Hearing Date and Time: March 26, 2013 at 11:00 a.m.
Objection Deadline: March 19, 2013 at 4:00 p.m.

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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)**

MOTION OF GOLDMAN SACHS INTERNATIONAL FOR ALLOWANCE OF AN ADMINISTRATIVE EXPENSE PURSUANT TO 11 U.S.C. §§ 503(B)(1), 503(B)(3)(D) AND 503(B)(4)

Goldman Sachs International ("**GSI**") by and through its undersigned counsel files this Motion (the "**Motion**") for allowance and payment of an administrative expense against the estates of Arcapita Bank B.S.C.(c) ("**Arcapita**") and its affiliated debtors other than Falcon Gas Storage Company, Inc. (collectively, the "**Debtors**") pursuant to sections 503(b)(1), 503(b)(3)(D) and 503(b)(4) of Title 11 of the United States Code (the "**Bankruptcy Code**") in the amount of $250,000 (the "**Administrative Expense Amount**"). In support of this Motion, GSI respectfully states as follows:

INTRODUCTION

On September 25, 2012, the Debtors filed a motion for approval to enter into a commitment for a debtor-in-possession financing facility ("**DIP Financing**") with a prospective financing party (the "**First Proposed DIP Financing Party**" and such proposed commitment, the "**First DIP Proposal**"). The Official Committee of Unsecured Creditors (the "**Committee**") and the Debtors' senior secured prepetition creditor (the "**Senior Prepetition Creditor**") opposed the Debtors' entry into the First DIP Proposal on the basis that the proposed commitment imposed onerous terms on the Debtors' estates but remained subject to conditions, including completion of diligence. At a hearing on October 9, 2012, the Court adjourned hearing on the First DIP Proposal and suggested that the parties continue marketing and seek alternative proposals for the DIP Financing.

At the Committee's request, GSI and its counsel, Latham & Watkins LLP ("**Counsel**"), immediately began a herculean effort to prepare a proposal for DIP Financing. GSI's and Counsel's work included (1) due diligence on the proposed collateral for DIP Financing, (2) analysis of (a) the novel complexities of Shari'ah-compliant DIP Financing and (b) the far greater and more challenging complexities presented by the Debtors' capital and portfolio ownership structures and (3) drafting and negotiation of commitment papers, including a comprehensive term sheet, for DIP Financing. The extraordinary efforts of GSI and its Counsel led to a DIP Financing proposal on terms that were substantially more valuable for the Debtors' estates than those of the First DIP Proposal. GSI's involvement had a profound impact on the DIP Financing process by leading other potential financing parties to offer more competitive DIP Financing proposals, as demonstrated by the steady evolution in commercial terms of the Debtors' DIP Financing proposals. The resulting competition ultimately enabled the Debtors to

secure a commitment for DIP Financing on far more favorable terms than those of the First DIP Proposal and ultimately on terms that would not have been available absent a competitive process.

GSI made a substantial contribution to the Debtors' estates by offering economic and structural terms that provided the Debtors with a viable financing option and the necessary leverage to secure the best-available DIP Financing package. In addition to generating substantial savings to the estates, GSI's contributions mooted the objections to the First DIP Proposal that would have otherwise resulted in time consuming and expensive litigation and impeded the Debtors' efforts to obtain DIP Financing.

GSI submits that, whether measured qualitatively or quantitatively, the value GSI contributed to the DIP Financing process, and thus the benefits it provided to the Debtors, the creditors and the estates, are the very essence of a "substantial contribution" claim under section 503(b)(3)(D) of the Bankruptcy Code, or, in the alternative, are actual, necessary costs of preserving the Debtors' estate that meet the requirements of section 503(b)(1) of the Bankruptcy Code. Although GSI incurred expenses (including the fees and expenses of its Counsel) that greatly exceed the Administrative Expense Amount, GSI requests only this limited amount in satisfaction of its substantial contribution claim. Both the Debtors and the Committee support the relief requested in this Motion.

GSI requests allowance of an administrative expense of $250,000 on account GSI's expenses (including the fees and expenses of its Counsel) and payment of such amount upon the earlier of (a) the expiration of the period in which an appeal of an order granting the Motion may be taken under Federal Rule of Bankruptcy Procedure 8002(a) and (b) the dismissal of any appeals of an order granting the Motion.

FACTUAL BACKGROUND

1. A brief synopsis of the process through which the Debtors ultimately obtained DIP Financing is set forth below:

- On September 25, 2012, the Debtors filed a motion seeking the Court's approval to execute a commitment letter with the First Proposed DIP Financing Party. This motion was met with an objection from the Committee and a limited objection and reservation of rights from the Senior Prepetition Creditor.

- On October 9, 2012, the Court adjourned the hearing on the First DIP Proposal and suggested the parties solicit alternative financing proposals. On the same date, GSI executed a confidentiality agreement with the Debtors and began working with the Debtors to prepare and negotiate a DIP Financing proposal.

- The work of GSI and its Counsel to provide an alternative and superior DIP Financing option for the Debtors enabled the Debtors and the Committee to continue negotiations that resulted in a competitive process and increasingly beneficial terms for the Debtors' estates.

- The Court approved a commitment for a DIP Financing on November 9, 2012 on terms significantly more favorable to the Debtors' estates than the First DIP Proposal and other successive proposals. The Court ultimately approved the Debtors' DIP Financing on December 14, 2012.

2. As demonstrated below, the participation of GSI in the DIP Financing process was a turning point in the Debtors' and Committee's ability to obtain the financing terms ultimately incorporated into the Final DIP Proposal (as defined below).

I. The First DIP Proposal

3. On August 29, 2012, the Debtors filed their *Motion For an Order Approving Expense Reimbursement In Connection With Prospective Post-Petition Financing* [Dkt. No. 448], seeking authorization to reimburse up to $500,000 of the actual and reasonable expenses incurred by a financing party in connection with the negotiation and documentation of DIP Financing. The Debtors argued that such expense reimbursement would be necessary to create

an incentive for any financing party to undertake drafting and negotiation of DIP Financing documents that would meet the Debtors' needs. The Court approved the expense reimbursement in an order signed on September 21, 2012. *Order Approving Expense Reimbursement In Connection With Prospective Post-Petition Financing* [Dkt. No. 500].

4. On September 25, 2012, the Debtors filed their *Motion For Entry Of An Order Authorizing the Debtors To Enter Into A Financing Commitment Letter And Incur Related Fees, Expenses And Indemnities* [Dkt. No. 513] (the "**Commitment Motion**") seeking the Court's approval of the Debtors' entry into a commitment letter (the "**Commitment Letter**") with the First Proposed DIP Financing Party, which provided for a $150 million secured debtor-in-possession Murabaha facility.[1]

5. The Commitment Letter was contingent upon completion of due diligence and credit committee approval (the "**Subject Conditions Precedent**"). Furthermore, the Commitment Letter provided the First Proposed DIP Financing Party with a termination right based on a broadly-drafted definition of "Material Adverse Effect."

6. The First DIP Proposal limited the Debtors to a one-time draw of the entire $150 million facility, regardless of the Debtors' actual financing needs, and required the payment of fees on the full amount of the facility, including an obligation to pay a fee of 10.5 percent per annum on any undrawn amount if the Court authorized the Debtors to draw only a part of the total commitment in the interim period. The First DIP Proposal required the Debtors to obtain approval from the Court for up to an additional $400,000 in expense reimbursement.

[1] The security package included (A) perfected first-priority liens on: (i) all of the Debtors obligors' unencumbered property, with enumerated exceptions; and (ii) all material property owned by the non-Debtor obligors, with enumerated exceptions; and (B) perfected junior liens on all property owned by the Debtor obligors that were encumbered by prepetition liens.

7. The First DIP Proposal also required that the Debtors pay a $2.25 million commitment fee (1.50 percent of the committed amount) to the First Proposed DIP Financing Party upon the First DIP Financing Party's completion of the Subject Conditions Precedent. Furthermore, the First DIP Proposal authorized the First Proposed DIP Financing Party to terminate the Commitment Letter and earn a break-up fee of $1.125 million (0.75 percent of the committed amount) if the Debtors merely engaged in negotiations with other potential financing parties, even if the Debtors failed to obtain alternative financing (the "**No-Shop Provision**").

8. In response to the Commitment Motion, the Committee filed a *Response and Limited Objection to Debtors' Motion to Approve DIP Commitment Letter and Fee Letter* [Dkt. No. 533], arguing, among other things, that the significant obligations and commitments imposed on the Debtors' estates by the Commitment Letter were not justified without an unconditional commitment from the First Proposed DIP Financing Party in return. Furthermore, the Debtors' Senior Prepetition Creditor filed a *Limited Objection and Reservation of Rights* [Dkt. No. 531] with respect to the Commitment Motion, noting that, among other deficiencies, the First DIP Proposal "is a blatant attempt to extract as much financial gain as possible at the expense of the Debtors' estates and to accelerate the approval of the full . . . DIP Facility." *Id.*, ¶ 4.

9. On October 9, 2012, the Court held a hearing on the Commitment Motion. During the hearing, the Court expressed its concerns with the structure of the First DIP Proposal—in particular, the contingent nature of the First Proposed DIP Financing Party's obligations. Hr'g Tr. 95:7-95:15, Oct. 9, 2012 ("My concern is about the lack of a commitment. . . . I'm just not sure what the estate is really getting here."). The Court further questioned the merits of the First Proposed DIP Financing Party's No-Shop Provision as a "de facto barrier to an actual other agreement." Hr'g Tr. 101:8-101:16, Oct. 9, 2012.

II. The Bidding Process

10. On or about October 9, 2012, GSI signed a confidentiality agreement with the Debtors and began to conduct expedited due diligence on the Debtors and the proposed collateral for the DIP Financing. During this period, another potential financing party (the "**Final DIP Financing Party**") submitted a proposal for DIP Financing. On October 18, 2012, GSI delivered its own proposal for DIP Financing (the "**First GSI Proposal**") to the Debtors and Committee that included, among other improved terms, provisions for a multi-draw facility, as opposed to a single-draw facility, and conversion of the DIP Financing into an exit facility. Furthermore, the First GSI Proposal reflected an earnest effort to propose DIP Financing fundamentally rooted in Shari'ah principles, rather than a facility akin to standard DIP Financing with selective use of Shari'ah terminology, such as the First DIP Proposal.

11. On the same day that GSI submitted its First GSI Proposal, the First Proposed DIP Financing Party provided the Debtors with a revised commitment letter that included concessions in favor of the Debtors, some of which were originally introduced into negotiations by GSI. The First Proposed DIP Financing Party dropped out of the bidding process shortly thereafter.

12. Throughout this multi-week process, GSI and its Counsel were involved in extensive negotiations and worked around the clock to provide the Debtors with continually evolving proposals, each of which supported the Debtors' efforts negotiate DIP Financing and further improved upon the financing terms. GSI presented the Debtors with a binding commitment in early November and continued to negotiate with the Debtors to improve the terms of GSI's commitment in response to the Debtors' requests until the Debtors decided to obtain DIP Financing from the Final DIP Financing Party and bring the Commitment Motion (as

supplemented) before the Court on November 7, 2012. Over this period, GSI's commitment and engagement provided the Debtors with leverage to negotiate with the other potential financing participants and thereby benefited the Debtors' estates. The evolution towards more favorable DIP Financing terms is evidenced by change in terms from the First DIP Proposal to the Debtors' supplement to the Commitment Motion filed on November 1, 2012 [Dkt. No. 610] and finally to the commitment letter approved under the *Order Authorizing the Debtors to Enter into the Revised Fortress Commitment Letter and Incur Related Fees, Expenses and Indemnities* [Dkt. No. 620] (the "**DIP Commitment Order**").

13. On November 9, 2012, the Court entered the DIP Commitment Order approving a revised commitment from the Final DIP Financing Party (the "**Final DIP Proposal**"). The Final DIP Proposal included (i) a commitment of up to $150 million (the "**DIP Commitment Amount**"), subject to mandatory reduction within 120 days of closing of the DIP facility, (ii) a commitment fee of 2.0 percent of the DIP Commitment Amount ($2.5 million), to be paid upon entry of the order authorizing execution of the DIP Financing, and (iii) reimbursement of the Final DIP Financing Party's expenses incurred through the date of entry of that order, plus an additional $250,000 deposit to cover future expenses. *See* DIP Commitment Order.

14. The Final DIP Proposal contained a number of significant structural and economic improvements that benefitted the Debtors, their creditors, and their estates. Many of these improvements were initially proposed by GSI or were obtained by the Debtors' exertion of the leverage provided by GSI's extensive involvement in the negotiation process. These valuable structural improvements include (a) conversion of the DIP Financing into an exit facility, (b) permitted multiple draws with a reduced cost for unfunded commitments and (c) documentation that was designed from the ground up to meet the Debtors' needs for Shari'ah-

compliant DIP Financing. In addition, the Final DIP Proposal eliminated the harshest financial aspects of the First DIP Proposal, including the hair trigger commitment and breakup fees.

15. GSI submits that it provided direct and tangible financial and structural benefits to the Debtors, their creditors and their estates by offering the terms for DIP Financing that the Final DIP Financing Party was ultimately compelled to match and improve upon to be selected by the Debtors to provide DIP Financing. These actual, material benefits to the Debtors' estates amount to a "substantial contribution," and the expenses incurred by GSI in connection with the DIP Financing process are actual, necessary costs and expenses of preserving the Debtors' estates. The Debtors and the Committee, which GSI submits are the estate fiduciaries that were most closely involved in the DIP Financing process, support the relief requested by this Motion.

ARGUMENT

GSI IS ENTITLED TO ALLOWANCE AND PAYMENT OF AN ADMINISTRATIVE EXPENSE REFLECTING ITS SUBSTANTIAL CONTRIBUTION AND ACTUAL, NECESSARY EXPENSES OF PRESERVING THE DEBTORS' ESTATES

16. Pursuant to section 503(b) of the Bankruptcy Code, GSI seeks allowance and payment of an administrative expense in the amount of $250,000 as partial compensation for the costs and expenses incurred by GSI (including the fees and expenses of its Counsel) in connection with the DIP Financing process. GSI's participation in the Debtors' DIP Financing process benefited and preserved the Debtors' estates by (a) leading a competitive process resulting in DIP Financing on more favorable terms than the First DIP Proposal and further successive proposals that culminated in the Final DIP Proposal and (b) enabling the Debtors to obtain approval of the Final DIP Proposal without objection the Committee or Senior Prepetition Creditor, thereby obviating the need for time-consuming and costly litigation. The administrative expense requested by GSI represents a mere fraction of the total expenses

incurred by GSI in conducting its extensive due diligence and drafting and negotiation of multiple DIP proposals. GSI submits that the foregoing expenses are reasonable in light of its substantial contribution to the Debtors' estates.

I. The Legal Standards

17. Section 503(b)(3)(D) of the Bankruptcy Code entitles a stakeholder or creditor to recover as administrative expenses the actual and necessary expenses incurred in making a "substantial contribution" in a case under Chapter 11. 11 U.S.C. § 503(b)(3)(D).[2] Moreover, as described further below, section 503(b)(4) provides for reasonable compensation for professional services rendered by an attorney or accountant to a party that has made a substantial contribution. 11 U.S.C. § 503(b)(4).

18. The reimbursement of stakeholders who make a substantial contribution to a Chapter 11 case is designed to promote meaningful participation in the reorganization process. See, e.g., In re Richton Int'l Corp., 15 B.R. 854, 855-56 (Bankr. S.D.N.Y. 1981) (noting that "[t]he policy aim of authorization of such compensation is to promote meaningful creditor participation in the reorganization process" and that "[c]oncomitant with the aim of creditor participation is the authorization of compensation for counsel to creditors") (citations omitted); see also In re 9085 E. Mineral Office Bldg., Ltd., 119 B.R. 246, 253 (Bankr. D. Colo. 1990)

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[2] Section 503(b)(3)(D) of the Bankruptcy Code provides, in pertinent part:

> (b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 503(f) of this title, including—
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> . . .
>
> (3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by—
>
> . . .
>
> (D) a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a substantial contribution in a case under chapter 9 or 11 of this title . . .

11 U.S.C. § 503(b)(3)(D).

(warning that a narrow application of substantial contribution awards would have a chilling effect upon the section's goal of encouraging meaningful creditor participation).

19. Although the Bankruptcy Code does not define the term "substantial contribution," courts have held that an applicant has "substantially contributed" to a Chapter 11 case "when it is demonstrated that the services rendered have substantially contributed an actual, direct and demonstrable benefit to the estate [and] its creditors . . . ." In re Am. Preferred Prescription, Inc., 194 B.R. 721, 726 (Bankr. E.D.N.Y. 1996); see, e.g., In re Bayou Grp., LLC, 431 B.R. 549, 562 (Bankr. S.D.N.Y. 2010) (substantial contribution award justified where creditor "actively facilitated the negotiation and successful confirmation of the chapter 11 plan or, in opposing a plan, brought about the confirmation of a more favorable plan"); In re McLean Indus., Inc., 88 B.R. 36, 39 (Bankr. S.D.N.Y. 1988) (creditor made substantial contribution where its objection prompted other objections that resulted in an increase to the value of the estate).

20. Further, courts exercise their discretion and examine the totality of the relevant facts when determining whether a party has "substantially contributed" to a case under Chapter 11. See In re U.S. Lines, 103 B.R. 427, 430 (Bankr. S.D.N.Y. 1989); see also In re 9085 E. Mineral Bldg., 119 B.R. 246, 253 (Bankr. D. Colo. 1990) (awarding compensation where applicant's efforts, when "viewed as a whole," made a substantial contribution to the debtor's estate).

21. This Court has made it clear that the substantial contribution test is applied "in hindsight, and scrutinizes the actual benefit to the case" of the applicant's action. Granite Partners, L.P., 213 B.R. 440, 447 (Bankr. S.D.N.Y 1997). In focusing on the actual benefits realized by the estates and the creditors as a result of the claimant's action, this Court has drawn

a distinction between the standards for substantial contribution awards on the one hand, and fee applications under section 330(a) of the Bankruptcy Code, on the other. Id.

22. The requested administrative expense for contributions made to the estates asserted by GSI is also justified under section 503(b)(1)(A) of the Bankruptcy Code, allowing the "actual, necessary costs and expenses of preserving the estate." 11 U.S.C. § 503(b)(1)(A). To determine whether a claim is entitled to administrative expense priority under section 503(b)(1)(A), courts require that the claim (i) arise from a transaction with the bankruptcy estate, and (ii) must have directly and substantially benefitted the estate. See, e.g., In re Eagle-Picher Indus., Inc., 447 F.3d 461, 464 (6th Cir. 2006); In re Tyson, Case No. 03-41900, 2005 WL 3789356, *8 (Bankr. S.D.N.Y. June 3, 2005); Microsoft Corp. v. DAK Indus., Inc. (In re DAK Indus., Inc.), 66 F.3d 1091, 1094 (9th Cir. 1995); In re Jartran, 732 F.2d 584, 587 (7th Cir. 1984). When a losing bidder can demonstrate that its actions assisted the Debtors and directly contributed to the estate's receiving more than it would have otherwise, a section 503(b)(1)(A) claim is appropriate. See In re Tyson, 2005 WL 3789356, *8-9 (approving an unsuccessful bidder's administrative expense claim where the bidder's participation led to resolution of a title dispute); In re Tama Beef Packing, Inc., 321 B.R. 496, 497-98 (B.A.P. 8th Cir. 2005) (approving an unsuccessful stalking horse bidder's post-bidding administrative expense claim seeking reimbursement of its actual expenses incurred in advancing the competitive bidding process). See also In re Tropea, 352 B.R. 766, 768 (Bankr. N.D.W.V. 2006) (stating that "[p]ursuant to section 503(b)(1), no express contract need exist providing for a break-up fee; an unsuccessful stalking horse bidder may seek reimbursement of its actual expenses"); In re Dorado Marine, Inc., 332 B.R. 637, 641 (Bankr. M.D. Fla. 2005) (allowing an unsuccessful stalking horse bidder's post-bidding administrative expense claim for expenses incurred in conducting due

diligence and other efforts that were relied upon by other bidders and served as a catalyst for higher bids).

23. Applying these standards as a whole, GSI has conferred an actual demonstrable benefit to these cases entitling it to allowance and payment of an administrative expenses to compensate GSI for its expenses, including the reasonable fees and expenses of its Counsel. Indeed, section 503(b)(4) specifically provides that an applicant is entitled to, as an administrative expense:

> *reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under [section 503(b)(3)]*, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant . . . .

11 U.S.C. § 503(b)(4) (emphasis added). As GSI provided a substantial contribution to these cases and is thus entitled to an allowed administrative expense under section 503(b)(3)(D) of the Bankruptcy Code, it is also entitled to be reimbursed for its Counsel's reasonable fees and actual, necessary expenses under section 503(b)(4). Notwithstanding the full amount of its expenses in connection with the DIP Financing process, GSI requests allowance and payment of the limited Administrative Expense Amount, representing only a portion of its potential administrative expenses, in full satisfaction of its claim.

II. GSI Provided a Substantial and Cognizable Benefit to the Debtors' Estates

24. Courts have found that applicants have conferred an actual and demonstrable benefit to a Chapter 11 case in a variety of contexts, including where such applicant can show that it provided a monetary benefit to the debtor's estate. See, e.g., In re Dorado Marine, 332 B.R. at 641 (finding that bidder's participation as a stalking horse bidder was a substantial benefit to the estate because it served as a catalyst for higher bids). By bidding against the First

DIP Proposal and continuing to make proposals for DIP Financing that offered the Debtors superior structural and financial terms, GSI enabled the Debtors to obtain DIP Financing on superior economic and structural terms than those offered in the First DIP Proposal, thereby producing a monetary benefit to the Debtors, their creditors and estates.

25. As described above, the First DIP Proposal included a range terms that were burdensome to the Debtors' estates, each of which received strong objections from the Committee and the Senior Prepetition Creditor. To begin with, the commitment from the First Proposed DIP Financing Party was entirely contingent on its completion of due diligence and approval of its credit committee, which effectively made it a proposal rather than a true firm commitment. See Response and Limited Objection of Official Committee of Unsecured Creditors to Debtors' Motion to Approve DIP Commitment Letter and Fee Letter [Dkt. No. 533], ¶ 3. In addition, the First Proposed DIP Financing Party had the option to terminate its commitment based on a very broad material adverse effect provision without forfeiting its $2.25 million commitment fee. Taken together, these two provisions gave the First Proposed DIP Financing Party substantial flexibility to walk away from the DIP Financing, while potentially still collecting a sizable fee from the Debtors' estates. Despite the First Proposed DIP Financing Party's ability to walk away from its DIP Financing commitment, the No Shop Provision would have created barriers to any competing DIP Financing proposal by preventing the Debtors from negotiating with other financing parties without incurring a $1.125 million break-up fee.

26. Furthermore, the structure of the DIP Financing was inflexible and did not consider the particular needs of the Debtors. The First DIP Proposal permitted only a single $150 million draw down and required the payment of a 10.5 percent per annum fee on the full facility amount, regardless of whether such amount was actually drawn. Furthermore, the First

DIP Proposal merely feigned Shari'ah compliance by proposing a conventional DIP Financing and substituting some Shari'ah terminology in the place of conventional terms, in disregard of the specific Shari'ah requirements of the Debtors.

27. The Final DIP Proposal, which was ultimately approved by the Court, consisted of terms that were substantially superior for the Debtors' estates to those in the First DIP Proposal, and accordingly received no objections. Some of the improved terms included (i) a meaningful "unused line fee" that substantially reduced the fee on any undrawn amounts as compared to the First DIP Proposal and was structured towards Shari'ah compliance, (ii) the Debtors' ability to access the DIP Financing in multiple draws, and (iii) an overall financing structure that was framed around Shari'ah compliance.

28. These vastly improved terms provided an actual and demonstrable benefit to the Debtors' estates and their creditors. The participation of GSI in the DIP Financing process spurred a number of concessions on the part of the First Proposed DIP Financing Party in its subsequent proposals, as well as a host of new, favorable terms that GSI introduced into negotiations, which ultimately made their way into the Final DIP Proposal. Taken as a whole, GSI's extensive participation in the DIP Financing process was a direct cause of this actual and demonstrable benefit that accrued to the Debtors' estates. Therefore, GSI provided a substantial contribution to these cases and incurred actual, necessary costs of preserving the Debtors' estates, entitling it to an allowed administrative expense under sections 503(b)(1)(A) and 503(b)(3)(D) of the Bankruptcy Code. The Debtors and the Committee support the relief requested by this Motion. GSI submits that the Debtors and Committee are the parties most familiar with the DIP Financing process and the role of GSI therein and that their support is itself strong evidence of GSI's substantial contribution and preservation of the Debtors' estates.

29. For the same reasons that the Administrative Expense Amount is justified as a substantial contribution payment, the Administrative Expense Amount also falls within the range of reasonableness for settlements under Bankruptcy Rule 9019. This is particularly so given the limited size of the Administrative Expense Amount and the fact that it represents only a small fraction of the total expenses incurred by GSI in connection with these cases.

III. The Professional Services Provided Were Reasonable and the Expenses Incurred Were Actual, Necessary Costs

30. Once a court determines an applicant has made a substantial contribution in a Chapter 11 case under section 503(b), the court scrutinizes the applicant's request for reimbursement of professional services for reasonableness under section 503(b)(4) of the Bankruptcy Code. See In re Texaco, Inc., 90 B.R. 622, 627, 630-32 (Bankr. S.D.N.Y. 1988). Under section 503(b)(4), the reasonableness of professional charges is assessed on the basis of the time, nature, extent, and value of the services rendered and whether related expenses are actual and necessary. See 11 U.S.C. § 503(b)(4). However, GSI does not seek reimbursement of all actual and necessary costs, but submits that the considerable time, energy, and output of its Counsel and the expenses related thereto should be considered as part of the total calculus in assessing approval of the Administrative Expense Amount.

31. During these cases, Counsel invested significant time and effort on behalf of GSI in analyzing the proposed collateral for the DIP Financing and developing a proposal for Shari'ah-compliant DIP Financing on a highly expedited basis, involving the coordinated efforts of its New York, London and Dubai offices to maintain progress around the clock. Counsel engaged in a rigorous diligence analysis of the proposed collateral for the DIP Financing,

engaged in extensive discussions and negotiations with counsel for the Debtors and prepared a series of proposals that were submitted to the Debtors and Committee.[3]

32. Each of these proposals required substantial legal analysis relating to Shari'ah law and the specific structuring that would be necessary to make a DIP Financing Shari'ah compliant.[4] As the Debtors acknowledged in their *Motion For An Order Approving Expense Reimbursement In Connection With Prospective Post-Petition Financing* [Dkt. No. 448], the work involved in this case is both "novel and complex," as there is "no precedent for Shari'ah compliant DIP financing." *Id.* at 3.

33. GSI's diligence analysis of the proposed collateral for the Debtors' DIP Financing was highly complex and nuanced. A substantial portion of the Debtors assets ultimately constitute equity interests in portfolio companies with their own balance sheets and third party financing. The examination of the organizational and financial structures of the Debtors' portfolio companies revealed that these structures were rendered unusually complicated by their Shari'ah compliance and syndication structures. These complexities required GSI and its Counsel to undertake a time-intensive analysis of the assets available to pledge as collateral in support of the DIP Financing.[5]

34. The fees and expenses GSI incurred in this matter are the product of the customary and ordinary rates GSI's Counsel actually charged during the relevant period for comparable bankruptcy and non-bankruptcy related work.[6] The actual expenses incurred by Counsel in providing professional services were necessary, reasonable and justified under the

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[3] See Declaration of Mitchell A. Seider, executed on March 4, 2013 (the "**Seider Dec.**"), ¶ 7.

[4] Id.

[5] Id.

[6] Id., ¶ 8.

circumstances and therefore are allowable under section 503(b)(4). Nonetheless, GSI requests only the limited Administrative Expense Amount to satisfy its substantial contribution claim and actual, necessary costs of preserving the Debtors' estates. GSI's actual expenses in this matter (including the fees and expenses of Counsel) greatly exceed the administrative expense GSI seeks in the Motion.

CONCLUSION

For the foregoing reasons, GSI respectfully requests that the Court enter an order (i) allowing its administrative expense in the amount of $250,000; (ii) directing payment on the claim upon expiration of the appeals period pursuant to Rule 8002 of the Federal Rules of Bankruptcy Procedure; and (iii) granting such other and further relief as the Court deems just and proper. GSI reserves the right to amend and supplement this Motion.

Dated: March 4, 2013
New York, New York

Respectfully submitted,

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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)**

ORDER ALLOWING ADMINISTRATIVE EXPENSE PURSUANT TO 11 U.S.C. §§ 503(B)(1), 503(B)(3)(D) AND 503(B)(4)

Upon consideration of the motion (the "**Motion**")[1] of Goldman Sachs International ("**GSI**") for allowance and payment of an administrative expense against the estates of Arcapita Bank B.S.C.(c) ("**Arcapita**") and its affiliated debtors other than Falcon Gas Storage Company, Inc. (collectively, the "**Debtors**") pursuant to 11 U.S.C. §§ 503(b)(1), 503(b)(3)(D) and 503(b)(4); and it appearing that this Court has jurisdiction to consider the Motion and the relief requested therein in accordance with 28 U.S.C. §§ 157 and 1334; and it further appearing that this matter is a core proceeding within the meaning of 28 U.S.C. § 157(b); and it further appearing that venue of this proceeding and the Motion is proper in this District in accordance with 28 U.S.C. §§ 1408 and 1409; and it further appearing that adequate and proper notice of the Motion has been given, and that no other or further notice is necessary; and it further appearing that the relief requested in the Motion is in the best interests of the Debtors, their estates and their creditors, as GSI made a substantial contribution to these cases, provided a substantial benefit to the Debtors, their creditors, and their estates and incurred actual, necessary expenses of preserving the Debtors' estates in connection with the Debtors' efforts to obtain debtor-in-possession financing; and it further appearing that pursuant to sections 503(b)(1), 503(b)(3)(D)

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

and 503(b)(4) of Title 11 of the United States Code (the "**Bankruptcy Code**"), GSI is entitled to an Order (i) allowing an administrative expense in the amount of $250,000; and (ii) directing that such administrative expense be paid promptly upon such Order becoming a final order; and it further appearing that the Administrative Expense Amount sought by GSI is reasonable and appropriate, and that the expenses for which GSI seeks reimbursement were necessary, reasonable, and actually incurred; and after due consideration and sufficient cause appearing therefor, it is hereby:

ORDERED that the Motion is granted in its entirety;

IT IS FURTHER ORDERED that GSI is hereby granted, pursuant to sections 503(b)(1), 503(b)(3)(D) and 503(b)(4) of the Bankruptcy Code, an allowed administrative expense in the amount of $250,000 (the "**Administrative Expense Amount**") for the substantial contribution GSI provided to the Debtors, creditors and the estates and GSI's actual, necessary expenses of preserving the Debtors' estates pursuant to sections 503(b)(1) and 503(b)(3)(D) of the Bankruptcy Code, and as reimbursement to GSI for the fees and expenses of its counsel, Latham & Watkins LLP, in connection with GSI's participation in the Debtors' efforts to raise DIP Financing pursuant to section 503(b)(4) of the Bankruptcy Code;

IT IS FURTHER ORDERED that the Debtors are hereby authorized and directed to pay GSI the Administrative Expense Amount upon the earlier of (a) expiration of the appeals period pursuant to Rule 8002 of the Federal Rules of Bankruptcy Procedure without the filing of a notice of appeal of this Order and (b) the date of dismissal of any appeals of this Order; and

IT IS FURTHER ORDERED that this Court shall retain jurisdiction to hear and determine all matters arising from or related to the relief granted in this Order.

Dated: _____, 2013
New York, New York

_____
UNITED STATES BANKRUPTCY JUDGE