UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case Nos. 12-11076-shl

- x

In the Matter of:

ARCAPITA BANK B.S.C.(C), et al,

Debtors.

- x

U.S. Bankruptcy Court

One Bowling Green

New York, New York

September 30, 2014

11:51 AM

B E F O R E :

HON SEAN H. LANE

U.S. BANKRUPTCY JUDGE

Modified Bench Ruling re: Doc. #1979 Objection Of Captain Hani Alsohaibi To The Proposed Diversion Of Funds By And For The Benefit Of The First Islamic Investment Bank B.S.C.(C)/Arcapita Bank B.S.C.(C) Affiliates And Successors And Reservation Of Rights And Request For Hearing Concerning The Administrative Solvency/Insolvency Of The First Islamic Investment Bank B.S.C.(C)/Arcapita Bank B.S.C.(C) Affiliates And Successors Filed By Tally M. Wiener On Behalf of Hani Alsohaibi

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Before the Court is an application that is styled objection of Captain Hani Alsohaibi to the proposed diversion of funds by and for the benefit of First Islamic Investment Bank B.S.C./Arcapita Bank B.S.C. affiliates and successors and reservation of rights. It goes on to request a hearing concerning the "administrative insolvency" of The First Islamic Investment Bank B.S.C./Arcapita Bank B.S.C. affiliates and successors. It's found at Docket No. 1979.

I also have before me an opposition by the reorganized debtors to that application, as well as a reply that was filed on the docket.

The objection complains of the alleged proposed diversion of funds. It says that Arcapita seeks relief from payment obligations owing under a Murabaha agreement among Arcapita Investment Holding Limited, Goldman Sachs International, and other entities. It goes on to say that Arcapita seeks a waiver from Goldman to divert $5 million that it would otherwise be obligated to pay to service its loan. It goes on to complain that Arcapita is administratively insolvent. And all of these statements need to be understood in the context of the current posture of this case and so some background is in order.

The debtors' assets here primarily consisted of investments in operating companies and other portfolio

assets, including interests in joint ventures. Approximately 70 percent of the debtors' investments related to operating companies or other portfolio assets in which the debtors held directly or indirectly only minority equity interests. The balance of the debtors' investments related to operating companies and other portfolio assets in which the debtors held directly or indirectly 50 percent or more of the interests.

The plan of reorganization in this case that was put before the Court and ultimately confirmed proposed to establish a New Cayman Islands holding company, New Arcapita Topco, to own and control a series of newly formed intermediate holdings companies and subsidiaries, the new holding companies.

The plan provided that the new holding companies would own directly or indirectly 100 percent of the debtors' assets, and in exchange for their allowed claims the majority of the debtors' unsecured creditors would receive a pro rata share of the new Sharia-compliant Sukuk facility, substantially all of the equity of the new holding companies and certain warrants issued by New Arcapita Topco.

The reorganized Arcapita Group, with the assistance of AIM Group Ltd., would wind down its operations. Reorganized Arcapita Group

would make distributions from the exits of investments which would occur in a manner and at a time that maximized returns and would be consistent with the terms of the cooperation agreement, as that term is used in the plan.

The business plan provided for the retention of AIM, which was a newly formed investment management company, to manage the investment assets on a day-to-day basis.

These are only the top level details of the plan which are set forth in far more detail in the confirmation order and the plan, but are provided here only to give some general sense of what happened in the case.

The plan was confirmed and a confirmation order entered on June 17, 2013, the effective date of that plan was September 17, 2013.

Given all of these facts, the Court is going to deny the application before it for relief.

Although the application is styled as an objection to a proposed course of action by the reorganized debtors, in fact there's no current request that has been made by the reorganized debtors to this Court to do anything. In fact, the Arcapita case has been confirmed, so this objection is talking about obligations of a reorganized debtor that is not in bankruptcy court. In fact, the reorganized debtors explain that the injunctive relief requested by the objector here is to prevent RA Holdco 2 LLC and its co-obligors under a court-approved

exit financing from obtaining a waiver of certain terms.

The reorganized debtors state, and I agree, that this is an agreement between private parties, neither of whom is in bankruptcy, and so the action here does not require court approval.

There's some reference by the objector here that the terms of the exit financing documents must be honored. So, for example, the objector cites to paragraph 10(b)(iii)(B) of the final order approving the exit financing that says certain modifications require court approval such as those that "increase the commitments or the rate of profit or fees payable thereunder," and that's discussed at the reply at page 11. But there's been no showing that the waiver of the condition at issue here in any way triggers that requirement or any other obligation under the exit financing.

In fact what appears to be at issue is a request to waive a prepayment, that is an ability to not have to honor one particular condition, but which in fact would change nothing else in the obligation. So what it essentially does is channel funds to the reorganized debtors to use as they see fit, which the reorganized debtors note is something that is being done in the business judgment of the reorganized debtor and does not require court approval.

There's been some discussion in the papers about

the financial health of the reorganized debtors. I don't need to resolve this issue to rule on the application that is in front of me, but I do think it is important to note that the reorganized debtors strongly disagree with the views of Captain Hani Alsohaibi on that subject. On this topic, they note three things.

One is that the reorganized debtors sought and obtained 100 percent consent of the applicable lenders for the waiver of certain aspects of the prepayment provision of the exit facility; second, they note that it increased, from their point of view, liquidity for the reorganized debtors between asset sales; and third, that from their point of view they're doing better than projections set forth in the disclosure statement.

There's also a request here to take down, so to speak, a particular website, www.arcapita.com, and to mandate that the case administration website should be kept up to date.

As the reorganized debtors note, the website for Arcapita was transferred to the AIM Group Ltd. as part of the plan and there has been nothing identified to this Court that's in the confirmation order or the plan that has been violated regarding the use of the website or any other aspect relating to the website, including the maintenance of the case administration website. Nothing has been

identified to me as violating the terms of any court order or matter approved by the Court. So, that deals with the issues going forward.

To the extent that the application seeks to revisit any terms of the confirmation order I'm going to deny that request. A bankruptcy court's order of confirmation is treated as a final judgment with res judicata effect. *See In re Indesco International, Inc.*, 354 B.R. 660, 664 (Bankr. S.D.N.Y. 2006). "Any attempt by the parties or those in privity with them to relitigate any of the matters that were raised or could have been raised therein is barred under the doctrine of res judicata." *Sure-Snap Corporation v. State Street Bank & Trust Co.*, 948 F.2d 869, 873 (2d Cir. 1991).

Courts have considered confirmation of a plan in a Chapter 11 proceeding to be an event comparable to the entry of a final judgment in ordinary civil litigation. *See Silverman v. Tracar, S.A.*, 255 F.3d 87, 92 (2d Cir. 2001).

So for all those reasons given the record in front of me on the application as well as the record of the case, and that is the plan confirmation and the terms of that plan, I'm going to reject the application.

With all that said I'd ask that the reorganized debtors submit a proposed order addressing the pending application and just make it clear that it's being denied for the reasons stated on the record at the hearing.