HEARING DATE AND TIME: June 26, 2012 at 11:00 a.m. (Eastern Time)
OBJECTION DEADLINE: June 19, 2012 at 12:00 p.m. (Eastern Time)

GIBSON, DUNN & CRUTCHER LLP
Michael A. Rosenthal (MR-7006)
Janet M. Weiss (JW-5460)
Matthew K. Kelsey (MK-3137)
200 Park Avenue
New York, New York 10166-0193
Telephone: (212) 351-4000
Facsimile: (212) 351-4035

Attorneys for the Debtors
and Debtors in Possession

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**

DEBTORS' MOTION FOR AN ORDER PURSUANT TO SECTIONS 363(b) AND 503(c) OF THE BANKRUPTCY CODE AND BANKRUPTCY RULE 9019 AUTHORIZING DEBTORS TO IMPLEMENT EMPLOYEE PROGRAMS AND GLOBAL SETTLEMENT OF CLAIMS

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

BACKGROUND 5

JURISDICTION AND VENUE 5

RELIEF REQUESTED 5

EXISTING CONTRACTUAL AND STATUTORY OBLIGATIONS TO EMPLOYEES 6

PROPOSED EMPLOYEE PROGRAMS 13

I. The Severance Program 13

II. The Key Employee Incentive Plan (KEIP) 18

III. The Key Employee Retention Program (KERP) 21

IV. The Global Settlement 22

BASIS FOR RELIEF REQUESTED 24

I. The Employee Programs Comply with Section 503(c) of the Bankruptcy Code. 25

A. Section 503(c)(1) of the Bankruptcy Code Does Not Apply Because neither the Employee Programs nor the Global Settlement Constitutes Impermissible Retention Pay 25

B. The Severance Program Satisfies the Requirements of Section 503(c)(2) of the Bankruptcy Code by Restricting Corporate Insiders' Benefits to Statutorily Proscribed Limits 28

II. The Employee Programs Are the Product of Good Business Judgment and Should Be Approved under Sections 363(b) and 503(c)(3) of the Bankruptcy Code 29

III. The Global Settlement Is in the Best Interests of the Debtors' Estate and Should Be Approved 36

NOTICE 40

NO PRIOR REQUEST 40

TABLE OF AUTHORITIES

Page(s)

Cases

Chaney v. Official Comm. of Unsecured Creditors (In re Crystal Apparel),
207 B.R. 406 (S.D.N.Y. 1997) ... 28

Global Home Prods.,
369 B.R. 778 (Bankr. D. Del. 2007) ... 23, 26, 32

In re BearingPoint, Inc.,
Case No. 09-10691 (REG) (Bankr. S.D.N.Y. July 24, 2009) ... 34

In re Bethlehem Steel Corp.,
479 F.3d 167 (2d Cir. 2007) ... 26

In re Borders Group, Inc.,
Case No. 11-10614 (MG) (Bankr. S.D.N.Y. April 22, 2011) ... 34

In re Dana Corp. (Dana II),
358 B.R. 567 (Bankr. S.D.N.Y. 2006) ... 24-26, 28, 30, 34, 35

In re Delaware Hudson Co.,
124 B.R. 169 (Bankr. D. Del. 1991) ... 28

In re Dow Corning,
198 B.R. 214 (Bankr. E.D. Mich. 1996) ... 35

In re Drexel Burnham Lambert Group, Inc.,
960 F.2d 285 (2d Cir. 1992) ... 35

In re Energy Coop.,
886 F.2d 921 (7th Cir. Ill. 1989) ... 34

In re Integrated Resources, Inc.,
147 B.R. 650 (Bankr. S.D.N.Y. 1992) ... 28

In re Ionosphere Clubs, Inc.,
156 B.R. 414 (S.D.N.Y. 1993) ... 35

In re Lionel Corp.,
722 F.2d 1063 (2d Cir. 1983) ... 28

In re Mesa Air Group, Inc.,
Case No. 10-10018, 2010 WL 3810899 (Bankr. S.D.N.Y. Sept. 24, 2010) ... 28

In re Nellson Nutraceutical, Inc.,
369 B.R. 787 (Bankr. D. Del. 2007) ... 25

In re Nortel Networks Inc.,
Case No. 09-10138 (KG) (Bankr. D. Del. Mar. 5 and 20, 2009) ... 34

In re Purofied Down Prod. Corp.,
150 B.R. 519 (S.D.N.Y. 1993) ... 35

In re Teltronics Serv., Inc.,
762 F.2d 185 (2d Cir. 1985) ... 35

TABLE OF AUTHORITIES (cont'd)

Page(s)

In re WorldCom, Inc.,
347 B.R. 123 (Bankr. S.D.N.Y. 2006) 35

Machinery Terminals, Inc. v. Woodward (In re Albert-Harris, Inc.),
313 F.2d 447 (6th Cir. 1963) 34

Nellis v. Shugrue,
165 B.R. 115 (S.D.N.Y. 1994) 35

Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson,
390 U.S. 414 (1968) 35

Rodman v. Rinier (In re W.T. Grant Co.),
620 F.2d 319 (2d Cir.),
cert. denied, 446 U.S. 983 (1980) 30

Straus-Duparquet, Inc. v. Local Union. No. 3 (*In re Straus-Duparquet, Inc.*),
386 F.2d 649 (2d Cir. 1967) 26, 30

Vaughn v. Drexel Burnham Lambert Group, Inc. (In re Drexel Burnham Lambert Group, Inc.),
134 B.R. 499 (Bankr. S.D.N.Y. 1991) 34

Zelin v. Unishops, Inc. (In re Unishops, Inc.),
553 F.2d 305 (2d Cir. 1977) 30

Statutes

11 U.S.C. § 363(b)(1) 28

11 U.S.C. § 503(c) 23

11 U.S.C. § 503(c)(2) 26, 27

28 U.S.C. § 1334 ....5, 1

28 U.S.C. § 1408 ....5, 1

28 U.S.C. § 1409 ....5, 1

28 U.S.C. § 157 ....5, 1

28 U.S.C. § 157(b)(2) 5

Rules

Fed. R. Bankr. P. 9019(a) 34

Arcapita Bank B.S.C.(c) ("***Arcapita***") and certain of its subsidiaries, as debtors and debtors in possession (collectively, the "***Debtors***" and each, a "***Debtor***"), submit this motion (the "***Motion***") for entry of an order substantially in the form annexed hereto as ***Exhibit A*** pursuant to sections 363(b) and 503(c) of title 11 of the United States Code (the "***Bankruptcy Code***") and Rule 9019 of the Federal Rules of Bankruptcy Procedure (the "***Bankruptcy Rules***") authorizing the Debtors to implement the Employee Programs and Global Settlement (each as defined below) of claims between the Arcapita Group[2] and its Employees (as defined below). In support thereof, the Debtors respectfully represent:

PRELIMINARY STATEMENT

The Debtors request authority to implement Employee Programs structured to rationalize the size of the Arcapita Group workforce through a 96-person reduction in force, to provide retention or incentive bonuses to 59 additional Employees, and, pursuant to the Global Settlement, to settle potential claims between the Arcapita Group and its Employees arising out of the Arcapita Group's prepetition incentive plans. The Employee Programs promise to generate substantial savings and to align Employees' interests with those of the Debtors' estates and creditors. Finally, if approved, the Employee Programs will motivate non-Terminated Employees (as defined below) to deliver superior service and compensate a targeted group of Employees who will assume increased workloads during the Debtors' Chapter 11 Cases (as defined below) in support of the Arcapita Group's efforts to maximize the value of the estates for the benefit of creditors.

---

[2] The "***Arcapita Group***" means Arcapita along with its Debtor and non-Debtor subsidiaries.

To the Debtors' knowledge, no creditor body disputes that a reduction in force would benefit the Debtors' estates.[3] This makes sense, as projected savings derived from the reduction in force promise increased value to creditors. The proposed workforce reduction, as implemented by the Severance Program and the Global Settlement, would provide the Debtors with the following substantial benefits moving forward:

- reducing Arcapita Group wages and other benefit costs by approximately $830,000 per month;
- significantly limiting severance costs;
- mitigating (and, in most cases, eliminating) the risk of Employee litigation through the satisfaction of Terminated Employees' legal rights to severance and notice payments;
- settling certain Employee claims against the Arcapita Group for prepetition benefits and monetary awards;
- maintaining morale of retained employees through the equitable treatment of Terminated Employees and Global Settlement of claims between the Arcapita Group and participating Employees;
- maximizing the value of the estates by favorably settling claims to ensure that the Arcapita Group receives a meaningful return on otherwise extremely speculative receivables due from Employees; and
- fostering confidence in the Debtors' reorganization through senior managements' election to forgo or delay their receipt of Employee benefits hereunder.

[3] One member of the Committee filed a pleading calling for a workforce reduction within eight days of the commencement of these cases. *Objection to Certain Matters Scheduled for Hearing on March 29, 2012 at 11:00 A.M.* filed by Euroville S.ar.l [Docket No. 33]. While this Motion has been a priority of the Arcapita Group, filing has been delayed as Arcapita Group has responded to numerous requests of the official committee of unsecured creditors (the "***Committee***") for accompanying information and has had extensive discussions with the Committee related to its review and conditions to support implementation of the Employee Programs. *See* FN4.

The second component of the relief sought herein, retention and incentive compensation, also promises to benefit the estates and align Employee interests with those of the Debtors' financial stakeholders. The KEIP and the KERP (each as defined below) are structured to align the interests of the Debtors' workforce with those of the creditors and motivate Employees to deliver superior performance in light of additional Employee responsibilities attendant to the restructuring process. In particular, certain continuing Employees have undertaken significantly increased workloads to maintain investor relations, coordinate with the Debtors' restructuring advisors regarding the U.S. and Cayman insolvency proceedings, develop a long-term business plan for the reorganized entity and respond to estate parties' numerous requests for information.

This workload increase is particularly striking in light of the sacrifices made by Employees prior to the commencement of these cases. Arcapita historically maintained an incentive system to align Employee and investor interests. In 2011 and the beginning of 2012, however, the Debtors failed to make scheduled cash 2011/2012 Bonuses (as defined below), and, as a consequence of the Debtors' financial condition and the resulting filing of the Chapter 11 Cases, the incentive effect of equity incentives was undermined. In light of the foregoing, after considerable discussion with their advisors, the Debtors' management elected to provide the targeted incentive and retention bonuses described herein.

The Employee Programs and the Global Settlement are the product of significant effort by the Debtors' management and their advisors. In particular, in consultation with their advisors, Arcapita management considered (a) recent workforce losses and the potential for continued Employee destabilization, (b) the benefits of adopting a single metric incentive system versus using individualized "reach goals," (c) potential costs attendant to settling claims under the Arcapita Group's prepetition incentives and (d) the Debtors' ability to maximize the value of

their estates absent proper Employee compensation. The proposed KERP and KEIP reflect each of these considerations.

In addition, the Debtors and their advisors have spent a considerable amount of time vetting the Employee Programs with advisors for the Committee. This process has included an in-person and telephonic meetings between the Debtors' and the Committee's advisors (which management attended telephonically), multiple presentations, substantial due diligence, and ongoing dialogue regarding the structure of the Employee Programs and the Global Settlement.[4] As of the date of this filing, the Committee supports implementation of all of the Employee Programs.[5]

The complexity of the Employee Programs and Global Settlement was unavoidable given the various challenges confronting the Debtors (e.g., some Employees are employed by non-Debtors; most Employees are employed in foreign jurisdictions; and to maximize tax efficiencies for the benefit of employees, the Debtors' prepetition incentive plans were very complicated). The relief requested herein constitutes a comprehensive response to the challenges of motivating and retaining key Employees, rationalizing the Arcapita Group workforce in five separate jurisdictions, resolving claims arising from prepetition Arcapita Group incentives and potentially avoiding future litigation by satisfying contractual and statutory benefits due and payable to Terminated Employees. Further, the Debtors gave careful consideration to ensure that the

---

[4] The Debtors, in fact, were prepared to file a motion seeking approval of the Severance Program and the Global Settlement on May 10, 2012 (for the May 31 hearing), but delayed such filing to continue discussions with the Committee to obtain its support and to structure a more comprehensive program.

[5] As of the date of this filing, certain aspects of the KEIP have not yet been finalized. According, the Committee's support for the KEIP is subject to its review and approval of the final terms of the KEIP. Additionally, the Committee's support for the Employee Programs is subject to final documentation acceptable to the Committee. The Debtors understand that the Committee intends to file a statement in support of the relief requested herein in advance of the hearing on this Motion.

Employee Programs and Global Settlement limit cash costs. A simpler program that failed to address all of these issues would result in greater uncertainty and costs to the estates.

As a result of the foregoing, the Employee Programs and Global Settlement reflect a sound exercise of the Debtors' business judgment, enhances the value of the Debtors' estates for the benefit of creditors, satisfies all relevant criteria of the Bankruptcy Code and, accordingly, should be approved.

BACKGROUND

1. On March 19, 2012 (the "***Petition Date***"), Arcapita and five of its affiliates (collectively, the "***Initial Debtors***") commenced cases under chapter 11 of the Bankruptcy Code. On April 30, 2012, Falcon Gas Storage Co., Inc. (together with the Initial Debtors, the "***Debtors***") commenced a case under chapter 11 (collectively, with the chapter 11 cases of the Initial Debtors, the "***Chapter 11 Cases***") of the Bankruptcy Code.

2. The Debtors are operating their businesses and managing their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No request has been made for the appointment of a trustee or an examiner in the Chapter 11 Cases. The Committee was appointed by the Office of the United States Trustee on April 5, 2012.

JURISDICTION AND VENUE

3. The Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

RELIEF REQUESTED

4. The Debtors request the Court to enter an order, substantially in the form attached hereto as ***Exhibit A***, pursuant to sections 363(b) and 503(c) of the Bankruptcy Code and Bankruptcy Rule 9019, authorizing the Debtors to implement (a) a key employee retention

program (the "***KERP***") for 39 non-insider Employees, (b) a key employee incentive plan (the "***KEIP***") for four insider and 16 non-insider Employees, (c) a severance program (the "***Severance Program***" and collectively with the KERP and the KEIP, the "***Employee Programs***"), for the Terminated Employees and any other Employees terminated without cause during the Chapter 11 Cases and (d) a global settlement of claims between the Arcapita Group and its Employees[6] arising in connection with prepetition incentive plans (the "***Global Settlement***"). The KERP, KEIP, Severance Program and Global Settlement are all described below.

EXISTING CONTRACTUAL AND
STATUTORY OBLIGATIONS TO EMPLOYEES

5. The Employee Programs are complex, but their complexity is the product of a number of factors. First, in response to Committee requests for a global resolution of multiple Employee compensation issues, the Debtors are seeking approval for both a Severance Program (for an increased number of Terminated Employees) and incentive and retention bonus plans for a targeted group of 59 non-Terminated Employees. Second, the Employee Programs, in particular the Severance Program, are structured to address Terminated Employees' contractual and statutory rights at termination (some of which arise in favor of or against non-Debtors and most of which arise under foreign law) and claims arising in connection with certain prepetition incentive programs. Absent resolution of these claims and obligations, the Arcapita Group (particularly non-Debtor entities) could be saddled with employee claims and litigation in multiple foreign jurisdictions.

[6] This relief excludes the seven Employees that are the members of Arcapita's senior management team.

6. Set forth below are descriptions of the various outstanding obligations Arcapita Group has to its Employees.

7. IPP/IIP. As an investment bank, Arcapita established multiple incentive plans over the years, including cash pay and equity incentive programs. Under the equity incentive program, certain Employees who assumed certain obligations to Arcapita received the right to co-invest (at a price) along with Arcapita in Arcapita Group portfolio investments and non-Debtor subsidiaries. Co-investment was intended to align the Employees' interests with those of the Arcapita Group: in effect, as a result of their participation in the upside of portfolio investments, Employees were also motivated to advance the interests of the Arcapita Group.

8. Prepetition, the Debtors maintained two plans permitting management employees to co-invest along with the Arcapita Group in non-Debtor subsidiaries and investments. Due to the inherent risk associated with such plans, certain employees below the management level were not permitted to participate. These two plans—(a) the Investment Participation Program (the "***IPP***") for non-U.S. citizens and (b) the Investment Incentive Program (the "***IIP***" and together with the IPP, the "***IPP/IIP***") for U.S. citizens—serve a similar function.[7] They both enable Employees to invest—either currently or using deferred compensation—in Arcapita Group investments, as follows:[8]

- The IPP permits non-U.S. management Employee participants to purchase shares alongside the Arcapita Group with cash advanced to such Employees via interest-free loans from Arcapita Incentive Plan Limited, a Cayman Islands entity ("***AIPL***") (with AIPL using for this purpose funds loaned to it by Arcapita). Employee participants repay the loans in five equal annual installments by

---

[7] For tax reasons, as described below, the IPP and IIP have different structures

[8] A diagram meant to illustrate operation of both the IPP and IIP is attached hereto as ***Exhibit B***.

allocating a portion of their annual bonus awards to the loans, at a rate of 15% per year (aggregating 75% repayment over the five year period). Employees with more than five years of experience received loan relief for the remaining 25% (such that if a loan is advanced to an Employee with more than five years of service at the date of the loan, the loan would effectively be immediately reduced by 25%). Although IPP loans are accounted for as loans from Arcapita to AIPL, followed by loans from AIPL to the applicable Employees, Employees typically signed notes in favor of Arcapita. By their terms, Employee participant loans must be repaid upon termination.

- The IIP is a deferred compensation program designed to mimic the economic aspects of the IPP for Employees that are U.S. citizens. Generally speaking, the IIP has two components: (i) a profits interest in AIPL, through which the Employee receives the benefit of any increase in the value of the investment, and (ii) an allocated deferral account, to receive, through deferred compensation, the cost of the investment (less any investment losses attributable to "paid" shares). In addition, each IIP participant is required to enter into a contingent loss reimbursement agreement ("***CLRA***") with AIPL, under which the Employee participant agrees that upon disposition of the investment, the Employee participant is required under certain circumstances to make a capital contribution to AIPL to cover any loss incurred on the "unpaid" portion of the investment. The allocated deferral under the IIP is increased by 25% and the CLRA is reduced by 25% for plan participants with greater than five years of service. The amount of the CLRA obligation is generally reduced ratably to zero over a five-year period.

At any given time under the IPP/IIP, the Employee participant may owe the Arcapita Group money, either because of the AIPL loans (under the IPP) or a loss in value of the applicable non-Debtor subsidiary or investment (thereby triggering a CLRA obligation) (under the IIP). A loss in value, however, does not automatically result in net IPP/IIP obligations, particularly where the Employee has five years of service and, thus, received an automatic 25% reduction to its IPP/IIP obligations. The Debtors estimate that 13 of the 96 projected Terminated Employees currently have outstanding IPP/IIP obligations, and five of those Terminated Employees have outstanding loan/CLRA obligations that exceed the estimated fair value "mark" of the shares that would be

returned to Arcapita via the Global Settlement (the "***Net Obligations***"). The aggregate amount of obligations for these 13 Terminated Employees is approximately $4.76 million,[9] compared to the fair value mark of their respective shares which will be returned to the Arcapita Group of $4.81 million in the aggregate.[10] For the five Terminated Employees with Net Obligations, the aggregate amount of such Net Obligations total approximately $46,000. On a company-wide basis, there are 60 IPP/IIP Employee participants (with some overlap between the two programs), excluding seven members of senior management for which relief is not currently being sought, who have outstanding obligations under the plans of approximately $15.49 million in the aggregate.[11] Of these 60 Employees, there are 15 Employees with Net Obligations, and the aggregate amount of such Net Obligations total approximately $358,000. Despite the structure, the Arcapita Group and its Employees have always considered the IPP/IIP as an incentive plan rather than a series of loans. The Arcapita Group's historical practice of electing not to enforce its rights against severed employees having outstanding IPP/IIP obligations at termination sets a strong precedent for interpretation of IPP/IIP as an incentive plan linked to long-term compensation.

---

[9] Many of the payments described in herein will be made in local currency. Accordingly, there may be a shift in payment amounts due to fluctuations in currency rates.

[10] Under the terms of the IPP/IIP, any outstanding amounts owing by the Employee would be payable on termination. The Debtors are offering relief from the IPP/IIP obligations to all Employees, even if there are no Net Obligations outstanding in respect of the value of the "mark" at a certain date against the amount of loans (or CLRA with respect to the IIP).

[11] For the 60 IPP/IIP participants referenced, the current estimated fair value of all shares awarded under the IPP/IIP is $44.65 million. Of this, shares with a current estimated fair value of approximately $21.66 million have been paid for and shares with a current estimated fair value of approximately $10.89 million have been earned through vesting. The balance of the shares, which have a current estimated fair value of approximately $12.10 million, have not been paid for and are unvested. Including the 13 potential Terminated Employees, the current estimated fair value of shares that will be returned to Arcapita Group via the Global Settlement is $15.86 million, which is greater than the aggregate obligations due under the IPP/IIP.

9. Stock Purchase Plan. Since 2006, the Debtors have maintained an employee Stock Purchase Plan (the "***SPP***"), which provides the Employees with annual grants of equity ownership in Arcapita Bank. Historically, the SPP shares could be used to repay an Employee's IPP/IIP obligations, with the SPP share value being based on the most recent net book value of Arcapita shares. Prior to the Petition Date, the Debtors acknowledged that it would not be feasible to maintain future sales or transfers under the SPP. With equity values of Arcapita sagging, the SPP was no longer an effective incentive program, nor was it appropriate to allow Employees to use SPP shares as payment for IPP/IIP obligations.

10. Notice/Severance. Prior to developing the Severance Program, the Debtors and their restructuring advisors worked with Arcapita's foreign counsel to analyze Terminated Employees' contractual and statutory rights to severance and notice pay due at termination. While benefits vary by jurisdiction,[12] in nearly all of the applicable jurisdictions, employers must provide severed employees with such benefits.[13] For example, in Bahrain (home to approximately two-thirds of the Terminated Employees), Arcapita must provide severed employees with (a) statutory notice equal to 30 days' pay[14] and (b) severance pay equal to 15 days' wages for each of the first three years of service and 30 days' pay for each year of service

---

[12] The relevant jurisdictions for the terminated Employees are Bahrain, the United Kingdom, Hong Kong, Singapore, and the United States.

[13] Of the five relevant jurisdictions, only United States non-Debtor Employees (all of whom are "at will" employees) lack statutory or contractual rights to notice or severance payments.

[14] Employee "pay" includes wages, benefits in kind and allowance benefits (each, as described in the *Debtors' Motion for Entry of Interim and Final Orders Authorizing the Debtors to (A) Pay Certain Prepetition Wages, Salaries, and Reimbursable Employee Expenses, (B) Pay and Honor Employee Medical and Similar Benefits, and (C) Continue Employee Compensation and Employee Benefit Programs* [Docket No. 24] (the "***Employee Wage Motion***")).

thereafter.[15] Arcapita Limited, the employer of certain additional Terminated Employees, also provides both notice and severance pay equal to (a) statutory notice pay of one week's wages for employees, increasing by one week for each full year of service from the second year onward up to a maximum of twelve weeks' wages and (b) statutory severance pay per full year of service of one half weeks' pay for individuals under age 22, one week's pay for individuals from 22 to 40, and one and one half weeks' pay for individuals aged 41 and above, with weekly pay capped at £430 for purposes of statutory severance pay.

11. Prepetition Cash Bonuses. At the Petition Date, approximately $20.6 million in aggregate prepetition announced but unpaid bonuses were owed to over 250 Employees (collectively, the "***2011/2012 Bonuses***"). The majority of the 2011/2012 Bonuses were announced in 2011. In September 2011, Debtor and non-Debtor employees received communications (generally from Arcapita) relating to their June 2011 fiscal year-end compensation. Consistent with past practice, each communication detailed the 2011 bonus award payable to the relevant Employee and provided that such award would be deposited into the Employee's bank account during the then current month (September); however, the 2011 bonus amounts were not distributed to the Employees. In addition, several Employees have contractually guaranteed or incentive 2011/2012 Bonuses (aggregating to approximately $2.6 million). Due to liquidity concerns or, in the case of 2012 bonuses, the Debtors' inability to pay

---

[15] Under Bahraini labor law, employers are required to provide non-Bahraini employees with a pro rata leaving indemnity at termination. Bahraini employees are entitled to a similar leaving indemnity, except a portion of the Bahraini leaving indemnity is deferred in the form of a pension entitled upon retirement and paid by the General Organization for Social Insurance ("***GOSI***"). In an effort to provide all Employees in Bahrain with equal benefits, the Debtors seek authority to provide Bahraini Terminated Employees with the same severance benefit at termination as received by non-Bahraini Terminated Employees.

such bonuses after the commencement of the Chapter 11 Cases, the Debtors have not paid the 2011/2012 Bonuses.

12. Vacation.[16] Each of the Debtors and non-Debtors provide vacation time to their Employees. Executive Directors of Arcapita, for example, are entitled to 25 vacation days per year. All other Arcapita Employees are entitled to 22 vacation days. The Debtors estimate that at termination, the Arcapita Group will owe the 96 Terminated Employees an aggregate of approximately $203,000 on account of accrued but untaken vacation days.

13. Employee Loans. Prepetition, the Arcapita Group provided certain Employees with interest-free loans including upon a showing of need (each, a "***Employee Loan***" and, collectively, the "***Employee Loans***"). Certain loans were generally advanced against an Employee's annual bonus (which, as discussed above, would not have been paid in 2011 and 2012). At the Petition Date, 9 of the 96 Terminated Employees collectively owed the Arcapita Group approximately $432,000 on account of the Employee Loans. Other Employee Loans for continuing Employees approximate to $1.5 million.

14. Expatriate Expense Payments. The Debtors' Bahraini labor counsel have advised the Debtors that the Debtors are responsible for travel and moving expenses to return any expatriate Terminated Employees in Bahrain to their country of origin (the "***Expatriate Expense Payments***"). The Debtors project that of the 66 Terminated Employees in Bahrain, 16 are expatriates of another country. At this time, the cost of Expatriate Expense Payments is unclear,

---

[16] The Court previously approved Debtor Employees' receipt of benefits on account of prepetition and postpetition vacation days in the Court's *Order (A) Authorizing the Debtors To (A) Pay Certain Prepetition Wages, Salaries, and Reimbursable Employee Expenses, (B) Pay and Honor Employee Medical and Similar Benefits, and (C) Continue Employee Compensation and Employee Benefit Programs* [Docket No. 136], or the "***Employee Wage Order***."

but it is estimated that the cost to relocate these 16 expatriates (and their families) should approximate $195,000.

PROPOSED EMPLOYEE PROGRAMS TO BE IMPLEMENTED UPON APPROVAL OF THE MOTION BY THE COURT

15. In light of the foregoing obligations, the Debtors' business judgment that the proposed reduction in force of 35% – in addition to the 20 Employees lost to attrition alone since the beginning of 2012 – could have a destabilizing effect on the balance of the Debtors' workforce, and the Debtors' concomitant need to retain and motivate key Employees, the Debtors seek an order authorizing them to implement the following programs.

I. The Severance Program

16. As mentioned previously, the proposed reduction in force calls for the termination of 96 Employees (each, a "***Terminated Employee***" and collectively, the "***Terminated Employees***").[17] The Terminated Employees are a diverse group: 92 Terminated Employees hold the positions of clerk, analyst, associate, principal, or director or otherwise provide administrative, support or supervisory services ("***Terminated Non-Senior Management Employees***") and the remaining four Terminated Employees are senior-level employees who hold the position of Executive Director ("***Terminated Senior Management Employees***"). The Terminated Employees work for five separate Arcapita Group entities (Arcapita and four non-Debtors) in five separate jurisdictions. As discussed above, nearly all Terminated Employees have contractual and/or statutory rights to a number of payments or benefits at termination,

[17] Arcapita Limited Terminated Employees have not yet been identified as UK law forbids employers from selecting employees for a workforce reduction until a certain process is concluded. As the Severance Program is not yet final, Arcapita cannot yet identify such Employees. Accordingly, the inclusion of UK Employees is not meant to identify any particular Employee; rather, inclusion of UK Employees in this motion is for illustrative purposes only.

including severance pay, notice pay, and/or vacation pay. Brief summaries of Employee severance and non-severance benefits at issue here, including those compensable at termination, are described above.

17. The Severance Program is designed to comply with the Employees' contractual and statutory rights held against Arcapita Group entities, provide Employees who are terminated without cause (including the Terminated Employees) with consistent treatment across multiple jurisdictions, resolve other outstanding employee benefits and minimize severance cash outlays. The following chart provides an overview of the Severance Program payments to Employees with and without IPP/IIP exposure. Notably, the chart's description with respect to the application of the Severance Program to the Terminated Employees under the presently proposed 96-person workforce reduction will apply to other Employees who are terminated without cause during the Chapter 11 Cases.

	Severance Program (No IPP/IIP Exposure)	**Severance Program (IPP/IIP Exposure)**
Notice	Terminated Employee shall receive the higher of statutory or contractual notice payment in lieu of notice, subject to minimums of one month for Terminated Non-Senior Management Employees and three months for Terminated Senior Management Employees.	Same as "No IPP/IIP Exposure" except: For the 13 Terminated Employees who have IPP/IIP exposure (and elect to take part of the Global Settlement), combined notice and severance pay shall be limited to a total of four months' pay less any outstanding Employee Loan and other staff loan obligations, unearned vacation days, post-termination school fee payments and non-contractually mandated private pension payments.
Severance	Terminated Employee shall receive the higher of statutory or contractual severance, subject to a minimum of 15 days' wages for each year of service for first three years and 30 days' wages for each year of service thereafter.	

Deductions	Termination payments to all recipients shall be reduced by outstanding Employee Loan and other staff loan obligations, unearned vacation days, post-termination school fee payments, non-contractually mandated private pension payments and a pro rata adjustment for subsistence allowance payments.	Same.
Bonus Payments	Employee shall be entitled to a general unsecured claim against Arcapita equal to the amount of any accrued and unpaid 2011/2012 Bonuses, notwithstanding the identity of the Debtor or non-Debtor party against whom the award is held.	Same.
IPP/IIP Loan Repayment	N/A	Arcapita shall allow Employees to satisfy their outstanding obligations under the IPP/IIP by signing over to Arcapita all shares for which they have not yet paid (or for which deferred compensation has not yet been allocated) and a pro-rata portion of shares that have vested due to the employee having 5 or more years of employment.
Holiday Pay	Paid (reconciled against pro rata entitlement).	Same.
Stock Purchase Plan	Suspend program.	Same.
Bahrain Specific Contractual Non-Management Pension.	Paid.	Same.

Specific aspects of the Severance Program are discussed below.

18. Notice/Severance. The majority of the Employees maintain contractual and/or statutory rights to notice and severance payments. Accordingly, the Debtors request authority to award all Employees terminated without cause during the Chapter 11 Cases (including the Terminated Employees) the greater of the notice and severance payments due such Employee by contract or statute, subject to the following minimums: (a) for notice pay, a minimum of one month's notice pay for Terminated Non-Senior Management Employees or three months' notice

pay for Terminated Senior Management Employees; and (b) for severance, a minimum of 15 days' pay per year of service for up to three years of service, plus 30 days' pay for each year of service thereafter (together, and as reduced in the following paragraph, the "***Notice and Severance Payments***").

19. The Notice and Severance Payments are subject to specific reductions on account of prepetition benefits. First, as part of the Global Settlement, Employees terminated without cause will have the option to elect to receive a release from their IPP/IIP obligations in return for, among other things, an agreement to a total four-month cap on the combination of Notice and Severance Payments. In addition, in all cases, the Notice and Severance Payments will be reduced by Employee Loans owed by applicable Employees to the Arcapita Group (an aggregate of $432,000 for Terminated Employees as described above and amounts attributable to any taken but unearned vacation days). Assuming all 13 Terminated Employees with IPP/IIP exposure elect to receive a release from their IPP/IIP exposure, the projected cash costs of the Notice and Severance Payments for the 96 Terminated Employees are $1.65 million and $2.62 million, respectively, resulting in a total projected cash cost for Notice and Severance Payments for the Terminated Employees of $4.27 million.[18] After further deduction on account of recoverable Employee Loans, the projected cash cost of the Notice and Severance Payments for the Terminated Employees is $3.84 million.

20. Vacation. Consistent with past practices, applicable law, and the Court's Employee Wage Order with respect to the Debtor Employees (Debtor Terminated Employees

---

[18] If an Employee chooses not to accept the Global Settlement, there will be no related cap on his or her Notice and Severance Payment entitlements (except for the cap established by the Bankruptcy Code). But the Debtors, in turn, would be entitled to receive repayment of all amounts outstanding under the IPP/IIP.

comprising a full 68% of the group), the Debtors intend to fully compensate Employees terminated without cause for untaken accrued vacation pay (the "***Accrued Vacation Payments***"). At the time of this filing, the estimated accrued but unused vacation for the Terminated Employees is $203,000. Notably, there is a corresponding reduction in termination payments where the Employee has taken more than his/her pro rata share of vacation days.

21. Indemnity. Under the employment agreements of 39 Employees in Bahrain, certain private pension balance payments must be made upon termination of each such Terminated Employee's employment (the "***Private Pension Payments***"). The total expected cost of the Private Pension Payments is estimated to be approximately $444,000.

22. Expatriate Expense Payments. While the amount of Expatriate Expense Payments is uncertain, the Debtors intend to comply with their statutory obligation to make such payments, including to the 16 relevant Terminated Employees. For such Employees, the Debtors approximate this liability at $195,000.

23. 2011/2012 Bonuses. Under the Severance Program, Employees terminated without cause and owed 2011/2012 Bonuses would receive a prepetition claim against Arcapita in the Chapter 11 Cases (the "***Accrued Bonus Claims***"), notwithstanding the identity of the Debtor or non-Debtor against which the award is held. Any such prepetition claims are being reflected in the schedules and statements required pursuant to section 521 of the Bankruptcy Code and Rule 1007(c) of the Bankruptcy Rules.

24. Stock Purchase Plan. As part of the Severance Program, the Debtors propose to suspend the SPP, as it is no longer an effective incentive plan. The Debtors have also cancelled plans to launch a new stock grant program, which was intended to replace the SPP.

II. The Key Employee Incentive Plan (KEIP)

25. As set forth above, the Debtors historically provided their Employees with various compensation and benefit programs designed to incentivize excellent performance, align senior management incentives with those of other stakeholders, provide Employees with market-based, compensation opportunities and benefit packages and reward exceptional service. These historical programs included, among others, annual short-term cash incentives and long-term equity incentives (under the SPP and IPP/IIP).

26. As the Arcapita Group has suffered financial set-backs, however, the ability of the Debtors to reward outstanding efforts has diminished. In 2011 and 2012, the Arcapita Group failed to pay the 2011/2012 Bonuses which had previously been announced. Moreover, deal shares in many Arcapita Group investments lost value (such that, in certain cases, IPP/IIP participants may have Net Obligations in excess of the underlying share values under the program). Accordingly, the Debtors seek authority to provide incentive and retention pay to key Employees to encourage continuous improvement across all levels of the Arcapita Group's operations and facilitate a prompt reorganization and exit from chapter 11.

27. KEIP Participants. The KEIP provides for performance-based incentive payments to 20 Employees of varying rank based upon their personal achievements during the cases (collectively, the "***KEIP Participants***"). KEIP Participants (approximately 7% of the Employee population as of January 1, 2012) include four insiders and 16 non-insiders. In Arcapita's business judgment, it was appropriate to include a number of non-insider employees in the KEIP to align Employee motivation and the related financial impact to the estate and, as a precautionary measure, to avoid time-consuming and costly litigation regarding the identity of

insiders moving forward.[19] The non-insider population within the KEIP is comprised solely of Employees with the title of director.

28. KEIP Performance Metrics. In developing the program, Arcapita management considered adopting a universal plan that established general performance metrics for all KEIP Participants. The Arcapita Group's operational structure, however, did not lend itself to a universal measuring stick. KEIP Participants fall generally in two categories: (a) Employees who generally have shouldered additional responsibilities on account of the US and Cayman proceedings and (b) Employees managing or overseeing one or more specific Arcapita Group portfolio companies. As a result of this structure, establishing a general incentive program that links Employee compensation to overall corporate performance could threaten to undermine the KEIP's purpose. For example, if the company performed well, but one or more portfolio companies managed by a KEIP Participant underperformed, that KEIP Participant would receive payment. Such an outcome would undercut the purpose of incentive pay. As a result, after considerable discussion with the Debtors' and the Committee's respective advisors, the Debtors' management opted to fashion a KEIP plan which establishes individual metrics for each individual KEIP participant.

29. The identities of the KEIP participants along with the applicable potential KEIP awards and performance goals (the "***KEIP Performance Goals***")[20] are set forth on ***Exhibit C***

---

[19] Having reviewed the job titles, responsibilities and authority of the Debtors' Employees, the Debtors believe that only those Employees with a title of at least Executive Director may be considered insiders, as such term is defined in the Bankruptcy Code. However, to avoid needless litigation over what constitutes an insider (such as the recent litigation in the *In re Eastman Kodak Company* (Case No. 12-10202 (ALG)) chapter 11 cases pending in the Southern District of New York), the Debtors erred on the side of inclusion with respect to providing incentive-based bonuses.

hereto. Generally, however, where a KEIP participant is charged with overseeing one or more portfolio companies, KEIP Performance Goals for that individual are linked to the portfolio company's or companies' satisfaction of specific financial performance goals (*i.e.* EBITDA or minimum proceeds at asset sale). By contrast, KEIP Performance Goals for Employees not linked to a specific portfolio company are tied to restructuring milestones.

30. KEIP Awards. Target incentive payments under the KEIP represent between 3 to 12 months' wages (wages being defined as base salary plus any required subsistence payments). In aggregate, payments under the KEIP at target levels of performance total approximately $3.0 million.[21] Certain Employees may be eligible to receive a greater amount in the event stretch goals are satisfied. The $3.0 million target amount represents approximately .08% of the Arcapita Group's prepetition assets, based on book value. This falls well below the average (on a percentage basis) for comparable programs identified by Alvarez & Marsal LLC ("***A&M***"). (*See Declaration of Brian Cumberland in Support of Debtors' Motion for an Order pursuant to Sections 363(b) and 503(c) of the Bankruptcy Code and Bankruptcy Rule 9019 Authorizing Debtors To Implement Employee Programs and Global Settlement of Claims* (annexed hereto as ***Exhibit D***) (the "***Cumberland Declaration***") ¶ 9).

31. If a KEIP Participant is terminated "for cause" or quits prior to attainment of that KEIP Participant's KEIP Performance Goal, such KEIP Participant will forfeit his or her opportunity to receive a KEIP award. A KEIP Participant terminated "without cause" prior to

[Footnote continued from previous page]

[20] Certain of the proposed KEIP Performance Goals are currently being refined by the Debtors. The Debtors will file a supplement to this Motion if the proposed KEIP Performance Goals change prior to the hearing date on this Motion.

[21] This aggregate KEIP amount would increase if levels of performance exceed the milestones established KEIP Performance Goals.

the attainment of that Employee's KEIP Performance Goal (assuming that goal is met) would receive full payment.

III. The Key Employee Retention Program (KERP)

32. KERP Participants. The KERP provides payment of retention-based cash awards to 39 KERP participants across four jurisdictions (collectively, the "***KERP Participants***"). The 39 KERP participants represent approximately 14% of the Employee population as of January 1, 2012. The 39 KERP participants are all non-insiders; no KERP participant holds a title of Executive Director or above. A list of the 39 KERP Participants is attached hereto as ***Exhibit E***.

33. Establishment of the KERP is a response to Employee attrition since the Petition Date. Twelve Employees with a rank of Director or below have quit during the Chapter 11 Cases, many of whom would not otherwise have been subject to the proposed workforce reduction.

34. KERP Awards. Retention payments represent between two to nine months' wages for the KERP participants (wages being defined as base salary plus any required subsistence payments). The median KERP award opportunity is $46,000. The aggregate payments under the KERP could equal as much as $2.6 million (including the discretionary component, which is discussed below). This amount represents approximately .07% of the Arcapita Group's prepetition assets, based on book value, and falls well below the average (on a percentage basis) for comparable programs identified by A&M. (*See Cumberland Declaration* ¶ 11).

35. KERP Participants must generally remain with the Arcapita Group through the effective date of a chapter 11 plan of reorganization or liquidation to receive a KERP award. If a KERP Participant is terminated "for cause" or quits during the Chapter 11 Cases, that KERP

Participant will forfeit his or her opportunity to receive a KERP award hereunder. A KERP Participant terminated "without cause" would receive full payment.

36. Additionally, a small number of key non-insider Employees would participate in a discretionary pool under the KERP, based upon the judgment of the Debtors' management. That discretionary pool will not exceed $300,000 in aggregate and will only be utilized on an as-needed basis at the discretion of senior management to retain other key Employees not part of the KERP. No insider will be permitted to receive a retention payment from the discretionary pool. Any payment from the discretionary pool, moreover, may not exceed $30,000 per Employee absent the consent of the Committee, and all such payments will be conditioned on the future performance of services for a to-be-determined length of time.

37. Based on the foregoing, the total cost of the proposed KERP and KEIP program (assuming target payouts), including the $300,000 reserved for discretionary payments, totals $5.5 million.

IV. The Global Settlement

38. As discussed above, there are 60 Employees, including the Terminated Employees and excluding members of senior management, that have outstanding obligations under the IPP/IIP totaling $15.49 million. Of these 60 Employees, 15 Employees owe a greater amount in connection with the IPP/IIP than the fair value "mark" of the shares[22] that would be returned to Arcapita Group via the Global Settlement. That is, they have Net Obligations under the plans. The aggregate amount of such Net Obligations, calculated as the shortfall in total obligations less the estimated fair value of shares returned to Arcapita Group via the Global

---

[22] This do not reflect does not reflect current valuations being performed by KPMG LLP and therefore may be subject to change.

Settlement, is approximately $358,000. As previously discussed, Terminated Employees account for approximately $4.76 million of the total outstanding obligations and $46,000 of the Net Obligations.

39. The proposed Global Settlement provides for the settlement of all outstanding claims between the Arcapita Group and its Employees (including the Terminated Employees) in connection with the IPP/IIP. Specifically, the Global Settlement provides participating Employees with the following treatment:

- Non-U.S. Participants. Terminated Employees who are non-U.S. participants, under the Global Settlement, would be allowed to satisfy outstanding IPP loan obligations by transferring to Arcapita a portion of the shares purchased under the IPP having a purchase price equal to the outstanding loan obligation. For example, if two years after the closing of a transaction, a Terminated Employee (with less than five years of employment) has paid 30% of the total purchase price of his or her shares, upon termination, the Terminated Employee may accept Arcapita's settlement offer to exchange the remaining loan obligation in return for the Employee's transferring 70% of his or her deal shares to Arcapita. Terminated Employees with five or more years of employment would receive the same treatment (except the Employee's loan amount would already have been automatically reduced by 25% and, as part of the Global Settlement, the Employee shall voluntarily agree to return a pro rata portion of the shares associated with the 25% automatic share reduction). Notably, Terminated Employees would not be able to accept this settlement offer on a deal-by-deal basis. Arcapita's offer to "swap" outstanding loan obligations in return for the unpaid IPP shares would only be available for all or none of the deals for which the Terminated Employee holds an interest.

- US Participants. Also under the Global Settlement, Terminated Employees who are U.S. participants would be allowed to forfeit the profits interest corresponding to their "unpaid" shares in exchange for the elimination of any outstanding CLRA in respect of such shares. Thus, the applicable U.S. Employee's allocated deferral account would be reduced by losses only with respect to "paid" shares. The allocated deferral account would not be converted to a contingent payment obligation at termination, but

instead, the U.S. participant would continue to have a right to a deferred payment through the conclusion of the Chapter 11 Cases.

- <u>Continuing Employees</u>. All continuing Employees (who either (a) remain with the Debtors for at least 120-days after the date of this entry of the Order or (b) are terminated without cause), with the exception of seven members of senior management will have the opportunity to have their obligations under the IPP/IIP settled by signing over to Arcapita a pro rata portion of the "deal" shares in a similar manner as performed by non-U.S. participants. Senior management will not participate in this program at this time.

Finally, as discussed above, to participate in the Global Settlement, the Terminated Employees (and the non-Terminated Employees who may be included in future force reductions) must agree to forgo their statutory and contractual Notice and Severance Payment in return for a combined capped four-month Notice and Severance Payment and release the Arcapita Group from any additional claims and causes of action. Assuming (a) all Employees (including Terminated Employees), with the exception of seven senior management employees, with outstanding IPP/IIP obligations participate in the Global Settlement, the Debtors estimate that such participation could potentially generate approximately $6.92 million in Notice and Severance Payment savings and (b) only the 15 Employees with Net Obligations (i.e. loan/CLRA obligations in excess of the estimated fair value of the shares to be returned via the Global Settlement) so participate, such participation could potentially generate approximately $1.60 million in Notice and Severance Payment savings.

<u>BASIS FOR RELIEF REQUESTED</u>

40. The proposed Arcapita Group reduction in force, as implemented by the Severance Program, the KERP, the KEIP, and the Global Settlement, are in the best interests of the Debtors' estates, creditors, and other parties in interest and should be approved.

I. The Employee Programs Comply with Section 503(c) of the Bankruptcy Code

41. Section 503(c) of the Bankruptcy Code sets forth certain limitations on transfers or payments by debtors, to the extent that such payments are (i) payments to an insider for the purpose of inducing such person to remain with the debtor's business; (ii) severance payments to an insider; or (iii) transfers or obligations outside the ordinary course. 11 U.S.C. § 503(c).

A. Section 503(c)(1) of the Bankruptcy Code Does Not Apply Because Neither the Employee Programs Nor the Global Settlement Constitutes Impermissible Retention Pay

42. Section 503(c)(1) of the Bankruptcy Code applies only to "pay to stay" plans for insiders that do not motivate insider participants "to produce and increase the value of the estate." *In re Dana Corp.* (*Dana II*), 358 B.R. 567, 584 (Bankr. S.D.N.Y. 2006). Incidental retentive effects of an incentive plan do not trigger a violation of section 503(c)(1): "merely because a plan has some retentive effect does not mean that the plan, overall, is retentive rather than incentivizing in nature." *Id.* at 571. Thus, *Dana II* sensibly recognizes that every form of payment—be it a wage, salary, or bonus—must have some retentive impact. *See also Global Home Prods*., 369 B.R. 778, 786 (Bankr. D. Del. 2007) ("The fact . . . that all compensation has a retention element does not reduce the Court's conviction that [the] Debtors' primary goal [is] to create value by motivating performance.").

43. Severance Program and Global Settlement. Neither the Severance Program—which provides payments to severed Employees—nor the Global Settlement implicate the restrictions set forth in section 503(c)(1). The Severance Program provides benefits to severed Employees, not retained Employees. As such, it's not an inducement for employees to stay and does not implicate section 503(c)(1) at all. And as a result of the cap on severance and notice period benefits provided to those Employees that are arguably insiders – i.e., the four executive directors that are Terminated Employees yet are participating in the Global Settlement – none of

these Employees will be receiving more than 10 times the amount of severance that a rank-and-file Terminated Employee will receive, thereby not violating section 503(c)(2), either.[23]

44. As for the Global Settlement, it is neither retention nor incentive pay. Rather, the Global Settlement comprises the resolution of claims between participant Employees and the Debtors and, in any event, is designed primarily to benefit non-insiders (seven members of senior management have elected to forego participation at this time and only seven Executive Directors, including the Terminated Employees, have IPP/IIP obligations). Participants in the Global Settlement receive relief from their IPP/IIP obligations. In return, however, they must return to Arcapita unpaid and even some vested shares in non-Debtor subsidiaries, accept capped Notice and Severance Payments, remain with the Arcapita Group for an additional 120 days and release their employers from other claims. As such, the Global Settlement is simply that – namely, a settlement of claims between Employees and the Debtors as governed by Bankruptcy Rule 9019, not a retention plan subject to section 503(c)(1) of the Bankruptcy Code.

45. Further, to the extent an Employee – including a member of senior management – elects to continue holding shares in non-Debtor subsidiaries, such ownership is not retention pay. Equity ownership in this fashion by definition aligns insiders' interests with the estates. Senior management is incentivized to drive value in the underlying investments. Accordingly, section 503(c)(1) would not apply. *Dana II*, 358 B.R. at 583.

46. The KEIP: Employee compensation programs structured to motivate or incentivize employees to deliver superior performance are not subject to section 503(c)(1). *See In re Nellson Nutraceutical, Inc.*, 369 B.R. 787, 804 (Bankr. D. Del. 2007). Section 503(c)(1)

[23] A more complete description of this feature is set forth below.

applies solely to "pay to stay" retention plans for insiders that do not motivate plan participants "to produce and increase the value of the estate." *Dana II*, 358 B.R. at 584.

47. The KEIP here aligns the interest of the KEIP Participants with those of the Debtors' financial stakeholders. Because payments under the KEIP will only be made if the Key Participants drive the Debtors to achieve certain milestones structured to deliver additional value to the estates' financial stakeholders. For example, a KEIP Participant's receipt of its KEIP award may be tied to proceeds generated by the sale of a portfolio company. Thus, the KEIP is calibrated to increase the value of these estates. Finally, payment levels under the KEIP are reasonable and were determined by management based on their review of compensation offered by other chapter 11 debtors. (*See Cumberland Declaration* ¶ 9).

48. Notably, that the Debtors chose to forgo a one-size-fits all approach to performance metrics evidences the Debtors' intent to motivate superior Employee performance. The Debtors and their advisors spent a considerable amount of time determining the best way to link an Employee's KEIP Performance Goal to his or her area of expertise and authority. The Debtors believe that a greater sense of control an Employee feels over attainment of a specific milestone leads to the creation of a more effective motivating tool.

49. KEIP Participants are not eligible for a KEIP award hereunder unless clear-cut performance hurdles are achieved, and there is no guaranty these hurdles will ever be achieved. With respect to the restructuring milestones, creditors have publicly stated that they believe consummation of a restructuring plan is at the very least challenging. The KEIP Performance Goals require the Debtors to reverse historic value declines and satisfy specific financial performance metrics (for certain KEIP Participants), all to the benefit of the Debtors' financial stakeholders. Accordingly, section 503(c)(1) does not apply. *See Global Home Prods.*, 369 B.R.

at 787 (finding plans to be incentive in nature where "[they] were reasonably intended to incentivize management and senior level sales managers to produce and increase the value of Debtors' estate").

50. The KERP. The KERP does not implicate section 503(c)(1) of the Bankruptcy Code because KERP Participants are all non-insiders. No KERP Participant has a job title of Executive Director or above. In fact, in part to avoid needless litigation regarding the identities of the Debtors' insiders, the Debtors incorporated 16 non-insiders into the KEIP Participants.

B. The Severance Program Satisfies the Requirements of Section 503(c)(2) of the Bankruptcy Code by Restricting Corporate Insiders' Benefits to Statutorily Proscribed Limits

51. Section 503(c)(2) of the Bankruptcy Code limits severance payments that can be made to an insider of the debtor. *See* 11 U.S.C. § 503(c)(2). Severance is a form of compensation arising where an employee has been terminated for reasons other than misconduct and is intended to alleviate the economic loss attributable to the employee's dismissal. *See In re Bethlehem Steel Corp.*, 479 F.3d 167, 173 (2d Cir. 2007) (Sotomayor, J.); *accord Straus-Duparquet, Inc. v. Local Union. No. 3* (*In re Straus-Duparquet, Inc.*), 386 F.2d 649, 651 (2d Cir. 1967); *Dana II*, 358 B.R. at 576.

52. Under section 503(c)(2) of the Bankruptcy Code, a court may approve a severance payment to an insider if both "(A) the payment is part of a program that is generally applicable to all full-time employees; and (B) the amount of the payment is not greater than 10 times the amount of the mean severance pay given to nonmanagement employees during the calendar year in which the payment is made." 11 U.S.C. § 503(c)(2).

53. Four Terminated Senior Management Employees have the title Executive Director. Assuming all four are found to be insiders as that term is used in the Bankruptcy Code, projected payments under the Severance Program comply with section 503(c)(2)'s restrictions.

As proposed, and taking all deductions into account, none of the Terminated Senior Management Employees will receive Notice and Severance Payments in excess of 10 times the mean Notice and Severance Payments payable to the Terminated Non-Senior Management Employees (approximately $38,900).[24] To the extent that the Severance Program, moreover, would provide for a total payment to any insider Employee of an amount greater than the statutorily proscribed limit, such payment shall be capped at the maximum permissible amount under section 503(c)(2).

54. <u>KERP/KEIP</u>. Awards available under the KEIP and KERP are not "severance." No award is triggered by the termination of an individual's employment with the Arcapita Group (with or without cause). Instead, KEIP Participants may be entitled to an award only upon the satisfaction of specific performance milestones. KERP Participants, none of whom are insiders, receive payment for agreeing to remain with the Arcapita Group for a set period of time. Section 503(c)(2) of the Bankruptcy Code, therefore, does not apply to either the KEIP or the KERP.

II. The Employee Programs Are the Product of Good Business Judgment and Should Be Approved under Sections 363(b) and 503(c)(3) of the Bankruptcy Code

55. Bankruptcy Code section 363(b)(1) permits a debtor in possession to use property of a debtor's estate "other than in the ordinary course of business" after notice and a hearing. 11 U.S.C. § 363(b)(1). The use of estate property should be approved by the court if a debtor demonstrates a sound business justification for its use. *See In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983); *In re Delaware Hudson Co.*, 124 B.R. 169, 179 (Bankr. D. Del. 1991). Section 503(c)(3) of the Bankruptcy Code incorporates a substantially similar standard; a

[24] Notably, by contract, one insider would receive Notice and Severance Payments in excess of the statutory cap if that Employee did not elect to participate in the Global Settlement. However, if that Employee does not so participate, the Debtors will reduce any Notice and Severance Payments to such Employee to the statutorily permitted amount.

transaction is "justified by the facts and circumstances of the case" under section 503(c)(3) if the transaction falls within the debtor's "sound business judgment." *See In re Mesa Air Group, Inc.*, Case No. 10-10018, 2010 WL 3810899, at *4 (Bankr. S.D.N.Y. Sept. 24, 2010) (*citing Dana II*, 358 B.R. at 576-77).

56. Once the debtor has articulated a valid business purpose, a presumption arises that the debtor's decision was made on an informed basis, in good faith, and in the honest belief that the action was in the best interests of the company. *In re Integrated Resources, Inc.*, 147 B.R. 650, 656 (Bankr. S.D.N.Y. 1992). Courts are cautious not to subject their own business judgment for the debtor's judgment. *See, e.g.*, *Chaney v. Official Comm. of Unsecured Creditors* (*In re Crystal Apparel*), 207 B.R. 406, 410 (S.D.N.Y. 1997) ("[C]ourts must exercise great deference in reviewing a corporation's decision to pay its employees.").

57. The Severance Program. The Debtors believe that the proposed workforce reduction as implemented by the Severance Program and the Global Settlement is the product of sound business judgment, promises the Debtors long-term monetary and non-monetary benefits, and is justified by the facts and circumstances of the Chapter 11 Cases. First and foremost, the workforce reduction will generate immediate cost savings. Terminated Employees cost the Arcapita Group $830,000 per month in wages and benefits. Because of the reduced focus of the Debtors' business, certain Arcapita jobs have been rendered redundant or otherwise superfluous. Reduced expenses going forward will serve to maximize the value of the Debtors' estates and aid the Debtors' efforts to reorganize.

58. In light of the cost savings and a number of other factors, the costs attendant to the Severance Program and the Global Settlement are reasonable and the payment of such amounts is in the best interests of the Debtors. The Debtors and their advisors have expended

considerable effort to limit the cash costs of the proposed workforce reduction without violating Employees' legal rights. The Debtors estimate that the total cash cost of the Severance Program and the Global Settlement (in each case, for the Terminated Employees) is $4.5 million. With monthly savings of approximately $830,000, the projected cash "payback period" for the workforce reduction equals approximately 5 and one-half months. The Debtors expect to generate savings of $5.5 million in cash over the next 12 months. Significantly, senior management has opted out of the Global Settlement and participation in the KEIP at this junction.

59. In addition, the Severance Program's terms will minimize the costs and time of labor litigation in multiple jurisdictions. If the Arcapita Group fails to satisfy the Terminated Employees' respective legal rights, there is a substantial risk that the Terminated Employees, the vast majority of whom either (a) work for non-Debtors or (b) are not subject to personal jurisdiction in the United States, would likely file suit against their former employers – i.e., members of the Arcapita Group – in foreign jurisdictions. The automatic stay would not prevent the commencement or continuation of these suits against non-Debtor members of the Arcapita Group. Ultimately, having evaluated the issues at length, the Debtors believe that labor litigation will prove costly and time consuming and, where the Debtors have failed to satisfy Employees' legal rights, could result in the same outcome from a liability standpoint (with the additional costs of legal fees and, in some jurisdictions, the plaintiff's legal fees). Indeed, after consultation with local counsel, the Debtors believe that local courts in foreign jurisdictions are likely to uphold Employees' rights under local law. The foregoing equally applies to any other Employees terminated without cause during the Chapter 11 Cases.

60. The Severance Program and the Global Settlement also would each serve to maintain morale among remaining Employees, given the fair and consistent treatment to Employees contemplated thereunder. If the Arcapita Group fails to propose and implement a fair severance plan, the retained Employees may quit rather than wait to receive similar treatment. Given the Debtors' current restructuring efforts, it would be difficult, expensive, and time consuming – if not impossible – to find and train replacements for the retained Employees in an appropriate period of time. As a result, the Severance Program and the Global Settlement will avoid jeopardizing both the continued efficient operation of the Debtors' businesses and the potential recoveries to the Debtors' stakeholders by appropriately incentivizing the retained Employees.

61. Payment of statutory or contractual Notice and Severance Payments is also consistent with the Second Circuit case law governing termination pay. Even absent approval of this Motion, Notice and Severance Payments (approximately 95% of the total Severance Program cash costs assuming all 15 Terminated Employees with Net Obligations participate in the Global Settlement) would constitute an administrative expense of the estates. *See Rodman v. Rinier* (*In re W.T. Grant Co.*), 620 F.2d 319, 320-21 (2d Cir. 1980), *cert. denied*, 446 U.S. 983 (1980); *Zelin v. Unishops, Inc.* (*In re Unishops, Inc.*), 553 F.2d 305, 308 n.1 (2d Cir. 1977); *In re Straus-Duparquet, Inc.*, 386 F.2d at 651.

62. Finally, the allowance of Accrued Bonus Claims on account of unpaid 2011/2012 Bonuses against Arcapita will also save cash and avoid potential litigation as to whether Arcapita or some other non-Debtor Arcapita Group entity is liable on the claim. Over 30 percent of the Terminated Employees are non-Debtor Employees. Absent the allowance of a claim at Arcapita, these Employees may seek to enforce their claims against their respective non-Debtor

employers. Awarding all Employees (including non-Debtor Employees) claims on account of their 2011/2012 Bonuses against Arcapita thus reduces the cash drain on the estates. As holders of general unsecured claims against Arcapita, the Terminated Employees will have to wait to collect on those claims through the plan process.

63. The Key Employee Incentive Program. The Debtors' immediate need to incentivize their employees is self-evident: the Debtors are at a critical juncture in the Chapter 11 Cases and require refocused Employee compensation to maximize the value of the Debtors' estates. Incentive plans, such as the proposed KEIP, drive employees to focus their efforts on the satisfaction of specific performance metrics. To this end, the Debtors (prior to the Chapter 11 Cases) and their competitors regularly offer performance incentives to employees. Prepetition, the Debtors provided Employees with annual cash bonuses and co-investment rights (at a cost), linking Employee interests to those of Arcapita's financial stakeholders. Before and during the cases, Employee incentive compensation has been non-existent. Indeed, the Debtors failed to satisfy announced 2011/2012 Bonuses and have not sought to continue their incentive systems postpetition. Notably, courts in this district have held that incentive payment may be used to increase estate values. *See*, *e.g.*, *Dana II*, 358 B.R. at 581.

64. During these cases, the Debtors adopted a measured approach to setting individualized performance metrics designed to motivate KEIP Participants to deliver superior performance and award sizes aimed at providing Employees with market compensation. This process was undertaken with the advice of the Debtors' benefits advisors, particularly A&M's employee benefits group, and their restructuring professionals. (*Cumberland Declaration* ¶ 15). To the extent the KEIP Performance Goals are met, the Arcapita Group will have delivered superior performance, in terms of both investment management and the corporate reorganization.

Specific portfolio companies will have flourished, increasing the value of the estates. Concurrently, the Debtors will have satisfied major restructuring goals, reducing the Debtors' go-forward restructuring costs and permitting Employees to refocus their efforts on running the Arcapita Group's business. *CF In re Global Home Prods, LLC*, 369 B.R. at 787 (approving incentive program where, "to the extent the Plans motivate management and sales people to create additional value, all creditors will benefit").

65. Factors relevant to an analysis of a chapter 11 debtor's business judgment in structuring and proposing an employee incentive plan include: (a) whether the plan is reasonably calculated to achieve its purpose; (b) whether attendant plan costs are reasonable in the context of a debtor's assets, liabilities and earning potential; (c) whether the plan's scope is fair and reasonable with respect to plan participants and non-plan participants; (d) whether the plan is consistent with industry standards; (e) whether the debtor performed reasonable due diligence in identifying plan participants; and (f) whether the debtor received independent counsel in developing the plan. *See Dana II*, 358 B.R. at 576-577.

66. Each of the following factors favors approval of the KEIP here.

- *The KEIP Performance Goals*: The KEIP Performance Goals are individualized goals, specifically tailored to each individual KEIP Participant. In addition, the KEIP Performance Goals are structured to reward KEIP Participants for the satisfaction of specific benchmarks (*e.g.* portfolio company financial performance and the achievement of restructuring milestones) meant to increase the value of the estates for the benefit of creditors.

- *The Scope of the KEIP is reasonable*: There are 20 KEIP Participants (representing approximately 7% of the Arcapita Group workforce at the beginning of 2012). The KEIP is not a global program available to all non-Terminated Employees. In formulating the KEIP, considerable time and effort was spent selecting Employees who could drive values and increase the probability of the Debtors' successfully reorganizing in chapter 11. (*Cumberland Declaration* ¶ 9).

- *The Cost Is Reasonable*: The cost of the KEIP at target is $3.0 million. This amount represents approximately .08% of the Arcapita Group's prepetition assets, based on book value, and thus, falls below the average for comparable programs identified by A&M. (*Cumberland Declaration* ¶ 9).

- *The KEIP Is the Product of Substantial Negotiation*: The Debtors' and the Committee's advisors met repeatedly regarding the Employee programs. The KEIP was developed with considerable input from the Committee's advisors.

67. In light of the foregoing, the Debtors respectfully submit that the KEIP is justified by the facts and circumstances of the Chapter 11 Cases and constitutes a valid exercise of the Debtors' sound business judgment.

68. The Key Employee Retention Plan. As noted above, the Debtors delayed filing the original workforce reduction program to continue negotiations with the Committee regarding a more global resolution of Employee issues. Since the Petition Date, the Debtors have suffered an unacceptable amount of Employee attrition. Predictably, the Employees with the most to offer (and who could provide the greatest assistance with respect to the current Arcapita turnaround) are also the most mobile. Accordingly, the Debtors, in a sound exercise of their business judgment, have chosen to establish a limited retention plan for non-insiders to encourage retention. Both the scope and size of the KERP are limited. There are only 39 KERP Participants who stand to receive $2.27 million. An additional $300,000 has been set aside for a discretionary pool.

69. Retention programs such as the KERP have been approved by numerous courts in this and other districts. *See, e.g., In re Borders Group, Inc.*, Case No. 11-10614 (MG) (Bankr. S.D.N.Y. April 22, 2011) (approving, in part, retention plan for twenty-five "director"-level employees); *In re BearingPoint, Inc.*, Case No. 09-10691 (REG) (Bankr. S.D.N.Y. July 24, 2009) (approving in part non-insider payments connected to completion of estate wind-down); *In*

re Nortel Networks Inc., Case No. 09-10138 (KG) (Bankr. D. Del. Feb. 27, 2009, Mar. 5, 2009, Mar. 20, 2009) [Docket Nos. 389, 436 and 511] (approving, among other things, a key employee retention plan "tailored to provide incentives to the Debtors' critical employees to remain with Nortel and to strive for a speedy achievement of the Milestones").[25]

III. **The Global Settlement Is in the Best Interests of the Debtors' Estate and Should Be Approved**

70. Rule 9019(a) of the Bankruptcy Rules provides that "the court may approve a compromise or settlement" on motion by the debtor after notice and a hearing. Fed. R. Bankr. P. 9019(a). A court may approve a settlement if it is in the best interests of the estate. *In re Energy Coop.*, 886 F.2d 921, 927 (7th Cir. 1989); *accord Vaughn v. Drexel Burnham Lambert Group, Inc.* (*In re Drexel Burnham Lambert Group, Inc.*), 134 B.R. 499, 505 (Bankr. S.D.N.Y. 1991). In making its decision on whether to approve a settlement, the bankruptcy court should use its sound discretion. *In re Drexel Burnham Lambert*, 134 B.R. at 505; *Machinery Terminals, Inc. v. Woodward* (*In re Albert-Harris, Inc.*), 313 F.2d 447, 449 (6th Cir. 1963).

71. The Supreme Court stated that a bankruptcy court considering a settlement should "apprise[] [it]self of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated." *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968). In making its decision, the court must "determine if the 'settlement falls below the lowest point in the range of reasonableness.'" *In re WorldCom, Inc.*, 347 B.R. 123, 137 (Bankr. S.D.N.Y. 2006) (*citing In re Teltronics Serv., Inc.*, 762 F.2d 185, 189 (2d Cir. 1985)); *accord In re Dow Corning*, 198 B.R.

---

[25] The Debtors have not annexed copies of the unreported orders cited herein because of their size. Copies of these orders, however, are available upon request of the Debtors' counsel, including at the hearing to consider the Motion.

214, 222 (Bankr. E.D. Mich. 1996). Courts in this Circuit have considered the following factors in determining the range of reasonableness of Rule 9019 settlements:

- the balance of the probability of success in the litigation and the settlement's future benefits;
- the likelihood of complex and protracted litigation with accompanying expense, inconvenience, and delay, including the difficulty in collecting on the judgment; and
- the paramount interests of the creditors and the support of creditors and other parties in interest.

See In re Drexel Burnham Lambert Group, Inc., 960 F.2d at 285, 292 (2d Cir. 1992); *Nellis v. Shugrue*, 165 B.R. 115, 122 (S.D.N.Y. 1994); *In re Ionosphere Clubs, Inc.*, 156 B.R. 414, 428 (S.D.N.Y. 1993); *In re Purofied Down Prod. Corp.*, 150 B.R. 519, 522 (S.D.N.Y. 1993).

72. Probability of Success in Litigation. Absent the Global Settlement, to the extent Employees' have Net Obligations at all in respect of the IPP/IIP, the Arcapita Group may be forced to pursue repayment of Employee obligations through litigation in foreign jurisdictions. The likelihood of success in any such litigation would be diminished by the structure of the programs and the Debtors' historical treatment of Employees. There is a concern that notes executed by Employees in favor of Arcapita are not enforceable since funds for the IPP were advanced to Employees by AIPL, a subsidiary of Arcapita, not Arcapita itself. And, while admittedly, AIPL advanced to the Employees funds received by it from Arcapita, Employees maintain an argument that Arcapita should not be permitted to enforce a loan to which it is not a party.

73. In addition, the historical treatment of the IPP/IIP also undercuts any argument that the obligations thereunder should be enforced now. The Arcapita Group historically did not pursue departing or terminated Employees in respect of their IPP/IIP exposure. Also, because the obligations under the IPP/IIP are between the Employee and AIPL, the Debtors may be

unable to set them off versus obligations owed the Employee by Arcapita. Finally, Employees may argue that the Arcapita Group's failure historically to enforce these loans supports their treatment as an incentive plan, not a debt which needs to be satisfied.

74. All of these arguments, taken together, contribute to meaningful litigation risk – and the attendant costs and delays related thereto – if the Debtors sought to collect on an outstanding receivable owed to an Employee, rather than settle with such Employee, and regain possession of the unvested shares and enjoy the benefits of reduced severance and notice period payment obligations. Indeed, given the speculative value of a receivable a company may have against an individual employee, the Debtors believe that the Global Settlement is clearly a superior alternative to collection litigation, particularly when you take into account the fact that only 15 Employees have Net Obligations in respect of the IPP/IIP.

75. Expense, Inconvenience and Delay, Including the Difficulty in Collecting on the Judgment. Significant expense, inconvenience, and delay would accompany efforts to pursue litigation against participating Employees in multiple foreign jurisdictions. Considering only the Terminated Employees (as opposed to the entire Employee population), litigation in respect of the IPP/IIP obligations would require pursuing claims (and retaining counsel) in five separate jurisdictions. Furthermore, because the defendants would be individuals, even if the Arcapita Group were able to successfully enforce its IPP/IIP claims, the collection costs and risk would be high.

76. Best Interests of Creditors. The Global Settlement provides creditors with substantial value. Pursuant to the Global Settlement, (a) participating Employees shall agree to return unpaid and even some previously vested IPP/IIP shares to Arcapita, accept capped Notice and Severance Payments, and release the Arcapita Group from all claims, and (b) the Arcapita

Group shall release the participating Employees from obligations arising under the IPP/IIP (including in respect of Employee interest free loans). Taking each of these settlement components into account, the Global Settlement is in the best interests of the Debtors' creditors and meets the standard for the range of reasonableness set forth above. By the Debtors estimate, the fair value "mark" of such shares that would be signed over to Arcapita Group in the Global Settlement equals approximately 102% of the related IPP/IIP obligations. In addition, as previously discussed, potential savings in respect of implementing the caps upon severance and notice payments could result in additional estimated savings of approximately $6.92 million if all Employees with IPP/IIP exposure were terminated, including the 15 Terminated Employees with IPP/IIP exposure. Finally, while the face amount of the receivables owed by relevant Employees is $15.49 million, there is simply no valid reason to give those receivables the face-amount of their value. Indeed, given the variety of the different forums, litigation costs and risks, and the inherent difficulty of successfully collecting against an individual, it is a stretch (at best) to argue that the receivables should be given their full face value.

77. Finally, it is important to note that the top seven members of Arcapita's senior management have voluntarily agreed to forgo cash benefits under the KEIP and participation in the Global Settlement at this time. This decision sends a clear message to the creditors that management is committed to developing an expeditious exit from chapter 11 and is not seeking any additional compensation at this time. This unprecedented display of strong leadership should further boost the morale of remaining Employees.

78. As a result of the foregoing, the Global Settlement provides a reasonable compromise that precludes highly uncertain and burdensome litigation and is therefore in the

best interests of the Debtors, their estates, their creditors and parties in interest and should be approved.

NOTICE

79. The Debtors have provided notice of filing of the Motion by electronic mail, facsimile and/or overnight mail to: (i) the Office of the United States Trustee for the Southern District of New York, 33 Whitehall Street, 21st Floor, New York, New York 10004 (Attn: Richard Morrissey, Esq.); (ii) the Committee, Milbank, Tweed, Hadley & McCloy LLP, 1 Chase Manhattan Plaza, New York, New York 10005 (Attn: Dennis F. Dunne, Esq. and Evan R. Fleck, Esq.); and (iii) all parties listed on the Master Service List established in these Chapter 11 Cases. A copy of the Motion is also available on the website of the Debtors' notice and claims agent, GCG, Inc., at www.gcginc.com/cases/arcapita.

NO PRIOR REQUEST

80. No prior motion for the relief sought in this Motion has been made to this or any other court.

WHEREFORE, the Debtors respectfully request that the Court grant the relief requested herein and such other and further relief as the Court may deem just and proper.

Dated: New York, New York
June 5, 2012

Respectfully submitted,

/s/ Michael A. Rosenthal

Michael A. Rosenthal (MR-7006)
Janet M. Weiss (JW-5460)
Matthew K. Kelsey (MK-3137)
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, New York 10166-0193
Telephone: (212) 351-4000
Facsimile: (212) 351-4035

ATTORNEYS FOR THE DEBTORS AND
DEBTORS IN POSSESSION

HEARING DATE AND TIME: June 26, 2012 at 11:00 a.m. (Eastern Time)
OBJECTION DEADLINE: June 19, 2012 at 12:00 p.m. (Eastern Time)

GIBSON, DUNN & CRUTCHER LLP
Michael A. Rosenthal (MR-7006)
Janet M. Weiss (JW-5460)
Matthew K. Kelsey (MK-3137)
200 Park Avenue
New York, New York 10166-0193
Telephone: (212) 351-4000
Facsimile: (212) 351-4035

Attorneys for the Debtors
and Debtors in Possession

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**

NOTICE OF HEARING ON DEBTORS' MOTION
FOR AN ORDER PURSUANT TO SECTIONS 363(b) AND 503(c)
OF THE BANKRUPTCY CODE AND BANKRUPTCY RULE 9019
AUTHORIZING DEBTORS TO IMPLEMENT EMPLOYEE
PROGRAMS AND GLOBAL SETTLEMENT OF CLAIMS

PLEASE TAKE NOTICE that a hearing on the annexed motion, dated June 5, 2012 (the "***Motion***"), of Arcapita Bank B.S.C.(c) and certain of its subsidiaries and affiliates, as debtors and debtors in possession (collectively, the "***Debtors***"), will be held before the Honorable Sean H. Lane, United States Bankruptcy Judge, in Room 701 of the United States Bankruptcy Court for the Southern District of New York (the "***Bankruptcy Court***"), One Bowling Green, New York, New York 10004, on **June 26, 2012 at 11:00 a.m. (Eastern Time)**, or as soon thereafter as counsel may be heard.

PLEASE TAKE FURTHER NOTICE that any responses or objections to the Motion (the "***Objections***") shall be filed electronically with the Court on the docket of *In re Arcapita Bank B.S.C.(c), et al.*, Ch. 11 Case No. 12-11076 (SHL) (the "***Docket***") pursuant to the Case Management Procedures approved by this Court[1] and the Court's General Order M-399 (available at http://nysb.uscourts.gov/orders/orders2.html) by registered users of the Court's case filing system and by all other parties in interest on a 3.5 inch disk, preferably in portable document format, Microsoft Word, or any other Windows-based word processing format (with a hard copy delivered directly to Chambers), in accordance with the customary practices of the Bankruptcy Court and General Order M-399, to the extent applicable, and served in accordance with General Order M-399 on (i) counsel for the Debtors, Gibson, Dunn & Crutcher LLP, 200 Park Avenue, New York, New York 10166 (Attn: Michael A. Rosenthal, Esq., Janet M. Weiss, Esq. and Matthew K. Kelsey, Esq.); (ii) the Office of the United States Trustee for the Southern District of New York, 33 Whitehall Street, 21st Floor, New York, New York 10004 (Attn: Richard Morrissey, Esq.); and (iii) the Official Committee of Unsecured Creditors, Milbank, Tweed, Hadley & McCloy LLP, 1 Chase Manhattan Plaza, New York, New York 10005 (Attn: Dennis F. Dunne, Esq. and Evan R. Fleck, Esq.) so as to be received no later than **June 19, 2012 at 12:00 p.m. (Eastern Time)** (the "***Objection Deadline***").

PLEASE TAKE FURTHER NOTICE that if no Objections are timely filed and served with respect to the Motion, the Debtors may, on or after the Objection Deadline, submit to the

[1] *See* Order (A) Waiving the Requirement That Each Debtor File a List of Creditors and Equity Security Holders and Authorizing Maintenance of Consolidated List of Creditors in Lieu of a Matrix; (B) Authorizing Filing of a Consolidated List of Top 50 Unsecured Creditors; and (C) Approving Case Management Procedures [Docket No. 21].

Bankruptcy Court an order substantially in the form of the proposed order annexed to the Motion, which order may be entered with no further notice or opportunity to be heard.

Dated: New York, New York
June 5, 2012

/s/ Michael A. Rosenthal
Michael A. Rosenthal (MR-7006)
Janet M. Weiss (JW-5460)
Matthew K. Kelsey (MK-3137)
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, New York 10166-0193
Telephone: (212) 351-4000
Facsimile: (212) 351-4035

ATTORNEYS FOR THE DEBTORS
AND DEBTORS IN POSSESSION

EXHIBIT A

PROPOSED ORDER

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**

ORDER PURSUANT TO SECTIONS 363(b) AND 503(c) OF THE BANKRUPTCY CODE AND BANKRUPTCY RULE 9019 AUTHORIZING DEBTORS TO IMPLEMENT EMPLOYEE PROGRAMS AND GLOBAL SETTLEMENT OF CLAIMS

Upon consideration of the motion (the "***Motion***")[1] of Arcapita Bank B.S.C.(c) and certain of its subsidiaries, as debtors and debtors in possession in the above-captioned Chapter 11 Cases (collectively, the "***Debtors***" and each, a "***Debtor***"), for entry of an order authorizing the Debtors to implement the Employee Programs and the Global Settlement; 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 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 a hearing before the Court (the "***Hearing***"); and the Court having determined that the legal and factual bases set forth in the

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

Motion and at the Hearing 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.

2. The Debtors are authorized to implement the Employee Programs and pay the following amounts: (a) the Notice and Severance Payments; (b) the Accrued Vacation Payments; (c) the Private Pension Payments; (d) the Expatriate Expense Payments; subject to reduction by the amount of any outstanding Employee Loans; and (e) KERP and KEIP awards, subject to the terms and conditions set forth in the Motion.

3. The Debtors are further authorized, pursuant to sections 363 and 503 of the Bankruptcy Code, to take any other actions necessary to implement the KERP, KEIP and Severance Program (for all Employees terminated without cause during the Chapter 11 Cases) on the terms and conditions set forth in the Motion.

4. Any Employee with an Accrued Bonus Claim has the right to file a proof of claim if his or her respective claim is omitted from the schedules and statements required pursuant to section 521 of the Bankruptcy Code and Rule 1007(c) of the Bankruptcy Rules.

5. The Debtors are authorized to take any other actions necessary to implement the Global Settlement.

6. The Debtors are further authorized to suspend the Stock Purchase Plan.

7. The terms and conditions of this Order shall be immediately effective and enforceable upon entry.

8. This Court shall retain exclusive jurisdiction to enforce the terms of this Order.

Dated: New York, New York
_________, 2012

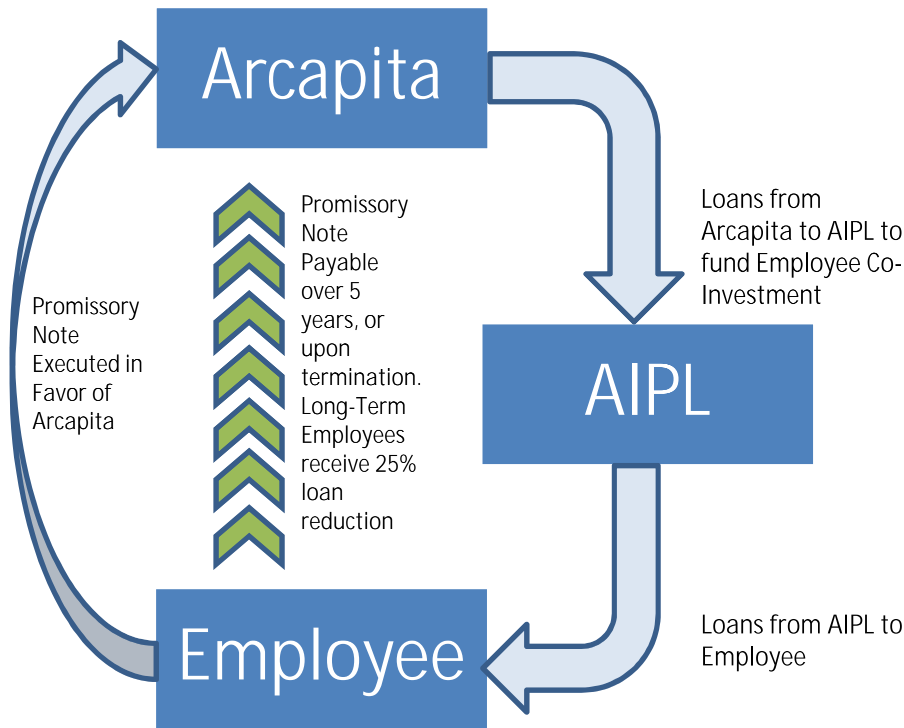
____
THE HONORABLE SEAN H. LANE
UNITED STATES BANKRUPTCY JUDGE

EXHIBIT B

IPP/IIP DIAGRAM

The Investment Participation Program and the Investment Incentive Program: Plan Structure

Investment Participation Program (Non-US)



Investment Incentive Program (US)

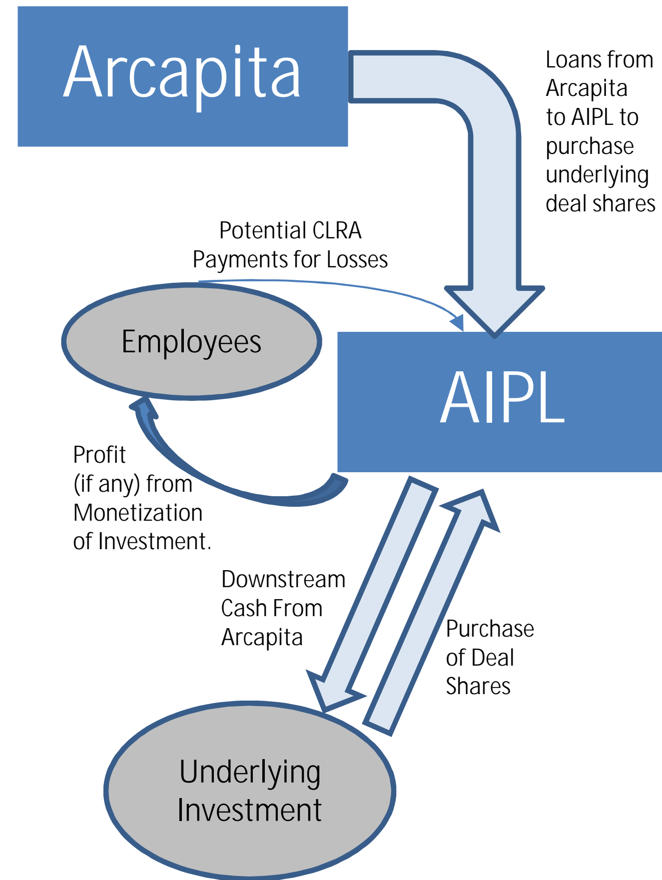


EXHIBIT C

KEIP PARTICIPANTS

FILED UNDER SEAL

EXHIBIT D

CUMBERLAND DECLARATION

GIBSON, DUNN & CRUTCHER LLP
Michael A. Rosenthal (MR-7006)
Janet M. Weiss (JM-5460)
Matthew K. Kelsey (MK-3137)
200 Park Avenue
New York, New York 10166-0193
Telephone: (212) 351-4000
Facsimile: (212) 351-4035

Attorneys for the Debtors
and Debtors in Possession

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**

DECLARATION OF BRIAN L. CUMBERLAND, MANAGING DIRECTOR OF ALVAREZ & MARSAL TAXAND, LLC, IN SUPPORT OF DEBTORS' MOTION FOR AN ORDER AUTHORIZING DEBTORS TO IMPLEMENT EMPLOYEE PROGRAMS AND GLOBAL SETTLEMENT OF CLAIMS

Pursuant to 28 U.S.C. § 1746, I, Brian L. Cumberland, hereby declare:

1. I am a Managing Director with Alvarez & Marsal Taxand, LLC ("***A&M Taxand***"), the tax consulting practice of Alvarez & Marsal North America, LLC ("***A&M***"). My business address is 2100 Ross Avenue, Suite 2100, Dallas, Texas 75201. A&M is a professional services firm that has been retained on an interim basis by the Debtors in these Chapter 11 Cases.

2. Except as otherwise indicated, all facts set forth in this declaration are based upon my personal knowledge and experience, my review of publicly available and proprietary information regarding incentive plans in chapter 11 cases, and information learned from my review of relevant documents and information supplied to me by management and

advisors of the above-captioned debtors and debtors in possession (collectively, the "***Debtors***" and each, a "***Debtor***"), including A&M and A&M Taxand advisors. I am authorized to submit this declaration in support of *Debtors' Motion for an Order Pursuant to Sections 363(b) and 503(c) of the Bankruptcy Code and Bankruptcy Rule Authorizing Debtors to Implement Employee Programs and Global Settlement of Claims* (the "***Motion***").[1] If called upon to testify, I would testify competently to the facts and opinions set forth herein.

OVERVIEW

3. I am an expert in executive and management compensation with over 20 years of experience in the field. I have familiarized myself with the Debtors' operations and unique challenges, reviewed the Debtors' key employee retention program (the "***KERP***") and the key employee incentive plan (the "***KEIP***" and collectively with the KERP, the "***Continuing Employee Programs***"), gathered relevant market data on incentives in chapter 11, reviewed data regarding the compensation levels at the Debtors' peer chapter 11 debtors, and analyzed whether the Continuing Employee Programs are consistent with typical market practice.

4. Based on my analysis, I have concluded that the payouts proposed under the Continuing Employee Programs, and the allocation of such payouts, are reasonable and consistent with market practice. This conclusion is based upon a comparison of the payout structure and proposed payouts under the Continuing Employee Programs with market data regarding incentives both inside and outside of the chapter 11 process.

PROFESSIONAL BACKGROUND AND QUALIFICATIONS

5. I received my bachelor's degree in business administration from the University of Texas, my juris doctor from St. Mary's School of Law and my master of laws in

[1] Capitalized terms used but not otherwise defined herein have the meanings set forth in the Motion.

taxation from the University of Denver. Prior to joining A&M Taxand, I led KPMG's Compensation and Benefits Group for the Southwest United States, and I was also a member of KPMG's National Tax Practice in Washington, D.C.

6. My curriculum vitae, which includes a list of my publications in the previous ten years, is attached hereto as Exhibit A.

7. A&M Taxand is an international professional services firm that offers a wide variety of services to private and public clients, including expert analysis of executive and management compensation. My responsibilities at A&M Taxand primarily have involved consulting to corporate clients, specifically with regard to executive compensation. I currently lead A&M Taxand's Compensation and Benefits practice. In this capacity, I have worked with numerous *Fortune* 1000 companies and am frequently retained by these companies to advise them on their management compensation strategies, programs and pay levels. I have participated in the development and design of over 100 management incentive plans for companies inside and outside of chapter 11.

DEBTORS' CONTINUING EMPLOYEE PROGRAMS

8. Based on information supplied by the Debtors and information regarding retention and incentive plans in other chapter 11 cases, A&M Taxand drafted preliminary proposals for the Debtors' Continuing Employee Programs. The Debtors then refined the initial plan proposal to strike the appropriate balance between: (a) motivating Employees to achieve the desired business objectives; (b) retaining key non-executive Employees during the pendency of the Chapter 11 Cases; (c) recognizing present financial constraints on the Debtors' businesses and the interests of other creditors; and (d) addressing the particular circumstances of the Chapter 11 Cases. The Continuing Employee Programs proposals were then further refined and vetted by

the Debtors' management and restructuring advisors, as well as the advisors for the official committee of unsecured creditors in the Chapter 11 Cases (the "***Committee***").

9. As set forth in the Motion, the Debtors' KEIP provides an opportunity for 20 employees of varying rank based upon their personal achievements during the cases (the "***KEIP Participants***") to receive incentive pay for outstanding performance. The KEIP Participants represents approximately 7% of the Employee population as of January 1, 2012. Target incentive payments under the KEIP represent between 3 to 12 months' wages (wages being defined as base salary plus any required subsistence payments). In aggregate, payments under the KEIP at target levels of performance total $3.0 million. Certain Employees may be eligible to receive payouts in excess of the targeted amounts in the event stretch goals are satisfied. The $3.0 million target amount represents approximately .08% of the Arcapita Group's prepetition assets.[2] This falls well below the average (on a percentage basis) that has been paid in comparable programs established by other chapter 11 debtors, as identified by A&M Taxand.

10. If a KEIP Participant is terminated "for cause" or quits during the Chapter 11 Cases, that KEIP Participant will forfeit his or her opportunity to receive a KEIP award. A KEIP Participant terminated "without cause" prior to the attainment of that Employee's KEIP Performance Goal (assuming that goal is met) would receive full payment.

11. The KERP provides payment of retention-based cash awards to 39 KERP Participants across four jurisdictions (collectively, the "***KERP Participants***"). The 39 KERP participants represent approximately 14% of the Employee population as of January 1, 2012. No KERP Participant holds a title of Executive Director or above. Retention payments represent between two to nine months' wages for the KERP Participants (wages being defined as base

[2] This estimate reflects the net book values of the Arcapita Group's assets as of September 30, 2011.

salary plus any required subsistence payments). The median KERP award opportunity is $46,000. The aggregate payments under the KERP could equal as much as $2.3 million.

12. KERP Participants must generally remain with the Arcapita Group through the effective date of a chapter 11 plan to receive a KERP award. If a KERP Participant is terminated "for cause" or quits before the KERP award is earned, that KERP Participant will forfeit his or her opportunity to receive a KERP award. A KERP Participant terminated "without cause" may receive full payment.

13. Additionally, a small number of key non-insider Employees may participate in a discretionary pool under the KERP, based upon the judgment of the Debtors' management. That discretionary pool will not exceed $300,000 in aggregate and will only be utilized on an as-needed basis at the discretion of senior management to retain other key Employees not part of the KERP. No insider will be permitted to receive a retention payment from the discretionary pool. Any payment from the discretionary pool, moreover, may not exceed $30,000 per Employee absent the consent of the Committee, and all such payments will be conditioned on the future performance of services for a to-be-determined length of time.

14. The total payments under the KERP could equal as much as $2.6 million ($2.3 million plus discretionary pool of $300,000). This amount represents approximately .07% of the Arcapita Group's prepetition assets[3] and falls well below the average (on a percentage basis) that has been paid in comparable programs established by other chapter 11 debtors, as identified by A&M Taxand. The aggregate cost of the Continuing Employee Plans in comparison to prepetition assets is very favorable when compared to market practices.

[3] This estimate reflects the net book values of the Arcapita Group's assets as of September 30, 2011.

A&M TAXAND'S INDEPENDENT REVIEW OF THE CONTINUING EMPLOYEE PROGRAMS

15. My analysis of the Continuing Employee Programs revealed that the terms and payout structure under the Continuing Employee Programs are within market norms and are reasonable. At the start of our engagement, A&M Taxand participated in multiple working group sessions with the Debtors' management team and advisors to refine our understanding of the Debtors' operational history and immediate restructuring goals. Subsequent to these initial discussions, A&M Taxand updated its knowledge of the Debtors' existing base salary, annual, long-term incentive compensation programs, and other prepetition benefits. Through this review, A&M Taxand was able to confirm the Debtors' recent compensation history, which enabled us to evaluate the KEIP and KERP with appropriate consideration for the Debtors' specific and reasonable objectives in this instance.

16. In assessing the reasonableness of the Continuing Employee Programs, A&M Taxand gathered data on retention and incentive plans for companies in chapter 11 dating back to late 2005. Data from earlier periods was not considered relevant as such plans would not have been held to as high of a standard as is required today due to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, which became effective for all cases filed on or after October 17, 2005. This data was collected from publicly available information as well as from A&M Taxand's proprietary database.

RESULTS OF A&M TAXAND'S INDEPENDENT REVIEW

17. Based on A&M Taxand's comparison of comparable plans with the Continuing Employee Programs, I believe the structure of the Continuing Employee Programs is reasonable and consistent with other retention and incentive plans approved by bankruptcy courts in the chapter 11 process since the enactment of the Bankruptcy Abuse Prevention and Consumer

Protection Act of 2005. The fact that most KERP participants must stay through completion of case requires more than most comparable retention plans.

18. Size of Program: A&M Taxand reviewed the size of KEIP and KERP payments (target amount in the case of certain KEIP participants) relative to the accrued, but unpaid, bonuses. On a dollar-weighted basis, KEIP and KERP payments are approximately 61% and 57% of the 2011 bonus earned, but not paid to the participants. The size of the proposed KEIP and KERP payments are also generally less than the historical bonus accruals.

19. Although the percentage of participants in the Continuing Employee Programs in relation to prepetition Employees is high, this high ratio can be explained by the fact that the Debtors are relatively small employers, employ a large number of professionals, and the nature of the industry in which Arcapita operates. A comparison of KEIP and KERP payments as a percentage of salary (including subsistence payments) to market data is comparable.

20. Scope: In working with the Debtors' management in selecting KEIP and KERP participants, several factors were considered:

- Whether the Employee is critical to the completion of essential tasks that must be completed during the Chapter 11 Cases;
- Whether such Employee's contribution promises to drive value to the Debtors' estates and creditors during the Chapter 11 Cases;
- Whether the Employee is likely to deliver superior performance on account of a KEIP award;
- For KERP Participants, whether, in the opinion of management, the Employee was perceived by management as someone who will be part of the reorganized entity; and
- Also for KERP Participants, whether the Employee is perceived by management to be a "flight risk," and the financial and operational burden that would be placed on the Debtors if the KERP Participants were to resign.

21. Based on my experience and the work I have done in this case and the independent analysis performed by A&M Taxand, it is my opinion that the Debtors' Continuing Employee Programs are reasonable, within market norms and tailored to incentivize the Participants in the Continuing Employee Programs to maximize value for all stakeholders in the Debtors' chapter 11 cases.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on this 5th day of June, 2012.

By: /s/ Brian L. Cumberland
Name: Brian L. Cumberland
Title: Managing Director,
Alvarez & Marsal Taxand, LLC

Exhibit A

Curriculum Vitae of Brian L. Cumberland

Brian L. Cumberland

National Managing Director, Compensation and Benefits

Alvarez & Marsal Taxand, LLC
2100 Ross Avenue, 21st Floor
Dallas, Texas 75201
Phone: (214) 438-1013
Cell: (214) 232-5372
Email: bcumberland@alvarezandmarsal.com

Relevant Experience

Brian Cumberland leads the Firm's Compensation and Benefits practice. Prior to joining A&M, Mr. Cumberland led KPMG's Compensation and Benefits Group for the Southwest. Prior to relocating to the Dallas office, Brian was in KPMG's Washington National Tax Practice. Brian has experience in various facets of executive compensation qualified plan and welfare benefit consulting.

Representative Accomplishments

Brian has participated in a variety of compensation & benefit consulting engagements, including:

- Executive Compensation, including issues related to stock options, restricted stock, non-qualified retirement plans, deferred compensation, top hat plans, global compensation strategies, golden parachute rules and the one million-deduction limitation.

- Qualified plan consulting, including areas such as plan design, qualification issues and nondiscrimination testing. Brian has extensive knowledge and hands on experience in all aspects involving retirement plans including thrift, 401(k), profit sharing, and ESOPs.

- Welfare Benefit plan consulting, including extensive knowledge and hands on experience in most aspects of Voluntary Employee Beneficiary Associations (VEBAs), welfare benefit plans, fringe benefits, cafeteria plans, and health savings accounts.

- Assist with the development of compensation strategies, benchmarking compensation, annual incentive, and long-term compensation programs to align with a company's business strategies and with consideration of the tax and accounting ramifications. Including designing compensation programs for executives and members of a company's board of directors, Key Employee Incentive Programs ("KEIPs") for insiders, and Key Employee Retention Programs ("KERP").

- Partnered with Fortune 1000 companies to develop and deliver human resources services on both national and international levels. Worked with clients to develop worldwide strategic direction. Identified industry "best practices" and how these could be used to meet client growth strategies.

Education

- BBA in Finance, the University of Texas
- Juris Doctorate, St. Mary's School of Law
- LL.M - Taxation from the University of Denver

Professional Activities

- National Managing Director - Compensation and Benefits, Alvarez & Marsal Taxand, Dallas, Texas.
- Member of the State Bar of Texas
- Member of American Bar Association (ABA)
- Member of Southwest Benefits Association
- Member of Dallas Bar Association (DBA)

Publications Authored In Prior Ten Years

- *Top 10 Payroll Mistakes Companies Make,* Tax Advisor Weekly, March 27, 2012.
- *2012-2011 Executive Change in Control Report,* January 2012.
- *How Pre-IPO Companies Can Hit a Compensation Grand Slam,* Tax Advisor Weekly, October 18, 2011.
- *Maneuvering Through the IRS Employment Tax and Reporting Minefield,* Tax Advisor Weekly, March 15, 2011.
- *2010-2009 Executive Change in Control Report,* January 2010.
- *Executive Change in Control Arrangements at the Top 200 Companies,* Tax Advisor Weekly, January 12, 2010.
- *Alternatives for Underwater Stock Options in a Depressed Market,* Tax Advisor Weekly, July 9, 2009.
- *There's More to Deferred Compensation Than 409A: Maintaining Top Hat Plan Status,* Tax Advisor Weekly, January 27, 2009.
- *Troubled Assets Relief Program - Laying the Groundwork for Executive Compensation Changes to Come,* November 11, 2008.
- *Taxation of Equity Compensation in Mergers and Acquisitions, Tax Advisor Weekly,* Sept 16, 2008.
- *ESOPs: The Basics, Creating a Market for Closely Held Stock and the Transition to Employee Ownership,* Alvarez & Marsal Taxand, LLC 2008.
- *The 409A Compliance Deadline is Looming – The A&M Taxand Action Plan,* Tax Advisor Weekly, July 29, 2008.
- *Severance Payments – Go on, Take the Money and Run,* Tax Advisor Weekly, July 15, 2008.
- *Retention of Key Executives during a Recession,* May 27, 2008.
- *Section 409A Non-Qualified Deferred Compensation, by Brian L. Cumberland and J.D. Ivy,* Taxation of Executive Compensation and Retirement, March 2008.
- *IRS Drops 162(m) Bomb,* February 21, 2008.
- *Executive Change in Control Arrangements at the Top 200 Companies,* Tax Advisor Weekly, January 23, 2008.

- *2007 Executive Change in Control Report,* January 2007.
- *New Cafeteria Plan Regulations: After 20 Years, Now is the Time to Get Your Plans up to Code,* Tax Advisor Weekly, October 18, 2007.
- *401(k) Wrap Plans: Rising to the Operating Challenges,* Tax Advisor Weekly, August 16, 2007.
- *They're Here: 409A Final Deferred Compensation Regulations,* Tax Advisor Weekly, June 22, 2007.
- *Funding a U.K. Employee Share Ownership Trust,* Tax Advisor Weekly, April 12, 2007.
- *2006 Executive Change in Control Report,* January 2008.
- *Deadline December 31 – New Rules and Guidance Change the Landscape for Compensation and Benefits Reporting,* Tax Advisor Weekly, November 30, 2006.
- *Analysis of Executive Change in Control Arrangements of the Top 200 Companies,* Tax Advisor Weekly, October 5, 2006.
- *What Every Tax Director Needs to Know Regarding Benefit Plan Tax Issues,* Tax Advisor Weekly, August 10, 2006.
- *SEC Proposes to Broaden Disclosure of Golden Parachute Payments, by Brian Cumberland and JD Ivy,* Executive's Tax & Management Report, July 2006.
- *Expensing Stock Options: Income Tax Consequences, by Brian L. Cumberland and J.D. Ivy,* Financial Reporting Watch, July 2006.
- *Backdating Stock Options: Tax Ramifications, by Brian L. Cumberland and J.D. Ivy,* Tax Analysts, June 2006.
- *The Tax Implications of Expensing Stock Options – Global Equity Compensation Programs,* Tax Advisor Weekly, June 15, 2006.
- *SEC Proposed Changes to Executive Pay Disclosure Requirements – What Companies may not have Focused on,* Tax Advisor Weekly, April 19, 2006.
- *Expensing Stock Options: Income Tax Impact,* Tax Advisor Weekly, March 1, 2006.
- *The Real IMPACT of Stock Dilution, Co-author with Aaron Brown,* The Corporate Board, November/December 2004.

Recent Speeches

- Speaker, Tax Executives Institute, Tulsa Chapter: - *Change in Control Survey, Compensation Clawback Policies, Timing of Bonus Deduction, Employment Tax Audit Issues, Worker Classification: (Employee vs. Independent Contractor).* February 2012.
- Speaker, Tax Executives Institute, New Jersey Chapter: - *Golden Parachute Rules, Change in Control Survey, Compensation Clawback Policies, Timing of Bonus Deduction, Employment Tax Audit Issues, Worker Classification: (Employee vs. Independent Contractor).* February 2012.
- Speaker, NASPP, Executive Compensation: *Impact of the Dodd-Frank Act.* March 10, 2011.
- Speaker, Haynes & Boone Conference - *Planning for Proxy Season; Executive Compensation & Corporate Governance Issues - Dodd-Frank Wall Street Reform and Consumer Protection Act.* October 14, 2010.
- Speaker, Tax Executive Institute, Austin: - *Compensation & Benefit Issues Recent Trends*, October 2009.
- Speaker, Lorman Education Services: *Designing and Structuring Incentive, Retention and Severance Plans for Companies in Bankruptcy, Scheduled,* February 2009.
- Speaker, Tax Executive Institute, Florida *Compensation & Benefits Update*, June 2008.
- Speaker, State Bar of Texas: *Executive Fringe Benefits*, April 2008.

- Speaker, Tax Executive Institute, North Carolina: *Executive Compensation and Deferred Compensation Issues*, December 2007.
- Speaker, Lorman Education Services: *Executive Compensation Issues*, November 2007.
- Speaker, Tax Executive Institute, Tulsa: *Executive Compensation and Deferred Compensation Issues*, September 2007.
- Speaker, Tax Executive Institute, Houston: *Executive Compensation and Deferred Compensation Issues*, June 2007.
- Speaker, Tax Executive Institute, South Florida: *Executive Compensation and Deferred Compensation Issues*, June 2007.
- Speaker, Southwest Benefits Association 32nd Annual Conference: *Best Practices in Coping with the New Deferred Compensation Rules*, May 2007.
- Speaker, Tax Executive Institute, Dallas: *Executive Compensation and Deferred Compensation Issues*, May 2007.
- Speaker, Tax Executive Institute, Fort Worth: *Executive Compensation and Deferred Compensation Issues*, April 2007.
- Speaker, Southwest Benefits Association: *Section 409A Final Regulations,* May 2007.
- Speaker, Tax Executive Institute/San Jose State University High Technology Tax Institute: *Section 409A – Deferred Compensation Update*, November 2006.
- Speaker, Tax Executive Institute, Dallas: *Executive Compensation and Deferred Compensation Issues*, May 2006.
- Speaker, Tax Executive Institute, Dallas: *Deferred Compensation Rules – Section 409A*, December 2005.
- Speaker, Tax Executive Institute Austin: *SFAS 123R – Expensing Equity Compensation*, November 2005.
- Speaker, Financial Services, Healthcare & Public Sector, Information, Communications & Entertainment Roundtable: *Understanding SFAS 123R: Accounting Practices, Executive Compensation Issues, Valuation Techniques Used in Expensing Stock Option Awards, and Deferred Tax Assets Related to Equity Awards*, September 2005.
- Speaker, Financial Executives Institute: *SFAS 123R – Stock Option Expensing*, September 2005.
- Speaker, Houston Private Equity Luncheon, Houston: *FAS 123R, Deferred Tax Assets, and Compensation Trends*, June 2005.
- Speaker, Byron Nelson Tax CPE Event, Dallas: *IRC Section 409A, FAS123R, and Redesign of Executive Compensation*, May 2005.
- Speaker, Tax Executives Institute, Fort Worth Chapter: *FAS 123R and Executive Compensation Trends*, May 2005.
- Speaker, Power & Utilities Tax Best Practices Share Forum: *FAS 123R, Executive Compensation and Compensation Trends*, May 2005.
- Speaker, National Association of Regulatory Utility Commissioners Staff Subcommittee on Accounting and Finance: *FAS 123R and Executive Compensation Trends*, April 2005.
- Speaker, Burkenroad Reports Investment Conference: *Senior Executive & Board Compensation – The Changing Environment*, April 2005.
- Speaker, Tax Executives Institute, Houston Chapter: *FAS 123R: Tax Impact*, April 2005.
- Speaker, Tax Executives Institute, Houston Chapter: *IRS Initiative on Executive Compensation*, March 2005.
- Speaker, Gutman's New Law Training, Dallas: *Compensation and Benefits Provisions of the American Job Creation Act of 2004*, December 2004.
- Speaker, Gutman's New Law Training, Houston: *Compensation and Benefits Provisions of the American Job Creation Act of 2004*, December 2004.

- Speaker, Tax Executives Institute, San Antonio Chapter: *Compensation and Benefits Provisions of the American Job Creation Act of 2004*, December 2004.
- Speaker, Tax Executive Institute, Dallas Chapter: *IRS Initiative on Executive Compensation, FAS 123, and Deferred Compensation Legislation*, October 2004.
- Speaker, Corporate Officers Forum: *Executive and Equity Compensation*, December 2003.
- Speaker, Turnaround Management Association: *Running a Bankrupt Company*, January 2003.
- Speaker, Tax Executives Institute, Dallas Chapter: *Executive Compensation Update*, September 2002.

Articles Quoting Brian Cumberland

- *Executive Pay Practices Under Scrutiny* by Brian Grow and Eamon Javers, Business Week, September 2006.
- *Coco-Cola's Director Pay Draws Criticism*, Base and Bonus, May 2006.
- *Designing New Deferred Compensation Plans is a Top Corporate Priority*, Houston Medical Journal, May 2005.
- *IRS Limits When Execs Can Cash in Deferred Compensation*, El Paso, Inc., February 2005.
- *Companies Mull Over Stock Option Alternatives* by Chad Eric Watt, Dallas Business Journal, January 2005.
- *Perks Altered Following Changes to Deferred Compensation Rules* by Sonya Stinson, New Orleans City Business Journal, January 2005.
- *Paid Time Off Offers Greater Flexibility* by Lisa Tanner, Austin Business Journal, October 2004.
- *Paid Time Off Offers Greater Flexibility* by Lisa Tanner, Dallas Business Journal, September 2004.

Sources Citing Change in Control Report

- *Golden Parachute Payments for CEOs Increased by 32%* by Compensation Standards, February 2012.
- *Golden Parachutes Appear To Be Losing Their Luster*, Workforce Management, February 2012.
- *Golden Parachutes,* Directors & Boards e-briefing, February 2012.
- *Golden Parachute Values Up 32% Over Two-Year Period*, Pension & Benefits Reporter, January 2012.
- *Golden Parachute Values Up 32% Over Two-Year Period*, Pension & Benefits Daily, January 2012.
- *Golden Parachute Values Up 32% Over Two-Year Period*, Daily Tax Report, January 2012.
- *'Golden Parachute' Payments Up by 32% Over Two Years at Large Firms,* SHRM Online, January 11, 2012.
- *Value of "Golden Parachute" Payments Increased by 32% in Past Two Years, According to New Study by Alvarez & Marsal Taxand,* Business Wire, January 9, 2012.

- *2012 – 2011 Change In Control report also covered by the following publications*: MarketWatch, WorldatWork, CBS Moneywatch, Boston Globe, SFGate.com, WABC New York, Business Insider, Minneapolis-St. Paul Star Tribune, Houston Chronicle, Morningstar, Kansas City Star, Dallas Morning News, InvestorPlace, Miami Herald, San Jose Mercury News, Sacramento Bee, Pittsburgh Tribune Review, Charlotte Observer, Cincinnati Enquirer, Sign On San Diego, Oklahoman, WCBSTV New York, Salt Lake Tribune, International Business Times, Columbus Dispatch, Newsday, Fort Worth Star-Telegram, United Press International, Albany Times Union.com.
- *New Report by A&M Indicates Diminishing Luster in 'Golden Parachutes' A&M* Taxand Change in Control Report *by Brian Cumberland*. Business and Finance Week February 27, 2010.
- Terminated? Who Cares? Severance-pay packages for CEOs appear to be coming down. But slowly. By Perri Capell, Wall Street Journal, April 2008.
- *Exit Pay: Best Practices in Practice* by Institutional Shareholder Services, May 2007.

EXHIBIT E

KERP PARTICIPANTS

FILED UNDER SEAL