

Hearing Date: September 19, 2012 at 2:00 p.m. (Prevailing Eastern Time)

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

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| In re: | : | Chapter 11 |
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| ARCAPITA BANK B.S.C.(C), et al., | : | Case No. 12-11076 (SHL) |
| | : | |
| Debtors. | : | (Jointly Administered) |
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**STATEMENT AND RESERVATION OF RIGHTS OF OFFICIAL
COMMITTEE OF UNSECURED CREDITORS WITH RESPECT TO
DEBTORS’ MOTION FOR ORDER CONFIRMING THE DEBTORS’
AUTHORITY TO FUND NON-DEBTOR AFFILIATE DISTRICT COOLING**

The Official Committee of Unsecured Creditors (the “Committee”) of Arcapita Bank B.S.C.(c) (“Arcapita”) and its affiliated debtors in possession (collectively, the “Debtors”) in the above-captioned jointly administered chapter 11 cases hereby submits this statement and reservation of rights (the “Statement”) with respect to the *Debtors’ Motion for Order Confirming the Debtors’ Authority to Fund Non-Debtor Affiliate District Cooling* [Docket No. 468] (the “Motion”),¹ and respectfully states as follows:

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

STATEMENT

1. As holding companies without any operations, the Debtors must use estate assets to fund their non-debtor affiliates' businesses. Because these transfers of scarce estate resources necessarily reduce the consideration available to fund recoveries for the Debtors' unsecured creditors, the Committee, as the statutory representative of those creditors, is tasked with reviewing the Debtors' funding proposals to ensure that expenditures are made only when in the best interests of the Debtors' estates.

Throughout these chapter 11 cases, the Committee and its advisors have worked diligently to evaluate each of the Debtors' portfolio company funding proposals. As part of this process, the Committee has at times objected, either formally or informally, to certain funding requests. To date, each such objection has been resolved through negotiations between the Committee and the Debtors.

2. The proposed \$1.9 million payment (the "District Cooling Payment") to fund non-debtor affiliate District Cooling is an example of such a funding request. As has too often been the case, the Debtors sought Committee authorization to make the District Cooling Payment, which comes on the heels of a recent \$2 million funding to the same entity,² without initially providing the Committee with sufficient information to analyze the propriety of the proposed funding, nor setting forth a reasonable rationale for making the payment.

3. Following the Committee's service of discovery requests related to the Motion, the Debtors provided more meaningful disclosure regarding the rationale for

² The Committee's consent to the previous payment to District Cooling was conditioned on the Debtors' commitment to meet certain progress milestones, none of which have been satisfied.

making the District Cooling Payment, including updated information from the relevant deal team regarding the status and anticipated resolution of negotiations with other stakeholders. As a result, the Committee no longer objects to the Debtors making the District Cooling Payment.

4. In approving the proposed District Cooling Payment, the Committee notes that the ultimate result of the process by which the Debtors sought and obtained the Committee's consent is consistent with and, indeed, validates the process implemented by the Court during the August 1, 2012 hearing for resolving disputes between the Committee and the Debtors with respect to proposed funding of non-debtor affiliates. By requiring the Debtors to file a motion to seek authority to transfer estate funds to non-debtor affiliates pursuant to the Debtors' monthly budgets in cases where the Committee has not approved the proposed transfer, the Debtors are required to fully justify the fairness of the proposed funding and, consequently, to provide the Committee, as representative of the Debtors' unsecured creditors, with information necessary to evaluate the transaction. This is ultimately what happened with respect to the District Cooling Payment, where the Debtors finally provided sufficient justification for the funding request, including, most importantly, providing detailed information regarding developments in the negotiations with the other stakeholders. Only by providing this information was the Committee able to conclude that lending \$1.9 million of the estates' capital to District Cooling at this time is not unfair to the Debtors' creditors. In the absence of this additional information, the Committee could not otherwise determine whether such negotiations are likely to create value for the benefit of all creditors or whether the District Cooling Funding will merely drain the Debtors' limited available

cash with no hope of improving returns or mitigating damages for which the estates may be responsible. This concern was particularly acute with this investment given that the Debtors had previously defaulted on the progress milestones to which they had agreed with the Committee.

5. While the Committee believes the consensual resolution of this dispute is in all parties' interests and that the procedure prescribed by the Court for the Debtors to seek approval of transfers to non-debtors over the Committee's objection ultimately produced the right result, the process by which this result was reached leaves much to be desired. Only after the estates were forced to incur the costs associated with the Debtors' drafting of the Motion, the commencement of discovery with respect to the Debtors' proposals, and the Committee's preparation of responsive pleadings, did the Debtors provide sufficient information to permit the Committee to get comfortable with the rationale for the District Cooling Payments. Estate resources are scarce, and any unnecessary costs of administering the estates result in a needless reduction of creditor recoveries.

RESERVATION OF RIGHTS

6. The Committee's agreement to permit the Debtors to make the District Cooling Payment is explicitly limited to the current \$1.9 million funding request, and in no respect should the Committee's consent to the District Cooling Payment at this time be construed as support for any future payments the Debtors may seek to make or any potential settlement or arrangement the Debtors may seek to enter into with the other relevant stakeholders of District Cooling.

Dated: New York, New York
September 17, 2012

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