Tally M. Wiener
LAW OFFICES OF TALLY M. WIENER, ESQ.
119 West 72nd Street, PMB 350
New York, NY 10023
(212) 574-7975 (International)
(855) COMILAW (US/Canada, Toll-Free)
(212) 496-4170, Attn: PMB 350 (Facsimile)
tally.wiener@thecomi.com

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**

OBJECTION OF CAPTAIN HANI ALSOHAIBI TO THE MOTION OF FIRST ISLAMIC INVESTMENT BANK B.S.C.(c) N/K/A ARCAPITA BANK B.S.C.(c) AND ITS FELLOW DEBTORS FOR AUTHORITY TO OBTAIN REPLACEMENT FINANCING FROM GOLDMAN SACHS TO REPAY EXISTING FINANCING [DOCKET NO. 1157]

AND

REQUEST THAT THE HEARING SCHEDULED FOR JUNE 10, 2013 CONCERNING APPROVAL OF THE PROPOSED FINANCING BE ADJOURNED

Comes now before the Honorable United States Bankruptcy Court for the Southern District of New York Captain Hani Alsohaibi, a party in interest in the above-captioned bankruptcy cases, by and through his undersigned counsel, the Law Offices of Tally M. Wiener, Esq., and respectfully submits this Objection (the "*Objection*") to the relief requested by First Islamic Investment Bank B.S.C.(c) n/k/a Arcapita Bank B.S.C.(c) and its fellow debtors ("*Arcapita*" or the "*Debtors*") in the *Debtors' Motion for Order Pursuant to 11 U.S.C. §§ 105, 362, 363(b)(1), 363(m), 364(c)(1), 364(c)(2),*

364(c)(3), 364(e) and 552 and Bankruptcy Rules 4001 and 6004 Authorizing the Debtors to Obtain Replacement Postpetition Financing to Repay Existing Postpetition Financing [Docket No. 1157] (the "*Motion*"). In support of the Objection and the accompanying request that the hearing scheduled for June 10, 2013 concerning approval of the proposed financing be adjourned, Captain Alsohaibi respectfully states as follows:

JURISDICTION AND VENUE

1. The Court has jurisdiction to consider this Objection and the request for adjournment pursuant to 28 U.S.C. §§ 157 and 1334 to the extent it has jurisdiction to consider the Motion. Captain Alsohaibi reserves all rights concerning jurisdiction and venue, the Debtors' insolvency filings in the United States of America and in the Cayman Islands having frustrated his reasonable commercial expectations.

BACKGROUND

2. On March 18, 2012, the Board of Directors of Arcapita, a Bahrain-registered joint stock company, authorized the filing of voluntary bankruptcy proceedings. The next day, Arcapita and certain of its affiliates filed bankruptcy petitions with the United States Bankruptcy Court for the Southern District of New York under chapter 11 of the Bankruptcy Code. Arcapita Investment Holdings Limited, a wholly owned debtor subsidiary of Arcapita, later petitioned for a winding-up order in the Cayman Islands.[1] Falcon Gas Storage Co., Inc. became a debtor under chapter 11 of the Bankruptcy Code on April 30, 2012.

[1] Presumably understanding that the Debtors would be unable to achieve recognition in New York of the Arcapita Investment Holdings Limited insolvency proceedings in the Cayman Islands under the well-reasoned ruling of the Honorable Burton R. Lifland in *Bear Stearns*, they seem to be holding off on seeking recognition in order to establish grounds for recognition under the rationale of Judge Lifland's subsequent ruling in the *Fairfield* chapter 15 case. This strategy is ill-conceived and ill-fated.

3. Arcapita filed its first motion for an order extending its exclusive period to file a chapter 11 plan on June 12, 2012, nearly one year ago, telling a story about seeking bankruptcy relief in the USA on an "emergency basis" [Docket No. 237, ¶ 1], which contradicts the Declaration filed on the day of its first chapter 11 filing [Docket No. 6, ¶ 26, "the Debtors carefully considered reorganization options under the laws of various other jurisdictions."].

4. Arcapita filed its second extension motion on September 25, 2012. Therein Arcapita represented: "To allay any concern that the case should not be delayed by further extensions, the Debtors are only asking for 60 days and, if the Motion is granted as requested, the Debtors also agree that they will not seek a further extension of the exclusive period to file a plan of reorganization." [Docket No. 509, ¶ 4]. Arcapita went on to promise:

> 25. To insure there is no waste of time and no danger that the estates may be left with no plan in the event a new equity plan cannot be confirmed because the equity raise proves unsuccessful, the Debtors further commit that, on or before December 14, 2012, the Debtors will file a plan of reorganization that provides, in the same plan document, for the Debtors' emergence from chapter 11 pursuant to (a) a "new money" plan, provided that the new equity infusion is committed and available when the confirmation hearing is held or, if it is not, (b) pursuant to an alternative "stand alone plan" that provides for the managed disposition and distribution of the Debtors' assets (the "***Toggle Plan***").
>
> 26. Proceeding as described above ensures that, one way or another, by December 14, either (a) the Debtors will be filing motion to approve a disclosure statement supporting the Toggle Plan, solicitation procedures and a confirmation schedule or (b) exclusivity will automatically terminate and any party may then file a plan.

[Docket No. 509, ¶¶ 25-26].

5. Arcapita went on to file a third extension motion on December 11, 2012 [Docket No. 701], a fourth extension motion on December 19, 2012 [Docket No. 728], a fifth extension motion on January 3, 2013 [Docket No. 759], a sixth extension motion on January 11, 2013 [Docket No. 770], and a seventh extension motion on January 25, 2013 [Docket No. 806]. Arcapita also filed a motion to extend its exclusive period for soliciting acceptance of a chapter 11 plan [Docket No. 911].

6. Arcapita's chapter 11 proceedings having dragged on and on, and professional fees having risen, Arcapita was in need of funds.

7. Goldman Sachs considered providing debtor-in-possession financing to Arcapita, then passed and collected a $250,000 award for having made a substantial contribution to the case [Docket No. 1074]. Goldman Sachs' involvement in the case appears to have increased appetite for lending funds to Arcapita, as CF ARC LLC and Fortress Credit Corp. (together, "*Fortress*") provided debtor-in-possession financing.

8. Goldman Sachs now seeks to provide to Arcapita a non-priming secured murabaha financing with a principal amount of $175 million, to allow Arcapita to repay the Fortress facility, which is scheduled to mature on June 14, 2013.

9. On May 27, 2013, Arcapita filed the Motion seeking court approval for the financing, and setting an objection deadline of June 3, 2013.

ARGUMENT

10. Arcapita did not include the proposed Goldman Sachs financing agreement with the Motion, which clearly violates the letter and spirit of the Federal

Rules of Bankruptcy Procedure and the Local Bankruptcy Rules for the Southern District of New York.[2]

11. Federal Rule of Bankruptcy Procedure 4001(c) states:

> (c) Obtaining Credit.
>
> (1) Motion; Service.
>
> (A) Motion. A motion for authority to obtain credit shall be made in accordance with Rule 9014 and shall be accompanied by a copy of the credit agreement and a proposed form of order.
>
> (B) Contents. The motion shall consist of or (if the motion is more than five pages in length) begin with a concise statement of the relief requested, not to exceed five pages, that lists or summarizes, and sets out the location within the relevant documents of, all material provisions of the proposed credit agreement and form of order, including interest rate, maturity, events of default, liens, borrowing limits, and borrowing conditions. If the proposed credit agreement or form of order includes any of the provisions listed below, the concise statement shall also: briefly list or summarize each one; identify its specific location in the proposed agreement and form of order; and identify any such provision that is proposed to remain in effect if interim approval is granted, but final relief is denied, as provided under Rule 4001(c)(2). In addition, the motion shall describe the nature and extent of each provision listed below:
>
> (i) a grant of priority or a lien on property of the estate under §364(c) or (d);
>
> (ii) the providing of adequate protection or priority for a claim that arose before the commencement of the case, including the granting of a lien on property of the estate to secure the claim, or the use of property of the estate or credit obtained under §364 to make cash payments on account of the claim;

[2] *See* Local Bankruptcy Rule for the Southern District of New York 4001-2.

> (iii) a determination of the validity, enforceability, priority, or amount of a claim that arose before the commencement of the case, or of any lien securing the claim;
>
> (iv) a waiver or modification of Code provisions or applicable rules relating to the automatic stay;
>
> (v) a waiver or modification of any entity's authority or right to file a plan, seek an extension of time in which the debtor has the exclusive right to file a plan, request the use of cash collateral under §363(c), or request authority to obtain credit under §364;
>
> (vi) the establishment of deadlines for filing a plan of reorganization, for approval of a disclosure statement, for a hearing on confirmation, or for entry of a confirmation order;
>
> (vii) a waiver or modification of the applicability of nonbankruptcy law relating to the perfection of a lien on property of the estate, or on the foreclosure or other enforcement of the lien;
>
> (viii) a release, waiver, or limitation on any claim or other cause of action belonging to the estate or the trustee, including any modification of the statute of limitations or other deadline to commence an action;
>
> (ix) the indemnification of any entity;
>
> (x) a release, waiver, or limitation of any right under §506(c); or
>
> (xi) the granting of a lien on any claim or cause of action arising under §§544, 545, 547, 548, 549, 553(b), 723(a), or 724(a).

(emphasis added)

12. The non-inclusion of standard and mandatory information deprived parties in interest including Captain Alsohaibi, who had invested in Arcapita's success in good

faith, a meaningful opportunity to assess the relief requested so as to determine whether to object and, if so, on what grounds.

13. Arcapita was aware of the defects in its filings. The Motion states:

> As noted previously, the DIP Agreement will be filed by the Debtors as a supplement to this Motion prior to the hearing to consider this Motion. This summary, therefore, is qualified in its entirety by the provisions of the Commitment Documents attached hereto, and ultimately the definitive DIP Agreement and/or the DIP Order to be filed by the Debtors, as applicable. . . . To the extent there are any conflicts between this summary and the terms of the definitive DIP Agreement and/or the DIP Order, as applicable, the terms of the DIP Agreement and/or the DIP Order, as applicable, shall govern.

[Motion, footnote 7].

14. On June 6, 2013 – after the objection deadline had passed - Arcapita filed a Supplement [Docket No. 1216]. The Supplement includes the "definitive form of the DIP Budget" that had been missing from the Motion "for the consideration of the Court and other parties in interest." [Docket No. 1216, ¶¶ 1, 2]. Arcapita then filed a Second Supplement, which included the agreement, but not the statutorily mandated cross-references [Docket No. 1224]. The PDF filed by Arcapita is 186 pages long and, even those very well-versed in Shari'ah law would find it difficult to get through it in time to formulate a view as to whether it is Shari'ah compliant prior to the hearing on approval of the Motion. In particular, the proposed financing agreement clause 5.9(a)(1)(D) allows Arcapita to use the funds to "for adequate protection payments made to SCB[3] in accordance with the SCB Settlement Order." The Shari'ah-compliance of these payments may require additional consideration under Shari'ah rules prohibiting an increase in the profit paid to SCB in consideration of the delay between their stated

[3] Standard Chartered Bank

maturity on March 28, 2012 and the Effective Date.[4] Under a murabaha agreement, the terms must specify upon conclusion of the agreement the cost price and profit. Any excess paid by the buyer to the seller must be in the form of a penalty (*ta'zir*) solely to ensure prompt repayment and must be donated to charity and cannot be considered income to the seller. Under common interpretations of Shari'ah, both the giver and the receiver are subject to Islamic rules prohibiting interest (*riba*).

15. In sum, Arcapita holds itself out as being an Islamic investment bank, and is regulated as such by the Central Bank of Bahrain, and the parties of interest to the case should have enough time to consider whether to support the chapter 11 plan and the financing agreement that enables it after consultation with their own Shari'ah experts and other advisors, which is not permitted under the accelerated time table (or as Arcapita puts it, "sprinting to the finish line in these chapter 11 cases'").[5]

[4] In the proposed financing agreement § 6.2, the late payment terms specify in line with generally accepted Shari'ah principles that only actual costs and not opportunity costs or financing costs may be charged and that the balance must be paid on behalf of the purchaser to charitable foundations selected by the purchaser. There is no supporting evidence provided by Arcapita or SCB that post-petition profit paid to SCB with funds from this facility would comply with the Shari'ah principles incorporated into the proposed financing agreement.

[5] *See* Debtors' *Ex Parte* Application for Order Shortening Time for Hearing on a Motion Authorizing and Approving a Settlement and Plan Support Agreement with Standard Chartered Bank [Docket No. 1226, ¶ 8].

16. Moreover, violations of disclosure requirements, and the transparency and due process considerations underlying them, should not be tolerated in the Southern District of New York in the name of a "sprint" caused by poor planning.

Dated: New York, New York
June 7, 2013

Respectfully submitted on behalf of
Captain Hani Alsohaibi by:

/s/ Tally M. Wiener
Tally M. Wiener
LAW OFFICES OF TALLY M. WIENER, ESQ.
119 West 72nd Street, PMB 350
New York, NY 10023
(212) 574-7975 (International)
(855) COMILAW (US/Canada, Toll-Free)
(212) 496-4170, Attn: PMB 350 (Facsimile)
tally.wiener@thecomi.com