

GIBSON, DUNN & CRUTCHER LLP

Michael A. Rosenthal (MR-7006)
Craig H. Millet (admitted *pro hac vice*)
Matthew J. Williams (MW-4081)
Matthew K. Kelsey (MK-3137)
200 Park Avenue
New York, New York 10166-0193
Telephone: (212) 351-4000
Facsimile: (212) 351-4035

Attorneys for the Debtors and Debtors in Possession

**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 MOTION TO FILE A
REDACTED VERSION OF THE FORTRESS COMMITMENT LETTER**

Arcapita Bank B.S.C.(c) (“*Arcapita*”) and certain of its affiliates (each, a “*Debtor*” and collectively, the “*Debtors*”) in the above referenced chapter 11 cases (the “*Chapter 11 Cases*”), submit this motion (the “*Motion*”), on an *ex parte* basis, for an order pursuant to section 107(b) of title 11 of the United States Code (the “*Bankruptcy Code*”)¹ and Rule 9018 of the Federal Rules of Bankruptcy Procedure (the “*Bankruptcy Rules*”) authorizing the Debtors to file a redacted version of the Commitment Letter with Fortress Credit Corp. (the “*Fortress Commitment Letter*”), annexed as **Annex 1** to the *Supplement to Debtors’ Motion for Entry of an Order Authorizing the Debtors to Enter into a Financing Commitment Letter and Incur*

¹ All statutory references are to the Bankruptcy Code unless otherwise specified.

Related Fees, Expenses and Indemnities in Connection Therewith (the “**Commitment Letter Motion Supplement**”);² (b) file unredacted copies of such documents with the Court under seal; and (c) provide copies of such unredacted 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 “**U.S. Trustee**”). 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

2. On September 25, 2012, the Debtors filed the *Debtors' Motion for Entry of an Order Authorizing the Debtors to Enter into a Financing Commitment Letter and Incur Related Fees, Expenses and Indemnities in Connection Therewith* [Docket No. 513] (the “**Initial Motion**”), by which they sought this Court’s approval to enter into the Commitment Letter with Silver Point Finance, LLC (the “**Initial Lender**”).³ After the hearing on the Original Motion was held on October 9, 2012, the Court, prior to ruling, adjourned the hearing on the Original Motion to October 12, 2012 to afford the parties an opportunity to attempt to reach a consensual resolution of disputed issues and address the Court’s stated concerns. The hearing has since been

² The Commitment Letter Motion Supplement was filed on November 1, 2012 [Docket No. 610]. Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Commitment Letter Motion Supplement.

³ Any Arcapita post-petition financing transaction will be in the form of a Shari’ah compliant Murabaha, or commodities transaction, not a loan.

adjourned several times, and is now scheduled for November 5, 2012, at 2:00 p.m. (prevailing U.S. Eastern Time).

RELIEF REQUESTED

3. 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 a redacted version of the Fortress Commitment Letter 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 Committee; (ii) the Joint Provisional Liquidators; and (iii) the U.S. Trustee.

4. This Motion seeks to protect a very limited yet highly commercially sensitive piece of information regarding the financial condition of an Arcapita portfolio company (the “***Redacted Information***”). Save for this single redaction in one footnote, the Debtors are not seeking any other protection for the Fortress Commitment Letter.

BASIS FOR RELIEF REQUESTED

5. 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).

6. 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).

7. 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.*

8. The Redacted Information is highly confidential and commercially sensitive in nature. The redaction concerns information relating to the Debtors’ assets provided to Fortress in connection with its commitment. In general, the Debtors lay out in great detail the types of information provided to Fortress in the Fortress Commitment Letter and the annexes attached thereto. The Redacted Information, however, relates to a potential future transaction involving an Arcapita portfolio company, disclosure of which could negatively impact ongoing negotiations. Disclosure of the Redacted Information, therefore, would be damaging to the Debtors if disclosed.

9. The Debtors will provide unredacted copies of the Fortress Commitment Letter to the Committee, the Joint Provisional Liquidators and the U.S. Trustee as soon as practicable. Therefore, public disclosure of the Redacted Information 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 Redacted Information may request a further order from this Court. In sum, the relief sought in this Motion is necessary to protect the highly confidential and commercially sensitive information of the Debtors and will not impair the ability of this Court to protect the public interest.

NO PRIOR REQUEST

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

NOTICE

11. 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 Fortress Commitment Letter was not finalized until November 1, 2012, 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 Redacted Information, *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
November 2, 2012

Respectfully submitted,

/s/ Michael A. Rosenthal

Michael A. Rosenthal (MR-7006)

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

Matthew J. Williams (MW-4081)

Matthew K. Kelsey (MK-3137)

GIBSON, DUNN & CRUTCHER LLP

200 Park Avenue

New York, New York 10166-0193

Telephone: (212) 351-4000

Facsimile: (212) 351-4035

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
A REDACTED VERSION OF THE FORTRESS COMMITMENT LETTER**

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 Fortress Commitment Letter with redactions; 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 a redacted copy of the Fortress Commitment Letter, and to serve the redacted Fortress

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

Commitment Letter 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 an unredacted copy of the Fortress Commitment Letter.

4. The unredacted Fortress Commitment Letter 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 Fortress Commitment Letter on (i) the Committee; (ii) the Joint Provisional Liquidators; and (iii) the U.S. Trustee for the Southern District of New York.

6. The Debtors shall provide the unredacted Fortress Commitment Letter as otherwise provided by any order of this Court or any other judicial, administrative or legislative body or committee.

7. Any party who receives the unredacted Fortress Commitment Letter in accordance with this Order shall not disclose or otherwise disseminate such unredacted Fortress Commitment Letter, or the Redacted Information contained therein, to any other person or entity and shall keep the Redacted Information confidential.

8. The unredacted Fortress Commitment Letter or the Redacted Information shall not be disclosed or further disseminated by the Clerk or any other party except upon further order of this Court.

9. Any pleadings filed in these Chapter 11 Cases that discloses the Redacted Information 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.

10. 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