GIBSON, DUNN & CRUTCHER LLP
Michael A. Rosenthal (MR-7006)
Craig H. Millet (Admitted *Pro Hac Vice*)
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

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

DEBTORS' OPPOSITION TO MOTION OF OFFICIAL COMMITTEE OF UNSECURED CREDITORS FOR ENTRY OF AN ORDER PURSUANT TO FED. R. BANKR. P. 2004, 9006 AND 9016 AUTHORIZING EXPEDITED DISCOVERY FROM THE DEBTORS

I.
THE COMMITTEE'S INTENDED USE OF THE INFORMATION SOUGHT IS IMPROPER

The Committee's Motion makes vague general references to its alleged need for "information on the Co-Investors and SIP investors … to understand who the stakeholders in the Portfolio Investments are and what control risks the Debtors face." Motion at ¶ 1. However, the Committee fails to explain that it already has a copy of all documents, including the administration and management agreements, a form of proxy and other materials through which the Debtors directly and indirectly administer the Portfolio Company investments and the

Committee well knows the terms upon which the Proxies (as defined below) may be revoked and the other agreements terminated. The terms and import of those documents has been the subject of countless discussions, meetings and communications between the professionals and advisors to the Committee, the JPLs, the Ad Hoc Group, and the Debtors and even meetings between Committee members themselves and the Debtors' management. The Committee fully understands the "control risks the Debtors face."

Despite the vague references to information in the Motion, what the Committee specifically seeks is set forth on the last page in proposed order (the "***Proposed Order***") attached to the Motion:

i. All proxies executed with respect to any company in the holding structure (which will identify the investors in the Syndication Companies);

ii. All documents evidencing a revocation of the Proxies; and

iii. A current share register for each entity in the holding structure (which will also identify the investors in the Syndication Companies and SIP Investors).

The Committee's Motion is bare bones at best and is based on the apparent assumption that 2004 orders are available simply for the asking. The Motion is not based on *any* evidence and does not explain why the information the Committee now has is inadequate or how simply obtaining the *identity* of the customers/investors will provide the missing link and suddenly give rise to the knowledge and understanding the Committee claims it lacks as to the investments or the risks affiliated with change of control. Although not disclosed in the Motion, the Committee's true motivation is apparent after reviewing the proposed Order and after discussions with the Committee's professionals as to why this information is needed.

The professionals for the Committee have informed the Debtors' professionals that the Committee intends to first (i) disseminate the identity of all Co-Investors and SIP Investors

(collectively, the "***Investors***") to the full Committee, including the Debtors' competitors on the Committee, and then (ii) contact the Investors directly and solicit their support for the terms of a post confirmation governance system different from the Debtor's proposed Plan that excludes the personnel and management with whom the Investors are familiar. After being less than forthright with this Court in the Motion as to this end goal, the Committee asks this Court to authorize these actions through the proposed order.

The Committee's Motion for an order pursuant to Rule 2004 should be denied because the Proposed Order requested contains an extremely broad general enabling provision which the Committee contends will authorize it to take actions not permissible under Rule 2004 or the Bankruptcy Code and to disseminate the Investors' names to the full Committee and to contact the Investors directly to, in effect, compete for the proxies entered into between the Investors and AIML (collectively, the "***Proxies***"). The "authorization" to act that the Committee seeks through the Proposed Order should not be allowed because it:

- Is outside of an order that may be entered pursuant to by Rule 2004 and the Committee has failed to meet its affirmative burden establishing "cause";
- Violates the Debtors' exclusive right to operate its business as a debtor in possession;
- Will greatly interfere with and disrupt the economic and contractual relationships between the Debtors and the Investors and may well cause the very problem the Committee claims it needs to understand;
- Will disrupt the Debtors' business and will cause harm to the value of the Debtors' assets in the event of the revocation of the Proxies and the resulting breach in lending agreements due to a "change of control";
- Violates the Debtors' exclusive right to solicit the acceptance of the proposed chapter 11 plan now on file;
- Amounts to the Committee's attempt to solicit support of a Plan outside of an approved disclosure statement; and
- Would require Arcapita Bank to violate Bahraini law and expose Arcapita Bank and its agents to civil and criminal liability in Bahrain.

The Committee's use of Rule 2004 instead of propounding discovery under Rule 7001 *et. seq.* of the Federal Rules of Bankruptcy Procedure is also improper. *See* Proposed Order at 2.

II.
THE STABILITY OF THE VITAL RELATIONSHIP BETWEEN THE THIRD PARTY INVESTORS AND THE DEBTORS IS ESSENTIAL TO THE REALIZATION OF THE VALUE OF THE DEBTORS' ASSETS

To fully understand the disruptive nature of the actions the Committee intends to take under the guise of discovery, it is important to understand the relationship between the Debtors and the target third party Investors who are in effect the Debtors' clients and customers and not creditors. The Committee's superficial discussion in paragraph 7 of the Motion does not paint the full picture.

A. The Third Party Investors Targeted by the Committee's Discovery Are Arcapita's Clients and Customers and Not Creditors

Prior to the commencement of these chapter 11 cases, Arcapita Bank B.S.C. ("***Arcapita Bank***"), along with affiliated entities (collectively, the "***Arcapita Group***") operated primarily as an investment company which provided Shari'ah-compliant investment opportunities to a diverse network of approximately 1,800 high net worth individuals, families, institutions and sovereign wealth funds based primarily in Saudi Arabia, Kuwait, Bahrain, United Arab Emirates, Qatar, Oman and certain countries in Southeast Asia. The investors rely on the Arcapita Group's Shari'ah Supervisory Board to monitor and ensure the ongoing compliance of the investments with Shari'ah law.

The Arcapita Group's investments generally involved a deal-by-deal "co-investment" strategy whereby the Arcapita Group acquired some or all of the equity of a portfolio company target and subsequently sold or syndicated approximately 70-80% of the investment to its exclusive network of investors while retaining 20-30% of the investment for its own account.

Each non-U.S. investment was generally structured through the creation of a Cayman Islands company (a "***Transaction Holdco***") which acquired, directly or indirectly, an interest in the portfolio company target. The Arcapita Group generally retained 20%-30% of the equity of the Transaction Holdco in its long-term hold portfolio and offered the remaining Transaction Holdco equity for sale to third party investors by transferring it to the Cayman Islands companies (collectively, the "***Syndication Companies***"). The third party investors acquired an indirect interest in the Transaction Holdco equity by buying equity in the Syndication Companies.

As to investments in U.S. companies, the Arcapita Group followed the same initial steps in establishing Syndication Companies; however, for regulatory and tax reasons, the characteristics of the Syndication Companies, and the manner in which the Arcapita Group sold equity in the Syndication Companies, differed. Instead of selling the equity in the Syndication Companies directly to third party Investors, the Arcapita Group utilized special programs (the "***Strategic Investor Programs***") where shares in the Syndication Companies, (representing approximately 98% of the economic interest in each underlying U.S. portfolio investment), were sold by Arcapita Investment Holdings Limited to Cayman Islands companies, known as "program non-voting companies" (the "***PNVs"***) and then Arcapita Bank, on behalf of the PNVs, sold the interest in the PNV's to third party Investors. The remaining 2% of the economic interest in the portfolio company was held by Cayman "program voting companies ("***PVs.***")

The Committee is well aware of this syndication structure. Since the Committee's appointment, the Debtors have provided the Committee with access to a vast array of financial, structural, procedural and other materials. Throughout the chapter 11 cases, the Debtors have maintained an electronic data site and posted information to that data site regarding the Debtors' structure and operations as well as the structure and operations of their non-debtor affiliates.

Specifically, the Debtors have produced, among other items, (i) general syndication and governance documents for non-Debtor subsidiaries and private placement memoranda for multiple Portfolio Companies, (ii) documents and other information pertaining to major pre-petition financings, including copies of financing documents, (iii) portfolio level structure charts and valuation and liquidity reports (disaggregated between private equity, infrastructure, real estate and venture capital projects), (iv) information regarding expected waterfalls from monetization proceeds, (v) property leases, (vi) cash budgets, (vii) insurance information, (viii) business plan information, (ix) a summary of material litigation and (x) employee information.

In particular, at the Committee's request, the Debtors provided the Committee with extensive information as to corporate governance documents (except the Investor lists themselves) for a typical U.S. investment holding structure and a typical non-U.S. investment holding structure. There can be no uncertainty as to the holding structure and control rights with respect to the Portfolio Companies.

B. The Debtors' Exercise of Control Through Terminable Administration Agreements

Each Syndication Company and PV entered into an Administration Agreement with Arcapita Bank affiliate AIML whereby AIML, subject to the oversight of the Syndication Company board of directors appointed to represent Investors' interests, manages the affairs of the Syndication Company. While the Administration Agreements provide AIML with certain rights and responsibilities concerning the management of the Syndication Companies and the PVs, the Administration Agreements do not authorize AIML to vote the equity interests held by the Syndication Companies or PVs in the Transaction Holdco without approval of the Syndication Company or PV board of directors. In addition, AIML, as administrator, does not

have the authority to acquire or dispose of any portfolio company investment without the approval of the board of the applicable Syndication Company or PV.

The Administration Agreements generally have an initial term of four years, and thereafter automatically renew for successive one-year periods, unless the Syndication Company board of directors gives notice of its intent not to renew the Administration Agreement 30 business days prior to the end of the present term. Further, the Administration Agreements are terminable at any time by the Syndication Company on 60 business days' notice if the Investors, as shareholders of the Syndication Company, approve of the termination by a special resolution which requires a two-thirds vote.

Copies of almost all, if not all, of the Administration Agreements have been provided to the Committee and the Committee acknowledges its understanding of this management structure. *See, e.g.,* Motion at ¶ 9 (stating that Arcapita provides "management services to the Portfolio Companies.").

C. The Debtors' Exercise of Control Through Revocable Proxies

The Investors as shareholders of the Syndication Company also granted Proxies to AIML as to the voting rights of the third-party investors in the Syndication Company. Provided they remain in place and the boards of the Syndication companies and/or Transaction Holdcos are not replaced by Investor action, AIML is thereby able to control the Transaction Holdco through the Syndication Company Proxies. The Syndication Company Proxies are limited in scope, and are revocable in the sole discretion of the Investors.

The rights of AIML under the Syndication Company Proxies do not extend to the election or removal of directors of the Syndication Companies themselves; rather, those rights are vested in the current Syndication Company board members (who have been given the power to appoint a replacement for any resigning member) and the Investors in the Syndication Companies (who,

upon a two-thirds vote may remove and replace board members). In addition, the Syndication Company Proxies require that all third-party investors be provided with notice of shareholders' meetings and any proposals where the third party investors as shareholders may act by written consent. The third-party investors have the right to instruct AIML how to vote.

As noted above, the Committee has electronic access to a form proxy the terms of which are identical to the vast majority of the proxies executed by the Investors and the Committee tacitly acknowledges its comprehension of the use and terms of the proxies in the Motion. Motion at ¶ 8 (recognizing that corporate governance control may be lost if Investors were to take coordinated action).

III.
A LOSS OF CONTROL RESULTING FROM THE REVOCATION OF PROXIES AND THE TERMIANTION OF AGREEMENTS WILL NEGATIVELY IMPACT THE VALUE OF THE ESTATE

A. Loss of Control of Transaction Holdcos and the Sale of Portfolio Companies

The Arcapita Group only holds a minority interest in the Portfolio Companies and relies on its control of the Transaction Holdcos through the Proxies, Administration Agreements and/or favorable composition of Syndication Company boards of directors to control when a Portfolio Company is sold and the price and terms at which it is sold. Without the Proxies and board seats, the Reorganized Debtors and creditors will be at the mercy of others as to any sale or will be forced to sell Arcapita's minority interest at a very significant discount.

The revocation of Proxies may also cause a default under existing Debtor in Possession Financing and will make the ongoing negotiations of Exit financing far more difficult and expensive.

B. Loss of Revenue from Management Agreement and Administration Agreements

The Debtors earn fees and other revenue for providing management and other services to the Portfolio Companies through management agreements. Not only will the Reorganized Debtors suffer a loss of control in the event these agreements are terminated, but also the Reorganized Debtors will suffer a significant loss of revenue otherwise available to offset post confirmation expenses.

C. Change of Control Risk

As the Committee is well aware, some of the significant Portfolio Entities have financing agreements and other contracts that contain provisions relating to a "change of control." Though the definition of "change of control" varies from contract to contract, among the events that could constitute a "change of control" are: (i) Arcapita Bank and/or certain of its subsidiaries or affiliates ceasing to own or control the voting stock of certain specified entities; (ii) Arcapita Bank and/or certain of its subsidiaries or affiliates ceasing to possess the power to direct or cause the direction of the policies and management of certain specified entities; or (iii) the directors and/or employees of certain specified entities ceasing to be employees of Arcapita Bank and/or certain of its subsidiaries or affiliates.

The occurrence of a "change of control" typically constitutes an event of default under the relevant contract, for which the remedies generally include, where the relevant contract is a financing agreement, the acceleration of the obligations owed by the applicable portfolio entity. A default based on a change of control may also trigger cross-default and cross-acceleration provisions in the other contracts entered into by that portfolio entity. In that event, the applicable portfolio entity may not have sufficient funds to meet its obligations and unless it can negotiate a waiver or obtain expensive substitute financing (if available at all), the Portfolio Company may lose its assets to foreclosure or other rapid disposition and at a greatly reduced value.

IV.
THE COMMITTEE'S INTENDED COURSE OF ACTION IS LIKLEY TO CAUSE THE REVOCATION OF THE PROXIES AND THE TERMINATION OF THE OTHER AGREEMENTS

As shown in detail in the attached declaration of Hisham Al Raee, the direct communication with Investors that the Committee intends to pursue will place the Proxies and other agreements in jeopardy without any counterbalancing benefit to the estates. As Mr. Al Raee explains, the Investors are currently comprised of approximately 1,300 high net worth individuals, families, institutions and sovereign wealth funds based primarily in Saudi Arabia, Kuwait, Bahrain, United Arab Emirates, Qatar, Oman and certain countries in Southeast Asia.

Because of significant cultural differences, the Investors, and particularly those from the countries that comprise the Gulf Cooperation Council ("GCC") – which consists of Qatar, Saudi Arabia, Oman, Kuwait, United Arab Emirates and Bahrain, are inherently private individuals or entities. Any intrusive and non-consensual appropriation of their personal and financial information, especially by a western "Committee" operating under U.S. law, will be viewed with extreme hostility. This reaction is especially likely where, as is often the case, the Investor is a member or affiliate of the royal family of a GCC country, or a sovereign wealth fund in a GCC country. *See* Al Raee Decl. at ¶ 5. Arcapita's commitment to protect the Investor's privacy as required by Bahraini law and to comply with Shari'ah were key considerations in the Investors' decision to make investments through Arcapita. *See* Al Raee Decl. at ¶¶ 5-8.

Post-petition, Arcapita has expended extensive efforts to maintain stability and control within the Investor base, so far with success. *See* Al Raee Decl. at ¶¶ 10 - 13. However, the present stability is tenuous at best and unrest grows with the passage of time and the spread of unfounded rumors. The interference with the Debtors' business through a "proxy fight" of the nature now proposed by the Committee, will be very poorly received by the Investors and can

only harm the Debtors' estate with no evidence from the Committee that harm can be avoided or that any benefit will result that outweighs the risk. *See* Al Raee Decl. at ¶ 7. The dissemination of the Investor identities to competitors of the Debtors thereby providing those competitors with the Debtors "customer list" and allow competitors to press Investors for business and other services will also increase the disruption of the relationships through which the Debtors control the Portfolio Companies. *See* Al Raee Decl. at ¶ 15.

V.
THE COMMITTEE HAS FAILED TO SATISFY ITS BURDEN TO SHOW CAUSE FOR THE INFORMATION ITS SEEKS AND THE ACTIONS IT INTENDS TO TAKE

A. Rule 2004 is Not Unlimited and a Rule 2004 Order is Not Available Just for the Asking

While "[t]he primary purpose of a Rule 2004 examination is to permit the trustee to ascertain the extent and location of the estate's assets," "an examination may be conducted by 'any party in interest,' including a creditor." *In re Hammon*, 140 B.R. 197, 201 (S.D. Ohio 1992) (citing Fed. R. Bankr. P. 2004(a)). "[T]here are important limits to the scope of an examination taken pursuant to Rule 2004." *In re Coffee Cupboard*, 128 B.R. 509, 514 (Bankr. E.D.N.Y. 1991). Although Rule 2004 may permit a party in interest considerable latitude in structuring discovery, "'the availability of Rule 2004 as a discovery tool is not unlimited.'" *In re Enron Corp.*, 281 B.R. 840, 840 (Bankr. S.D.N.Y. 2002) (quoting *Intercontinental Enters., Inc. v. Keller (In re Blinder, Robinson & Co., Inc.)*, 127 B.R. 267, 274 (D. Col. 1991)); *In re Continental Forge Co., Inc.*, 73 B.R. 1005, 1007 (Bankr. W.D. Pa. 1987) (Rule 2004 it is not without limits). Where a movant seeks Rule 2004 discovery for an impermissible purpose, the application may be properly denied. *See, e.g.*, *In re Duratech Indus., Inc. ("Duratech")*, 241 B.R. 291 (Bankr. E.D.N.Y. 1999), *aff'd*, 241 B.R 283 (E.D.N.Y. 1999).

Courts regularly apply a balancing test to determine whether "there should be some limitations on scope of the Rule 2004 examination and the documents to be produced." *Id. at* 516. In limiting the scope of 2004 discovery, the Court in *In re Coffee Cupboard* considered the history of the cases, prior discovery, the importance to issues upon which the Court has the power to decide, as well as the purpose for which discovery was sought. *Id*. at 514-17.

Here, the Debtors have supplied the Committee with thousands of documents relating to the Debtors' direct and indirect assets and liabilities. The information provided by the Debtors has enabled the Committee to act as a fully informed participant throughout these cases, including in connection with plan negotiations (where the Debtors, in fact, adopted the Committee's suggested economic splits into the Debtors' proposed Chapter 11 plan now on file). The Investors' identities will not provide the Committee with any greater understanding than they have now.

B. The Committee Has Made No effort to Meet its Affirmative Burden of Establishing Good Cause

To invoke the Court's discretion, a requesting party must show "good cause" for the examination requested. *In re Eagle-Picher Indus., Inc.* ("*Eagle Picher*"), 169 B.R. 130, 134 (Bankr. S.D. Ohio 1994) ("the one seeking to conduct a 2004 examination has the burden of showing good cause") (citation omitted). *See also In re Bd. of Dirs. of Hopewell Int'l Ins., Ltd.*, 258 B.R. 580, 587 (Bankr. S.D.N.Y. 2001) (Rule 2004 "give[s] the Court significant discretion").

> Rule 2004 requires that we balance the compelling interests of the parties, weighing the relevance of and necessity of the information sought by examination. That documents meet the requirement of ***relevance does not alone demonstrate that there is good cause*** for requiring their production. ***The burden of showing good cause is an affirmative one*** in that it is not satisfied merely by a showing that justice would not be impeded by production of the documents.

In re Coffee Cupboard, 128 B.R. at 514, *citing In re Drexel Burnham Lambert Group, Inc.,* 123 B.R. 702, 712 (Bankr. S.D.N.Y. 1991) (emphasis added).

The Committee merely states that its goal is "understand[ing] what rights the Debtors have with respect to the control of their Portfolio Investments," but the naked claim that the Committee seeks "understanding" does not establish cause for the production of the information sought. Motion at ¶ 9. The logical connection to establish cause is lacking because the Debtors' control rights do not arise from the identities of the Co-Investors or SIP Investors. Those rights are contractual, and the Committee already has access to all governing organizational documents and form of proxies.

The Committee cannot argue that Investor names are needed to analyze the Plan when, (i) the Debtors have provided the Committee with all necessary information to conduct a thorough evaluation of the Plan and the Debtors' contractual governance rights, (ii) the Plan reflects the Committee's agreed upon economic division and (iii) the requested relief would permit Committee members and advisors to directly contact third party debtor investors who are not Committee constituents.

In truth, the Committee seeks the third party Investors' identities to directly solicit their support for an alternative reorganization structure. The Committee outright admits its goal is to redo the proposed post-emergence governance regime of the Plan. Motion at ¶ 3 (the Committee has an "urgent need to make an informed *determination* regarding the appropriate go-forward management structure for the Debtors post-emergence") (emphasis added).

A statutory committee's desire to submit a competing chapter 11 plan does not constitute "good cause" where exclusivity has not expired. *Eagle Picher*, 169 B.R. at 134 ("To the extent that the examination proposed is for the purpose of developing an alternative plan of

reorganization, we hold that that purpose does not constitute good cause."). In all cases, discovery performed by potential plan proponents should be viewed with additional skepticism. *See Duratech*, 241 B.R. at 296 ("When it comes to non-debtor plan proponents . . . bankruptcy courts become far more attentive to scope and, yes, motivation of the Rule 2004 application."). While the Debtors maintain the exclusive right to file a Plan and indeed have done so, "there can be no justification presently for examination calculated to develop information relating to an alternative plan" or, in this case, an alternative proposed post confirmation governance structure. *Eagle Picher*, 169 B.R. at 134.

The Committee's Motion does not satisfy its affirmative burden of showing cause either as to the specific information sought or the unfettered use of that information that it intends. The Debtors hereby expressly object to the extent the Committee attempts to belatedly satisfy its burden in a Reply, rather than in the Motion itself.

C. Rule 2004 May Not be Used to Obtain Authority to Disrupt the Business of a Debtor in Possession or Derail a Debtor's Proposed Plan.

Rule 2004 relates to the discovery of information; it may *not* be used to obtain authority for a course of conduct to, such as the course of conduct intended by the Committee here. The Debtors here are debtors in possession cloaked with both the responsibilities *and* the power of a trustee. Even under the express terms of the rule, examinations and document requests "may relate only to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge." Fed. R. Bankr. P. 2004(b). "[C]ourts may limit, condition or forbid Rule 2004 discovery when it is designed to abuse or harass." *In re Recoton Corp.*, 307 B.R. 751, 755 (Bankr. S.D.N.Y. 2004). Deciding whether or not to allow a Rule 2004

examination is within the court's discretion. *In re J&R Trucking, Inc.*, 431 B.R. 818, 821 (Bankr. N.D. Ind. 2010).

The Committee intends that there be no bounds to its proposed use of the identity of the Investors. Motion at ¶ 11. Except for references to the usual authorities typically cited in *every* Rule 2004 Motion, the Committee has *not cited one single authority* that allows Rule 2004 to be used to force the public disclosure of all customers or clients of a debtor and to also obtain the authority of the Court to use that information to contact the customers and disrupt the business of a debtor in possession, especially within the exclusivity period.

D. The Unlimited General "Enabling Provision" in the Proposed Order is Blatantly Improper and Unsupported by Law

The Committee's proposed Order includes an overly broad general enabling provision, the inclusion of which renders Rule 2004 and the Court's control of 2004 discovery meaningless. Without addressing or mentioning it in the Motion, the Committee's proposed Order includes the following:

> **ORDERED** that the Committee is authorized to conduct, ***without further order of this Court, additional discovery beyond that specifically named in the Document Requests*** (as defined in the Motion), including, ***without limitation***, additional document requests and depositions from the 2004 Parties and ***any other person or entity***, to the extent the ***Committee deems necessary*** and to the extent additional discovery relates to the Committee's investigation under § 1103 of the Bankruptcy Code.

Proposed Order at pg. 2 (emphasis added).

If allowed, the scope of this provision means that once a 2004 Order is entered as to *any* subject, and no matter how narrow or limited that order may be, Rule 2004 no longer applies and the Committee may then conduct *any* other discovery on *any* other subject as to *any* person the Committee unilaterally deems necessary and without *any* further involvement of the Court. The Committee has not cited one single authority that supports this overly broad and lawless provision.

The same is true with respect to the provisions in the proposed Order providing for service of *any* other discovery as to *any* matter on Debtors' counsel and also the requirement that the Debtors must respond to *any* future discovery on *any* subject within 10 days after receipt. Proposed Order at pg. 1.

The Instructions contained in Schedule 1 to the proposed Order are also unsupported by any authority and are well beyond what is permitted by Rules 2004, 7034 and/or 9016 of the Federal Rules of Bankruptcy Procedure and the Debtors expressly object to each of the Instructions.

E. Once a Contested Matter is Pending, a Motion Under Rule 2004 is No Longer Appropriate

The Committee claims that the 2004 discovery is based on the pending motion for the approval of the Disclosure Statement. However, Rule 2004 is not the appropriate procedural vehicle one a contested matter is pending vehicle. *In re Bennett Funding Group, Inc.,* 203 B.R. 24 (Bankr. N.D.N.Y. 1996). The rule articulated by *Bennett Funding* is that: "Discovery of evidence *related* to the pending proceeding must be accomplished in accord with more restrictive provisions of [the Federal Rules of Bankruptcy Procedure], while *unrelated* discovery should not be subject to those rules simply because there is an adversary proceeding pending." *In re Bennett Funding Group, Inc.*, 203 B.R. at 29 (emphasis in original). *See also In re Washington Mut., Inc.*, 408 B.R. 45, 51 (Bankr. D. Del. 2009) ("In this Court's view, the proper approach is that of *Bennett Funding.*"); *In re Glitnir banki hf.*, 2011 WL 3652764, at *4 (Bankr. S.D.N.Y. Aug. 19, 2011) (citing *Bennett Funding*); *In re Enron Corp*., 281 B.R. 836, 840 (Bankr. S.D.N.Y. 2002) (same).

Under the rule, "once an adversary proceeding or contested matter is commenced, discovery should be pursued under the Federal Rules of Civil Procedure and not by Rule 2004."

In re Enron Corp., 281 B.R. 836, 840 (Bankr. S.D.N.Y. 2002); *In re Bennett Funding Group, Inc.,* 203 B.R. 24, 28 (Bankr. N.D.N.Y. 1996)("[O]nce an adversary proceeding or contested matter has been commenced, discovery is made pursuant to the Fed. R. Bankr. P. 7026 *et seq.,* rather than by a Fed. R. Bankr. P. 2004 examination."). Rule 2004 discovery not appropriate where it would "unavoidably and unintentionally create a back door" to discovery in another proceeding. *Id.* at 29-30. *See In re Dinubilo,* 177 B.R. 932, 939–40 & n. 12 (E. D. Cal. 1993) (contrasting the differences between Rule 2004 examinations and discovery under the Federal Rules).

VI.
THE COMMITTEE SEEKS AN ORDER REQUIRING A VIOLATION OF BAHRAINI LAW

The Investors opened accounts with Arcapita Bank and subscribed to investments in the Syndication Companies and SIP's through those accounts. Accordingly, the information requested as to the Investors is governed by Article 117 of Part 8 of the CBB and Financial Institutions Law 2006. The Proposed Order requested by the Committee would subject Arcapita *and its agents* to criminal penalties in Bahrain. An order of this Court will provide little solace to Arcapita's management and agents resident in the GCC if charged with an offense under the CBB law.

Article 117 provides as follows:

Article (117) Restriction on Disclosure of Confidential Information by Licensees

Confidential Information must not be disclosed by a Licensee unless such disclosure is done:

1. Pursuant to an unequivocal approval of the person to whom the confidential information relates.

2. In compliance with the provisions of the law or any international agreements to which the Kingdom is a signatory.

3. In the process of executing an order issued by a Competent Court.

4. For the purpose of implementing an instruction given by the Central Bank.

See Declaration of Parween Abdul-Rahman attached hereto which provides evidence of Bahraini law and its operation which may be considered by this Court pursuant to Rule 44.1 of the Federal Rules of Civil Procedure.

The CBB Law provides for regulations regarding the financial industry in the Kingdom of Bahrain and specifically applies to any person licensed by the Central Bank of Bahrain to provide any of the regulated services. Arcapita Bank is a Licensee. For the purposes of Article 117, "Confidential Information" means any information on the private affairs of any of the Licensee's customers and includes an investor's identity, contact information and customer information. The disclosure exception in Article 117(3), applies only to an order issued by a court in the Kingdom of Bahrain and would not apply to an order of a court in the United States of America, such as the 2004 order requested here.

Alternatively, Article 118 of the CBB Law, provides that *the Central Bank may disclose* Confidential Information:

1. In any of the cases stated in Article 117;

2. In connection with any measures taken by the Central Bank to ensure stability and reinforce trustworthiness of banking and the financial system of the Kingdom of Bahrain; or,

3. In cooperation with international financial organizations or competent administrative bodies or authorized committees.

In any event, no person who receives, directly or indirectly, Confidential Information may further disclose the information other than as specified under Article 118 of the CBB Law.

This would appear to include the members of the Committee, its agents and professional, to the extent they were to receive Confidential Information through 2004 discovery.

If Arcapita Bank or any of its employees (or any recipient, such as the Committee) failed to comply with Article 117, they could be subject to imprisonment and a fine not exceeding Bahraini Dinars 10,000, or either penalty (Article 171 of the CBB Law). Article 172 of the CBB Law states that any legal person shall be liable and punished under criminal law by a fine not exceeding two hundred thousand Bahraini Dinars, if any of the crimes stated in the CBB Law are committed in his name or for his account or by means of any of his facilities, was the result of any action or gross negligence, due to the approval of any member of the board of directors or any other official of that legal person or any person who acts in such capacity. *See* Declaration of Parween Abdul-Rahman.

VII.
ANY INFORMATION PRODUCED SHOULD BE SUBJECT TO A PROTECTIVE ORDER

The Committee has failed to establish cause for the disclosure identity of the Investor names and the Committee's Motion should simply be denied. However, if the Court still finds that, despite Bahraini law, that cause has been shown to require the disclosure of the Investors' identities by the production of the requested Proxies and other information, then the order should include provisions to protect the Debtors, their professionals, agents and the estates from the harm that will result from the misuse of the information. The terms of any order should, at a minimum, include the following terms:

1. The dissemination of the Proxies, any document evidencing the revocation of a Proxy and any other information provided that identifies any Investor or party to a Proxy or confidential information regarding any Investor or party to a Proxy ("Investor Information"), shall be limited to Milbank as counsel to the Committee and Houlihan

Lokey as financial advisor to the Committee ("Designated Committee Professionals"). The Investor Information shall not be disseminated to the Committee members or their representatives.

2. The Designated Committee Professionals shall not, without a further order of the Court, contact any of the Investors identified in the Investor Information (directly or indirectly), shall not provide the Investor Information to any other person to allow them to contact the Investors and shall not otherwise use or allow anyone else to use the Investor Information or any information therein to interfere with the Debtors' business and/or contractual relationships between the Debtors and the Investors. The Designated Committee Professionals shall be responsible for insuring that its agents, employees, partners, associates, clients, members, principals, affiliates, directors, or others who may obtain the Investor Information, or the information therein, comply with the provisions of the Order.

3. The Designated Committee Professionals shall not include the Investor Information in or otherwise disclose the Investor Information in any filing in the Debtor's Bankruptcy cases in the United States or the Cayman Islands, or any other filing or publication, that would place the Investor Information in the public record or otherwise make the Investor Information accessible to anyone other than the Designated Committee Professionals.

Rule 9018 of the Federal Rule of Bankruptcy Procedure provides, "On motion or on its own initiative, with or without prejudice, the court may make any order which justice requires ... to protect the estate or any entity in respect of a trade secret or other confidential research, development, or commercial information." *In re Handy Andy Home Improvement Centers, Inc.*,

199 B.R. 376, 382 (Bankr. N.D. Ill 1996). A showing of good cause is not required for the entry of a protective order under a Rule 2004 investigation. *Id.*

Dated: New York, New York
February 28, 2013

Respectfully submitted,

/s/ Craig H. Millet

Michael A. Rosenthal (MR-7006)
Craig H. Millet (Admitted *Pro Hac Vice*)
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

101466696.1

GIBSON, DUNN & CRUTCHER LLP
Michael A. Rosenthal (MR-7006)
Craig H. Millet (admitted *pro hac vice*)
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

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

DECLARATION OF PARWEEN ABDUL-RAHMAN PURSUANT TO FED. R. CIV. P. 44.1 IN SUPPORT OF DEBTORS' OPPOSITION TO MOTION OF COMMITTEE OF UNSECURED CREDITORS FOR AN ORDER PURSUANT TO FED. R. BANKR. P. 2004

I, Parween Abdul-Rahman, hereby declare as follows:

1. I am an attorney with the law firm Haya Rashed Al Khalifa, which is located in the Kingdom of Bahrain. As an attorney in Bahrain, I am familiar with Bahraini law and specifically the Central Bank of Bahrain and Financial Institutions Law Decree No. 64 of 2006 ("CBB Law"). I regularly work with international law firms in providing advice on corporate, commercial and employment issues relating to Bahraini law. Except as otherwise indicated herein, all facts set forth in this Declaration are based upon my personal knowledge and information learned from my review of relevant documents. If called upon to testify, I could and would testify competently to the facts set forth herein.

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2. The CBB Law provides for regulations regarding the financial industry in the Kingdom of Bahrain and specifically applies to Licensees. In this regard, Article 1 of the CBB Law defines "Licensee" as any person licensed by the Central Bank of Bahrain to provide any of the regulated services. Therefore, Arcapita Bank B.S.C.(c) ("***Arcapita Bank***") qualifies as a Licensee.

3. I am familiar with Article 117 of the CBB Law, which accordingly provides that Confidential Information must not be disclosed by a Licensee unless such disclosure is done:

1. Pursuant to an unequivocal approval of the person to whom the confidential information relates.
2. In compliance with the provisions of the law or any international agreements to which the Kingdom is a signatory.
3. In the process of executing an order issued by a Competent Court.
4. For the purpose of implementing an instruction given by the Central Bank.

4. For the purposes of Article 117 of the CBB Law, "*Confidential Information*" means any information on the private affairs of any of the Licensee's customers[1]. This definition would include, but not be limited to, investor identity, contact information and customer information.

5. For the avoidance of doubt, the disclosure exception in Article 117(3) of the CBB Law above, applies only to an order issued by a court in the Kingdom of Bahrain and would not apply to an order of a court in the United States of America.

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[1] Article 116 of the CBB Law

6. In addition, no person who receives, directly or indirectly, Confidential Information may disclose such information otherwise than as specified under Article 118 of the CBB Law[2].

7. If Arcapita Bank or any of its employees failed to comply with Article 117, they could be subject to imprisonment and a fine not exceeding Bahraini Dinars 10,000, or either penalty (Article 171 of the CBB Law).

8. Furthermore, Article 172 of the CBB Law states that any legal person shall be liable and punished under criminal law by a fine not exceeding two hundred thousand Bahraini Dinars, if any of the crimes stated in the CBB Law are committed in his name or for his account or by means of any of his facilities, and this was a result of any action or gross negligence, or by the approval or under covering of any member of the board of directors or any other official of that legal person or any person who acts in such capacity.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 28th day of February, 2013.

Parween Abdul-Rahman

[2] Article 119 of the CBB Law.

GIBSON, DUNN & CRUTCHER LLP
Michael A. Rosenthal (MR-7006)
Craig H. Millet (Admitted *Pro Hac Vice*)
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

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

DECLARATION OF HISHAM AL RAEE IN SUPPORT OF DEBTORS' OPPOSITION TO MOTION OF OFFICIAL COMMITTEE OF UNSECURED CREDITORS FOR AN ORDER PURSUANT TO FED. R. BANKR. P. 2004

I, Hisham Al Raee, declare as follows:

1. I am an Executive Director at Arcapita Bank B.S.C.(c) ("***Arcapita Bank***") and have been a member of its management team since Arcapita Bank's inception. I have over 16 years of investment banking and finance experience, and I currently head placement and relationship management for Arcapita Bank's clients. Prior to joining Arcapita Bank, for five years, I was the Senior Director of Business Development with Reuters Middle East in Saudi Arabia and, prior to that, I worked in the finance department at Citibank N.A., Bahrain.

2. Except as otherwise indicated herein, all facts set forth in this Declaration are based upon my personal knowledge, information learned from my review of relevant documents,

and information supplied to me by employees under my supervision. I am authorized to submit this Declaration and, if called upon to testify, I could and would testify competently to the facts set forth herein.[1]

3. As primary part of my responsibilities at Arcapita Bank, I deal with those third party investors ("***Investors***") to whom Arcapita Bank has sold interests in the non-debtor Syndication Companies that are, effectively, Arcapita Bank's co-investors in the Portfolio Companies. Among other things, I am generally in charge of communicating with Investors and maintaining Investor satisfaction and stability within the Investor group. Based on my experience, I am very familiar with the Investors, their goals, their concerns and the cultural and other issues that often give rise to problems based on the Investors' perception of facts and circumstances they do not fully understand.

4. I am aware that the Official Committee of Unsecured Creditors (the "***Committee***") has requested that the Bankruptcy Court order that Arcapita Bank disclose the names of all Investors to the Committee and its professionals, and that the Committee intends to use that information to contact the Investors directly.

Privacy and Confidentiality Issues

5. The Investors are comprised of approximately 1,300 high net worth individuals, families, institutions and sovereign wealth funds based primarily in Saudi Arabia, Kuwait, Bahrain, United Arab Emirates, Qatar, Oman and certain countries in Southeast Asia. These Investors elected to invest with Arcapita Bank because of Arcapita Bank's commitment to protect their privacy. Even the structure of the investments and the use of proxies ("***Proxies***") and management and administration agreements ("***Administration Agreements***") between AIML and the Syndication Companies in which the Investors hold an interest are structured to protect

[1] All capitalized terms used and not defined herein shall have the meanings ascribed to them in the Opposition.

their privacy. Culturally, the Investors, and particularly those from the countries that comprise the Gulf Cooperation Council ("GCC") – which consists of Qatar, Saudi Arabia, Oman, Kuwait, United Arab Emirates and Bahrain, are inherently private individuals or entities. Any intrusive and non-consensual appropriation of their personal information, especially regarding their financial affairs, will be viewed extremely hostilely. This characteristic is further accentuated when, as is often the case, the Investor is a member or affiliate of the royal family of a GCC country, or a sovereign wealth fund in such country.

6. Based upon my daily interaction with the Investors and my knowledge of objections they have previously raised to any potential disclosure of their identities, I am certain that the Investors will regard the disclosure of their identities, even if ordered by the Bankruptcy Court, as a breach of Arcapita Bank's confidentiality and privacy commitments to them and be particularly unsympathetic to unsolicited communications from the Committee which, from the Investors' perspective, is a faceless entity that bears no relationship to the management team at Arcapita Bank who the Investors voluntarily chose to manage their Arcapita-related investments.

7. In my opinion, the Investors' displeasure with disclosure of their names, and particularly any effort by the Committee to communicate with the Investors, will have several negative and value destructive ramifications for the Debtors. First, these actions will undermine trust and confidence in management of the Debtors making revocation of Proxies more likely. Second, these actions will complicate, rather than advance, discussions with the Investors, giving rise to stiff resistance on any decision that requires an Investor vote, and possibly evoking legal action in the GCC by the Investors as a result, among other reasons, of damages they perceived they will sustain from dissemination of information regarding their financial affairs.

Shari'ah Compliance

8. The Investors expressly chose to invest with Arcapita Bank to insure their investments comply with Shari'ah law. The Investors rely on Arcapita Bank's Shari'ah Supervisory Board to monitor and ensure the ongoing compliance of the investments with Shari'ah. Based on my extensive experience with Investors in the GCC, the Investors will not entrust their investments to parties who they feel do not understand Shari'ah or who they feel are not committed to maintaining Shari'ah compliance. Communications from Western-based creditors who themselves do not adhere to Shari'ah principles will simply exacerbate the concerns of the Investors, who already highly question the chapter 11 process and how it will impact their Shari'ah compliant investments through non-Debtor entities. This concern, in my view, will result in the Investors taking precipitous actions, some of which may be difficult rationally to explain without also considering the broader context of the manner in which these investments were made by, or the cultural characteristics of, the GCC Investor. Again, any heightened concern by the Investors will be very disruptive to maintaining the Proxies and increases the possibility of other legal action by the Investors.

9. Any disclosure and circulation of Investors' information would be in breach of Article 117 of the Central Bank of Bahrain and Financial Institutions Law 2006, but also will jeopardize the future relationship and reputation of Arcapita Bank, its board members and the reorganized Arcapita Bank's efforts to maximize the future value of the assets jointly owned by Arcapita Bank and the Investors.

Prevention of the Revocation of Proxies and Administration Agreements

10. Through the Administration Agreements between Arcapita Investment Management Limited ("***AIML***") and the Syndication Companies and Proxies granted to AIML

by the Investors as shareholders in the Syndication Companies, Arcapita Bank maintains effective control over the investments in which the Investors and Arcapita Bank each hold an interest. A principal reason the Investors agreed to allow Arcapita Bank this control relates to the fact that AIML itself is managed by the very individuals with whom the Investors agreed to invest. So long as this relationship continues, Arcapita Bank maintains the ability to maximize the value of the investments for all parties. However, any suggestion that this relationship might be broken – including any suggestion through an out-of-the-blue communication from the Committee that Arcapita Bank creditors might be displacing management – carries with it the unintended consequence that the Investors will take every opportunity and look for every legal angle to revoke the Proxies, terminate the Administration Agreements or destabilize the Syndication Companies through changes in the board of directors. I am aware that the Administration Agreements generally provide for an initial term of four years, and thereafter automatically renew for successive one-year periods, unless the Syndication Company gives notice of its intent not to renew the Administration Agreement 30 business days prior to the end of the present term. I am also aware that the Administration Agreements are terminable at any time by the Syndication Company on 60 business days' notice if the shareholders of the Syndication Company approve of the termination by a special resolution which requires a two-thirds vote. I am also aware that the Proxies are revocable in the sole discretion of the Investors.

Maintaining Stability Within the Investor Group

11. Although prior to the bankruptcy filing, my responsibilities included Investor communication and Investor satisfaction, since the bankruptcy filing, I and others at Arcapita Bank, including CEO Atif Abdulmalik and Vice Chairman of the Board Abdulaziz Al Jomaih have spent an enormous amount of time maintaining relationships with the Investors, clarifying

misunderstandings and rumors related to the chapter 11 process and trying to insure the Investors do not revoke the Proxies or cause the termination of Administration Agreements. The Investors have regularly expressed their concern and distrust over any control of their affairs by others unknown to them.

12. As part of those efforts to calm growing Investor concerns, I and others at Arcapita Bank concluded that it was crucial that Arcapita Bank forward correspondence to the Investors to prevent growing unrest and to promote stability. Because of his reputation and stature and because the majority of the Investors have expressed to me their trust in him to guide future efforts to achieve the Investors' ultimate return objectives, we decided that a letter should come from Abdulaziz Al Jomaih whose family have always been the anchor of Arcapita Bank. The letter from Arcapita Bank sent to Investors the week of February 10, 2013 addressed the growing Investor concern over the continuity of the oversight of their investments by those with whom they are familiar and trust, as compared to unknown third parties that they fear. Based upon response from Investors, the letter from Abdulaziz Al Jomaih has had a positive impact in the market to calm and stabilize the Investor group and to delicate balance through a showing an alignment of interests necessary to maintain the Proxies.

13. The stability within the Investor group and delicate balance maintained thus far will be destroyed if the Committee or any other outside entity were to obtain the identities of all Investors and were to then contact the Investors with inquiries and positions the Investors will simply not understand. A "proxy contest" of the nature proposed by the Committee, will demonstrate a break in the communication between the Investors and Arcapita Bank, will be perceived as the worst fears of the Investors coming to pass due to the interference of an outside agency they neither trust nor understand and will trigger panic by the Investors based on the

perception that those with whom they are familiar will not be in control of their investments. In my experience, once the Investor body is destabilized in this fashion, control will be very difficult if not impossible to regain. The Committee is not in a position to handle the fallout that will result from the competitive solicitation process the Committee intends.

14. The Kingdom of Bahrain is a major financial center in the GCC due in part to its progressive banking regulations and laws that protect the confidentiality and privacy of banking customers who themselves act in compliance with Bahraini law. Based on my experience within the GCC, the disclosure of the Investors' identities here, especially if that information is then used to contact the Investors, will cause significant damage not only to Arcapita Bank itself, but also to the reputation of the Kingdom of Bahrain as a financial center whose laws may be trusted to protect customer privacy.

15. The names and confidential information of the Investors is highly proprietary after being developed by Arcapita Bank over many years. The disclosure of the identity of the Investors would be very valuable to Arcapita Bank competitors, including those on the Committee, and would irreparably harm Arcapita Bank's ability to maintain the stability of the Investor group. The disclosure of the Investors would provide competitors with a customer list of best and key target customers active in the investing markets in which both Arcapita Bank and its competitors engage.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 28th day of February, 2013.

/s/ Hisham Al Raee
Hisham Al Raee

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