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**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.	:	Joint Administration Requested
	:	
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DEBTORS' MOTION FOR ENTRY OF AN ORDER CONFIRMING THE PROTECTIONS OF SECTIONS 362 AND 365 OF THE BANKRUPTCY CODE AND RESTRAINING ANY ACTION IN CONTRAVENTION THEREOF

Arcapita Bank B.S.C.(c) and certain of its subsidiaries, as debtors and debtors in possession (collectively, the “*Debtors*” and each, a “*Debtor*”), submit this motion (the “*Motion*”) for entry of an order substantially in the form annexed hereto as *Exhibit A*, pursuant to sections 105(a), 362, and 365 of title 11 of the United States Code (the “*Bankruptcy Code*”), enforcing, restating, and restraining any action taken in contravention of the automatic stay and the provisions in the Bankruptcy Code and preventing the enforcement of *ipso facto* clauses against

the Debtors. In support thereof, the Debtors respectfully represent:¹

BACKGROUND

1. On March 19, 2012 (the “*Petition Date*”), each of the Debtors commenced cases (the “*Chapter 11 Cases*”) under chapter 11 of the Bankruptcy Code. The Debtors are operating their businesses and managing their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No committee has been appointed in these Chapter 11 Cases.

2. Founded in 1996, Arcapita, through its Debtor and non-Debtor subsidiaries (collectively, with Arcapita, the “*Arcapita Group*”), is a leading global manager of Shari’ah-compliant alternative investments and operates as an investment bank. Arcapita is not a domestic bank licensed in the United States, nor does it have a branch or agency in the United States as defined in section 109(b)(3)(B) of the Bankruptcy Code. Arcapita is headquartered in Bahrain and is regulated under an Islamic wholesale banking license issued by the Central Bank of Bahrain (the “*CBB*”). The Arcapita Group employs 268 people and, together with the other Debtors and their non-Debtor Subsidiaries, has offices in Atlanta, London, Hong Kong, and Singapore in addition to its Bahrain headquarters. The Arcapita Group’s principal activities include investing for its own accounts and providing investment opportunities to third-party investors in conformity with Islamic Shari’ah rules and principles. The Arcapita Group also derives revenue from managing assets for its third party investors.

3. The Arcapita Group provides investors the opportunity to co-invest with

¹ A description of the Debtors’ business and the reasons for filing the Chapter 11 Cases is set forth in the Declaration of Henry A. Thompson, in Support of the Debtors’ Chapter 11 Petitions and First Day Motions and in Accordance with Local Rule 1007-2, executed on March 19, 2012 (the “*Thompson Declaration*”). This Motion is supported by the Thompson Declaration.

the Arcapita Group on a deal-by-deal basis across three global asset classes: real estate, infrastructure and private equity and venture capital. Typically, the Arcapita Group, through its non-Debtor subsidiaries, takes an indirect 10-20% equity stake alongside its third-party investors in non-Debtor holding companies that directly own operating portfolio companies in the United States, Europe and the Middle East. The underlying investments made by the Arcapita Group are generally medium to long term projects that have limited value in the short term, and often require significant on-going capital funding to complete in order to realize the value of the investment.

4. The Arcapita Group has approximately \$7 billion in assets currently under management. As of the Petition Date, on a consolidated basis, the Arcapita Group owns assets valued at approximately \$3.06 billion² and has liabilities of approximately \$2.55 billion, as described in more detail in the Thompson Declaration. Approximately \$1.1 billion of the Debtors' prepetition liabilities are comprised of that certain murabaha, Shari'ah-compliant syndicated facility, issued on March 28, 2007, and maturing on March 28, 2012 (the "*Syndicated Facility*").

5. Like virtually all investment banks and private equity institutions, the Arcapita Group has been adversely impacted by the global economic downturn, and has been especially hard hit by the recent debt crisis in the Eurozone. This global recession has hampered the Arcapita Group's ability to obtain liquidity from the capital markets, and has also resulted in a reduction in asset values (and concomitant difficulties in monetizing certain of the Debtors' illiquid and complex investments held by the Debtors' affiliated portfolio companies). As a

² This includes Arcapita's beneficial interest in assets under management.

result thereof, the Debtors do not have the liquidity necessary to repay the Syndicated Facility when it comes due on March 28, 2012, thus precipitating the filing of the Chapter 11 Cases. On a more general basis, the Debtors commenced these Chapter 11 Cases to facilitate the development and implementation of a comprehensive proposal designed to enable the Debtors to (a) restructure their debts, (b) weather the current economic conditions, and (c) realize the full value of their assets over time for the benefit of the Debtors' creditors and other stakeholders.

JURISDICTION AND VENUE

6. The Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

RELIEF REQUESTED

7. The Debtors have borrowed more than \$1 billion from financial and other institutions. While many of these institutions have connections with the United States, many do not. In addition, the Debtors have foreign operations with potentially large numbers of foreign creditors and counterparties to contracts (the "*Foreign Creditors*") who may be unaware of the global-reaching prohibitions and restrictions of the Bankruptcy Code. In particular, these Foreign Creditors may be unfamiliar with the operation of the automatic stay and other provisions of the Bankruptcy Code, including the stay on enforcement of *ipso facto* clauses.

8. Due to this unfamiliarity, on or after the Petition Date, certain Foreign Creditors may attempt to seize assets located outside of the United States to the detriment of the Debtors, their estates, and creditors, or take other actions in contravention of the automatic stay under section 362 of the Bankruptcy Code. In addition, upon learning of the Chapter 11 Cases,

Foreign Creditor counterparties to unexpired leases and executory contracts may attempt to terminate those leases or contracts due to the commencement of the Chapter 11 Cases.

9. To ensure that the Debtors' operations are not disrupted by enforcement actions or the exercise of self-help remedies initiated by Foreign Creditors outside the United States, the Debtors hereby an order, pursuant to section 105(a) of the Bankruptcy Code, that confirm, restate, and restrain any action taken in violation of two key protections afforded to the Debtors under the Bankruptcy Code: (a) the automatic stay provisions of section 362 of the Bankruptcy Code; and (b) the prohibition of section 365 of the Bankruptcy Code against terminating agreements and leases due to *ipso facto* provisions, both of which are further described below. The Debtors believe that a specific order from this Court that the Debtors can present to Foreign Creditors outside of the United States will assist in protecting the Debtors from actions by such creditors that would violate the provisions of the Bankruptcy Code.

A. Bankruptcy Code Section 362: The Automatic Stay

10. Upon the commencement of the Chapter 11 Cases, section 362 of the Bankruptcy Code automatically stays and enjoins (subject to certain exceptions) all persons and entities from, among other things: (a) commencing or continuing any judicial, administrative, or other proceeding against the Debtors that was or could have been commenced before the Petition Date; (b) recovering upon a claim against any of the Debtors that arose before the Petition Date; (c) taking any act to obtain possession or exercise control of any of the Debtors' property; and (d) taking any action to collect, assess, or recover a claim against any of the Debtors that arose before the Petition Date. *See* 11 U.S.C. § 362(a)(1), (2), (3) and (6).

11. The automatic stay is a fundamental protection provided by the Bankruptcy Code that performs two functions: (a) affording the Debtors a breathing spell from their creditors; and (b) centralizing all disputes concerning property of the estate "so that

reorganization can proceed efficiently.” *See, e.g., Shugrue v. Air Line Pilots Ass’n, Int’l (In re Ionosphere Clubs, Inc.)*, 922 F.2d 984, 989 (2d Cir. 1990) (citations omitted).

12. Courts broadly construe the automatic stay because of its fundamental importance to a debtor’s reorganization. *In re NextWave Personal Commc’ns., Inc.*, 244 B.R. 253, 271 (Bankr. S.D.N.Y. 2000) (“The automatic stay is broadly written and broadly construed.”). As such, the protections of the automatic stay extend to protect a debtor’s property and contracts wherever located and by whomever held. *See Nakash v. Zur (In re Nakash)*, 190 B.R. 763, 768 (Bankr. S.D.N.Y. 1996) (“[L]egislative history makes clear Congress’ intent that ‘wherever located’ language be broadly construed to include property located in and outside of the U.S.”) (citations omitted).

13. The automatic stay has even been held to apply extraterritorially. *See In re Nakash*, 190 B.R. at 768 (“[B]ased upon the applicable Code sections [namely, sections 541 and 362], other indicia of congressional intent and case law in this district, the automatic stay applies extraterritorially.”); *Hong Kong & Shanghai Banking Corp. v. Simon (In re Simon)*, 153 F.3d 991, 996 (9th Cir. 1998) (“Given this clear expression of intent by Congress in the express language of the Bankruptcy Code, we conclude that Congress intended extraterritorial application of the Bankruptcy Code as it applies to property of the estate.”); *Lykes Bros. Steamship Co., Inc. v. Hanseatic Marine Services (In re Lykes Bros. Steamship Co., Inc.)*, 207 B.R. 282, 287 (Bankr. M.D. Fla. 1997) (“[T]he automatic stay imposed by 11 U.S.C. § 362 extends beyond the territorial boundaries of the United States.”); *In re McLean Indus.*, 74 B.R. 589, 601 (Bankr. S.D.N.Y. 1987) (“[t]he automatic stay applies extraterritorially”).

B. Bankruptcy Code Section 365: Prohibitions Against Enforcement of Termination and Anti-Assignment Provisions

14. Section 365 of the Bankruptcy Code prohibits all parties to executory contracts and/or unexpired leases with the Debtors from, among other things, modifying or terminating such contracts or leases, or any right or obligation under such contracts or leases, at any time after the commencement of the case solely due to contractual provisions conditioned on: (a) the insolvency or financial condition of the debtor at any time before the closing of the chapter 11 cases; (b) the commencement of the chapter 11 cases themselves; or (c) the appointment of a trustee in the chapter 11 cases. *See* 11 U.S.C. § 365(e)(1). Thus, section 365(e) of the Bankruptcy Code invalidates so-called “*ipso facto*” provisions, which provide for the termination of a contract or lease solely due to a bankruptcy filing.

15. Pursuant to section 365, any actions by third parties to modify or terminate contracts or enforce their terms against the Debtors are prohibited absent court approval. *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 531-32 (1984) (holding that while the debtor may enforce the terms of the contract against the creditor, the creditor is precluded from enforcing the terms of an executory contract prior to its assumption by the debtor). Thus, a third party must continue to perform under an executory contract until it is assumed or rejected. *Calpine Energy Servs., L.P. v. Reliant Energy Electric Solutions, L.L.C. (In re Calpine Corp.)*, Case No. 06-10678, 2009 Bankr. LEXIS 1041, at *15 (Bankr. S.D.N.Y. May 7, 2009) (“During th[e] gap period between the petition date and plan confirmation, a creditor may not enforce a prepetition executory contract against the debtor.”); *Krafsur v. UOP (In re El Paso Refinery, L.P.)*, 196 B.R. 58, 72 (Bankr. W.D. Tex. 1996) (“The [Bankruptcy] Code places an independent duty on the non-debtor to continue the performance of an executory contract until it is assumed or rejected

.... Whether the debtor performs or not, the non-debtor must perform until assumption or rejection.”).

BASIS FOR RELIEF REQUESTED

A. The Relief Sought Herein Should Be Granted Under Section 105(a)

16. Section 105(a) of the Bankruptcy Code authorizes the Court to issue “any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). The basic purpose of section 105(a) is to assure the bankruptcy court’s power to take whatever action is appropriate or necessary in aid of the exercise of its jurisdiction. *See In re L&S Indus., Inc.*, 989 F.2d 929, 932 (7th Cir. 1993). Such orders are appropriate where, as here, they are essential to the debtor’s reorganization efforts and do not pose a burden on the debtor’s creditors. *See Momentum Mfg. Corp. v. Employee Creditors Comm. (In re Momentum Mfg. Corp.)*, 25 F.3d 1132, 1136 (2d Cir. 1994) (“It is well settled that bankruptcy courts are courts of equity, empowered to invoke equitable principles to achieve fairness and justice in the reorganization process. . . . We have repeatedly emphasized the importance of the bankruptcy court’s equitable power.”).

17. Among the equitable powers available to the bankruptcy court under section 105 is its broad ability to issue injunctions to enforce the automatic stay. *Adelphia Commc’ns. Corp. v. America Channel, LLC (In re Adelphia Commc’ns. Corp.)*, 345 B.R. 69, 83-84 (Bankr. S.D.N.Y. 2006) (“Injunctions to enforce the automatic stay – in substance, to enforce a statutory prohibition by a prohibitory injunction – have been routinely granted by bankruptcy courts, and affirmed by higher courts, most often under Bankruptcy Code section 105(a).”). Courts have also relied upon section 105 as a basis to reimpose a lapsed stay. *See In re Wedgewood Realty Group, Ltd.*, 878 F.2d 693, 701 (3d Cir. 1989) (finding court has authority to

reimpose a lapsed stay). While the automatic stay enjoins most creditor actions against an estate, courts have recognized that, where appropriate, discretionary injunctions may be issued pursuant to section 105. *See Lyondell Chem. Co. v. Centerpoint Energy Gas Servs. (In re Lyondell Chem. Co.)*, 402 B.R. 571, 587 (Bankr. S.D.N.Y. 2009) (“No one considering this matter objectively disputes the power of a bankruptcy court, under section 105(a) of the Code, to enjoin acts against third parties when they impair a debtor’s ability to reorganize in a chapter 11 case—even though such acts are not proscribed by the automatic stay of section 362 of the Code.”).

18. The Debtors submit that this Court has ample authority under section 105 of the Bankruptcy Code to grant the relief requested herein. Granting such relief is appropriate, necessary, and fully consistent with the terms of the Bankruptcy Code, and should facilitate a more orderly transition into chapter 11 by protecting against potential interference by Foreign Creditors.

B. Bankruptcy Courts In This District Routinely Grant Similar Relief

19. Courts in this district have regularly issued orders confirming, enforcing, and restating these Bankruptcy Code protections. *See, e.g., In re TBS Shipping Services Inc.*, Case No. 12-22224 (RDD) (Bankr. S.D.N.Y. Feb. 10, 2012) [Docket No. 34]; *In re Almatris B.V.*, Case No. 10-12308 (MG) (Bankr. S.D.N.Y. May 17, 2010) [Docket No. 112]; *In re Lyondell Chemical Company, Inc.*, Case No. 09-10023 (REG) (Bankr. S.D.N.Y. January 7, 2009) [Docket No. 64].³ The facts and circumstances of the Chapter 11 Cases similarly justify the grant of the requested relief.

³ The Debtors have not annexed copies of the unreported orders cited herein because of their size. Copies of these orders, however, are available upon request of the Debtors’ counsel, including at the hearing to consider the Motion.

20. Even though an order of the sort sought by this Motion is not necessary to trigger the protections afforded the Debtors by sections 362 and 365 of the Bankruptcy Code, the entry of such an order is critical to the reorganization of these Debtors given the operations and contacts with creditors outside of the United States. The Debtors believe that many of the Foreign Creditors are not aware of the significant protections afforded to the Debtors resulting from the filing of these Chapter 11 Cases. Accordingly, granting of the relief requested herein will help ensure that: (a) creditors, particularly Foreign Creditors, do not seize the Debtors' assets or take any other action in violation of the automatic stay and (b) the non-debtor parties to unexpired leases and executory contracts with the Debtors will continue to perform and will not unilaterally terminate their contracts.

21. The foregoing authority from cases adjudicated in this district illustrates that it is often necessary to advise third parties of the existence and effect of sections 362 and 365 of the Bankruptcy Code through a separate order. The Debtors believe that the existence of such an order, which the Debtors will be able to transmit to affected parties, will maximize the protections afforded by sections 362 and 365 of the Bankruptcy Code. Further, the Debtors believe that the "automatic" and self-executing nature of these protections may not be recognized by Foreign Creditors unless embodied in an order of this Court.

22. The Debtors firmly believe that the Debtors' estates will benefit from, and their ability to reorganize will be assisted by, an order of this Court confirming the protections of sections 362 and 365 of the Bankruptcy Code. Accordingly, the Debtors respectfully request that this Court issue an order that confirms, restates, and restrains any action in contravention of, the foregoing Bankruptcy Code provisions.

NOTICE

23. No trustee, examiner, or official committee of unsecured creditors has been appointed in the Chapter 11 Cases. The Debtors have provided notice of filing of the Motion by electronic mail, facsimile and/or overnight mail to: (a) the Office of the United States Trustee for the Southern District of New York; (b) the Debtors' 50 largest unsecured creditors on a consolidated basis; (c) the Central Bank of Bahrain; and (d) the agent for the Debtors' prepetition secured and unsecured murabaha facilities. Due to the nature of the relief requested herein, the Debtors submit that no other or further notice is required.

NO PRIOR REQUEST

24. No prior motion for the relief sought in this Motion has been made to this or any other court.

WHEREFORE, the Debtors respectfully request that the Court grant the relief requested herein and such other and further relief as the Court may deem just and proper.

Dated: New York, New York
March 19, 2012

Respectfully submitted,

/s/ Michael A. Rosenthal
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**PROPOSED ATTORNEYS FOR THE DEBTORS
AND DEBTORS IN POSSESSION**

EXHIBIT A

Proposed Order

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

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IN RE:	:	Chapter 11
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ARCAPITA BANK B.S.C.(C), et al.,	:	Case No. 12-11076 (SHL)
	:	
Debtors.	:	Jointly Administered
	:	
-----X		

**ORDER CONFIRMING THE PROTECTIONS OF
SECTIONS 362 AND 365 OF THE BANKRUPTCY CODE AND
RESTRAINING ANY ACTION IN CONTRAVENTION THEREOF**

Upon consideration of the motion (the “*Motion*”)¹ of Arcapita Bank B.S.C.(c) and certain of its subsidiaries, as debtors and debtors in possession in the above-captioned Chapter 11 Cases (collectively, the “*Debtors*” and each, a “*Debtor*”), for entry of a an order confirming, enforcing, and restating the application of: (a) the automatic stay and (b) the injunction preventing non-debtor counterparties to contracts with the Debtors from terminating such contracts or leases; and upon the Thompson Declaration in support thereof; and the Court having found that it has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334; and the Court having found that jurisdiction and venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C §§ 1408 and 1409; and the Court having found that the relief requested in the Motion is in the best interests of Debtors’ estates, their creditors, and other parties in interest; and notice of the Motion and the opportunity for a hearing on the Motion was appropriate under the particular circumstances; and the Court having reviewed the Motion and having considered the statements in support of the relief requested therein at a hearing before the

¹ Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Motion.

Court (the “*Hearing*”); and the Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before the Court; and after due deliberation, and having overruled objections, if any, and sufficient cause appearing therefor,

IT IS HEREBY ORDERED:

1. The Motion is granted to the extent set forth herein.

2. All persons (including individuals, partnerships, corporations, and other entities and all those acting on their behalf) are hereby stayed, restrained and enjoined, pursuant to section 362(a) of the Bankruptcy Code, from:

- (a) (i) commencing or continuing (including the issuance or employment of process) any judicial, administrative, or other action or proceeding against the Debtors that was or could have been commenced before the commencement of the Chapter 11 Cases (the “*Petition Date*”); (ii) commencing or continuing (including the issuance or employment of process) any bankruptcy, liquidation, suspension of payments, or any and all other similar proceedings in a foreign jurisdiction and (iii) recovering a claim against the Debtors that arose before the Petition Date;
- (b) enforcing, against the Debtors or against property of their estates, a judgment or order obtained before the Petition Date;
- (c) taking any action to obtain possession of property of the Debtors’ estates or to exercise control over property of the estates or interfere in any way with the conduct by the Debtors of their businesses, including, without limitation, attempts to interfere with deliveries or events or attempts to seize or reclaim any equipment, supplies, or other assets the Debtors use in their businesses;
- (d) taking any action to create, perfect, or enforce any lien against property of the Debtors’ estates;
- (e) taking any action to create, perfect, or enforce against property of the Debtors any lien to the extent that such lien secures a claim that arose prior to the Petition Date;
- (f) taking any action to collect, assess, or recover a claim against the Debtors that arose prior to the Petition Date;

- (g) offsetting any debt owing to the Debtors that arose before the Petition Date against any claim against the Debtors; and
- (h) commencing or continuing any proceeding before the United States Tax Court concerning the Debtors, subject to the provisions of 11 U.S.C. § 362(b);

provided, however that exceptions to automatic stay as set forth in section 362 are treated as provided therein.

3. Pursuant to sections 362 and 365 of the Bankruptcy Code, notwithstanding a provision in a contract or lease or any applicable law, all persons are hereby stayed, restrained, and enjoined from terminating or modifying any contract or lease to which one or more Debtors are party or signatory, at any time after the Petition Date due to a provision in such contract or lease that is conditioned on the (a) insolvency or financial condition of any Debtor at any time before the closing of the Chapter 11 Cases; (b) commencement of the Chapter 11 Cases under the Bankruptcy Code; or (c) the appointment of a trustee in the Chapter 11 Cases (or one of the Chapter 11 Cases); *provided, however*, that exceptions set forth in sections 362 and 365 are treated as provided therein.

4. Pursuant to sections 362 and 365 of the Bankruptcy Code, all parties to a contract or lease with one or more of the Debtors shall continue to perform their obligations under such contract or lease until such contract or lease is assumed or rejected by the Debtors or otherwise expires by its own terms.

5. Nothing in this Order or the Motion shall constitute a rejection or assumption by the Debtors, as debtors-in-possession, of any executory contract or unexpired lease.

6. In accordance with the Bankruptcy Code, the Bankruptcy Rules, and applicable law, upon request of a party in interest, and after notice and a hearing, the Court may

grant relief from the restraints imposed herein in the event that it is necessary, appropriate, and warranted to terminate, annul, modify, or condition the injunctive relief herein.

7. The Debtors are hereby authorized to serve a copy of this entered Order upon such creditors and other parties in interests as they deem necessary, desirable, or appropriate.

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

9. To the extent that any affiliates of the Debtors subsequently commence chapter 11 cases that are jointly administered with the Chapter 11 Cases, the relief granted pursuant to this Order shall apply to such debtors and their respective estates.

Dated: New York, New York
_____, 2012

THE HONORABLE SEAN H. LANE
UNITED STATES BANKRUPTCY JUDGE