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

NOTICE OF EX PARTE MOTION TO FILE EXHIBITS UNDER SEAL

PLEASE TAKE NOTICE that the annexed *ex parte* Motion (the “*Motion*”) of Arcapita Bank B.S.C.(c) and certain of its subsidiaries and affiliates, as debtors and debtors in possession (collectively, the “*Debtors*”) was filed on dated September 25, 2012.

PLEASE TAKE FURTHER NOTICE that any responses or objections to the Motion (the “*Objections*”) shall be filed electronically with the Court on the docket of *In re Arcapita Bank B.S.C.(c), et al.*, Ch. 11 Case No. 12-11076 (SHL) (the “*Docket*”), pursuant to the Case Management Procedures approved by this Court¹ and the Court’s General Order M-399

¹ See Order (A) Waiving the Requirement That Each Debtor File a List of Creditors and Equity Security Holders and Authorizing Maintenance of Consolidated List of Creditors in

(available at <http://nysb.uscourts.gov/orders/orders2.html>), by registered users of the Court's case filing system and by all other parties in interest on a 3.5 inch disk, preferably in portable document format, Microsoft Word, or any other Windows-based word processing format (with a hard copy delivered directly to Chambers), in accordance with the customary practices of the Bankruptcy Court and General Order M-399, to the extent applicable, and served in accordance with General Order M-399 on (i) counsel for the Debtors, Gibson, Dunn & Crutcher LLP, 200 Park Avenue, New York, New York 10166 (Attn: Michael A. Rosenthal, Esq., Janet M. Weiss, Esq. and Matthew K. Kelsey, Esq.); (ii) the Office of the United States Trustee for the Southern District of New York, 33 Whitehall Street, 21st Floor, New York, New York 10004 (Attn: Richard Morrissey, Esq.); (iii) the Official Committee of Unsecured Creditors, Milbank, Tweed, Hadley & McCloy LLP, 1 Chase Manhattan Plaza, New York, New York 10005 (Attn: Dennis F. Dunne, Esq. and Evan R. Fleck, Esq.); and (iv) counsel to Silver Point Finance, LLC, White & Case LLP, 1155 Avenue of the America, New York, NY 10036-2787 (Attn: Scott Greissman, Esq. and Andrew Zatz, Esq.).

[Footnote continued from previous page]

Lieu of a Matrix; (B) Authorizing Filing of a Consolidated List of Top 50 Unsecured Creditors; and (C) Approving Case Management Procedures [Docket No. 21].

Dated: New York, New York
September 25, 2012

/s/ Michael A. Rosenthal

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ATTORNEYS FOR THE DEBTORS
AND DEBTORS IN POSSESSION

Fees, Expenses and Indemnities (the “**Commitment Letter Motion**”);² (b) file unredacted copies of such documents with the Court under seal; and (c) provide copies of such unredacted documents to (i) the Committee, (ii) the Joint Provisional Liquidators, and (iii) the United States Trustee (each, as defined below). In support of this Motion, the Debtors respectfully represent as follows:

JURISDICTION

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. The statutory predicates are section 107(b) of the Bankruptcy Code and Rule 9018 of the Bankruptcy Rules.

BACKGROUND

A. General Background

2. On March 19, 2012 (the “**Petition Date**”), Arcapita and five of its affiliates (collectively, the “**Initial Debtors**”) 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. 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.

3. On April 5, 2012, the United States Trustee for Region 2 appointed the Official Committee of Unsecured Creditors appointed in the Chapter 11 Cases (the “**Committee**”) [Dkt. No. 60] pursuant to sections 1102(a) and (b) of the Bankruptcy Code.

² The Commitment Letter Motion is being filed substantially contemporaneously herewith. Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Commitment Letter Motion.

B. The Fee Letter and the Parkhill Declaration

4. By way of the Commitment Letter Motion, the Debtors are seeking authority to enter into the Commitment Letter in connection with the offer of Silver Point Finance, LLC (“*Silver Point*”) to provide approximately \$150 million of debtor in possession Shari’ah compliant financing (the “*Proposed Transaction*”).³

5. Prior to filing the Commitment Letter Motion, the Debtors and their advisors orchestrated a rigorous solicitation process structured to obtain the best available Shari’ah compliant financing. The Commitment Letter is the product of that solicitation process. It offers the Debtors sufficient financing to maximize the value of their estates for all stakeholders and promises to bridge the Debtors to their projected emergence from Chapter 11 in the first quarter of 2013. Nonetheless, to the extent more advantageous financing is available, the Commitment Letter provides the Debtors with a “fiduciary out” to pursue an alternative transaction.

6. The Commitment Letter obligates Silver Point to conduct due diligence and to negotiate final documentation in connection with the Proposed Transaction. Silver Point’s commitment to perform under the Commitment Letter is subject to certain contingencies, including the Debtors’ payment of certain fees and expenses to Silver Point (the “*Fees*”) under the Fee Letter. Certain of those Fees constitute the negotiated “price” charged by Silver Point for the service they are providing the Debtors—namely, debtor in possession financing. 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 Silver Point’s competitors and prejudice Silver Point’s ability to compete

³ For ease of reference, the transaction contemplated by the Commitment Letter is referred to simply as the Proposed Transaction. In actuality, any Arcapita post-petition financing transaction will be in the form of a Shari’ah compliant Murabaha, or commodities transaction, not a loan.

and bid for the Proposed Transaction and other similar financings. The Fee Letter is attached as an Exhibit to the Commitment Letter Motion.

7. The Debtors also submitted the Parkhill Declaration as an exhibit to the Commitment Letter Motion. It provides background regarding the solicitation process and compares competing proposals received by the Debtors. The Parkhill Declaration describes certain aspects of the Fee Letter in comparison to such competing proposals.

RELIEF REQUESTED

8. 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 Fee Letter and Parkhill Declaration publicly with the Court; (b) file unredacted versions of such documents with the Court under seal; and (c) provide unredacted versions of such documents to (i) the Official Committee of Unsecured Creditors (the “*Committee*”); (ii) the joint provisional liquidators appointed in the Cayman Islands liquidation proceedings of AIHL (the “*Joint Provisional Liquidators*”); and (iii) the United States Trustee for the Southern District of New York (the “*United States Trustee*”).

9. This Motion seeks to protect a very limited set of information, the terms of the Fee Letter between Silver Point and the Debtor Obligors. The Debtors are not seeking any protection for the Commitment Letter, and have filed unredacted copies of the Commitment Letter as an exhibit to their Commitment Letter Motion. In addition, Silver Point has agreed to allow Debtors to publicly disclose certain provisions of the Fee Letter in the Commitment Letter Motion, namely the nature and amount of the Commitment Fee and any portion thereof payable

in connection with an alternative transaction, as well as the terms pursuant to which it shall be paid.

BASIS FOR RELIEF REQUESTED

10. Section 107(b) of the Bankruptcy Code provides, in relevant part, as follows: “On request of a party in interest, the bankruptcy court shall . . . (1) protect an entity with respect to a trade secret or confidential research, development, or commercial information . . .” 11 U.S.C. § 107(b).

11. 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).

12. 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.*

13. Courts in the Southern District of New York previously have ruled that fee letter provisions or descriptions thereof may be filed under seal, including on facts almost identical to those at hand. In *In re Adelpia Communications Corporation*, Case No. 02-41729 [Docket No. 4260] (Bankr. S.D.N.Y. Mar. 24, 2004), the court authorized 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 — just as in this case. *Id.* [Docket No. 4252]. The court also granted the debtor’s *ex parte* motion to file a fee letter under seal in *In re Calpine Corporation*, Case No. 05-60200 [Docket No. 3486] (Bankr. S.D.N.Y. Jan. 29, 2007), after the debtors in that case pointed out that disclosure of the fee structures and allocations described in the fee letter could give a “strategic advantage” to competitors of the arrangers. *Id.* [Docket No. 3484]. *See In re Almatris*, Case No. 10-12308 (Bankr. S.D.N.Y. July 23, 2010) [Docket No. 308] (authorizing debtors to file fee provisions under seal, where the debtors indicated that the fee provisions contained sensitive and confidential commercial information).

14. The Fees contained in the Fee Letter and described in the Parkhill Declaration are “confidential” and “commercial” in nature. This alone justifies their protection. *Video Software Dealers Assoc.*, 21 F.3d at 28. Moreover, as previously mentioned, the Fees represent the negotiated price of the services being provided by Silver Point, and, as such, constitute the most confidential commercial information of financial institutions, like Silver Point, that are engaged in the business of arranging financings. If the Fee Letter were made public, competitors could try to top the Silver Point Commitment Letter prior to entry of the Commitment Letter Motion (because of the Debtors’ fiduciary out) and would have unfair insight into Silver Point’s general bidding strategy going forward.

15. Disclosure of the Fees would be damaging to Silver Point if disclosed to its competitors. Proprietary pricing information is considered sensitive in the finance industry and is not typically made publicly available. Disclosure of such pricing information would impair the ability of Silver Point to bid and compete for other financings, and if required in bankruptcy cases in general, would discourage the participation of financial institutions in debtor in possession and exit financings.

16. The Debtors will provide unredacted copies of the Fee Letter and Parkhill Declaration to the Committee, the Joint Provisional Liquidators⁴ and the United States Trustee soon after the filing of the Commitment Letter Motion (and, in any case, in advance of any objection deadline with respect to the Commitment Letter Motion). In addition, the Debtors are prepared to share the Fee Letter and the Parkhill Declaration with Standard Chartered Bank, the Debtors' only secured lender, if it executes a confidentiality agreement satisfactory to the Debtors and Silver Point. Therefore, public disclosure of the Fees 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 of the Fees may request a further order from this Court. In sum, the relief sought in this Motion is necessary to protect the confidential commercial information of the Debtors and Silver Point and will not impair the ability of this Court to protect the public interest.

NO PRIOR REQUEST

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

NOTICE

18. 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 Fee Letter and Commitment Letter were not finalized until the date hereof, cause for *ex parte* relief has been shown pursuant to Rule 9077-1 of the Local

⁴ Silver Point has also agreed that it will not object to the Joint Provisional Liquidators filing the Fee Letter with the Cayman Court administering the liquidation of Arcapita Investment Holdings Limited so long as the letter is filed under seal in such proceedings.

Bankruptcy Rules for the Southern District of New York. Given the above and the confidential nature of the information contained in the Fee Letter and Parkhill Declaration, *ex parte* consideration is appropriate. See *In re Calpine Corporation*, Case No. 05-60200 [Docket 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. *Id.* [Docket No. 3484].)

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
September 25, 2012

Respectfully submitted,

/s/ Michael A. Rosenthal
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Craig H. Millet (admitted *pro hac vice*)
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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**

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

**EX PARTE ORDER AUTHORIZING THE
DEBTORS TO FILE EXHIBITS UNDER SEAL**

Upon consideration of the motion (the “*Motion*”)¹ 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 Fee Letter and the Parkhill Declaration 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.
2. Pursuant to section 107(b) of the Bankruptcy Code, the Debtors are authorized to file redacted copies of the Fee Letter and the Parkhill Declaration (the “*Redacted Documents*”),

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

and to serve such Redacted 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 Fee Letter and the Parkhill Declaration (the “*Unredacted Documents*”).

4. The Unredacted 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. The Debtors shall serve copies of the Unredacted Documents on (i) the Official Committee of Unsecured Creditors; (ii) the joint provisional liquidators appointed in the Cayman Islands liquidation proceedings of AIHL; and (iii) the United States Trustee for the Southern District of New York.

6. The Debtors are authorized but not directed to provide the Unredacted Documents to Standard Chartered Bank, with the consent of Silver Point, to the extent such consent is required under the Commitment Letter and if Standard Chartered Bank executes a confidentiality agreement reasonably acceptable to Silver Point.

7. The Debtors shall provide the Unredacted Documents as otherwise provided by any order of this Court or any other judicial, administrative or legislative body or committee.

8. Any party who receives the Unredacted Documents in accordance with this Order shall not disclose or otherwise disseminate such Unredacted Documents, or any of the Fees contained therein, to any other person or entity and shall keep the Fees confidential, except as otherwise disclosed in the Commitment Letter Motion.

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

10. Any pleadings filed in these Chapter 11 Cases that disclose the Fees (other than to the extent disclosed in the Commitment Letter Motion) shall be filed with such Fees 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.

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

Dated: New York, New York
_____, 2012

THE HONORABLE SEAN H. LANE
UNITED STATES BANKRUPTCY JUDGE