Hearing Date and Time: April 30, 2013 at 11:00 a.m.

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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)**

REPLY OF GOLDMAN SACHS INTERNATIONAL TO LIMITED OBJECTION AND RESERVATION OF RIGHTS OF CF ARC LLC TO MOTION FOR ALLOWANCE OF AN ADMINISTRATIVE EXPENSE PURSUANT TO 11 U.S.C. §§ 503(B)(1), 503(B)(3)(D) AND 503(B)(4)

Goldman Sachs International ("GSI") submits this reply to the limited objection and reservation of rights (the "Objection") of CF ARC LLC, an affiliate of Fortress Credit Corp. in its capacity as investment agent and security agent (the "Agent") under the Debtors' senior secured superpriority debtor-in-possession Murabaha facility (the "DIP Facility") to the motion of GSI for allowance of an administrative expense claim pursuant to 11 U.S.C. §§ 503(B)(1), 503(B)(3)(D) and 503(B)(4) (the "Motion").[1]

[1] Capitalized terms that are used but not defined herein are used with the meanings given to such terms in the Motion.

THE MOTION IS TIMELY AND GSI HAS SATISFIED THE STANDARD FOR ALLOWANCE OF AN ADMINISTRATIVE EXPENSE

The Agent's efforts in this case to engraft onto the Bankruptcy Code a requirement for the confirmation and consummation of a chapter 11 plan before the Motion may even be considered are baseless. The Bankruptcy Code contains no such requirement[2] and GSI has shown that, consistent with other precedents, its contributions to the Debtors' DIP financing process were of substantial value to the Debtors' estates, thus satisfying at this time the requirements for allowance of an administrative expense under sections 503(b)(1), 503(b)(3)(D) and 503(b)(4) of the Bankruptcy Code. Tellingly, both the Debtors and the Official Committee of Unsecured Creditors (the "Committee") support the Motion.

The Agent's sole argument for rewriting section 503(b) of the Bankruptcy Code relies entirely on *dicta* from a footnote in a matter that bears no relation to GSI's Motion. See In re Adelphia Commc'ns Corp., 336 B.R. 610, 662 n. 130 (Bankr. S.D.N.Y. 2006) (Gerber, J.) (hereinafter "Adelphia"). That opinion considered motions by a group of noteholders (the "Adelphia Movants") for, among other things, appointment of a chapter 11 trustee for some but not all of the debtors in large, complex and jointly-administered chapter 11 cases. Id. at 616. A motion for allowance of a substantial contribution claim was not even before the Court. Judge Gerber went to great lengths to emphasize that the Adelphia Movants had pushed the "nuclear war button" as part of a "scorched earth litigation strategy" that would have led to "devastatingly adverse consequences" if their motions were granted. Id. at 618-19. The Adelphia Movants

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[2] Courts should interpret statutes as they are written and not add to them. See, e.g., Dodd v. United States, 545 U.S. 353, 359 (2005) ("[W]e are not free to rewrite the statute that Congress has enacted. '[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'") (quoting Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A., 530 U.S. 1, 6 (2000)).

pursued this strategy as means to disrupt pending transactions in an effort to extract a greater distribution for themselves, thereby "sidestepping the Court-approved processes for determining the Intercreditor Dispute issues on their respective merits." Id. at 619. Fundamentally, the disputes before the Court in Adelphia revolved around the relative share that different groups of creditors would receive upon the confirmation and consummation of a chapter 11 plan. Id. at 617. In that case, the benefits that the Adelphia Movants provided to the estates (if any)[3] could only be measured after distributions to creditors were resolved.

In contrast to the facts of Adelphia, GSI's extraordinary contributions in these chapter 11 cases provided actual benefits to the Debtors' estates, and those benefits have been fully realized by all of the Debtors' estates and creditors. The DIP marketing process ended with approval of the commitment letter extended by Fortress Credit Corp. on November 9, 2012. (See Dkt. No. 620.) The Debtors have access to the DIP Facility, which contains terms that were either first introduced by GSI or that were obtained by the Debtors using the leverage provided by a series of fully-committed offers extended by GSI. Moreover, the value provided to the estates by GSI's participation in the DIP financing process has been recognized by the Debtors and the Committee, which GSI submits are the estate fiduciaries that were most closely involved in the DIP financing process. The Agent has shown no reason why Adelphia (or its *dicta*) is at all relevant to the facts of this case.

Post-Adelphia precedent from this Court and other bankruptcy courts make clear that substantial contribution claims in the specific context of DIP financing may be approved prior to

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[3] Judge Gerber's opinion is quite clear on the Court's views of the value of the Adelphia Movants' contributions: "Indeed, the appointment of a trustee for Arahova and/or its subsidiaries [i.e., the sub-set of debtors at issue] would be *antithetical* to creditor interests, subjecting them to actual and potential prejudice in many ways, with no corresponding benefit." Id. at 619 (emphasis in original).

confirmation and consummation of a chapter 11 plan. In the chapter 11 cases titled In re General Growth Properties, Inc. (hereinafter "GGP"), this Court granted an administrative claim to an unsuccessful bidder in a DIP financing process before the confirmation of a chapter 11 plan and ordered payment promptly upon entry of the order. Stipulation and Order, Case No. 09-11977 (Bankr. S.D.N.Y. Aug. 4, 2009) (Dkt. No. 1180). Similarly, in In re Philadelphia Newspapers, LLC, the Bankruptcy Court allowed a substantial contribution claim for an unsuccessful DIP lender that offered a DIP facility when no other party was prepared to do so, thereby providing the debtors leverage to "get[] the ball rolling" and enable them to obtain a satisfactory DIP loan elsewhere. 445 B.R. 450, 465 (Bankr. E.D. Pa. 2010) (hereinafter, "Philly News"); see also In re Photo Promotion Assoc., Inc., 881 F.2d 6, 8-9 (2d Cir. 1989) (holding it is within the discretion of the Bankruptcy Court to decide when an administrative claim under section 503(b) of the Bankruptcy Code is to be allowed and paid); COLLIER ON BANKRUPTCY, ¶ 503.03 (Alan N. Resnick & Henry J. Sommer eds., 16th ed., 2012) (same). In GGP and Philly News, as here, the conclusion of the DIP financing process crystalized the value of the potential DIP lender's participation in bidding to provide a DIP facility.

The amount of GSI's claim reflects a settlement with the Debtors and Creditors Committee and is well within the range of reasonableness. The amount is also *de minimis* in the context of these chapter 11 cases—it represents a mere 2.0 percent of the $12.351 million in restructuring fees that the Debtors expect to incur under their current budget for just the six weeks ending May 4, 2013. (See Amended Notice of Filing of Proposed Fourteenth Interim Budget; Dkt. No. 921.) No party other than the Agent (i.e., GSI's competitor in the DIP financing market) has objected to the Motion.

CONCLUSION

For the foregoing reasons, GSI respectfully requests that the Court enter an order (i) allowing its Administrative Claim in the amount of $250,000, (ii) directing payment of the Administrative Claim upon expiration of the appeals period pursuant to Rule 8002 of the Federal Rules of Bankruptcy Procedure and (iii) granting such other and further relief as the Court deems just and proper.

Dated: April 25, 2013
New York, New York

Respectfully submitted,

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UNITED STATES BANKRUPTCY COURT
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Debtors.	**Jointly Administered**

CERTIFICATE OF SERVICE

I, Jessica L. Bengels, hereby certify that on April 25, 2013, true and correct copies of the annexed Reply of Goldman Sachs International to Limited Objection and Reservation of Rights of CF ARC LLC to Motion for Allowance of an Administrative Expense Pursuant to 11 U.S.C. §§ 503(B)(1), 503(B)(3)(D) and 503(B)(4), dated 4/25/13, were caused to be served pursuant to the *In re Arcapita Bank B.S.C.(c), et al.*, Ch. 11 Case No. 12-11076 (SHL) "Case Management Procedures," entered 3/22/12, and the *In re Arcapita Bank B.S.C.(c), et al.*, Ch. 11 Case No. 12-11076 (SHL) "2002 Service List as of February 19, 2013," entered 2/19/13, via electronic mail upon the parties listed in the attached Service List for whom an e-mail address for service has been provided, and upon all other parties listed therein (including the Office of the United States Trustee) via first class United States Mail, by delivering and leaving same in the official depository of the United States Postal Service, located at 885 Third Avenue, New York, New York 10022.

Dated: April 25, 2013
New York, New York

Jessica L. Bengels

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