HEARING DATE AND TIME: October 9, 2012 at 2:00 p.m. (Eastern Time)
OBJECTION DEADLINE: October 2, 2012 at 12:00 p.m. (Eastern Time)

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE:	**Chapter 11**
ARCAPITA BANK B.S.C.(c), *et al.*,	**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 GLOBAL SETTLEMENT OF SENIOR MANAGEMENT CLAIMS

PLEASE TAKE NOTICE that a hearing on the annexed motion, dated September 18, 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 **October 9, 2012 at 2:00 p.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., Craig H. Millet, 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 **October 2, 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
September 18, 2012

/s/ Michael A. Rosenthal

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ATTORNEYS FOR THE DEBTORS
AND DEBTORS IN POSSESSION

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

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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 Senior Management Global Settlement (as defined below) of claims between the Arcapita Group [1] and six members of senior management (each, a "***Senior Manager***", collectively, "***Senior Management***").[2] In support thereof, the Debtors respectfully represent:

PRELIMINARY STATEMENT

On July 9, 2012, the Court approved a settlement of certain outstanding employee obligations relating to the IPP and IIP equity incentive programs (each described below) in exchange for, among other things, unpaid IPP or IIP equity shares in portfolio companies, capped notice and severance benefits and a commitment to continue to work for the Arcapita Group until November 6, 2012 (the "***Original Global Settlement***").[3] In addition, the Court approved a key employee incentive program for certain key members of the Debtors' management (the "***KEIP***"), a key employee retention program for certain critical staff of the Debtors (the "***KERP***") and a significant reduction in force of the Arcapita Group's employees

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

[2] Senior Management consists of the following persons: Atif Abdulmalik; Henry Thompson; Mohammed Chowdhury; Martin Tan; Essa Zainal; and Hisham Al-Raee.

[3] The Original Global Settlement was one part of the *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* [Docket No. 205] (the "***Original Motion***").

(which projects to yield millions of dollars in annual savings for the Debtors on a go-forward basis) (the "***RIF***").

Notably, the Senior Managers agreed not to participate in either the Original Global Settlement or the KEIP. They did so to avoid potentially protracted litigation with the Committee (defined below) that could have delayed the implementation of the RIF, the KEIP and the KERP, all of which were necessary, in the Debtors' and management's opinion, to stabilize the Debtors in the wake of the abrupt commencement of the Chapter 11 Cases (defined below).

Senior Management's decision has yielded significant dividends for the estates. Indeed, since the Court's approval of these employee programs, the Debtors have stabilized their operations and avoided the flight of the Arcapita Group's best employees who have most, if not all, of the institutional knowledge required to effectively manage the Debtors' interests in Arcapita Group investments and portfolio companies.

In addition, Senior Management, with the assistance of the Debtors' legal and financial advisors, has developed a long-term business plan designed to effectuate, among other things, an expeditious exit from bankruptcy. Concomitantly, Senior Management has also been laser-focused in its efforts to canvass potentially interested parties in making a significant equity investment in the Debtors in connection with an overall restructuring plan. Given the significant progress that has been made to date in the development of a business plan and exit strategy, the Debtors believe that the time is now optimal to establish a global settlement program with Senior Management analogous to the Original Global Settlement. Notably, by this Motion, the Debtors are not seeking to establish a new cash-pay incentive system for Senior Management.

The Senior Management Global Settlement, however, does not mirror the Original Global Settlement. The concept here is to provide Senior Management with economics similar to those offered in the Original Global Settlement but to condition eligibility and participation upon the achievement of a specific incentive that, if achieved, will benefit the estates and its creditors. In other words, the global settlement designed for Senior Management starts with a Bankruptcy Rule 9019 settlement (just like the Original Global Settlement), but adds a challenging incentive condition designed to generate significant cost savings for the benefit of all creditors and the estates. In addition, under the Senior Management Global Settlement, as part of the settlement, Senior Management has volunteered, under certain outcomes, to forfeit substantial amounts of unsecured claims against the estate (unrelated to either the IPP or the IIP).

The hard work and dedication of Senior Management has been crucial to the progress made in the Chapter 11 Cases thus far, and will continue to be crucial as plans for reorganization and an exit from Chapter 11 are developed and negotiated. While Senior Management has been patient in awaiting its participation in the global settlement, the Debtors believe that a Senior Management Global Settlement must be implemented soon to avoid missing an opportunity to link settling Senior Management's IPP/IIP obligations to creditor returns at a crucial time in these cases. Implementation of the Senior Management Global Settlement satisfies the Bankruptcy Code and the Bankruptcy Rules, incentivizes Senior Management to satisfy a challenging goal that, if accomplished, will enhance the value of the Debtors' estates for all stakeholders, and reflects a sound exercise of the Debtors' business judgment. Accordingly, this Motion 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. 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. On April 5, 2012, the Office of the United States Trustee appointed an official committee of unsecured creditors in these Chapter 11 Cases (the "***Committee***").

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 global settlement of claims between the Arcapita Group and its Senior Management arising in connection with two Arcapita Group prepetition incentive plans (the "***Senior Management Global Settlement***"). The Senior Management Global Settlement is described below.

EXISTING INCENTIVE PLANS AND RIGHTS OF AND AGAINST SENIOR MANAGEMENT

5. Prior to the Petition Date, the Debtors maintained two highly complex incentive plans, the Investment Participation Program (the "***IPP***") and the Investment Incentive Program (the "***IIP***" and together with the IPP, the "***IPP/IIP***"). Both plans permitted participating

Arcapita Group employees to incur obligations to Arcapita in order to invest alongside Arcapita in Arcapita Group investments. Co-investment was intended to align employees' interests with those of the Arcapita Group and their financial stakeholders.[4] Both the IPP and the IIP enable Employees to invest—either currently or using deferred compensation—in Arcapita Group investments, as follows:[5]

- IPP: The IPP permits non-U.S. management employee participants to purchase shares alongside the Arcapita Group with cash advanced to those 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 allocating a portion of their annual incentive payments 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.

- IIP: 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 maximum amount of the CLRA obligation is generally reduced ratably by 15% per year to 25% of the purchase price of the investment

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

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

over a five-year period. 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.

Because participant employees incur fixed obligations to the Arcapita Group to fund their initial participation in the IPP/IIP, if an investment loses value, a participant may have IPP/IIP obligations that are greater than the value of his or her related IPP/IIP investments.

6. All six members of Senior Management currently have outstanding IPP/IIP obligations.[6] Each Senior Manager has outstanding loan/CLRA obligations that, in the aggregate, exceed the estimated fair value "mark" of the shares that would be returned to Arcapita via the Senior Management Global Settlement (as described below) (the "***Net Obligations***"). The aggregate amount of obligations for the 6 Senior Managers is approximately $7.5 million,[7] compared to the $4.0 million aggregate fair value mark of the associated shares which will be returned to the Arcapita Group if all six participate in the Senior Management Global Settlement.[8]

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[6] Notably, these obligations are interest free and will not increase over time.

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

[8] Under the terms of the IPP/IIP, any outstanding amounts owing by the Senior Managers would be payable on termination. The Original Global Settlement offered relief from the IPP/IIP obligations to all employees against the amount of loans (or CLRA with respect to the IIP). Notably, the fair value mark here is based on the "mid-point" valuation method performed by KPMG LLP ("***KPMG***") in the Chapter 11 Cases, not the valuation method used in the Original Motion. Using the original methodology, the aggregate value of the shares which may be returned to Arcapita via the Senior Management Global Settlement would actually exceed the related aggregate IPP/IIP obligations. A final KPMG "mid-point" valuation method was not available at the filing of the Original Motion.

In addition, the "mid-point" valuation only reflects the value of the shares at this point in time. The Debtors intend to hold the shares until monetization of the subject investments. The KPMG valuation indicates that the value of the equity at monetization may be higher.

THE ORIGINAL GLOBAL SETTLEMENT

7. On June 5, 2012, the Debtors proposed to settle claims and obligations arising under IPP and the IPP pursuant to sections 363(b) of the Bankruptcy Code and Bankruptcy Rule 9019 in the form of the Original Global Settlement. This relief was sought in the middle of a company-wide RIF of approximately 35% of the pre-existing workforce. While terminated employees could immediately elect to participate in the program, continuing employees had to wait. Specifically, remaining employees were eligible for the Original Global Settlement if they (a) remained with the Arcapita Group until November 6, 2012, or (b) were terminated without cause prior to such date.

8. The Original Global Settlement made no distinction with respect to corporate insiders, meaning that all employees, regardless of their position with the Arcapita Group, were eligible to participate (other than Senior Management). Indeed, three of the terminated employees were senior-level employees holding the position of Executive Director, and, therefore, insiders.[9] All three were permitted to participate in the Original Global Settlement. *Original Motion* ¶ 16.

9. The Original Global Settlement provided for the settlement of all outstanding claims between the Arcapita Group and employees in connection with the IPP/IIP. Non-U.S. employees under the Original Global Settlement were permitted 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. In addition, employees with five or

[9] While the Bankruptcy Code does not define the terms officer or director, Arcapita has determined, based on advice from its legal advisors, that employees holding titles of Executive Director and higher are likely constitute "officers" and therefore "insiders" for the purposes of §§ 101(31) and 503(c).

more years of service could elect to receive the same treatment except, because the employees' loan amounts would already have been automatically reduced by 25%, they voluntarily agreed to return a pro rata portion of any shares associated with the 25% automatic share reduction. Similarly, U.S. IIP participants were required to give up all future deferral opportunities and forfeit the portion of their profits interest corresponding to their "unpaid" shares in exchange for the elimination of any outstanding CLRA amounts under the IIP. Finally, participating employees agreed to cap their notice and severance payments and release the Arcapita Group from further claims and causes of action.

THE SENIOR MANAGEMENT GLOBAL SETTLEMENT

10. From an economic perspective, the Senior Management Global Settlement is similar to the Original Global Settlement (which as described above applied to all employees other than Senior Management). To participate in the Senior Management Global Settlement, a participating Senior Manager must agree to forgo his statutory and contractual notice and severance pay in return for a combined capped four-month notice and severance payment[10] and release the Arcapita Group from any additional claims and causes of action. These economic terms match those approved for non-Senior Management participating employees.

11. In addition, in an effort to further align management's incentives with those of other stakeholders, the Debtors propose to further condition Senior Management's participation on the Senior Management Global Settlement on a key, definitive Milestone: the filing of an

[10] Note that in the absence of the Senior Management Global Settlement, notice and severance payments will nonetheless be capped to a certain extent by § 503(c)(2) of the Bankruptcy Code. The notice and severance payment will also be reduced to the extent that any Senior Manager has other loans outstanding relating to obligations outside of IPP/IIP.

Eligible Plan by the Debtors by December 15, 2012 (the "***Milestone***").[11] If satisfied, the Debtors submit, this Milestone will benefit the estates and their stakeholders.

12. Finally, in exchange for achieving the Milestone and being granted the Senior Management Global Settlement, in the event of ultimate confirmation of a New Money Plan, either through the filing of a Toggle Plan or a separate New Money Plan, all participating Senior Managers have agreed to waive their prepetition unsecured claims against all of the Debtors relating to unpaid 2011 incentive payments.

13. In two specific scenarios where the ability of Senior Management to achieve the Milestone is removed, due to no action or fault of its own, Senior Management will be able to participate fully in the Senior Management Global Settlement. This will occur if either (a) the Chapter 11 Cases are converted into chapter 7 proceedings on or before December 15, 2012, which conversion is not initiated by the Debtors,[12] or (b) the winding up petition in FSD Cause No.45 of 2012 – AJ (the "***Cayman Proceedings***") in the Grand Court of the Cayman Islands is converted from a joint provisional liquidation to a full liquidation and winding up, which conversion is not initiated by the Debtors.

BASIS FOR RELIEF REQUESTED

14. The proposed Senior Management Global Settlement is in the best interests of the Debtors' estates, creditors and other parties in interest and should be approved.

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[11] An ***Eligible Plan*** is either (1) a standalone chapter 11 plan whereby the current entities emerge from chapter 11 in a substantially similar organization (the "***Standalone Plan***") or (2) a chapter 11 plan (the "***Toggle Plan***") that provides for both (a) a restructuring plan premised on the Debtors' raising new equity capital from investors (the "***New Money Plan***") and (b) a Standalone Plan. If a Toggle Plan is filed, it will "toggle" from a New Money Plan to a Standalone Plan if a minimum of $500 million of new equity is not in escrow prior to plan confirmation. If at least $500 million of new equity is raised and in escrow by December 15, 2012, a New Money Plan can be filed as an Eligible Plan, satisfying the Plan Milestone.

[12] Note that participants in the Original Global Settlement are also able to elect to participate in the case of a conversion to chapter 7, independent of the initiating party.

I. The Senior Management Global Settlement is a Rule 9019 Settlement in the Best Interests of the Debtors' Estate and Should Be Approved

15. 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).

16. 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. 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). Many of the same factors which favored the settlement of employee claims via the Original Global Settlement continue to favor the settlement proposed herein.

17. Probability of Success in Litigation. Just as with the Original Global Settlement, absent the Senior Management Global Settlement, the Arcapita Group may be forced to pursue repayment of IPP/IIP obligations through litigation in foreign jurisdictions. The likelihood of success in any such litigation would be diminished by the structure of the programs. There is a concern that notes executed by employees in favor of Arcapita are not enforceable since funds for the IPP were advanced to the employees by AIPL, not Arcapita itself. And, while admittedly, AIPL advanced to the employees funds received by it from Arcapita, Senior Managers could argue that Arcapita should not be permitted to enforce a loan to which it is not a party. Similarly, 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.

18. 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. Employees may argue that the Arcapita Group's failure historically to enforce these obligations supports their treatment as an incentive plan, not an obligation which needs to be satisfied.

19. 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 a Senior Manager, rather than settle with such person, and regain

possession of the unpaid shares and enjoy the benefits of both reduced severance and notice period payment obligations and potentially, waived unsecured annual incentive payment claims in the future.

20. Expense, Inconvenience and Delay, Including the Difficulty in Collecting on the Judgment. Significant expense, inconvenience, and delay would accompany efforts to pursue litigation against Senior Management in multiple foreign jurisdictions. Furthermore, because the defendants would be individuals, even if the Arcapita Group were able to successfully enforce its IPP/IIP claims, collection costs and risks would be high.

21. Best Interests of Creditors. The Senior Management Global Settlement, like the Original Global Settlement, provides creditors with substantial value. Pursuant to the Senior Management Global Settlement, (a) participating Senior Managers shall agree to return to Arcapita all unpaid IPP/IIP shares and a pro rata portion of the IPP/IIP shares that vested automatically after five years of employment, to accept capped notice and severance pay, to release the Arcapita Group from all claims and potentially to waive unsecured annual incentive payment claims, and (b) the Arcapita Group shall release the participating Employees from obligations arising under the IPP/IIP. Further – and perhaps most importantly – reflective of Senior Managers' authority and influence on the structure of the reorganization, the Senior Management Global Settlement is conditioned upon the achievement of a Milestone that is beneficial to the Debtors' estates and creditors.

22. Taking each of these settlement components into account, the Senior Management Global Settlement is in the best interests of the Debtors' creditors and meets the standard for the range of reasonableness set forth above. The current fair value "mark" of the shares that would be signed over to Arcapita Group in the Senior Management Global Settlement, according to the

KPMG mid-point valuation, equals approximately 54% of the related IPP/IIP obligations. The valuation, moreover, indicates that the value of the shares may grow over time. Conversely, Senior Management's corresponding IPP/IIP obligations would remain unchanged; the IPP/IIP obligations are interest free. In addition, as previously discussed, potential savings resulting from the caps on severance and notice payments could result in additional estimated savings of approximately $1.2 million if all Senior Managers with IPP/IIP exposure were terminated and elected to participate.[13]

23. While the face amount of the receivables owed by relevant Employees is $7.5 million, there is simply no valid reason to give those receivables the face amount of their value. Given the variety of the different forums, litigation costs and risks, and the inherent difficulty of successfully collecting against an individual, it is unrealistic (at best) to argue that the receivables should be given their full face value. By contrast, the value potential of the Milestone is self-evident. The achievement of the Milestone would expedite an exit from costly chapter 11 proceedings and allow for timely payouts on creditors' claims. Finally, in the scenario where a New Money Plan is ultimately confirmed, if all Senior Managers participate in the Senior Management Global Settlement, prepetition claims by Senior Management for unpaid 2011 incentive payments will be waived.

24. As a result of the foregoing, the Senior Management Global Settlement provides a reasonable compromise that precludes highly uncertain and burdensome litigation while providing measurable benefits to the Debtors' estates, in the form of returned deal shares, potentially waived claims and additional cost savings. The Senior Management Global

[13] Note that this amount is the estimated annual savings taking into account the § 503(c)(2) cap on severance payments. If section 503(c)(2) ultimately does not apply the savings would approximate $4.6 million.

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

II. Section 503(c) of the Bankruptcy Code Does Not Apply to the Senior Management Global Settlement

25. Section 503(c) of the Bankruptcy Code sets forth certain limitations on transfers or payments by debtors, to the extent that such payments are (a) payments to an insider for the purpose of inducing such person to remain with the debtor's business; (b) severance payments to an insider; or (c) transfers or obligations outside the ordinary course. 11 U.S.C. § 503(c). The consummation of the Senior Management Global Settlement does not violate section 503(c).

A. Section 503(c)(1) of the Bankruptcy Code Does Not Apply Because Senior Management Global Settlement Does Not Constitute Impermissible Retention Pay

26. 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.").

27. The Senior Management Global Settlement does not implicate the restrictions set forth in section 503(c)(1). Like the Original Global Settlement, the Senior Management Global Settlement is not retentive pay. Rather, the Senior Management Global Settlement comprises the

resolution of claims between participant Senior Managers and the Debtors. Participants in the Senior Management Global Settlement will receive relief from their IPP/IIP obligations. In return, however, they will return to Arcapita unpaid shares as well as a pro rata portion of those shares that vested automatically after 5 years of service in non-Debtor subsidiaries, accept capped notice and severance payments, potentially waive additional unsecured annual incentive payment claims against the estates, and release their employers from other claims. Because the Senior Management Global Settlement is a settlement of claims between Senior Management and the Debtors as governed by Bankruptcy Rule 9019, it does not implicate section 503(c)(1) of the Bankruptcy Code.

28. That the Debtors have made it more difficult and expensive for Senior Management, as compared to other employees, to settle their IPP/IIP claims further does not drag the proposed settlement into the purview of section 503(c). From a purely economic perspective, the Senior Management Global Settlement is similar to the Original Global Settlement except it is even more advantageous to the Arcapita Group. Unlike other employees, Senior Managers have volunteered, in certain outcomes, to forgo unsecured claims for unpaid 2011 incentive payments in order to settle their IPP/IIP obligations. Moreover, the addition of the Milestone is reflective of the participants' authority and seeks to align management incentives with the interests of the other stakeholders. Limiting restructuring expenses via an expedient closure to the Chapter 11 Cases is in everyone's best interests.

29. Further, to the extent a Senior Manager continues to hold shares in non-Debtor companies as a result of the Senior Management Global Settlement, 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.

B. The Senior Management Global Settlement is Not a Severance Program Subject to Section 503(c)(2) of the Bankruptcy Code

30. 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.

31. 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).

32. While Senior Management are insiders, there is no severance payment in the Senior Management Global Settlement. Rather, notice and severance pay upon termination, if applicable, will already be capped by the § 503(c)(2) cap on severance payments and then further reduced by an aggregate amount of $1.2 million if Senior Managers are eligible for and elect to participate in the program.

III. Even if Rule 9019 Does Not Apply, the Senior Management Global Settlement Is the Product of Good Business Judgment and Should Be Approved under Sections 363(b) and 503(c)(3) of the Bankruptcy Code

33. 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 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).

34. 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 substitute 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.").

35. The Senior Management Global Settlement is the product of sound business judgment, promises the Debtors short and long-term monetary and non-monetary benefits, and is justified by the facts and circumstances of the Chapter 11 Cases.

36. For Senior Managers who choose to participate in the Senior Management Global Settlement, IPP/IIP Loan and CLRA obligations will no longer be due. If all Senior Managers

choose to participate, the face value cost of this portion of the program (not taking into account for example the value of the AIHL shares that will be returned to the Debtors) will be $7.5 million. However, as discussed earlier, given the challenges and expense of potential recoupment of these obligations, the true value of the outstanding obligations is actually much lower.

37. Meanwhile, the tangible monetary benefits of the Senior Management Global Settlement to the Debtors are significant. First, the Debtors will secure the return of unpaid shares and a portion of those shares that vested automatically after five years of employment. Second, the Debtors will also benefit from capped notice and severance pay, instead of being subject to complex contractual and statutory notice and severance requirements that can lead to much higher payouts. And, third, Senior Managers has volunteered, in certain situations, to forego prepetition unsecured annual incentive payment claims in order to participate.

38. The achievement of the Milestone will also provide substantial savings to the Debtors. The main purpose of the Milestone is to expedite the filing of a plan, and ultimately, the reorganization and exit from bankruptcy. Remaining in the Chapter 11 Cases is very costly for Debtors. Fees for the services of the Debtors' and Committee's professionals are currently running at a rate of over $6 million per month, with $22.7 million of fees and $0.56 million of expenses requested to date. The Milestone pushes Senior Management to pursue dual tracks of developing both a Standalone Plan and raising equity for a New Money Plan. The pursuit of two tracks makes it more likely that a plan will be filed by December 15, 2012, expediting the Debtors' exit from chapter 11 in a manner that will benefit all stakeholders.

39. Given the substantial cost savings and the positive incentives for Senior Management that the Senior Management Global Settlement provides, it is clearly the product of

the Debtors' sound business judgment and should therefore be treated with deference by this Court.

NOTICE

40. 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

41. 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
September 18, 2012

Respectfully submitted,

/s/ Michael A. Rosenthal
Michael A. Rosenthal (MR-7006)
Janet M. Weiss (JW-5460)
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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 PURSUANT TO SECTIONS 363(b) AND 503(c) OF THE BANKRUPTCY CODE AND BANKRUPTCY RULE 9019 AUTHORIZING DEBTORS TO IMPLEMENT SENIOR MANAGEMENT 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 Senior Management 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 Motion and at the

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

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 take any actions necessary to implement the Senior Management Global Settlement.

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

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

Dated: New York, New York
_____, 2012

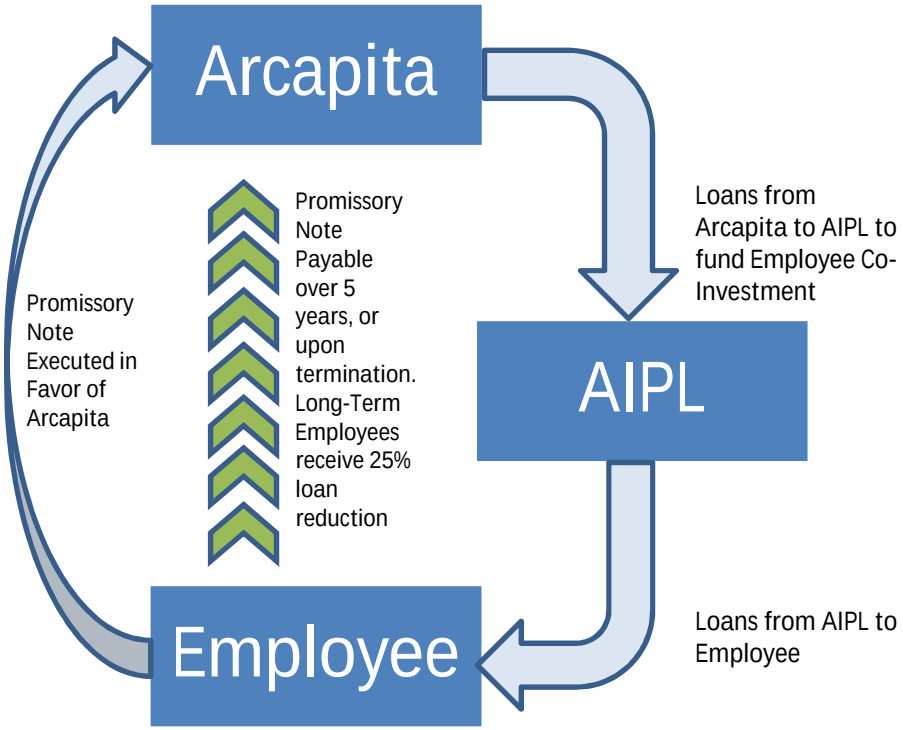
_____
THE HONORABLE SEAN H. LANE
UNITED STATES BANKRUPTCY JUDGE

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)