the Debtors succeed in raising new money — which seems unlikely — what will the estates and creditors have won? The Debtors have offered no evidence that they can raise an adequate amount of capital to achieve a confirmable plan. Rather, expenses will be racked up, time will be wasted and, in the first quarter of 2013, the creditors may find themselves with a significantly worse outcome than an immediate and orderly monetization of the Debtors' existing investments.

2. The Debtors do not need more time to propose a plan; they are simply seeking more time to roll the proverbial dice in an attempt to save the management team's jobs. Let's look at the facts. The Debtors have already determined to propose their "toggle plan," which was outlined for the Court a month ago. 9/5/12 Hr'g Tr., at 13:7-14. The concept of the "toggle plan" is simple — if the Debtors raise sufficient new money by the confirmation hearing date ***in 2013***, they will "reorganize;" if they cannot, the Debtors will conduct an orderly monetization of

their existing investments. To be clear, the Debtors' business is not an operating business and it is not a complex business. It doesn't make anything or sell anything or provide services to anyone. It invested in businesses or assets and attempts to maximize the value of those investments. Consequently, the Debtors' so-called "reorganization" of their business is simply raising new funds to make new investments. This should not be done on the backs of the creditors. The Debtors should be — and should have been from the outset of these chapter 11 cases — determining how to maximize the value of the existing investments, rather than spending astonishing amounts of money trying to find new investors. ***The Debtors can file a plan within a week if not today***. The "toggle plan" can include the Debtors' view of how value should be allocated among various creditor groups and then the Debtors and the creditors can negotiate the terms of the plan - out in the open.

3. Moreover, the Debtors' justifications for seeking an extension of exclusivity are not compelling and are stale. The Debtors assert that they were not able to extensively prepare for these chapter 11 cases. While this may be true, it is old news. By their own admission, the Debtors have stabilized their businesses and, most importantly, have proposed and explained the "toggle plan" they want to file. In addition, while Shari'ah law makes these cases academically and superficially interesting and perhaps unique, it does not make these cases complex. Neither the "toggle plan" nor any other issue in these chapter 11 cases is predicated on difficult issues under Shari'ah law. The Debtors demonstrate that they have all the pieces in place to propose the "toggle plan." The question is why don't they file the plan now? The answer is simple - to buy as much time as they can to try to raise new money. This is not a proper justification for obtaining an extension of exclusivity. The Debtors should not be given this much latitude.

## BACKGROUND

4. Since commencing these chapter 11 cases more than six months ago on March 19, 2012 (the "Petition Date"), the Debtors are now seeking their second extension of the exclusive periods to file and solicit votes on a plan to December 14, 2012 and February 12, 2013, respectively.[1] In support of their request for an additional 120 days to solicit votes on *a* plan, the Debtors offer four arguments, each of which will be addressed below:

5. First, the Debtors assert that the chapter 11 cases are large and complex as a result of the Debtors' subsidiaries having complicated corporate structures to facilitate Shari'ah-compliant investments and a world-wide business with multi-jurisdictional issues, including a related Cayman Islands proceeding. The Debtors note that, because these cases were filed on an emergency basis after negotiations broke down on a consensual extension of debt maturities, they required significant time at the onset of these cases to stabilize the business and analyze the many legal issues relevant to the Debtors' restructuring.[2] Accordingly, the Debtors posit that, although they have "advance[d] [these cases] significantly relative to the preparation of a restructuring plan intended to provide an expeditious exit from chapter 11," additional time is required to permit the Debtors to negotiate and propose a chapter 11 plan. Exclusivity Extension Motion, at 2, ¶2.

6. Second, the Debtors identify the progress they have made toward reorganization as demonstrated by (i) delivery of the KPMG valuation reports indicating assets under management with a liquidation value of $1.4 billion, (ii) delivery of a "new money" business

---

[1] On July 11, 2012, this Court granted the Debtors a 90-day extension of their exclusive periods to file and solicit acceptances of a chapter 11 plan until October 15, 2012 and December 14, 2012, respectively. *Order Pursuant to Section 1121(d) of the Bankruptcy Code Extending the Debtors' Exclusive Periods to File a Plan or Plans of Reorganization and Solicit Acceptances Thereof* [Docket No. 309].

[2] None of the members of the Ad Hoc Group participated in the Debtors' failed prepetition negotiations to extend their debt maturities.

plan and related investor presentation, (iii) initiation of negotiations with the Official Committee of Unsecured Creditors and (iv) the promise of a standalone business plan for monetizing the Debtors' existing asset portfolio.[3] The Debtors also highlight the significant work already undertaken to address important plan issues, including, among other things (i) analyses of governance agreements and change of control and proxy issues related to how Arcapita manages its portfolio companies and investments; (ii) analyses of foreign law and enforcement issues, including those involving the Central Bank of Bahrain and issues relating to the Cayman Proceeding, and (iii) analyzing cash needs and developing rolling budgets intended to minimize expenditures, while maintaining and protecting the Debtors' indirect interest in and control of multiple investments which constitute the value of the Debtors' estates *and protecting related optionality as to those assets while a reorganization plan is formulated.*

7. Third, the Debtors argue that they are in the best position to maximize value and "reconcile the varying, and sometimes disparate, interests of creditors" by creating a plan of reorganization that maximizes value for all. Exclusivity Extension Motion, at 19, ¶42. By committing to pursue a "toggle plan" on or before December 14, 2012, the Debtors assert that they can "pursue the option that the Debtors believe will provide the greatest benefit to creditors *without exposing the Debtors' estates to a significantly downside risk if the new equity money does not materialize.*" Exclusivity Extension Motion, at 13, ¶28 (emphasis added).

8. Finally, the Debtors assert that "[t]hrough prudent business decisions and cash management" they are "ahead of budget" and have sufficient liquidity to maintain exclusive control of the process because they can pay all administrative claims. Exclusivity Extension Motion, at 19, ¶43. At the same time, the Debtors have filed a motion to enter into a

[3] Counsel for the Ad Hoc Committee, who has entered into a confidentiality agreement directly with the Debtors, received a copy of the standalone business plan on October 1, 2012.

commitment letter for a proposed $150 million DIP financing facility[4] because they "anticipate the need for debtor-in-possession financing to provide adequate liquidity" through their proposed exclusive periods. Exclusivity Extension Motion, at 20, ¶43.

**ARGUMENT**

9. The Debtors' request to extend their exclusive period to file a plan is simply not supported by the facts and circumstances here.

10. First, although these are large chapter 11 cases with world-wide operations and concomitant proceedings in the Cayman Islands, that is not particularly unique and the Debtors' operations are not complex. None of the Debtors are operating companies. The Debtors do not sell anything, buy anything or service anything. The Debtors invested money. The Debtors' job is to take actions to maximize the value of their existing investments without undue risk to the creditors' recoveries. The Debtors' request to extend the exclusive periods is not to give them more time to propose a plan, they want more time to try to raise money, which they have been trying to do for months. The Debtors have offered no evidence that raising new money is likely — and to attempt to do so will require significant additional time and expense, while simultaneously risking creditor recoveries. Notably, the Debtors have demonstrated a history of delay and missed deadlines:

- At a hearing on June 26, 2012, the Debtors told the Court that they would begin circulating the KPMG valuation reports in July and hoped to have all reports available by the end of July. 6/26/12 Hr'g Tr., at 19: 1-3. The valuation reports were not provided until mid-August;
- At the June 26, 2012 hearing, the Debtors suggested that the "new money" process would be complete in August or September. 6/26/12 Hr'g Tr., at 32:8-12. At the hearing on September 5, 2012 the Debtors said it was "too early to give the Court a report" and they hoped the equity raise would "come together" in September. 9/5/12

[4] *See Debtors' Motion for Entry of an Order Authorizing the Debtors to Enter into a Financing Commitment Letter and Incur Related Fees, Expenses and Indemnities* [Docket No. 513] ("DIP Commitment Motion").

Hr'g Tr., at 12:19-21. September has come and gone and now the Debtors are asking their constituents to wait until the confirmation hearing - ***in 2013! -*** to see if the money will arrive to fund their "new money" plan; and

- At the hearing on June 26, 2012, the Debtors told the Court that they hoped to file a DIP motion in August and that such a motion would be on file "certainly no later than the beginning of September." 6/26/12 Hr'g Tr., at 20:21-25, 21:1-2. (Again, September has come and gone.) Then, at the September 5, 2012 hearing, the Debtors said they were making a final decision on the DIP lender by the end of the week and hoped to present the motion on DIP financing at the October 2 hearing. 9/5/12 Hr'g Tr., at 13:16-25. The Debtors have been pursuing DIP financing for months, but only recently filed a motion for approval of a commitment letter relating to a DIP facility and still have not filed a motion for approval of the DIP facility.

11. Indeed, the difficulty the Debtors are having attempting to raise a $150 million DIP Facility, with all of the protections a DIP lender receives, does not bode well for the Debtors' prospects of raising sufficient new money to confirm a plan acceptable to creditors. The Debtors should not be given 4 months to see if they can raise new money - they should file their "toggle plan" promptly and be put on a very short leash so funds are not imprudently invested and creditor recoveries are not diminished by what may end up to be a new money pipe dream.

12. Second, by the Debtors' own admission, the litany of work undertaken to date means "[t]he Debtors [now] have the building blocks for negotiation of an exit in place…" Exclusivity Extension Motion, at 11, ¶24]. ***In other words, the Debtors can file a plan now.*** Specifically:

- The Debtors filed their Schedules and Statements of Financial Affairs on June 8, 2012 and have sufficient knowledge regarding claims against them to develop and propose a plan;

- The Debtors have analyzed the waterfall recoveries, change of control and proxy issues that dictate allocation of value;

- The Debtors have obtained the valuation reports and developed each of the new money and standalone business plans and can assess the cost/benefit of pursuing each alternative;

- The Debtors have analyzed foreign laws and enforcement issues in foreign jurisdictions, including issues involving the Central Bank of Bahrain, issues relating to Cayman law and the Cayman proceeding, a proceeding in Luxembourg, and a proceeding in Poland; and

- Since the appointment of the joint provisional liquidators ("JPLs") in the Cayman proceedings, the Debtors have been communicating regularly with the JPLs to coordinate the chapter 11 cases with the Cayman proceedings. Recently, these discussions have focused on how to obtain "validation orders" from the Cayman Court relating to the anticipated DIP facility and the EuroLog IPO. *See* Exclusivity Extension Motion, at 10, ¶21.

13. The "toggle plan" is ready *now*. The Debtors do not require sixty days to draft and file the "toggle plan" — or a straight forward stand alone plan. And the Debtors should not be allowed to use the excuse that they have not fully negotiated a consensual plan as a justification for an extension of exclusivity. The Bankruptcy Code does not permit the Debtors the luxury of time to negotiate a fully "consensual" plan (or two) before putting forth the Company's proposal for a fair and reasonable way to monetize assets and allocate value among creditors in accordance with relative priorities. Negotiations can and often do occur when parties are faced with upcoming hearings on approval of a disclosure statement and confirmation of a plan. There is no question that the filing of *any* plan would add real value in moving these cases forward. Plan issues that require negotiation will have to be addressed whether its today or three or four months from now; the time to file the plan is now. The Debtors' promise not to seek a further extension beyond the proposed 60 days does *not* "allay any concern" that creditors have. The promise is illusory. If the Debtors cannot raise sufficient new money over the next four months, the only option will be the stand alone plan. That plan should be filed now.

14. Third, the Debtors assertions that they may preserve optionality through the proposed "toggle plan" process "*without exposing the Debtors' estates to a significantly downside risk if the new money doesn't materialize*" is wrong — and there certainly is no evidence of this. While attempting to preserve the mere possibility of a new money raise (with

no guarantee, evidence or even likelihood that if it miraculously occurs, the estates' value and creditor recoveries will be enhanced), the Debtors are continuing to fund their worldwide business infrastructure at a considerable cost and prejudice to their creditors. Logic would suggest that abandoning the new money plan and focusing on monetizing the existing investments in an orderly manner would significantly reduce the Debtors' costs. However, the Debtors do not even attempt to provide evidence to the Court that the costs are justified by the benefits, if any, of continuing to pursue a potentially failed new money process. The Debtors should be taken to task here:

(a) After starting these cases with approximately $155.1 million cash on hand at the Petition Date, the Debtors' access to cash has decreased to $48.1 million as of September 15, 2012. *Declaration of Lawrence R. Hirsh in Support of Debtors' Motion for Entry of an Order Authorizing the Debtors to Enter into a Financing Commitment Letter and Incur Related Fees, Expenses and Indemnities*, Ex. C to DIP Commitment Motion ("Hirsh Declaration") at 7, ¶17 [Docket No. 513].

(b) The Debtors' stay in chapter 11 is incredibly expensive. The Debtors' DIP Commitment Motion proposes to use almost half ($72.4 million) of the anticipated DIP proceeds for "restructuring expenses." *See* Hirsh Declaration, at 9, ¶19. Notably, there is no definition of restructuring expenses. What are they? Are they necessary? Do they benefit the estates and the creditors?

(c) During these chapter 11 cases, the Debtors have spent $34.3 million to fund staff and general administrative costs as of September 15, 2012. Hirsh Declaration, at 6, ¶15. Additionally, the DIP budget projects another $34.9 million to fund staff and general administrative expenses to run the business through March 31, 2013 (not including deal funding). Hirsh Declaration, at 8, ¶19.

(d) As of September 15, 2012, the Debtors have expended $50.5 million to fund investments in these chapter 11 cases. Hirsh Declaration, at 6, ¶15. And the Debtors' DIP budget forecasts $44.4 million to fund investments through the projected emergence date of March 31, 2013. Hirsh Declaration, at 9, ¶19. In contrast, cash receipts during this period are only $6.3 million. Hirsh Declaration, at 8, ¶19.

15. Indeed, the Debtors have been working to raise capital for months and promising results, but to no avail. Without compelling evidence, the Ad Hoc Group cannot have confidence that the Debtors can raise an adequate amount of new money and, even if it appears, the Debtors

do not explain why the estates and creditors will be better off than in an orderly monetization of the existing investments now. The Debtors should not be permitted to write options at the expense of their creditors. The Debtors should cease the equity raise process now (or within a very short time frame) and move forward with monetizing their existing investments and significantly reducing the administrative costs of these cases. The Debtors should file the "toggle plan" now. The requested extension of exclusivity appears to be for another purpose — to buy the Debtors more time to raise equity and stave off liquidation, thus, saving management's jobs. This is not the purpose of chapter 11 and the delay is prejudicial to the Debtors' creditors who are bearing the costs of these cases.

16. Waiting 120 days to find out if the Debtors can raise the money could be a death knell for creditor recoveries in these chapter 11 cases, especially with the Debtors seeking to borrow $150 million in DIP financing, which will be senior to all current creditors. Indeed, given the posture of these cases, the exclusive periods should be extended *at most* through any hearing scheduled with respect to DIP financing, as the Debtors' hopes now hinge on both approval of a senior, secured DIP facility being available to fund their "toggle plan" process AND the possibility of raising sufficient new money to support a confirmable plan. The Debtors should be required to file a chapter 11 plan immediately and only borrow the money they need to conduct an orderly wind-down of their investments. The KPMG reports show that liquidation of the Debtors' global investments will generate $1.4 billion. *See* Exclusivity Extension Motion, at 2, ¶1 n. 1. The Debtors should be working to monetize those assets for their constituents, not chasing a pipe dream.

17. Absent further showing of benefit to creditors, the Debtors' request for exclusivity extensions of sixty days should be denied.

Dated: October 2, 2012
New York, New York

By: /s/ Jonathan S. Henes
Jonathan S. Henes
Nicole L. Greenblatt
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, New York 10022
Telephone: (212) 446-4800
Facsimile: (212) 446-4900

and

James H.M. Sprayregen, P.C.
Sienna R. Singer
KIRKLAND & ELLIS LLP
300 North LaSalle
Chicago, Illinois 60654
Telephone: (312) 862-2000
Facsimile: (312) 862-2200

*Counsel for Ad Hoc Group of Holders of the Arcapita Bank B.S.C.(c) Syndicated Facility*