

Hearing Date and Time: May 7, 2012 at 11:00 a.m.

CLIFFORD CHANCE US LLP

Rick B. Antonoff (RA-4158)
31 West 52nd Street
New York, New York 10019
Telephone: (212) 878-8000
Facsimile: (212) 878-8375

Attorneys for Commerzbank Aktiengesellschaft

**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

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

Commerzbank Aktiengesellschaft ("Commerzbank") respectfully submits this Response to Debtors' Objection, filed on April 30, 2012 (the "Objection") [Dkt. No. 106], to the Motion of Commerzbank Aktiengesellschaft for Entry of an Order Granting Limited Relief from the Automatic Stay to Deliver a Claim Notice (the "Motion") [Dkt. No. 89]. In responding to the Objection, and in further support of the Motion, Commerzbank respectfully represents as follows:

Cause Exists to Modify the Stay

1. The Debtors' Objection elevates form over substance by haggling over words instead of effect. Regardless what the notice is called or what provisions are in the Guarantee, Commerzbank absolutely and unequivocally does *not* seek in the Motion to collect its claim or to

have its claim allowed. Nor does Commerzbank seek to prejudice any defense or dispute to its claim under the Guarantee, except one: That the claim is invalid because Commerzbank failed to deliver a notice, when that failure is due solely to the imposition of an automatic stay arising after the primary obligation became due but before the notice could be delivered under the terms of the Guarantee.

2. The automatic stay is not intended to deprive a creditor of its claim; it is meant only to prevent the creditor from enforcing it. The stay is not a claims resolution mechanism and Commerzbank is not attempting to use it as one. Ironically (or perhaps deliberately), it is the Debtors (and, by joinder, the Official Committee of Unsecured Creditors) that are trying to use the stay to deprive Commerzbank of its claim outside of the claims resolution process by arguing that delivery of a notice is a condition to the claim and, at the same time, that Commerzbank should not be permitted to satisfy that condition (Objection p.2) while also recognizing that Commerzbank's concern may be correct that failure to deliver a notice jeopardizes its claim (Objection p. 3). This is a textbook example of a debtor using the stay as a shield and a sword which this Court should not condone. *See In re Braniff Int'l Airlines, Inc.*, 159 B.R. 117, 125 (E.D.N.Y. 1993) ("The protections for the debtor under the Bankruptcy Code operate as a shield, not a sword.").

3. There are no *Texaco* issues here (Objection ¶11) as the notice has no effect on the amount of the claim and doesn't foreclose the Debtors from disputing the claimed amount. Indeed, *Texaco* tends to support granting the requested relief since the purpose here is to render the debt due and payable immediately, albeit not immediately collectible. *See In re Texaco*, 73 B.R. 960, 967-68 (Bankr. S.D.N.Y. 1987) ("If the Note holders only sought to preserve their right to claim the 13.25% interest rate and not be faulted for not having filed a Notice of

Acceleration, there would be no problem. . . . The debtors should not be permitted to use the automatic stay and argue that a formal Notice of Acceleration is a condition precedent to the Note holders' right to claim the higher interest rate."').¹

4. Commerzbank fully intends to file a proof of claim in due course, thereby initiating the claims resolution process with respect to the Guarantee. That is not an issue in this Motion. The only issue in this Motion is whether the balance of harms weighs in favor of permitting Commerzbank to deliver a notice. It is clear, Debtors' protestation notwithstanding, that delivery of a notice under the terms set forth in the Motion and repeated here causes no harm to the Debtors, other creditors or the estate. Again, it is not a collection effort, an allowance of a claim or a forfeiture of the Debtors' ability to dispute a claim on the merits. Indeed, Commerzbank is well aware that this Court can and will strictly proscribe any relief it grants. In contrast, and as highlighted several times in the Objection, failure to deliver a notice puts Commerzbank at risk of losing its claim (Objection pp. 2-3, ¶6). Eliminating claims is not what the automatic stay is meant to do. The Motion should therefore be granted.²

The Debtors' Alternative Form of Order is Generally Acceptable

5. In view of the limited relief sought in the Motion, Commerzbank agrees that the additional provisions to the form of Order proposed by the Debtors and attached to the Objection are generally acceptable. Commerzbank would slightly modify proposed Paragraph 4 of such

¹ The Debtors' reliance in the Objection on *Metro Square* (Objection ¶9) is misplaced as that decision rests squarely on that court's conclusion that it had the authority to enjoin collection actions against non-debtors. *In re Metro Square*, No. 4-88-2117, 1988 WL 86679 (Bankr. D. Minn. Aug. 10, 1988), at *3-5. That issue is not even remotely implicated in the Motion.

² The Debtors correctly concede that the relief requested in the Motion may not be sufficient ultimately to protect Commerzbank's claim and that further proceedings may be necessary (Objection p. 4, n.2). But in quoting from the Motion, they selectively omit Commerzbank's note that any such further proceedings would only be pursued after further relief from this Court.

Order to clarify that the Debtors' right to contest Commerzbank's claim under the Guarantee is not impaired except insofar as any challenge is based on the failure to make demand.

6. A further revised form of order is attached hereto as Exhibit A. A copy marked against the Order proposed in the Objection is attached hereto as Exhibit B.

CONCLUSION

WHEREFORE, Commerzbank respectfully requests that this Court grant its motion for relief from the automatic stay to allow it to deliver a claim notice to Arcapita under the Guarantee.

Dated: New York, New York
May 3, 2012

Respectfully submitted,

/s/ Rick B. Antonoff
Rick B. Antonoff (RA-4158)
CLIFFORD CHANCE US LLP
31 West 52nd Street
New York, NY 10019
Tel: (212) 878-8000
Fax: (212) 878-8375

Attorneys for Commerzbank Aktiengesellschaft

Exhibit A

(Revised 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)
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**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 Guarantee¹; 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

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

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 to 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, other than on the basis that Commerzbank failed to make demand under 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

THE HONORABLE SEAN H. LANE
UNITED STATES BANKRUPTCY JUDGE

Exhibit B

(Revised Form of Order - Markup)

**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)
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¹ Capitalized terms used in this Order and not otherwise defined in this Order have the meanings ascribed to such terms in the Motion.

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 to 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, other than on the basis that Commerzbank failed to make demand under 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

THE HONORABLE SEAN H. LANE
UNITED STATES BANKRUPTCY JUDGE