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Hearing Date and Time: Thursday, May 31, 2012 at 2:00 p.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., Debtors.	**Case No. 12-11076 (SHL)** (Jointly Administered)
In re:	**Chapter 11**
FALCON GAS STORAGE COMPANY, INC., Debtor.	**Case No. 12-11790 (SHL)**

LIMITED OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO DEBTORS' APPLICATION FOR APPROVAL OF THEIR EMPLOYMENT AND RETENTION OF KPMG LLP AS VALUATION ADVISOR

The Official Committee of Unsecured Creditors (the "Committee") of Arcapita Bank B.S.C.(c) and each of its affiliated debtors in possession in the above-

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captioned chapter 11 cases (collectively, the "Debtors") hereby submits this limited objection (the "Limited Objection") to the *Debtors' Application Pursuant to Sections 327(a) and 330 of the Bankruptcy Code for an Order Authorizing the Debtors to Retain and Employ KPMG LLP as Valuation Advisor to the Debtors* Nunc Pro Tunc *to the Petition Date* [Docket No. 123] (the "KPMG Retention Application")[1] and in support thereof, respectfully states as follows:

PRELIMINARY STATEMENT

1. The Committee does not dispute the Debtors' need for an independent, unaffiliated professional to value their businesses. Nor does the Committee question the qualifications of KPMG LLP ("KPMG") to serve as the Debtors' "valuation advisor." However, for the reasons set forth herein, final approval of the KPMG Retention Application is premature.

2. Instead of adopting the approach taken by debtors in chapter 11 cases of comparable size and complexity by retaining one "financial advisor" or "investment banker," the Debtors are seeking to retain three professional firms to perform financial advisory services: (a) KPMG, (b) Alvarez & Marsal North America, LLC ("A&M")[2], and (c) Rothschild Inc. and N M Rothschild & Sons Limited (together, "Rothschild" and, together with A&M and KPMG, the "Proposed Financial Advisors").[3] Even under the best

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[1] Capitalized terms used but not defined herein shall have the meanings ascribed to them in the KPMG Retention Application.

[2] See *Debtors' Application for Interim and Final Orders Approving the Employment and Retention of Alvarez & Marsal North America, LLC as Financial Advisors to Debtors and Debtors in Possession Pursuant to Sections 327(a) and 328 of the Bankruptcy Code* [Docket No. 47] (the "A&M Retention Application").

[3] See *Debtors Application for an Order Approving the Employment and Retention of Rothschild Inc. and N M Rothschild & Sons Limited as Financial Advisors and Investment Bankers for the Debtors* Nunc Pro Tunc *to the Petition Date* [Docket No. 53] (the "Rothschild Retention Application" and, together

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of circumstances, this construct raises the spectre of duplication and inefficiency. Each of the FA Retention Applications must, therefore, be subjected to careful scrutiny and considered not only independently but collectively as well.

3. Notwithstanding the request of the Committee and the Office of the United States Trustee, and what is plainly "best practices," the Debtors are seeking approval of the FA Retention Applications in piecemeal, seriatim fashion. It is clearly in the best interests of the Debtors' estates and creditors that all of the FA Retention Applications be considered by the Court simultaneously to (a) determine whether it is efficient -- or even possible -- to allocate the proposed services among three advisors in the manner contemplated by the Debtors, and (b) implement safeguards to prevent overlap of services, duplication of efforts, or unnecessary additional costs to the estates. Additionally, approval of the compensation structure for each Proposed Financial Advisor should not proceed in isolation: while the proposed compensation for any one Proposed Financial Advisor may appear reasonable by itself, an examination of the aggregate proposed compensation for the three advisors, including potential "success" bonuses, may prove to be excessive and unjustified. Given the Debtors' current liquidity constraints, where every dollar expended should provide demonstrable benefit to the estates, these estates simply cannot afford to incur unwarranted and unnecessary professional fees.

4. Accordingly, the Committee respectfully submits that consideration of the KPMG Retention Application should be deferred to the next hearing date on which the Debtors are prepared to present to the Court all of the FA Retention Applications.

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with the KPMG Retention Application and the A&M Retention Application, the "FA Retention Applications").

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5. In addition, the Court should not approve the Debtors' retention of KPMG until certain potential conflicts of interest and confidentiality procedures have been appropriately addressed. In this regard, KPMG should be required to disclose additional details regarding certain potentially problematic representations that are detailed below and, if the KPMG Retention Application is approved, KPMG should be required to institute appropriate "ethical wall" procedures to protect any confidential information it has and will receive in the course of its engagement by the Debtors.

BACKGROUND

6. On April 2, 2012, the Debtors filed the A&M Retention Application, seeking authority to retain A&M as their financial advisor, and to compensate A&M for its services at its customary hourly rates, as well as pay A&M (upon the satisfaction of conditions yet to be negotiated between the Debtors and A&M) an "Incentive Fee" of fifteen percent (15%) of the total amount A&M charges the Debtors during the pendency of these cases. A&M Retention Application ¶¶ 18, 19, 21.

7. On April 3, 2012, the Debtors filed the Rothschild Retention Application, seeking authority to retain Rothschild as their financial advisor and investment banker, and to pay Rothschild (i) an advisory fee of $150,000 per month (the "Monthly Fee") and (ii) a $12,000,000 fee (the "Transaction Fee"), reduced by fifty percent (50%) of the Monthly Fees actually paid, upon the occurrence of one of several events. Rothschild Retention Application ¶¶ 13, 15.

8. On May 4, 2012, the Debtors filed the KPMG Retention Application, seeking authority to retain KPMG as their "valuation advisor," and compensate KPMG at the

hourly rates that purportedly reflect an agreed discount of approximately thirty percent (30%) from KPMG's ordinary and customary hourly rates.

9. At the request of the Office of the United States Trustee, the Debtors adjourned the hearing on the A&M and Rothschild Retention Applications, both of which are currently scheduled to be heard at the June 26, 2012 omnibus hearing. KPMG, purportedly concerned about continuing to render services to the Debtors without a retention order, was unwilling to have its retention application adjourned.

LIMITED OBJECTION

I. There Is Considerable Risk of Unnecessary Duplication of Services

10. According to the KPMG Retention Application, KPMG is expected to provide valuation services with respect to the Debtors' interests in certain of their subsidiaries and, in connection with such valuation services, KMPG will *inter alia* "consider the robustness of the underlying business plan." KPMG Retention Application ¶ 16. When considering the robustness of the underlying business plan, KPMG will, *inter alia*: (i) review and comment on the company's projections and cash flows; (ii) summarize and independently challenge the key assumptions that underpin such projections in light of recent and current results; and (iii) review and comment on the reasonableness of the key assumptions. Id.

11. At the same time, the Rothschild Retention Application states that Rothschild is expected to "review and analyze the Debtors' assets and the operating and financial strategies of the Debtors" in connection with their intermediate and long-term business prospects and will "review and analyze the business plans and financial projections prepared by the Debtors including, but not limited to, testing assumptions and comparing

those assumptions to historical trends of the Debtors and industry trends." Rothschild Retention Application ¶ 13.

12. Anticipating concerns with respect to duplication of KPMG's and Rothschild's efforts, the Debtors have attempted to distinguish between their respective proposed services, stating that "[KPMG's] services will be limited to providing valuation services for the specific portfolio assets in which the Debtors hold interests – not in determining the Debtors' enterprise value, which will be provided by [Rothschild] in the context of evaluating and developing strategic alternatives for the Debtors in connection with their ongoing restructuring efforts." KPMG Retention Application ¶ 14.

13. The Debtors' attempt to distinguish the services to be provided by Rothschild from those to be provided by KPMG is unsatisfactory. It appears that Rothschild's anticipated review of the Debtors' assets, business plans and financial projections as part of its determination of the Debtors' "enterprise value" will directly overlap with, and be duplicative of, the services that KMPG will perform as part of its review and valuation of the Debtors' portfolio assets and the underlying assumptions and projections.

14. To address the foregoing concerns, the Debtors must first explain why retention of both KPMG and Rothschild is necessary. Furthermore, even if the Debtors persuade the Court that it is necessary, they must clarify the scope of each of these engagements, and explain what measures KPMG and Rothschild will implement to ensure that any potential duplication of services is avoided. Thus, it is in the interests of the Debtors' estates and creditors for the Court to defer its consideration of the KPMG Retention

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Application until a subsequent hearing at which time all of the FA Retention Applications may be considered together.

15. The Bankruptcy Code prohibits compensation of professionals for "unnecessary duplication of services" or for "services that were not . . . necessary to the administration of the case." 11 U.S.C. § 330(a)(4)(A). Accordingly, when several professionals are retained in a chapter 11 case to perform similar or related services, it is incumbent on the debtors to explain to the court's satisfaction (i) what measures the professionals propose to take to eliminate, or at least minimize, an "unnecessary duplication of services," and (ii) why multiple retentions are "necessary to the administration of the case." See, e.g., In re Drexel Burnham Lambert Group, Inc., 133 B.R. 13, 27 (Bankr. S.D.N.Y. 1991) ("[T]he application must explain how the investment banker/advisor will eliminate, or at least reduce, the duplication of effort . . . where there are armies of professionals apparently doing the same thing as the investment banker/advisor.").

16. Where the debtors fail to demonstrate both that multiple retentions are necessary and that adequate measures will be taken to avoid duplication of efforts, the multiple retention applications should be denied. See, e.g., In re Gillett Holdings, Inc., 137 B.R. 452 (Bankr. D. Colo. 1991) (retention of multiple firms denied where debtor could not demonstrate either benefits of hiring multiple firms or measures for limitations on duplicative work); In re Am. Bantam Car Co., 103 F. Supp. 731, 733 (W.D. Penn. 1952) (multiple retentions not permitted because they would interfere with "an economical administration of the Debtor's estate").

17. Approving the Rothschild and KPMG Retention Applications absent implementation of appropriate protections for duplication and inefficiency would impose on

the Court, parties in interest and the professionals themselves an unworkable after-the-fact inquiry with respect to the reasonableness of compensation after the services have been rendered. This is plainly an unworkable solution.

II. Reasonableness of Proposed Compensation Cannot Be Evaluated in Isolation

18. Furthermore, given the lack of clarity with respect to the allocation of responsibilities among the Proposed Financial Advisors, it is impossible for either the Court or parties in interest, including the Committee, to determine whether the compensation proposed for any one of the Proposed Financial Advisors is reasonable. Such determination can only be made when the precise scope of services to be provided by each of the Proposed Financial Advisors has been finalized and, thus, each proposed compensation structure can only be evaluated in conjunction with the others.

19. The problem is that although the compensation proposed for any single Proposed Financial Advisors may be consistent with market terms for a professional performing a customary range of financial advisory services, it may be excessive given the reduced scope of services proposed to be performed in this engagement. For example, the Debtors propose to pay to Rothschild compensation (including the $12 million Transaction Fee) that appears to be at the high end of the market for investment bankers in cases of comparable size, notwithstanding the fact that KPMG appears to have been tapped to perform many, if not most, of the valuation services that customarily constitute a substantial portion of the services performed by an investment banker, such as Rothschild.[4]

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[4] Although the Committee is not yet in the position to definitively evaluate the reasonableness of the compensation proposed to be paid to any one of the Proposed Financial Advisors, the Committee believes that the aggregate estimated compensation of the Proposed Financial Advisors, as set forth in a budget recently provided to the Committee, is above market.

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20. The Court must not be placed in a position where it approves the scope of services and compensation for one Proposed Financial Advisor only to discover, at a later date, while evaluating the retention application for another Proposed Financial Advisor, that the latter could more efficiently perform some of the same services, and thus should receive some of the compensation already approved for the former. This situation is avoidable simply by deferring consideration of the KPMG Retention Application until a subsequent hearing date when it can be evaluated together with the other FA Retention Applications.

III. KPMG's Retention Should Not be Approved Until Disclosure and Confidentiality Issues Have Been Resolved

21. The KPMG Retention Application should not be approved until certain additional disclosures have been made and certain confidentiality issues addressed. These matters have been the subject of discussions between the Committee's counsel and KPMG's counsel and were addressed in a supplemental declaration filed on May 29, 2012, but closure has not yet been reached on any of these issues.

22. First, the original declaration of David Fletcher filed in support of the KPMG Retention Application (the "Declaration") discloses that KPMG has been engaged by a potential acquirer of an entity in which the Debtors own an interest (the "portfolio company"). KPMG should be required to disclose additional details with respect to such engagement, including the identity of both the portfolio company and the potential acquirer, to ensure that there is no conflict of interest.[5] Furthermore, there must be a mechanism to ensure not only that this portfolio company is not one of the entities KPMG will be valuing, but also that KPMG will not be provided confidential information regarding any other

[5] The Committee does not suggest that such information must be publicly disclosed. However, it should at the very least be disclosed to the U.S. Trustee and the Committee's professionals, with additional confidentiality restrictions, if appropriate.

portfolio companies with respect to which it (or any of its affiliates) is engaged by potential acquirers or other parties in interest. At the very least, KMPG should institute appropriate "ethical wall" procedures to (a) separate its employees providing services in connection with this engagement from its employees providing services in connection with any engagements in connection with portfolio companies, and (b) prevent the transmittal of any confidential information acquired by KPMG in the course of this engagement to any potential acquirers of portfolio companies or professionals providing services to such potential acquirers.

23. Second, the Declaration discloses that KMPG will utilize the services of other affiliated KPMG member firms when appropriate. However, the Declaration also states that such affiliated KPMG member firms may accept engagements bearing on these cases without KPMG's knowledge. Again, KPMG should institute procedures to ensure that a proper "ethical wall" is maintained in the applicable affiliated KPMG member firms between any employees of such affiliated firms who provide services to the Debtors and those employees of such firms who provide services to any other party in connection with these cases. Finally, any affiliated KPMG member firm that is performing work for the Debtors' estates should be required to file a disinterestedness affidavit with the Court, which should include specific information regarding the services to be performed by such affiliate.

CONCLUSION

WHEREFORE, for the reasons stated herein, the Court (i) should sustain this Limited Objection; (ii) defer its consideration of the KPMG Retention Application until a subsequent hearing date when all of the FA Retention Applications can be considered collectively or, in the alternative, deny the KPMG Retention Application until the

Committee's concerns have been addressed; and (iii) grant the Committee such other relief as is just.

Dated: New York, New York
May 29, 2012

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