

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

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: **Chapter 11**
: **Case No. 12-11076 (SHL)**
: **Jointly Administered**
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IN RE:
ARCAPITA BANK B.S.C.(c), et al.,
Debtors.

**FINAL ORDER AUTHORIZING (A) DEBTORS TO PAY CERTAIN
PREPETITION CLAIMS OF CRITICAL AND FOREIGN VENDORS;
AND (B) FINANCIAL INSTITUTIONS TO HONOR AND PROCESS
RELATED CHECKS AND TRANSFERS**

Upon consideration of the motion (the “*Motion*”)¹ of Arcapita Bank B.S.C.(c) and certain of its subsidiaries and affiliates, as debtors and debtors in possession (collectively, the “*Debtors*” and each, a “*Debtor*”) in the above-captioned chapter 11 cases (the “*Chapter 11 Cases*”), for entry of interim and final orders (a) authorizing the Debtors to pay all or a portion of the prepetition claims of critical and foreign vendors (the “*Critical and Foreign Vendors*”); (b) authorizing banks and other financial institutions to receive, process, honor, and pay checks and transfers issued in relation to the foregoing and to rely on the representations of the Debtors as to which checks and transfers are authorized to be paid in accordance with this Motion, and (c) to the extent necessary, authorizing the Debtors to issue replacements for any dishonored check or transfer related to the foregoing; and upon the Thompson Declaration in support thereof; and the Court having found that it has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334; and the Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C §§ 1408 and 1409; and the Court having

¹ Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Motion.

found that the relief requested in the Motion is in the best interests of Debtors' estates, their creditors, and other parties in interest; and notice of the Motion and the opportunity for a hearing on the Motion was appropriate under the particular circumstances; and the Court having reviewed the Motion and having considered the statements in support of the relief requested therein at the interim and final hearings before the Court (the "*Hearings*"); and the Court having determined that the legal and factual bases set forth in the Motion and at the Hearings establish just cause for the relief granted herein; and upon all of the proceedings had before the Court; and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED:

1. The Motion is granted to the extent set forth herein on a final basis.
2. The Debtors are authorized to pay in the ordinary course of the Debtors' businesses some or all of the prepetition claims which are due and owing to the Critical and Foreign Vendors (the "*Critical and Foreign Vendor Claims*"), in an aggregate amount not to exceed \$2.0 million (the "*Critical Vendor Claims Cap*"), in accordance with the procedures set forth herein.
3. Notwithstanding anything contained herein to the contrary, with respect to Critical Vendors (who are not also Foreign Vendors), the Debtors are authorized to pay Critical Vendors (subject to the Critical and Foreign Vendor Claims Cap) who agree to continue to supply goods or services to the Debtors on such Critical Vendor's "*Customary Trade Terms*" or on other such favorable terms as are acceptable to the Debtors. As used herein, "*Customary Trade Terms*" means, with respect to a Critical Vendor: (a) terms the Debtors determine are equal or more favorable than the trade terms, practices and programs that were most favorable to

the Debtors in effect prepetition; or (b) such other trade terms as agreed by the Debtors and such Critical Vendor, so long as the Critical Vendor extends trade credit to the Debtors.

4. Notwithstanding anything herein, to the extent the Debtors seek to pay amounts owed to Critical and Foreign Vendors in excess of the Critical and Foreign Vendor Claims Cap, they may do so with the consent of the Official Committee of Unsecured Creditors in these chapter 11 cases (the “*Committee*”) or upon further order of this Court, after notice and a hearing, it being understood that consent of the Committee is not required for the Debtors to pay Critical and Foreign Vendor Claims in an aggregate amount not to exceed the Critical and Foreign Vendor Claims Cap.

5. The Debtors shall determine, in the ordinary course of business, who is a Critical Vendor by considering, among other things: (a) which vendors/service providers the Debtors absolutely need to continue to operate without disruption; (b) which vendors/service providers would be prohibitively expensive to replace; and (c) which vendors/service providers present an unacceptable risk should they threaten to not provide services or supplies postpetition.

6. The Debtors shall determine, in the ordinary course of business, who is a Foreign Vendor by considering, among other things, which vendors/service providers may have lien rights and which vendors/service providers may maintain little or no contacts with the United States such that the automatic stay may be rendered ineffective against them.

7. The Debtors shall undertake all reasonable efforts to cause Critical Vendors (who are not also Foreign Vendors) to enter into a letter agreement (the “*Critical Vendor Letter Agreement*”) substantially in the form attached to the Motion as *Exhibit C*.

8. The Debtors are authorized to enter into Critical Vendor Letter Agreements when the Debtors determine, in the exercise of their reasonable business judgment, that it is appropriate to do so.

9. The Debtors' inability to enter into a Critical Vendor Letter Agreement shall not preclude them from paying a Critical Vendor Claim when, in the exercise of their reasonable business judgment, such payment is necessary to the Debtors' operations.

10. If the Debtors determine that a Critical Vendor has not complied with the terms and provisions of the Critical Vendor Letter Agreement or has failed to continue to provide Customary Trade Terms following the date of such agreement, or on such terms as were otherwise agreed to between the Debtors and such Critical Vendor, the Debtors may terminate a Critical Vendor Letter Agreement, together with the other benefits to the Critical Vendor as contained in this Order, *provided, however*, that the Critical Vendor Letter Agreement may be reinstated if: (a) such determination is subsequently reversed by the Court for good cause after it is shown that the determination was materially incorrect after notice and a hearing following a motion from the Critical Vendor; (b) the underlying default under the Critical Vendor Letter Agreement is fully cured by the Critical Vendor not later than five business days after the date the initial default occurred; or (c) the Debtors, in their sole and absolute discretion, reach a subsequent agreement with the Critical Vendor .

11. If a Critical Vendor Letter Agreement is terminated as set forth above, or if a Critical Vendor that has received payment of a prepetition claim later refuses to continue to supply goods or services in compliance with the Critical Vendor Letter Agreement, on the Customary Trade Terms, or on such other favorable credit terms as were agreed to between the Debtors and such Critical Vendor, then the Debtors may, in their discretion and without further

order of the Court, exercise the following rights: (a) declare the payment of the Critical Vendor Claim a voidable post-petition transfer under section 549(a) of the Bankruptcy Code that the Debtors may seek to avoid and recover in cash or goods; and (b) return the parties to their original positions (*i.e.*, immediately prior to the entry of this Order) by reinstating the Critical Vendor Claim and demanding the immediate return of the Debtors' payment of the Critical Vendor Claim (to the extent that such payment exceeds the value provided by such Critical Vendor to the Debtors post-petition, for which value the Debtors have not yet compensated the Critical Vendor, without giving effect to setoff, recoupment, adjustments, etc.).

12. All Critical Vendor Letter Agreements shall be deemed to have terminated, together with the other benefits to Critical Vendors as contained in this Order, upon entry of an order converting the Debtors' Chapter 11 Cases to cases under chapter 7 of the Bankruptcy Code.

13. The Debtors are authorized to pay fees, assessments and other charges ("**Fees**") from various governmental and licensing authorities that are necessary to continue the Debtors' international operations.

14. The Debtors shall provide regular updates to the professionals retained or to be retained by the Committee pursuant to an order of the Court ("**Committee Professionals**") regarding the following subjects: (a) the name of each Critical Vendor and Foreign Vendor who has received a payment under this Order (or the related interim order) at a given time; (b) the amount paid to each such Critical Vendor or Foreign Vendor; and (c) a brief description of the type of goods and services provided by each such Critical Vendor or Foreign Vendor.

15. Committee Professionals shall be authorized to share information received by such Committee Professionals pursuant to the preceding paragraph with the Committee in

their discretion; *provided* that, any such information shall constitute confidential information (notwithstanding the failure of the Debtors to designate any specific piece of information as confidential or otherwise privileged), the treatment of which by Committee members shall comply with applicable Committee bylaws and other relevant confidentiality documents, in each case, governing a Committee member's treatment of confidential information received from the Debtors or their advisors.

16. The Debtors shall provide the Committee with 10 days' prior notice (the "*Notice Period*") of any payment of a Critical or Foreign Vendor Claim to a Critical Vendor or Foreign Vendor that has not been specifically identified prior to the entry of this Order by the Debtors to the Committee as a Critical Vendor or a Foreign Vendor. If the Debtors and the Committee cannot come to a consensual resolution regarding the making of such payment, then, prior to the expiry of the Notice Period, the Committee may file an objection with this Court with respect to payments to the newly identified Critical Vendor or Foreign Vendor on an expedited basis (and the Debtors hereby consent to the expedited nature of any such objection). If the Committee fails to object to this Court within the Notice Period, the Debtors shall have the right to make payments to the newly identified Critical Vendor or Foreign Vendor.

17. This Order shall not be construed to limit, or in any way affect, the Debtors' ability to contest any invoice or other charge or claim of any Critical Vendor or any Foreign Vendor.

18. All applicable banks and other financial institutions are hereby authorized, when requested by the Debtors, to receive, process, honor, and pay any and all checks and transfers regarding amounts authorized to be paid by the Debtors under this Order, without regard to whether any check or transfer was issued before or after the Petition Date. Such banks

and other financial institutions may rely on the representations of the Debtors with respect to whether any check or transfer issued by the Debtors before the Petition Date should be honored pursuant to this Order, and shall not have any liability to any party for relying on such representations by the Debtors as provided for herein.

19. The Debtors are authorized, in their sole discretion and to the extent necessary, to issue checks and transfers postpetition to replace any checks or transfers in respect of the Critical and Foreign Vendors' claims that are dishonored or rejected.

20. Nothing contained in this Order shall be deemed to constitute an assumption of any executory contract or to require the Debtors to make any of the payments authorized herein.

21. Any payment made pursuant to this Order is not, and shall not be, deemed an admission to the validity of the underlying obligation or waiver of any rights the Debtors may have to subsequently dispute such obligation.

22. Notwithstanding entry of this Order, the Debtors' rights to seek enforcement of the automatic stay provisions of section 362(a) of the Bankruptcy Code with respect to any creditor that demands payment of their prepetition debts as a condition to doing business with the Debtors postpetition are preserved.

23. Notwithstanding the relief granted herein and any actions taken hereunder, nothing herein shall create, nor is intended to create, any rights in favor of, or enhance the status of any claim held by, any party.

24. Notwithstanding the possible applicability of Bankruptcy Rule 6004(h), the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

25. The notice requirements set forth in Bankruptcy Rule 6004(a) are hereby waived.

26. The Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order.

Dated: New York, New York
May 17, 2012

/s/ Sean H. Lane
THE HONORABLE SEAN H. LANE
UNITED STATES BANKRUPTCY JUDGE