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*Proposed Counsel for Official Committee of
Unsecured Creditors of Arcapita Bank B.S.C.(c), et al.*

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

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In re:	:	Chapter 11
	:	
ARCAPITA BANK B.S.C.(C), et al.,	:	Case No. 12-11076 (SHL)
	:	
Debtors.	:	(Jointly Administered)
	:	
-----		X
In re:	:	Chapter 11
	:	
FALCON GAS STORAGE CO., INC.,	:	Case No. 12-11790 (SHL)
	:	
Debtor.	:	(Joint Administration Requested)
	:	
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**STATEMENT OF OFFICIAL COMMITTEE OF UNSECURED CREDITORS IN
SUPPORT OF DEBTORS' MOTION PURSUANT TO SECTIONS 365(d)(3) AND
363(b)(1) OF THE BANKRUPTCY CODE FOR AUTHORIZATION FOR ARCAPITA
TO MAKE INVESTMENT TO SUPPORT THE LUSAIL JOINT VENTURE**

The Official Committee of Unsecured Creditors (the "Committee") of Arcapita Bank B.S.C.(c) and each of its affiliated debtors in possession (collectively, the "Debtors") in the above-captioned chapter 11 cases (the "Chapter 11 Cases") hereby submits this statement in

support (the “Statement”) of *Debtors’ Motion Pursuant to Sections 365(d)(3) and 363(b)(1) of the Bankruptcy Code for Authorization for Arcapita to Make Investment to Support the Lusail Joint Venture* [Docket No. 150] (the “Lusail Payment Motion”).¹

STATEMENT

1. The Committee supports the relief requested in the Lusail Payment Motion. This decision was the product of weeks of careful analysis and deliberation, including multiple presentations to the Committee’s advisors by the Debtors, their local counsel and a third party appraiser. The Committee grappled with the relief requested in the Lusail Payment Motion, in the first instance because of the attention surrounding “Lusail,” and then because of the Debtors’ liquidity position. However, after comprehensive review of the proposal, and in light of the modifications made to the proposed form of order at the Committee’s request, and other protections to which the Debtors and the Committee have agreed, the Committee has concluded that the proposed payment reflects an appropriate exercise of the Debtors’ business judgment, as it affords the Debtors an opportunity to increase significantly the value of the Debtors’ estates for the benefit of unsecured creditors, while maintaining the status quo among the members of the Arcapita Group and third parties with respect to claims and causes of action that may exist.

I. Relief Requested Does Not Impair Rights with Respect to 2012 Transactions

2. The Committee initially viewed the relief requested in the Lusail Payment Motion with a jaundiced eye as a result of the 2012 Transactions. Virtually every discussion regarding the Debtors’ chapter 11 filing includes a discussion of the Debtors’ investment in the Lusail Joint Venture, and the transactions initiated by the Arcapita Group within weeks prior to

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

the commencement of these cases pursuant to which, *inter alia*, the Arcapita Group transferred to QIB its interest in the Lusail Land. Naturally, given the questions that accompany those events, including those raised by the timing, magnitude, and entities involved, the Committee directed its advisors to scrutinize the transactions as one of its first orders of business. The Committee's review of those transactions is ongoing.

3. As the Committee's advisors conducted their diligence with respect to the Lusail Joint Venture documents, they learned that QRE's original purchase of its interest in the Lusail Land from Al Imtiaz in 2008 was structured such that the Arcapita Group became responsible for additional purchase price installment payments resulting from QRE's assumption of certain of Al Imtiaz's obligations under the Land Purchase Agreement. Specifically, under the Shareholders Agreement, QRE's share of the purchase price installments includes an obligation to pay \$30.4 million on June 1, 2012, and additional amounts annually thereafter. The Arcapita Group would thus have been required to satisfy the June Funding Obligation in order to fulfill QRE's 2012 purchase obligations, notwithstanding the occurrence of the 2012 Transactions. This discovery allowed the Committee to separate its review and analysis of the 2012 Transactions from its consideration of the Lusail Payment Motion. Many of the modifications to the proposed order and discussions between the Committee and the Debtors have focused on ensuring that all rights are reserved with respect to the 2012 Transactions.

II. Lusail Land is a Valuable Estate Asset

4. The Committee advisors have spent a considerable amount of time scrutinizing the Lusail Land investment. Based upon a review of valuation materials the Debtors provided to the Committee, and an independent analysis of the asset, the Committee believes the investment in the Lusail Land provides significant value to the Debtors' estates. More important,

however, is the prospect of greater value, which the estates could realize if the Debtors are permitted to retain their interests in the Lusail Land while they stabilize their businesses and recognize the potential upside of further development of Lusail City for the 2022 World Cup.

5. Given the potential value to the estates, the Committee was particularly concerned about a provision in the Lease that would allow QIB to declare a default in the event that Arcapita becomes “bankrupt.”² Although this is plainly an unenforceable *ipso facto* provision,³ to assure itself that QIB would be unable to declare a default and terminate the Lease based on this provision, the Committee consulted with Qatar legal counsel to understand whether such provisions would be enforceable under local law.⁴ Based on those discussions, the Committee is satisfied that the condition precedent to the termination right has not occurred under relevant Qatari law and the provision would otherwise be unenforceable under the Bankruptcy Code. Accordingly, there is little risk that the Committee would find itself in the untenable position of having supported the June payment to later find that the pendency of these Chapter 11 Cases would give QIB the right to terminate the Lease.

² Specifically, section 4.1.3 of the Lease provides that QIB may terminate the Lease immediately upon any of the following occurring with respect to Arcapita:

- (a) becomes bankrupt; or
- (b) appoints a liquidator or has one appointed over it; or
- (c) has a receiver, including a provisional receiver, or receiver and manager of any of its assets, or an administrator, appointed.

³ See In re Chateaugay Corp., No. 92 CIV 7054, 1993 WL 159969, at *5 (S.D.N.Y. May 10, 1993) (“Section 365 abrogates the power of *ipso facto* clauses. No default may occur pursuant to an *ipso facto* clause and no reliance may be placed upon an alleged default where the only cause for default is the debtor’s commencement of a bankruptcy case”); In re Lehman Bros. Holdings Inc., 422 B.R. 407, 415 (Bankr. S.D.N.Y. 2010) (“It is now axiomatic that *ipso facto* clauses are, as a general matter, unenforceable.”). The policy reason for this prohibition is that “the automatic termination of a debtor’s contractual rights deters rehabilitation and causes a forfeiture of assets,” which is contrary to the general purpose of bankruptcy protections. In re Enron, 306 B.R. 465, 472 (Bankr. S.D.N.Y. 2004). Accordingly, the prohibitions against *ipso facto* clauses “are construed broadly to effectuate the Bankruptcy Code’s policy against forfeiture.” In re C.A.F. Bindery, 199 B.R. 828, 833 (Bankr. S.D.N.Y. 1996).

⁴ See Lease § 10.9 (providing that the Lease “shall be governed by and construed in accordance with the law of Qatar and is hereby referred to the exclusive jurisdiction of Qatari courts”); see also Share Purchase Agreement § 9.9 (providing the same with respect to the Share Purchase Agreement).

III. Committee-Required Modifications Protect Rights of Parties in Interest and Maintain Status Quo Among Members of Arcapita Group

6. The Committee's support for the Debtors' payment of the June Funding Obligation was also conditioned upon the following protections and reservations of rights.

7. *First*, at the Committee's request, the Debtors have revised the proposed order (the "Revised Proposed Order") to reserve all rights of the Debtors, the Committee and other parties in interest with respect to, *inter alia*, claims or causes of actions relating to the Lusail Joint Venture and also noting that the order will not be deemed to be a determination as to the allocation of proceeds of the 2012 Transactions or any potential disposition of the Arcapita Group's interests in the Lusail Joint Venture.

8. *Second*, the Committee and the Debtors have agreed to Committee oversight and controls in certain areas with respect to the Lusail Joint Venture, particularly in the event that the Arcapita Group seeks to monetize its interests in the Lusail Joint Venture. Such rights will ensure that the fiduciary for unsecured creditors has a meaningful role in the management and potential sale of this important asset. In addition, the next payment under the Lease is due in September 2012. Because that payment will necessitate separate Court approval, it will serve as another checkpoint with respect to the Debtors' management and potential monetization of the Lusail Joint Venture.

9. *Third*, the Committee understands from the Debtors that the June Funding Obligation will be structured as an intercompany loan from Arcapita to QRE to provide Arcapita with a claim against QRE for the funding, which was QRE's obligation under the Shareholder Agreement. At the Committee's request, however, Arcapita and QRE have agreed to modify their funding structure to include certain credit enhancements for Arcapita that are appropriate for a debtor in possession providing a loan to a non-debtor. The Committee believes that this

structure for the June Funding Obligation appropriately protects Arcapita for its satisfaction of the June Funding Obligation without pre-judging any intercompany claims that may arise with respect to the Lusail Joint Venture or the 2012 Transactions. For example, although the proceeds of the 2012 Transactions were transferred to Arcapita pursuant to the Debtors' consolidated cash management system, the Committee required that Arcapita Investment Holding Limited's claims with respect to such amounts will remain unimpaired by the granting of the relief sought in the Lusail Payment Motion.

WHEREFORE, for the reasons stated herein, the Committee respectfully requests that the Court (i) grant the relief requested in the Lusail Payment Motion; (ii) enter the Revised Proposed Order; and (iii) grant such other and further relief as it may deem just.

Dated: New York, New York
May 30, 2012

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