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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

STANDARD CHARTERED BANK'S OBJECTION TO THE DEBTORS' MOTION FOR ENTRY OF AN ORDER (I) APPROVING THE DISCLOSURE STATEMENT AND THE FORM AND MANNER OF NOTICE OF THE DISCLOSURE STATEMENT HEARING, (II) ESTABLISHING SOLICITATION AND VOTING PROCEDURES, (III) SCHEDULING A CONFIRMATION HEARING, AND (IV) ESTABLISHING NOTICE AND OBJECTION PROCEDURES FOR CONFIRMATION OF THE DEBTORS' JOINT CHAPTER 11 PLAN

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Standard Chartered Bank ("**SCB**"), through its undersigned counsel, hereby files this objection (this "**Objection**") to the *Debtors' Motion for Entry of an Order (I) Approving the Disclosure Statement and the Form and Manner of Notice of the Disclosure Statement Hearing, (II) Establishing Solicitation and Voting Procedures, (III) Scheduling a Confirmation Hearing, and (IV) Establishing Notice and Objection Procedures for Confirmation of the Debtors' Joint Chapter 11 Plan* [Docket No. 828] (the "**Motion**"), filed by the above-captioned debtors and debtors in possession ("**Arcapita**" or the "**Debtors**"). In support thereof, SCB respectfully represents and states as follows:[1]

PRELIMINARY STATEMENT

1. The Debtors' first amended plan [Docket No. 981] (the "**Plan**") and first amended disclosure statement [Docket No. 983] (the "**Disclosure Statement**") are premised on a purported settlement term sheet with SCB (attached as Exhibit G to the Disclosure Statement, the "**SCB Term Sheet**"). However, as the Debtors are well aware, SCB has not agreed to the SCB Term Sheet. As a result, the Disclosure Statement contains grossly inadequate and incorrect disclosure and cannot be approved. To the extent the Debtors are attempting to impose the treatment set forth in the SCB Term Sheet on SCB over its objection, such treatment violates the express statutory requirements of the Bankruptcy Code and thus the Disclosure Statement cannot be approved.

2. Furthermore, the construct of the Plan is a scheme by the Debtors to deprive creditors of Arcapita Investment Holdings Limited ("**AIHL**") (including SCB) of their rights under Cayman Islands law in AIHL's provisional liquidation proceeding (the "**Cayman**

[1] By filing this Objection, SCB is not acknowledging the propriety of these chapter 11 cases or that the Court should continue to exercise jurisdiction over each of the Debtors. SCB reserves the right to request that the Court dismiss, or abstain from, these chapter 11 cases.

Liquidation Proceeding") in the Grand Court of the Cayman Islands (the "**Cayman Islands Court**") through the purported sale of AIHL's assets to a newly created affiliate. The Debtors' creditors and the Court should not be lured into supporting the Plan without appropriate disclosure that it is unlikely that the Plan will be approved or otherwise supported by the Cayman Islands Court in the face of an objection by SCB. As discussed below, the Plan is in direct contravention of SCB's rights under Cayman Islands law.

3. The Plan described in the Disclosure Statement is patently unconfirmable under chapter 11 for the following reasons: *First*, SCB cannot be required to waive its administrative or superpriority claims. These claims are required to be paid in full and in cash as a matter of law. *See* 11 U.S.C. §§ 1129(a)(9)(A); 507(a)(2). To date, SCB holds superpriority administrative claims in the amount of approximately $14.22 million (as set forth at pgs. 65-66 in the Disclosure Statement)[2] as well as administrative claims for all of its expenses incurred in connection with the Debtors' chapter 11 cases (the "**Chapter 11 Cases**") and the Cayman Liquidation Proceeding. In violation of the basic principle of bankruptcy law that such claims must be paid in full in cash on the effective date under any chapter 11 plan, the SCB Term Sheet provides that SCB must agree that "up to $15 million plus any SCB admin claim resulting from net proceeds generated with respect to asset sales . . ." may be satisfied through a new SCB murabaha facility.

4. *Second*, under the Plan, the Debtors cannot require that affiliates of SCB take any action whatsoever with respect to any rights they may have against non-Debtor affiliates. Standard Chartered Bank (China) Limited ("**SCB China**") has extended an approximately

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[2] The Debtors acknowledge as follows: "The $14.22 million attributable to LT Holdings' equity interest in Assisted Living Investments gave rise to an administrative expense claim in favor of SCB under the SCB cash collateral order." Disclosure Statement, pp.65-66.

¥270,935,198 murabaha facility (approximately ¥286,832,842 or $46.4 million is outstanding) to certain non-Debtor affiliates that is secured by certain wind energy assets in China (the "**Honiton Facility**"). Under the SCB Term Sheet, the Debtors require that SCB and the Debtors "will engage in good faith negotiations in an effort to reach an amendment to the Honiton Facility in connection with the plan process." SCB and SCB China are entitled as a matter of law to take any actions (including the exercise of enforcement remedies) that they believe are permitted under the Honiton Facility, related agreements, and applicable law.

5. *Third*, under Cayman Islands law, the shares of the Subsidiary Debtors that are mortgaged to SCB are the property of SCB. Specifically, SCB is the beneficial owner of such shares, has equitable title to such shares, and any distributions on account of such shares are property of express trusts established under Cayman Islands law for the benefit of SCB. As such, the shares and the trust property are not property of the Debtors or property of the Debtors' estates. *See* 11 U.S.C. § 541(d). Accordingly, neither the shares nor the trust property can be used by the Debtors to fund their reorganization under the Plan. Because the Plan proposes to use the shares and the trust property to fund the Plan, it is patently unconfirmable and therefore the Disclosure Statement cannot be approved.

6. *Fourth*, absent SCB's consent, the Debtors cannot satisfy the requirements of § 1129(a)(10) of title 11 of the United States Code (the "**Bankruptcy Code**") and thus cannot confirm the Plan for any of the Debtors. From the outset of these cases, the Debtors have represented to the Court that SCB was the only creditor of Arcapita LT Holdings Limited ("**Arcapita LT**"), WindTurbine Holdings Limited ("**WindTurbine**"), AEID II Holdings Limited ("**AEID II**"), and RailInvest Holdings Limited ("**Railinvest**", and together with Arcapita LT, WindTurbine, and AEID II, the "**Subsidiary Debtors**"). Although the Debtors for the first time

have asserted that there are other creditors of the Subsidiary Debtors under the Plan and Disclosure Statement, each of these creditors are unimpaired under the Plan.

7. Although the Debtors may attempt to convince this Court that a cramdown plan can be confirmed without the acceptance of an impaired accepting class at each Debtor under an ill-conceived "joint plan" theory, this argument has been expressly rejected in two recent cases. *See In re JER/Jameson Mezz Borrower II, LLC*, 461 B.R. 293, 302-03 (Bankr D. Del. 2011); *In re Tribune Co.*, 464 B.R. 126, 180-84 (Bankr. D. Del. 2011). These cases make clear that absent substantive consolidation, section 1129(a)(10) of the Bankruptcy Code cannot be satisfied on a per-plan (as opposed to a per-debtor) basis.

8. The Debtors have not attempted to substantively consolidate these cases for the simple reason that the Debtors could not in good faith seek to consolidate the cases of the Subsidiary Debtors -- four special purpose vehicles formed under Cayman Islands law -- where SCB expressly relied on the corporate separateness and structural priorities of those entities. Accordingly, the Plan cannot be confirmed with respect to Subsidiary Debtors without violating § 1129(a)(10) of the Bankruptcy Code. Moreover, because a substantial portion of the value of the Debtors flows through Arcapita LT, the Plan cannot be confirmed with respect to AIHL and Arcapita Bank B.S.C.(c.) ("**Arcapita Bank**") as there can be no assurance that the proposed treatment for creditors of AIHL and Arcapita Bank could be achieved absent a confirmed plan for the Subsidiary Debtors.

9. *Fifth*, the Debtors' Bahrain banking license and company registration expressly provide that Arcapita is authorized to practice in Bahrain as a wholesale bank governed by Islamic principles, and the Disclosure Statement provides that the Debtors are and shall remain Shari'ah-compliant entities. *See* Registration/Renewal Certificate of A Closed Joint Stock

Company, Arcapita Bank B.S.C., attached hereto as Exhibit A; License to Provide Regulated Services, Arcapita Bank B.S.C., attached hereto as Exhibit B; Disclosure Statement, pp.20, 42, 178. The Plan proposes to impose a new Murabaha agreement on SCB. However, a Shari'ah-compliant instrument is formed by a contractual agreement between the parties. Without consent, the transaction fails.

10. In order for a Murabaha transaction to be effectuated, SCB would need to take many affirmative actions, including the purchase and sale of approximately $100 million in precious metals. This purchase and sale requirement cannot simply be "deemed" satisfied if the Murabaha agreement is to be Shari'ah compliant. Accordingly, any imposed treatment on SCB would be a clear violation of the Debtors' corporate governance and would constitute an *ultra vires* action that cannot be approved by the Court. Such an act may also amount to a breach of Arcapita Bank's banking license.

11. Moreover, it is outside the bounds of chapter 11 and U.S. law for any court to enter an affirmative injunction requiring SCB to spend approximately $100 million of its own money to purchase precious metals and enter into an agreement to sell such metals to Arcapita on terms unacceptable to SCB, where SCB is under no legal obligation (much less a legal obligation requiring specific performance) to do so. There can be no dispute that a chapter 11 plan cannot require a creditor to take such affirmative action to obtain a recovery under the plan.

12. Even if this Court were to permit the Debtors to violate wantonly their own corporate governance, the Disclosure Statement must be revised to provide full disclosure that the Debtors are willfully violating their Islamic principles and disclose any repercussions that the Debtors could face from not only their creditors and investors, but also the creditors, investors,

and trade partners of their non-debtor affiliates and any loss of value or other negative impact that the Debtors may face as a result of the blatant disregard of their corporate governance.

13. *Sixth*, the terms of the Debtors' proposed exit financing have not yet been finalized. Without exit financing in place the Plan is not feasible on its face and cannot be confirmed. Moreover, the terms of the exit financing will have a direct and likely negative impact on SCB. Unless and until the terms and conditions of the exit financing are finalized, the Disclosure Statement cannot be approved.

14. *Seventh*, leaving aside the fact that the Debtors are not able to cram down SCB in a Shari'ah-compliant manner, the proposed profit rate under the New SCB Facility is substantially lower than the market rate evidenced in these Chapter 11 Cases, and therefore is not an appropriate cramdown rate.

15. In light of the significant issues under Cayman Islands law discussed herein, the Court as a matter of judicial economy should grant SCB limited relief from the automatic stay to litigate these issues before the Cayman Islands Court, which is better suited to determine issues of Cayman Islands law, and to avoid having these issues litigated in this Court and then in the Cayman Islands Court.

16. Accordingly, the Disclosure Statement cannot be approved as it contains woefully inadequate information and describes a Plan that is facially unconfirmable. Moreover, the Plan will result in duplicative litigation if limited stay relief is not granted to SCB.

I. BACKGROUND

A. The Debtors

17. On March 19, 2012 (the "**Petition Date**"), Arcapita Bank, AIHL, and the Subsidiary Debtors each filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. On April 30, 2012, Falcon Gas Storage Company, Inc. ("**Falcon**") filed a voluntary

petition for relief under chapter 11. The Chapter 11 Cases are being jointly administered in this Court.

18. Immediately following the Petition Date, AIHL sought ancillary relief from the Grant Court of the Cayman Islands, which has appointed joint provisional liquidators ("**JPLs**") for AIHL and stayed the winding-up of AIHL pending the outcome of the Chapter 11 Cases. An official committee of unsecured creditors (the "**Committee**") was appointed in the Chapter 11 Cases on April 5, 2012.

19. Arcapita Bank is the ultimate parent of all entities in the Arcapita group. AIHL is its wholly-owned subsidiary. AIHL's wholly-owned subsidiary, Arcapita LT, has a 100% interest in a group of Cayman Islands holding companies that own substantially all of Arcapita's equity interests in long-term investments. AEID II, WindTurbine, and Railinvest are each wholly-owned subsidiaries of Arcapita LT.

B. The SCB Murabaha Facilities

20. SCB has extended $100 million under two Murabaha facilities (the "**SCB Secured Facilities**") to Arcapita Bank, as obligor, pursuant to (i) that certain Master Murabaha Agreement, dated as of May 30, 2011, in the principal amount of US $50,000,000 (as amended, restated, replaced, supplemented or otherwise modified from time to time, and together with such supporting and ancillary documents thereto, the "**SCB May Murabaha Agreement**"); and (ii) that certain Master Murabaha Agreement, December 22, 2011, in the principal amount of US $50,000,000 (as amended, restated, replaced, supplemented or otherwise modified from time to time, and together with such supporting and ancillary documents thereto, the "**SCB December Murabaha Agreement**," and together with the SCB May Murabaha Agreement, the "**SCB Murabaha Agreements**").

21. The SCB Secured Facilities are Shari'ah-compliant Murabaha facilities. Under the SCB Murabaha Agreements, SCB agreed to sell $100 million in precious metals to Arcapita Bank in exchange for Arcapita Bank's agreement to pay SCB the cost price of the precious metals plus profit and costs, on deferred payment terms. SCB Murabaha Agreements, ¶¶ 2.2, 5.2. The transactions described in the SCB Murabaha Agreements did not happen only on paper. Pursuant to the SCB Murabaha Agreements, and in order to satisfy the Shari'ah requirements, SCB did in fact purchase $100 million in precious metals and transferred ownership of the precious metals to Arcapita Bank. The full amount of the obligations under the SCB Secured Facilities is due and owing to SCB.

22. Pursuant to certain guaranties, obligations due and owing under the SCB Secured Facilities are also obligations of the Subsidiary Debtors. The obligations of Arcapita Bank under the SCB May Murabaha Agreement are jointly and severally guaranteed by AIHL, Arcapita LT, and WindTurbine in accordance with that certain Guaranty dated May 30, 2011 (the "**May Guaranty**"). The obligations under the SCB December Murabaha Agreement are jointly and severally guaranteed by AIHL, Arcapita LT, AEID II, RailInvest and WindTurbine in accordance with that certain Guaranty dated December 22, 2011 (the "**December Guaranty**," and together with the May Guaranty, the "**SCB Guaranties**"). Pursuant to these SCB Guaranties, SCB is a creditor of each of the Subsidiary Debtors.

23. The obligations under each of the SCB Secured Facilities are secured by equitable mortgages (the "**SCB Mortgages**" and together with the SCB Murabaha Agreements, the SCB Guaranties, and the Finance Documents and Security Documents (each as defined in the SCB Murabaha Agreements) and any other documents related to the foregoing agreements, the "**SCB Murabaha Documents**") over the shares (the "**Owned Shares**") of each of the Subsidiary

Debtors -- Arcapita LT, AEID II, WindTurbine and RailInvest. AIHL and Arcapita LT are the mortgagors under the SCB Mortgages, which are governed by the law of the Cayman Islands. *E.g.*, Equitable Mortgage Over Shares in Arcapita LT Holdings Limited, dated December 22, 2011, ¶10 ("**December Arcapita LT Mortgage**"). Under Cayman Islands law, beneficial title to the Owned Shares passed to SCB prepetition, on the date of entry into the SCB Mortgages, leaving the Debtors with no more than bare legal title to the Owned Shares. Accordingly, the Owned Shares are the property of SCB, not property of the Debtors' estates.[3]

24. The SCB Mortgages also create express trusts (the "**Cayman Trusts**") under Cayman Islands law for the benefit of SCB over all dividends and other distributions made on or in respect of the Owned Shares or any thereof, including future property. *E.g.*, December Arcapita LT Mortgage, ¶8.3. After the occurrence of an event of default under the SCB Secured Facilities (which indisputably has occurred), all dividends and other distributions made on or in respect of the shares delivered to SCB under the SCB Mortgages or any thereof automatically constitute Trust Property -- property of the Cayman Trusts.[4] Trust Property is immediately and automatically impressed with a trust upon its creation, such that the beneficial interest vests solely in SCB, leaving the Debtors with no more than bare legal title to the Trust Property. As a matter of Cayman Islands law, the Trust Property is not subject to the bankruptcy or liquidation

[3] A mortgage "is a transfer of ownership to the creditor by way of security, upon the express or implied condition that the asset shall be reconveyed to the debtor when the sum secured has been paid." GOODE ON COMMERCIAL LAW 42 (E. McKendrick, ed., 4th Ed. 2009).

[4] "It is clear from these authorities that an assignment for value of future property actually binds the property itself directly it is acquired -- automatically upon the happening of the event, and without any further act on the part of the assignor, and does not merely rest in, and amount to, a right in contract, giving rise to an action. The assignor, having received the consideration, becomes in equity, on the happening of the event, trustee for the assignee of the property devolving upon or acquired by him, and which he had previously sold and been paid for." *In re Lind*, (1915) 2 Ch. 345, 360.

of the trustees (AIHL and Arcapita LT), and SCB is entitled to retain or claim the Trust Property as against a Cayman Islands liquidator or any other creditor or third party claiming through the trustees.[5] The Trust Property is accordingly the property of SCB, not property of the Debtors' estates.

C. The SCB Settlement Order

25. On July 26, 2012, the Debtors filed a motion [Docket No. 350] (the "**IPO Motion**") seeking authority to sell certain of the assets of Arcapita LT, including substantially all of the assets of AEID II (the "**IPO Assets**"), pursuant to an initial public offering (the "**EuroLog IPO**"). The IPO Motion did not contain any information or assurances regarding how the Debtors intended to protect SCB's security interest and trust rights with respect to the IPO Assets. Accordingly, on August 12, 2012, SCB filed an objection to the IPO Motion to assert and protect its rights as sole beneficial owner of the Trust Property [Docket No. 389]. Following substantial good faith negotiations, the Debtors, the Committee, the JPLs, and SCB entered into a settlement on October 7, 2012. This Court ordered and approved the settlement on October 19, 2012, in the *Order Pursuant to Section 105(a) of the Bankruptcy Code and Bankruptcy Rule 9019, Authorizing and Approving the Settlement with Standard Chartered Bank.* [Docket No. 587] (the "**SCB Settlement Order**"). Not only did the SCB Settlement Order allow the Debtors to pursue the EuroLog IPO while protecting and preserving SCB's rights with respect to the IPO

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[5] "[B]ecause value has been given on the one side, the conscience of the other party is bound when the subject matter comes into existence. Because his conscience is bound, equity fastens upon the property itself and makes him a trustee of the legal rights of ownership of the assignee . . . [the assignee's right] may survive the assignor's bankruptcy because it attaches without more eo instanti when the property arises and gives the assignee and equitable interest therein." *Palette Shoes Pty. Ltd.* v. *Krohn*, (1937) 58 CLR 1, 26-27 (Austl.).

Assets, but it also set forth a negotiated scheme to provide for the Debtors' limited allowed use of certain Trust Property during the Chapter 11 Cases.

26. As provided in the SCB Settlement Order, SCB consented to the transfer of Trust Property, other than Trust Property related to AEID II, RailInvest, and WindTurbine, to be transferred to and used by AIHL or otherwise in Arcapita's discretion, provided that if Trust Property is transferred to AIHL or otherwise disposed of, "SCB shall be granted superpriority administrative expense claims (the "**SCB Superpriority Claims**") against AIHL in an amount equal to the sum of all funds that have been or will be transferred post-petition to AIHL or otherwise disposed of on account of the SCB Asserted Trust Property." SCB Settlement Order, Exhibit 1, p.2. The SCB Superiority Claims "shall have priority ahead of all other present and future administrative claims" subject to a limited carve-out for professional fees and debtor in possession financing that met certain requirements. *Id*. at Exhibit 1, pp.2-3. SCB was also granted administrative claims for all of SCB's reasonable fees and expenses related to the Debtors' cases and the SCB Secured Facilities and for post-petition profit. *Id*. at Exhibit 1, p.4.

27. On December 4, 2012, the Debtors filed their *Motion for an Order Authorizing the Debtors to Grant Approvals and Consents in Connection With Sale by Non-Debtor Subsidiary* [Docket No. 684] (the "**Sunrise Sale Motion**"), pursuant to which Arcapita's equity interest in certain assisted living investments in England would be sold to a third party for a purchase price of £65 million, of which the Debtors would ultimately receive approximately $36 million (the "**Sunrise Sale Transaction**"). At the hearing on the Sunrise Sale Motion on December 18, 2012, the Debtors acknowledged that a portion of the purchase price was on account of equity indirectly owned by Arcapita LT. Accordingly, the Debtors acknowledged that the Sunrise Sale Transaction would result in the creation of SCB Superpriority Claims in the

amount of approximately $14.22 million. Hearing Tr. 56:13-19, Dec. 18, 2012 [Docket No. 762]. This Court granted the Sunrise Sale Motion on December 18, 2012 [Docket No. 726], and the Sunrise Sale Transaction was consummated. As a result, SCB has an approximately $14.22 million SCB Superiority Claim against AIHL. In the Disclosure Statement, the Debtors have acknowledged that total proceeds from the Sunrise Sale Transaction received by the Debtors were approximately $35.98 million, and "approximately $14.22 million" of the sale proceeds are attributable to equity wholly owned by Arcapita LT. Disclosure Statement, pp.65-66.

D. The Plan and Disclosure Statement

28. The Debtors filed the Motion on February 8, 2013. The amended Plan and Disclosure Statement were filed on April 16, 2013. In the Disclosure Statement, the Debtors aver as follows:

> Since entry of the order approving the SCB Settlement, the Debtors and SCB engaged in discussions regarding SCB's treatment under the Plan. Such discussions have resulted in the SCB Term Sheet attached hereto as Exhibit G. **The SCB Term Sheet describes the treatment afforded to SCB under the Plan, and represents a compromise and settlement with SCB** of issues that were either not resolved by the SCB Settlement or were resolved by the SCB Settlement but require modification in light of the Plan.
>
> The Debtors believe that the settlement embodied in the SCB Term Sheet is a fair and reasonable settlement of all issues related to SCB and falls well within the range of reasonableness required in connection with chapter 11 settlements.

Disclosure Statement, p.84 (emphasis added). The SCB Term Sheet does not represent a compromise and settlement with SCB. As the Debtors are well aware, the parties engaged in substantial good faith negotiations, but never reached final agreement. SCB has not consented to either the SCB Term Sheet, the Plan, or the Disclosure Statement.

29. The Plan and Disclosure Statement provide that in full and final satisfaction of all of SCB's claims, including the SCB Superpriority Claims, SCB shall receive the "New SCB

Facility Obligations," which are defined as the obligations under the "New SCB Facility," which means "a new Murabaha facility with a cost price equal to the amount of the Allowed SCB Claims, to be entered into by (i) certain Reorganized Debtors and/or New Holding Companies and certain of their Affiliates and (ii) SCB on the Effective Date, the terms of which shall be substantially in accordance with the terms set forth on the SCB Term Sheet." Plan, p.9; Plan, Exhibit A, p.17. The "SCB Claims" include all of SCB's administrative claims, including the SCB Superpriority Claims. *Id*. Exhibit A, p.21. Accordingly, the Debtors propose to satisfy the SCB Superpriority Claims through the New SCB Facility, and not through payment in full in cash, as required under the Bankruptcy Code.

30. The Plan also provides that "[i]t is a condition precedent to the receipt of the New SCB Facility Obligations that SCB, as the Holder of the Allowed SCB Claims, comply with the New Facility Distribution Procedures." Plan, p. 9. The "New Facility Distribution Procedures" with respect to the New SCB Facility are defined as "execution of the New SCB Facility, binding [SCB] to the provisions of the New SCB Facility and the other documents related thereto." Plan, Exhibit A, p.16. By constructing the Plan in this matter, the Debtors are effectively acknowledging that they cannot impose the New SCB Facility, a Shari'ah compliant Murabaha facility, on SCB without SCB's consent. For the new Murabaha facility to be created, SCB would be required to use its own funds to purchase precious metals in the total amount of its claims against the Debtors, and sell those precious metals to the Debtors in exchange for the Debtors' agreement to repay SCB on the terms of the New SCB Facility. The Debtors would then sell the precious metals and use the proceeds to pay the total amount of SCB's claims. It is without question the Debtors cannot impose such a requirement on SCB.

31. Finally, the Plan proposes that the New SCB Facility will be repaid out of "Excess Cash," which includes any cash in excess of the sum of "(a) $20 million and (b) the cash required to fund operations of the primary obligor under the New SCB Exit Financing Documents ("**New Arcapita Issueco**") and its subsidiaries for the succeeding four (4) months, including for the avoidance of doubt, to fund New Arcapita Issueco's business of managing and funding its portfolio investment companies." SCB Term Sheet p.3. SCB shall only receive Excess Cash generated by AEID II, WindTurbine, and RailInvest ahead of the exit lender. Excess Cash generated by all other sources, including the other assets of Arcapita LT, whose shares are likewise subject to the Cayman Trusts, shall first be used to pay down the exit facility.

II. ARGUMENT

32. Before a chapter 11 plan can be confirmed, the court must first approve a disclosure statement. *In re 18 RVC, LLC*, 485 B.R. 492, 495 (Bankr. E.D.N.Y. 2012). To be approved, a disclosure statement must contain "adequate information" regarding the proposed plan. 11 U.S.C. § 1125. The Bankruptcy Code defines "adequate information" as follows:

> [I]nformation of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records . . . that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan . . . .

Id. § 1125(a)(1). The disclosure of adequate information regarding a plan to creditors and the bankruptcy court is of prime importance. *Kunica v. St. Jean Financial, Inc.*, 233 B.R. 46, 54 (S.D.N.Y. 1999) ("The importance of full disclosure is underlaid by the reliance placed upon the disclosure statement by the creditors and the court. Given this reliance, we cannot overemphasize the debtor's obligation to provide sufficient data to satisfy the Code standard of 'adequate information.'") (quoting *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 417 (3d Cir. 1988)).

33. "In addition to the requirement that the disclosure statement contain adequate information, a bankruptcy court should not approve a disclosure statement if the proposed plan which it describes is incapable of confirmation." *In re 18 RVC*, 485 B.R. at 495; *see also In re GSC, Inc.*, 453 B.R. 132, 157 n.27 (Bankr. S.D.N.Y. 2011) ("An unconfirmable plan is grounds for rejection of the disclosure statement); *In re Quigley Co., Inc.*, 377 B.R. 110, 115-16 (Bankr. S.D.N.Y. 2007) ("If the plan is patently unconfirmable on its face, the application to approve the disclosure statement must be denied, as solicitation of the vote would be futile."); *In re Filex, Inc.*, 116 B.R. 37, 41 (Bankr. S.D.N.Y. 1990) ("Only those plans which . . . patently comply with the applicable provisions of the Bankruptcy Code will pass muster for disclosure purposes.").

34. Moreover, in addition to the fact that seeking confirmation would be futile, a disclosure statement describing a patently unconfirmable plan should not be approved because it would waste the time and resources of the Court and the parties. *In re 266 Washington Associates*, 141 B.R. 275, 288 (Bankr. E.D.N.Y. 1992) ("The approval of a disclosure statement by a bankruptcy court is an early step in the confirmation process, followed by time consuming and expensive solicitation procedures and confirmation hearings. Having found patent legal defects in the Amended Plan rendering it not confirmable, the Court denies approval of the Debtor's first amended disclosure statement."); *In re Valrico Square Ltd. Partnership*, 113 B.R. 794, 796 (Bankr. S.D.Fla. 1990) ("Soliciting votes and seeking court approval on a clearly fruitless venture is a waste of the time of the Court and the parties."); *In re Atlanta West VI*, 91 B.R. 620, 622 (Bankr. N.D.Ga. 1988) (stating that a disclosure statement that describes a facially unconfirmable plan should not be approved in order "to avoid engaging in a wasteful and fruitless exercise of sending the disclosure statement to creditors and soliciting votes on the proposed plan when the plan is unconfirmable on its face").

35. Section 1129 of the Bankruptcy Code sets forth the requirements for plan confirmation, including the following. First, the Bankruptcy Code requires that administrative expense claims be paid in full in cash on the effective date of the plan in order for a plan to be confirmed. 11 U.S.C. § 1129(a)(9)(A); *In re Emons Industries, Inc.*, 76 B.R. 59, 60 (Bankr. S.D.N.Y. 1987) ("Confirmation of a plan of reorganization mandates that provision for payment in full in cash be made for all allowed expenses of administration."). In addition, for a plan to be confirmed, if there are any impaired classes under a plan, at least one class of impaired claims must vote to accept the plan. 11 U.S.C. § 1129(a)(10); *In re Tribune Co.*, 464 B.R. at 180-84. Finally, the Plan must be feasible. 11 U.S.C. § 1129(a)(11); *In re DBSD North America, Inc.*, 634 F.3d 79, 106 (2d Cir. 2011). If fewer than all of the impaired classes of claims vote to accept the plan, the plan can still be confirmed if every other requirement of plan confirmation, including §§ 1129(a)(9)(A), (10) & (11), are met, the plan does not discriminate unfairly, and is fair and equitable with respect to each impaired, rejecting class. 11 U.S.C. §§ 1129(a)(8), 1129(b).

36. As set forth below, the Disclosure Statement fails to meet the requirements for approval for multiple reasons. First, the Plan described by the Disclosure Statement is patently unconfirmable, and therefore it would be an unnecessary waste of estate resources to allow the Debtors to undertake the costly process of solicitation, and the Disclosure Statement should not be approved. Second, the Disclosure Statement does not contain adequate (or even accurate) information for creditors to make an informed decision as to whether to vote in favor of the Plan.

A. The Plan Is Patently Unconfirmable

37. The Plan described by the Disclosure Statement is unconfirmable on its face for several reasons, and accordingly the Disclosure Statement cannot be approved. First, the Plan fails to pay SCB's administrative claims in full and in cash on the effective date. Second, under

the Plan, the Debtors cannot force SCB or SCB China to agree to negotiate a workout of the obligations of a non-Debtor affiliate. Third, the Debtors cannot use the Owned Shares or the Trust Property, which are not property of the Debtors or of their estates, to fund the Plan. Fourth, the Plan fails to satisfy § 1129(a)(10), because SCB is the only impaired class for each of the Subsidiary Debtors and SCB will not accept the Plan. Fifth, the Plan is conditioned on SCB agreeing to enter into a new Murabaha facility, as required for the facility to be Shari'ah-compliant. SCB does not consent or agree to the new facility proposed by the Debtors, and the Court cannot order SCB to enter into the new agreement. Sixth, the Debtors have not finalized a commitment to provide exit financing, and accordingly the Plan is not feasible. Seventh, the proposed profit rate for the New SCB Facility is substantially lower than the market rate, and therefore does not satisfy the requirements for cramdown.

1. The Plan Does Not Satisfy Section 1129(a)(9)

38. The Plan does not satisfy section 1129(a)(9) and is therefore patently uncomfirmable. As explained above, instead of paying the approximately $14.22 million SCB Superpriority Claims in full in cash, the Debtors are proposing to give SCB new debt. Under section 1129(a)(9), a plan must provide that administrative claims are paid in full in cash as of the plan's effective date in order to be confirmable. *In re Adelphia Business Solutions, Inc.*, 341 B.R. 415, 422 (Bankr. S.D.N.Y. 2003) (estimating the amount of an administrative claim in order to determine plan feasibility, because under section 1129(a)(9)(A) the Code requires "that on the effective date of a plan, all admin expenses must be paid in full"); *In re Drexel Burnham Lambert Group Inc.*, 138 B.R. 723, 761 (Bankr. S.D.N.Y. 1992) ("[As] required by § 1129(a)(9)(A) of the Bankruptcy Code, § 3.1 of the Plan provides for payment in full of Administrative Claims in Cash on or before the later of the Consummation Date or the date on which an Administrative Claim is allowed."). Because the Plan fails to pay the SCB

Superpriority Claim in full and in cash upon the effective date of the Plan, it fails to meet the requirements of § 1129(a)(9) and cannot be confirmed.

2. The Debtors Cannot Force SCB and SCB China to Negotiate a Workout of the Obligations of a Non-Debtor Affiliate

39. The Debtors cannot force SCB or SCB China to engage in negotiations with a non-Debtor affiliate pursuant to SCB's treatment under the Debtors' Plan. In this Circuit, injunctive relief for non-debtor third parties is only approved in unique circumstances. *SEC v. Drexel Burnham Lambert Group, Inc. (In re Drexel Burnham Lambert Group, Inc.)*, 960 F.2d 285, 293 (2d Cir.1992). There is no justification for any third party injunctive relief being granted to the Debtors' affiliates under the Plan, and the Debtors have not attempted to present any such justification. Moreover, the Debtors are seeking mandatory relief, not simply injunctive relief, because they are asking for an order requiring SCB or SCB China to negotiate a workout of the Honiton Facility, likewise without presenting any basis for such relief. *Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 406 (2d Cir. 2011) (the burden is higher on a party seeking a mandatory injunction). Simply put, the Debtors cannot require SCB China to negotiate a workout of the Honiton Facility, which is not an obligation of the Debtors, under the Plan. Accordingly, the Plan is patently unconfirmable and the Disclosure Statement cannot be approved.

3. The Debtors Cannot Use SCB's Property to Fund the Plan

40. The Plan is patently unconfirmable because it proposes to use the Owned Shares and the Trust Property to fund the Debtors' Plan. SCB Term Sheet, p.3. This is improper, as neither the Owned Shares nor the Trust Property is property of the Debtors or of the Debtors' estates. The chapter 11 debtor's estate is comprised, with certain exceptions, of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C.

§ 541(a)(1). Where the debtor holds only bare legal title, and no equitable interest, the property in question does not become property of the estate. *See* 11 U.S.C. § 541(d) (where the debtor only holds "legal title and not an equitable interest," the property becomes property of the estate "only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold"); *Owen v. Owen*, 500 U.S. 305, 308 (1991); *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204 n.8 (1983) ("Congress intended to exclude from the estate property of others in which the debtor had some minor interest such as a lien or bare legal title.").

41. In addition, property of the estate does not include property that the debtor holds in trust for another. *See Begier v. I.R.S.*, 496 U.S. 53, 59 (1990) ("Because the debtor does not own an equitable interest in property he holds in trust for another, that interest is not 'property of the estate.'"); *Whiting Pools*, 462 U.S. at 205 n.10 ("Congress plainly excluded [from the bankruptcy estate] property of others held by the debtor in trust at the time of the filing of the petition."); *see also In re Flanagan*, 503 F.3d 171, 180 (2d Cir. 2007) (noting that "any property that the debtor holds in constructive trust for another is excluded from the estate"); *Premier Operations Ltd. v. David Morgan Fine Arts Int'l, Inc. (In re Premier Operations Ltd.)*, No. 02-3384, 2005 U.S. Dist. LEXIS 7164, at *7-15 (S.D.N.Y. Apr. 25, 2005) (the pre-petition transfer of property subject to a valid express trust under applicable state law is not an avoidable transfer, since it is not a transfer of property of the debtor or the estate); *Gowan v. The Patriot Group, LLC (In re Dreier LLP)*, 452 B.R. 391, 416 (Bankr. S.D.N.Y. 2011) (same); *Cassirer v. Herskowitz (In re Schick)*, 234 B.R. 337, *passim* (Bankr. S.D.N.Y. 1999) (same).

42. The question of the extent of the Debtors' interest in the Owned Shares and the Trust Property is governed by applicable nonbankruptcy law, which in this case is the law of the

Cayman Islands. *See Butner v. United States*, 440 U.S. 48, 54-57 (1979); *Premier Operations*, 2005 U.S. Dist. LEXIS 7164, at *10-11; *see also Patterson v. Shumate*, 504 U.S. 753, 757-59 (1992) (concluding that the phrase "applicable nonbankruptcy law" in section 541(c)(2) is not limited to state law but "encompasses any relevant nonbankruptcy law").

43. Under the law of the Cayman Islands, equitable title to the Owned Shares passed to SCB upon entry into the SCB Secured Facilities. The Debtors have no more than bare legal title and a revisionary interest with respect to the Owned Shares, and thus the Owned Shares are not assets of the Debtors' estates. Equitable title to the Owned Shares rests with SCB. Likewise, under Cayman Islands law, the Cayman Trusts create a valid express trust over the Trust Property, which became effective automatically and immediately upon the occurrence of an Event of Default under the SCB Murabaha Documents. *See In re General Growth Properties, Inc.*, No. 09-11977, 2011 WL 2974305, *3-4 & n.8 (Bankr. S.D.N.Y. July 20, 2011). Accordingly, in accordance with Cayman Islands law, the Trust Property is imposed with an express trust. The Trustees only have bare legal title to the Trust Property and, as such, the Trust Property is beneficially owned by SCB and does not constitute an asset of the Debtors' estates.

44. Upon the satisfaction in full of the Debtors' obligations under the SCB Secured Facilities in accordance with their governing law (English law), the equitable ownership of the Owned Shares will revert to the Debtors, and any remaining dividends or other distributions made on or in respect of the shares of the Subsidiary Debtors, if any, will be available to the other creditors of AIHL. *See Soho 25 Retail, LLC v. Bank of America, N.A. (In re Soho 25 Retail, LLC)*, No. 11-1286-SHL, 2011 WL 1333084, at *8-9 (Bankr. S.D.N.Y. Mar. 31, 2011) (concluding that where the debtor had, at most, a revocable license in the rents at issue, which was revoked pre-petition, the debtor only had an interest in rents to the extent the mortgage was

satisfied, and until the mortgage was satisfied, the rents were not property of the estate). Similar to the debtor in *Soho 25*, the Debtors have no interest in the Owned Shares or the Trust Property until the obligations under the SCB Murabaha Documents are fully satisfied.

45. The law is clear that where property is not property of the estate, but rather is the property of a third party, it may not be used over that third party's objection to fund a debtor's chapter 11 plan. *See* 11 U.S.C. § 541(d); *In re Jason Realty, L.P.*, 59 F.3d 423, 426-31 (3d Cir. 1995) (concluding that where the debtor had absolutely assigned rents to a secured creditor, under New Jersey law, legal ownership had passed to the secured lender and the rents were not property of the estate, and therefore could not be used to fund a chapter 11 plan) (citing *Commerce Bank v. Mountain View Village, Inc.*, 5 F.3d 34 (3d Cir. 1993)); *In re Loco Realty Corp.*, No. 09-11785, 2009 WL 2883050, *4-6 (Bankr. S.D.N.Y. 2009) (concluding that where the debtor had absolutely assigned rents to a secured creditor, the rents were not property of the debtor's estate and could not be used to fund a chapter 11 plan). Accordingly, until SCB's claims are paid in full in cash, the Debtors have no right to use the Owned Shares or the Trust Property to fund a chapter 11 plan over SCB's objection.

4. The Plan Does Not Satisfy Section 1129(a)(10)

46. The Plan for the Subsidiary Debtors does not satisfy section 1129(a)(10), which provides that if there are any impaired classes of claims, at least one impaired class must vote to accept the plan. Here, SCB's claims are impaired, and SCB is the only impaired creditor of the Subsidiary Debtors. Therefore, the Plan cannot be confirmed for the Subsidiary Debtors without SCB's acceptance. *In re JER/Jameson*, 461 B.R. at 302-03 (holding that the § 1129(a)(10) requirement applies on a per-debtor basis, and that a debtor with only one creditor could not confirm a plan over that creditor's objection); *In re Tribune Co.*, 464 B.R. at 180-84 (same).

47. In *Jameson*, one of the debtors in the jointly-administered chapter 11 cases (Mezz II) had only one creditor. 461 B.R. at 302. The debtors had not been substantively consolidated, and the court concluded no plan could be confirmed as to Mezz II over the objection of its sole creditor because there could be no impaired accepting class. *Id.* at 302-03. Accordingly, there was no possibility of confirming a plan. *Id.* at 303. In *Tribune*, which also involved multiple affiliated debtors that had not been substantively consolidated, the court emphasized that in the absence of substantive consolidation, "entity separateness is fundamental." 464 B.R. at 182. The court explained that cases involving multiple debtors were often jointly administered only for purposes of convenience, and that debtors could file joint plans, also only as a matter of convenience. *Id.* at 183. However, the court was clear that matters of convenience could not affect the requirements for confirmation under the Bankruptcy Code, and that there was "nothing ambiguous in the language of § 1129(a)(10), which, absent substantive consolidation or consent, must be satisfied by each debtor in a joint plan." *Id.*

48. Although a handful of cases mention that the § 1129(a)(10) requirement should be applied on a per-joint-plan basis, as opposed to a per-debtor basis, these cases are readily distinguishable, as they have involved statements in dicta, unpublished opinions, and cases involving substantive or deemed consolidation. *See In re Charter Commc'ns*, 419 B.R. 221, 226 (Bankr. S.D.N.Y. 2009); *In re Enron Corp.*, No. 01-16034 (AJG), 2004 Bankr. Lexis 2549, at *235 (Bankr. S.D.N.Y. July 15, 2004); *In re SGPA, Inc.*, No. 01-02609, 2001 Bankr. Lexis 2291, at *21-22 (Bankr. M.D. Pa. Sept. 28, 2001).

49. The *Tribune* court distinguished each of *Charter*, *SGPA*, and *Enron* on grounds applicable here. *Tribune*, 464 B.R. at 181-82. In C*harter*, opponents of the plan argued that section 1129(a)(10) was not satisfied because the impaired classes that voted for the plan were

"'artificially gerrymandered' solely for the purposes of obtaining the approval of an impaired class of creditors." 419 B.R. at 264. The court rejected this argument, finding that there were legitimate reasons for the plan's classification of claims, and then noted that even if their objection was valid, the plan would still be confirmable because section 1129(a)(10) applied on a per plan basis. *Id.* at 266. The court in *Tribune* discounted this statement as "either an alternative ruling or dicta." *Tribune*, 464 B.R. at 182. *Tribune* similarly distinguished *SGPA* and *Enron*. The *Tribune* court reasoned that *SGPA* explicitly stated that substantive consolidation of the debtors would not have harmed the bondholders objecting to the plan. *Id.* at 181. Likewise, *Enron* was distinguished on the ground that the case involved a plan that incorporated a global compromise between the debtors and creditors that provided for substantive consolidation. *Id.*

50. Here, the Debtors are not substantively consolidated, substantive consolidation could drastically affect recoveries, and SCB is the only impaired creditor of the Subsidiary Debtors. Accordingly, the Plan cannot be confirmed as to the Subsidiary Debtors under section 1129(a)(10) unless SCB consents. Moreover, the Plan cannot be confirmed as to AIHL and Arcapita Bank because a substantial part of the value of the Debtors flows through Arcapita LT. Because SCB does not consent, the Plan is patently unconfirmable.

5. The Plan Cannot Be Shari'ah Compliant and Cramdown SCB

51. Arcapita Bank is a Shari'ah-compliant investment company that operates under an Islamic wholesale banking license issued by the Central Bank of Bahrain. Disclosure Statement, at 30, 35, Exhibits A & B. Under Arcapita Bank's charter, it may only enter into transactions that are Shari'ah compliant, and as such, entry into a non-Shari'ah-compliant loan, through cramdown or otherwise, would be an *ultra vires* act.[6] For a Shari'ah-compliant Murabaha to be

[6] *See* Tally M. Wiener & Sean P. McGrath, *Middle East Meets West in the Southern District of New York*, AM. BANKR. INST. J., Oct. 2012, at 40 (discussing these chapter 11

created, both parties must agree to the transaction and take many financially significant actions thereunder, including the purchase of the principal amount worth of precious metals.

52. This simply cannot be accomplished through cramdown, as no court or statute can require a party to enter into a contract or take action where there is no legal obligation to do so. *See In re Coastal Shipping Ltd.*, 812 F.Supp.396, 402 (S.D.N.Y. 1993) ("[A]rbitration—being a creature of contract law—can only be ordered if the parties have agreed to arbitration, and then only in accordance with the terms of the agreement."); *Stull v. Hicks*, 59 Ill.App.3d 665, 667 (1978) ("We are mindful of the fundamental principle that a court may not make a new contract for the parties . . . ."); *Bloss v. Federated Publications, Inc.*, 145 N.W.2d 800, 803-04 (Mich. Ct. App. 1966) (refusing to compel a defendant to publish plaintiff's advertisements, as the defendant is a "strictly private enterprise" that had no legal obligation to sell advertising to any party); *Glantz Contracting Co. v. General Electric Co.*, 379 So.2d 912, 916 (Miss. 1980) ("Courts do not have the power to make contracts where none exist, nor to modify, add to, or subtract from the terms of one in existence.") (quoting *Citizens Nat'l Bank of Meridian v. L.L. Glascock, Inc.*, 243 So.2d 67, 70 (Miss. 1971)); *Stephens v. Hicks*, 72 S.E. 313, 316 (N.C. 1911) ("[The Legislature] may do many things with reference to contracts, but it cannot make a contract between parties, because a contract implies volition and the agreement of two or more minds to one and the same thing; in other words, consent.").

53. The Plan proposes that the treatment of SCB's claims will be that SCB and certain unidentified Arcapita entities will enter into a new, Shari'ah-compliant Murabaha facility, *see* Disclosure Statement, p.114; Disclosure Statement, Exhibit G, and that SCB's consent will be a

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cases and concluding that "[w]hile a consensual restructuring of a Shariah-compliant company is theoretically possible, there cannot be a 'cramdown' under 11 U.S.C. § 1129."); Abed Awad and Robert E. Michael, *Iflas and Chapter 11: Classical Islamic Law and Modern Bankruptcy*, 44 INT'L LAW. 975, 999 (2010).

condition precedent to SCB's treatment under the Plan. The entry into the New SCB Facility is a condition precedent to the effective date, and the Plan is silent as to what SCB's treatment will be if SCB does not enter into the new facility. Although the Plan provides that the Debtors can waive the condition precedent to the effective date of entry into the New SCB Facility, this is not practically possible without specifying what alternative treatment SCB would then receive. Plan, p. 38. SCB does not consent to the proposed treatment of its claims under the Plan; accordingly, the Plan is patently unconfirmable.

6. The Plan Is Not Feasible Without Committed Exit Financing And Lacks Adequate Disclosure

54. "To confirm a plan under Chapter 11, a bankruptcy court must find that the plan is feasible, or, more precisely, that '[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor . . . unless such liquidation or reorganization is proposed in the plan.'" *In re DBSD North America, Inc.*, 634 F.3d at 106; 11 U.S.C. § 1129(a)(11). A plan is feasible if it has a "reasonable assurance of success;" courts do not require an "absolute guarantee" of success. *Id.* at 106-07.

55. A condition precedent to confirmation of the Plan is that "[t]he documents evidencing the Exit Facility shall have been executed and delivered by the respective parties thereto, and all conditions precedent to the effectiveness of such documents shall have been satisfied or waived." Plan, p.38. The Plan, however, fails to identify the principal amount of the Exit Facility (which could be anywhere from $215 million to $315 million), the identity of the agent, the identity of the participants, and even the identity of the obligors, who are defined as "the Reorganized Debtors and/or New Holding Companies and certain of their Affiliates that are party to the Exit Facility." Plan, Exhibit A, p.10; *see also* Disclosure Statement, Exhibit C, p.8. The Exit Facility Term Sheet is marked "[TO COME]". Disclosure Statement, Exhibit F.

56. Without committed exit financing on specific terms, there is both a lack of adequate disclosure and a lack of feasibility. The terms of the proposed exit facility could dramatically impact SCB and the treatment the Debtors purport to impose on SCB under the SCB Term Sheet. Moreover, without an exit facility, the Plan is not feasible and cannot be confirmed, even by its terms. Accordingly, the Disclosure Statement cannot be approved without further disclosure as to the committed terms of the Debtors' exit financing.

7. The Proposed Profit Rate of the New SCB Facility is Substantially Lower than the Market Rate

57. The Debtors propose that the New SCB Facility will have a profit rate of 8.75%. Even assuming that the Debtors somehow could cram down SCB in a Shari'ah compliant manner -- which they cannot -- the profit rate proposed is substantially lower than the market rate evidenced in these Chapter 11 Cases. Where an efficient market rate exists, the court should use that rate to determine the rate of a proposed cramdown instrument under a chapter 11 plan. *In re American HomePatient, Inc.*, 420 F.3d 559, 568 (6th Cir. 2005); *In re DBSD North America, Inc.*, 419 B.R. 179, 209 (Bankr. S.D.N.Y. 2009) (in setting a cramdown interest rate, "courts in this district have looked to the market interest rate for loans with similar terms"), *rev'd on other grounds by* 634 f.3D 79 (2d Cir. 2011); *see also Till v. SCS Credit Corporation*, 541 U.S. 465, 476 n.14 (2004) ("Thus, when picking a cramdown rate in a Chapter 11 case, it might make sense to ask what rate an efficient market would produce.").

58. Actual loan offers and the rate obtained by debtors for their exit financing are evidence of the efficient market rate. *See In re 20 Bayard Views, LLC*, 445 B.R. 83, 109 (Bankr. E.D.N.Y. 2011) (in determining whether there was an efficient market, courts should "consider expert evidence and evidence of actual loan offers"); *In re Winn-Dixie Stores, Inc.*, 356 B.R. 239, 255-56 (Bankr. M.D. Fla. 2006) (concluding "that the process leading to the exit facility

was an efficient test of the market" and requiring the cramdown rate to match the rate of the exit facility).

59. The Debtors engaged in a market process to obtain a Shari'ah-compliant debtor-in-possession murabaha facility (the "**DIP Facility**"). The best profit rate the Debtors were able to obtain for their DIP Facility was 10% + LIBOR (with a 2% floor). [Docket Nos. 690, 695 & 727]. Upon information and belief, the rates that have been proposed for the Debtors' exit facility are substantially higher than the rate under the DIP Facility. Given the evidence of the market rate for Shari'ah-compliant financing in the context of these Chapter 11 Cases, it is clear that an efficient market exists. Accordingly, the profit rate under any cramdown SCB facility must be at least as high as the profit rate provided to the exit lender.

B. The Disclosure Statement Does Not Contain Adequate Information

60. Under section 1125(a)(1), a disclosure statement must contain information of a kind, and in sufficient detail, as far as is reasonably practicable that would allow creditors to make an informed judgment about whether to accept or reject the proposed plan. Here, the Disclosure Statement lacks adequate disclosure on several material issues, including the lack of SCB's consent and the likelihood that the Plan will not be approved in the Cayman Liquidation Proceeding.

61. *First*, at a minimum, the Debtors cannot be allowed to solicit acceptances of the Plan using a Disclosure Statement that inaccurately states that SCB has consented to the proposed treatment of its claims. The fact that SCB intends to challenge confirmation of the Plan, which currently is premised on SCB's consent, is material information that creditors must have in making their decision of whether to accept or reject the Plan.

62. *Second*, creditors must be informed of the risks that the Plan, even if somehow confirmed in this Court, would not obtain the required approval of the Cayman Islands Court

presiding over the Cayman Liquidation Proceeding over SCB's objection, including for the reasons set out herein which are governed by Cayman Islands law.

C. The Court Should Grant Limited Stay Relief To SCB

63. Given the substantial Cayman Islands legal issues that must be decided in connection with confirmation, the Court should grant SCB limited relief from stay in order to litigate the Cayman Islands legal issues in the Cayman Islands Court. In determining whether to grant relief from stay, courts in this Circuit consider, among other things, "the interests of judicial economy and the expeditious and economical resolution of litigation." *In re Sonnax Industries, Inc.*, 907 F.2d 1280, 1286 (2d Cir. 1990) (listing the factors to be considered in deciding whether to lift stay). The Cayman Islands law issues at issue in this case are best decided by a Cayman Islands court, and the resolution of these issues is necessary to confirm any plan in these Chapter 11 Cases over SCB's objection and to obtain approval in the Cayman Islands. Judicial economy will be best served by allowing SCB to commence this litigation in the Cayman Islands now, so that this Court may have the benefit of the Cayman Islands' court's views in connection with confirmation. *See In re Taub*, 438 B.R. 39, 48-49 (Bankr. E.D.N.Y. 2010) (concluding that the interests of judicial economy favored relief from stay to allow a state court divorce case to proceed, since "[e]quitable distribution is governed by New York law, and is an area of law where the state courts have special expertise").

D. Expedited Discovery In Connection With Confirmation Is Warranted

64. In the unlikely event that the Court approves the Disclosure Statement and allows the Debtors to proceed to confirmation, the Court should allow the parties to take discovery in connection with confirmation on an expedited basis. A party may seek expedited discovery under Federal Rule of Civil Procedure 26 (which is incorporated into Fed. R. Bank. P. 7026 and is generally applicable to contested matters under Fed. R. Bankr. P. 9014) if "good cause"

exists. *Ayyash v. Bank Al-Madina*, 233 F.R.D. 325, 326-27 (S.D.N.Y. 2005) (applying a "flexible standard of reasonableness and good cause" to request for expedited discovery); *see also Stern v. Cosby*, 246 F.R.D. 453, 457 (S.D.N.Y. 2007) (allowing expedited discovery where request was "reasonable in light of all the circumstances"). Given the substantial issues that must be decided in order to confirm the Debtors' Plan, as set forth herein, in the event the Court overrules SCB's Objection and approves the Disclosure Statement, expedited discovery in connection with confirmation will be necessary. Even with expedited discovery, given the anticipated need for expert discovery as well as factual discovery, SCB anticipates that the minimum 28 days will not be sufficient.

CONCLUSION

65. As set forth above, the Disclosure Statement cannot be approved. Moreover, unless the Debtors and SCB come to a settlement and compromise with respect to SCB's treatment under a chapter 11 plan, no plan can be confirmed in the Debtors' Chapter 11 Cases. SCB is willing to reengage the Debtors in negotiations regarding what plan treatment might be acceptable to SCB, and hopes that a consensual resolution may be reached. However, at present, there is no deal. Accordingly, the Court should deny the Motion and require the Debtors to continue to negotiate with all of their creditors, so that the next plan proposed is more than a placeholder.

66. In the event the Court overrules SCB's Objection and approves the Disclosure Statement, SCB reserves the right to assert the arguments herein and any additional arguments at the hearing on Plan confirmation, including without limitation arguments with respect to the proposed third party releases contained in the Plan.

WHEREFORE, for the foregoing reasons, SCB respectfully requests that the Court (a) deny the Motion and (b) grant SCB such other and further relief as the Court deems appropriate.

Dated: New York, New York
April 22, 2013

DECHERT LLP

By: */s/ Brian E. Greer*

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Attorneys for Standard Chartered Bank

Exhibit A

KINGDOM OF BAHRAIN
MINISTRY OF INDUSTRY & COMMERCE

مملكـــة البـــــحـــريـــن
وزارة الصنـــاعـــة و التــــــجــــــارة

Registration/Renewal Certificate Of A Closed Joint Stock Company

Registration Date	02/11/1996	Registration No	36403	Branch No	1

Address

Flat/Shop	801	Building	114
Road	385	Block	304
City/Village	MANAMA CENTER		

Bahrain Investors' Center of the Kingdom Of Bahrain certifies that ARCAPITA BANK B.S.C.(CLOSED) registered under name

- ARCAPITA BANK B.S.C.(CLOSED) -

Has been registered/renewed at the above address in accordance with Decree(1) Finance the year 1961 as amended by Decree No. 34/1976 and Decree No. 12/1978 and accordance with Commercial Companies Law No: 21/2001 and its amendments to Practice the following activities:

* ***Wholesale Bank - Islamic Principles***

s Valid Until ***02/11/2012*** **Chief of Bahrain Investor's Center** Page 1

ee should follow the legislation, conditions and the procedures of the other related official parties

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يرجى تثبيت هذه الشهادة في مكان بارز داخل المحل
يرجى قراءة الارشادات خلف الشهادة

KINGDOM OF BAHRAIN
MINISTRY OF INDUSTRY & COMMERCE

مملكة البحرين
وزارة الصناعة و التجارة

شهادة تسجيل / تجديد شركة مساهمة بحرينية مقفلة

تاريخ القيد	02/11/1996	رقم الفرع	1	رقم السجل	36403

العنوان:

مدينة / قرية	وسط المنامة	مجمع	304	طريق	385	مبنى	114	محل / شقة	801

يشهد مركز البحرين للمستثمرين بمملكة البحرين بأنة قد تم تسجيل / تجديد قيد بنك آركابيتا ش.م.ب(مقفلة) و المسجل باسم

- (بنك آركابيتا ش.م.ب(مقفلة -

و ذلك فى العنوان المدون أعلاه وفقا لنص المرسوم رقم 1 ماليه لعام 1961م و المعدل بالمرسوم رقم 34 لعام 1976م إستناداً لقانون الشركات التجاريه الصادر بالمرسوم بقانون رقم 21 لعام 2001م و ذلك لمزاولة الأنشطه التاليه

- مصرف قطاع جملة - إسلامي

02/11/2012 هذة الشهادة صالحة لغاية *

رئيس مركز البحرين للمستثمرين

صفحة رقم 1

على المرخص له مراعاة القوانين والإجراءات والاشتراطات لدي الجهات الرسمية الأخرى ذات العلاقة

Exhibit B

مملكة البحرين

Kingdom of Bahrain

مصرف البحرين المركزي

Central Bank of Bahrain

License No. **WB/036**

ترخيص رقم: م.ق.ج/٠٣٦

License to Provide Regulated Services

ترخيص بتقديم خدمات خاضعة للرقابة

Subject to the provisions of Decree No.64 of 2006 with respect to promulgating the Central Bank of Bahrain and Financial Institutions Law and all Rules and Regulations issued thereunder, the following License has been granted to the institution named below:

وفقاً لأحكام قانون مصرف البحرين المركزي والمؤسسات المالية الصادر بالمرسوم بقانون رقم (٦٤) لسنة ٢٠٠٦ وجميع اللوائح والأنظمة الصادرة عن مصرف البحرين المركزي فقد تم منح الترخيص التالي للمؤسسة المذكورة أدناه:

Name of Institution: **Arcapita Bank B.S.C. (c)**

إسم المؤسسة: بنك أركابيتا ش.م.ب. (م)

Type of license: **Wholesale Bank (Islamic Principles)**

نوع الترخيص: مصرف قطاع جملة (إسلامي)

License Date: **20th August 1996**

تاريخ إصدار الترخيص: ٢٠ أغسطس ١٩٩٦م

Governor: [signature]

المحافظ: [signature]

Certificate issue date: 24/4/2007

تاريخ إصدار الشهادة: ٢٤/٤/ ٢٠٠٧