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

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

**DEBTORS' REPLY TO OBJECTION OF CF ARC LLC TO
MOTION FOR THE ENTRY OF AN ORDER AUTHORIZING THE
DEBTORS TO (A) ENTER INTO A FINANCING COMMITMENT LETTER
AND RELATED FEE LETTER TO OBTAIN (I) REPLACEMENT DIP
FINANCING AND (II) EXIT FINANCING, (B) INCUR AND PAY ASSOCIATED
FEES AND EXPENSES, AND (C) PROVIDE RELATED INDEMNITIES**

Arcapita Bank B.S.C.(c) ("***Arcapita***")¹ and certain of its affiliates (each, a "***Debtor***" and collectively, the "***Debtors***") in the above-referenced chapter 11 cases, hereby submit this reply (this "***Reply***") to the *Objection of CF ARC LLC to Motion for the Entry of an Order Authorizing the Debtors to (A) Enter into a Financing Commitment Letter and Related Fee Letter to Obtain (I) Replacement DIP Financing and (II) Exit Financing, (B) Incur and Pay Associated Fees and Expenses, and (C) Provide Related Indemnities* (Dkt. No. 1085) (the "***Objection***"). This Reply is

¹ Capitalized terms not otherwise defined in this Reply shall have the meanings ascribed to them in the *Motion for the Entry of an Order Authorizing the Debtors to (A) Enter into a Financing Commitment Letter and Related Fee Letter to Obtain (I) Replacement DIP Financing and (II) Exit Financing, (B) Incur and Pay Associated Fees and Expenses, and (C) Provide Related Indemnities* (Dkt. No. 1061) (the "***Commitment Letter Motion***").

supported by the *Declaration of Bernard Douton in Support of the Debtors' Motion for Entry of an Order Authorizing the Debtors to (A) Enter into a Financing Commitment Letter and Related Fee Letter to Obtain (I) Replacement DIP Financing and (II) Exit Financing, (B) Incur and Pay Associated Fees and Expenses, and (C) Provide Related Indemnities* (the “**Douton Declaration**”), filed concurrently herewith.

REPLY

Prior to seeking approval of the Commitment Letter with Goldman Sachs,² the Debtors and the Committee ran an auction process and ultimately agreed upon the highest and best bidder. Douton Declaration ¶¶ 10-13. Not surprisingly, as is common, to promote the integrity of the bidding process, the Debtors and the Committee established a deadline of April 26, 2013, at 1:00 p.m. (Eastern Time), for parties to submit their proposed final and best bids. Douton Declaration ¶ 12. Three days after that deadline, CF ARC LLC (together with its affiliates, “**Fortress**”) submitted the “April 29th” proposal referenced in its objection. Not only was that proposal three days late, but by its very terms, the proposal terminated five hours after its receipt by the Debtors. Douton Declaration ¶ 15. Hence, as of the agreed upon conclusion of the auction **and** the filing of the Motion, there can be no dispute that the Commitment Letter, which also included a contractual “fiduciary out” which could be exercised by the Debtors, represented the best binding commitment.³

² Capitalized terms not defined herein have the meaning ascribed to them in the Commitment Letter Motion.

³ The Debtors and the Committee were certainly within their rights in setting a deadline for final and best bids. By way of analogy, in dealing with court-approved bid procedures, numerous courts have held that a debtor may refuse to accept a non-conforming bid submitted after the close of an auction. *See, e.g., Colony Hill*, 111 F.3d at 277 (affirming court’s refusal to accept late bid where disgruntled bidder received adequate notice prior to transaction); *In re Sebert*, 2008 WL 686264 (E.D. Mich. 2008) (affirming decision to not accept late bid where no indication was given that bids would be accepted after the auction date); Transcript of Record at 27-28, *In re Extended Stay Inc.*, No. 09-13764 (JMP) (Bankr. S.D.N.Y. June 17, 2010) (Dkt. No. 1102) (Peck, J.) (noting that disgruntled bidder must make credible assertion of a deviation of governing bidding procedures to support consideration of late bid). However, a court may look favorably upon consideration of new or

Nonetheless, in its filing yesterday, Fortress appears to have resurrected its previously terminated April 29th proposal on even better financial terms. The Debtors view this as a positive development. Consistent with their fiduciary duties, fully preserved by the “fiduciary out” provisions set forth in paragraph 3 of the Commitment Letter, the Debtors continue to review, analyze and compare both proposals and are continuing discussions with the Committee, Fortress and Goldman Sachs.

Dated: New York, New York
May 14, 2013

Respectfully submitted,

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supplemental bids where there is some special circumstance or condition warranting further consideration, such as when the bidding procedures may reasonably be interpreted as anticipating or even inviting late bidding; or where local custom and practice contemplates late bidding; or where there are problems with the notice of the procedures and the relevant deadlines. *See, e.g., In re Financial News Network, Inc.*, 980 F.2d 165, 170 (2d Cir. 1992) (finding the bankruptcy court did not abuse its discretion in allowing bids after the close of the bidding procedures where the bidding scenario was “complex and fluid,” the nature of the assets being sold was speculative, the late bidder’s proposal was not an attempt to circumvent the auction process, and reopening the bidding was not inconsistent with the rules of the auction or the reasonable expectations of the parties.); *In re Food Barn Stores, Inc.*, 107 F.3d 558, 566 (8th Cir. 1997) (holding bankruptcy court properly considered late bids because the court had adopted informal and flexible bidding arrangements with no deadlines to submit offers and because the judge had a well-known propensity for conducting in court room sales thus making it within the reasonable expectations of the parties that there could be further bidding after the auction).