Committee Objection Deadline: September 14, 2012
Hearing Date and Time: September 19, 2012 at 2:00 p.m. (prevailing U.S. Eastern Time)

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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 DEBTORS' MOTION FOR ORDER CONFIRMING THE DEBTORS' AUTHORITY TO FUND NON-DEBTOR AFFILIATE DISTRICT COOLING

PLEASE TAKE NOTICE that on September 7, 2012, the above-captioned debtors and debtors in possession (the "***Debtors***") filed the annexed *Debtors' Motion for Order Confirming the Debtors' Authority to Fund Non-Debtor Affiliate District Cooling* (the "***Motion***").

PLEASE TAKE FURTHER NOTICE that a hearing (the "***Hearing***") to consider the Motion will take place before the Honorable Sean H. Lane, United States Bankruptcy Judge, in Room 701 of the United States Bankruptcy Court, One Bowling Green, New York, New York 10004-1408 (the "***Bankruptcy Court***") on **September 19, 2012 at 2:00 p.m. (prevailing U.S. Eastern Time)**, or as soon thereafter as counsel may be heard.

PLEASE TAKE FURTHER NOTICE that any and all objections to the Motion (the "***Objections***") shall be filed electronically with the Court on the docket of *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 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) Milbank, Tweed, Hadley & McCloy LLP, 1 Chase Manhattan Plaza, New York, New York 10005 (Attn: Dennis Dunne, Esq. and Evan Fleck, Esq.), so as to be received no later than **September 14, 2012** (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 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
September 7, 2012

/s/ Michael A. Rosenthal
Michael A. Rosenthal (MR-7006)
Craig H. Millet (admitted *pro hac vice*)
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IN RE:	:	**Chapter 11**
ARCAPITA BANK B.S.C.(c), *et al.*,	:	**Case No. 12-11076 (SHL)**
Debtors.	:	**Jointly Administered**

DEBTORS' MOTION FOR ORDER CONFIRMING THE DEBTORS' AUTHORITY TO FUND NON-DEBTOR AFFILIATE DISTRICT COOLING

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Arcapita Bank B.S.C.(c) ("***Arcapita Bank***") and certain of its subsidiaries and affiliates, as debtors and debtors in possession, (collectively, the "***Debtors***") hereby submit this motion (the "***Motion***") for an order confirming the Debtors' authority to provide $1.9 million in funding to their non-Debtor affiliate District Cooling Holding Company Limited ("***District Cooling***"). In support of the Motion, the Debtors respectfully represent:

PRELIMINARY STATEMENT

1. The Debtors have determined in the exercise of their business judgment that it is in the best interests of the Debtors' estates to provide funding for the operations of District Cooling and thereby avoid the immediate breach of obligations owed by District Cooling to third parties that would result in the almost certain loss of the Debtors' entire investment in District Cooling. By providing the $1.9 million funding to District Cooling, it will be able to maintain operations for a limited period of time while the Debtors complete efforts to obtain third-party financing or, alternatively, negotiate a consensual exit of the business.

2. The Joint Provisional Liquidators charged with representing the creditors of Debtor Arcapita Investment Holdings Limited have analyzed the business issues involved, have no objection to the further funding, and support the Debtors' efforts to maximize the value of District Cooling by pursuing the ongoing negotiations. However, the Committee disagrees. It believes its business judgment should be substituted for the Debtors', that further funding should be prohibited, that the Debtors' efforts to date should be scrapped, negotiations should cease and, instead, District Cooling should breach its obligations—effectively discarding the entire District Cooling investment based on the claims that will result from District Cooling's default.

3. Although the Committee disagrees, the Debtors' judgment is that, given the opportunity, they will achieve a work-out through pending negotiations and will preserve the

value of District Cooling or at least greatly reduce damages through a consensual transition. The Debtors should be allowed the opportunity to complete the ongoing negotiations and avoid a certain breach because the Debtors' estates will bear the cost of the $1.9 million in funding requested in this Motion one way or another—either to fund operations while negotiations continue or, if this Motion is denied, as part of very substantial damages.

4. If the Debtors' affiliate District Cooling breaches its obligations by not maintaining operations, then a performance bond in the amount of $10 million will be drawn upon and $10 million in cash deposited by Arcapita Bank as the guarantor of such bond issued by Standard Chartered Bank will then be subject to its secured claims. Damages for breach will far exceed the amount of the performance bond and will effectively eliminate any remaining value of District Cooling. Conversely, if the Motion is approved, the funding will be made pursuant to a Murabaha-compliant facility senior to *all* other obligation of District Cooling with a profit rate of 15% and the Debtors will be positioned to maximize the value of District Cooling.

5. Therefore, the risk of accepting the Debtors' business judgment and funding the $1.9 million requested is quite small when compared to (i) the very substantial benefit which will be gained by successfully completing the ongoing negotiations and also (ii) the very certain and very sizeable damages that will result if the Committee is allowed to substitute its business judgment for that of the Debtors and the funding is prohibited.

JURISDICTION

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

RELIEF REQUESTED

7. The Debtors request an order confirming their authority to fund certain amounts to their non-Debtor affiliate District Cooling in accordance with section 363(c) of title 11 of the United States Code (the "***Bankruptcy Code***"). As an investment bank, funding investments in portfolio companies and investments fits squarely within the Debtors' ordinary course of business. Even if the Court does not agree that payment is in the ordinary course, however, there is ample support to pay the District Cooling Funding (as defined below) pursuant to section 363(b) of the Bankruptcy Code because payment of the District Cooling Funding constitutes a sound exercise of business judgment.

STATEMENT OF FACTS

A. General Background

8. On March 19, 2012 and April 30, 2012 the Debtors commenced cases under chapter 11 of the Bankruptcy Code (the "***Chapter 11 Cases***") in the United States Bankruptcy Court for the Southern District of New York (the "***Bankruptcy Court***"). 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 Official Committee of Unsecured Creditors (the "***Committee***") was appointed by the Office of the United States Trustee on April 5, 2012.

B. The Cash Management Motion

9. This Motion is submitted in connection with the Debtors' Motion for Interim and Final Orders (A) Authorizing Debtors to (I) Continue Existing Cash Management System, Bank Accounts, and Business Forms and (II) Continue Ordinary Course Intercompany Transactions;

and (B) Granting an Extension of Time to Comply with the Requirements of Section 345(b) of the Bankruptcy Code [Dkt. No. 12] (the "**Cash Management Motion**") filed on March 20, 2012, and approved on an interim basis seven times[1] [Dkt. Nos. 22, 62, 86, 133, 198, 310, 369]. The Motion relates to an objection brought by the Committee to the proposed budget [Dkt. No. 456] (the "**Budget**") sought to be approved in the eighth interim order approving the Cash Management Motion. This Motion is part of a briefing schedule approved by the Court to address the Committee's objection.

C. The District Cooling Businesses

10. Like the many portfolio companies under Arcapita, District Cooling is an indirect subsidiary of Debtor Arcapita LT Holdings Limited (which is a direct wholly-owned subsidiary of Debtor Arcapita Investment Holdings Limited ("***AIHL***") that owns a majority stake in a group of three companies that were formed to provide utility services—including district cooling, desalination, and wastewater services—to major real estate developments in the Gulf region. Wisniewski Decl. ¶ 4. "District cooling" is a way of providing air conditioning services to multiple buildings in geographic proximity by means of a centralized water chilling plant that pipes the chilled water to building sites where it is used to cool air that is circulated through the buildings. Cooling is a vital service is an area that spends much of year in excess of 100 degrees Fahrenheit.

11. The three district cooling companies are joint venture projects between District Cooling and Dalkia Utilities Company W.L.L. ("***Dalkia***"), a leading global energy services provider. *Id.* ¶ 5. The three companies are:

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[1] At the omnibus hearing held on September 5, 2012 the Court approved of the Cash Management Motion on an interim basis an eighth time, subject to resolution of the issues

a. Bahrain Bay Utilities Company B.S.C.(c) ("***BBU***"), which provides cooling services to Bahrain Bay, a $2.5 billion project in North Manama by means of an operating cooling plant completed in July 2011. *Id.* ¶ 7.

b. Bahrain Utilities Company 2 B.S.C.(c) ("***BU2***"), which contracted to build a cooling plant to service Al Areen, a $1 billion mixed-use residential and leisure real estate project currently under construction in Southwest Bahrain. *Id.* ¶ 8.

c. Paragon ABD Cooling LLC ("***ABD***"), which contracted to provide cooling services to Saadiyat Island, a $27 billion mixed-use real estate development currently under construction near the city of Abu Dhabi. Cooling services are now provided by diesel-powered temporary facility. *Id.* ¶ 9.

12. To date, District Cooling has invested more than $207 million in the three companies. *Id.* ¶ 13. Based on management's analysis, including a valuation report prepared by KPMG UK and a waterfall analysis compiled by the Debtors and their professionals, the Debtors believe that the total enterprise value of the operating companies within District Cooling is between $85 million and $123 million, on a current value basis as of April 2012 and that the Debtors' interest in the assets is estimated to exceed $20 million (including the cash supporting Arcapita Bank's Guaranty of the Performance Bond, discussed below). *Id.* ¶ 13.

D. District Cooling's Present Funding Needs

13. District Cooling's present funding needs requested by this Motion relate to ABD and its operations on Saadiyat Island in Abu Dhabi. ABD entered into a "Concession

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raised in this Motion only; however the signed order has not yet been entered on the docket.

Agreement" with the Tourism Development and Investment Company PJSC (the "***TDIC***") to be the exclusive provider of district cooling services to Saadiyat Island for a period of twenty-nine years at pre-defined tariff rates. *Id.* ¶ 9. The TDIC is a wholly-owned subsidiary of the Emirate of Abu Dhabi. *Id.* Pursuant to the Concession Agreement ABD committed to build three cooling plants to service Saadiyat Island and, while the plants are being constructed, to provide cooling services via diesel-powered temporary chillers. Concession Agreement ¶¶ 3.1; 16.4.[2] Construction on two of the three cooling plants has recently begun and cooling services are now being provided by the diesel-powered temporary facilities. Wisniewski Decl. ¶ 10.

14. ABD's performance under the Concession Agreement is assured by a $10 million performance bond (the "***Performance Bond***") issued by Standard Chartered Bank ("***SCB***") in favor of the TDIC. ABD's potential liability to SCB under the Performance Bond is guaranteed by Debtor Arcapita Bank pursuant to a Guarantee Indemnity (the "***Guaranty***") and Arcapita Bank has deposited $10 million with SCB as security for its Guaranty. *Id.* ¶ 11.

15. District Cooling, Dalkia, and the TDIC have also entered into a Lead Investor Undertaking pursuant to which District Cooling agreed to sufficiently fund ABD so that it can meet its obligations to the TDIC under the Concession Agreement. Lead Investor Undertaking ¶ 3. In the event of a breach by ABD resulting from District Cooling's failure to fund, the TDIC may assert claims against District Cooling resulting in an impairment of the value of BBU and BU2. Wisniewski Decl. ¶ 12.

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[2] The Debtors intend to introduce the various operative documents referenced in this Motion into evidence by stipulated agreement with the Committee as to authenticity. The Court will be provided with an exhibit binder that has copies of the relevant documents in advance of the hearing.

16. Under the plan in the existing Concession Agreement, District Cooling forecasts that it will need to infuse ABD with approximately $40 million in additional capital to complete and bring the projects online. *Id.* ¶ 10. District Cooling and its subsidiaries are obligated to provide the necessary capital pursuant to their agreements with Dalkia and the TDIC. *See* Lead Investor Undertaking ¶ 3; Joint Venture and Shareholders' Agreement ¶ 9. However, the TDIC is considering revising the development plans for Saadiyat Island to reduce the project's anticipated needs for district cooling. Wisniewski Decl. ¶ 16. Consequently, the TDIC, District Cooling, and Dalkia are currently negotiating an amendment to the terms of the Concession Agreement to reflect the project's reduced cooling needs and District Cooling expects that the re-negotiated Concession Agreement will only call for the construction of two plants (instead of three), thereby reducing ABD's capital needs. *Id.*

17. Under the Concession Agreement, if ABD fails to satisfy its obligations the TDIC has the right to step in to fulfill those obligations and to charge ABD for doing so. Concession Agreement ¶ 20. In that case, the TDIC would then have the right to draw on the Performance Bond and SCB may then pursue its rights against Arcapita Bank and the cash it holds as security. *See* Performance Bond ¶ 1.

18. Any failure by ABD to operate the temporary chillers would be a material breach under the Concession Agreement and is grounds for termination. Concession Agreement ¶¶ 16.4; 34. In the event of a breach by ABD, the TDIC could also be able to assert claims against District Cooling pursuant to the Lead Investor Undertaking and District Cooling's interests in the BBU and BU2 projects could be jeopardized. Dalkia could also assert claims against District Cooling for any losses Dalkia incurred as a result of the District Cooling's failure to fund, and District Cooling is likely to face investor suits and claims from unpaid contractors.

Wisniewski Decl. ¶ 23. Dalkia has sent correspondence to District Cooling expressing its intent to fully pursue claims against District Cooling, among others, in the event of an ABD breach of the Concession Agreement. *Id.* If these claims are pursued, then District Cooling's interest in all three of its investments in the district cooling operating companies could be materially negatively impacted and the potential economic benefit associated with the 29-year dedicated supply agreement memorialized by the Concession Agreement. *Id.*

19. Because of the sizeable capital needs for ABD alone, for the last 60 days, the Debtors and District Cooling have analyzed alternatives and have engaged in ongoing discussions with third-party investors, present investors, and Dalkia to determine how to provide ABD with its remaining capital needs or, alternately, to agree on an exit plan that will allow ABD to be replaced as to the Saadiyat Island development on a consensual basis thereby avoiding huge damage claims. *Id.* ¶ 18. Thus far, the investors, lenders, and Dalkia representatives have said that they are unwilling to commit until amendments to the Concession Agreement are finalized. *Id.*

20. To avoid a breach of the Concession Agreement while negotiations are ongoing and to perform under the Concession Agreement, ABD must purchase diesel fuel and incur other expenses to rent and operate the temporary chillers to maintain its operations. *Id.* ¶ 20. ABD must also proceed with at least minimal funding of construction of the permanent facilities to prevent its contractor from ceasing work resulting in a further material breach. *Id.*; *see also* Concession Agreement ¶ 35. Without funding from District Cooling and the Debtors, ABD lacks the funding necessary to maintain even minimal operations (not including the necessary capital expenditures for construction to prevent the contractor from walking off the job) and, if

ABD runs out of money to buy fuel, it will not be able to continue operating the temporary chillers. Wisniewski Decl. ¶ 21.

21. As has always been the case, District Cooling relies on the Debtors for funding and prepetition the Debtors funded District Cooling's capital needs as they arose in the ordinary course of District Cooling's operations. *Id.* ¶ 17. But now, without funding from the Debtors, District Cooling lacks the funds needed to pay for ABD's operations and, even if it delays in paying certain payables now due, ABD projects that it will run out of diesel fuel in mid to late September 2012. *Id.* ¶ 21. The Debtors' inability to support ABD will also lead to a public relations nightmare that will negatively impact the Debtors' ability to formulate a plan of reorganization. *Id.* ¶ 22.

22. To avoid a draw on the Performance Bond and the substantial damage claims that will accrue, plus to try and preserve the value of the District Cooling projects overall for the benefit of the Debtors' estates, in the exercise of their sound business judgment, the Debtors seek authority to fund the ABD project with an additional $1.9 million (the "***District Cooling Funding***") to maintain minimal operations while negotiations are completed.

23. The $1.9 million in funding requested will be used as a bridge to fund critical necessary expenses to buy diesel fuel, rent temporary cooling equipment, and to maintain minimal construction activities (and thereby avoid a default under the Concession Agreement) while the Debtors finalize the amendments to the Concession Agreement with the TDIC and pursue a third-party financing transaction or, alternatively, an agreement with the TDIC and Dalkia allowing District Cooling to exit the ABD investment on a consensual basis, thereby minimizing damages claims. *Id.* ¶ 24.

24. The District Cooling Funding will be structured as Murabaha-compliant funding that will be senior in priority of repayment to investor distributions in the District Cooling capital structure and result in a profit rate of 15% to the Debtors. District Cooling has no other debt and, if a workout is achieved as intended, the repayment of the Murabaha-compliant funding will be assured.

25. The further funding of $1.9 million to pay the operating expenses of ABD is an exercise of the Debtors' sound business judgment because:

a. It will avoid an immediate breach and will avoid the TDIC's draw on the Performance Bond and SCB's claims on the $10 million in cash posted by Arcapita Bank to support its Guaranty and, therefore, the almost certain loss of those funds;

b. It will avoid an immediate breach and it will maximize the opportunity to avoid or mitigate the substantial damage claims of Dalkia and the TDIC that may be asserted not only against ABD, but also District Cooling, resulting in an impairment to the equity value of the BUU and BU2 projects;

c. If financing cannot be obtained from third party sources, it will maximize the remaining value of ABD, BUU, and BU2 by arriving at a negotiated consensual exit plan with the TDIC and Dalkia as to ABD, thereby minimizing or eliminating damage claims otherwise certain to result in the event of an immediate breach;

d. It will maximize the opportunity of the Debtors to benefit from the enterprise value of the BUU and BU2 projects and also ABD; and,

e. It will provide an important opportunity to avoid the extremely negative impact in the Gulf region as to Arcapita as a whole and will severely deter potential investors vital to Arcapita's restructuring. *Id.* ¶ 25.

BASIS FOR RELIEF REQUESTED

26. The Debtors request that this Court enter an order pursuant to section 363(c) of the Bankruptcy Code confirming that the Debtors are authorized to provide funding in support of their portfolio company investment assets (such as the funding requested here) as expenditures in the ordinary course of business. Just as a debtor in the business of owning and operating a portfolio of industrial buildings may incur costs to repair a roof or to make tenant improvements, the Debtors here provide on-going funding and support to their operating company investments to mature and maximize their enterprise value. Because funding portfolio companies is within the Debtors' ordinary course of business, the Debtors believe that it is not necessary to seek authorization to advance the District Cooling Funding pursuant to section 363(b). Nonetheless, the Debtors fully support candor and acknowledge the need to disclose transfers of cash from Debtors to non-Debtors and regularly make such disclosures to the Committee, the Joint Provisional Liquidators of AIHL, and others as part of the budgeting process, as discussed above.

27. Even if the District Cooling Funding is outside the ordinary course of these Debtors' business, there is ample support to approve the payment under section 363(b). The Debtors remain "debtors-in-possession" and the decision to continue to fund District Cooling is a reflection of the Debtors' sound business judgment intended to maximize value of the Debtors' estates and to minimize claims against District Cooling that will wipe out any value of the district cooling businesses. Because of the presumption in favor of the business judgment of a

debtor in possession, the Committee bears a heavy burden. Absent a very strong showing by the Committee that the business judgment of the Debtors is wholly unreasonable, capricious, and well beyond a matter on which reasonable minds may differ, the Committee cannot force the Court into the business of operating the Debtors and deciding if the Committee's business judgment should be substituted for the business judgment of the Debtors.

A. Providing the District Cooling Funding Is in the Ordinary Course of these Debtors' Business.

28. A debtor "may enter into transactions including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing." 11 U.S.C. § 363(c)(1). The term "ordinary course of business" generally has been accepted to mean the interested parties' reasonable expectations regarding the nature of transactions that the debtor would likely enter in the course of its normal, daily business. *In re Lavigne*, 114 F.3d 379, 384 (2d Cir. 1997) (citing *In re Watford*, 159 B.R. 597, 599 (M.D. Ga. 1993), *aff'd without opinion*, 61 F.3d 30 (11th Cir. 1995)).

29. The following two tests have emerged to determine whether a transaction is "ordinary": (1) the "creditor's expectation test," also known as the "vertical test," and (2) the "industry-wide test," also called the "horizontal test." *Id.* Under this two-part test, "the touchstone of ordinariness is thus the interested parties' reasonable expectations of what transactions the debtor in possession is likely to enter in the course of its business." *Id.* at 384-85 (citation omitted). Under the vertical test, the court "views the disputed transaction from the vantage point of a hypothetical creditor and inquires whether the transaction subjects a creditor to economic risks of a nature different from those he accepted when he decided to enter into a contract with the debtor." *Id.* at 385 (citation omitted). The horizontal test involves "an

industry-wide perspective in which the debtor's business is compared to other like businesses." *Id.* at 385. Providing the District Cooling Funding easily satisfies both tests. The District Cooling Funding requested here is neither unique nor extraordinary. It is both what the creditors of Arcapita Bank and AIHL knew to be the business of the Debtors and it is exactly how other private equity firms in the same business of the Debtors operate.

30. Applying the vertical test, the creditors here have always known that the Debtors' business has always consisted of managing investors' funds who wish to invest their finds in conformance with Islamic law and then investing those funds along with the Debtors' funds through Shari'ah compliant investments in businesses with significant growth potential. Like the creditors of any private equity firm, the sophisticated creditors here knew that the Debtors' business model has always been to maximize the return of their investors by acquiring or forming companies with significant growth potential, then supporting and growing those businesses to maturity until they could be monetized upon a liquidity event that captures the value of that growth. This regularly requires further funding provided as additional equity contributions, as debt through one of the 60+ special purpose "WCF" entities which are all direct subsidiaries of AIHL, or even by Arcapita Bank's direct payment of certain expenses of the operating portfolio company—a process that results in a "receivable" due to Arcapita Bank. Indeed, the Debtors incurred the debt giving rise to the creditors' claims in large part for the express purpose of providing the liquidity necessary to fund and grow the Debtors' portfolio company assets. When the Debtors incurred the debt giving rise to the creditors' claims, these sophisticated creditors knew that the portfolio operating companies are the only "assets" of the Debtors and that supporting, funding, and monetizing those assets is the "ordinary" day-to-day

business in which the Debtors engage. Hence, the District Cooling Funding does not expose the creditors to any more than the risk they assumed when they first extended credit to the Debtors.

31. Applying the more objective "horizontal" test, from an industry-wide perspective, the business of private equity firms similar to the Debtors is to invest in and support portfolio companies, often through intercompany loans to fund the operations of their portfolio companies with goal of making a profit upon exit. In comparing the Debtors' business to other private equity firms, the Debtors' business is no different. The requested District Cooling Funding is exactly what would typically be expected of a private equity firm that invests in and supports a portfolio of businesses as assets. Thus, the Debtors' payment of the District Cooling Funding constitutes an ordinary course transaction under both the horizontal and the vertical tests.

B. Payment of the District Cooling Funding Amounts Is Supported By the Debtors' Sound Business Judgment

32. Section 363(b)(1) of the Bankruptcy Code provides, in relevant part, that "[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). Section 363(b)(1) does not set forth a standard to determine when a court should authorize the use, sale or lease of property of the estate. However, the Second Circuit has held that a bankruptcy court should approve a debtor's sale or use of property outside the ordinary course of business if the debtor can demonstrate a sound business justification for the proposed transaction. *See Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1071 (2d Cir. 1983).

33. Once a debtor articulates a valid business justification for the proposed transaction, significant weight is given to the debtor's business judgment. "The business judgment rule 'is a presumption that in making a business decision the directors of a corporation acted 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 Res., Inc.*, 147 B.R. 650, 656 (S.D.N.Y. 1992) (quoting *Smith v. Van Gorkam*, 488 A.2d 858, 872 (Del. 1985)). Courts apply the business judgment rule within the context of a chapter 11 case to shield a debtor's management from judicial second-guessing. *Id.*; *see also In re Johns-Manville Corp.*, 60 B.R. 612, 615-16 (Bankr. S.D.N.Y. 1986) ("the Code favors the continued operation of a business by a debtor and a presumption of reasonableness attaches to a debtor's management decisions").

34. The Debtors wish to make the District Cooling Funding because it is in the best interests of the Debtors and their stakeholders. Providing the District Cooling Funding will allow the Debtors to pursue value maximizing strategies or at least minimize damages and claims that will otherwise far exceed the amount of the District Cooling Funding requested. Conversely, following the business judgment of the Committee will result in an immediate default and myriad of claims and lost value for the Debtors and their stakeholders.

35. The Debtors' business judgment in structuring the funding is sound because the funding is as secure as possible. District Cooling has no other debt. The District Cooling Funding will be structured as a Murabaha-compliant financing that will be senior in priority of repayment to investor distributions in the District Cooling capital structure. Therefore, if the negotiations result in District Cooling preserving any of the value of BUU and BU2, there is little risk that the District Cooling Funding will not be eventually repaid. Further, the District Cooling Funding will provide a "profit" rate of 15% to the Debtors.

36. Providing the District Cooling Funding will also enable the Debtors to avoid the negative repercussions that would be associated with simply abandoning the ABD project—a move that would be a public relations disaster that could seriously damage the Debtors' efforts to raise new capital to support a plan of reorganization.

NOTICE

37. No trustee or examiner has been appointed in these chapter 11 cases. 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) Milbank, Tweed, Hadley & McCloy LLP, 1 Chase Manhattan Plaza, New York, New York 10005 (Attn: Dennis Dunne, Esq. and Evan 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

38. 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 enter an order, substantially in the form annexed hereto as Exhibit A, confirming the Debtors' ability to make the District Cooling Funding, and granting the Debtors such other and further relief as is just and proper.

Dated: New York, New York
September 7, 2012

Respectfully submitted,

/s/ Michael A. Rosenthal

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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 CONFIRMING THE DEBTORS' AUTHORITY TO FUND NON-DEBTOR AFFILIATE DISTRICT COOLING

Upon consideration of the Motion (the "***Motion***")[1] of Arcapita Bank B.S.C.(c), and certain of its subsidiaries and affiliates, as debtors and debtors-in-possession in the above-captioned chapter 11 cases (collectively, the "***Debtors***" and each, a "***Debtor***"), for entry of an order confirming the Debtors' authority to fund certain amounts to their non-Debtor affiliate District Cooling; and the Court having found that it has jurisdiction to consider this Motion pursuant to 28 U.S.C. sections 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. sections 1408 and 1409; and the Court having found that the relief requested in the Motion is in the best interests of the 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 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 Court hereby confirms that the Debtors are authorized to pay the District Cooling Funding, as described in the Motion and set forth in the Budget. Such payment is in the ordinary course of business within the meaning of 11 U.S.C. § 363(c)(1) and also satisfies the standards for authorization pursuant to § 363(b).

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

4. The Debtors are authorized and empowered to take all actions necessary to implement the relief granted in this Order.

Dated: New York, New York
_____, 2012

_____
THE HONORABLE SEAN H. LANE
UNITED STATES BANKRUPTCY JUDGE

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

EXHIBIT B

DECLARATION OF JOHN WISNIEWSKI

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 JOHN WISNIEWSKI IN SUPPORT OF DEBTORS' MOTION FOR AN ORDER CONFIRMING THE DEBTORS' AUTHORITY TO FUND CERTAIN AMOUNTS TO NON-DEBTOR AFFILIATE DISTRICT COOLING

I, John Wisniewski, hereby declare as follows:

1. I hold the title of Director in Arcapita Bank B.S.C.(c) ("***Arcapita Bank***"), one of the above-captioned debtors in possession (collectively, the "***Debtors***"). I am making this declaration in support of the Debtors' Motion (the "***Motion***")[1] for entry of an order confirming the Debtors' authority to fund certain amounts to non-Debtor affiliate District Cooling Holding Company Limited ("***District Cooling***"), under the terms and conditions set forth in the Motion.

2. I am familiar with District Cooling's business and capital needs because I have managed Arcapita's district cooling assets since I began my employment with Arcapita in September 2008. I am familiar with the corporate structure that Arcapita has set up to hold its district cooling interests and I am a member of the board of directors of BBU, BU2, and ABD (each as defined below). I am familiar with all of the major legal agreements associated with ABD. In particular, I led the negotiations that established the Concession Agreement and the Lead Investor Undertaking (each discussed below).

3. Except as otherwise indicated herein, all facts set forth in this Declaration are based upon my personal knowledge, information learned from my review of relevant

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

documents, and information supplied to me by employees who are under my supervision. I am authorized to submit this Declaration and, if called upon to testify, I could and would testify competently to the facts set forth herein.

A. General Background and the Controlling Agreements

4. District Cooling is an indirect subsidiary of Debtor Arcapita LT Holdings Limited which owns a majority stake in a group of three companies that were formed to provide utility services—including district cooling, desalination, and wastewater services—to major real estate developments in the Gulf region.

5. Pursuant to a series of joint venture and shareholders' agreements, the three district cooling companies are joint venture projects between District Cooling and Dalkia Utilities Company W.L.L. ("***Dalkia***"), a leading global energy services provider. Dalkia co-invests in each district cooling project as a minority investor and Dalkia provides each of the projects with technical expertise including plant design, equipment selection, and oversight of the construction of each project. In addition, Dalkia operates the plants post-commissioning pursuant to certain operations and maintenance contracts.

6. The three district cooling companies are Bahrain Bay Utilities Company B.S.C.(c) ("***BBU***"), Bahrain Utilities Company 2 B.S.C.(c) ("***BU2***"), and Paragon ABD Cooling LLC ("***ABD***").

7. BBU provides cooling services to Bahrain Bay, a $2.5 billion project in North Manama by means of an operating cooling plant completed in July 2011.

8. BU2 has contracted to build a cooling plant to service Al Areen, a $1 billion mixed-use residential and leisure real estate project currently under construction in Southwest Bahrain. The plant is nearing completion and awaits testing and commissioning.

9. Pursuant to a "Concession Agreement" between ABD and the Tourism Development and Investment Company PJSC (the "***TDIC***"), ABD agreed to be the exclusive provider of district cooling services to Saadiyat Island for a period of twenty-nine years at pre-defined "tariff" rates. Saadiyat Island is a $27 billion mixed-use real estate development currently under construction near the city of Abu Dhabi. The TDIC is a wholly-owned subsidiary of the Emirate of Abu Dhabi.

10. Pursuant to the Concession Agreement, ABD committed to build three cooling plants to service Saadiyat Island and, while the plants are being constructed, to provide cooling services to the development via diesel-powered temporary chillers. Construction on two of the three cooling plants contemplated by the Concession Agreement has recently commenced, and cooling services are now provided by the diesel-powered temporary facilities.

11. ABD's performance under the Concession Agreement is assured by a $10 million performance bond (the "***Performance Bond***") issued by Standard Chartered Bank ("***SCB***") in favor of the TDIC. ABD's potential liability to SCB under the Performance Bond is guaranteed by Debtor Arcapita Bank pursuant to a Guarantee Indemnity (the "***Guaranty***") and Arcapita Bank has deposited $10 million with SCB as security for its Guaranty

12. District Cooling, Dalkia, and the TDIC have also entered into a Lead Investor Undertaking pursuant to which District Cooling agreed to sufficiently fund ABD so that it can meet its obligations to the TDIC under the Concession Agreement. I understand that, in the event of a breach by ABD resulting from District Cooling's failure to fund, the TDIC may assert claims against District Cooling and, hence, the value of BBU and BU2.

13. To date, District Cooling has invested more than $207 million in the three companies. Based on my experience as part of management of District Cooling's three

operating companies and also my review of a valuation report prepared by KPMG UK and waterfall analysis compiled by the Debtors and their professionals, on behalf of District Cooling and the Debtors, it is my opinion that the total enterprise value of the operating companies within District Cooling is between $85 million and $123 million, on a current value basis as of April 2012. I estimate that the Debtors' interest in these assets exceeds $20 million (including the cash supporting Arcapita Bank's Guaranty of the Performance Bond).

B. ABD's Capital and Operating Expense Requirements

14. Pursuant to its obligations under the existing Concession Agreement, District Cooling forecasts that it would need to provide ABD with additional capital in excess of $40 million from internal and external sources to complete and bring the Saadiyat Island projects online. District Cooling and its subsidiaries are obligated to provide the necessary capital pursuant to the Joint Venture and Shareholders' Agreement by and between District Cooling Development III Limited and Dalkia (the "***JV Agreement***"), as well as the Lead Investor Undertaking with the TDIC.

15. Since September 2011 I have been involved in discussions with the TDIC regarding the scope and timing of the Saadiyat Island development and its needs for district cooling. I have met directly with the TDIC, along with staff from Dalkia, to discuss and negotiate with the TDIC on numerous occasions. I typically lead these negotiations with support from Dalkia and on occasion outside legal counsel. Over the last several months communications with TDIC and their advisors have occurred very frequently, sometimes daily. I am intimately familiar with the current state of negotiations, including the changes in the TDIC's district cooling requirements and the proposed commercial terms including adjusted tariffs.

16. In my communications with the TDIC as to the ABD facilities, the TDIC has informed me on behalf of ABD that is has modified its development plans for Saadiyat Island and, as a result, has reduced the anticipated need and timing for district cooling. Consequently, the TDIC, District Cooling, and Dalkia are currently negotiating an amendment to the terms of the Concession Agreement to reflect the project's reduced cooling needs. I am the person directly responsible on behalf of District Cooling and ABD for communicating directly with Dalkia and the TDIC and for negotiating those amendments with Dalkia and the TDIC. Negotiations are ongoing and are close to fruition. Based on the current state of the negotiations, I understand that the re-negotiated Concession Agreement will likely call for the construction of two plants (instead of three) thereby reducing ABD's capital needs. ABD needs to complete negotiations with the TDIC before it can forecast the amount of capital that will be needed to complete and operate two instead of three cooling plants.

17. As has always been the case, District Cooling relies on the Debtors for funding, and prepetition the Debtors funded District Cooling's capital needs as they arose in the ordinary course District Cooling's operations. Without funding from the Debtors, equity investment, or third party borrowing, District Cooling lacks the funds needed to pay for ABD's operations.

C. Efforts to Minimize Claims and Maximize Value by Avoiding a Breach

18. Because of the sizeable capital needs for ABD alone, for the last 60 days, I and others on behalf of the Debtors (including its advisors) and District Cooling have analyzed alternatives and have engaged in ongoing discussions with third-party investors, present investors, and Dalkia to determine how to provide ABD with its remaining capital needs or, alternately, to agree on an exit plan that will allow ABD to be replaced as to the Saadiyat Island

development on a consensual basis thereby avoiding huge damage claims. On behalf of District Cooling and ABD, I have personally participated in those discussions and negotiations with representatives of the TDIC, Dalkia, and potential investors and lenders. Thus far, I have been informed by these investors, lenders, and Dalkia representatives that they are unwilling to commit until amendments to the Concession Agreement are finalized.

19. Current negotiations with the TDIC are focused on amending the Concession Agreement in line with the new requirements for district cooling services for the Saadiyat Island project. Substantial progress has been made: the TDIC has indicated the quantity and timing of the district cooling demand that it proposes to commit to under Customer Cooling Agreements; the TDIC and ABD have exchanged proposals for the adjustments to tariff levels and other commercial terms affecting project economics, and the gaps in positions are being reduced. Next steps include the TDIC and ABD bringing the proposed terms to their respective boards for approval. Additionally, ABD intends to include third party investors in the negotiations with the TDIC with the intention of replacing District Cooling's funding obligations.

20. To avoid a breach of the Concession Agreement while negotiations are ongoing and to perform under the Concession Agreement, ABD must purchase diesel fuel and incur other expenses to rent and operate the temporary chillers to maintain its operations. ABD must also proceed with construction of the permanent facilities. I understand that, to the extent funding is needed by ABD, District Cooling and its subsidiaries are contractually required to provide that funding pursuant to the JV Agreement and the Lead Investor Undertaking.

21. Without funding from District Cooling and the Debtors, ABD lacks the funding necessary to maintain even minimal operations (not including the necessary capital

expenditures for construction to prevent the contractor from walking off the job) and, if ABD runs out of money to buy fuel, it will not be able to continue operating the temporary chillers. Even if it delays in paying certain payables now due, and depending on certain variables such as the weather, I project that ABD will run out of diesel fuel toward the later part of September. A cessation of work by ABD's contractor is also a breach under the Concession Agreement

22. I understand that any failure by ABD to operate the temporary chillers would be a material breach under the Concession Agreement and is grounds for termination. Based upon my experience in operating businesses in the Gulf region, the Debtors' inability to support ABD will also lead to a public relations nightmare that I believe will negatively impact the Debtors' ability to formulate a plan of reorganization.

23. I understand that, in the event of a breach by ABD, the TDIC could also be able to assert claims against District Cooling pursuant to the Lead Investor Undertaking and District Cooling's interests in the BBU and BU2 projects could be jeopardized. I understand that Dalkia could also assert claims against District Cooling for any losses Dalkia incurs as a result of the District Cooling's failure to fund, and that District Cooling is likely to face investor suits and claims from unpaid contractors. Dalkia has sent correspondence to District Cooling expressing its intent to fully pursue claims against District Cooling, among others, in the event of an ABD breach of the Concession Agreement. If these claims are pursued, then District Cooling's interests in all three of its investments in the district cooling operating companies could be materially negatively impacted.

24. The $1.9 million in funding requested will be used as a bridge to fund critical necessary expenses to buy diesel fuel, rent temporary cooling equipment, and to maintain minimal construction activities (and thereby avoid a default under the Concession Agreement)

while the Debtors finalize the amendments to the Concession Agreement with the TDIC and pursue a third-party financing transaction or, alternatively, an agreement with the TDIC and Dalkia allowing District Cooling to exit the ABD investment on a consensual basis, thereby minimizing damages claims.

D. The Funding Requested is an Exercise of Sound Business Judgment

25. Based on my experience in the Gulf generally and in operating District Cooling and its group of companies, I believe that the further funding of $1.9 million to pay the operating expenses of ABD is an exercise of the Debtors' sound business judgment because it will maximize the value of the District Cooling assets for the following reasons:

a. It will avoid an immediate breach and will avoid the TDIC's draw on the Performance Bond and SCB's claims on the $10 million in cash posted by Arcapita Bank to support its Guaranty;

b. It will avoid an immediate breach and it will maximize the opportunity to avoid or mitigate the substantial damage claims of Dalkia and the TDIC that may be asserted not only against ABD, but also against District Cooling and the equity value of the BUU and BU2 projects;

c. If financing cannot be obtained from third party sources, it will maximize the remaining value of ABD, BUU, and BU2 by arriving at a negotiated consensual exit plan with the TDIC and Dalkia as to ABD, thereby minimizing or eliminating damage claims otherwise certain to result in the event of an immediate breach;

d. It will maximize the opportunity to benefit from the enterprise value of the BUU and BU2 projects and also ABD; and,

e. It will maximize the opportunity to avoid the extremely negative publicity in the Gulf region on the Arcapita group as a whole due to the impact of a default by ABD and its cessation of operations resulting from a failure to fund by the Debtors which will negatively impact the Debtors' dealings with the vendors and creditors of Arcapita affiliates in the Gulf with whom the Debtors deal on a daily basis on a myriad of issues well beyond District Cooling and also potential investors vital to Arcapita's restructuring.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 7th day of September, 2012.

/s/ John Wisniewski
John Wisniewski

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