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

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	:
In re:	: Chapter 11
	:
	: Case No. 12-11076 (SHL)
ARCAPITA BANK B.S.C.(C), <u>et al.</u> ,	:
	: (Jointly Administered)
	:
Debtors.	:
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**MOTION OF OFFICIAL COMMITTEE OF  
UNSECURED CREDITORS FOR ENTRY OF AN ORDER  
PURSUANT TO FED. R. BANKR. P. 2004, 9006, AND 9016  
AUTHORIZING EXPEDITED DISCOVERY FROM THE DEBTORS**

The Official Committee of Unsecured Creditors (the "Committee") of Arcapita Bank B.S.C.(c) ("Arcapita") and the other debtors in possession in the above-captioned cases (collectively, the "Debtors") hereby submits this motion (this "Motion") pursuant to rules 2004, 9006 and 9016 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), requesting entry of an order authorizing the Committee to obtain discovery from the Debtors

regarding the corporate governance and control rights for their Portfolio Investments (as defined below). In support of this Motion, the Committee states as follows:

**PRELIMINARY STATEMENT**

1. To satisfy its statutory mandate to represent the interests of the Debtors' unsecured creditors in connection with the chapter 11 plan for the Debtors, the Committee requires certain information regarding the Debtors' Portfolio Investments. Specifically, the Committee seeks information on the Co-Investors and SIP Investors (each, as defined below) who hold the economic and/or voting interests in the Portfolio Investments alongside the Debtors to understand who the stakeholders in the Portfolio Investments are and what control risks the Debtors face.

2. A key issue that must be addressed in the Debtors' plan is who will manage the Debtors' businesses post-emergence and on what terms. Certain core members of the Debtors' management team have expressed a desire to remain with the Debtors in similar roles to those they currently occupy, but the Committee has not yet determined whether it can support such an arrangement. At the same time, the Debtors have repeatedly raised the spectre of the loss of control of the Portfolio Investments. The Committee has requested that the Debtors provide information to the Committee on the Co-Investors and SIP Investors. This information is readily available to the Debtors and yet, despite the Committee's requests and the Debtors' acknowledgement of the significance of the control risks, the Debtors have refused to provide the information to the Committee, without articulating any reasonable rationale for their refusal.

3. Most recently, the Debtors informed the Committee that members of the Debtors' management team formed a new management company ("Newco") to, among other things, advise some or all of the Co-Investors with respect to their investments alongside the

Debtors in the Portfolio Investments. In light of the potential conflicts of interests this arrangement presents, as well as the Committee's urgent need to make an informed determination regarding the appropriate go-forward management structure for the Debtors following emergence, the Committee submits that the Debtors should be required to make available to the Committee information necessary to understand what control risks exist with respect to the third party investors in the Portfolio Investments. The Committee is concerned that the Debtors may attempt to use their knowledge of the identity of the Co-Investors and SIP Investors to give existing management an inside track to secure post-emergence roles with the Debtors to the detriment of the Debtors' unsecured creditors. This should not be permitted.

4. The Committee files this Motion to obtain access to information that will permit it to understand the Portfolio Investments and negotiate appropriate governance provisions for the Debtors' chapter 11 plan. The Committee has no objection to receiving this information subject to reasonable and appropriate confidentiality restrictions.

### **BACKGROUND**

5. On March 19, 2012, Arcapita and five of its affiliates commenced the above-captioned chapter 11 cases. On April 30, 2012, Falcon Gas Storage Co., Inc. commenced its case under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101 et seq. (as amended, the "Bankruptcy Code"). The Debtors continue to manage their properties and operate their businesses as debtors in possession in accordance with sections 1107 and 1108 of the Bankruptcy Code.

6. On April 5, 2012, the United States Trustee for the Southern District of New York appointed the Committee. Since its formation, in furtherance of its statutory duties, the Committee has been investigating the Debtors' business operations, as well as their assets and liabilities. In the course of this investigation, it has become clear to the Committee that the

value of the Debtors' estates derives primarily from the Debtors' investments in the Portfolio Investments (as defined below).

7. Headquartered in Bahrain, Arcapita is the ultimate parent of a corporate family (the "Arcapita Group") that is a global manager of *Shari'ah*-compliant alternative investments and operates as an investment bank. The Arcapita Group's business model involved sourcing, structuring and syndicating investments to third party investors on a deal-by-deal basis across three global asset classes: real estate, infrastructure, and private equity and venture capital. Typically, each operating business in Arcapita's portfolio (collectively, the "Portfolio Investments") is held through a complex corporate holding structure, which features one or more non-Debtor holding companies, established specifically for the purpose of holding all of the interests in a given operating business (each, a "Holdco"). Each Holdco is owned in turn by investment vehicles that are themselves owned by Arcapita Group entities and certain third-parties that purchased interests in the specific Portfolio Investment through a syndication process conducted by the Arcapita Group (the "Co-Investors"). The ownership proportions held by Arcapita and its Co-Investors vary significantly between Portfolio Investments and the control rights of Arcapita and the Co-Investors vary as well. For U.S.-based Portfolio Investments, the Arcapita Group and Co-Investors hold only non-voting interests while 100% of the voting interests in the Portfolio Investments are concentrated in the hands of participants in the Arcapita Group's "Strategic Investor Program" (the "SIP Investors"). The Committee has not been provided any information regarding the identity of the Co-Investors, the SIP Investors or their holdings.

8. The Committee believes that, notwithstanding the size of the Debtors' position relative to the Co-Investors and the variations in the relevant holding structures, the

Debtors effectively maintain primary control of major investment decisions regarding each Portfolio Investment. The Committee believes that the Debtors' control over the Portfolio Investments is maintained primarily through boards of directors populated by Arcapita personnel and/or other insiders at various levels within the relevant holding structures. The control maintained by the Debtors appears to be strengthened by the complexity of the corporate structures through which the Portfolio Investments are held although, ultimately, the Committee believes, the Debtors' control over at least some of the Portfolio Investments could be lost to organized Co-Investors or SIP Investors who were able to coordinate the necessary corporate actions to take control of the boards of directors of the Holdcos of a given Portfolio Investment.

9. Control of the Portfolio Investments is essential to the Debtors' ability to maximize the value of their estates. In addition to the value generated from Arcapita's investment in the Portfolio Investments' equity, Arcapita also generates revenue from managing the Co-Investors' investments and from providing management services to the Portfolio Investments. For many Portfolio Investments, Arcapita is also invested as a lender. It is essential, therefore, for the Committee's understanding of the Debtors' assets and reorganization plan, that the Committee is able to fully understand what rights the Debtors have with respect to the control of their Portfolio Investments.

10. While the Committee has been given access to certain information with respect to the Debtors' Portfolio Investments, and the Debtors have recently changed course and committed to provide the Committee with the additional information it requires to understand the control rights in the corporate structures of the Portfolio Investments, the Committee lacks key information to understand what risks exist with respect to the Debtors' ability to maintain control.

11. In particular, the Committee has been refused information regarding the identities of the Co-Investors and SIP Investors and their respective interests in the relevant Portfolio Companies. Without such information, the Committee remains unable to fully evaluate the control risks or the importance of maintaining the existing management team post-emergence to control those risks. Accordingly, on December 1, 2012, the Committee's advisors requested additional information from the Debtors regarding the Debtors' material Portfolio Investments and the identities of the Co-Investors and SIP Investors. The Debtors refused to provide the requested information. While the Debtors subsequently agreed to provide the Committee with certain additional information on the corporate structures of the Portfolio Investments,<sup>1</sup> the Debtors remain unwilling to disclose to the Committee the identities of the Co-Investors and SIP Investors, even on a confidential basis. On February 15, 2013, the request for this information was renewed by the Committee chair and again refused by the Debtors.

12. On February 8, 2013, the Debtors filed a proposed plan of reorganization and related disclosure statement that contemplates the orderly wind-up of the Debtors' businesses, including the eventual monetization of the Portfolio Investments for the benefit of the Debtors' unsecured creditors. Issues related to the post-emergence management team and governance structure remain significant open points with respect to the Debtor's proposed plan.

13. In connection with the Committee's negotiation of the terms of the Debtors' chapter 11 plan, it is imperative that the Committee has a full understanding of (i) which parties have control rights (affirmative or negative) with respect to the monetization of the Debtors' investments in the Portfolio Investments, and (ii) to what extent the Debtors' ability to

<sup>1</sup> The Committee does not seek to compel disclosure of information regarding the corporate structures of the Portfolio Investments pursuant to this Motion on the understanding that the Debtors will cooperate in this regard. However, the Committee reserves its rights to seek such discovery on an expedited basis if the information is not, or ceases to be, forthcoming.

control these investments may be lost to or materially influenced by third parties, such as the Co-Investors, SIP Investors and the Newco recently formed by the Debtors' management team.

14. Accordingly, by this Motion, the Committee moves this Court for an order compelling the Debtors to provide the Committee, on an expedited basis, the requested documents and information so that the Committee can evaluate the investment control risks associated with the Portfolio Investments. The Committee further reserves the right to make additional reasonable requests for information relating to its ongoing negotiations of the terms of chapter 11 plans for the Debtors.

#### **JURISDICTION AND VENUE**

15. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409. Pursuant to sections 1103(c)(2) and 1109(b) of the Bankruptcy Code, the Committee has standing to seek the relief sought in this Motion.

#### **RELIEF REQUESTED**

16. The Committee seeks entry of an order, in the form attached hereto as Exhibit A (the "Proposed Order"), pursuant to Bankruptcy Rules 2004, 9006 and 9016 authorizing the Committee to obtain expedited discovery from the Debtors to enable the Committee to properly discharge its fiduciary duties and conduct an investigation of the "acts, conduct, [and] assets" of the Debtors, "the operation of the [D]ebtor[s]' business" and any "matter[s] relevant to the case or to the formulation of a plan." 11 U.S.C. §1103(c)(2). Specifically, the Proposed Order directs the Debtors to produce the documents set forth in Schedule 1 attached to the Proposed Order (the "Document Requests"). The Proposed Order

also requires the Debtors to respond to all other reasonable discovery requests that the Committee may issue in connection with this investigation.

### **BASIS FOR RELIEF REQUESTED**

17. The Committee is a party in interest under section 1109(b) of the Bankruptcy Code that is authorized to obtain relief under Bankruptcy Rule 2004. Bankruptcy Rule 2004 provides, in relevant part:

(a) Examination on Motion. On motion of any party in interest, the court may order the examination of any entity.

(b) Scope of Examination. The examination of an entity under this rule or of the debtor under § 343 of the Code may relate only to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge.

(c) Compelling Attendance and Production of Documentary Evidence. The attendance of an entity for examination and for the production of documents, whether the examination is to be conducted within or without the district in which the case is pending, may be compelled as provided in Rule 9016 for the attendance of a witness at a hearing or trial.

18. Bankruptcy Rule 2004 provides for very broad discovery, including any matter relevant to the case or to the formulation of a plan. "The purpose of Rule 2004 examination is 'to show the condition of the estate and to enable the court to discover its extent and whereabouts and to come into possession of it that the rights of creditors may be preserved.'" In re Coffee Cupboard, Inc., 128 B.R. 509, 514 (Bankr. E.D.N.Y. 1991) (citing Cameron v. United States, 231 U.S. 710, 717 (1914)). Indeed, the investigative power embodied in Bankruptcy Rule 2004 is so broad that an examination thereunder can "legitimately be in the nature of a fishing expedition." In re Wilcher, 56 B.R. 428, 433 (Bankr. N.D. Ill. 1985); see also In re Hilsen, No. 87-11261, 2008 Bankr. LEXIS 2123, at \*1-2 (Bankr. S.D.N.Y. July 25, 2008)



(same); In re Bakalis, 199 B.R. 443, 447 (Bankr. E.D.N.Y. 1996) (same); Keene Corp. v Johns-Manville Corp. (In re Johns-Manville Corp.), 42 B.R. 362, 364 (S.D.N.Y. 1984) (same).

19. The discovery sought herein falls squarely within the scope of Bankruptcy Rule 2004. The documents and other information sought through the Document Requests relate directly to the Debtors' principal assets, i.e., the Portfolio Investments, as well as key facts that could affect the value of the Debtors' estates. A thorough review of this information by the Committee is critical to the formulation of chapter 11 plans for the Debtors that are fair and equitable to the Debtors' creditors. Indeed, "[w]hen a power granted under section 1103 is needed for the committee to fulfill its overriding duty of protecting the creditors' interest, the committee is obliged to employ the power." Advisory Comm. of Major Funding Corp. v. Sommers (In re Advisory Comm. of Major Funding Corp.), 109 F.3d 219, 224 (5th Cir. 1997).

20. Bankruptcy Rule 9006(c)(1) provides that "when an act is required or allowed to be done at or within a specified time by [the Bankruptcy Rules] or by a notice given thereunder or by order of court, the court for cause shown may in its discretion with or without motion or notice order the period reduced." Fed. R. Bankr. P. 9006(c)(1). The Committee respectfully requests that the Court shorten the time set forth in Bankruptcy Rule 9016 to require responses to the Committee's discovery requests within ten (10) days.

21. This proposed reduction is appropriate as a hearing to consider approval of the Debtors' proposed disclosure statement is scheduled for March 26, 2013. Thus, it is critical that the Committee receive the information set forth in the Document Requests as soon as possible.

22. After receiving and reviewing the documents responsive to the Document Requests, the Committee may determine that further discovery is necessary to fulfill its duties

and exercise its powers pursuant to section 1103(c)(2). The Committee reserves its rights to request and/or to conduct any other discovery, pursuant to Bankruptcy Rules 2004, 7034 and 9016 or other applicable rule or law, from any person or entity.

23. Courts have repeatedly emphasized the central role of creditors' committees in large and complex chapter 11 cases, such as these, in ensuring that the views of unsecured creditors are heard and their interests protected. See Pan Am Corp. v. Delta Air Lines, Inc., 175 B.R. 438, 514 (S.D.N.Y. 1994) ("An official committee of creditors plays a pivotal role in the bankruptcy process. The function of an official creditors committee is to aid, assist and monitor the debtor to ensure that the unsecured creditors' views are heard and their interests promoted and protected.") (internal citations omitted); In re Johns-Manville Corp., 26 B.R. 919, 925 (Bankr. S.D.N.Y. 1983) ("[F]iduciary duties [of reorganization committees] are crucial because of the importance of committees. Reorganization committees are the primary negotiating bodies for the plan of reorganization. ... [The] wide and important array of authority [provided to committees] indicat[es] the intent to create a significant and central role for committees in carrying out a reorganization.") (internal citations omitted). Only an informed Committee can fulfill its fiduciary duties to the unsecured creditor body and play a central role in these chapter 11 cases.

### **NOTICE**

24. Notice of this Motion has been given to: (a) counsel to the Debtors; (b) the Office of the United States Trustee; (c) Fortress Credit Corp., as debtor-in-possession lender, and (d) all parties requesting notice and service in these cases pursuant to Bankruptcy Rule 2002. In light of the nature of the relief requested, the Committee submits that no further or other notice is required.

**NO PRIOR REQUEST**

25. No prior application for the relief requested in this Motion has been made to this or any other Court.

**CONCLUSION**

WHEREFORE, the Committee respectfully requests that the Court grant this Motion and enter the Proposed Order, (i) authorizing the Committee to obtain discovery from the Debtors, pursuant to Bankruptcy Rules 2004, 9006 and 9016, regarding the corporate governance and control rights with respect to the Portfolio Investments, (ii) directing the Debtors to produce the documents identified in Schedule 1 attached to the Proposed Order, and (iii) granting such other relief as is just.

Dated: February 19, 2013  
New York, New York

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**EXHIBIT A**

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

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In re: : Chapter 11  
: :  
: : Case No. 12-11076 (SHL)  
ARCAPITA BANK B.S.C.(C), et al., : :  
: : (Jointly Administered)  
: :  
Debtors. : :  
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**ORDER AUTHORIZING DISCOVERY FROM THE DEBTORS**

Upon the motion of the Official Committee of Unsecured Creditors (the “Committee”) of the debtors in the above-captioned cases (collectively, the “Debtors”), pursuant to rules 2004, 9006 and 9016 of the Federal Rules of Bankruptcy Procedure for an order authorizing the Committee to obtain discovery from the Debtors regarding corporate governance and control rights with respect to the Portfolio Investments; and the Court having jurisdiction over the Motion pursuant to 28 U.S.C. §§ 1334 and 157; and notice of the Motion having been sufficient under the circumstances and no other or further notice being required; and after due consideration and good cause appearing therefore, it is hereby:

**ORDERED** that the Motion is granted; and it is further

**ORDERED** that the Committee is authorized to serve any subpoena, document request, request for admission, or other discovery, including, without limitation, the Document Requests identified in **Schedule 1** attached hereto by email, fax, overnight delivery or mail to the Debtors’ counsel; and it is further

**ORDERED** that the Debtors shall respond within 10 (ten) days of the date of receipt of such subpoena, document request, request for admission, or other discovery by their counsel; and it is further

**ORDERED** that the Committee is authorized to conduct, without further order of this Court, additional discovery beyond that specifically named in the Document Requests (as defined in the Motion), including, without limitation, additional document requests and depositions from the 2004 Parties and any other person or entity, to the extent the Committee deems necessary and to the extent additional discovery relates to the Committee's investigation under § 1103 of the Bankruptcy Code.

Dated: New York, New York  
\_\_\_\_\_, 2013

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THE HONORABLE SEAN H. LANE  
UNITED STATES BANKRUPTCY JUDGE

**Schedule 1**

## **REQUESTS FOR PRODUCTION OF DOCUMENTS**

### **A. Definitions**

The Committee hereby incorporates by reference the uniform definitions set forth in Rule 26.3 of the Local Rules of the United States District Courts for the Southern and Eastern Districts of New York. In addition, the following definitions apply:

1. The terms “Debtors”, “you”, and “your” refer to Arcapita Bank B.S.C. (c) (formerly known as First Islamic Investment Bank B.S.C. (c)), Arcapita Investment Holdings Limited, Arcapita LT Holdings Limited, WindTurbine Holdings Limited, AEID II Holdings Limited, RailInvest Holdings Limited, and each of their fellow debtors and debtors in possession, the estates of which are jointly administered under the caption *In re: Arcapita Bank B.S.C. (c), et al.*, Chapter 11 Case No. 12-11076 (SHL) before the United States Bankruptcy Court for the Southern District of New York, as well as such entities’ various non-debtor affiliates.

2. The term “portfolio investment” refers to any group of affiliated operating companies in which you hold any economic, voting or other type of interest.

3. The term “holding structure” refers to, with respect to a portfolio investment, all entities in the corporate family including the investment companies and each intermediate entity that holds any direct or indirect economic, voting or other interest in the Opco(s) (including any direct or indirect legal owner of the Opco that is not beneficially owned by the investment companies, such as a corporate services provider) and the Opco(s).

4. The term “Opco” refers to the operating company or companies of a portfolio investment.

5. The term “investment company” refers, with respect to a portfolio investment, to any entity (including any entity referred to as a syndication company, SIP, PNV, PV or other entity), that indirectly owns any economic, voting or other interests in the portfolio investment.



6. The term “proxy” refers to any proxy, appointment of attorney-in-fact or similar arrangement, pursuant to which you or any of your affiliates or direct or indirect subsidiaries are the donee or grantee.

7. The term “share register” refers to any record of an entity’s shareholders, members or other holders of equity interests as maintained by or on behalf of such entity.

8. The terms “and” and “or” shall be construed either conjunctively or disjunctively as necessary to bring within the scope of the request all responses that might otherwise fall outside the scope of the request.

9. The masculine includes the feminine and neuter genders. The past tense includes the present tense where the clear meaning is not distorted by change of tense.

**B. Instructions**

10. This document requests seek production of all responsive documents in the possession, custody, or control of the Debtors from all files, wherever located, whether active, in storage or otherwise, and whether public or non-public.

11. All documents produced shall be organized and labelled to correspond with the categories in Section C below, or shall be produced as they are kept in the ordinary course of business. Any document relating to more than one category may be grouped with documents in any applicable category.

12. The document requests are continuing in nature; therefore, you have a duty to supplement your production promptly upon obtaining or learning of additional responsive documents.

13. The document requests seek the production of all responsive documents created, drafted, sent, or received during the period beginning June 1, 2010 through the present, unless some other time period is specified in a particular request. If any requested document was

formerly in the possession of the Debtors and has been lost, transferred, altered, or destroyed, submit a written statement concerning each non-produced document which:

- A) describes in detail the missing document and its contents;
- B) identifies the person who prepared or drafted the document and, if applicable, the person to whom the document was sent or delivered;
- C) specifies the date on which the document was drafted or transmitted; and
- D) specifies the date on which the document was lost, transferred, altered, or destroyed and, if applicable, the circumstances surrounding its alteration or destruction.

14. Duplicate copies of a document need not be produced unless they contain writings, notes, or other unique characteristics that do not appear on all other copies of that document.

15. If you contend that a responsive document is privileged, in whole or in part, and therefore should not be produced or produced in redacted form, you shall comply with Rule 26(b)(5) of the Federal Rules of Civil Procedure in setting forth the information with respect to each claim or privilege.

**C. Documents Requested from the Debtors**

16. With respect to each portfolio investment, please provide the following documents:

- i. All proxies executed with respect to any company in the holding structure.
- ii. All documents evidencing the revocation of a proxy executed with respect to any company in the holding structure.
- iii. A current share register for each entity within the holding structure.