Hearing Date: October 9, 2012 at 2:00 p.m. (Prevailing Eastern Time)

Dennis F. Dunne
Abhilash M. Raval
Evan R. Fleck
MILBANK, TWEED, HADLEY & M^cCLOY LLP
1 Chase Manhattan Plaza
New York, NY 10005
Telephone: (212) 530-5000

Counsel for Official Committee of Unsecured Creditors of Arcapita Bank B.S.C.(c), et al.

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)**

STATEMENT IN CONNECTION WITH RESPONSE AND LIMITED OBJECTION OF OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO DEBTORS' MOTION TO APPROVE DIP COMMITMENT LETTER AND FEE LETTER

The Official Committee of Unsecured Creditors (the "Committee") of Arcapita Bank B.S.C.(c) and the other debtors in possession in the above-captioned jointly administered chapter 11 cases (collectively, the "Debtors") hereby submits this statement in connection with the *Response and Limited Objection of Official Committee of Unsecured Creditors to Debtors' Motion to Approve DIP Commitment Letter and Fee Letter* [Docket No. 533] (the "Response and Limited Objection"),[1] and respectfully states as follows:

[1] Capitalized terms used but not otherwise defined herein shall have the meaning ascribed to them in the Response and Limited Objection.

STATEMENT

1. On October 4, 2012, the Committee filed its Response and Limited Objection to the *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] (the "Motion"). In the Response and Limited Objection, the Committee noted that since the Motion was filed on September 25, 2012, other potential lenders have expressed interest in providing financing to the Debtors on more favorable terms than Silver Point Finance, LLC ("Silver Point"). The Committee further stated that the Debtors, notwithstanding their fiduciary duties, have refused to grant such potential lenders access to necessary information (subject to appropriate confidentiality restrictions) and have also refused to allow the Committee to share any information with such potential lenders, as would be required by the Committee's fiduciary duties. This information sharing restriction, in effect, imposed on the Committee the Debtors' "no shop" obligation under the yet-to-be approved commitment letter with Silver Point.

2. As a result, the Committee was compelled to request an emergency telephonic chambers conference, which was held on October 4, 2012. Following argument, the Court agreed with the Committee that it would be appropriate for it to explore alternative post-petition financing on the Debtors' behalf and directed the Debtors to facilitate the Committee's efforts in this respect. Consequently, the Committee has engaged with the potential alternative post-petition lenders and is in the process of executing confidentiality agreements with such lenders.

3. Based on these developments, the Committee's objection to the information sharing restriction in the Response and Limited Objection is currently moot.

Consequently, the Committee respectfully submits a revised version of the Response and Limited Objection, which includes the following changes:

- Paragraph two of the Response and Limited Objection is deleted in its entirety; and
- Paragraph four of the Response and Limited Objection is revised to read as follows: "As such, the relief requested in the Motion is premature and would foreclose the Debtors from engaging with these new lenders who could provide an actual commitment on potentially better terms than the ***uncommitted*** option offered by Silver Point."

A copy of the revised Response and Limited Objection, marked to show the above changes, as well as certain other non-substantive changes, is annexed hereto as Exhibit A.

4. The balance of the Committee's arguments set forth in the Response and Limited Objection remain pertinent and it remains the Committee's view that the Motion should be denied for the reasons set forth therein.

Dated: New York, New York
October 5, 2012

MILBANK, TWEED, HADLEY & M^{c}CLOY LLP

By: /s/ Dennis F. Dunne
Dennis F. Dunne
Abhilash M. Raval
Evan R. Fleck
1 Chase Manhattan Plaza
New York, NY 10005
Telephone: (212) 530-5000

Counsel for Official Committee of Unsecured Creditors of Arcapita Bank B.S.C.(c), et al.

Exhibit A

(Conformed Copy of the Response and Limited Objection)

Hearing Date: October 9, 2012 at 2:00 p.m. (Prevailing Eastern Time)

Dennis F. Dunne
Abhilash M. Raval
Evan R. Fleck
MILBANK, TWEED, HADLEY & M^cCLOY LLP
1 Chase Manhattan Plaza
New York, NY 10005
Telephone: (212) 530-5000

Counsel for Official Committee of Unsecured Creditors of Arcapita Bank B.S.C.(c), et al.

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)**

RESPONSE AND LIMITED OBJECTION OF OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO DEBTORS' MOTION TO APPROVE DIP COMMITMENT LETTER AND FEE LETTER

The Official Committee of Unsecured Creditors (the "Committee") of Arcapita Bank B.S.C.(c) ("Arcapita") and the other debtors in possession in the above-captioned jointly administered chapter 11 cases (collectively, the "Debtors") hereby submits this response and limited objection to the *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] (the "Motion"),[1] and in support thereof, respectfully states as follows:

[1] Capitalized terms used but not otherwise defined herein shall have the meaning ascribed to them in the Motion.

PRELIMINARY STATEMENT

1. On September 19, 2012, the Debtors came before this Court seeking approval to reimburse up to $500,000 of expenses to be incurred by a selected post-petition financing lender, stating that such expense reimbursement was necessary to incentivize the lender to begin negotiating the terms of such financing and drafting the necessary documentation.[2] After extensive discussions with the Debtors and certain modifications to the relief requested, the Committee agreed that an incentive in the form of an expense reimbursement was appropriate.

~~2. Now, less than three weeks after the expense reimbursement was approved, the Debtors are seeking to commit themselves to pay at least an ***additional $400,000*** in expense reimbursement, as well as significant fees, to a potential lender who ***has not committed itself*** to provide any post-petition financing to the Debtors. Moreover, even before the Court has had a chance to consider the Motion, the Debtors have precluded themselves (and the Committee) from pursuing alternative post-petition financing despite the lack of any commitment to lend from the potential lender. Since the Motion was filed, other lenders have surfaced and have expressed interest in providing financing on more favorable terms. Notwithstanding their fiduciary duties, the Debtors have decided not to grant such lenders access to necessary information, subject to appropriate confidentiality restrictions, and have refused to allow the Committee, in accordance with its fiduciary duties, to share any information with these parties. Even before the commitment letter (the "Commitment Letter") has been authorized by the Court, the Debtors already treat themselves and the Committee as "locked up" under the terms of the agreement with the proposed post-petition lender Silver Point Finance, LLC ("Silver Point").~~

[2] *Debtors' Motion for an Order Approving Expense Reimbursement in Connection with Prospective Post-Petition Financing* [Docket No. 448] (the "DIP Expense Reimbursement Motion") at 3.

2. ~~3.~~ Under the terms of the **commitment letter (the "**Commitment Letter**")** and fee letter (the "Fee Letter" and, together with the Commitment Letter, the "Commitment Papers"), the so called "commitment" of Silver Point Finance, LLC ("Silver Point") remains subject to due diligence and internal credit committee approval (the "Commitment Conditions").[3] Clearly the Commitment Conditions render the Commitment Papers a misnomer; they represent no current commitment at all. Nevertheless, the Debtors are seeking authorization to pay Silver Point up to an additional $400,000 in expense reimbursement ***before*** the Commitment Conditions have been satisfied, and an ***unlimited*** amount thereafter.

3. ~~4.~~ Moreover, there is no deadline by which the Commitment Conditions must be satisfied and no express right for the Debtors to terminate the Commitment Papers in the event the Commitment Conditions are not promptly satisfied. In the meantime, the Debtors have agreed not to solicit any other financing proposals, subject solely to a watered down "fiduciary out," which allows the Debtors to consider unsolicited offers. However, if the Debtors merely engage in negotiations with other potential lenders, the Commitment Papers authorize Silver Point to terminate the Commitment Papers and earn a break-up fee of $1.125 million (the "Break-Up Fee") – even if the Debtors fail to obtain the alternative financing. Clearly, the result of this provision of the Commitment Papers is to severely restrict the Debtors' ability to obtain more favorable financing terms from other lenders since the mere act of "negotiating" with any other lender gives Silver Point the right to the Break-Up Fee. Even after the Commitment Conditions have been satisfied, the Commitment Papers allow Silver Point to terminate its lending commitment based on an extremely broad material adverse effect clause without forfeiting its entitlement to a $2.25 million commitment fee (the "Commitment Fee").

[3] Commitment Letter § 5(a) and 5(b).

Taken together, these provisions effectively seek to lock in economic gain to Silver Point at a time when it has not provided, nor even committed to provide, financing to the Debtors while effectively preventing any other financing sources from coming to the negotiating table. Indeed, since the Motion was filed, other lenders have surfaced and, upon information and belief, are conducting due diligence. As such, the relief requested in the Motion is premature and ~~has already foreclosed~~**would foreclose** the Debtors ~~(as well as the Committee)~~ from engaging with ~~the~~**these** new lenders who could provide an actual commitment on potentially better terms than the ***uncommitted*** option offered by Silver Point.

4. ~~5.~~ The Committee understands that lenders often require incentives to perform due diligence before committing to lend, but it does not support the Debtors' willingness to incur significant obligations to Silver Point in the absence of a firm commitment from Silver Point – particularly when, under the order approving the DIP Expense Reimbursement Motion, Silver Point already has the protection that would satisfy most lenders in similar circumstances.[4]

5. ~~6.~~ The imbalance of benefits and obligations imposed on the Debtors by the Commitment Papers is especially problematic in the context of these cases. The Debtors' willingness to obligate themselves under this bloated, costly facility constitutes an expensive frolic and detour on the path to an orderly wind down of the Debtors' estates, which, in the Committee's view, may represent the most appropriate resolution of these cases. While the Debtors require some post-petition financing in the near term, they do not require a "super-sized" $150 million facility now that does not allow any flexibility for multiple draws so as to minimize the payment of unnecessary fees. As drafted, the Commitment Papers require the full

[4] See Hr'g Tr. 17:10-18:10, 1-10 (Sept. 19, 2012) [Docket No. 524].

$150 million to be drawn down in one instance (unless the Court requires the Debtors to seek interim relief with respect to the financing) regardless of the Debtors' actual financing needs, and, under any circumstance, require the payment of fees on the full amount of the facility, including an obligation to pay 10.5% per annum on any undrawn amount. Moreover, the Debtors do not need a $150 million single draw facility because there are other potential cash sources not being accounted for, including any proceeds from the potential initial public offering of the EuroLog assets and the return of the placement funds. Furthermore, although the Debtors claim that they need the proposed facility to successfully exit chapter 11,[5] they have not presented any plan for an exit strategy. Accordingly, the Court should deny the Motion.

6. ~~7.~~ If the proposed lender needs additional expense reimbursement to complete its due diligence and come to a firm commitment to lend, the Committee respectfully submits that the preferred course would be for this Court to modify its original order to increase the expense reimbursement cap of $500,000 without otherwise locking the Debtors into the onerous and expensive provisions of the Commitment Papers. If, however, the Court is inclined to authorize the Debtors to enter into the Commitment Papers, it should condition such authorization on certain critical modifications to the Commitment Papers, including, but not limited to:

- Reducing the expense reimbursement amount available prior to the satisfaction of the Commitment Conditions and capping the overall reimbursement amount in the event the proposed facility is not funded by Silver Point;

- Requiring that the Commitment Conditions be satisfied by a date certain and providing the Debtors with the right to terminate the Commitment Papers (including the exclusivity and Break-Up Fee provisions) if Silver Point is unable to confirm satisfaction of the Commitment Conditions by such date;

[5] See e.g., Motion ¶ 3.

- Providing that the Break-Up Fee will only become payable if (i) the Commitment Conditions have been satisfied and (ii) the Debtors have received Court approval for an alternative debtor in possession financing, so that the Debtors can actually fulfill their fiduciary duties to seek the best available financing terms;

- Deleting the material adverse effect clause or, alternatively, providing that, by invoking this clause, Silver Point forfeits the Commitment Fee and any Break-Up Fee; and

- Deleting the requirement that proceeds of avoidance actions be earmarked to pay for any administrative claim held by Silver Point.

7. ~~8.~~ These modifications will not interfere with Silver Point's protections for the risk of the Debtors choosing an alternative debtor in possession lender, while allowing the Debtors to explore other alternatives without an immediate threat of termination by Silver Point. The Committee has communicated the need for these modifications to the Debtors and Silver Point in an attempt to reach a mutually satisfactory compromise; however, despite its best efforts, a consensual resolution has not been reached. A copy of the markup of the Commitment Letter reflecting the Committee's proposed revisions is attached as Exhibit A hereto and a copy of the markup of the Fee Letter reflecting the Committee's proposed revisions is attached as Exhibit B hereto.[6] The Committee notes that the term sheet attached to the Commitment Letter (the "Term Sheet") lacks detail in several key areas and, as such, the Committee reserves its rights to object to all or any portion of the proposed facility when, and if, a motion is made by the Debtors for approval of such facility.

OBJECTION

I. The Commitment Papers Unfairly Impose Significant Obligations on the Debtors While Silver Point Remains Uncommitted to Providing Financing

8. ~~9.~~ Under the circumstances of these cases, the Debtors' request for the

[6] In accordance with the Court's Ex Parte *Order Authorizing the Debtors to File Exhibits Under Seal* [Docket No. 515], the Committee's markup of the Fee Letter is being filed under seal.

Court to authorize their incurrence of additional significant obligations under the Commitment Papers without the benefit of a firm commitment from Silver Point is an unfair burden on the Debtors' estates. Silver Point should not be entitled to up to $900,000 in expense reimbursement even before the Commitment Conditions have been satisfied (nor an unlimited amount for reimbursement thereafter).

9. ~~10.~~ In the DIP Expense Reimbursement Motion, the Debtors asserted that approval of the $500,000 expense reimbursement was necessary to incentivize a potential lender to undertake the drafting and negotiating of documents that are *Shari'ah*-compliant and satisfy the strictures of chapter 11.[7] The Committee agreed to certain concessions in connection with the DIP Expense Reimbursement Motion, including agreeing to the reimbursement of costs and expenses incurred prior to September 7, 2012 . Nevertheless, at the hearing on the DIP Expense Reimbursement Motion, Debtors' counsel informed the Court of the Debtors' intention to request separate approval of the Commitment Papers in advance of approval of definitive post-petition financing documentation.[8] It is not clear to the Committee why, just three weeks after the approval of the expense reimbursement, additional payments of fees and expenses became necessary to persuade Silver Point to negotiate the proposed financing or why, despite the Debtors' statements to the Court to the contrary, it appears that Silver Point has neither completed its diligence nor have the parties proceeded with any of the financing documentation for the proposed facility.

10. ~~11.~~ Moreover, it is not just the additional expense reimbursement amount, but the overall fee structure that imposes an unfair burden on the Debtors. Specifically, the Commitment Papers provide that 0.75% of the amount of the facility ($1.125 million) is payable

[7] DIP Expense Reimbursement Motion at 3.
[8] Hr'g Tr. 15:3-9 (Sept. 19, 2012) [Docket No. 524].

to Silver Point as a break-up fee in the event the Debtors' board of directors makes a determination that its fiduciary duties require it to engage in mere ***negotiations*** with an unsolicited alternative financing source.[9] The Break-Up Fee is payable even if the Debtors ultimately determine not to pursue a financing with an alternate source – the mere fact of negotiations by the Debtors would trigger it and, if the Commitment Papers are to be read literally, it would seem the Break-Up Fee is payable even if the Debtors then proceed to consummate the financing with Silver Point. It is not at all clear how the Debtors expect to exercise their fiduciary duties if the mere act of negotiation with an unsolicited source results in the ability for Silver Point to terminate the Commitment Papers and collect the Break-Up Fee.

11. ~~12.~~ Absent a firm commitment from Silver Point to extend post-petition financing to the Debtors in the time frame required by the Debtors, Silver Point should not be entitled to amounts in excess of the previously approved expense reimbursement. Any additional incentives may be sought in connection with approval of definitive documentation for committed financing (if any). If the amount of the previously approved expense reimbursement is insufficient, the Committee may agree to an increase of such amount, but such augmentation should not be accompanied by the Debtors locking themselves into an exclusive period with an uncommitted lender or agreeing to pay a break-up fee.

II. The Material Adverse Effect Clause Is Too Broad

12. ~~13.~~ The Term Sheet provides that Silver Point may terminate its commitment to lend to the Debtors unless, since the date of the Commitment Letter, "nothing shall have occurred and Silver Point and the Participants shall not have become aware of any facts or conditions not previously known which has had, or could reasonably be expected to

[9] Motion ¶ 8.

have, a material adverse effect, provided that the continuation of the Chapter 11 Cases shall not constitute a material adverse effect."[10] As currently drafted, this material adverse effect clause is unreasonably broad and creates an unjustifiable risk that Silver Point can abandon its lending commitment without any penalty. Notably, the Debtors remain obligated to pay Silver Point the Commitment Fee and reimburse it for the expenses incurred even if Silver Point fails to fund the facility as a result of invoking the material adverse effect clause. Thus, even after the satisfaction of the Commitment Conditions, Silver Point continues to enjoy a free option to walk away from its commitment.

13. ~~14.~~ Accordingly, the Court should not authorize the Debtors to enter into the Commitment Papers unless, among other things, the material adverse effect clause is removed or, at the least, the Commitment Papers are modified to provide that Silver Point would forfeit its entitlement to the Commitment Fee and any Break-Up Fee if it terminates its commitment to lend based on the material adverse effect clause. This would ensure that the clause is not merely a free option for Silver Point to terminate its commitment.

III. Avoidance Actions Should Be for Benefit of Unsecured Creditors

14. ~~15.~~ The Term Sheet also provides that, while the DIP Collateral (as defined in the Term Sheet) does not include actions for preferences, fraudulent conveyances, and other avoidance power claims under chapter 5 of the Bankruptcy Code, the proceeds of any such actions will be available to pay administrative claims of Silver Point or other participants in the financing.[11]

15. ~~16.~~ Avoidance actions and their proceeds, however, are distinct creatures

[10] Commitment Letter, Exhibit B.
[11] See Term Sheet.

of bankruptcy law designed to ensure equitable distribution to general unsecured creditors.[12]

It is inappropriate for the Debtors to earmark such proceeds for a secured lender and allow Silver Point to receive a priority interest in the funds that should be preserved for the general unsecured creditors. A successful reorganization requires the cooperation of, and a shared risk by, all parties in interest. Accordingly, the proceeds of avoidance actions should not be available to satisfy Silver Point's administrative claims.

RESERVATION OF RIGHTS

18. The Committee fully reserves its right to raise additional arguments in respect of any interim or final order approving the Commitment Papers or the proposed post-petition financing facility with Silver Point.

[12] See, e.g., Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery (In re Cybergenics Corp.), 226 F.3d 237, 244 (3d Cir. 2000) (avoidance actions are not property of estate, but are essentially rights held by estate for benefit of creditors); Buncher Co. v. Official Comm. of Unsecured Creditors of GenFarm Ltd. P'ship IV, 229 F.3d 245, 250 (3d Cir. 2000) ("When recovery is sought under section 544(b) of the Bankruptcy Code, any recovery is for the benefit of all unsecured creditors . . ."); Gaudet v. Babin (In re Zedda), 103 F.3d 1195, 1203 (5th Cir. 1997) ("A trustee's avoidance powers are intended to benefit the debtor's creditors, as such powers facilitate a trustee's recovery of as much property as possible for distribution to the creditors."); McFarland v. Leyh (In re Tex. Gen. Petroleum Corp.), 52 F.3d 1330, 1335-36 (5th Cir. 1995) ("'[T]he proceeds recovered in an avoidance action satisfy the claims of priority and general unsecured creditors before the debtor benefits.' . . . The proceeds recovered in avoidance actions should not benefit the reorganized debtor; rather, the proceeds should benefit the unsecured creditors.") (quoting In re Sweetwater, 55 B.R. 724, 731 (D. Utah 1985) ("The avoiding powers are not 'property' but a statutorily created power to recover property."), aff'd in part, rev'd in part on other grounds, 884 F.2d 1323, 1327 (10th Cir. 1989)).

CONCLUSION

WHEREFORE, the Committee respectfully requests that the Court: (i) sustain this Objection; (ii) deny the relief requested in the Motion; and (iii) grant the Committee such other and further relief as is just.

Dated: New York, New York
October 4, 2012

MILBANK, TWEED, HADLEY & M^cCLOY LLP

By: /s/ Dennis F. Dunne
Dennis F. Dunne
Abhilash M. Raval
Evan R. Fleck
1 Chase Manhattan Plaza
New York, NY 10005
Telephone: (212) 530-5000

Counsel for Official Committee of Unsecured Creditors of Arcapita Bank B.S.C.(c), et al.