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Attorneys for the Debtors and Debtors in Possession

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

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	:
<b>IN RE:</b>	: <b>Chapter 11</b>
	:
<b>ARCAPITA BANK B.S.C.(c), et al.,</b>	: <b>Case No. 12-11076 (SHL)</b>
	:
<b>Debtors.</b>	: <b>Jointly Administered</b>
	:
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**SUPPLEMENT TO DEBTORS' APPLICATION FOR AN ORDER APPROVING  
THE EMPLOYMENT AND RETENTION OF ROTHSCHILD INC. AND N M  
ROTHSCHILD & SONS LIMITED AS FINANCIAL ADVISORS AND INVESTMENT  
BANKERS FOR THE DEBTORS NUNC PRO TUNC TO THE PETITION DATE**

On April 3, 2012 (the "**Filing Date**"), Arcapita Bank B.S.C.(c) ("**Arcapita**") and its affiliated debtors and debtors in possession (collectively, the "**Debtors**") filed the *Debtors' application for an Order Approving the Employment and Retention of Rothschild Inc. and N M Rothschild & Sons Limited as Financial Advisors and Investment Bankers for the Debtors Nunc*

*Pro Tunc to the Petition Date* [Docket No. 53] (the “**Original Application**”)<sup>1</sup> in the above-captioned chapter 11 cases (the “**Chapter 11 Cases**”).

1. Background. By the Original Application, the Debtors requested that the Court enter an order authorizing the Debtors to retain Rothschild pursuant to the terms of the Engagement Letter annexed thereto.<sup>2</sup> A proposed form of order (the “**Original Form of Order**”) was annexed to the Original Application.

2. As of the date of this filing, no party has objected to the Debtors’ proposed retention of Rothschild, in general, or the Original Application, specifically. At the request of first, the official committee of unsecured creditors in the Chapter 11 Cases (the “**Committee**”) and later, the office of the United States Trustee (the “**United States Trustee**”), the Debtors agreed to adjourn any hearing with respect to the Original Application, starting with the April 17, 2012 original hearing in the Chapter 11 Cases. The Original Application, as supplemented, is scheduled to be heard on July 9, 2012 (the “**Hearing**”).

A. **PROPOSED MODIFICATIONS TO THE TERMS OF COMPENSATION IN THE ENGAGEMENT LETTER**

3. Since the Filing Date, the Debtors, Rothschild, United States Trustee, the Committee and the Cayman Islands Joint Provisional Liquidator (the “**JPL**”) have engaged in good faith discussions and negotiations regarding the Original Application, the Engagement Letter and, generally, the terms of Rothschild’s engagement. In those discussions, the Committee and the JPL expressed certain concerns as to the fees to be paid Rothschild pursuant

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<sup>1</sup> Each capitalized term not otherwise defined herein shall have the meaning ascribed to it in the Original Application.

<sup>2</sup> The Engagement Letter was attached as **Exhibit 1** to the Resnick Declaration filed in support of the Original Application.

to the proposed terms of its retention. As a result of those discussions, the Debtors and Rothschild agreed to modify the terms of Rothschild's proposed engagement with the Debtors to resolve the objections of the Committee and the JPL. These modifications are, taken as a whole, economically favorable to the Debtors, and comprise a substantial further concession by Rothschild for the benefit of the Debtors' estates. Although the modifications have fully resolved the JPL's issues with respect to the Original Application, the modified terms have been insufficient to satisfy the Committee. The Committee contends that it still intends to object to Rothschild's retention, as modified.

4. Although the Committee refused to accept the Debtors' and Rothschild's offer to modify the terms of retention to resolve any objection of the Committee to Rothschild's retention, Rothschild and the Debtors are *not* returning to the Original Application and are *not* asking the Court to approve Rothschild's retention on the terms set forth therein. Instead, as a further showing of the Debtors' and Rothschild's efforts to be reasonable, the Debtors and Rothschild seek approval of Rothschild's retention on the modified terms set forth below. These modifications further are reflected in the revised form of proposed order annexed hereto as **Annex 1** (the "***Revised Form of Order***"). Annexed hereto as **Annex 2** is a marked up document which highlights all differences between the Revised Form of Order and the Original Form of Order. The Debtors currently intend to submit the Revised Form of Order for the Court's approval at the Hearing.

5. A comparison of the material economic terms of Rothschild's retention is as

follows:<sup>3</sup>

ITEM	ORIGINAL TERMS	NEW PROPOSED TERMS
Transaction Fee	\$12 million Transaction Fee	\$6 million Transaction Fee
Transaction Fee, Crediting	50% of all Monthly Fees to be credited against any Transaction Fee paid	100% of Monthly Fees after December 2012 to be credited against any Transaction Fee paid
Transaction Fee, New Conditions		<p>Transaction Fee payable only upon effectiveness of a plan of reorganization or similar Transaction that resolves the treatment of all or substantially all of the Debtors' liabilities, or for a Transaction that permits Company (as defined in the Engagement Letter) to continue as a going concern.</p> <p>Clarification that no more than one \$6 million Transaction Fee is payable</p>
New Capital Fee	To be determined in the event Rothschild was asked to become involved in raising new capital (Rothschild has since been asked)	<p>New Capital Fee of:</p> <ul style="list-style-type: none"> <li>- 0.75% of DIP financing raised;</li> <li>- 0.75% of New Capital up to \$500 million other than DIP; and</li> <li>- 1.50% of New Capital over \$500 million other than DIP</li> </ul>
New Capital Fee, Exclusions		No New Capital Fee for DIP financing raised from members of the Official Committee of Unsecured Creditors or of a Cayman Islands creditors committee, if one is formed
New Capital Fee, Crediting		100% of New Capital Fee in respect of the DIP financing to be credited against any subsequent New Capital Fee
Merger & Acquisition Fee (" <i>M&amp;A Fee</i> ")	None	M&A Fee of 1.00% of consideration paid for a sale of all or substantially all assets or for a sale of assets that the Debtors ask Rothschild to market

<sup>3</sup> This summary of the primary economic changes is provided for convenience only. The Engagement Letter, as modified by the Revised Form of Order, shall control in the event of conflict between it and this summary. The Debtors retain the right to further modify the Revised Form of Order, as necessary, prior to the hearing.

ITEM	ORIGINAL TERMS	NEW PROPOSED TERMS
Fee Cap	None	\$12 million cap on aggregate of Transaction, New Capital and M&A Fees
Monthly Fee	\$150,000 Monthly Fee	\$175,000 Monthly Fee
Liquidating Plan Exclusions	None	No New Capital or M&A Fee for liquidating plan (see above for related Transaction Fee condition)
New Termination Restrictions	Rothschild may terminate on thirty (30) days' notice	Rothschild may not terminate engagement after receiving Transaction, New Capital Fee or M&A Fee until 90 days after confirmation of plan (or conversion or dismissal), unless Arcapita consents, fails to make payments or otherwise breaches terms of engagement
Retainer Drawdown Requirement	None	Rothschild will draw down its escrowed retainer before seeking payment from estate for approved fees and expenses

**B. OUTSTANDING ISSUES**

6. The Committee has not yet filed an objection to Rothschild's retention. However, based on the many discussions and other exchanges between the Debtors' management, Committee members, Rothschild representatives and the professionals for each, the Debtors understand that the following are the material issues that remain in dispute. :

- Plan Must be Supported by Committee and all Classes of Creditors. The Committee insists that a Transaction Fee should not be payable except (i) upon the confirmation of a plan(s) supported by the Committee and (ii) if the plan(s) is accepted by each and every class of creditors entitled to vote on the plan(s);
- Section 363 Sale Related Fees. The Committee insists that a Transaction Fee should not be payable in the context of a sale of substantially all of the assets of the Debtors under section 363 unless such sale is supported by the Committee, and that no New Capital or M&A fee should be payable in connection with a sale under section 363; and
- Section 330 Reservation. Despite the extensive negotiations and modified terms, the Committee insists that it retain the right to object to the compensation of Rothschild on reasonableness grounds under section 330 of the Bankruptcy Code.

The extensive negotiations involving the JPL, the Committee and their professionals over the last 90 days have resulted in the modified terms evidenced by the Revised Form of Order. At the same time, these negotiations and the substance of the post-petition modifications agreed with Rothschild, have resolved any issues related to the propriety of the Debtors' decision to engage Rothschild or the Debtors' determination prepetition as to the "reasonableness" of the original fee to be paid to Rothschild, and any evidence as to those issues has no bearing on the reasonableness of Rothschild's proposed compensation, as now modified.

7. Given practices and controls implemented in the last 90 days, all of which the Committee is well aware, and the actual events that have occurred over that time, there is no material issue as to any "duplication of efforts" in the actual work being performed by the Debtors' financial and turnaround advisors - KPMG versus Alvarez & Marsal and Rothschild.

WHEREFORE, the Debtors respectfully request that the Court grant the relief requested in the Original Application, as modified by this Supplement, and such other and further relief as the Court may deem just and proper.

Dated: New York, New York  
July 5, 2012

Respectfully submitted,

/s/ Michael A. Rosenthal

Michael A. Rosenthal (MR-7006)

Craig H. Millet (admitted *pro hac vice*)

Janet Weiss (JW-5460)

Matthew K. Kelsey (MK-3137)

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ATTORNEYS FOR THE DEBTORS  
AND DEBTORS IN POSSESSION

# **ANNEX 1**

## **REVISED FORM OF ORDER**



**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

**ORDER APPROVING THE DEBTORS' EMPLOYMENT  
AND RETENTION OF ROTHSCHILD INC. AND N M ROTHSCHILD & SONS  
LIMITED AS FINANCIAL ADVISORS AND INVESTMENT BANKERS FOR THE  
DEBTORS NUNC PRO TUNC TO THE PETITION DATE**

Upon consideration of the application (the "*Application*")<sup>1</sup> of 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*") in the above-captioned chapter 11 cases (the "*Chapter 11 Cases*") for entry of an order (this "*Order*") authorizing the Debtors to employ and retain Rothschild Inc. and N M Rothschild & Sons Limited (together, "*Rothschild*") as their financial advisors and investment bankers, as more fully set forth in the Application; and upon consideration of the declarations of David L. Resnick and Homer Parkhill in support of the Application; and it appearing that the relief requested therein is in the best interests of the Debtors' estates, their creditors and other parties in interest; and it appearing that the Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334; and it appearing that this proceeding is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and it appearing that venue of this proceeding is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that notice of the

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<sup>1</sup> Capitalized terms used herein as defined terms and not otherwise defined shall have those meanings ascribed to them in the Application.

Application and opportunity for a hearing on the Application was appropriate under the particular circumstances and that no other or further notice need be given; and a hearing having been held to consider the relief requested in the Application and it appearing that Rothschild does not hold or represent interests adverse the Debtors' estates and is "disinterested," as that term is defined in section 101(14) of the Bankruptcy Code, as modified by section 1107(b) of the Bankruptcy Code; and it appearing that the terms and conditions of Rothschild's employment, including but not limited to the Fee and Expense structure and the Indemnification Provisions, are reasonable as required by section 328(a) of the Bankruptcy Code; and the Court having found and determined that the legal and factual bases set forth in the Application establish just cause for the relief granted herein; and it appearing that the relief sought in the Application is in the best interests of the Debtors, their estates, creditors and all parties in interest; and after due deliberation and sufficient cause appearing therefor,

**IT IS HEREBY ORDERED:**

1. The Application is approved, as provided herein.
2. In accordance with sections 327(a) and 328(a) of the Bankruptcy Code, Rules 2014(a) and 2016 of the Bankruptcy Rules and Rules 2014-1 and 2016-1 of the Local Rules, the Debtors shall be, and hereby are, authorized to employ and retain Rothschild in accordance with the terms and conditions set forth in the Engagement Letter attached hereto and incorporated herein by reference, effective *nunc pro tunc* to the Petition Date and to pay fees and reimburse expenses to Rothschild on the terms and times specified in the Engagement Letter.
3. The Engagement Letter, including, without limitation, the Fee and Expense Structure and the Indemnification Provisions, is approved in all respects except as otherwise set forth herein.

4. To the extent provided in the Engagement Letter, Rothschild's financial advisory and investment banking services to the Debtors include, as necessary and as Rothschild and the Debtors deem appropriate and feasible, the following:

- identify and/or initiate potential Transactions;
- with respect to the Debtors' intermediate and long-term business prospects and strategic alternatives to maximize the business enterprise value of the Debtors, review and analyze the Debtors' assets and the operating and financial strategies of the Debtors;
- review and analyze the business plans and financial projections prepared by the Debtors including, but not limited to, testing assumptions and comparing those assumptions to historical trends of the Debtors and industry trends;
- evaluate the Debtors' debt capacity in light of its projected cash flows and assist in the determination of an appropriate capital structure for the Debtors;
- assist the Debtors and its other professionals in reviewing the terms of any proposed Transaction, in responding thereto and, if directed, in evaluating alternative proposals for a Transaction;
- determine a range of values for the Debtors and any securities that the Debtors offer or propose to offer in connection with a Transaction;
- advise the Debtors on the risks and benefits of considering a Transaction with respect to the Debtors' intermediate and long-term business prospects and strategic alternatives to maximize the business enterprise value of the Debtors;
- review and analyze any proposals the Debtors receive from third parties in connection with a Transaction, including, without limitation, any proposals for debtor-in-possession financing, as appropriate;
- assist or participate in negotiations with the parties in interest, including, without limitation, any current or prospective creditors of, holders of equity in, or claimants against the Debtors and/or their respective representatives in connection with a Transaction;
- advise the Debtors with respect to, and attend, meetings of the Debtors' directors, creditor groups, official constituencies and other interested parties, as necessary in connection with Rothschild's primary responsibilities;
- if requested by the Debtors, participate in hearings before the Bankruptcy Court and provide relevant testimony with respect to the matters described herein and issues arising in connection with any proposed Plan; and
- render (but only to the extent permitted by further orders of this Court) such other financial advisory and investment banking services as may be agreed upon by Rothschild and the Debtors.

5. The first sentence of Section 4(a) of the Engagement Letter shall be amended and restated as follows:

Commencing as of the date hereof, whether or not a Transaction is proposed or consummated, an advisory fee (the "**Monthly Fee**") of \$175,000 per month.

6. Section 4(b) of the Engagement Letter shall be amended and restated as follows:

A fee (the "**Transaction Fee**") of \$6,000,000, payable upon the earlier of (i) the confirmation and effectiveness of a Plan and (ii) the closing of another Transaction (or series or combination of Transactions); *provided*, that a Transaction Fee shall be payable only upon effectiveness of a plan of reorganization or similar Transaction that resolves the treatment of substantially all or all of the Debtors' liabilities, or for a Transaction that permits the Company to continue as a going concern. Rothschild shall credit against the Transaction Fee 100% of the Monthly Fees due and paid after December 31, 2012; *provided*, that such credit shall not exceed the Transaction Fee. For the avoidance of doubt, no more than one Transaction Fee shall be payable.

7. Section 4(c) of the Engagement Letter shall be redesignated as Section 4(f) and a new Section 4(c) shall be inserted as follows:

A fee (the "**New Capital Fee**") equal to (i) 0.75% of the face amount of any debtor-in-possession financing raised (a "**DIP Raise**") and (ii) 0.75% of the first \$500,000,000, in the aggregate, and 1.5% thereafter of the face amount of any debt, equity or other capital raised, other than a DIP Raise; *provided*, that no New Capital Fee shall be payable on account of any portion of a DIP Raise that is funded by a member of the Official Committee of Unsecured Creditors or creditors' committee in the related Cayman Islands proceeding. Rothschild shall credit 100% of any New Capital Fee paid on account of a DIP Raise against any subsequent New Capital Fee; *provided*, that such credit shall not exceed such New Capital Fee(s). The New Capital Fee shall be payable upon the closing of the transaction by which the new capital is committed. For the avoidance of doubt, the term "raised" shall include the amount committed or otherwise made available to the Company pursuant to definitive documentation providing therefor, whether or not such amount (or any portion thereof) is drawn down at closing or is ever drawn down and whether or not such amount (or any portion thereof) is used to refinance existing obligations of the Company.

8. A new Section 4(d) of the Engagement Letter shall be inserted as follows:

A fee (the "**M&A Fee**") of 1.00% of Consideration (as defined below) if the Company, directly or indirectly, through a credit bid or otherwise, (i) sells substantially all or all of its assets (whether at once or in a series or combination of sales) or (ii) sells assets pursuant to a marketing and sale process that it has requested Rothschild to lead (a "**Sale**"). "**Consideration**" shall mean the total amount of all cash plus the total value (as determined pursuant hereto) of all securities, contractual arrangements (including, without limitation, any lease arrangements or put or call agreements) and other consideration, including, without limitation, any contingent or earned consideration, paid or payable, directly or indirectly, in connection with a Sale (including, without limitation, amounts paid (i) pursuant to covenants not to compete, employment contracts, employee benefit plans, management fees or other similar arrangements, and (ii) to holders of any warrants, stock purchase rights or convertible securities of the Company and to holders of any options or stock appreciation rights issued by the Company, whether or not vested). Consideration shall also include the amount of any short-term liabilities (including, without limitation, any trade or ordinary course liabilities) and any long-term liabilities of

the Company (including, without limitation, the principal amount of any indebtedness for borrowed money and capitalized leases and the full amount of any off-balance sheet financings) (x) repaid, defeased or retired, directly or indirectly, in connection with or in anticipation of a Sale or (y) existing on the Company's balance sheet at the time of a Sale (if such Sale takes the form of a merger, consolidation or a sale of stock or partnership interests) or assumed in connection with a Sale (if such Sale takes the form of a sale of assets). Consideration shall include (i) the value of any current assets not purchased, minus (ii) the value of any current liabilities not assumed. In the event such Sale takes the form of a recapitalization, restructuring, spin-off, split-off or similar transaction, Consideration shall include the fair market value of (i) the equity securities of the Company retained by the Company's security holders following such Sale and (ii) any securities received by the Company's security holders in exchange for or in respect of securities of the Company following such Sale (all securities received by such security holders being deemed to have been paid to such security holders in such Sale). The value of securities that are freely tradable in an established public market will be determined on the basis of the last market closing price prior to the consummation of a Sale. The value of securities that are not freely tradable or have no established public market, or if the consideration consists of property other than securities, the value of such property shall be the fair market value thereof as determined in good faith by Rothschild and the Company, provided, however, that all debt securities shall be valued at their stated principal amount without applying a discount thereto. If the consideration to be paid is computed in any foreign currency, the value of such foreign currency shall, for purposes hereof, be converted into U.S. dollars at the prevailing exchange rate on the date or dates on which such consideration is payable. Consideration shall also include the face amount of any liabilities tendered as purchase price in connection with any credit bid.

9. A new Section 4(e) of the Engagement Letter shall be inserted as follows:

Notwithstanding anything contained herein, (i) the sum of all Transaction, New Capital and M&A Fees paid shall not exceed \$12,000,000 and (ii) no New Capital Fee or M&A Fee shall be paid on account of a liquidating plan.

10. The first sentence of Section 7 of the Engagement Letter shall be amended and restated as follows:

This Agreement may be terminated by either the Company or Rothschild after ninety (90) days from the date hereof by providing thirty (30) days advance notice in writing; *provided* that if Rothschild is paid any Transaction Fee, New Capital Fee or M&A Fee, it will not terminate this Agreement until the earlier of the ninetieth (90th) day after confirmation of a plan of reorganization or liquidation, if any, or the day of conversion or dismissal of the Chapter 11 Cases unless the Company (i) consents or (ii) breaches the terms hereof including, without limitation, by failing to make any payment to Rothschild that is due hereunder and permitted by the Bankruptcy Court.

11. All requests of Rothschild for payment of indemnity pursuant to the Engagement Letter (including reimbursable expenses incurred in connection with such indemnity) shall be made by means of an application (interim or final, as applicable) and shall be subject to review

by the Court to ensure that payment of such indemnity conforms to the terms of the Engagement Letter and is reasonable based upon the circumstances of the litigation or settlement in respect of which indemnity is sought; *provided, however*, that in no event shall Rothschild be indemnified if the Debtors or a representative of the estates asserts a claim for, and a court determines by final order that such claim arose out of, Rothschild's own bad faith, fraud, self-dealing, breach of fiduciary duty (if any), gross negligence, or willful misconduct.

12. Rothschild will file fee applications for interim (as necessary) and final allowance of compensation and reimbursement of expenses pursuant to the procedures set forth in sections 330 and 331 of the Bankruptcy Code; *provided, however*, that Rothschild shall be compensated in accordance with the terms of the Engagement Letter, and subject to the procedures set forth in the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, the U.S. Trustee Guidelines and any other applicable orders of this Court.

13. The fees and expenses payable to Rothschild pursuant to the Engagement Letter shall be subject to review only pursuant to the standards set forth in section 328(a) of the Bankruptcy Code and shall not be subject to the standard of review set forth in section 330 of the Bankruptcy Code.

14. Notwithstanding anything to the contrary contained herein, the U.S. Trustee retains all rights to respond or object to Rothschild's applications for compensation and reimbursement of expenses on all ground including, but not limited to, reasonableness pursuant to section 330 of the Bankruptcy Code; and, in the event the U.S. Trustee objects, the Court retains the right to review the interim and final applications pursuant to section 330 of the Bankruptcy Code.

15. Rothschild shall include in its fee applications, among other things, time records setting forth a reasonably detailed description of the services rendered by each professional and

the amount of time spent on each date by each such individual in rendering services on behalf of the Debtors in one-half hour increments, but Rothschild shall not be required to provide or conform to any schedule of hourly rates.

16. Notwithstanding anything to the contrary in the Engagement Letter, the indemnification provisions are hereby modified as follows:

- (a) All requests of Indemnified Parties for payment of indemnity pursuant to the Engagement Letter shall be made by means of an application (interim or final as the case may be) and shall be subject to review by the Court to ensure that payment of such indemnity conforms to the terms of the Engagement Letter and is reasonable based upon the circumstances of the litigation or settlement in respect of which indemnity is sought, provided, however, that in no event shall any Indemnified Party be indemnified in the case of its own bad-faith, self-dealing, breach of fiduciary duty (if any), gross negligence or willful misconduct.
- (b) In the event that any Indemnified Party seeks reimbursement from the Debtors for reasonable attorneys' fees in connection with a request by such Indemnified Party for payment of indemnity pursuant to the Engagement Letter, as modified by this Order, the invoices and supporting time records from such attorneys shall be included in Rothschild's own application (both interim and final) and such invoices and time records shall be subject to the Fee Guidelines and the approval of the Court under the standards of sections 330 and 331 of the Bankruptcy Code without regard to whether such attorney has been retained under section 327 of the Bankruptcy Code and without regard to whether such attorneys' services satisfy section 330(a)(3)(C) of the Bankruptcy Code.
- (c) In no event shall any Indemnified Party be indemnified if the Debtor(s) or representatives of the estates assert a claim for, and a court determines by final order that such claim arose out of, any Indemnified Party's own bad-faith, self-dealing, breach of fiduciary duty (if any), gross negligence, or willful misconduct.

17. To the extent the Application and/or the Engagement Letter is inconsistent with this Order, the terms of this Order shall govern.

18. The relief granted herein shall be binding upon any chapter 11 trustee appointed in the Chapter 11 Cases, or upon any chapter 7 trustee appointed in the event of a subsequent conversion of the Chapter 11 Cases to cases under chapter 7.

19. The Debtors are authorized and empowered to take all actions necessary to implement the relief granted in this Order, including entry into the amended escrow agreement described in the Application; *provided*, that fees and expenses allowed to Rothschild shall be

paid from funds held by Rothschild pursuant to such amended escrow agreement until such funds have been depleted.

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

21. This Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order.

Dated: \_\_\_\_\_, 2012  
New York, New York

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THE HONORABLE SEAN H. LANE  
UNITED STATES BANKRUPTCY JUDGE



## **ANNEX 2**

### **MARK-UP OF FORM OF ORDER**

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

-----X--	
<b>IN RE:</b>	: <b>Chapter 11</b>
	: :
<b>ARCAPITA BANK B.S.C.(c), et al.,</b>	: <b>Case No. 12-11076 (SHL)</b>
	: :
<b>Debtors.</b>	: <b>Jointly Administered</b>
	: :
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**ORDER APPROVING THE DEBTORS' EMPLOYMENT  
AND RETENTION OF ROTHSCHILD INC. AND N M ROTHSCHILD & SONS  
LIMITED AS FINANCIAL ADVISORS AND INVESTMENT BANKERS FOR THE  
DEBTORS NUNC PRO TUNC TO THE PETITION DATE**

Upon consideration of the application (the "*Application*")<sup>1</sup> of 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*") in the above-captioned chapter 11 cases (the "*Chapter 11 Cases*") for entry of an order (this "*Order*") authorizing the Debtors to employ and retain Rothschild Inc. and N M Rothschild & Sons Limited (together, "*Rothschild*") as their financial advisors and investment bankers, as more fully set forth in the Application; and upon consideration of the ~~Declaration~~[declarations](#) of David L. Resnick, ~~Chairman of Global Financing Advisory at Rothschild, and Homer Parkhill~~ in support of the Application ~~(the "*Resnick Declaration*")~~; and it appearing that the relief requested therein is in the best interests of the Debtors' estates, their creditors and other parties in interest; and it appearing that the Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334; and it appearing that this proceeding is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and it appearing that venue of this proceeding is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and it appearing that notice of the

<sup>1</sup> Capitalized terms used herein as defined terms and not otherwise defined shall have those meanings ascribed to them in the Application.

Application and opportunity for a hearing on the Application was appropriate under the particular circumstances and that no other or further notice need be given; and a hearing having been held to consider the relief requested in the Application and it appearing that Rothschild does not hold or represent interests adverse the Debtors' estates and is "disinterested," as that term is defined in section 101(14) of the Bankruptcy Code, as modified by section 1107(b) of the Bankruptcy Code; and it appearing that the terms and conditions of Rothschild's employment, including but not limited to the Fee and Expense structure and the Indemnification Provisions, are reasonable as required by section 328(a) of the Bankruptcy Code; and the Court having found and determined that the legal and factual bases set forth in the Application establish just cause for the relief granted herein; and it appearing that the relief sought in the Application is in the best interests of the Debtors, their estates, creditors and all parties in interest; and after due deliberation and sufficient cause appearing therefor,

**IT IS HEREBY ORDERED:**

1. The Application is approved, as provided herein.
2. In accordance with sections 327(a) and 328(a) of the Bankruptcy Code, Rules 2014(a) and 2016 of the Bankruptcy Rules and Rules 2014-1 and 2016-1 of the Local Rules, the Debtors shall be, and hereby are, authorized to employ and retain Rothschild in accordance with the terms and conditions set forth in the Engagement Letter attached hereto and incorporated herein by reference, effective *nunc pro tunc* to the Petition Date and to pay fees and reimburse expenses to Rothschild on the terms and times specified in the Engagement Letter.
3. The Engagement Letter, including, without limitation, the Fee and Expense Structure and the Indemnification Provisions, is approved in all respects except as otherwise set forth herein.

4. To the extent provided in the Engagement Letter, Rothschild's financial advisory and investment banking services to the Debtors include, as necessary and as Rothschild and the Debtors deem appropriate and feasible, the following:

- identify and/or initiate potential Transactions;
- with respect to the Debtors' intermediate and long-term business prospects and strategic alternatives to maximize the business enterprise value of the Debtors, review and analyze the Debtors' assets and the operating and financial strategies of the Debtors;
- review and analyze the business plans and financial projections prepared by the Debtors including, but not limited to, testing assumptions and comparing those assumptions to historical trends of the Debtors and industry trends;
- evaluate the Debtors' debt capacity in light of its projected cash flows and assist in the determination of an appropriate capital structure for the Debtors;
- assist the Debtors and its other professionals in reviewing the terms of any proposed Transaction, in responding thereto and, if directed, in evaluating alternative proposals for a Transaction;
- determine a range of values for the Debtors and any securities that the Debtors offer or propose to offer in connection with a Transaction;
- advise the Debtors on the risks and benefits of considering a Transaction with respect to the Debtors' intermediate and long-term business prospects and strategic alternatives to maximize the business enterprise value of the Debtors;
- review and analyze any proposals the Debtors receive from third parties in connection with a Transaction, including, without limitation, any proposals for debtor-in-possession financing, as appropriate;
- assist or participate in negotiations with the parties in interest, including, without limitation, any current or prospective creditors of, holders of equity in, or claimants against the Debtors and/or their respective representatives in connection with a Transaction;
- advise the Debtors with respect to, and attend, meetings of the Debtors' directors, creditor groups, official constituencies and other interested parties, as necessary in connection with Rothschild's primary responsibilities;
- if requested by the Debtors, participate in hearings before the Bankruptcy Court and provide relevant testimony with respect to the matters described herein and issues arising in connection with any proposed Plan; and
- render (but only to the extent permitted by further orders of this Court) such other financial advisory and investment banking services as may be agreed upon by Rothschild and the Debtors.

5. The first sentence of Section 4(a) of the Engagement Letter shall be amended and restated as follows:

Commencing as of the date hereof, whether or not a Transaction is proposed or consummated, an advisory fee (the "**Monthly Fee**") of \$175,000 per month.

6. Section 4(b) of the Engagement Letter shall be amended and restated as follows:

A fee (the "**Transaction Fee**") of \$6,000,000, payable upon the earlier of (i) the confirmation and effectiveness of a Plan and (ii) the closing of another Transaction (or series or combination of Transactions); *provided*, that a Transaction Fee shall be payable only upon effectiveness of a plan of reorganization or similar Transaction that resolves the treatment of substantially all or all of the Debtors' liabilities, or for a Transaction that permits the Company to continue as a going concern. Rothschild shall credit against the Transaction Fee 100% of the Monthly Fees due and paid after December 31, 2012; *provided*, that such credit shall not exceed the Transaction Fee. For the avoidance of doubt, no more than one Transaction Fee shall be payable.

7. Section 4(c) of the Engagement Letter shall be redesignated as Section 4(f) and a new Section 4(c) shall be inserted as follows:

A fee (the "**New Capital Fee**") equal to (i) 0.75% of the face amount of any debtor-in-possession financing raised (a "**DIP Raise**") and (ii) 0.75% of the first \$500,000,000, in the aggregate, and 1.5% thereafter of the face amount of any debt, equity or other capital raised, other than a DIP Raise; *provided*, that no New Capital Fee shall be payable on account of any portion of a DIP Raise that is funded by a member of the Official Committee of Unsecured Creditors or creditors' committee in the related Cayman Islands proceeding. Rothschild shall credit 100% of any New Capital Fee paid on account of a DIP Raise against any subsequent New Capital Fee; *provided*, that such credit shall not exceed such New Capital Fee(s). The New Capital Fee shall be payable upon the closing of the transaction by which the new capital is committed. For the avoidance of doubt, the term "raised" shall include the amount committed or otherwise made available to the Company pursuant to definitive documentation providing therefor, whether or not such amount (or any portion thereof) is drawn down at closing or is ever drawn down and whether or not such amount (or any portion thereof) is used to refinance existing obligations of the Company.

8. A new Section 4(d) of the Engagement Letter shall be inserted as follows:

A fee (the "**M&A Fee**") of 1.00% of Consideration (as defined below) if the Company, directly or indirectly, through a credit bid or otherwise, (i) sells substantially all or all of its assets (whether at once or in a series or combination of sales) or (ii) sells assets pursuant to a marketing and sale process that it has requested Rothschild to lead (a "**Sale**"). "**Consideration**" shall mean the total amount of all cash plus the total value (as determined pursuant hereto) of all securities, contractual arrangements (including, without limitation, any lease arrangements or put or call agreements) and other consideration, including, without limitation, any contingent or earned consideration, paid or payable, directly or indirectly, in connection with a Sale (including, without limitation, amounts paid (i) pursuant to covenants not to compete, employment contracts, employee benefit plans, management fees or other similar arrangements, and (ii) to holders of any warrants, stock purchase rights or convertible securities of the Company and to holders of any options or stock appreciation rights issued by the Company, whether or not vested). Consideration shall also include the amount of any short-term liabilities (including, without limitation, any trade or ordinary course liabilities) and any

long-term liabilities of the Company (including, without limitation, the principal amount of any indebtedness for borrowed money and capitalized leases and the full amount of any off-balance sheet financings) (x) repaid, defeased or retired, directly or indirectly, in connection with or in anticipation of a Sale or (y) existing on the Company's balance sheet at the time of a Sale (if such Sale takes the form of a merger, consolidation or a sale of stock or partnership interests) or assumed in connection with a Sale (if such Sale takes the form of a sale of assets). Consideration shall include (i) the value of any current assets not purchased, minus (ii) the value of any current liabilities not assumed. In the event such Sale takes the form of a recapitalization, restructuring, spin-off, split-off or similar transaction, Consideration shall include the fair market value of (i) the equity securities of the Company retained by the Company's security holders following such Sale and (ii) any securities received by the Company's security holders in exchange for or in respect of securities of the Company following such Sale (all securities received by such security holders being deemed to have been paid to such security holders in such Sale). The value of securities that are freely tradable in an established public market will be determined on the basis of the last market closing price prior to the consummation of a Sale. The value of securities that are not freely tradable or have no established public market, or if the consideration consists of property other than securities, the value of such property shall be the fair market value thereof as determined in good faith by Rothschild and the Company, provided, however, that all debt securities shall be valued at their stated principal amount without applying a discount thereto. If the consideration to be paid is computed in any foreign currency, the value of such foreign currency shall, for purposes hereof, be converted into U.S. dollars at the prevailing exchange rate on the date or dates on which such consideration is payable. Consideration shall also include the face amount of any liabilities tendered as purchase price in connection with any credit bid.

9. A new Section 4(e) of the Engagement Letter shall be inserted as follows:

Notwithstanding anything contained herein, (i) the sum of all Transaction, New Capital and M&A Fees paid shall not exceed \$12,000,000 and (ii) no New Capital Fee or M&A Fee shall be paid on account of a liquidating plan.

10. The first sentence of Section 7 of the Engagement Letter shall be amended and

restated as follows:

This Agreement may be terminated by either the Company or Rothschild after ninety (90) days from the date hereof by providing thirty (30) days advance notice in writing; provided that if Rothschild is paid any Transaction Fee, New Capital Fee or M&A Fee, it will not terminate this Agreement until the earlier of the ninetieth (90th) day after confirmation of a plan of reorganization or liquidation, if any, or the day of conversion or dismissal of the Chapter 11 Cases unless the Company (i) consents or (ii) breaches the terms hereof including, without limitation, by failing to make any payment to Rothschild that is due hereunder and permitted by the Bankruptcy Court.

11. ~~4.~~ All requests of Rothschild for payment of indemnity pursuant to the Engagement

Letter (including reimbursable expenses incurred in connection with such indemnity) shall be

made by means of an application (interim or final, as applicable) and shall be subject to review by the Court to ensure that payment of such indemnity conforms to the terms of the Engagement Letter and is reasonable based upon the circumstances of the litigation or settlement in respect of which indemnity is sought; *provided, however*, that in no event shall Rothschild be indemnified if the Debtors or a representative of the estates asserts a claim for, and a court determines by final order that such claim arose out of, Rothschild's own bad faith, fraud, self-dealing, breach of fiduciary duty (if any), gross negligence, or willful misconduct.

12. ~~5.~~ Rothschild will file fee applications for interim (as necessary) and final allowance of compensation and reimbursement of expenses pursuant to the procedures set forth in sections 330 and 331 of the Bankruptcy Code; *provided, however*, that Rothschild shall be compensated in accordance with the terms of the Engagement Letter, and subject to the procedures set forth in the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, the U.S. Trustee Guidelines and any other applicable orders of this Court.

13. ~~6.~~ The fees and expenses payable to Rothschild pursuant to the Engagement Letter shall be subject to review only pursuant to the standards set forth in section 328(a) of the Bankruptcy Code and shall not be subject to the standard of review set forth in section 330 of the Bankruptcy Code.

14. ~~7.~~ Notwithstanding anything to the contrary contained herein, the U.S. Trustee retains all rights to respond or object to Rothschild's applications for compensation and reimbursement of expenses on all ground including, but not limited to, reasonableness pursuant to section 330 of the Bankruptcy Code; and, in the event the U.S. Trustee objects, the Court retains the right to review the interim and final applications pursuant to section 330 of the Bankruptcy Code.

15. ~~8.~~ Rothschild shall include in its fee applications, among other things, time records setting forth a ~~summary~~reasonably detailed description of the services rendered by each professional and the amount of time spent on each date by each such individual in rendering services on behalf of the Debtors in one-half hour increments, but Rothschild shall not be required to provide or conform to any schedule of hourly rates.

16. [Notwithstanding anything to the contrary in the Engagement Letter, the indemnification provisions are hereby modified as follows:](#)

- (a) [All requests of Indemnified Parties for payment of indemnity pursuant to the Engagement Letter shall be made by means of an application \(interim or final as the case may be\) and shall be subject to review by the Court to ensure that payment of such indemnity conforms to the terms of the Engagement Letter and is reasonable based upon the circumstances of the litigation or settlement in respect of which indemnity is sought, provided, however, that in no event shall any Indemnified Party be indemnified in the case of its own bad-faith, self-dealing, breach of fiduciary duty \(if any\), gross negligence or willful misconduct.](#)
- (b) [In the event that any Indemnified Party seeks reimbursement from the Debtors for reasonable attorneys' fees in connection with a request by such Indemnified Party for payment of indemnity pursuant to the Engagement Letter, as modified by this Order, the invoices and supporting time records from such attorneys shall be included in Rothschild's own application \(both interim and final\) and such invoices and time records shall be subject to the Fee Guidelines and the approval of the Court under the standards of sections 330 and 331 of the Bankruptcy Code without regard to whether such attorney has been retained under section 327 of the Bankruptcy Code and without regard to whether such attorneys' services satisfy section 330\(a\)\(3\)\(C\) of the Bankruptcy Code.](#)
- (c) [In no event shall any Indemnified Party be indemnified if the Debtor\(s\) or representatives of the estates assert a claim for, and a court determines by final order that such claim arose out of, any Indemnified Party's own bad-faith, self-dealing, breach of fiduciary duty \(if any\), gross negligence, or willful misconduct.](#)

17. ~~9.~~ To the extent the Application and/or the Engagement Letter is inconsistent with this Order, the terms of this Order shall govern.

18. ~~10.~~ The relief granted herein shall be binding upon any chapter 11 trustee appointed in the Chapter 11 Cases, or upon any chapter 7 trustee appointed in the event of a subsequent conversion of the Chapter 11 Cases to cases under chapter 7.



19. ~~11.~~ The Debtors are authorized and empowered to take all actions necessary to implement the relief granted in this Order, including entry into the amended escrow agreement described in the Application; provided, that fees and expenses allowed to Rothschild shall be paid from funds held by Rothschild pursuant to such amended escrow agreement until such funds have been depleted.

20. ~~12.~~ The terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

21. ~~13.~~ This Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order.

Dated: \_\_\_\_\_, 2012  
New York, New York

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THE HONORABLE SEAN H. LANE  
UNITED STATES BANKRUPTCY JUDGE