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**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

-----X  
: **Chapter 11**  
: **Case No. 12-11076 (SHL)**  
: **Jointly Administered**  
: **Debtors.**  
-----X

**DEBTORS' OBJECTION TO MOTION OF COMMERZBANK  
AKTIENGESELLSCHAFT FOR ENTRY OF AN ORDER GRANTING LIMITED  
RELIEF FROM THE AUTOMATIC STAY TO DELIVER A CLAIM NOTICE**

Arcapita Bank B.S.C.(c) ("*Arcapita*") and certain of its subsidiaries and affiliates,  
as debtors and debtors in possession (collectively, the "*Debtors*") hereby object  
(the "*Objection*") to the motion of Commerzbank Aktiengesellschaft ("*Commerzbank*") [Docket  
No. 89] seeking relief from the automatic stay (the "*Motion*").<sup>1</sup> In support thereof, the Debtors  
respectfully represent:

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<sup>1</sup> All capitalized terms not otherwise defined in this Objection shall have the meanings set forth in the Motion.

**PRELIMINARY STATEMENT**

By the Motion, Commerzbank seeks relief from the Bankruptcy Code's automatic stay in order to submit a Demand for payment on Arcapita on the premise that delivery of the Demand is a ministerial act meant to preserve a claim, not a collection effort. Motion ¶ 13. This argument and the Motion are fatally defective. Commerzbank goes to great lengths to term the Guarantee's requirements for assertion of a Demand as clerical, procedural and/or ministerial. Motion ¶¶ 13, 18. In fact, these contractual requirements are conditions to the assertion of a Guarantee claim, conditions which must be satisfied before the Guaranteed Amount (as defined below) can become due and payable. By the Motion, Commerzbank seeks relief to satisfy such conditions and assert a Demand on its otherwise potentially invalid claim. It is difficult to understand how that act can be termed ministerial. In fact, that Commerzbank is seeking relief from this Court directly belies any argument that a Demand is ministerial in nature or that its Guarantee claim is without question due and payable absent the delivery of a Demand.

The Debtors oppose the Motion and the relief requested by Commerzbank. The Bankruptcy Code prohibits third parties from taking action to enforce or collect on a prepetition claim absent cause. Regardless of how Commerzbank's Demand is characterized, it is at its core a notice meant to demand collection on the Guarantee. Motion Ex. C ¶ 5 (“[W]e hereby issue this notice to the Guarantor as a formal demand for payment of the Guarantee Liabilities by the Guarantor.”). Serving the Demand on the Debtors is a collection act in direct violation of the automatic stay.

Finally, while cause may exist in certain extraordinary circumstances to permit third parties relief from the stay, no such cause exists here. Commerzbank offers no legitimate justification for the relief requested, only a hypothetical argument that a party may wrongly

object to the Guarantee claim even though the parties purportedly intended Arcapita to be the primary obligor on the debt. The Debtors submit that Commerzbank's true concern is not that some party will make an unsupportable objection to Commerzbank's claim; Commerzbank's true concerns are that the argument set forth above may be correct and Commerzbank may have no claim versus Arcapita. Accordingly, Commerzbank should not receive special allowances to continue collection efforts to the disadvantage of other creditors and the estates. Like all other creditors, Commerzbank should be compelled to file a proof of claim against the Debtors and engage in the claims resolution process.

### **THE GUARANTEE**

1. The Guarantee was executed by Arcapita in connection with that certain €25 million murabaha facility dated as of May 16, 2008 by and among, amongst others PVC (LUX) Holding Company S.A r.l. ("**Borrower**"), a subsidiary of Arcapita, as borrower, and Commerzbank Aktiengesellschaft, Filiale Luxemburg (being the legal successor of Dresdner Bank AG, Niederlassung Luxemburg) as lender (as amended and restated, the "**Murabaha Facility**").

2. As noted by Commerzbank, the Guarantee is a payment, not collection guarantee. Payment in respect of the Guarantee, however, is subject to some very important contractual limitations. For one thing, although the principal amount of the Murabaha Facility is €25 million, the amount of the Guarantee (the "**Guaranteed Amount**") may be far less. Section 3 of the Guarantee caps the Guaranteed Amount through the use of specific deductions, including the "Guarantee Reduction Amount" (as defined in and calculated by the Guarantee).

3. In addition, unlike most loan guarantees, the Guarantee is not immediately due and payable upon the default of the Borrower. The Guarantee expressly conditions

Commerzbank's ability to collect on the Guarantee on (a) Commerzbank having delivered a notice of acceleration on the Borrower, (b) fourteen days having passed since the delivery of such notice and (c) Commerzbank's having subsequently delivered a demand on Arcapita, in its capacity as guarantor. At the Petition Date, the final two of these conditions had not been satisfied and accordingly, the Guaranteed Amount was not due and payable. By operation of law, the Debtors' chapter 11 filing prohibited any attempts by Commerzbank to take further steps to collect on the Guarantee.<sup>2</sup>

### **ARGUMENT**

#### **A. COMMERZBANK'S ATTEMPTS TO CONTINUE COLLECTION EFFORTS ON THE GUARANTEE SHOULD BE PROHIBITED IN ACCORDANCE WITH SECTION 362 OF THE BANKRUPTCY CODE**

4. Section 362 of the Bankruptcy Code prohibits, among other things, any act to obtain possession or control of property of a debtor's estate and any attempt to collect a pre-petition debt. 11 U.S.C. § 362(a)(3) and (a)(6). Parties may be granted relief from the automatic stay upon a showing of cause. *See* 11 U.S.C. § 362(d)(1). A party seeking such relief, however, has the burden of demonstrating cause. *See Sonnax Indus., Inc. v. Tri Component Prods. Corp. (In re Sonnax Indus., Inc.)*, 907 F.2d 1280, 1285 (2d Cir. 1990). "If the movant fails to make an initial showing of cause . . . the court should deny relief without requiring any showing from the debtor that it is entitled to continued protection." *Id.*

5. Commerzbank has not shown that cause exists for this Court to grant it relief from the automatic stay. Courts in the Second Circuit consider twelve factors, articulated in the *Sonnax* decision, to determine whether cause exists to lift or modify the stay. None of the

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<sup>2</sup> It is currently unclear whether the relief requested would prove sufficient to crystallize Commerzbank's claim. Commerzbank admits in a footnote that "further proceedings, including commercial arbitration, may become necessary to fully crystallize Commerzbank's claim." Motion ¶ 10 n.2.

factors support a showing of cause here. In fact, Commerzbank asserts that only one *Sonnax* factor, the “impact of the stay on the parties and the balance of harms,” favors lifting the automatic stay to allow Commerzbank to issue the Demand on Arcapita. The Debtors submit even this factor militates in favor of denial of the Motion.

6. In the Motion, Commerzbank fails to identify a legitimate harm that it would suffer absent stay relief. Commerzbank’s alleged harm is that a party may assert that the Guarantee claim is invalid. Motion ¶ 17. This allegation, however, is misplaced. As described in length above, absent the Demand, Commerzbank has no right to collect on or assert a claim in respect of the Guarantee. The Guarantee creates a limited right to payment; delivery of the Demand constitutes a condition precedent to the assertion of a Guarantee claim. Being that such right has not been triggered here, no argument exists that Commerzbank’s Guarantee claims could be improperly impaired absent stay relief. Moreover, to the extent Commerzbank disagrees with this analysis and submits that the Guarantee claim is valid absent stay relief, it fails to clearly describe why the Motion is necessary at all (or what harm it actually seeks to avoid).

7. Further, Commerzbank’s depiction of Section 1 of the Guarantee understates the harm that the proposed stay relief would inflict on the estates by mischaracterizing the Demand requirement as a purely clerical act meant to “crystallize” Commerzbank’s claim. Motion ¶ 13. This description, however, directly conflicts with the terms of the Guarantee and the Demand. Sections 1 and 3 of the Guarantee (which notably was negotiated at arm’s length by sophisticated parties) establish clear restrictions to its amount and payment. By the Motion, Commerzbank seeks to continue collection efforts by satisfying certain of these restrictions.

8. The Motion is not an attempt to simply preserve Commerzbank's claim. The Demand is by definition and by its terms a demand for payment. Motion Ex. C ¶ 5. If the Demand was anything else (*i.e.* if the Demand was designed to crystalize a claim), Section 1 of the Guarantee would remain unsatisfied and the Guaranteed Amount would not be due and payable. Artful drafting of the "Claim Notice" and the Motion cannot remove or otherwise distance the Demand from its purpose. Under Section 1 of the Guarantee, Demands are required to assert a claim against Arcapita and demand recovery or collection on that claim.

9. That Commerzbank asserts that the Demand is not an attempt to collect on the Guarantee conflicts with the terms of the Claim Notice and is otherwise irrelevant. *In re Metro Square*, No. 4-88-2117, 1988 WL 86679 (Bankr. D. Minn. Aug. 10, 1988). Assertions by a claimant that its demand for payment does not constitute a collection effort should not restrict the scope of the stay. *Id.* In *Metro Square*, the claimant sought authority to deliver a notice of acceleration under an indenture because the document required delivery of such notice in order for the lender to pursue remedies against non-debtor guarantors. 1988 WL 86679 at \*2. The notice therefore was not meant to result in an immediate recovery against the Debtor. Nonetheless, the Court rejected the creditor's arguments that stay relief was warranted. Even though the indenture accelerated automatically at the bankruptcy filing, the trustee could not take overt steps to accelerate the debt. *Id.* at \*5. That the debtor was arguably not harmed by delivery of the notice, moreover, did not in and of itself justify stay relief.

10. The balance of the harms weighs against granting relief from the automatic stay. Permitting Commerzbank to continue its collection efforts and deliver the Demand would cause great harm to the Debtors and the estates. The Guaranteed Amount could be for as much as €125 million. Allowance of that claim would impair the Debtors' solvency

and dilute recoveries of other creditors. Considered from the point of view of a holder of an allowed claim, few items could prove as damaging as the allowance or establishment of a large *pari passu* (or worse yet, a senior) claim.

11. Finally, allowing Commerzbank to unilaterally curtail the Debtors' ability to object to its claim would grant Commerzbank preferential treatment, and accordingly is not a valid basis for lifting the automatic stay. *See In re Texaco, Inc.*, 73 B.R. 960, 968-69 (Bankr. S.D.N.Y. 1987) (denying request for relief from the automatic stay where the purpose of the notice was not to render the debt due and payable immediately, but instead to preserve the creditor's rights to a higher interest rate). In *Texaco*, the Court held that the issuance of notices of acceleration went beyond preserving the *status quo*, because it would have enhanced the claimant's position. *Id.* at 968 ("Nothing in the legislative history implies that the automatic stay should be invoked in a manner which would advance the interests of some *unsecured* claims over others."). Issuance of the notices was not simply a "ministerial act" meant to preserve the noteholders' rights. *Id.* at 967-968. The notice constituted a "collection effort" and therefore, a stay violation. Similarly here, Commerzbank's request to file a Demand constitutes a collection effort, and to the extent that the Motion seeks to cut off the Debtors' ability to object to Commerzbank's Guarantee claim in the future, the Motion asks for relief beyond merely preserving the *status quo*.

12. As the Court notes in *Texaco*, nothing in Section 362(a) "would prevent the movants from filing a proof of claim under 11 U.S.C. § 501 consistent with their position" regarding the underlying debt. *Id.* at 964. Likewise, in the case at bar, Commerzbank should be directed to file a proof of claim consistent with its position that it holds a claim versus Arcapita.

**B. ALTERNATIVELY, THE DEBTORS SEEK REASONABLE LIMITATIONS ON THE PROPOSED FORM OF ORDER**

13. In the alternative, if the Court concludes that relief from the automatic stay is appropriate here, the Debtors object to terms of the form of order attached as Exhibit A to the Motion (the “*Commerzbank Order*”). By the Motion, Commerzbank requests relief from the stay solely for the purpose of serving a demand on Arcapita in accordance with Section 1 of the Guarantee. The stated goal of the Motion is to permit Commerzbank to crystalize its Guarantee claim (even if the Debtors submit that any demand is by definition a collection effort notwithstanding the stated goal of Commerzbank).

14. The scope of the Commerzbank Order does not correlate to the relief requested. There are no limits on the stay relief. Moreover, the Commerzbank Order does not preserve the Debtors’ right to contest Commerzbank’s Guarantee claim on the merits during or pursuant to these chapter 11 cases. This second point is especially important given Commerzbank’s assertion that the request for stay relief implicates the validity or allowance of Commerzbank’s claim. Motion ¶¶ 9, 17.

15. As a result of the foregoing, if the relief requested herein is deemed proper by the Court, the Debtors submit that the Court should enter the proposed order attached hereto as **Exhibit A**. A marked copy of the Proposed Order which highlights all of the Debtors proposed changes to the Commerzbank Order is attached hereto as **Exhibit B**.



**CONCLUSION**

For the reasons set forth herein, the Debtors respectfully request that the Motion be denied.

Dated: New York, New York  
April 30, 2012

Respectfully submitted,

/s/ Michael A. Rosenthal

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**PROPOSED ATTORNEYS FOR THE DEBTORS  
AND DEBTORS IN POSSESSION**

**Exhibit A**  
**Proposed Form of Order**

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

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

**ORDER MODIFYING THE AUTOMATIC  
STAT TO PERMIT COMMERZBANK  
AKTIENGESELLSCHAFT TO DELIVER A CLAIM NOTICE**

Upon consideration of the motion of Commerzbank Aktiengesellschaft (“*Commerzbank*”), dated April 23, 2012 [Dkt No. 89] (the “*Motion*”), for entry of an order granting relief from the automatic stay to permit Commerzbank to deliver to Arcapita Bank B.S.C. (c) (“*Arcapita*”) a claim notice under the Guarantee<sup>1</sup>; and the Court having found that it has jurisdiction to consider the Motion pursuant to 28 U.S.C. §§ 157 and 1334; and the Court having found that jurisdiction and venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and the Court having found that (a) the relief requested in the Motion, as modified by the terms of this Order, will not interfere with these chapter 11 cases or jeopardize the interests of creditors and (b) the balance of harms weighs in favor of granting the relief requested in the Motion; and notice of the Motion and the opportunity for a hearing on the Motion was appropriate under the particular circumstances; and the Court having reviewed the Motion and having considered the statements in support of the relief requested therein at a hearing before the Court (the “*Hearing*”); and the Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the

relief granted herein; and upon all of the proceedings had before the Court; and after due deliberation, and having overruled objections, if any, and sufficient cause appearing therefore,

**IT IS HEREBY ORDERED:**

1. The Motion is GRANTED in its entirety.
2. The statutory automatic stay in these chapter 11 cases is hereby modified solely to the extent necessary to permit Commerzbank to deliver a claim notice to Arcapita (as more fully described in the Motion), in Commerzbank's discretion, with respect to the Guarantee.
3. The statutory automatic stay established by section 362 shall remain effective against any other act by Commerzbank with respect its enforcement of, recovery on, assessment on or collection on the Guarantee.
4. This Order shall not impair any right of the Debtors to contest the allowance, validity, priority or amount of any claim, including in respect of the Guarantee.
5. The modification of the stay granted by this Order shall take effect immediately upon entry of this Order and shall not be stayed by operation of Bankruptcy Rule 4001(a)(3).
6. This Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation of this Order.

Dated: New York, New York  
May \_\_, 2012

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THE HONORABLE SEAN H. LANE  
UNITED STATES BANKRUPTCY JUDGE

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<sup>1</sup> Capitalized terms used in this Order and not otherwise defined in this Order have the meanings ascribed to such terms in the Motion.

**Exhibit B**  
**Mark-Up of Proposed Form of Order**

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

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

**ORDER MODIFYING THE AUTOMATIC  
STAY TO PERMIT COMMERZBANK  
AKTIENGESELLSCHAFT TO DELIVER A CLAIM NOTICE**

Upon consideration of the motion of Commerzbank Aktiengesellschaft ("Commerzbank"), dated April 23, 2012 [Dkt No. 89] (the "Motion"), for entry of an order granting relief from the automatic stay to permit Commerzbank to deliver to Arcapita Bank B.S.C. (c) ("Arcapita") a claim notice under the Guarantee<sup>1</sup>; and the Court having found that it has jurisdiction to consider the Motion pursuant to 28 U.S.C. §§ 157 and 1334; and the Court having found that jurisdiction and venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and the Court having found that (a) the relief requested in the ~~motion~~Motion, as modified by the terms of this Order, will not interfere with these chapter 11 cases or jeopardize the interests of creditors and (b) the balance of harms weighs in favor of granting the relief requested in the Motion; and notice of the Motion and the opportunity for a hearing on the Motion was appropriate under the particular circumstances; and the Court having reviewed the Motion and having considered the statements in support of the relief requested therein at a hearing before the Court (the "Hearing"); and the Court having

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<sup>1</sup> Capitalized terms used in this Order and not otherwise defined in this Order have the meanings ascribed to such terms in the Motion.

determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before the Court; and after due deliberation, and having overruled objections, if any, and sufficient cause appearing therefore,

**IT IS HEREBY ORDERED:**

1. The Motion is GRANTED in its entirety.
2. The statutory automatic stay in these chapter 11 cases is hereby modified solely to the extent necessary to permit Commerzbank to deliver a claim notice to Arcapita (as more fully described in the Motion), in Commerzbank's discretion, with respect to the Guarantee.
3. The statutory automatic stay established by section 362 shall remain effective against any other act by Commerzbank with respect its enforcement of, recovery on, assessment on or collection on the Guarantee.
4. This Order shall not impair any right of the Debtors to contest the allowance, validity, priority or amount of any claim, including in respect of the Guarantee.
5. The modification of the stay granted by this Order shall take effect immediately upon entry of this Order and shall not be stayed by operation of Bankruptcy Rule 4001(a)(3).
- 4.6. This Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation of this Order.

Dated: New York, New York  
May \_\_, 2012

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THE HONORABLE SEAN H. LANE  
UNITED STATES BANKRUPTCY JUDGE