



redacted versions of (i) the Fee Letter (the “*Fee Letter*”) with Goldman Sachs International (“*Goldman Sachs*”), annexed as *Exhibit C* to the *Debtors’ 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* (the “*Commitment Letter Motion*”), filed concurrently herewith, and (ii) the valuations of the Debtors’ assets (the “*Valuations*” and, together with the Fee Letter, the “*Confidential Documents*”) as set forth in Annex D to the Commitment Letter (the “*Commitment Letter*”) with Goldman Sachs, annexed as *Exhibit B* to the Commitment Letter Motion; and (b) file unredacted copies of the Confidential Documents with the Court under seal. In support of this Motion, the Debtors respectfully represent as follows:

### **JURISDICTION AND VENUE**

1. This Court has jurisdiction to consider this motion pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

### **BACKGROUND**

#### **A. General Background**

2. On March 19, 2012 (the “*Petition Date*”), Arcapita and five of its affiliates commenced cases under chapter 11 of the Bankruptcy Code. On April 30, 2012, Falcon Gas Storage Co., Inc. commenced a case under chapter 11 of the Bankruptcy Code.<sup>2</sup> 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.

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<sup>2</sup> Falcon Gas Storage Co., Inc. is not party to the Commitment Documents (as defined below).

3. On April 5, 2012, the United States Trustee for Region 2 (the “*U.S. Trustee*”) appointed the official committee of unsecured creditors (the “*Committee*”) (Dkt. No. 60) pursuant to sections 1102(a) and (b) of the Bankruptcy Code.

4. On April 25, 2013, the Debtors filed the *Second Amended Joint Plan of Reorganization of Arcapita Bank B.S.C.(c) and Related Debtors Under Chapter 11 of the Bankruptcy Code* (Dkt. No. 1036) (as may be further amended or supplemented, the “*Amended Plan*”). The related disclosure statement (Dkt. No. 1038) was approved by the order entered by this Court on April 26, 2013 (Dkt. No. 1045). The Debtors subsequently began soliciting votes for the Amended Plan pursuant to the procedures set forth in that order.

#### **B. The Fee Letter**

5. Pursuant to the Commitment Letter Motion, the Debtors seek authority to enter into a financing Commitment Letter and related Fee Letter (the “*Commitment Documents*”) with Goldman Sachs. The Commitment Documents contemplate (a) a replacement secured superpriority debtor-in-possession Murabaha facility (the “*Replacement DIP Facility*”) and (b) a larger exit Murabaha facility, upon the occurrence of the effective date for the Amended Plan and the satisfaction of other conditions precedent (the “*Exit Facility*” and, together with the Replacement DIP Facility, the “*Goldman Sachs Facilities*”). Subject to the Commitment Documents, Goldman Sachs (a) will be appointed as sole lead arranger, sole bookrunner and sole syndication agent with respect to and (b) will commit to provide the Goldman Sachs Facilities.

6. The Commitment Documents obligate the Debtors to protect the confidentiality of certain economic terms as against third parties. Notably, these restrictions do not apply to estate fiduciaries. The Debtors may share the Commitment Documents on a

confidential basis, including an unredacted Fee Letter, with the Committee, the Joint Provisional Liquidators appointed in the Cayman Island proceedings of Arcapita Investment Holdings Limited (the “*Joint Provisional Liquidators*”) and the U.S. Trustee. Indeed, the Committee played a major role in negotiating the Fee Letter, along with the other Commitment Documents.

7. The Fee Letter sets forth the Debtors’ obligations to pay certain fees (the “*Fees*”) in connection with Goldman Sachs’s commitments and appointments under the Commitment Documents. Much of the pricing information, as set forth in the Fee Letter, constitutes extremely sensitive and confidential commercial information. Public disclosure of such information would give a strategic advantage to Goldman Sachs’s competitors and prejudice Goldman Sachs’s ability to compete and bid for this deal and other similar transactions.

### **C. The Valuations**

8. The Valuations, as annexed as Annex D to the Commitment Letter, contain the confidential results of the efforts by KPMG LLP, whose retention by the Debtors to serve as a valuation advisor was approved by this Court’s order dated July 20, 2012 (Dkt. No. 335), to value the Debtors’ various portfolio investment assets.

9. Subject to the terms of the Commitment Letter, the Debtors and Goldman Sachs have agreed that substantially all assets of the Debtors (as well as the assets of certain non-Debtor affiliates) shall serve as collateral securing the obligations under the Goldman Sachs Facilities, subject to the liens and guarantees in favor of Standard Chartered Bank securing the Debtors’ obligations under certain existing pre-petition secured Murabaha facilities. By the Commitment Letter, the Debtors and Goldman Sachs have further agreed in concept (with definitive terms to be memorialized in the definitive documents) that the Valuations will serve as

the benchmark for the purpose of determining the Debtors' compliance with the terms of the Loan-to-Value/Collateral Coverage Ratio covenant, for the quarterly period ending after the closing date for the Replacement DIP Facility.

**RELIEF REQUESTED**

10. By this Motion, the Debtors seek entry of an order pursuant to section 107(b) of the Bankruptcy Code and Bankruptcy Rule 9018, substantially in the form annexed hereto as *Exhibit A*, authorizing the Debtors to: (a) file redacted versions of the Confidential Documents publicly with the Court; and (b) file unredacted versions of the Confidential Documents with the Court under seal.

11. This Motion seeks to protect a very limited set of information, namely sensitive pricing and fee information contained in the Fee Letter, and sensitive valuation information contained in the Valuations. The most relevant information in the Commitment Documents, including the nature and amount of the Goldman Sachs Facilities, is described in the Debtors' Commitment Letter Motion. Moreover, Goldman Sachs has agreed to give the Committee, the Joint Provisional Liquidators and the U.S. Trustee access to unredacted copies of all Commitment Documents.

**BASIS FOR RELIEF REQUESTED**

12. Section 107(b) of the Bankruptcy Code provides, in relevant part, as follows: "On request of a party in interest, the bankruptcy court shall . . . protect an entity with respect to a trade secret or confidential research, development, or commercial information . . ." 11 U.S.C. § 107(b).

13. Bankruptcy Rule 9018 provides, in relevant part, as follows:

On motion or on its own initiative, *with or without notice*, the court may make any order which justice requires (1) to protect the estate or any entity in respect of

a trade secret or other confidential research, development, or commercial information . . .

Fed. R. Bankr. P. 9018 (emphasis added).

14. The Second Circuit has held that section 107(b) and Bankruptcy Rule 9018 do “not require that commercial information be the equivalent of a trade secret before protecting such information.” *Video Software Dealers Assoc. v. Orion Pictures Corp. (In re Orion Pictures Corp.)*, 21 F.3d 24, 28 (2d Cir. 1994). In addition, the Second Circuit has held that a party seeking the sealing of information is only required to show that the information is confidential and commercial. No showing of “good cause” is necessary, although as set forth below, the Debtors here have demonstrated that good cause does exist. *Id.*

**A. Good Cause Exists to File the Fee Letter Under Seal**

15. The Fees payable to Goldman Sachs and other redacted terms set forth in the Fee Letter are “confidential” and “commercial” in nature. This alone justifies their protection. *Id.* Further, Courts in the Southern District of New York have previously ruled that fee letter provisions may be filed under seal in cases factually similar to this. *See, e.g., In re Almatris*, Case No. 10-12308 (Bankr. S.D.N.Y. July 23, 2010) (Dkt. No. 308) (authorizing debtors to file fee provisions under seal, where the debtors indicated that the fee provisions contained sensitive and confidential commercial information); *In re Calpine Corporation*, Case No. 05-60200 (Dkt. No. 3486) (Bankr. S.D.N.Y. Jan. 29, 2007) (same); *In re Adelphia Communications Corporation*, Case No. 02-41729 (Dkt. No. 4260) (Bankr. S.D.N.Y. Mar. 24, 2004), (authorizing the debtors to file a fee letter under seal, where the debtors had pointed out in their motion that the fee letter contained sensitive pricing terms).

16. The Fees represent in part the negotiated price of the arrangement and syndication services being provided by Goldman Sachs, and, as such, constitute the most

confidential commercial information. Disclosure of Goldman Sachs's fees to its competitors would be damaging; it would impair the ability of Goldman Sachs to bid and compete for other financings. Widespread disclosure of these fees in all cases would discourage the participation of financial institutions in DIP and exit financings.

17. Further, such disclosure would violate the confidentiality terms explicitly set forth in the Commitment Documents and permit Goldman Sachs to terminate its commitments.

**B. Good Cause Exists to File the Valuations Under Seal**

18. Likewise, the Valuations, consisting of the Debtors' own internal valuations of their portfolio assets, are highly "confidential" and "commercial" in nature. Public disclosure of the Valuations would mean that any party, including potential buyers who may be or may become interested in purchasing the Debtors' portfolio investments, would have access to the value of such investment as determined by the Debtors. Such information would give such potential buyers a crucial negotiating advantage, resulting in lower asset sale proceeds to the ultimate detriment of the Debtors' creditors and stakeholders.

19. To date, the Debtors have taken great care to protect the confidentiality of the Valuations, by entering into confidentiality agreements requiring that prospective recipients of the Valuations to keep such information confidential whenever it was deemed necessary to share the Valuations with any party other than the Debtors.<sup>3</sup> The relief requested by this Motion will ensure that the Valuations are not publicly disclosed to the detriment of the Debtors, their creditors and other stakeholders.

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<sup>3</sup> For the avoidance of doubt, the Debtors do not seek to disturb the contractual rights of any party with respect to the Valuations or the information contained therein pursuant to any existing confidentiality agreements that the Debtors have entered into with such party.

**C. Conclusion**

20. The Commitment Documents, including the Confidential Documents, have been provided to the Committee, the Joint Provisional Liquidators and the U.S. Trustee. The Committee has authorized the Debtors to represent that the Committee supports the Commitment Letter Motion and the relief requested herein. Accordingly, public disclosure of the Confidential Documents is not necessary to protect the interests of the Debtors' creditors. Furthermore, any party or member of the public with a compelling interest in learning the terms and contents of the Confidential Documents may request a further order from this Court.

21. In sum, the relief sought in this Motion is necessary to protect the confidential commercial information of the Debtors and Goldman Sachs and will not impair the ability of this Court to protect the public interest.

**NO PRIOR REQUEST**

22. No previous motion for the relief sought herein has been made to this or any other Court.

**NOTICE**

23. Advance notice of this Motion has not been given. Pursuant to Bankruptcy Rule 9018, the Court may “[o]n motion or on its own initiative, **with or without notice**” make any order which is required to protect trade secrets or confidential commercial information. (Emphasis added). Furthermore, due to the nature of the relief requested in this Motion and the fact that the Commitment Documents were not finalized until the date hereof, cause for *ex parte* relief has been shown pursuant to Rule 9077-1 of the Local Bankruptcy Rules for the Southern District of New York. Given the above and the confidential nature of the information contained in the Commitment Documents, *ex parte* consideration is appropriate. *See*



*In re Calpine Corporation*, Case No. 05-60200 (Dkt. No. 3486) (Bankr. S.D.N.Y. Jan. 29, 2007)  
(granting an *ex parte* order to seal a confidential fee letter, after debtors' motion showed that their  
motion to approve related financing had been finalized only three days earlier).

**CONCLUSION**

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  
May 3, 2013

Respectfully submitted,

/s/ Michael A. Rosenthal

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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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	:	
<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>
	:	
-----X	:	

**EX PARTE ORDER AUTHORIZING THE DEBTORS TO FILE CERTAIN DOCUMENTS UNDER SEAL IN CONNECTION WITH THE DEBTORS’ 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**

Upon consideration of the motion (the “*Motion*”)<sup>1</sup> of Arcapita Bank B.S.C.(c) (“*Arcapita*”) and certain of its subsidiaries and affiliates, as debtors and debtors in possession in the above-captioned Chapter 11 Cases (collectively, the “*Debtors*” and each, a “*Debtor*”), for entry of an order pursuant to Bankruptcy Code section 107 and Bankruptcy Rule 9018, authorizing them to file the Confidential Documents under seal; it appearing that the relief requested in the Motion is appropriate in the context of the Chapter 11 Cases and in the best interests of the Debtors and their respective estates; the Court having reviewed the Motion and having considered the statements in support of the relief requested therein; and the Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and after due deliberation and sufficient cause appearing therefor,

**IT IS HEREBY ORDERED:**

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

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

2. Pursuant to section 107(b) of the Bankruptcy Code, the Debtors are authorized to file redacted copies of the Confidential Documents, and to serve the redacted Confidential Documents on those parties entitled to notice under the Bankruptcy Code, Bankruptcy Rules or any other applicable order.

3. The clerk of the Bankruptcy Court shall accept for filing under seal unredacted copies of the Confidential Documents.

4. The unredacted Confidential Documents shall be available to the Court, but otherwise shall be kept under seal and may not be unsealed until and unless permitted by further order of the Court.

5. Notwithstanding any other provision of this Order, the Debtors shall be authorized to serve the unredacted Confidential Documents upon the Committee, the Joint Provisional Liquidators and the U.S. Trustee.

6. Any party who receives the unredacted Confidential Documents in accordance with this Order shall not disclose or otherwise disseminate such unredacted Confidential Documents, or any of the Fees or the Valuations contained therein, to any other person or entity and shall keep the Fees and the Valuations confidential, except (a) as otherwise disclosed in the Motion, and (b) as otherwise permitted in any confidentiality agreement that remains in force and has not been terminated as of the date of this Order, pursuant to which any of the Debtors have provided the Valuations to any party.

7. The unredacted Confidential Documents shall not be disclosed or further disseminated by the Clerk or any other party except upon further order of this Court.

8. Any pleadings filed in these Chapter 11 Cases that disclose the Fees or the Valuations (other than to the extent disclosed in the Motion) shall be filed with such information

redacted, and the Clerk of the Bankruptcy Court shall be authorized to accept such filings, provided that unredacted copies of such pleadings shall be filed under seal and served as specifically authorized in this Order and redacted copies of such pleadings shall be served on those parties entitled to notice under the Bankruptcy Code, Bankruptcy Rules or any other applicable order.

9. This Order shall be immediately effective and enforceable upon its entry.

Dated: New York, New York  
\_\_\_\_\_, 2013

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THE HONORABLE SEAN H. LANE  
UNITED STATES BANKRUPTCY JUDGE

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