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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**

REPLY IN SUPPORT OF DEBTORS' MOTION AUTHORIZING REPLACEMENT POSTPETITION FINANCING

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Arcapita Bank B.S.C.(c) ("***Arcapita Bank***"), Arcapita Investment Holdings Limited ("***AIHL***"), and related Debtors (collectively, the "***Debtors***" and each, a "***Debtor***") hereby respectfully submit this Reply (the "***Reply***") to the Second Objection of Hani Alsohaibi (with related joinders, the "***Objection***") to the final approval of the *Motion for an Order . . . Authorizing the Debtors to Obtain Replacement Postpetition Financing to Repay Existing Postpetition Financing* (the "***DIP Motion***")[1] [Docket No. 1157]:

I. INTRODUCTION

Hani Alsohaibi's ("***Hani***") Objection is based on the false premise that, for this Court to approve the DIP Transaction, this Court must find that the DIP Transaction complies with the principles of Shari'ah. Based on that false premise, Hani next falsely assumes that the fatwa of Arcapita Bank's Shari'ah Board (the "***Fatwa***") concluding that the DIP Transaction *does* comply with Shari'ah is subject to review and may be vacated by this Court. From those two false predicates, Hani then argues that the principles of Shari'ah may be objectively determined, that Arcapita Bank's Shari'ah Board was "wrong," and that, based on unsupported arguments well outside the bounds of Bankruptcy Rule 9011, the DIP Transaction does not conform to the principles of Shari'ah. However, the DIP Motion does not ask this Court to make any finding that the DIP Transaction complies with Shari'ah, and no such finding is required under bankruptcy law or as a condition precedent to the DIP Transaction. The principal Dip Transaction Documents are governed by English Law, and compliance with the moral and religious principles of Shari'ah, on which there is no universal view (at least on earth), is not pertinent to the Court's final ruling on the DIP Motion.

[1] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the DIP Motion.

Hani is also asking this Court to do what cannot be done in Bahrain or by any other tribunal in the world. Hani is asking this Court to somehow vacate the Fatwa of the Arcapita Bank Shari'ah Board and to substitute Hani's differing view as to the proper application of the principles of Shari'ah with respect to Islamic finance. Hani has not cited any authority that would allow this Court, or any court or organization anywhere in the world, to vacate or even question the Fatwa. Shari'ah compliance for Arcapita Bank is satisfied by employing a Shari'ah Supervisory Board as prescribed by regulations promulgated by the Central Bank of Bahrain (the "***CBB***," and such regulations, the "***CBB Regulations***") and the conclusions arrived at under the authority of that board are then final and absolute.

Hani never addresses why the DIP Transaction should not be approved when the Official Committee of Unsecured Creditors (the "***Committee***"), of which the CBB is a member, supports the DIP Transaction and the CBB itself—on whose regulations Hani heavily relies—has not objected. Hani also never addresses the devastating impact the ruling he seeks would have, not only on the Debtors' estates and the recovery of creditors in these chapter 11 cases, but also on the entire Islamic banking community.

II. RELEVANT BACKGROUND

The replacement DIP Transaction here, needed to repay and prevent a default under the existing Fortress Facility, is the product of an extensive and successful auction process involving multiple bidders, much of which was carried out in open Court. All interested parties have been well aware of the need for the DIP Transaction and its essential terms for some time. Indeed, on May 17, 2013, the Court entered an order approving the Debtors' entry into the Commitment Documents [Docket No. 1113]. Although structured in a similar fashion to the Fortress Facility, the replacement DIP Transaction offers significantly better pricing than the Fortress Facility, as

well as a longer duration and greater flexibility. Transcript of Hearing, *In re Arcapita Bank B.S.C.(c)* ("***June 10 Transcript***"), Case No. 12-11076 (Bankr. S.D.N.Y. June 10, 2013) at 33. It also facilitates the Debtors' exit from chapter 11.

All estate fiduciaries supported the Court's entry of an order approving the DIP Motion. The Committee, whose members include the CBB and on whose regulation Hani relies, authorized the Debtors to represent to the Court that the Committee supported the relief requested and the Debtors' entry into the DIP Transaction Documents. At the Interim Hearing, the Committee reiterated its firm support for the DIP Motion and the Debtors' entry into the DIP Transaction Documents in the form presented to the Court.

At the Interim Hearing, the Debtors provided evidence of their need for additional financing, as well as the immediate and irreparable harm that would be suffered by the estates if the Court did not grant the relief requested. *See* Makuch Declaration ¶ 8 (attached to the DIP Motion). No party, including Hani, argued that the Debtors did not require the DIP Transaction, that failure to approve the requested interim financing would not cause irreparable and immediate harm to the Debtors' estate, or that entry into the DIP Transaction is not a sound exercise of the Debtors' business judgment. No party, including Hani, argued that prejudice would be suffered by anyone if the DIP Transaction were approved.

The Court overruled Hani's objection to the DIP Motion being granted on an interim basis, noting that "***Captain Hani Alsohaibi failed to timely object to the Motion, notwithstanding that he previously has filed pleadings in this case and notwithstanding that the Debtors' request for replacement financing has been a subject of numerous prior pleadings and hearings that are reflected on the docket, thus giving more than adequate notice to Captain Hani Alsohaibi***." *Interim Order . . . (I) Authorizing Debtors (A) to Enter into and Perform under Murabaha Agreement, and (B) to Obtain Credit on a Secured Superpriority Basis,*

(II) Scheduling Final Hearing . . . and (III) Granting Related Relief [Docket No. 1245] (the "***Interim Order***") ¶ 1 (emphasis in original). The proposed financing at issue "has been on notice very publicly through [the] docket as well as court proceedings to all interested parties." June 10 Transcript at 33-34 (a copy of which is attached hereto as ***Exhibit A***).

The Court, in approving the interim relief requested by the Debtors, found that the Debtors' entry into the DIP Transaction on an interim basis and initial draw of the full $175 million of the DIP Transaction was necessary to avoid immediate and irreparable harm to the Debtors pending a final hearing, and constituted a sound exercise of the Debtors' business judgment. At the request of the Debtors, the Court scheduled the final hearing on the DIP Transaction for June 24, 2013, which is 18 days after the June 6, 2013 filing of the near final DIP Agreement attached to the second supplement to the DIP Motion and set June 17, 2013, as the objection deadline.

No stay of the Interim Order was sought or obtained by Hani or any other party. After all conditions precedent were met, on June 13, 2013, the Debtors, pursuant to the authority granted in the Interim Order, held a closing with respect to the $175 million in interim financing under the DIP Transaction authorized by the Interim Order. In excess of $105 million of that $175 million was immediately used to repay the Fortress Facility.

On June 17, 2012, Hani filed his Objection. On the same date, four other individuals, also represented by Hani's counsel, filed a joinder to that pleading [Docket No. 1263].[2] (The Debtors' reference to Hani also includes the four parties joining in Hani's Objection.)

[2] Hani's counsel has failed to file a disclosure as required by Bankruptcy Rule 2019, which makes it impossible to determine counsel's connections or arrangements with her alleged clients, the circumstances under which those clients came to be jointly represented, or the nature of their economic interests in the Debtors or with respect to each other.

III. HANI NEVER ADDRESSES THE CONSEQUENCES OF THE APPROVAL OR THE DISAPPROVAL OF THE DIP TRANSACTION AND THE IMPACT ON THE ESTATE

Although Hani is quick to assert technical objections to the replacement DIP Transaction, Hani never addresses his purpose in objecting and never mentions the consequences of either (i) the Court's approval of a replacement DIP Transaction that he contends does not conform to Shari'ah or (ii) the Court's disapproval of the replacement DIP Transaction. The Debtors can only assume that Hani would have preferred for the Debtors to have defaulted on the Fortress Facility, which would have caused Fortress to pursue its collateral and would also doom the Effective Date of the Debtors' now confirmed Plan. Hani appears to contend the Court should allow the same result as to the interim funding now provided by Goldman, the majority of which was used to repay the Fortress Facility. Hani never addresses why this is the better course or how it will maximize the value of the Debtors' estate for the benefit of *all* creditors, or even why this is in Hani's best interests.

Conversely, Hani never addresses how *he* will be harmed if the DIP Transaction is approved on a final basis. Hani has no standing to be a champion defending the alleged rights of all creditors; on the other hand, the Committee (of which the CBB is a member) does have a fiduciary duty to all creditors and has fulfilled that duty with strong support for the DIP Transaction. However, even if Hani could speak for all creditors, he never explains the negative consequences or other harm to the estate generally that would result from the Court were to give final approval to the DIP Transaction, assuming it does not conform to Shari'ah. As discussed below, even if Shari'ah compliance were an issue, compliance with Shari'ah has no effect on enforceability of the DIP Transaction Documents, and the party most impacted by this possible issue, the Investment Agent for the DIP Transaction, has already unequivocally demonstrated its position by advancing the interim financing authorized by the Interim Order.

Under the maxim that "the squeaky wheel gets the grease," Hani seems intent on complaining simply for the sake of doing so and hopes that someone will provide the grease to make the noise go away.

IV. THE PRINCIPAL REPLACEMENT DIP TRANSACTION DOCUMENTS ARE GOVERNED EXCLUSIVELY BY ENGLISH LAW AND NOT THE PRINCIPLES OF SHARI'AH

Parties to an agreement are free to agree on the body of law that will govern their agreement. Here, the principal replacement DIP Transaction Documents are all governed exclusively by English law and are enforceable under English law. Clause 23.1 of the DIP Agreement provides:

> 23.1 **Governing Law**
>
> > This Agreement and any non-contractual obligations arising out of or in connection with it are governed by English law.

DIP Agreement at clause 23.1.

Clause 30 of the Investment Agency Agreement provides:

> 30. **Governing Law**
>
> > This Agreement and any non-contractual obligations arising out of or in connection with it are governed by English law.

Investment Agency Agreement dated June 13, 2013 between Goldman Sachs International, as Investment, Arcapita Investment Holdings Limited, as the DIP Purchaser, Goldman Sachs International, as Arranger, and the Participants (the "***Investment Agency Agreement***"), attached hereto as ***Exhibit B***, at Clause 30.

Because the relevant DIP Transaction Documents are governed by English law, English law also controls the analysis of the role of Shari'ah. Fortuitously, as discussed in more detail below, the English Court of Appeal (the "***English Court***"), reviewing a case essentially on all fours with the Debtors' cases, has provided an extensive analysis as to the proper application of

Shari'ah in financing documents. *See Shamil Bank of Bahrain EC v. Beximco Pharmaceuticals Ltd*., 2004 1 W.L.R. 1784, 1795-96 (Ct. App.) (a copy of which is attached as ***Exhibit C*** for the convenience of the Court).

Although Hani argues that, to be approved, the DIP Transaction must comply with the principles of Shari'ah, there is no support for this argument either in the DIP Transaction Documents or in applicable law. As the English Court in *Shamil Bank* concluded, an agreement may only be controlled by one set of laws. *Id.* at 1795-96. In the case of the DIP Transaction Documents, that law is English law. The few references to Shari'ah in the DIP Transaction Documents do not contradict the clear expression of the parties in the DIP Transaction Documents that English law governs, and in any event the references to Shari'ah do not provide that Shari'ah governs the enforceability of the DIP Transaction Documents.

Even if the references to Shari'ah did purport to suggest that "Shari'ah law" governed the DIP Transaction Documents, Shari'ah may not be applied in determining the applicable law in a conflict of laws analysis. *Id.* at 1798 (Shari'ah "is not on the face of it applicable to a choice between the law of a country and a *non*-national system of law, such as the lex mercatoria, or 'general principles of law,' or as in this case, the law of Shari'ah."). Shari'ah, which is subject to differing interpretations, evidences religious and moral precepts that some followers of Islam use to guide their actions and behavior. It does not purport to be the applicable law of Bahrain, the country in which Arcapita Bank is incorporated; to the contrary, Bahrain is a civil law jurisdiction. Bahrain is a civil law jurisdiction whose civil code was based on the Egyptian civil code which itself was based on the French civil code.

Moreover, Hani acknowledges that AIHL—not Arcapita Bank—is the DIP Purchaser under the DIP Agreement. *See* Objection ¶ 40. As the Court is aware, AIHL is a Cayman entity,

and to the extent the laws of a Debtor's national origin could be held to override the express choice of law provisions in the DIP Transaction Documents and govern the DIP Transaction, it would be the laws of the Cayman Islands and not Bahrain. Hani has not and cannot argue that Shari'ah would have any bearing on enforceability under Cayman Islands law, which is based heavily upon English law.

V. NOTHING IN THE MOTION REQUIRES THIS COURT TO MAKE ANY FINDING AS TO SHARI'AH TO APPROVE THE DIP TRANSACTION

Hani appears to merely assume the premise that a finding by this Court as to Shari'ah compliance is a prerequisite to the approval of the DIP Transaction. Hani therefore assumes that, if he can convince this Court that the DIP Transaction fails to conform to principles of Shari'ah, this Court will then refuse to approve the DIP Transaction on a final basis. However, Hani's initial premise is flawed because nothing in the DIP Transaction Documents or in the Motion requires any finding by this Court that the DIP Transaction complies with Shari'ah.

There is no condition precedent that the DIP Transaction somehow objectively conform to Shari'ah, nor any requirement that the conclusion reached by the Arcapita Bank Sharia Board in the Fatwa be "correct" as measured against some objective standard for Shari'ah compliant agreements. In fact, this could never be the case because there is no "objective" unified notion of compliance with Shari'ah with respect to financial instruments.[3]

As to Shari'ah, the only condition precedent in the DIP Transaction Documents is that the Obligors themselves independently and unilaterally conclude that the Agreements comply with Shari'ah as evidenced by "[a] fatwa from Arcapita Bank's Sharia'a Board approving the Finance Documents and the transactions contemplated thereby." *See* DIP Agreement, Annex I, Schedule

[3] As discussed further below, Islamic clerics and scholars often disagree on the applicable Shari'ah principles, and compliance or non-compliance with any particular principle.

1 ¶ 8.1. This condition precedent has been satisfied.[4] Moreover, this condition precedent is consistent with the manner that Arcapita Bank, throughout its existence, has approached Shari'ah compliance. The DIP Transaction Documents do not attach a "form of fatwa" that must be used. Similarly, the DIP Transaction Documents do not provide that Arcapita must follow any particular procedure or analysis to obtain it. The mere issuance of the Fatwa conclusively establishes that, at least for purposes of satisfaction of the conditions precedent to the DIP Transaction, Arcapita Bank has complied with Shari'ah.

Indeed, the DIP Transaction Documents expressly negate any ability of the Obligors to argue that the DIP Transaction is not in compliance with the principles of Shari'ah and, therefore, unenforceable. The DIP Transaction Documents provide that the Obligors shall make their own determination as to compliance with Shari'ah and that

> No Obligor has relied on any representation by or any written declaration, Fatwa, opinion or other documents prepared by, on behalf of, or at the request of, the Investment Agent or any other Finance Party as to the Shari'ah compliance of the transactions contemplated by this Agreement or any other Finance Document and the Obligors have independently made their own assessment as to whether such transactions are compliant with the Shari'ah and ***no Obligor will claim any dispute on the grounds of Shari'ah compliance of the Finance Documents***.

DIP Agreement at Clause 12.28 (emphasis added).

Similarly, the Investment Agency Agreement provides as follows:

> 16.4 (a) Unless expressly agreed to the contrary, an Existing Participant makes no representation or warranty and assumes no responsibility to a New Participant for….(iv) the Shari'ah compliance of the Finance Documents and the transactions contemplated thereby.
>
> ***
>
> 17.16 **Shari'ah compliance**

[4] The DIP Agreement also includes as a Conditions Precedent to Exit Conversion Date: "A fatwa from the Exit Purchaser's Sharia'a Board approving the Finance Documents and the transactions contemplated thereby and a pronouncement by a Sharia'a Advisor to the Investment Agent approving the Finance Documents and the transactions contemplated thereby." DIP Agreement, Annex 1, Schedule 1 ¶ 8.2.

> (a) Each Participant and the Purchaser confirms that it has not relied upon any representation made by the Investment Agent as to the Shari'ah compliance of the transactions contemplated by this Agreement and the other Finance Documents.
>
> ***
>
> (b) Each Participant and the Purchaser acknowledge that the Finance Documents and the transactions contemplated by them have been pronounced compliant with the principles of Shari'ah by a Shari'ah adviser approved by the Purchaser and it has not and will not dispute or contest such pronouncement or seek to otherwise challenge the validity or enforceability of any Finance Document on the basis of non-compliance with the principles of Shari'ah.

Investment Agency Agreement at Clause 16.4, 17.16.[5]

If, as here, the parties to a financing agreement agree that it shall be governed by the laws of a particular country, here the laws of England, then whether the agreement complies with the principles of Shari'ah is not relevant to the enforceability of the agreement or the approval of the agreement under the Bankruptcy Code. *See Shamil Bank*, 1 W.L.R. 1784**.**

VI. THE RULING OF THE ENGLISH COURT IN *SHAMIL BANK* CONCLUSIVELY DEMONSTRATES THAT HANI'S OBJECTION SHOULD BE OVERRULED

In *Shamil Bank*, Murabaha financing agreements entered into by a Bahraini bank provided that "[s]ubject to the principles of the Glorious Sharia'a, this agreement shall be governed by and construed in accordance with the laws of England." *Id.* at 1787. The defendant

[5] The reference to Shari'ah in the definition of Commodities provides as follows:

> "**Commodities**" means, in relation to a Purchase Contract, the commodities specified in a Transaction Request, which may comprise Shari'ah compliant London Metal Exchange metals, platinum group metals or such other Shari'ah compliant commodities as may be agreed from time to time by the Purchaser and the Investment Agent and, in any event, will only include allocated commodities physically located outside of the United Kingdom and the United States of America.

DIP Agreement at Clause 1.1.

The Investment Agency Agreement also provides that the Security Agent/Investment Agent shall use reasonable efforts to invest cash in Shari'ah compliant profit bearing accounts and the parties waive any rights to receive "interest." Investment Agency Agreement at Clause 19.27(b).

Neither of these references provide that the DIP Transaction Documents shall be governed by Shari'ah or require any finding by the Court that the DIP Transaction Documents comply with Shari'ah.

borrowers and guarantors argued that, as structured, the financing agreements were disguised loans that improperly charged interest or "riba" in violation of Shari'ah and, therefore, they were not enforceable. The lower court and English Court in *Shamil Bank* addressed whether the financing agreements were only enforceable to the extent they complied with both English law and Shari'ah. *Id.* at 1793. The English Court found that the financing agreements were controlled exclusively by English law and, therefore, Shari'ah was not relevant and, even if they did not comply with Shari'ah, the financing agreements were fully enforceable. *Id.* at 1800-01.

In its analysis, the English Court found that the principles of Shari'ah are far from settled and are the subject of considerable disagreement among clerics and scholars. Unlike Hani, the parties in *Shamil Bank* each presented expert testimony as to the requirements of Shari'ah. Shamil Bank's expert, Dr. Lau, the former director of the Centre of Islamic and Middle Eastern Law testified that "the precise scope and content of Islamic law in general, and Islamic banking in particular, are marked by a degree of controversy within the Islamic world, best exemplified by the fact that the actual practice of Islamic banking differs widely within the Islamic world." *Id.* at 1793-94. "[T]the Glorious Sharia'a refers to the divine law as contained in the Qur'an and Sunnah. However, most of the classical Islamic law on financial transactions is not contained as 'rules' or 'law' in the Qur'an and Sunnah but is based on the often divergent views held by established schools of law formed in a period roughly between 700 and 850 CE." *Id.* The English Court summarized the testimony of Dr. Lau as follows:

> In the absence of any agreement on the boundaries of "Islamic banking" or, indeed, on ***what ought to be the precise ingredients of a Morabaha agreement***, it is in practice ***up to individual banks to determine the issue***. In the absence of any legal prescription as to what does and what does not constitute Islamic banking or finance, most Islamic banks, ***including those in Bahrain,*** seek the advice of Islamic scholars who examine and approve particular agreements and forms of agreement, the role of the [Bank's Shari'ah Committee] being to formulate the bank's interpretation of the Sharia'a.

***

> The particular form and content of Morabaha agreements varies. If a bank's religious supervisory board is satisfied that the bank's activities are in accordance with Sharia law, ***that concludes the matter, there being no provision in Bahrain law, or Islamic law generally, for an appeal by a customer of the bank against the board's rulings and certifications***.

Id. at 1794 (emphasis added).

Dr. Lau concluded, "[i]n my opinion for the Morabaha agreements to be in accordance with Islamic law all that is required is that they are certified as such by Shamil Bank's Religious Supervisory Board and the principal amounts are disbursed in accordance with the terms of the 1995 and 1996 Morabaha agreements." *Id.; see also* LMA Users Guide to Islamic Financing Documents ¶ 2.4 (September 2007 ed.) ("***LMA Guide***") (a copy of the LMA Guide is attached as ***Exhibit D*** for the Court's convenience) ("The relevant *Shari'a* board will issue its "fatwa" (religious order) as a condition to the transaction proceeding. Following this initial approval, there is usually no need for any subsequent review as to whether a particular financing remains *Shari'a* compliant in the opinion of the relevant *Shari'a* board.").

In comparing the testimony of the defendants' opposing expert, the lower court in *Shamil Bank* observed:

> The position of the defendant's expert, Mr Khan, formerly Khan J, chairman of the Sharia Appellate Bench of the Supreme Court of Pakistan . . .acknowledged that "wherever a question of interpretation of the principles contained in the Qur'an and Sunnah is involved, the application of the rules of Sharia'a has and will continue to give rise to disputes between different jurists." He also did not contradict the assertion of Dr. Lau that most of the classical Islamic law on financial transactions was not to be found in the Qur'an and Sunnah.

Shamil Bank at 1794.

The lower court also reasoned that "it is improbable, in the extreme, that the parties were truly asking this court to get into matters of Islamic religion and orthodoxy. This is especially so when the bank has its own religious board to monitor the compliance of the bank with the

board's own perception of Islamic principles of law in an international banking context." *Id*. at 1796.

Just as in *Shamil Bank*, no one in the Debtors' chapter 11 cases, except Hani, is asking this Court to make pronouncements of Shari'ah compliance based on Islamic religion and orthodoxy. And unlike *Shamil Bank*, the DIP Transaction Documents ***do not*** state that they are subject to "the principles of the Glorious Shari'ah." Therefore, it is even clearer in this case that the relevant DIP Transaction Documents are subject only to English Law.

The lower court in *Shamil Bank* held that, like the parties to the DIP Transaction Documents in the Debtors' chapter 11 cases, the parties in *Shamil Bank* agreed that English law governed their agreements and, therefore, no matter what moral code Shamil Bank and the defendants elected to follow in their business practices, the court need not decide compliance with the disputed and uncertain principles of Shari'ah. In upholding the ruling of the lower court, the English Court concluded that a disagreement between the parties as to the tenets of Shari'ah is not surprising and does not give rise to a proper issue of law for the courts to resolve.

> [S]o far as the "principles of . . . Sharia" are concerned, it was the evidence of both experts that there are indeed areas of considerable controversy and difficulty arising not only from the need to translate into propositions of modern law texts which centuries ago were set out as religious and moral codes, but because of the existence of a variety of schools of thought with which the court may have to concern itself in any given case before reaching a conclusion upon the principle or rule in dispute.

Shamil Bank at 1801.

Just as in *Shamil Bank*, no one in the Debtors' chapter 11 cases, except Hani, is asking this Court to make pronouncements of Shari'ah compliance based on Islamic religion and orthodoxy. And unlike *Shamil Bank*, the DIP Transaction Documents ***do not*** state that they are subject to "the principles of the Glorious Shari'ah." Therefore, it is even clearer in this case that the relevant DIP Transaction Documents are subject only to English Law.

VII. HANI ASKS THIS COURT TO INVALIDATE WIDESPREAD PRACTICES GENERALLY FOLLOWED IN ISLAMIC BANKING

Hani never objected to the original Fortress Facility, which has now matured and been paid. Without regard to the consequences to the Debtors' creditors or Islamic banking generally, Hani is now asking this Court to refuse to approve the DIP Transaction which is structured in a similar fashion to the Fortress Facility. Both facilities use a finance structure widely accepted throughout the Islamic banking world. Indeed, the finance structure that Hani alleges does not comply with Shari'ah and the regulations of the CBB is the very same structure by which the CBB itself, in March of 2009, invested $250 million pursuant to a Murabaha facility, and thereby became one of the largest creditors of Arcapita Bank. *See* First Amended Disclosure Statement, p. 48-49, for a description of the CBB Facility. The effect of sustaining Hani's Objection based on Hani's view of Shari'ah would mean that Murabaha-based claims against Arcapita Bank, including the claim of the CBB, are not enforceable and should be disallowed.

Hani's argument simply ignores commercial reality, the best interests of the Debtors' estates and, in fact, any objective measure of Hani's own best interests. Absent the DIP Facility, the Debtors would have insufficient funds to continue to operate and the possibility of a chapter 7 liquidation of the Debtors would be heightened. As the Court found in confirming the Debtors' chapter 11 plan, a chapter 7 liquidation would result in less value for creditors of the Debtors, including Hani. Moreover, this Court's ruling accepting Hani's argument would necessarily mean that the CBB itself violated Shari'ah in investing in Arcapita, undermine Bahraini banking law and, more generally, create havoc in world-wide Islamic banking, a substantial part of which is based on the fundamental form of financial transaction evidenced by the DIP Transaction Documents.

A. General Bahraini Banking Law Condones Practices Necessary to Meet Commercial Reality

The organization and operation of Shamil Bank is very similar to Arcapita Bank, and the reasoning in *Shamil Bank* could just as easily have applied to Arcapita Bank.

> [Shamil] bank is incorporated under the laws of Bahrain and licensed to act as a bank by the Ministry of Commerce and Bahrain Monetary Agency. The Kingdom of Bahrain is a constitutional monarchy and 95% of its population are muslims. None the less, while embracing and encouraging Islamic banking practice as a national policy, the principles of Islamic law, in particular the prohibition of Riba, have not been incorporated into the commercial law of Bahrain and there is an absence of any legal prescription as to what does and does not constitute "Islamic" banking or finance. In his survey of the commercial laws of the Arab Middle East, Professor Ballantyne (*Commercial Law in the Arab Middle East: The Gulf States* (1986), p 133) states that:
>
> "In our other jurisdictions, banking interest is, in practice, tolerated (Saudi Arabia) and even sanctioned by banking laws (Bahrain, Qatar and Oman), while any theoretical or hypothetical conflicts have been largely ignored."

Shamil Bank at 1788. Just as in *Shamil Bank*, Sharia'ah has no relevance to the enforceability of the DIP Transaction or its final approval by this Court.

B. LMA Users Guide to Islamic Financing Documents Contradicts Hani's Arguments

To promote compliance with Shari'ah while at the same time adhering to English law, the Loan Market Association ("***LMA***"), the leading organization that deals with primary and secondary syndicated loan transactions in Europe, the Middle East and Africa, has established guidelines and forms that are widely followed in structuring financing agreements in the Islamic world to be syndicated in the UK market. *See generally* LMA Guide. The form and structure of the documents comprising the DIP Transaction Documents here, and the intermediate transactional steps they contemplate, conform to the guidelines in the LMA Guide. In fact, the form of the Murabaha documentation comprising the DIP Transaction Documents was based on the LMA Guide form of loan agreement as adapted for Shari'ah transactions.

As a preface to discussing methods of compliance, the LMA's overview of Islamic banking again confirms the lack of a universal view as to Shari'ah:

> Islamic banking transactions are based on Islamic principles and jurisprudence (*Shari'a*) which are derived from a number of sources, including, primarily, the Qu'ran. These principles must be kept in mind when trying to determine the Islamic acceptability of proposed financing techniques. *Shari'a* is not a codified system of law and interpretations of the key principles can vary, particularly between the different "schools of thought". The four main schools are Shafi (followed predominantly in the Far East e.g. Malaysia), Hanbali (followed predominantly in the Middle East e.g. Saudi Arabia), Hanafi (followed predominantly in South East Asia e.g. Pakistan) and Maliki (followed predominantly in Africa).

LMA § 2.3 at p. 2-3.

For many years, Islamic banks have dealt with avoiding "riba" and have adopted processes including the use of internal Shari'ah boards to comply with Shari'ah. *See* LMA Guide § 2.4 at p. 4. Similar to Shamil Bank, Arcapita Bank complied with Shari'ah through the use of a Shari'ah supervisory board.

> In the absence of legal prescription as to what does and what does not constitute "Islamic" banking or finance, most Islamic banks create religious or Sharia supervisory boards which review annually the operations of the bank and determine whether or not these have been carried out in accordance with Islamic law. They examine on a test basis each type of transaction entered into by the bank and evidence to show that the transaction and dealings entered into by the bank are in compliance with Sharia rules and principles, submitting an annual report to the shareholders in that respect.

Shamil Bank at 1789.

In the case of Arcapita Bank, adherence to the principles of Shari'ah is satisfied by the institution and application of procedures through the Shari'ah Board. Under the Articles of Arcapita Bank, the conclusions reached by the Shari'ah Board as to a particular transaction are dispositive when determining Shari'ah compliance. *See* Article 43 of the Articles of Association of Arcapita Bank B.S.C.(c) (a copy of the relevant portion is attached hereto as ***Exhibit E***).

C. This Court Need Not Determine Whether the DIP Agreement Creates a Murabaha Or Tawarrug Transaction.

Common financing mechanisms used in Shari'ah compliant Islamic banking include:

- Murabaha (cost plus financing)
- Tawarruq/Reverse Murabaha
- Ijara (lease)
- Musharaka (equity financing)
- Mudaraba (participation financing)
- Istana'a (construction financing)
- Sukuk (Islamic bond)
- Bai salam (Forward financing)

LMA Guide § 2.5 at p. 4-10.

Without conceding whether the DIP Transaction Documents create a Murabaha or Tawarruq financing transaction, the LMA Guide expressly recognizes *both* as acceptable Shari'ah complaint financing structures. The Arcapita Bank Shari'ah Board has found the DIP Transaction to be Shari'ah compliant. That conclusion is final.

VIII. BY TAKING THE REQUIRED ACTIONS, ARCAPITA BANK HAS FULLY COMPLIED WITH THE PRINCIPLES OF SHARI'AH

Shari'ah is satisfied by employing a Shari'ah Supervisory Board as prescribed by CBB Regulations and the conclusions reached by that board are then final and absolute.

A. Hani Admits that Arcapita Bank Has Fully Complied With CBB Regulations

Hani admits that, to comply with CBB Regulations and Sharia'h, Arcapita Bank must:

1. "establish an independent Shari'a Supervisory Board consisting of at least three Shari'a scholars complying with AAOIFI's Governance Standards for Islamic Financial Institutions No.1 and No. 2" Objection ¶ 25; citing to CBB Rule HC-9.1.2

2. "receive their Sharia'a Supervisory Board Fatwa on all new financing proposals that have not been proposed before or amendments to existing contracts Objection ¶ 26; citing CBB Rule RM 2.2.14

3. "comply with all [AAOIFI] issued accounting standards as well as Sharia'a pronouncement issued by the Sharia'a board of the AAOFI." Objection ¶ 26 citing to CBB Rule 1.3.15.

Hani admits that Arcapita Bank did indeed have a properly formed Shari'ah Board consisting of four eminent Shari'ah scholars as provided by CBB rule HC-9.2.1. Hani also admits that the Arcapita Bank Shari'ah Board issued the Fatwa approving the DIP Transaction, as it had the Fortress Facility and many other financing transactions. Objection ¶ 41. Although mentioning the AAOFI standards, Hani never explains what they are and never even alleges that Arcapita Bank did not fully comply with AAOFI standards. Therefore, under the CBB Regulations cited by Hani, Arcapita Bank has fully complied with CBB Regulations and its pronouncements as to Shari'ah. Indeed, the CBB has never and *does not now* question Arcapita Bank's compliance with the CBB's regulations as to Shari'ah or the efficacy of the Fatwa issued by the Arcapita Bank Shari'ah Board.

Based on a misreading of a CBB Regulation, Hani's only argument is that the Fatwa issued by the Arcapita Bank Shari'ah Board is flawed, because it is signed by only one member of the Shari'ah Board. Hani then misstates the CBB Regulation and contends that "the signature by only one of the Sharia'ah board members fails to comply with the CBB rule that requires Shari'ah approval from at least three Shari'ah scholars." Objection ¶ 43. However, there is no such rule. As cited by Hani several times in the Objection, including in paragraph 42, CBB rule HC-9.2.1 requires that a Shari'ah board have at least three members; Arcapita Bank's Shari'ah Board has four. CBB Rule HC-9.2.1 does not say that a Fatwa issued by a Shari'ah Board must be signed by all board members.

As discussed above, a Shari'ah Board acts as a general supervisor of the policies of the bank; it does not address every transaction in which the Bank engages and a Fatwa does not need to be signed by all board members to represent the actions or approval of the Shari'ah Board. In the ordinary course of the business of Arcapita Bank both pre and post-petition, a Fatwa issued by the Arcapita Bank Shari'ah Board (including the Fatwa approving the Fortress Facility) has rarely been signed by all members of the Shari'ah Board.[6]

B. The Conclusion of the Shari'ah Board, Whatever it is, May Not be Disputed

Simply because he disagrees with its conclusion, Hani dismisses the Fatwa of the Arcapita Bank Shari'ah board, despite the fact that he admits that its members are all preeminent Shari'ah scholars. Objection ¶ 34. Hani asks this Court to accept Hani's view of Shari'ah in place of the pronouncements of the scholars on the Arcapita Bank Shari'ah Board who issued the Fatwa.

As demonstrated above, opinions as to Shari'ah are subject to considerable disagreements and even well founded or reasoned disagreement does not negate the opinion of a Shari'ah Board. The conclusions and oversight of a properly constituted Shari'ah Board are not subject to dispute or appeal and their conclusions are neither "right or wrong," they are simply final. Similar to the United States Supreme Court, a Shari'ah Board's conclusion is "right" simply because the Board is the last resort—there is nowhere else to go.

The fatal flaw in the logic in Hani's Objection is that, even if his view of Shari'ah were well founded, there is no mechanism or procedure in Bahrain to overturn or reject the opinion of the Arcapita Bank Shari'ah Board, and Hani has not provided any authority that would allow *any* tribunal *anywhere* to reject the Fatwa of a Shari'ah Board. But Hani asks this Court to do what

[6] Although not necessary, the Debtors have attached hereto as ***Exhibit F*** the additional signature of Dr. Abdul Sattar A.K. Abu Ghuddah, another member of the Arcapita Bank Executive Committee and a member of the Islamic Fiqh Academy, evidencing further approval of the DIP Transaction as complying with Shari'ah.

cannot be done in Bahrain or under Shari'ah—Hani asks this court to somehow vacate the Fatwa of the Arcapita Bank Shari'ah Board, to itself adjudicate the moral and religious issues underlying conclusions under Shari'ah, and to substitute Hani's judgment as to the proper application of the principles of Shari'ah to the DIP Transaction in place of the scholars on the Arcapita Bank's Shari'ah Board. It is difficult to even conceive the staggering, extensive and far reaching impact on the Islamic financing markets of the action Hani urges this Court to take.

IX. EVEN IF THIS COURT (OR ANY TRIBUNAL) COULD REVISIT THE SHARI'AH BOARD'S FATWA, HANI HAS CITED NO ADMISSIBLE EVIDENCE OR AUTHORITY TO SHOW THE SHARI'AH BOARD WAS "WRONG"

Hani's Objection is devoid of any evidence supporting his several factual assertions and his very limited citation to legal authority, such as the *Enron* case, is not authority at all. Hani bears the burden of establishing the basis of his objection, and he could have provided evidence of foreign law in compliance with Rule 44.1 of the Federal Rules of Civil Procedure or even provided copies of the obscure material he cites as "authority." Instead, Hani relies on flawed and incomplete citations and on references to edicts by the Organization of Islamic Cooperation and opinionated articles regarding the acceptable structure of transactions under Shari'ah. From this alone, Hani argues that the DIP Transaction does not comply with Shari'ah. Hani has not cited one authority of any kind where a fatwa, once issued, has been overturned, vacated, rejected or even questioned by any tribunal of any kind.

A. Hani's Citation to Allegations in a Complaint Filed in an Avoidance Action in *Enron* Exposes the Fundamental Weaknesses of His Entire Argument

At paragraphs 27 and 28 of his Objection, Hani argues that the structure of the DIP Transaction creates a Tawarruq rather than a Murabaha transaction. In paragraph 29, Hani argues that, in In re *Enron Corp.*, "a similar transaction was objected to in the Reorganized Debtors Fourth Amended Complaint for the Avoidance and Return of Preferential Payments and

Fraudulent Transfers . . . ." Hani then cites the allegations of this unspecified Enron complaint as if they were law or other conclusive findings that are somehow binding on this Court. In a complete *non sequitor*, Hani argues that these unsubstantiated allegations, made in the context of a complaint which had nothing whatsoever to do with Shari'ah or a Shari'ah-compliant transaction, prove that the Murabaha transaction intended here is actually a Tawarruq and that, contrary to common Islamic finance practice and the position of the LMA (which Hani conveniently ignores), a Tawarruq is not Shari'ah compliant.

Hani's arguments are not remotely on point and demonstrate that Hani misunderstands both the nature of a mere allegation in a complaint and the requirements of Bankruptcy Rule 9011.

Because Captain Hani failed to provide a citation to the specific adversary proceeding or docket number, the Debtors can only assume he was referring to the complaint filed in *Enron Corp. v. Citigroup Inc., et al. (In re Enron Corp.)*, Case No. 01-16034 (AJG), Adv. Pro. No. 03-09266 (AJG) (Bankr. S.D.N.Y. Jan. 10, 2005) [Docket No. 257] (the "***Enron Complaint***"). According to the Enron Complaint, certain defendants had participated in and/or assisted the debtors in furtherance of a prepetition scheme wherein the debtors, among other things, wrongfully recorded cash flows from debt obligations as income from business operations in order to manipulate their financial statements and deceive investors. Enron Compl. ¶ 2. Accordingly, the plaintiffs sought to avoid and recover payments made to the defendants as fraudulent transfers and preferential payments. Enron Compl. ¶¶ 743-855.

While the scheme described in the Enron Complaint might be interesting and is responsible for subsequent heightened accounting and corporate regulations,[7] the allegations in

[7] *See* Sarbanes-Oxley Act of 2002 (Public Company Accounting Reform and Investor Protection Act), Pub.L. 107–204, 116 Stat. 745 (2002); Thomas Gorman & Heather Stewart, *Is There a new Sheriff in Corporateville?*

the complaint simply have no bearing on the present matter. The Enron Complaint never once mentions Shari'ah law and has nothing to do with debtor-in-possession or exit financing, and the Enron Complaint's contention that, for purposes of a chapter 5 cause of action, the court should collapse a series of transactions has no relevance to the propriety and validity of the Arcapita Bank Shari'ah Board's analysis of the DIP Transaction or issuance of the Fatwa.

B. Opinions Expressed in Periodicals and Alleged Edicts by Trade Organizations Are Neither Evidence Nor Authority

From the scant citations provided, the Debtors could only locate some of the publications relied upon by Hani. (*See* Objection, at 16 n.12, 13 & 14 for the citations provided to the authorities on which Hani relies.) But none have the weight of law and, as presented, these publications are nothing but inadmissible hearsay and unsubstantiated opinion. By contrast, Hani ignores the LMA Guide discussed above. At best, Hani's reliance on articles and the opinions of organizations that adhere to one of the four schools of thought under Shari'ah prove nothing except considerable disagreements exist in what Shari'ah scholars contend is acceptable conduct under Shari'ah. It is for this reason that the CBB Regulations provide for the satisfaction of Shari'ah by appointment of a Shari'ah board and adherence to a process—both of which Arcapita Bank satisfied when it obtained the Fatwa related to the DIP Transaction—rather than subjecting the conclusion in a Fatwa to review.

X. HANI FUNDAMENTALLY MISUNDERSTANDS THE CAYMAN PROCEEDINGS AND THE OPERATION OF CHAPTER 15

Without explanation, basis or authority, and based only on the pendency of the provisional liquidation proceeding in the Grand Court of the Cayman Islands (the "**Cayman Court**"), Hani assumes that chapter 15 applies to AIHL's bankruptcy case and that AIHL must

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The Obligations of Directors, Officers, Accountants, and lawyers After Sarbanes-Oxley of 2002, 56 Admin. L. Rev. 135 (2004).

comply with chapter 15. Objection ¶ 17. Hani then erroneously asserts that this Court approved the DIP Transaction "on the basis it had been approved in the Cayman Islands." *Id.* Based on those false premises, Hani suggests that this Court had no authority to enter the DIP Order because AIHL is not properly before the Court as a chapter 11 debtor.

The Debtors have never requested the Court to approve the DIP Transaction on the basis that it has been approved by the Cayman Court. Rather, the Debtors have sought this Court's approval in accordance with the applicable requirements of the Bankruptcy Code and have sought authorization of the Cayman Court in accordance with the Court's *Order Pursuant to Section 363(b)(1) of the Bankruptcy Code Authorizing AIHL to Enter Into a Cross Border Protocol With the Joint Provisional Liquidators in the Cayman Proceedings* [Docket No. 471].

Hani's argument, made with absolutely no evidence or consideration of the over 15 months of history in AIHL's chapter 11 case, reflects (i) Hani's complete misunderstanding of the relationship of AIHL's chapter 11 case to AIHL's ancillary provisional liquidation in the Cayman Islands and (ii) the lengths to which Hani will go to make meritless and unfounded arguments to this Court well outside the bounds of Bankruptcy Rule 9011.

As extensively discussed in the First Amended Disclosure Statement and several times in pleadings filed in this Court beginning with the inception of the chapter 11 cases, AIHL first commenced a chapter 11 case before this Court and subsequently sought ancillary relief for AIHL from the Cayman Court "with a view to facilitating the US Bankruptcy Proceedings . . . ." *See* Order of the Cayman Court, March 19, 2012 (the "***AIHL Cayman PL Order***"), at 1 (a copy of which is attached hereto as ***Exhibit G***). The Cayman Court appointed the Joint Provisional Liquidators, who have appeared repeatedly before this Court, to "oversee, monitor and assist the directors [of AIHL]" but specifically did not displace [the directors] from

their role as or capacity as representatives of AIHL, as debtor in possession under chapter 11 of the Bankruptcy Code.

Given the AIHL Cayman PL Order, Hani's arguments as to the applicability of chapter 15 of the Bankruptcy Code to AIHL are, at best, uninformed. Paragraphs 2 and 5 of the AIHL Cayman PL Order clearly and unequivocally slam the door on these arguments. Pursuant to paragraph 2 of the AIHL Cayman PL Order, the Cayman Court ordered:

> The directors of the Company are authorized to continue to exercise all powers of management conferred on them by the Company immediately prior to the date of this Order and to remain the representatives of the Company in its capacity as debtor in possession under s.1107 of the US Bankruptcy Code, subject to the Provisional Liquidators overseeing, monitoring and assisting the directors in the exercise of such powers (but not superseding the directors or their authority to control and direct the Company's US Bankruptcy Proceedings). Without prejudice to the generality of the foregoing, the directors of the Company are authorized to take all necessary steps with a view to formulating and presenting a compromise or arrangement to the Company's creditors and, in particular, to take such steps and proceedings on behalf of the Company as may be required in relation to the US Bankruptcy Proceedings.

Cayman Order ¶ 2.

Paragraph 5 of the AIHL Cayman PL Order is even more direct in its rejection of the contention that the commencement of the Cayman Islands provisional liquidation proceeding means that chapter 15 is the proper procedural vehicle for AIHL in the United States. The Cayman Court ordered:

> For the avoidance of doubt, this Order shall not be deemed to have initiated a foreign proceeding, as that term within the meaning of s.101(23) of the U.S. Bankruptcy Code, the Provisional Liquidators' role shall be limited to assisting the Company's directors and reporting to this Court as provided herein, and the Provisional Liquidators are not being appointed as "foreign representatives" within the meaning of s.101(24) of the US Bankruptcy Code and are not authorised or required to seek recognition under Chapter 15 of the US Bankruptcy Code.

Cayman Order ¶ 5.

The provisional liquidation in the Cayman Islands was filed, not to defeat, but rather to facilitate, AIHL's chapter 11 case. The purpose of obtaining Cayman validating orders,

including the one related to the DIP Transaction, is to insure that, even in a subsequent AIHL liquidation proceeding in the Cayman Islands, the transactions approved by the Court will be recognized in the Cayman Islands and not invalidated or avoided. Throughout the course of the Debtors' chapter 11 cases, the Cayman Court has entered many validating orders to facilitate AIHL's chapter 11 case in the United States, all with the goal of maximizing the value of recoveries to AIHL creditors. It is in this spirit of cooperation that the Cayman Court, on May 31, 2013, validated the provisions of the Plan related to AIHL and, on June 6, 2013, validated the DIP Transaction (a copy of this order is attached hereto as ***Exhibit H***).

Dated: New York, New York
June 20, 2013

Respectfully submitted,

/s/ Craig H. Millet

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ATTORNEYS FOR THE DEBTORS AND
DEBTORS IN POSSESSION

Exhibit A

United States Bankruptcy Court

Southern District Of New York

Case No. 12-11076

- X

In The Matter Of:

ARCAPITA BANK B.S.C. (C), ET AL,

Debtors.

- X

U.S. Bankruptcy Court

One Bowling Green

New York, New York

June 10, 2013

11:35 A.M.

B E F O R E:

Hon Sean H. Lane

U.S. Bankruptcy Judge

Hearing Re: Subordination Of The Tide Claims

Transcribed By: Lee M. Sapp

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P R O C E E D I N G S

The Court: Good morning, please be seated.

UNIDENTIFIED SPEAKER: Good morning, Your Honor.

THE COURT: We're here in Arcapita Bank B.S.C. et al for a hearing on a few different matters including the debtors motion for financing -- replacement post petition and financing as well as a hearing on an issue that's related to confirmation and subordination but is sufficiently discreet that I asked for folks to tee it up today in advance of two hours confirmation hearing. And I just want to let folks know what we were doing before we came out here. There is a request for a bench conference -- I'm sorry chamber's conference which sometimes can be useful in cases of parties want to have more candid conversations consistent with my practice of always in those instances having every party who is a party in interest to a particular matter be present for the chamber's conference. Everybody was so present in related to the financing motion and at that time I shared thoughts that I was going to share and will share now at the hearing. The financing motion is not -- is -- has been teed up for today. There's one objection to it and that objection as I understand is -- is at this point procedural although certainly Captain Honey's counsel can speak for herself. I perceive there's procedural saying essentially we didn't get the -- the

agreement itself until after the objection deadline and we haven't had sufficient time to look at it. And what I mentioned to parties back in the chambers conference is you know the rules about this rule 4001(c)1 which walk about a motion to obtain credit shall be accompanied by a copy of the credit agreement as well as a proposed form of order. They are what they are and that I always tried my best to see if I can cure any procedural issues because we all have plenty of other things to fight about on substance is normally the case. And I threw out the notion that in many large cases on the first day financing's addressed on an interim basis and -- and that's certainly something that would -- might resolve a procedural objection and then we can tee this up for a final hearing at some other date. And then I asked exactly when the financing expired. The existing financing expired and was told that that was later in the week. Although some time was needed to close. So Friday when the financing ends might not be an appropriate date, so.

All that's what was discussed earlier and so with that let me get appearances from counsel and I think it'd probably make sense to address the financing motion first.

MR. WILLIAMS: Good afternoon, Your Honor, Matthew Williams of Gibson Dunn and Crutcher for the debtors. With me are my partners Michael Rosenthal and Craig Millet.

MR. FLECK: Good Aft -- good morning, Your Honor, Evan Fleck of Milbank Tweed, Hadley and McCloy on behalf of the official committee of unsecured creditors and I'm joined by my partner Al Piza (Phonetic).

MR. SEIDER: Good day, Your Honor, Mitchell Seider of Latham and Watkins with Adam Goldberg of Latham and Watkins for Goldman Sachs International.

THE COURT: Good day is -- is wonderfully straddling the line. So anytime you can start to eat lunch I'm happy to go with morning, afternoon or good day.

MS. WEINER: And good day, Your Honor, I'm Tally Mindy Weiner here for Captain Honey also (Unintelligible).

THE COURT: All right.

MR. WOODS: I'm Richard Morrissey for US Trustee.

THE COURT: All right good day to you all. All right so we've turned over to debtors to talk about the financing motion.

MR. WILLIAMS: Good afternoon, Your Honor, Mathew Williams for the debtors. Originally what I had planned was to go through the you know why we need the financing which is set forth in the motion and to go through the terms and the financing which is also set forth in the motion and supplement that we filed yesterday, I'm sorry, last weekend there's a further supplement yesterday and then I was going to deal with the objection. I think that given Your Honor's

comments what might make more sense is to just deal with the objection first and then answer any questions Your Honor has but I'm happy to do which ever you think is appropriate.

THE COURT: Well maybe you could do a -- a highly abbreviated version of -- of the motion and what you're planning to do but you can certainly keep it short, I've read the papers.

MR. WILLIAMS: Okay. So here we are today the motion was filed on May 27th. The motion for replacement DIP financing with Goldman Sachs International. The objection deadline was June 3rd at 4:00 p.m. No objections were timely received. Although the creditors -- neither the creditor's committee not the ad hoc committee filed anything in response to the motion but I think I've got authority to say and certainly my understanding that both the committee and the ad hoc committee fully support the relief requested herein.

Four days after the objection deadline on Friday, June 7th, we got an objection filed by Captain Honey, Al Shoaibi (Phonetic). I'm just going to refer to the objecting party as Captain Honey given the -- I don't want to butcher the pronunciation.

So briefly where we are we need the DIP financing for two reasons. The first as Your Honor just mentioned is we're running out of time with our current DIP financing.

Our current DIP financing provided by Fortress terminates -- matures on Friday of this week. We've got a hundred and fifty million dollar ($150m) financing package with Fortress of that right now approximately a hundred and five million dollars ($105m) is outstanding.

As set forth in the Macau Declaration filed with our objection we don't have the money to pay that come June 14th. So absent the relief requested in this motion we would be in default under the Fortress facility absent some extension that facility which right now we don't have authority for.

There's another reason we need the money as well, Your Honor, the hundred and seventy five million ($175m) and the reason for that is even though the Fortress facility was a hundred and fifty million dollar ($150m) facility we've repaid approximately forty five million dollars ($45m) of that as part of mandatory prepayments under that DIP facility. So right now we owe about a hundred and five ($105) we only had access to that one O five ($105).

The good news about the Goldman facility that will be provided pursuant to this motion is it's providing a hundred seventy five million dollars ($175m) which will bridge us not only past June 14th but past consummation of the plan.

As Your Honor knows my colleagues will be here

tomorrow pursuing confirmation of a plan that has wide creditors support although we've got the confirmation hearing tomorrow that's likely to -- consummation, it's my understanding is going to take a while. And so because of that we're going to need additional liquidity. This facility will provide us with the ability not only to pay off Fortress but give us the liquidity going forward. So from a business perspective I don't think anybody could reasonably challenge the fact that we need the money. I think that's uncontroverted.

Just briefly on the terms of the replacement facility, Your Honor, again not only does it solve our two looming problems which is the maturity and the liquidity but it sounds substantially better terms than our current facility. You know what's the same about it? Quite a bit. We have the same debtor obligors. We have the same priority we -- which in essence their placement DIP will have super priority and expenses pursuant to 364(c)(1)and 503 (b)of the bankruptcy code. The claims will be subject to the same carve out which is the fifteen million dollar ($15m) post default carve out that we had with the Fortress facility.

Like the original DIP facility the providers have also agreed to in essence the same treatment with SCB as Your Honor knows there's been a lot of back and forth with SCB and how we deal with the collateral. So there in

essence stepping into that same position. Being subordinate to SCB with respect to AEID 2 Rail Invest and Wind Tervine (Phonetic).

They also have the same security package under the original DIP facil -- I'm sorry under the current -- that provides DIP facility the liquidity of providers will receive a first lien priority on all encumbered assets. Secondly in priority on encumbered assets. No liens on avoidance actions again like the Fortress facility. And the liens like the administrative claims will be subject to the same carve out, the fifty million dollar ($15m) carve out.

We also have a -- a -- if -- almost identical budge covenant which is basically -- it's not line item tested and we have a ten percent variance and that's the same. The good news is what's better are a lot of the commercial and legal terms, Your Honor. As you'll remember last month at the commitment letter hearing after a spirited auction we ultimately chose after going back and forth between two bidders we ultimately chose the -- this facility. And the reason we did that is because it provided materially better economic and legal terms for the debtor.

We realized at the time that it was going to be a lot of work to get the Goldman facility done and we took that into account and we determined well you know is it easier to go with Fortress you know because we knew that we

we're going to have timing issues and the like but the truth of the matter is this facility was a really, really -- it provided a substantial incremental benefit over the current facility that we had. For instance as I said earlier we have the hundred seventy million dollars ($175m) as opposed to the hundred and fifty million dollars ($150m).

In addition we have substantially better pricing, Your Honor. Right now we've got under the -- under the current DIP facility we had libor plus ten percent with a two percent libor floor. Under this facility the replacement facility we would have libor plus 8.25 percent with a lower libor floor of 1.5 percent. So it's better pricing.

The default profit is better as well. We've got two percent under this -- under the new facility as opposed to six percent in the old. As I stated earlier we'll have a longer duration right? I mean it's not going to be at maturity (Unintelligible) we've got a maturity date of July 31st and the good news is to the extent that consummation gets delayed even further we can extend that out for an additional two months with no fee which is a big benefit for the estate.

Under the old DIP facility we would be subject for any extensions for among other things a 1.5 percent fee. The financial covenants, Your Honor, it really -- the

replacement facility really incorporates two financial and covenants, two principle financial and covenants. The first is a minimum liquidity covenant of fifteen million dollars ($15m) and a second is the minimum loan to value coverage ratio. We -- in discussions with the debtor's financial advisors the debtors are more than comfortable that we'll be able to meet these covenants. We don't see them being an issue.

We have less restrictive prepayment provisions. I'm happy to go through them if you want, Your Honor, but I feel like I'm getting into details a little bit more --

THE COURT: No that's not necessary thank you.

MR. WILLIAMS: It -- it's a long -- the -- so we've got much better terms. We -- I think everyone would agree both the committee, the ad hoc committee, certainly the debtors and all the advisors. And we've got substantially better terms here.

And so what we're left with is a procedural objection filed late by a party who complains that we didn't technically comply with rule 4001(c). Now I heard Your Honor's comments and I'm happy to -- you know we have tried to resolve it both with the objecting party and with the DIP lenders we've pushed to give the objecting party more time to actually read the credit agreement. We also have been pushing the DIP lenders to maybe do an interim -- interim

order like Your Honor said. We haven't gotten either yet. I will tell Your Honor that a couple of things -- one and to the extent it's relevant the reason we didn't file the DIP credit agreement with the motion is that one it wasn't done yet. But two we did file a 27 page agreed upon term sheet with detailed terms, very detailed terms.

And that was an agreement between the parties. We also, Your Honor, one of the reasons we couldn't file it even as we got closer is given the fact that this agreement is subject to syndication. Once you file that agreement, once you make the agreement completely public lenders get wed to the terms and from the estate's perspective both from the committee's perspective and the debtors perspective filing that agreement, right the quote -- the form agreement inhibits our ability to get better terms as we continue to negotiate. So that was one of the principle reasons why we didn't file it even after we had a relatively good working draft.

Now understand technically we did not comply with 4001(c) there is case law out there Your Honor that provides that you know to the extent that a party doesn't technically comply with 4001(c) you know I would quote a case that we even found it was called in re Plaza Di Ritero (Phonetic) and it's 2009 WL 363356, where the court found that the failure to -- by the party to raise the 4001 (c) objection

timely precluded that part -- precluded the moving party from being aware that such non compliance would be an issue and thus from fixing the problem timely with the second amended motion.

So you know I -- I -- I understand that the technical objection, the procedural objection. And if we could solve it we would either with the party objecting or with the DIP lenders. It's unclear to me yet and maybe when the objecting party steps up to the podium here they'll explain their position in the case. What exactly their creditor position is because it wasn't clear to me at least in the motion -- in the objections and maybe they can explain that but you know given the extraordinary circumstances here you know the debtors would ask that you approve the motion on the final basis. And I know that Goldman wants to be heard on the interim final issue as well so maybe after the objecting party speaks we could hear from the DIP lender and the committee as well.

THE COURT: All right let me hear from the objector first.

MR. WILLIAMS: Thank you, Your Honor.

THE COURT: Thank you.

MR. WOODS: Your Honor, may I just add one point?

THE COURT: Sure.

MR. WOODS: I -- I know it's adding something to my

-- to my partner's comment. He said a couple times and I just want the court to be clear that confirmation may go on for a long time. I don't think that's the case. We intend to present our confirmation case pretty succinctly tomorrow. There have been limited objections filed. I think what he meant was that the effective date may not occur for a long time.

THE COURT: No that's how I understood it.

MR. WILLIAMS: Your Honor, I apologize. I thought I said consummation but I --

THE COURT: No I got it. All right let me hear from the objector.

MS. WEINER: Good day again, Your Honor. I ask at the outset for equal time. I'll try to be brief.

THE COURT: Well say what you need to say and we'll figure it out.

MS. WEINER: Okay. Well I understand that -- Arcapita position is that my client has filed a procedural objection that was late and that I'm calling them out on technical non compliance. Now I don't agree with that characterization there's a substantive issue here and I think that if Your Honor looks at the case that was cited it's clearly distinguishable. I haven't seen the case but from the description it's distinguishable. What should have been filed by the debtors here --

THE COURT: No I know what the rule says. My question for you is where have you been? Certainly I've seen a pleading that your client filed earlier on the case so I know your client's been following the matters. We had a -- a rather lengthy financing beauty pageant for lack of a -- of a better term in which the -- the details and the terms were being fought about in open court with a wonderful situation for the estate and a more frustrating situation for most lenders where there were coming in with better and better terms in such that we actually had to set a last and final deadline where rather ceremoniously people provided me with the last and best offers. So that was pretty much out there it in -- in this courtroom as to what was going on as well as in -- in the docket. So if you're following the docket there were -- there were lots of pleading back and forth by -- by the debtors, by the committee, by parties who were seeking to be the financing parties. Your client was -- was nowhere to be seen in connection with that. And then there was a 27 page term sheet that was filed and certainly an objection could have been made timely that would have said that's insufficient and we object. No such objection was -- was lodged. And so when the inevitable happened which is the actual agreement was filed -- which was -- which was clearly going to be what was going to happen there was a filing after that that didn't comply with the -- the

rules in terms of time. So you understand from my point of view that I -- I've tried to resolve procedural objections and I'm a big fan obviously of due process and of people getting things -- an opportunity to address things but you -- you will understand you're not in the best position to make that argument given the factual circumstances.

MS. WEINER: I -- I thank you, Your Honor. To address some of the points that you've made here. You've asked firstly where's the client. Ben Captain Honey has been in Jeddah, Saudia Arabia where -- where --

THE COURT: I -- I didn't mean that. If --

MS. WEINER: -- where he --

THE COURT: -- wait, wait. If -- I'm asking a question, I'm telling you what's on my mind so you get a chance to address it substantively. If we -- if we're going to get -- go down the road of being snarky then I -- I don't think this is going to be a very productive discussion. So I -- I'm -- I'm asking you how you want me to consider your objection procedurally. And in that same vein I'd also like to ask if there is -- you're clients view about how long and how much time would be necessary to review the agreement that is already been previewed in the 27 page term sheet.

MS. WEINER: Okay and Your Honor, I -- I apologize. I don't mean to be getting snarky --

THE COURT: No I don't need an apology. I just want to have a -- a legitimate discussion on the merits. And I have my views, sometimes I'm right, sometimes I'm wrong, sometimes people point out things that I haven't thought of so I -- when I ask a question I actually do want a substantive answer because there may be something you're going to tell me that's going to change my mind so that's why I ask.

So -- so let me ask again, procedurally how you view your client's situation in terms of making this objection at this time. And secondly from a practical point of view how much time is your client requesting to look at this to the extent that I order it be interment final?

MS. WEINER: Okay, Your Honor, firstly the debtors -- even as of right now have not put on file everything that they're supposed to put on file. The cross references required by the rule went on file I think at 10:26 p.m. last night that woke me up as I was going to sleep. I heard the ping on my phone. As of when I handed my phone to security that had not been served. So I just want to be clear that even putting aside the lateness issues as of this morning there wasn't a complete file. I don't even know that you got a chambers copy but I shant belabor that because I think you understand the -- the -- there's been what's being called procedural non compliance.

And in terms of how much time is needed to review this agreement, late Thursday night the debtors filed a 186 page PDF, I think about a 180 some odd pages of that were --

THE COURT: I -- I'd like to say it's unusual in this courthouse but I -- I'm sad to say I would be lying if I said so but how much time is it that your clients requesting?

MS. WEINER: I -- I am hopeful that we can do this in a week or two. I would need to find a Sharia -- someone who's sharia knowledgeable. This case is --

THE COURT: But -- but why would the finding of somebody who is Sharia knowledgeable be something that would have waited until this point in time given the finance -- wouldn't that person -- it have been wise to retain that person when the financing motions were being filed and so you knew additional financing was going to be obtained? And on terms that were different than the existing financing? So I -- I'm -- I'm not -- that argument I will say does not persuade me. It persuades me that -- that you need some time to take a look at things and I'm thinking of sometime this week. That's what I'm willing to do is to try to work out something where there would be a hearing at the end of the week. I'm going to take everybody's views and I'm going to make a ruling. So I'm asking for your view but if it's one or two weeks I'm going to tell you two weeks is

-- is not happening.

MS. WEINER: Okay well perhaps this would help. Your Honor's is correct that Captain Al so Hiabib (Phonetic) has written to the court before. I was engaged by my client on Wednesday. So in terms of telling what have you been waiting for I haven't been waiting for anything. I've started acting --

THE COURT: Yeah but I can't -- I can't do that if you're client is -- waits till the last minute to get counsel. I -- I empathize with the position that you're in but your client's certainly has been in notice since I've seen filings from your client. And I believe they relate to the disclosure statement but don't quote me on that. But I know I've seen some several months ago. So your client has been following this matter and certainly has -- those -- those pleadings if I remember correctly exhibited an understanding of exactly what we were doing here. I believe they were all pro se, that's correct but I -- I'm not going to consider except perhaps as a practical matter the fact that that you were retained Wednesday which is I think after the objection deadline, that -- that's your client's choice. And unfortunately your -- your stuck with your client's choices. I appreciate your candor on that but -- but I -- I'm not going to -- that's of limited beautility (Phonetic) in this circumstance.

MS. WEINER: One -- one further thing with respect to the delay here which is Goldman Sachs from what I understand had been diligencing this DIP months ago, months ago. And indeed it sought and obtained a substantial contribution claim even though -- I'm sorry, substantial contribution award even though it didn't close. So if the question to me is well what is your client been waiting for. I don't understand why the debtors are teeing this up for you as an emergency. Why it's a sprint to the finish line because Goldman could've been negotiating --

THE COURT: Well let -- let -- let --

MS. WEINER: -- this months ago.

THE COURT: The financing issue has been the subject of multiple discussions going back to the hurricane in the fall so I will say it has been teed up at the last second so I think in -- in view of the pleadings would show -- and the docket would show that that's not the case. So to the extent that -- I'm not quite sure how that relates to what I have in front of me which is a very set motion response time and -- and a hearing date. This has been fairly well noticed. And so I -- I'm going to reject the -- the that somehow this has been crammed down everybody's throat. It's been pretty much well noticed. And I'll ask the parties who are of -- of interest to sort of straighten me out to the extent that I have my dates wrong but I think

it's been on for a while. So anything else that you want to -- want to tell me?

MS. WEINER: Yes, to address three more things and then I'm happy to sit down. In terms of the noticing in this case, we ourselves served our papers over the -- the weekend. And we observed the master service list has been kept -- that's on the court's website is all messed up. So if you look at how the services have gone out in this case by Garden City Group on behalf of Arcapita --

THE COURT: Look do you have a specific argument as to your client? I didn't see this in the objection so I'm -- I'm a little in the dark as to what your argument is as to your client on this issue.

MS. WEINER: What I've been trying to -- to argue throughout here, Your Honor, is transparency, due process and fairness and if Your Honor's saying to me well these things have been noticed and people have known about this for months now --

THE COURT: No, no, I -- I want to hear --

MS. WEINER: -- I'm telling you that the service list is messed up.

THE COURT: Messed up as to your client? Or I'm not interested in you policing the universe here. And I'm trying to get this back to the objection to the motion that I have. I didn't see anything in the objection mentioning

services and issue, I'm always concerned about due process but I'm always weary of -- of a particular creditor deciding to serve as ombudsman to everybody's rights in a way that -- that -- that might be perceived as -- as leverage. So what about service is it that you want to tell me as it pertains to your client if anything?

MS. WEINER: Okay. Your Honor, I'll tell you about service and notice as it pertains specifically to my client and not as -- as some kind of cop here that I'm not which is from what I understand the grand court in Cayman approved the Goldman financing on Friday --

THE COURT: What's this -- wait a minute, we've now segwayed into something else that's not -- you were talking about the master service list so let's finish the point and then we can move on to the Cayman Islands.

MS. WEINER: The point, Your Honor, is that there's been an assumption here that things are proceeding in a transparent manner and in a way that gives people time -- you know what, I'm -- I'm happy to move on with that point because if no one in this courtroom cares that the master's service list is messed up I'm not going to make them care. We can move on to what's going on in the Cayman.

THE COURT: All right, you can do whatever you'd like to do counsel, it's up to you.

MS. WEINER: Your Honor, this is my first

appearance be -- before you and I -- I really -- really don't want to go down this way. I'm a three time federal law clerk I have the highest respect for the system and process and the Judges --

THE COURT: No, no, that -- that's fine just tell me what you want to tell me and I'll -- I'll hear it and then I'll make my decision.

MS. WEINER: Okay. I appreciate that. From what I -- I understand from friends in Cayman the grand court in Cayman approved the Goldman financing on Friday I believe that was not disclosed to parties in interest. It certainly was not disclosed to my client who has a direct interest in that because the liquidation of the company on the back end of the chapter 11 I believe will be going on in Cayman. I think it is disingenuous at best for them to ask Your Honor to approve this financing without disclosing to you and the other parties and interest that the Cayman court has already approved it. There's also not a chapter 15 in place so I don't think that you -- you have the authority technically to recognize that but you can enter your own approval order. I agree that that rather creates some -- some chaos, two different courts approving agreements on two different terms. It's important to Captain Al Shoaibi for me to let you know that he is in this case at all because he was unlawfully solicited in Saudi Arabia that is the subject of

an investigation in Saudi Arabia. The debtors do not dispute this by the way. So he's rather astounded that this court would -- would keep -- keep this case going and keep the protections of the automatic stay in place for a company that is breaking the law in his native country. He never wanted to come into this case. He got dragged into it by an unlawful solicitation.

And what we would like to see happen is a liquidation. We posit Your Honor that the company they keep telling you you should approve this because we need the money, we need the money, we need the money. Every time they get money they waste the money. If you look at operating reports they are losing money. So --

THE COURT: I believe we've segwayed into a confirmation objection. So which we're going to get to tomorrow. So just anything else on this particular motion? You're -- you're advocating liquidation rather than reorganization that's fine you can make that argument tomorrow. So anything else on this particular motion?

MS. WEINER: Your Honor, I would be willing to take adjournment if the other parties are to try to work this out yet again but if not I -- I have nothing further unless someone else wants to be heard here as well. In which case I'd like to be able to reply to that. Thank you very much.

THE COURT: Thank you.

MR. SEIDER: Your Honor, Mitchell Seider of Latham Watkins on behalf of Goldman Sachs International. I'd like to be heard for just a moment or two in support of the debtors motion for actually the final order today.

Your Honor, the motion requesting the relief was filed on May 27th and Your Honor is of course correct at the time the motion was filed the credit facility was not attached to the motion. And the objection deadline for the motion was set at June 3rd. between May 27th and June 3rd, the credit facility was not filed with the court and on the objection deadline it had not been filed.

The objector has filed its objection four days after the deadline. I've had the opportunity to read the objection and Your Honor is of course correct as to what rule 4001(c) provides with respect to timing. Rules however, Your Honor also become the subject of cases. And the case law on procedural deadlines in bankruptcy cases is fairly clear. When a deadline that's been set by a court is missed, it's incumbent upon the objecting party to demonstrate and substantiate excusable neglect for not meeting the deadline. There is nothing in the objection explaining or substantiating why there has been or even alleging why there has been or even alleging excusable neglect in this case.

One further point, Your Honor, it is typical at

least in my experience that when a party files a pleading before the court, the party sets forth the precise nature of its connection to the case. In the objection there is a statement that the objector is a party in interest. There is no statement in the objection that the objector is a creditor or how much the objector's claim as a creditor may be for.

It is entirely possible that the objector here is a creditor or an equity holder in a non debtor affiliate of the debtors. Those non debtors of course are not before Your Honor. So just to make this very brief and to sum it up Your Honor, there's been no showing of excusable neglect for missing the deadline. The entry of the final order today is important for reasons I know Your Honor understands and it's not even clear as to what the connection between the objector in the case is, thank you.

THE COURT: Anyone else wish to be heard?

MR. FLECK: Your Honor, once again Evan Fleck on behalf of the Official Committee of Unsecured Creditors. Mr. Williams was -- was correct the committee is supportive of the relief requested by the debtors in the motion. In particular, Your Honor I wanted to note that this is not the type of case where the committee was looking over the debtors shoulders as the debtor negotiated with the lender regarding the terms of the agreement. The committee has

been involved through its advisors indirectly in every step of the -- every step of the negotiation, every step of the documentation as a fiduciary for all the unsecured creditors we are comfortable with the terms that are before the court today for approval are appropriate. And are in the best interest of the estates. We take seriously as the committee -- as the fiduciary for unsecured creditors the issues that were raised by the objectors counsel today. Particular with respect to transparency and the appropriateness of the process. The committee was -- was comfortable with the timing of the motion as well as the filing of the -- the detail term sheet and then the definitive documentation. We think that that was appropriate for purposes of advancing the dialogue with respect to the negotiation. We think creditors were on notice. That issue was discussed with the -- with the committee directly and the committee was comfortable proceeding in the fashion that -- that we actually did receive in the case.

The -- the issues with respect to service in the case are also important. The committee members themselves have -- have -- have actually inquired of their advisors to be sure that service is appropriate particularly given the international nature of this case. And -- and not only have the -- is it our view that the debtors have handled that issue appropriately throughout the case but the committee

has also taken independent steps to be sure that -- that those issues are handled appropriately both with the respect to this proceeding as well as when action is taken in the Cayman court.

I know that's a little bit afield of what's before the court so I wanted to first speak in favor of the motion and make clear that notwithstanding the fact that the committee didn't file a separate pleading other than the one Your Honor referenced in support of the commitment letter, we are firmly in support of the relief that's being requested. But given the other comments that were made with respect to process in the case generally I thought it was important that -- that Your Honor hear from the committee our perspective with respect to the operation of the case throughout -- I know some of them are confirmation issues we can deal with them tomorrow but the committee has been kept apprised, we have used our website, we have used outreach and we've had a dialogue with -- with creditors throughout the case to be sure that they're informed with respect to the case generally and specifically with respect to financing because it has featured so prominently in -- in the proceedings of this case. Happy to answer any questions from the court.

THE COURT: Thank you. Anyone else who wishes to be heard?

MR. WOODS: Your Honor, I can't let the Cayman notice point go. So just a quick -- a quick response. There was a hearing in the Cayman as the court knows. Whenever we do something for AIHL that involves a potential transfer of AIHL property we need a Cayman validation order. It always comes in conjunction with an order from this court that we're seeking today with respect to all the debtors. But in the Cayman court it only relates to AIHL.

There may be many things that Captain Honey as we know he's not a creditor of AIHL. And the -- and the notice procedures that were followed in connection with the Cayman proceeding for the Cayman validation order complied with Cayman law, that is the basis of that Cayman joint liquidation proceeding.

THE COURT: All right, thank you.

MS. WEINER: Your Honor, AIHL is a debtor both in Cayman and here in this court. So I'm -- I'm not really appreciating with the significance is of saying that what's going on in Cayman affects only AIHL, I don't really get it because it's a here too.

In terms of responding to the comments of Goldman counsel the Captain Al Shoaibi is indeed a party in interest. He was sent a proof of claim from what I'm told, I haven't seen it yet. He was also sent a plan ballot or some kind of paper work in connection with the plan. In

terms of exact position I think that's in the papers he filed pro se but in any event parties are not being required to file claims publically the claim register is under seal

And in terms of who needs to show excusable --

THE COURT: Well I don't think it's under seal, I think it's just not on the docket which is not uncommon in large cases.

MS. WEINER: I think I can't access it like in the Leeman case, I do some work in Leeman, I can pull up the claims register online. In this case I can't.

THE COURT: Well it's not under seal. There's been no sealing order relating to any of the claims so that's -- I can tell you that for a hundred percent certainty.

MS. WEINER: Is -- is that right?

THE COURT: I don't think we need to get -- Yeah I'm not going to have a -- an inquest on it --

MS. WEINER: Okay.

THE COURT: I'm just clarifying the facts.

MS. WEINER: Further with respect to excusable neglect, well -- we've explained that a motion was not fully on -- on -- on file so the financing motion -- so I don't believe that I need to show excusable neglect and indeed that I think that Arcapita and Goldman Sachs need to excuse their own neglect in not attaching the mandatory filings. That's all I have unless you have questions.

THE COURT: All right, no I don't.

MS. WEINER: Thank you very much.

THE COURT: All right anyone else wish to be heard on this motion? All right, I have in front of me a motion for financing that is to replace the existing financing with other financing. And the existing financing matures on Friday. There is no dispute about several facts relating to the financing. One is that it has significantly better terms for the estate then the existing financing. This includes better pricing, longer duration as well as flexibility also includes more money. There has been no dispute that the debtors need the money although there is clearly a -- a disagreement about the proper path of the case that Captain Honey wishes to pursue in a confirmation objection.

There's also no dispute that the financing has been the subject -- financing in this case has been the subject of many, many pleadings and many proceedings. I remember extensive proceedings up in White Plains where we had a hearing in this case as a result of the hurricane in the fall and there were many discussions at that time and there continue to be many discussions including the -- essentially auction that was held on financing in this very courtroom not -- a few weeks ago.

So the matter has been on notice very publically

through docket as well as court proceedings to all interested parties.

So I am -- I do not adopt Captain Honey's objection about the -- the transparency issue. I -- I think it has been transparent the need for financing, the terms of the financing and I think Captain Honey has essentially been missing in that dialogue or even monitoring those proceedings. So unless he's been talking to the creditors committee in which case he would know the creditors committee is supporting -- essentially the path has been taken in this case on financing.

I find problematic many the objections that have been set forth in the pleadings as well as presented for the first time here today including things relating to the master service list and service in the case. I believe if my memory serves that in fact I have -- I tweaked the service at one point not permitting service simply by email but required packages to be sent overseas because of my concern about service.

I also reject any allegation thus far is unproven and unsubstantiated relating to the Cayman court. I -- I think I've been very well informed as to what's gone on in the Cayman court. It's been the subject of pretty much every hearing that we've had in this case. I've gotten an update and it is not -- it's not a simple dance back and

forth between a Chapter 11 in this jurisdiction in a proceeding in the Cayman Island's court but it is also not a rare one.

This is not a chapter 15, I think that comment misunderstands the nature of the relationship between a chapter 11 in this jurisdiction and a Cayman Island proceeding.

I have no view on the merits of any allegations regarding events and solicitations Saudi Arabia, not facts have been presented to me. Those -- those -- it is what it is. And that's being investigated as been -- Captain Honey has stated.

So I am -- the one thing I do have a hang up with which is what I said from the very get go this morning is the requirement of the rule. I do believe that debtors and the committee and Goldman given the facts and circumstance of this case thought it was beneficial to do something different than what the rule provided. There were no objections to that or timely objections I should say. A 27 page term sheet is a fairly robust view of the financing. So they can't have it both ways and complain 27 pages doesn't give you enough but a 181 pages is too burdensome. I'm not quite sure what the magic page number in that range becomes.

But that said the rules are the rules which is

what I said from the get go. So what I am willing to do is to approve on an interim basis the financing here today and schedule a hearing later this week with sufficient time that for closing by Friday so that Captain Honey and his counsel can take a look at Shari compliance issues that they're interested in. I reject the notion that a week or two is the appropriate deadline for such a adjournment.

The merits on the final financing to the extent that Captain Honey has decided to retain counsel at the last minute despite knowing of the proceedings and monitoring them. That is a choice that he has made. This confirmation hearing has been set for some time and financing as I said has been the subject of -- of ongoing discussions for many, many months. So Wednesday is something that leaps out to me, Wednesday afternoon to the extent that that would work with parties schedules. If I understand the -- the deadlines right that would give some two days both for Captain Honey to take a look at the pleading that was filed on -- on the -- I believe the 6th or the 7th -- the 6th and it would also give hopefully sufficient time for the parties to close any financing as is appropriated if it is approved on a final basis.

So I'm happy to let parties chat among themselves if they want to do that before telling me what their view is on that but that’s my current inclination.

MR. WILLIAMS: Good afternoon, Your Honor, Matthew Williams, Gibson Dunn for the record for the debtors. I -- just one question I had with -- and again I have to speak with the DIP lenders and maybe a shorter term -- it would make sense but we -- to the extent we could get the DIP lenders to agree would Your Honor be willing to enter the interim order today so that the --

THE COURT: Yes.

MR. WILLIAMS: -- okay, all right. I just wanted to make sure.

THE COURT: Yeah, no, no. That -- an interim order today just -- justice is not -- not at all uncommon in fact the -- the routine way of doing it in first day, you should come in you need financing you get an interim order and then there's a final order which gives people sufficient time to take a look at things.

MR. WILLIAMS: Okay I'm sorry, I just misunderstood --

THE COURT: No, no, no I don't think I was very clear. So I would enter and interim order today and then have a final hearing with the thought of entering a final order if appropriate the same day right after the conclusion of that hearing. That's normally how -- how I handle financing in -- in Mega Chapter 11 cases. It's just sort of a standard course.

MR. WILLIAMS: Understood, Your Honor. I just needed that clarified.

THE COURT: That's fine.

MS. WEINER: That is one -- can you hear me from here?

THE COURT: You -- you may want to come around to just get a microphone, any microphone will do. You can use whatever works for you. Just -- I don't know if it counts for purposes -- I'll hear you but I don't think it counts for purposes of a transcript which is important.

MS. WEINER: I thank you. I'll certainly take the opportunity to speak with counsel if they would like to. Since from what I understand Your Honor is entering a -- an interim order today. I suppose I cannot appeal that immediately because I would need to bring a motion for leave to appeal. So I would ask if that could -- if you would grant leave to --

THE COURT: If you -- if you -- if you want to appeal it I'll need a motion asking for leave to appeal it because I -- I confess I -- I don't have -- I need somebody to look at the law, you need someone with the laws and people can respond. I question really the utility of doing so if I'm going to have a final hearing on Wednesday but obviously you're free to do whatever you think you'd like to do.

MS. WEINER: Your Honor, the utility is that there's going to be a confirmation hearing tomorrow and so it's just sort of a sequencing thing. Which is if Your Honor confirms a plan tomorrow and I don't get -- get to put my objection on file till Wednesday the debtors no doubt will argue that I'm mooted out somehow. So I'm just trying to avoid getting mooted out.

THE COURT: I -- I -- just file your motion and I'll figure it out.

MS. WEINER: Thank you.

THE COURT: So thank you. All right I don't know if the lender wants to weigh in on this or if anybody want chat or how you want to do this. Again that -- that's up to you.

MR. WILLIAMS: Thank you, Your Honor. Thank you for your willingness to enter the interim order today under the circumstances I think that's the best course and we will of course be supportive of entry of the interim order today. If Your Honor will allow us a few minutes to have a discussion with Captain Honey's counsel around when we can set the final hearing using your suggestion of Wednesday as --

THE COURT: All right.

MR. WILLIAMS: As a good base from our perspective.

THE COURT: All right I -- I have matter Wednesday

morning but let me just check to see -- I have one thing at 2:00 that's a status conference and I confess -- one moment. I confess that that's not a hearing on a contested matter, it's a status conference. So that if you all came in at 2:30 I think that would be fine.

MR. WILLIAMS: I'm sorry, Your Honor. I apologize --

THE COURT: No, that's all right. I was saying I have --

MR. WILLIAMS: -- counsel --

THE COURT: -- matters on at 10:00 on -- on Wednesday and I have one matter on at 2:00. If memory serves that should be fairly brief. So I would expect to be free as in about 2:30 on Wednesday afternoon.

MR. WILLIAMS: Thank you, Your Honor. With that in mind may we have a few minutes to speak --

THE COURT: Sure.

MR. WILLIAMS: -- to the debtors, the committee, and the objector's counsel.

THE COURT: So what I will do is I will take a short recess and then when we come back you can let me know if there's anything else we need to discuss on that motion and if not we'll proceed with the subordination.

MR. WILLIAMS: Thank you, Your Honor.

(Whereupon the court recessed)

THE COURT: Please be seated.

MR. WILLIAMS: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. WILLIAMS: Matthew Williams, Gibson Dunn and Crutcher for the debtor. Captain Honey's counsel is not back in the courtroom yet. We've got somebody out looking for her.

THE COURT: That's fine. We'll wait a minute.

MR. WILLIAMS: Okay. I will -- while we're waiting for Captain Honey's counsel if -- well I guess we're not on the record. We -- it's probably better if we wait --

THE COURT: Yeah, it's the -- let's just give it a -- give it a second.

MR. WILLIAMS: We appreciate it. Thank you, Your Honor.

THE COURT: Shuffle some papers in the meantime.

MR. WILLIAMS: Your Honor, if I can be excused for a second I'll go join the search.

THE COURT: Sounds like Sea Quest.

MR. WILLIAMS: Your Honor, may I suggest -- I mean one alter -- one thing we can do as we're looking for her is move to the subordination matter unless you wanted to adjourn --

THE COURT: All right I have no problem with that if everybody's present who has an interest in that matter,

that would be fine.

All right so it is the debtors request under the plan to subordinate so I would imagine I'd hear from the debtors first and the committee and then from Tide. And I assume that all the folks from Tide are in the courtroom? I -- I --

MR. WOODS: Good afternoon, Your Honor. Troy Wood on behalf of Tide.

THE COURT: Afternoon, all right.

MR. WILLIAMS: Good afternoon, Your Honor, Craig Millet from Gibson Dunn Crutcher on behalf of the debtors.

THE COURT: All right how can such a short obviously clearly drafted statute create such confusion? I had a number of questions that I thought might be worth to throw out and then folks can address then as they go through. One thing was it's clear in addressing the case law that many of the things that are talked about are not actually relevant to the actual decisions of those courts. So are of varying degrees of utility. And so what I'm trying to get is a -- a sense of how you read the entire statute in terms of giving effect to all of its parts. And there's been various arguments back and forth that somebody's reading something out of the statute. I know Tide makes that argument explicitly but also the questions had her to read it in a way that makes it most -- much

common sense out of out it as -- as we can.

So that's one point I'd like the parties to address. In terms of if there's language in there and it may not be implicated here but how does it relate to the overall results and -- and what -- what should it mean. I also would like folks to address the corporate sort of structure here in the sense that the arguments about who is structurally senior or not senior. And the parties have different views about that. I believe Tide says it's structurally senior because it's stock. And I believe the debtors say that it says something different so I'd like a little more detail on that because that was -- that was really addressed in passing in the papers.

And then the third thing that I think is sort of a common question that I had was does your position require the creation of a new class that's not contemplated in the existing plan and if so do you have any -- what's your support for -- for that or is it something that as long as you're subordinated to who you're supposed to be subordinated to that you fall into the next class. So those are the three things that I think cut across all parties positions. So when you get a chance to work that into your presentation whenever that is I'd appreciate it.

MR. MILLET: Very good, Your Honor. Hopefully I will be able to address all those -- those three. I think -

- I think my presentation will in fact do that.

Your Honor, I think first I would like to note that the briefs do reflect that the parties at least have some common ground here and I hope to show the court that by working through that this really is going to come down to at least as to this case, I'm not sure how to solve the problems or the statute as to every case but as to this case we'll come down to one fairly narrow issue.

We certainly know or at least it's been presented there was no issue or material factor that needs to be resolved and this is a legal issue. The subordinate issue can be decided procedurally as part of the confirmation of plan that's not longer in dispute. And that section 5 can be clearly applies at least to the claims and issue here. So that's not something that we have to fight about.

THE COURT: All right am I also right in saying I think for different reasons the parties both say the common stock exception does not apply. I think you say it for different reasons one because -- one's concern about being pulled down, the other's concerned about being pulled up but I think you both say it doesn't apply.

MR. MILLET: Well, Your Honor, I think what we would say is that if you follow the analysis that I think the parties actually have some common ground on it may not matter. Whether you apply it or don't apply it, you get to

the same place. And that's what I hope to show the court here by going through the analysis.

THE COURT: Well but I think the debtors opening brief said we don't think the common stock analysis applies. I think it was a preemptive position thinking that Tide might say it did and then Tide came back and said, no, no we don't think it'll --

MR. MILLET: I understood your question backward, Your Honor. Yes that's true.

THE COURT: Okay all right.

MR. MILLET: That's exactly why it does not apply to act as a saver here if you will to elevate the claim back to the level of common stock.

THE COURT: So then the only issue that I have is -- is how to read the statute when it does apply -- clearly does apply and the common stock exception doesn't apply to the level of subordination.

MR. MILLET: Well, Your Honor as the court commented at the beginning the cases here have been less than uniform in their approach. And 510(b) is clear if you will when it -- it deals with a security of the debtor itself. Of course when you get into the area of dealing a security of an affiliate of the debtor the area becomes much more murky.

And we get into having to determine what is the

claim or interest represented by set security? And that becomes the key issue in the case here today. Here as the Falcon of course it's what is the claim or interest represented by the Nortex (Phonetic) LLC membership interest as to Falcon. Once we determine that section 510 (b) says that of course we subordinated to all interest or claims that are equal to our (Unintelligible) so then it should step down somewhere between that and then figure out what happens with the common stock exception whether it applies or not to be elevated back up.

Like we said the cases have been anything other than uniform in this approach they oddly enough get to somewhat of the same result. Although they do it in very different ways but in continuing to look for some common ground and I think this happens to this will also help answer one of the courts questions is Tide claims that the National Farm case represents a correct reading of the statute. It applies every element of the statute. It reads every element in and applies under the analysis that it uses correctly applies the elements that 510 (b) would do in a case where you have -- have an affiliates stock being considered as to a parent. That's at page 11 paragraph 22 of their brief.

Of course National Farm arose in the context of a motion to appoint a Trustee as opposed directly as to a 510

(b) issue. And the opposition raised issues as to whether or not a joinder in the motion or that that joinder had standing because their claim should be subordinate. And so the court did address some of the 510 (b) issues and -- but never the less in the interest of having some common analytical ground that we can apply here, ground that Tide says applies every element of the statute gives meaning to the words of the statute. I think we can use 510 (b) at least for argument sake in an analytical approach and see where it takes us since that would be something that both parties agree upon.

The of course the approach in -- in National Farm was a follow the security approach. And -- and that is the approach that Tide says is the most appropriate case to follow. So looking at National Farm quickly and then applying it to our case here at National Farm was a breach of a stock purchase agreement with respect to its wholly owned subsidiary.

Similar to our case except in our case of course we have the consummation of the actual sale of the wholly owned subsidiary. The buyer there obtained a prepetition judgment for damages. The debtor filed of course the assets of the debtor at the time it filed its chapter 11 petition still included, the stock of the subsidiary. And it was in fact the valuable asset of the debtor.

The court analyzed the 510 (b) issues in the context (Unintelligible) appoint a Trustee but reasoned when it looked at those issues that set security means that the claim follows the security.

So in stating it as to that case the court said the claim represented by set security arising from the purchase of common stock of the debtors subsidiary has the same priority as the common stock of the subsidiary.

Okay. That sounds all right but exactly what does that mean? The court then went on to say of what value does that represent in that case? And the court there decided that the case turned upon whether or not the subsidiary which was still owned by the debtor in that case was solvent and therefore had value or what value does that stock represent to that entity.

The court said if that entity, if the affiliate -- if the subsidiary that is still owned by the debtor has value, if there is equity in that entity then the claim is not subordinated to the extent of the debtors equity in the subsidiary. In other words to the extent of that value.

National Farm went on to say however if the subsidiary was not solvent and hence the parent's interest had no value then -- and this is quoting from the case, "The claim would be subordinated at the parent level." Further quoting, "And the claim would have the priority of the

subsidiaries common stock at the parent (Unintelligible)". And then the court finally said, "And shares of a subsidiary create no interest in the assets of the parent."

So then applying that analysis to our case here we have -- of course Tide purchased one hundred percent of the LLC membership interest in Nortex. The sale was consummated and the Nortex interest are no longer held by Falcon in this case.

Unlike National Farm there was no value left in Falcon with respect to Nortex. Like the National Farm case Tide is also said here but we don't have a judgment yet. We do have claims pending before the district court which we had decided including fraud and the inducement, breach of contract and importantly whether Tide was excused from performing the escrow as a result of fraud and therefore whether the money in escrow was property of the estate, property of the Falcon Estate or not. And Judge will -- will tell us at some point whether it's property of the estate or not.

And therefore we'll know whether or not those proceeds at some point are assets of the parent. So the first step is as to Tide was the claimer and just represented by the hundred percent membership interest in Nortex will follow the security. We know that it's whatever it is that Falcon still holds in Nortex. Of course Falcon

holds nothing in Nortex.

Now Tide says -- and this is the key point of disagreement and this comes down to the key issue that needs to be decided by the court is Tide says, "The escrowed money represents the equity in Nortex." But that really can't be the case. First of all is -- if that statement is made by Tide in one clause, one half of a sentence in their brief no authority of any kind decided for the proposition that proceeds of the sale of an affiliate are themselves equity in the affiliate.

And it sort of begs the question because the district court's going to tell us whether or not those assets are property of the estate. If they're property of the estate they are just that. They are assets of the parent. The same assets of the parent that the National Farm case referred to when it said stock and the subsidiary creates no interest in the assets of a parent.

So Tide has to prove to show that there is still some interest here represented by the equity in Nortex that the proceeds are themselves equity in Nortex. And again we've had no case law whatsoever from Tide on that. There's no case showing the tracing is appropriate. There's no lien claimed in those proceeds. In fact Tide has represented to the district court and earlier proceedings that it does not claim a lien in those proceeds.

And in fact the law does provide that you can't trump 510 (b) by claiming a constructive trust interest in the proceeds of the sale based upon fraud and the inducement. Which is exactly the situation we have here. In that case at least the court considered whether or not the parties had even made a case for constructive trust and then went and said you haven't -- but even if you did -- even if you did you can't trump 5 -- section 510 (b) by claiming that there -- that there is some sort of interest here that trumps 510 (b) by saying that's my specific property. Here we have no claim for constructive trust. We don't even get to square one.

Second, even if we did for -- for Tide to say the cash proceeds of the sale represent the interest in Nortex of what was sold but be creating a constructive trust. But be creating a lien. When we think of an interest in specific money that is property of the parent assets of the parent which is exactly what National Farm said the stock does not represent.

And this really has an important aspect for both the bank as well as the claims against Falcon. And I think this is an important distinction here for confirmation purposes, Your Honor. Is -- whatever happens to Falcon, whatever the court does with respect to subordination the falcon plan can be confirmed because it's a direct waterfall

plan, how would they fit in.

In the bank case here we need to have -- because otherwise if we create a new class we're going to have issues with whether that's a consenting class and various things. But there clearly isn't a new class at least as to the bank. We'll talk about the new class issue in a minute that the court talked about. But at least as to the bank I know the analysis of National Farm which has been adopted by Tide there really can't be because whether or not that seventy million dollars ($70m) represents equity in Nortex that Falcon holds it doesn't represent anything that our Arcapita Bank holds. Arcapita Bank itself doesn't have that money. Its not alleged to have that money, it can't possibly have that money. So whatever that money represents in terms of being equity and Nortex at the Falcon level over at the bank level it repre -- there's nothing there. So there is no asset of the parent derivative of Nortex to which Tide can look to to say that's my claim and so therefore I should be anything senior other than common stock.

Now the important part and this is what I meant a moment ago by you don't necessarily need the common stock exception to apply or not apply to get the point that they've made in National Farms. National Farms says if there is no equity, if that Nortex stock in this case does

not represent any value to the debtor. Then, subsidiary -- then that stock in the subsidiary the Nortex stock here has the -- the priority of the Nortex stock. And then as we've said many times, because that does not create any interest in the assets of the debtor that means it goes below common stock. It actually drops down. And that's what follow the security means. That's even what Lernout (Phonetic) said, "Follow the security" means.

So as to Tide -- pardon me as to Falcon we clearly have the issue where if there's no equity in Nortex as we're still being held by Falcon then the priority of the claim represented by the Nortex Security goes below common stock. The same is true at the bank that we don't even have an allegation, there's something at the bank level that would represent an equity interest in Nortex. So it goes down.

Now if perchance as argued to be very passive with common stock that's when the common stock exception here we'd have to argue whether it implies or not and because such interest here, set security is LLC interest and not common stock the U.S. commercial cases reading the plain text of the statute and giving meaning to it it doesn't save it and bring it back up. 510 (b) says it must go below the claim represented by set security unless it's common stock.

Now the reading of which way you use the common stock exception of push if you will claim I think the only

case that's ever used up to push something down was the VF case. And that's sort of an outlier in terms of this entire analysis. But that case really does not give --

THE COURT: And what's your understanding of VF is that in looking at it I got the sense that the Judge being on the verge of having a discussion about the level of subordination said it's covered by the common stock exception and -- and stocked her analysis and therefore in terms of an actual holding while it has many holdings in it, it doesn't really have a holding about the level of subordination as I understand it. Is that something you agree with or disagree with?

MR. MILLET: Generally, Your Honor, it's difficult to see -- it's looked there like the Judge had a result in mind and then sort of backed into an analysis if you will. Because the Judge even assumed there that you start with the presumption that the claim represented by set security is at the general unsecured level because she reasoned there the court ruled that reason there that -- because if you didn't have 510 (b) at all that's where it would be. However we do have 540 (b) and it says, you started at different places the claim represented by set security. Doesn't say the claim that would have existed but for section 510 (b). Could have said that but congress didn't say that. It said the claim represented by set security. So you can't simply

plug the starting point in at general unsecured drop it down and then say okay I also have common stock so it goes here.

Now whether the court really did this kind of one, two, three step analysis it just says well it's got to be subordinate at something and the common stock exception says it goes at common stock -- I've got common stock that's one that'll put it.

And so I think the court got there by parking at a common stock and ending the analysis. Lernout got to a -- the similar result in a wholly different way. And National Farm gets there but it depends upon what equity is still left in the parent, you know the affiliate, not even how you get there.

THE COURT: All right now I know that -- that Tide's analysis of 510(b) is not your analysis so I -- I assume what you just basically did is say to the extent you follow their analysis we -- we still prevail so I assume you're going to get to your analysis of how the statute should work.

MR. MILLET: Your Honor, we tried to lay that out in our papers. And we think under whatever analysis -- I mean whether you VF, whether you pick Lernout, whether you pick even National Farm you more or less get to the same place. But the interest represented by the security is because figuring out what that means at the parent level it

should be then over because here of course we have one hundred percent of the assets of Falcon in effect being sold. It's almost the same as selling Falcon.

It should come in at the Common Stock level if you will and be at the Common Stock level. And then look to see whether the common stock exception, once you have to put it below because 510 (b) says we have to subordinate the claim to everything equal to or seniors (Unintelligible) does the common stock exception and push it back up. And here because we have in essence a hundred percent of the equity being sold comes in at common stock drops down, common stock exception doesn't apply because set security is LLC membership interest so it doesn't go back up, it comes insubordinate. So under that analysis or National Farm end up in the same place is our view.

THE COURT: All right.

MR. MILLET: Now I -- I looking at the court's questions. We talked -- I think I talked about corporate structure a little bit. If I haven't answered that question I'd be happy to do so. We talked about giving effect to all the parts of the statute because we said okay assuming we take National Farm which Tide says give effective part to the statute.

THE COURT: Well let me back up for the corporate structure. Is there any dispute among the parties as to how

to understand the corporate structure here in terms of seniority. I know they don't agree with the outcome but I'm just trying to get a sense on whether there's a dispute as to how you consider that question.

MR. MILLET: Not that I'm aware of, Your Honor. I think it's quite clear that these were in fact LLC membership interest. And the -- the structure of Falcon is relatively simple as well. There are no debentures or other securities that might come above it in that sense. We have general and scribd claims and then we would have these claims.

THE COURT: So it's really just a matter of -- well I'll -- I'll hear from Tide in a minute about -- about that question. So in terms of your reading of the statute Tide does make the argument that the debtors read that file the language about equal -- equal to the claim or interest represented by security that language out. So what's your response to that?

MR. MILLET: Not at all, Your Honor, in fact we -- we very heavily rely on that because we are trying to look at the claim represented by the security. What does it mean over at the Tide level and partly at the Falcon level. We have to try to figure out what that is and under National Farm of course talked about what equity and just what value does it represent at the Falcon level, represents none so it

ends up down believe.

Under a different analysis followed by the other cases because this involved a hundred percent of the securities or a hundred percent of the assets it's the same as common stock it's like buying Falcon. So it would come in at the common stock level. Its subordinated down and not pushed back up by the common stock.

So we are actually looking very carefully and saying what is represented by that security much like they did in National Farm. So I'm not at all reading it out, in fact heavily relying on it. We think VF read it out of the statute. And in fact then said well we're going to treat it as if there was no statue and say okay now apply the statute. Start at general and scribd claim it out from there. And we're saying no the statute does say claim represented by set security. It doesn't say the claim would have been filed but for 510 (b). And therefore we're in fact saying very much so they're relying on that language.

THE COURT: So in your view your reading of it means that in most cases the result unless its common stock is going to be -- that it's going to be just allowed?

MR. MILLET: In most cases and -- and depending upon if you have a more senior level of security perhaps and the -- and the structure of the debtor in a simple case like this it may very well be disallowed and unfortunately that's

what the case law has paid lip service to and said as they did in Geneva Steel that this is a very important issue for investors because often in cases there's no distribution to certain class levels. And so you have to worry about the same thing that USA commercial said.

And -- and also the final question of the court, I didn't want to ignore that about should there be some new class? No case has created sort of if you will a new class. No -- there's been no support for that. Every case no matter what analysis they've employed have -- is in essence plugged in. The claim represented by such security at some existing level of claim within the structure of the debtor and work within that.

If you didn't do that and you didn't create a new class you -- you could create all kinds of havoc in terms of confirmation issues and acceptance by that class and what the plan would mean and a whole variety of issues.

THE COURT: But when you plug it in and then say its subordinate to the claim equal or interest equal to, that means you just go down to the next level whatever the next class is, whatever that may be.

MR. MILLET: Yes and that's what the courts have done with it and it -- and it is difficult to reconcile if you will simply looking at the statute with -- but National Farm does it by saying if you follow the security and

therefore the value that it represents and sort of figure out where it goes. National Farm to the extent there was value in you know in that issue the (Unintelligible) trust company or here in the security -- in Nortex itself -- not just because there's proceeds in the -- in the company but because of the ask itself would just simply say it's not subordinated period to the extent of that value. So it doesn't create a new class if you will. It just says it's not subordinated to the extent of that value.

So yes otherwise if there is no value there it would go down and let's say by common stock based upon the -- the reading of the statute. That's what the statute says. Now one can say well perhaps that's not the intent of the statute but whenever you have the -- the -- really look at the intent of the statute is but you look at the statute itself and it says, "Subordinated to all claims senior to or equal to." And that equal to language is hard to see right there in the statute and then reconcile it with all the pundents who've commented upon the purpose of the statute because the -- to really make the statute work with what others say or its purpose it's very difficult to do so with those expressed words that congress put in there so --

THE COURT: Well and there's a lot of cases that talk about the purpose and it seems clear that the purpose is to -- to -- since you as an investor have the upside you

shouldn't get the protection that a creditor would get. And I think beyond that it's -- it's -- I wouldn't say its silent but there's just -- there's not a whole lot of clarity so I feel like in terms of legislative intent which as -- as Justice Scalia would -- would -- would cringe at this very conversation.

But I don't know that there's a whole lot to go on beyond that fundamental principle in any event which I guess is a -- if you -- if you took the legislative intents and used it as your touch stone then you probably are -- are VF -- you follow VF I would think.

MR. MILLET: And you -- you -- I'm glad you did but you sort of stole the point I was going to make cause the legislative history speaks to when you first -- how you first knock it out of a class but it doesn't talk about where it ends up. And the courts then struggle with that. And that's the -- the assistance we're trying to provide the court in terms of an (Unintelligible) today.

THE COURT: Remind me what the plan says. I know there's a super subordinated class which I assume is the debtors view of where Tide's claim should end up but there's also a subordinated class which is above that. And what does that consist of?

MR. MILLET: As to Falcon that -- that's a class of employee interests in Falcon itself. In other words, they

had common stock interests in Falcon. So applying subordination there we place them in -- in a class but it's not -- it's a different class but it's not above common stock. It shares pari passu with common stock. So it effectively applies the statute. Because of their employment claims or their unemployment rights they have in affect common stock in Falcon that would them be at the Falcon's common stock level. It would get subordinated to that level except that there because it is common stock in Falcon, their employees are Falcon, you could save back the common stock.

That class that they're in shares pari passu with common stock even though it's numbered 8 and this one's numbered 9 it's the same.

THE COURT: All right.

MR. MILLET: So that's the classes --

THE COURT: So it's subordinated but not to common stock?

MR. MILLET: Correct.

THE COURT: All right.

MR. MILLET: Down to an equal level of pari passu with common stock as well.

THE COURT: All right.

MR. MILLET: As to Falcon. That's an important distinction. One final comment, Your Honor, is I may have

spent too much time about Arcapita Bank because in reading Tide's opposition I'm not sure I necessarily understand them to be objecting to the Arcapita Bank plan. There's nothing in the opposition that says it expressly objects to the Arcapita Bank plan. So I did explain that if they are -- well it shouldn't matter because there is certainly is no equity in Arcapatia Bank as to Nortex but perhaps its not even -- an objection's been made because I -- I don't even really see an objection to class 10(a) the "A" class is (Unintelligible) Arcapital Bank classes.

THE COURT: All right. Thank you. All right let me hear from Tide unless the committee wants to add something at this point. Maybe I should hear from everybody on one side.

MR. FLECK: I can just -- I can do it from here, Your Honor. Evan Fleck on behalf of the committee. Your Honor, we filed a brief joinder to set the position of the committee first of all to join in the arguments that the debtors made also to set out what we believe is the fact that the -- the statute is clear we -- we don't think we need to look for legislative intent but then further if you do we think if you look at the progression of the statute we think it is helpful and aids in the debtor's argument with respect to the application of the exception. But other than that, Your Honor, we'll -- we'll join the debtor's argument

and support the position that was laid out by Mr. Mellit.

THE COURT: All right let me just answer your question about that. I did read your chart. Can you sort of summarize how in your view the progression of the -- of the statute supports the argument.

MR. FLECK: Well, Your Honor, it's just that -- that the -- the -- congress spent -- spent a great deal of time with respect dealing with this section, 510 (b) but the common stock and we think that if there was a desire to -- to modify the common stock exception that would have been done. We see the language elsewhere within 510 (b) being modified with this common stock exception that remains as -- as it was intended. And -- and -- well remains static.

THE COURT: All right thank you. Now let me hear from Tide.

MR. WOODS: Good afternoon, Your Honor. Troy Wood on behalf of Tide.

THE COURT: Afternoon. Let me start out with asking the question that I think Mr. Millet ended with is your take on the Arcapita Bank plan and whether this is a -- I didn't understand this to be a -- a Falcon only objection but let me ask you.

MR. WOODS: The argument applies to both. We objected to that -- to the -- in our plan objections we did object and our objection is that really you asked what --

there's not a new class that needs to be created it's just that class 8 just doesn't need to share pari passu with the shareholders.

They mentioned the -- the individual claimants. The debtor hadn't sought to subordinate those claimants. They -- they sought to disallow them. They filed plan objections -- I mean claim objections. So the only party in class A is (Unintelligible).

They objected to the individual shareholders claims and said that they -- they equal equity and -- and they don't have valid claims. They do not seek to subordinate those claims. They have not filed any subordination to those claims. So the only class -- the only part in class in Falcon is my client. And all you had to do to the plan is to say we don't share pari passu with the shareholders. That's the only change. You don't have to create a new -- a new class. All you have to do is just say that we don't share pari passu with shareholders which is the law. That's how the courts have interpreted. That's what National Farm did and that's what VF Brands did.

THE COURT: All right.

MR. WOODS: Your Honor, going to your question is -- the other thing you brought is what provision they ignore and as put in our papers. They do -- they did strike out that are senior or equal to the claim or interest

represented by such security. And you asked the debtors counsel a very important question is if not here when would an affiliate security ever have priority or ever have entitlement to a claim in the debtor. And -- and they said well most of the time. And then his answer was you have to look at the corporate structure. Well that's exactly what we're doing here. And that's our argument is -- is to determine when an affiliate's claims based on a cell of an affiliates security is senior or equal to other claims of the debtor and other interest of the debtor. You have to look at the corporate structure. And here --

THE COURT: Why don't you walk me through it as to each of the debtors from your point of view?

MR. WOODS: Okay. Your Honor, I have a demonstrative evidence.

THE COURT: Sure.

MR. WOODS: May I approach? May I approach?

THE COURT: Sure. Actually do you have one more copy?

MR. WOODS: I do.

THE COURT: Since I have made someone else suffer with me in discussing the wonders of subordination. Thank you.

MR. WOODS: Your Honor, the -- the importance and what distinguishes this case from all of the other cases

that the debtor relies on is that we bought an asset of -- of the debtor Falcon. And so our interest the equity in Nortex is structurally superior as it relates to the purchase price that was paid for that equity is structurally superior to all interest above that. And that's what VF Brands recognizes. And that's -- that's what National Farms recognizes is what 510 is pro -- is intended to prohibit is if Nortex was a debtor in this bankruptcy it would prohibit us from jumping ahead of that equity and having a claim against Nortex and its assets and debtors. It doesn't -- it doesn't prohibit us from following the security. Meaning following back behind. In fact the one case they rely on is U.S. Commercial Mortgage.

And what that case said is you're suborned to the level immediately below your -- your interest. So in this instance in the corporate chart we bought equity in Nortex and so if we have to fall back behind Nortex that gives you a claim against Falcon. That's the -- that's the seniority based on corporate structure of the debtors in this case. What VF Brands says is okay then you have a claim that's equal to the unsecured creditors Falcon and so you're subordinated to those unsecured creditors.

Now she was -- Judge Walrath (Phonetic) was very clear on the two step process. I think to answer the court's question is absolutely she addressed the common stock. And

used it as a sword in that case but for the common stock exception used as a sword by Judge Walrath the -- the claims of those creditors in that case would have stopped immediately behind the generally unsecured creditors and that's what we're asking in this case is that we're subordinated to the general unsecured creditors but not to the level of equity by --

THE COURT: But doesn't that create a new class?

MR. WOODS: No. It's class 8 its just it doesn't share pari passu that's all it is.

THE COURT: I don't know how that works if class 8 does -- is supposed to share pari passu. If you have a class and you say it's in this class but it's treated differently then I don't -- how is it the same as -- as things in that class?

MR. WOODS: It -- in class 8 either it should not share pari passu or if -- if the debtor wants to keep class 8 then there will have to be another class that's in between the general unsecured creditors in equity. The debtors could have just as easily said class 8 doesn't share pari passu. It -- there's nothing in the bankruptcy code that says class 8 has to share pari passu. We're the only creditor in that class. They've objected to every other claim in the case.

THE COURT: Well but if I -- if I haven't ruled on

the objections they -- they are still in a class. So if there's a claimant who -- who's in a class there's an intent to object to it but it hasn't been objected, right now they're accounted for in that plan in that class so you're not the only person in that class. You may someday be the only person in that class but you're not currently is my understanding of that.

MR. WOODS: The -- the -- I think the court's remedy is either to say class 8 doesn't share pari passu and these other creditors would be class 9. They would essentially be -- they would be treated because that's what they are they're equity. That's what the hopper parties are and that's what these claimants are. They -- they have -- they have equity interest in -- in the debtor Falcon and they want to share in the pro rata distribution. And -- and so they would go into class 9.

And so I think the court -- the remedies for this court would either change class 8 so it wouldn't be pari su or create another class that says -- but I think that -- that -- that would resolve our objection if there was a class in between the general unsecured creditors and the subordinated credit claims that share pari passu.

THE COURT: And your support for creating a separate class is -- is -- what do you rely on for that?

MR. WOODS: It's just that following the bankruptcy

code. The banks play the points --

THE COURT: Well but subordination can mean a couple different things right? It could mean for the sake of simplifying the hypothetical that there are three classes and class two is -- is -- is where it lines up in terms of such security and if you're subordinated below class 2 you could either just fall into class 3 or you could be essentially class 2 (b), so --

MR. WOODS: But there's no -- I'm sorry. I didn't mean to interrupt you.

THE COURT: -- so that's -- I guess my question is in -- in your view what -- what should happen here?

MR. WOODS: Either a new class be sub -- to be created which would resolve our objection and allow the confirmation to be --

THE COURT: All right that's the 2(b) methodology, okay.

MR. WOODS: Okay or change class 8 to not share pari passu.

THE COURT: But how do I -- how do I -- I mean I have a plan that has other claimants in class 8 right? So you're saying I would -- I would affect those rights or I would change the plan of the debtors to say that we propose class 8, class 8 has voted on the plan or done whatever it's going to do not object based on the understanding that it is

going to share pari passu but then I'm going to sua sponte take them and -- and change their rights after -- after the plan has sort of -- I mean do it at confirmation?

MR. WOODS: There are class -- Your Honor, if you -- if you deny the objections of those claims they fall in class 5 not 8.

THE COURT: But I don't have any objections in front of me.

MR. WOODS: Correct, Your Honor.

THE COURT: I -- I know you've said that but you -- you're -- you're --

MR. WOODS: But there's no --

THE COURT: -- linking two things that aren't linked for purposes of the plan. People object to claims before sometimes during, usually after and until I have an objection that's been ruled on, a claim is prima facia valid and its accounted for in a plan right? I mean that's the way I understand that it works unless somebody has some really interesting authority to tell me to the contrary.

So -- so I can't -- I'm just struggling with your alternative. I understand the creating a 2 (b) class a separate class but I'm wondering if under your world view that there really is no choice but to create a -- a new class. Because I would have to -- I would have to -- I would have to address it. And because otherwise you'd be

asking me to come in and change the rights of folks under the plan after all this time at a confirmation hearing.

MR. WOODS: Correct, Your Honor. To the best way to address the courts concerns would be to create class 8 (a) and class 8 (b).

THE COURT: All right.

MR. WOODS: That essentially -- or 1 and 8 (1) and 8 (2).

THE COURT: And what -- what case authority do you have from my ability to create a new class in that plan confirmation context?

MR. WOODS: Well the court would either deny confirmation of Falcon it's a liquidating plan or the debtor to -- to overcome that objection it would resolve our objection and allow the liquidating plan to -- to -- to be confirmed. And so the court would either say I'm going to deny confirmation because it does not adequately provide -- apply 510 (b) or I'll let you amend it and -- and at that point we would consent to the amendment and -- and the court would confirm the plan.

THE COURT: All right and for Arcapita Bank?

MR. WOODS: I think a similar resolution could be had but the courts correct. I don't know if there's any distribution above to get to our claims up at Arcapita Bank. Our main concern is the seventy million dollars ($70m), Your

Honor.

THE COURT: Right well that may be not as important to you but its -- its important to me in terms of trying to figure out what I have to resolve and what I don't have to resolve so if you -- if you pursue a claim in the Arcapita Bank situation in that case then I deal with it whether you're like well I'm not that -- all that interested in it or very interested in it, it's all the same to me so --

MR. WOODS: It would be the same result, Your Honor.

THE COURT: No, no, no I -- I understand that but what I'm -- what you're saying is it's -- it's not really what you're after but it really -- that doesn't matter to me either you're pursuing that argument as to Arcapita Bank or you're not and I understand you are so that my question then is how does it -- how does your world view apply to Arcapita and you're saying it's the same thing either say deny confirmation because it doesn't apply to 510 (b) or -- or I guess that's probably -- probably it.

MR. WOODS: Or create class 8 (1) and 8(2).

THE COURT: All right well I think that's a new plan though. If I -- I think about got 8 (1) and 8 (2). That -- that's fine I mean it -- but I'm just -- I'm just trying to understand the implications that's all.

MR. WOODS: Your Honor, you know all the cases have

gone to great lengths not to interrupt the statute to provide for disallowance. And in the -- if the -- if -- if congress wanted to just say look all affiliate claims, claims arising from sales of affiliates are just simply disallowed except for the common stock exception. Well one they didn't do that and so the court shouldn't interpret the statute to provide that. And again if you adopt their interpretation it's not that most of the time affiliates claims would be disallowed it is all of the time affiliates claims.

If -- if you don't say that equity in a wholly owned subsidiary and the claims that arise there can be senior to or equal to claims of a debtor then in no circumstances could a claim from in any affiliate ever be allowed except for the common stock exception. And that just wasn't what congress intended. Why would congress draft the statute that is dead as opposed to just saying what we want to do is disallow claims from sale of all affiliate debtors except for the common stock. What is so special about common stock first all? And they even admit in their -- in their -- in their pleadings that its probably just an oversight cause at the time that the congress in acted this that -- that -- you know LLC interests were just not as popular as they are now. And -- and there's a lot of talk about well if congress wanted to amend the statute it

could. The fact of the matter is -- is you know as this court's aware it just -- this issue doesn't arise very often in bankruptcy cause normally there's not distribution up to equity and so what happens in all of these cases that are being cited to the court is they're saying all right you're claims are subordinated to the general unsecured creditors. Well the general unsecured creditors are getting cents on the dollar so you're out of the money.

So the fact that congress hasn't amended it is quite frankly if this issue hadn't made its way up to the circuit courts --

THE COURT: Well it -- for my purposes doesn't really matter why they haven't amended it they just haven't amended it so -- so I'm stuck with a statute that other courts have struggled to interpret. So --

MR. WOODS: That's fine --

THE COURT: Mr. Mellit had gone through his -- his take on value using the follow the security approach. And -- and I think I can probably guess a number of things you would say but I wanted to get your take on where you part company with him on that analysis. That is he goes through and talks about the value saying well if you're going to do it that way you -- you look for the value and you look to solvency and then you apply to each debtor and he thinks it's very easy on the Arcapita front to reach the result and

that -- but even as to -- to Falcon you reach the same result so where you part company with them on that analysis?

MR. WOODS: Down at the Falcon level, Your Honor, clearly the seventy million dollars ($70m) represents the alleged equity in the debtors interest in -- in Nortex equity, in their stock. I mean that's what we did. We bought -- we didn't buy assets of Nortex, we bought Falcon's equity in Nortex. So by very definition the proceeds of that equals the equity.

Our position is that we overpay a hundred and twenty million dollars ($120m) because of their fraud, they've admitted that. For the purposes of today they're saying you're correct. You overpaid by a hundred twenty million dollars ($120m). Fifty million dollars ($50m) of that has already been dispersed to Arcapita. So they have already guiding Arcapaita and its creditors they've already received four hundred and forty five million dollars ($445m) which we believe and what they've admitted is hundred and twenty million dollars ($120) over the true value of that equity. Fifty million's ($50m) already left the barn it is up and -- and Arcapita and its creditors have already enjoyed the fruits of that fraud. The question is is the seventy ($70m) that's remaining are we entitled to -- to distributions as a creditor of Falcon before Falcon's equity and the creditors of Falcon's equity receive distributions

on that seventy ($70m). Now the ironic thing is they're using 510 for the very purpose it's intended to prevent. They're using 510 so that they're equity interest can jump ahead of our claims. We contacted for the sale of an asset.

THE COURT: Well --

MR. WOODS: That's the result. That is the net result is -- is that if the court adopts their interpretation then essentially they are jumping ahead --

THE COURT: But the -- but the purpose of it is that -- is that security just don't end up robbing unsecured creditors of value and that you -- you have certain upside risks and certain downside risks and they're distinct from -- from what creditors and the position that they're in. But -- but let me get back to the val -- let me get back to the value thing for a second. So in your view when -- when Mr. Millet says that the seventy million ($70m) is not an appropriate proxy for the value here you disagree and think it is because it's the purchase of the stock itself?

MR. WOODS: Absolutely.

THE COURT: All right.

MR. WOODS: It's -- it's -- absolutely.

THE COURT: Then, then let me ask you about that as to Arcapita he says as to Arcapita its pretty clear that -- that -- that is -- is -- is not value for the parent and therefore that even under the case you rely on you still end

up subordinated down. And so I know the parties have treated these things together but there are some factual distinctions. So what's your -- what's your response on his value point as to Arcapita Bank?

MR. WOODS: Well assuming the seventy million ($70m) never leaves Falcon then I agree with them because it will be eaten up by creditors, claims including ours it would never get to Arcapita so I would agree that at that point. They -- Arcapita besides the fifty million ($50m) they've already received there would now be additional distributions up there. And so our claim wouldn't rely on the equity of -- of -- of excuse me, the -- the equity value going up. Our claim would be under VF Brands which said that our claim because we bought stock that is structurally subordinated in the corporate tree which -- that's our position is you look at the corporate tree that's what debtors counsel -- when the court asks the question under what circumstances could affiliates claim ever be senior to a claim or an interest in the debtor. The court -- the response you got was sometimes it could you have to look at the corporate tree. So we're just asking you look at the corporate tree when you buy a wholly owned subsidiary of the debtor then you are structurally superior to those -- all the claims. You can follow that security, meaning you can go behind it. You can't jump ahead of it, go behind it.

When you go behind it you have a claim against Falcon. You have a claim against Arcapita. You're subor -- under VF Brands you're subordinated to general unsecured but you're not subordinated to equity.

THE COURT: Right but -- but I would have to adopt VF Brands starting point of looking at the unsecured which you will admit is a bit of an out wire compared to other cases that -- that talk about comparing it to -- to not to the unsecured, you use a different starting point, you look at the securities.

MR. WOODS: No, Your Honor, I don't believe it's an outlier --

THE COURT: I mean for Arcapita Bank I'm referring to because what I think you said is that the value analysis that you don't see the seventy million dollars ($70m) going up. And therefore there is no -- there's no value that would make it appropriate to -- to have -- to come before equity in Arcapita Bank, if I'm understanding Mr. --

MR. WOODS: That's correct, Your Honor. But I don't think it's an outlier because again if you look at all the cases that they cite its always someone above the debtor that's buying equity above the debtor trying to jump down into that class. There's nothing that says you can follow -- - that you can't follow you're equity and swim upstream. It's just -- and the -- you say that VF Brands is an outlier

the problem with VF Brands it's the only case that really address this issue. This is the only public -- I mean published opinion that actually address this specific issue is how do you treat claims that arise from a wholly owned subsidiary downstream that are structurally -- structurally senior to the claims and interest above that. And so that's what Judge Walrath was struggling with and we believe she came to the right decision.

THE COURT: Well again there are numerous of these cases that you don't know what the right decision would be on a level without the common stock exception cause the -- the courts apply that and it solves a significant portion of the issues for all these judges. And then there are a couple of circuit decisions that -- and other decisions that address these things only in dicta but tend to be more expansive. So there's -- there's not a whole lot out there that actually grapples with the issue on -- on the terms of making an actual holding.

So for -- for purposes of the Arcapita Bank you don't dispute the debtors sort of value analysis but rather you rely on -- on VF for purposes of the part.

MR. WOODS: That's correct. Your Honor, the last thing I would -- I would suggest to the court, it's in our pleadings but you know I think it is important that this court not interpret the statute to cause observed results.

No one -- it -- Arcapita and its creditors and the Hopper parties they have equity in Falcon. They bore the risk of whether that equity would ever bear any fruit. We -- because we contractually bargained for the purchase of an asset of Falcon, our claims are structurally senior to those claims. And so they want to shift that -- that -- that burden of risk. That's why I'm saying that they're interpretation misuses 510 (b) cause if you look at the -- at the cases they cite they talk about who bore the risk of the equity in Falcon and what's the absolute priority rules. Follow the absolute priority rules. Here our case we contractually bargained for and obtained an agreement to buy an asset of Falcon. The equity in Falcon, which is Arcapita in the Hopper parties they're the ones that bore the risk that it turns out that hey they -- Falcon defrauded us or breached their contract that those claims would stop distributions up to their level.

In this instance what they're -- what they're arguing is interpret that to allow us to you know don't let Tide -- they're saying Tide needs to bear all that risk because they're an equity buyer. Well they're an equity holder. And they're the ones that hold the risk of Falcon.

THE COURT: All right well let me play devil's advocate for a second. Isn't that consistent with the statute that you -- you find sort of what you're similar to

and then you're subordinated to that right? I mean that -- th that's what one -- I think it's the 9 circuit Bap decision with Judge Russell writing it said, "The statute says what it says. You can question its wisdom but it doesn't contemplate the same treatment." And maybe -- maybe the common stock exception is outdated. That it should be more expansive and as a matter of policy I'm sure people in this room could probably write a better statute at this point given the -- the various financial instruments that are out there but at least Judge Russell had a problem with a notion of -- of saying that something that's on the same level with the way 510 (b) operates that -- that it would -- it would -- it would work that way cause the language in the statute doesn't say that way and has that common stock carve out in that one instance where congress thought it was appropriate.

MR. WOODS: Your Honor, and -- but remember Judge Rosa what the -- what he was struggling with was they were -- the claimant in there were seeking double recovery. They had filed a proof of interest in one amount and a proof of claim in another amount. And they wanted to double recovery at the level of equity. And that's what they subordinated.

THE COURT: I -- I don't know about that because he had language in that where -- wherein he reversed the decision saying you know you're entitled to file both. They've said that they one -- one will be credited against

the other so we're going to treat them separately. So I don't know that that was the animating principle of that decision. I think he -- he went on probably as only a trial court Judge would who's sitting in an appellate panel to try to provide some detailed guidance. To -- to address the issue since he was -- had -- should've gotten himself up to speed. So -- so that -- I mean that's my concern is that -- is the statute when sort of treating -- this idea of treating like alike doesn't -- isn't written that way. It -- other than the common stock exception it's really designed to say well if you're alike you go after.

And I -- no academics have debated that hotly as to why that is and what it means and whether it makes any sense at all but that's the way it's written and that's -- I spent -- before I got to the cases I spent a few days just trying to read the statute and figure out what the statute on its own meant and it's quite a bit of a challenge.

MR. WOODS: The -- but we're not alike because again we did not buy equity in -- in Falcon. That's what Hopper did and that's what Arcapita -- we -- we contracted with Falcon that gave us an unsecured creditor. So we are not like them. We could have bought -- we could have just bought Falcon's interest in -- excuse me, Arcapita's equity interest in -- in Falcon. And we could have bought that. We could have bought it from Hopper but we didn't. The

parties contractually negotiated and bargained for a position that was senior to the -- to the interest of Arcapita and the Hopper parties.

And, Your Honor, the -- the -- what -- what really is happening here is they're -- they're trying to profit from the fruits of their own fraud. I mean there's seventy million dollars ($70m) left. The fifty million dollars ($50m) has gone out the door. And there's not much we can do to get that money back but there is seventy million ($70m) there.

THE COURT: Well I -- I have some questions about that. I mean the -- the statute is written in a way that it contemplates the kind of allegations that are made here being subordinated and then it's just a question of the level. So congress made a decision that these fights about stock and shareholders and various things are subordinated and then the questions what the hell does the rest of it mean. So I don't know if you're going to go down that road then congress would have -- would have carved out certain kinds of exceptions based on conduct, not on class or kind. So I don't know that that's going to get you very far. I think the idea of comparing what -- comparing the different interest is -- is -- is what you've spent a lot of time on and as Mr. Millet is the right way to go because I don't -- I don't know that I have that kind of authority the way

congress is -- you know they were certainly aware of fraud allegations and rescission, all sorts of stuff that -- that you know if you're making those allegations you think you've been wronged.

MR. WOODS: The only reason I bring that up, Your Honor is because you have to decide between two interpretations. If you decide our interpretation then you avoid those observed results and that -- and that's why I brought it up. And -- and -- and our interpretation is the only one that gives full effect to the entire statute and all the language and recognizes as congress did, is there could be a scenario when affiliates claim -- or claims arising from a sale of an affiliate there's going to be an allowed claim. And it's going to be senior to claims and other interests. When is that scenario? That scenario can only be when you buy a wholly owned subsidiary of the debtor. And if you don't agree with that then what you're interpreting the statute to mean and what congress meant was I want to disallow all claims from all cells involving affiliates except for a common stock exception. Which just does not -- it leads to observed results and it just doesn't make sense why congress would prefer common stock over other interest. Thank you, Your Honor.

THE COURT: Thank you.

MR. WOODS: Your Honor, can I have 30 seconds to

ask my partner one question?

THE COURT: Sure, absolutely.

MR. WOODS: Your Honor, in answer your question and maybe simplify this hearing, we withdraw our objection to the Arcapita plan treatment.

THE COURT: All right. All right --

MR. WOODS: So we're just focused on the Falcon --

THE COURT: Thank you, that does clarify -- clarify things a little bit cause it's a different analysis.

MR. WOODS: Thank you, Your Honor.

THE COURT: Thank you. I appreciate pragmat -- pragmatism where I can find it.

MR. MILLET: Seeing if Ms. Weiner was back yet. Your Honor, Craig Millet again for the -- for the debtor. That will make my comments more brief in light of the withdrawal of the issues as to Arcapita Bank.

There is one thing that is very important that I clear up. At the outset of Mr. Wood's arguments he made comments that Tide is the only party in class 8. Which disturbs me a little bit in that Thronson (Phonetic) is not in class 8. We filed objections to the Thronson claims because they had basically duplicated claims and claimed priority in a variety of things. We don't dispute that they have claims we dispute the amount that they claim and that will get worked out. We also objected to Tide's claim.

Tide's claim in the plan is in class 10 (a), not in 8 (a). We entered into a voting stipulation that this court approved pursuant to an order. The voting stipulation expressly provides for purposes of voting only. Tide will be in class 8 (a). And then it went on to recite a litany of words about how this is not admitting that it's in class 8 (a), everybody reserves their rights and all that jazz.

But we did not put them in class 8(a) as Mr. Woods claims. They are not the only party in class 8(a). They currently are in class 10 (a) and will only move from that if this court makes a decision on the subordination matter to put them someplace other than 10 (a).

THE COURT: So you gave them the benefit of the doubt in terms of this argument for purposes of voting on the plan?

MR. MILLET: Exactly, so it is not at all correct to say that they are in class 8 or that they are the only party in class 8 or that they're in class 8 (a) at all because they will not go to class 8 (a) unless this court puts them there.

Now if this court were to put them there the court has the -- this court would be effecting the rights of the Thronson parties who's claims are based upon common stock of Falcon not LLC membership interest in Nortex it will be changing. So you can't simply do that. It would require

the creation of some new class that we don't currently have that would give rise to confirmation issues potentially because of course for voting purposes Tide has voted no. So if you put them in some class we could have a problem with a rejecting class that would cram down in a variety of other issues. So simply creating classes is -- sounds nice perhaps on its face but it has a lot more ramifications and therefore is unsupported by the authorities. There's no cases that have really done that. And I don't believe that you know that Mr. Woods been able to cite to any of his brief while we're here before the court. So we stand on our position that creating a new class at Falcon or anywhere else is -- is not appropriate.

Passing over my bank comments now. Mr. Woods focused a great deal on congressional intent on doing what congress intended and giving them the benefit of their bargain and what they bargain for and they said they bargain for a structurally senior position of sale of course but nobody even addressed that they bargained to buy some LLC interest and that was it.

But Mr. Woods never tied -- tied, T I E D, his -- his arguments to a specific case with the authority. He strictly said this is the result that the court should impose because it is -- it gives rise to the purpose of the statute. But in their papers Tide said that National Farm

was the correct analysis to follow and that it gave meaning to every aspect of the statute. And yet he's rejected National Farm now and said we should do something different instead of looking at what value the Nortex Security still represents to Falcon.

And also there is discussion whether in every case there would always be subordinated interest here when you deal with an affiliate, perhaps not so. Falcon could have sold 20 percent of the interest of Nortex to someone who could have then had a claim, Falcon would have of course then still retained 80 percent and the Nortex stock or Nortex LLC membership interest that the Falcon (Unintelligible) would have represented value following the National Farm. And (Unintelligible) therefore would have still been something left in that case so it's not every case but even if it is our position is that's unfortunately what the statute says because it says suborning it to anything equal to the case law have recognized that, Geneva Steel recognized that, USA Commercial recognized that and by the way we don't admit that it was necessarily an oversight of congress. I don't know why congress limited the common stock. Judge Russell said and we quoted that in our papers, that Judge Russell noted it was a commercial. That don't know why this was done. But we have not admitted that it was an oversight in any way, shape or form. It was strictly

a quote from the (Unintelligible) said USA Commercial.

To argue that there is some specific right to the seventy million dollars ($70m) there was arguing for the imposition of the constructive trust or a lien or some special interest in that fund that has not been provided by any case law and certainly not by 510 (b).

THE COURT: Well let me ask a practicing question about the seventy million ($70m). On the merits of the case in -- in front of Judge Wood I'm having some -- and maybe there's an easy answer to this that I haven't seen. If she decides that its property of the debtors estate then you go through this analysis in terms of where the money is distributed, right? And but in which case she is likely to if I understand correctly have rejected the merits of the underlying litigation.

MR. MILLET: Perhaps, not necessarily.

THE COURT: Not necessarily. Well I guess not necessarily. But I mean conversely if -- if -- if she -- if she sides with Tide then she will have said the seventy million dollars ($70m) is -- is likely not part of the debtors estate. And this will all be moot. So I'm -- I'm -- I'm sort of wondering whether in fact that we're going to have a serious mootness problem if we ever had a meris (Phonetic) decision on it but I guess it doesn't matter anyway.

MR. MILLET: True, Your Honor, there's -- there's a claim of fraud in the inducement and if its somehow proven that Tide was excused both -- excused from releasing the money from escrow and that the money had not already passed to the estate, to it was titled that -- and Falcon had not occurred, in that case the money could go directly solely to Tide in that instance. But if the court gets past that it could still address whether it was simple fraud or whether it was a breach of contract. In which case that simply represents a claim at this -- at this courts level that this court will then resolve and as the court quickly observed fraud or no fraud congress has recognized these just as claims without some sort of moral difference between them and how they're treated in bankruptcy.

So in that instance it could come to this court without necessarily resolving all of the issues in that -- in that sense.

The last point I'll make, Your Honor, is the comments about the VF case and whether the comments like exception can be used to move up or move down the level of interest. And -- and I respectively submit that the court there are just simply got it wrong. If -- if the court even really analyzed how to use the common stock exception.

The Geneva Steel case which the 10th Circuit case cited in our reply brief, spoke as to what that -- the

effect of the common stock exception laws and I've said in 1984 congress amended the statute to make clear that fraud claims springing from the purchase or sale of common stock are created on the same level as common stock. Springing from the same level as common stock. All other claims are subordinative to their underlying security. So it's -- it's a saver clause if you will, it keeps it up. It's not something used to push down.

THE COURT: All right.

MR. MILLET: With that, unless the court has any further questions --

THE COURT: I -- I do not, thank you.

MR. WOODS: The 80 20 split that wouldn't change the effect you just have two claimants. We -- both the 80 and the 20 would be subordinated to the equity of Falcon and -- and receive no distribution so if you interpret the statute the way they wanted the court is going to be interpreting the statute to say all claims arising from sales of affiliates at -- securities are disallowed except common stock exception. Common stocks are the only ones that are going to be preserved. Everything else is not subordinated but disallowed. Even on the 80 20 split it wouldn't -- if I -- if I have 20 and there's another creditor with 80 that creditor would also be super subordinated according to them. And they would also be

behind equity. And there's nothing behind equity, always. If you put us behind equity once we -- we will always be disallowed. And so that -- so our interpretation is the only interpretation that gives full effect to all the language in (Unintelligible). Thank you, Your Honor.

THE COURT: Thank you. All right anyone else wish to be heard? All right well thank you for agreeing to take this subordination piece a day early. I think it'll make the confirmation hearing which I'm sure will have its own -- own issues to address a little more efficient so I'm going to take the matter under advisement and I appreciate the helpful papers and arguments folks. And I do reserve the right to ask a follow up question tomorrow if I -- if I have -- have an epiphany that something that I had not asked today. All right anything else that we need to do today? I assume we need to circle back on the financing issue. I -- I was happy to hear if parties had worked something out but if they haven't I really made what I thought was a ruling and I'll -- I'll stick by it which is that I'll -- I'll grant the interim financing today and then the only question is the scheduling for the --

UNIDENTIFIED SPEAKER: May it please the court I'd like to mention just one thing and I apologize for this. My sons graduating high school tomorrow so I won't be here. I just wanted to explain to the court that I -- I'm not absent

from lack of interest but I --

THE COURT: You should be there.

UNIDENTIFIED SPEAKER: My colleagues will -- will carry on and I thank the court for its time today.

THE COURT: As -- as somebody who had a son graduate this year as well you -- you definitely should be there that's a moment in life you don't want to miss. And I will suspect that you will remember missing that and -- and you might not remember being here on your death bed you -- you never want to have to say your regret is that you should have spent more time at work that's --

UNIDENTIFIED SPEAKER: My wife has promised that she would remind daily if --

THE COURT: All right.

UNIDENTIFIED SPEAKER: I will remember it when you ask me, I'll remember it.

THE COURT: That's true. I guess it's all a matter of one's perspective. But no congratulations to your son. Where's he going to college?

UNIDENTIFIED SPEAKER: He's going to go to Cal Poly San Luis Obispo and he informed me just about a year ago he wants to be a lawyer which was quite a shock.

THE COURT: All right awesome. My -- my oldest is -- is decided he's not going to follow in the legal tradition so -- so. Congratulations

MR. WILLIAMS: Good afternoon, Your Honor, apologize we were not able to locate Captain Honey's counsel.

THE COURT: All right well then what I'm go to do --

MR. WILLIAMS: I if I could --

THE COURT: Sure.

MR. WILLIAMS: -- indulge -- I do think -- well we talked with Captain Honey's counsel outside and Captain Honey's counsel was of the view that Wednesday was too tight for them and it was going to -- and it was -- they were going to continue their objections. So what I -- I think after talking with the DIP lenders and with the committee I think we had some productive discussions and what we'd like to do to avoid this issue you know on appeal to the extent that Captain Honey does determine to appeal and the like but I -- I think where we are is we get the interim order entered today given the fact that we filed the credit agreement on the 6th if we could schedule a hearing on or around the 20th that would obviate the 14 day issue altogether and then we can set objection deadlines 7 days prior to the hearing date.

THE COURT: All right well there -- there a couple wrinkles in that. One is I'm assuming if you're doing that that you don't have a problem with the 14 as a date because

you had a maturity issue right?

MR. WILLIAMS: Well what we would do, Your Honor, we still on the interim basis give in everything we've got going on. We would still draw down the entire amount so we'd be able to deal with the maturity issue.

THE COURT: All right. The other is -- is something that's not something you can fix. I'm actually camping on an Island in Lake George on the 20th. And it's a tradition that I started when I was in the US Attorney's office because the only way to actually be away was to go to an island. And have no modern conveniences so I've continued the tradition. I -- I certainly can fit you in shortly after that and I'm looking at the calendar now and think that the 24th, which is the Monday which should be the first day to be available would -- would -- I can squeeze you in then if that works.

MR. WILLIAMS: It works for the debtors, Your Honor if could just discuss with --

THE COURT: Certainly.

MR. WILLIAMS: We think that works, Your Honor.

THE COURT: All right so what I'd like to do is schedule that in the afternoon at 2:00 and if you would send out a notice -- well I guess the -- the order can -- can do the trick but just in an abundance of caution I think probably a separate notice to say that there's going to be a

hearing on the -- on the final approval of the financing for the 24th at 2:00 and just give me one moment.

MR. WILLIAMS: Sure.

THE COURT: I just wanted to make sure that there was not matter that I was overlooking and setting that date. All right and if you get me the interim order today I will -- I will sign it and get it in today.

MR. WILLIAMS: Yes, Your Honor I believe we have black lines and on a disk as well so we'll hand that into chambers.

THE COURT: All right.

MR. WILLIAMS: Thank you, Your Honor.

THE COURT: Anything else we should discuss this afternoon? All right then I'll see you all tomorrow. Thank you.

MULTIPLE SPEAKERS: Thank you, Your Honor.

(Whereupon Proceedings Concluded At 1:56 P.M.)

C E R T I F I C A T I O N

I, Lee M. Sapp, Certify That The Foregoing Transcript Is A True And Accurate Record Of The Proceedings.

Lee M Sapp

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Aaert Certified Electronic Transcriber Cet**D-596

Veritext
200 Old Country Road
Suite 580
Mineola, Ny 11501

Date: March 14, 2013

Exhibit B

INVESTMENT AGENCY AGREEMENT

dated 13 June 2013

between

GOLDMAN SACHS INTERNATIONAL
as Investment Agent

that

ARCAPITA INVESTMENT HOLDINGS LIMITED
as the DIP Purchaser

and

GOLDMAN SACHS INTERNATIONAL
as Arranger

and

THE PARTICIPANTS
(as defined herein)

DIFC, Building 1, Level 3
PO Box 506698
Dubai

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THIS AGREEMENT is dated 13 June 2013 and made between:

(1) **GOLDMAN SACHS INTERNATIONAL** as investment agent of the Participants (the "**Investment Agent**");

(2) **ARCAPITA INVESTMENT HOLDINGS LIMITED** (the "**DIP Purchaser**");

(3) **THE ENTITIES LISTED IN PART 1 OF SCHEDULE 1** as guarantors (the "**Original Guarantors**");

(4) **GOLDMAN SACHS INTERNATIONAL** as arranger (the "**Arranger**");

(5) **THE INSTITUTIONS SET OUT IN PART 2 SCHEDULE 1** as Participants (the "**Original Participants**"); and

(6) **GOLDMAN SACHS INTERNATIONAL** as security agent of the Secured Parties (the "**Security Agent**").

IT IS AGREED as follows:

1. DEFINITIONS, INTERPRETATION AND OBLIGOR'S AGENT

1.1 Definitions

In this Agreement, capitalised terms and expressions used but not defined shall, unless a contrary indication appears, have the meanings given to them in the Murabaha Facility Agreement and:

"**Additional Profit Portion**" in relation to a Participant and a payment of Additional Profit, that Participant's Percentage of that payment of Additional Profit.

"**Agent**" means the Investment Agent and the Security Agent.

"**Assignment Agreement**" means an agreement substantially in the form set out in Schedule 4 (*Form of Assignment Agreement*) or any other form agreed between the relevant assignor and assignee.

"**Confidential Information**" means all information relating to the Purchaser, the Group, the Finance Documents or the Facility (including, without limitation, the existence of the Finance Documents, the transactions contemplated by the Finance Documents and the parties thereto) of which a Finance Party becomes aware in its capacity as, or for the purpose of becoming, a Finance Party or which is received by a Finance Party in relation to, or for the purpose of becoming a Finance Party under, the Finance Documents or the Facility from either:

(a) any member of the Group or any of its advisers; or

(b) another Finance Party, if the information was obtained by that Finance Party directly or indirectly from any member of the Group or any of its advisers,

in whatever form, and includes information given orally and any document, electronic file or any other way of representing or recording information which contains or is derived or copied from such information but excludes information that:

(i) is or becomes public information other than as a direct or indirect result of any breach by that Finance Party of Clause 27.2 (*Confidentiality*);

(ii) is identified in writing at the time of delivery as non-confidential by any member of the Group or any of its advisers; or

(iii) is known by that Finance Party before the date the information is disclosed to it in accordance with paragraph (a) or (b) above or is lawfully obtained by that Finance Party after that date, from a source which is, as far as that Finance Party is aware, unconnected with the Group and which, in either case, as far as that Finance Party is aware, has not been obtained in breach of, and is not otherwise subject to, any obligation of confidentiality.

"**Confidentiality Undertaking**" means a confidentiality undertaking substantially in a recommended form of the LMA or in any other form agreed between the Purchaser and the Investment Agent.

"**Contribution**" means, in relation to a proposed Purchase Contract, each amount contributed or to be contributed by a Participant pursuant to Clause 6 (*Contributions*) (prior to the deduction of that Participant's applicable Additional Profit Portion), such amount being equal to that Participant's Percentage of the relevant Cost Price.

"**Contribution Notice**" means a notice substantially in the form set out in Schedule 2 (*Form of Contribution Notice*).

"**Delegate**" means any delegate, agent, attorney or co-trustee appointed by the Security Agent.

"**Defaulting Participant**" means any Participant:

(a) which has failed to make its participation in a Contribution available or has notified the Investment Agent that it will not make its participation in a Contribution available by the Specified Time for that Contribution in accordance with Clause 6.2 (Payment of Contributions);

(b) which has otherwise rescinded or repudiated a Finance Document; or

(c) with respect to which an Insolvency Event has occurred and is continuing,

unless, in the case of paragraph (a) above:

(i) the failure to make the participation in the Contribution is caused by:

(A) an administrative or technical error; or

(B) a Disruption Event; and

payment is made available within five (5) Business Days of its due date; or

(ii) the Participant is disputing in good faith whether it is contractually obliged to make the participation in question available.

"**Designated Account**" means, in relation to a proposed Purchase Contract, the account into which each Participant shall pay its Contribution, the details of which shall be specified by the Investment Agent in the relevant Contribution Notice.

"**Disruption Event**" means either or both of:

(a) a material disruption to those payment or communications systems or to those financial markets which are, in each case, required to operate in order for payments to be made in connection with the Facility (or otherwise in order for the transactions

contemplated by the Finance Documents to be carried out) which disruption is not caused by, and is beyond the control of, any of the Parties; or

(b) the occurrence of any other event which results in a disruption (of a technical or systems-related nature) to the treasury or payments operations of a Party preventing that, or any other Party:

(i) from performing its payment obligations under the Finance Documents; or

(ii) from communicating with other Parties in accordance with the terms of the Finance Documents,

and which (in either case) is not caused by, and is beyond the control of, the Party whose operations are disrupted.

"**Facility Commitment**" means:

(a) in relation to the Original Participant, the amount in Dollars set opposite its name under the heading "Facility Commitment" in Schedule 1 (*The Original Participants*); and

(b) in relation to any other Participant, the amount in Dollars of any Facility Commitment transferred to it under this Agreement,

as increased and to the extent not cancelled, reduced or transferred by it under the Finance Documents.

"**Facility Office**" means the office or offices notified by a Participant to the Investment Agent in writing on or before the date it becomes a Participant (or, following that date, by not less than five Business Days' written notice) as the office or offices through which it will perform its obligations under this Agreement.

"**LMA**" means the Loan Market Association.

"**Illegality Event**" mean, in relation to a Participant, it becoming unlawful in any applicable jurisdiction for the Participant to perform any of its obligations as contemplated by the Finance Documents or to fund, issue or maintain its Contribution in any Purchase Contract.

"**Impaired Agent**" means the Investment Agent at any time when:

(a) it has failed to make (or has notified a Party that it will not make) a payment required to be made by it under the Finance Documents by the due date for payment;

(b) the Investment Agent otherwise rescinds or repudiates a Finance Document; or

(c) an Insolvency Event has occurred and is continuing with respect to the Investment Agent;

unless, in the case of paragraph (a) above:

(d) its failure to pay is caused by:

(i) administrative or technical error; or

(ii) a Disruption Event; and

payment is made within 3 Business Days of its due date; or

(iii) the Investment Agent is disputing in good faith whether it is contractually obliged to make the payment in question.

"Insolvency Event" in relation to a Finance Party means that the Finance Party:

(a) is dissolved (other than pursuant to a consolidation, amalgamation or merger);

(b) becomes insolvent or is unable to pay its debts or fails or admits in writing its inability generally to pay its debts as they become due;

(c) makes a general assignment, arrangement or composition with or for the benefit of its creditors;

(d) institutes or has instituted against it, by a regulator, supervisor or any similar official with primary insolvency, rehabilitative or regulatory jurisdiction over it in the jurisdiction of its incorporation or organisation or the jurisdiction of its head or home office, a proceeding seeking a judgment of insolvency or bankruptcy or any other relief under any bankruptcy or insolvency law or other similar law affecting creditors' rights, or a petition is presented for its winding-up or liquidation by it or such regulator, supervisor or similar official;

(e) has instituted against it a proceeding seeking a judgment of insolvency or bankruptcy or any other relief under any bankruptcy or insolvency law or other similar law affecting creditors' rights, or a petition is presented for its winding-up or liquidation, and, in the case of any such proceeding or petition instituted or presented against it, such proceeding or petition is instituted or presented by a person or entity not described in paragraph (d) above and:

(i) results in a judgment of insolvency or bankruptcy or the entry of an order for relief or the making of an order for its winding-up or liquidation; or

(ii) is not dismissed, discharged, stayed or restrained in each case within 30 days of the institution or presentation thereof;

(f) has exercised in respect of it one or more of the stabilisation powers pursuant to Part 1 of the Banking Act 2009 and/or has instituted against it a bank insolvency proceeding pursuant to Part 2 of the Banking Act 2009 or a bank administration proceeding pursuant to Part 3 of the Banking Act 2009;

(g) has a resolution passed for its winding-up, official management or liquidation (other than pursuant to a consolidation, amalgamation or merger);

(h) seeks or becomes subject to the appointment of an administrator, provisional liquidator, conservator, receiver, trustee, custodian or other similar official for it or for all or substantially all its assets;

(i) has a secured party take possession of all or substantially all its assets or has a distress, execution, attachment, sequestration or other legal process levied, enforced or sued on or against all or substantially all its assets and such secured party maintains possession, or any such process is not dismissed, discharged, stayed or restrained, in each case within 30 days thereafter;

(j) causes or is subject to any event with respect to it which, under the applicable laws of any jurisdiction, has an analogous effect to any of the events specified in paragraphs (a) to (i) above; or

(k) takes any action in furtherance of, or indicating its consent to, approval of, or acquiescence in, any of the foregoing acts.

"**Majority Participants**" means a Participant or Participants whose Commitments aggregate more than 66 $^{2}/_{3}$% of the Total Commitments (or, if the Total Commitments have been reduced to zero, aggregated more than 66 $^{2}/_{3}$% of the Total Commitments immediately prior to the reduction).

"**Murabaha Facility Agreement**" means the superpriority debtor-in-possession and exit facility master murabaha facility agreement dated on or about the date of this Agreement entered into by, amongst others, the Purchaser, the Guarantors and the Investment Agent for and on behalf of the Participants.

"**Obligors' Agent**" means the Parent, appointed to act on behalf of each Obligor in relation to the Finance Documents pursuant to Clause 1.4 (*Obligors' Agent*).

"**Participant**" means:

(a) any Original Participant; or

(b) any bank, financial institution, trust, fund or other entity which has become a Participant in accordance with Clause 16 (*Changes to the Participants*),

which in each case has not ceased to be a Party in accordance with the terms of the Finance Documents.

"**Participation**" means at any time, in relation to a Participant and save as otherwise provided in this Agreement, the aggregate amount of the Contributions actually made by it under this Agreement at such time, as the same may be increased or decreased by assignments or transfers and prepayments in accordance with the terms of the Finance Documents.

"**Participation Purchase Transaction**" means, in relation to a person, a transaction where such person purchases by way of assignment or transfer any Facility Commitment, Participation or amount outstanding under the Murabaha Facility Agreement other than any assignment or transfer which occurs pursuant to the primary syndication of the Facility.

"**Party**" means a party to this Agreement.

"**Percentage**" means, in relation to a Participant, the percentage set opposite its name under the heading "Percentage" in Schedule 1 (*The Original Participant*) as amended from time to time to reflect the proportion borne by its Facility Commitment to the Total Commitments.

"**Receiver**" means a receiver or receiver and manager or administrative receiver of the whole or any part of the Charged Property.

"**Related Fund**" in relation to a fund (the "**first fund**"), means a fund which is managed or advised by the same investment manager or investment adviser as the first fund or, if it is managed by a different investment manager or investment adviser, a fund whose investment manager or investment adviser is an Affiliate of the investment manager or investment adviser of the first fund.

"**Remittance**" means:

(a) the Deferred Sale Price in relation to any Purchase Contract; and/or

(b) any other amount paid or owing under a Finance Document by an Obligor and remitted to the Investment Agent,

for onward payment to the Participants pursuant to this Agreement.

"**Representative**" means any delegate, agent, manager, administrator, nominee, attorney, trustee or custodian.

"**Secured Obligations**" means all present and future moneys, debts and liabilities due, owing or incurred from time to time by any Obligor to any Secured Party under or in connection with any Finance Document (in each case, whether alone or jointly, or jointly and severally, with any other person, whether actually or contingently, and whether as principal, surety or otherwise).

"**Secured Parties**" means each Finance Party and any Receiver or Delegate.

"**Specified Time**" means a time determined in accordance with Schedule 5 (*Timetables*).

"**Super Majority Participants**" means a Participant or Participants whose Commitments aggregate more than 85% of the Total Commitments (or, if the Total Commitments have been reduced to zero, aggregated more than 85% of the Total Commitments immediately prior to the reduction).

"**Total Commitments**" means the aggregate of the Facility Commitments, being U.S.$175,000,000 at the date of this Agreement, and as increased or decreased pursuant to the terms of the Finance Documents, including as described in Clause 5.4 (*Increase of Facility Commitments*).

"**Transfer Certificate**" means a certificate substantially in the form set out in Schedule 3 (*Form of Transfer Certificate*) or any other form agreed between the Investment Agent and the Purchaser.

"**Transfer Date**" means, in relation to an assignment or a transfer, the later of:

(a) the proposed Transfer Date specified in the relevant Assignment Agreement or Transfer Certificate; and

(b) the date on which the Investment Agent executes the relevant Assignment Agreement or Transfer Certificate.

"**US Tax Obligor**" means:

(a) the Purchaser, to the extent it is resident for tax purposes in the United States of America; or

(b) an Obligor some or all of whose payments under the Finance Documents are from sources within the United States for US federal income tax purposes.

1.2 **Construction**

Clause 1.2 (*Construction*) of the Murabaha Facility Agreement applies to this Agreement as though it were set out in full in this Agreement.

1.3 **Third party rights**

Unless expressly provided to the contrary in this Agreement, a person who is not a Party has no right under the Contracts (Rights of Third Parties) Act 1999 to enforce or to enjoy the benefit of any term of this Agreement.

1.4 **Obligors' Agent**

(a) Each Obligor (other than the Parent) by its execution of this Agreement or an Accession Letter irrevocably appoints the Parent (acting through one or more authorised signatories) to act on its behalf as its agent in relation to the Finance Documents and irrevocably authorises:

(i) the Parent on its behalf to supply all information concerning itself contemplated by this Agreement to the Finance Parties and to give all notices and instructions (excluding, in the case of the Purchaser, Transaction Requests), to execute on its behalf any Accession Letter, to make such agreements and to effect the relevant amendments, supplements and variations capable of being given, made or effected by any Obligor notwithstanding that they may affect the Obligor, without further reference to or the consent of that Obligor; and

(ii) each Finance Party to give any notice, demand or other communication to that Obligor pursuant to the Finance Documents to the Parent,

and in each case the Obligor shall be bound as though the Obligor itself had given the notices and instructions (excluding, in the case of the Purchaser, any Transaction Requests) or executed or made the agreements or effected the amendments, supplements or variations, or received the relevant notice, demand or other communication.

(b) Every act, omission, agreement, undertaking, settlement, waiver, amendment, supplement, variation, notice or other communication given or made by the Obligors' Agent or given to the Obligors' Agent under any Finance Document on behalf of another Obligor or in connection with any Finance Document (whether or not known to any other Obligor and whether occurring before or after such other Obligor became an Obligor under any Finance Document) shall be binding for all purposes on that Obligor as if that Obligor had expressly made, given or concurred with it. In the event of any conflict between any notices or other communications of the Obligors' Agent and any other Obligor, those of the Obligors' Agent shall prevail.

2. APPOINTMENT OF THE INVESTMENT AGENT

(a) In consideration of the payment by the Participants of a fee of U.S.$100 (the receipt and adequacy of which the Investment Agent hereby acknowledges), each Participant irrevocably:

(i) appoints the Investment Agent to enter into the Finance Documents (other than this Agreement) as its agent on its behalf and to act as its agent under and in connection with the Finance Documents; and

(ii) authorises the Investment Agent to exercise the rights, powers, authorities and discretions specifically given to the Investment Agent under or in connection with the Finance Documents together with any other incidental rights, powers, authorities and discretions.

(b) The Investment Agent hereby accepts its appointment.

3. FINANCE PARTIES' RIGHTS AND OBLIGATIONS

3.1 Obligations several

The obligations of each Finance Party under the Finance Documents are several. Failure by a Finance Party to perform its obligations under the Finance Documents does not affect the obligations of any other Party under the Finance Documents. No Finance Party is responsible for the obligations of any other Finance Party under the Finance Documents.

3.2 Separate and independent rights

The rights of each Finance Party under or in connection with the Finance Documents are separate and independent rights and any amount due under the Finance Documents to a Finance Party from the Purchaser shall be a separate and independent payment obligation.

3.3 Separate enforcement

A Finance Party may, except as otherwise stated in the Finance Documents, separately enforce its rights under the Finance Documents and it shall not be necessary for the Investment Agent or the Participants (as the case may be) to be joined as an additional party in any proceedings for its purpose.

4. CONDITIONS PRECEDENT

4.1 Initial Conditions Precedent

(a) The Investment Agent shall notify each Participant promptly when it has received all of the documents and other evidence listed in Schedule 1 Part 1 (*Initial Conditions precedent documents*) of the Murabaha Facility Agreement in form and substance satisfactory to it.

(b) No Participant shall be obliged to perform its obligations under Clause 5 (*Contributions*) in relation to the Initial DIP Purchase Contract unless it has received a notice from the Investment Agent in accordance with paragraph (a) above.

4.2 Exit Conversion Date Conditions Precedent

(a) The Investment Agent shall notify each Participant promptly when it has received all of the documents and other evidence listed in Schedule 1 Part 2 (*Conditions precedent to Exit Conversion Date*) of the Murabaha Facility Agreement in form and substance satisfactory to it.

(b) No Participant shall be obliged to perform its obligations under Clause 5 (*Contributions*) in relation to the Initial Exit Purchase Contract unless it has received a notice from the Investment Agent in accordance with paragraph (a) above.

5. CONVERSION TO EXIT FACILITY

5.1 Plan of reorganization

Pursuant to the Plan of Reorganization and upon the effective date thereof, the Exit Purchaser shall have purchased or otherwise acquired substantially all of the assets of AIHL.

5.2 Exit Facility Option

In the event that AIHL exercises the Exit Facility Option and upon:

(a) the execution and delivery by AIHL and the Exit Purchaser of an accession, assumption and novation agreement in form and substance reasonably satisfactory to the Investment Agent (the "**Accession and Novation Agreement**"); and

(b) the satisfaction (or waiver in accordance with the terms of the Finance Documents) of the other conditions precedent set forth in clause 2.4(c) of the Murabaha Facility Agreement,

(i) each of (x) AIHL and (y) the Investment Agent, the Security Agent and the Participants shall be released from further obligations towards one another under this Agreement and the other Finance Documents and their respective rights against one another shall be cancelled (being the "**Discharged Rights and Obligations**" and AIHL shall cease to be the Purchaser under the Finance Documents);

(ii) each of (x) the Exit Purchaser and (y) the Investment Agent, the Security Agent and the Participants shall, by novation, assume obligations towards one another and/or acquire rights against one another which differ from the Discharged Rights and Obligations only insofar as the Exit Purchaser and the Investment Agent, the Security Agent and the Participants shall have assumed and/or acquired the same respective obligations and rights in place of and the Investment Agent, the Security Agent and the Participants; and the Exit Purchaser shall become a party to the applicable Finance Documents as the "**Purchaser**";

(iii) the Investment Agent, the Security Agent and the Participants shall retain the same rights and obligations among themselves as they would have, had the Exit Purchaser at all times been the Purchaser; and

(iv) on and following the Exit Conversion Date the defined term "**Purchaser**", shall be construed to refer to the Exit Purchaser, in accordance with the provisions of this clause 5.2.

5.3 **Further Assurance**

Each of AIHL, the Exit Purchaser, the Investment Agent, the Security Agent and the Participants shall take such actions and execute and deliver such agreements, instruments or other documents (at the sole cost and expense of the Exit Purchaser) as the Investment Agent may reasonably request and solely as are necessary to give effect to the provisions of this clause 5 including amending or amending and restating any of the Finance Documents to remove those provisions that apply solely to the period prior to the Exit Conversion Date; provided, however that the consent of, or other action by, any of the Participants or Agents is not a condition precedent to the effectiveness of the Accession and Novation Agreement and the provisions of clause 5.

5.4 **Increase of Facility Commitments**

Each Participant acknowledges that, subject to the terms and conditions of the Murabaha Facility Agreement, on the Exit Conversion Date, the Facility Limit shall increase by US$175,000,000 and each Participant agrees that, in relation to such increase, each Participant's Facility Commitment shall be increased *pro rata* so that the Total Commitments equal the Facility Limit on the Exit Conversion Date.

6. CONTRIBUTIONS

6.1 Delivery of a Contribution Notice

(a) Subject to paragraph (c) below, upon receipt by the Investment Agent of a duly completed Transaction Request from the Purchaser and provided the conditions set out in Clause 3.2 (*Conditions precedent to each Purchase*) of the Murabaha Facility Agreement have been satisfied, the Investment Agent shall deliver to each Participant a Contribution Notice by the Specified Time (other than in relation to the Initial DIP Purchase Contract and, if the Transaction Date of the Initial Exit Purchase Contract falls on the Exit Conversion Date, the Initial Exit Purchase Contract, in which case the Investment Agent shall deliver to each Participant a Contribution Notice at such time as agreed between the Investment Agent and each Participant).

(b) Each Contribution Notice delivered to a Participant in accordance with paragraph (a) above shall notify that Participant of:

(i) the proposed Cost Price;

(ii) the proposed Transaction Date;

(iii) the type of Commodities to be purchased;

(iv) the proposed Deferred Payment Date;

(v) the amount of that Participant's required Contribution (which, in the case of the Initial Exit Purchase Contract if the Transaction Date of such Initial Exit Purchase Contract falls on a Deferred Payment Date, shall take into account any netting of payments relating to the Cost Price element of the maturing Deferred Sale Price pursuant to the Netting Letter); and

(vi) in case of the Initial DIP Purchase Contract and the Initial Exit Purchase Contract, the amount of that Participant's Additional Profit Portion.

(vii) the details of the Designated Account.

(c) If amounts due to the Purchaser in respect of an on sale of Commodities purchased pursuant to a proposed Subsequent Purchase Contract (other than the Initial Exit Purchase Contract if the proposed Transaction Date falls on a Deferred Payment Date) are to be netted off against the Deferred Sale Price of a maturing Purchase Contract in accordance with the terms of the Netting Letter:

(i) the Investment Agent shall notify each Participant accordingly and disclose its Percentage of the Profit Amount payable by the Purchaser; and

(ii) a Contribution Notice in respect of the proposed Purchase Contract shall not be required.

6.2 Payment of Contribution

(a) Upon receipt of a Contribution Notice in accordance with Clause 6.1 (*Delivery of a Contribution Notice*), each Participant shall make its Contribution (less its Additional Profit Portion, if applicable) available to the Investment Agent for value in Dollars in the Designated Account by the Specified Time (other than in relation to the Initial DIP Contract and, if the Transaction Date of the Initial Exit Purchase Contract falls on the Exit Conversion Date, the Initial Exit Purchase Contract, in which case each Participant shall make its Contribution available to the Investment Agent on the

Transaction Date at such time as agreed between the Investment Agent and each Participant).

(b) Each Participant's obligation to make its Contribution is unconditional where the Investment Agent is obliged to pay the relevant Cost Price under the Murabaha Facility Agreement.

(c) The Investment Agent shall be entitled to assume that each Participant has provided its Contribution in accordance with paragraph (a) above and may (but shall not have any obligation, to the extent it has not received any Contribution from a Participant) in relation to a proposed Purchase Contract, purchase Commodities in accordance with clause 5.2 (*Purchase of Commodities by Investment Agent*) of the Murabaha Facility Agreement in reliance on that assumption.

6.3 **Non-payment of Contribution**

(a) If a Participant fails to pay its Contribution in accordance with Clause 6.2 (*Payment of Contribution*), the Investment Agent shall:

(i) promptly notify the Purchaser and each other Participant;

(ii) purchase a reduced amount of Commodities from the Seller for an amount equal to the aggregate of the Contributions actually received from the Participants in respect of the proposed Purchase Contract; and

(iii) reduce the Deferred Sale Price accordingly and notify the Purchaser and the other Participants of the revised amount.

(b) The Investment Agent shall not be liable nor will it assume any responsibility for the obligations of the Participant that has failed to pay its Contribution.

(c) The Purchaser shall have no recourse to the Investment Agent or the Participants which have complied with their obligations under Clause 6.2 (*Payment of Contribution*) in respect of the obligations of the defaulting Participant.

7. COMMODITIES

7.1 **Confirmation of purchase**

(a) Upon completion of the purchase of the Commodities from the Seller, the Investment Agent shall, in relation to the relevant Purchase Contract, notify each Participant of the purchase of the Commodities, the Transaction Date and the Deferred Payment Date.

(b) The Investment Agent shall, on the request of a Participant, supply such additional information in relation to the purchased Commodities as is available to it and reasonably required by that Participant in order to enable it to determine the Commodity Tax treatment applicable to the purchased Commodities.

7.2 **Documentation**

(a) Upon receipt by the Investment Agent of the certificate or other documents evidencing title to the Commodities, the Investment Agent shall, in relation to a Purchase Contract, hold its interest in the Commodities for and on behalf of the Participants in accordance with their Percentages.

(b) The Investment Agent shall not be responsible for any loss incurred in connection with the possession, deposit or access to any document relating to the Commodities unless such loss arose directly as a result of the gross negligence or wilful default of the Investment Agent.

7.3 **Disclaimer**

The Investment Agent gives no warranty, guarantee, representation or covenant, whether express or implied, arising by law or otherwise in respect of the Commodities. Any such warranty, guarantee, representation or covenant is expressly excluded to the extent permitted by law.

8. REMITTANCES

8.1 **Payments of Remittance**

(a) Upon payment of its Contribution, each Participant shall be entitled to receive its Percentage of the Remittance in accordance with the terms of this Agreement.

(b) Subject to this Clause 8 and Clause 21.4 (*Clawback*), in relation to each Purchase Contract, the Investment Agent shall pay to each Participant its Percentage of the Remittance as soon as practicable after receipt of the Deferred Sale Price (or other amount paid or owing under a Finance Document) from the Purchaser for the account of each Participant's Facility Office, as applicable.

(c) If amounts due to the Purchaser in respect of an on sale of Commodities purchased pursuant to a proposed Purchase Contract are netted off against the Deferred Sale Price of a maturing Purchase Contract in accordance with the Netting Letter, the Investment Agent shall pay to each Participant, in respect of the maturing Purchase Contract, its Percentage of the Profit Amount and the amount (if any) by which the Cost Price of the proposed Purchase Contract is less than the Cost Price of the maturing Purchase Contract as soon as practicable after receipt of such amounts for the account of each Participant's Facility Office.

(d) If amounts due to the Purchaser in respect of an on sale of Commodities pursuant to the Initial DIP Purchase Contract or the Initial Exit Purchase Contract are netted off against any Additional Profit in accordance with the Netting Letter, each Participant acknowledges that it shall not be entitled to receive its portion of that Additional Profit.

(e) In relation to any Remittance which constitutes a Deferred Sale Price in relation to which the Profit Amount was calculated in accordance with clause 18.7(b) (*Market Disruption*) of the Murabaha Agreement, the Investment Agent shall pay to each Participant its Percentage of the Cost Price element of that Remittance and its share of the Profit Amount in accordance with the rate supplied by that Participant pursuant to such clause as soon as possible after receipt from the Purchaser for the account of each Participant's Facility Office.

8.2 **Limited recourse**

(a) The obligation of the Investment Agent to pay a Participant its Percentage of the Remittance in accordance with Clause 8.1 (*Payments of Remittance*) is conditional upon the Investment Agent having established to its satisfaction that:

(i) the Participant has paid its corresponding Contribution in accordance with Clause 6.2 (*Payment of Contribution*); and

(ii) it has received the corresponding Deferred Sale Price from the Purchaser in accordance with the Murabaha Facility Agreement and is entitled to apply that amount in accordance with this Agreement.

(b) No Participant shall have recourse to the Investment Agent if the Investment Agent does not receive the Deferred Sale Price in respect of a Purchase Contract in accordance with the Murabaha Facility Agreement.

9. PREPAYMENT AND CANCELLATION

9.1 Illegality

If it becomes unlawful in any applicable jurisdiction for a Participant to perform any of its obligations as contemplated by the Finance Documents or to fund or maintain its Contribution in any Purchase Contract, that Participant shall promptly notify the Investment Agent upon becoming aware of that event and the provisions set out in Clause 9.1 (*Illegality*) of the Murabaha Facility Agreement shall apply.

9.2 Mandatory prepayment: take-out financing, net sale proceeds

Upon receipt of a notice from the Purchaser under Clause 9.4(c) (*Proceeds*) of the Murabaha Facility Agreement, the Investment Agent shall promptly notify the Participants and the applicable provisions of Clause 9.4 (*Proceeds*) to Clause 9.10 (*Restrictions*) of the Murabaha Facility Agreement shall apply.

9.3 Voluntary prepayment

(a) Upon receipt of a notice from the Purchaser under Clause 9.2(a) (*Voluntary Prepayment and Facility Limit Reduction*) of the Murabaha Facility Agreement, the Investment Agent shall promptly notify the Participants and the applicable provisions of Clause 9.2(a) (*Voluntary Prepayment and Facility Limit Reduction*) to clause 9.10 (*Restrictions*) of the Murabaha Facility Agreement shall apply.

(b) The Investment Agent may not agree a reduced notice period under paragraph (a) of Clause 9.2(a) (*Voluntary Prepayment and Facility Limit Reduction*) of the Murabaha Facility Agreement without the consent of the Majority Participants.

9.4 Voluntary reduction

(a) Upon receipt of a notice from the Purchaser under Clause 9.2(c) (*Voluntary Prepayment and Facility Limit Reduction*) of the Murabaha Facility Agreement:

(i) the Investment Agent shall promptly notify the Participants; and

(ii) the applicable provisions of Clauses 9.2 (*Voluntary Prepayment and Facility Limit Reduction*) to Clause 9.10 (*Restrictions*) of the Murabaha Facility Agreement shall apply.

(b) The Investment Agent may not agree a reduced notice period under clause 9.2(c) (*Voluntary Prepayment and Facility Limit Reduction*) of the Murabaha Facility Agreement without the consent of the Majority Participants.

(c) Any cancellation under Clause 9.2(c) (*Voluntary Prepayment and Facility Limit Reduction*) of the Murabaha Facility Agreement shall reduce the Facility Commitments of the Participants rateably.

9.5 **Right of replacement or repayment and cancellation in relation to a FATCA Protected Participant**

The Parties will comply with the obligations expressed to be assumed by them pursuant to clause 9.9 (*Right of replacement or repayment and cancellation in relation to a FATCA Protected Participant*) of the Murabaha Facility Agreement.

9.6 **Cancellation of Facility Commitments**

(a) The Facility Commitments (or a portion of the Total Commitments) shall be cancelled at the times and in the circumstances specified in Clause 2.1 (*Facility*), Clause 9.1(a) (*Illegality*), Clause 9.8 (*Reduction of Facility Limit and administration fee*) and Clause 16.25 (*Acceleration*) of the Murabaha Facility Agreement.

(b) No amount of the Facility Commitments cancelled under the Murabaha Facility Agreement may be subsequently reinstated.

10. PROFIT AMOUNT

10.1 **Market disruption**

(a) Each Participant may notify the Investment Agent before 5.00pm in London on the Quotation Day that the cost to it of obtaining matching deposits in the London interbank market would be in excess of LIBOR.

(b) If a Market Disruption Event occurs in relation to a proposed Purchase Contract, the provisions of Clause 18.7 (*Market disruption*) of the Murabaha Facility Agreement shall apply.

11. TAX GROSS UP AND FATCA

11.1 **Notification of Purchaser Tax Deduction**

The Investment Agent shall promptly upon becoming aware that the Purchaser must make a Tax Deduction (or that there is a change in the rate or the basis of a Tax Deduction) notify the Participants and the Purchaser accordingly. Similarly, a Participant shall notify the Investment Agent on becoming so aware in respect of a payment payable to that Participant. If the Investment Agent receives such notification from a Participant it shall notify the Purchaser.

11.2 **FATCA Information**

(a) Subject to paragraph (c) below, each Party shall, within ten Business Days of a reasonable request by another Party:

(i) confirm to that other Party whether it is:

(A) a FATCA Exempt Party; or

(B) not a FATCA Exempt Party; and

(ii) supply to that other Party such forms, documentation and other information relating to its status under FATCA (including its applicable "passthru payment percentage" or other information required under the US Treasury Regulations or other official guidance including intergovernmental agreements) as that other Party reasonably requests for the purposes of that other Party's compliance with FATCA.

(b) If a Party confirms to another Party pursuant to (a)(i) above that it is a FATCA Exempt Party and it subsequently becomes aware that it is not, or has ceased to be a FATCA Exempt Party, that Party shall notify that other Party reasonably promptly.

(c) Paragraph (a) above shall not oblige any Finance Party to do anything which would or might in its reasonable opinion constitute a breach of:

(i) any law or regulation;

(ii) any fiduciary duty; or

(iii) any duty of confidentiality.

(d) If a Party fails to confirm its status or to supply forms, documentation or other information requested in accordance with paragraph (a) above (including, for the avoidance of doubt, where paragraph (c) above applies), then:

(i) if that Party failed to confirm whether it is (and/or remains) a FATCA Exempt Party then such Party shall be treated for the purposes of the Finance Documents as if it is not a FATCA Exempt Party; and

(ii) if that Party failed to confirm its applicable "passthru payment percentage" then such Party shall be treated for the purposes of the Finance Documents (and payments made thereunder) as if its applicable "passthru payment percentage" is 100%,

until (in each case) such time as the Party in question provides the requested confirmation, forms, documentation or other information.

(e) If the Purchaser is a US Tax Obligor, or where the Investment Agent reasonably believes that its obligations under FATCA require it, each Participant shall, within ten Business Days of:

(i) where the Purchaser is a US Tax Obligor and the relevant Participant is an Original Participant, the date of this Agreement;

(ii) where the Purchaser is a US Tax Obligor and the relevant Participant is a New Participant, the relevant Transfer Date;

(iii) to the extent the Exit Purchaser is a US Tax Obligor, the Exit Conversion Date;

(iv) where the Purchaser is not a US Tax Obligor, the date of a request from the Investment Agent,

supply to the Investment Agent:

(A) a withholding certificate on Form W-8 or Form W-9 (or any successor form) (as applicable); and

(B) any withholding statement and other documentation, authorisations and waivers as the Investment Agent may require to certify or establish the status of such Participant under FATCA.

The Investment Agent shall provide any withholding certificate, withholding statement, documentation, authorisations and waivers it receives from a Participant pursuant to this paragraph (e) to the Purchaser and shall be entitled to rely on any

such withholding certificate, withholding statement, documentation, authorisations and waivers provided without further verification. The Investment Agent shall not be liable for any action taken by it under or in connection with this paragraph (e).

(f) Each Participant agrees that if any withholding certificate, withholding statement, documentation, authorisations and waivers provided to the Investment Agent pursuant to paragraph (e) above is or becomes materially inaccurate or incomplete, it shall promptly update such withholding certificate, withholding statement, documentation, authorisations and waivers or promptly notify the Investment Agent in writing of its legal inability to do so. The Investment Agent shall provide any such updated withholding certificate, withholding statement, documentation, authorisations and waivers to the Purchaser. The Investment Agent shall not be liable for any action reasonably taken by it under or in connection with this paragraph (f).

11.3 **FATCA Deduction**

(a) Each Party may make any FATCA Deduction it is required to make by FATCA, and any payment required in connection with that FATCA Deduction, and no Party shall be required to increase any payment under the Finance Documents in respect of which it makes such a FATCA Deduction or otherwise compensate the recipient of the payment for that FATCA Deduction.

(b) Each Party shall promptly, upon becoming aware that it must make a FATCA Deduction (or that there is any change in the rate or the basis of such FATCA Deduction) notify the Party to whom it is making the payment and, in addition, shall notify the Purchaser, the Investment Agent and the other Finance Parties.

12. INCREASED COSTS

(a) A Finance Party intending to make a claim pursuant to Clause 18.5 (*Increased costs*) of the Murabaha Facility Agreement shall notify the Investment Agent of the event giving rise to the claim.

(b) Each Finance Party shall, as soon as practicable after a demand by the Investment Agent, provide a certificate confirming the amount of its Increased Costs.

(c) If a Deferred Sale Price is increased to reflect any Increased Cost incurred by a Finance Party, that increase in the Deferred Sale Price shall be for the account of the Finance Party that has incurred that Increased Cost.

13. MITIGATION BY THE FINANCE PARTIES

Each Finance Party shall comply with the obligations expressed to be assumed by it under Clause 10 (*Mitigation*) of Murabaha Facility Agreement).

14. "KNOW YOUR CUSTOMER" CHECKS

Each Finance Party shall comply with the obligations expressed to be assumed by it under Clause 13.11(b) (*"Know your customer" checks*) of the Murabaha Agreement).

15. EVENTS OF DEFAULT

On and at any time after the occurrence of an Event of Default which is continuing, the Investment Agent shall exercise its rights set out in Clause 16.24 (*Acceleration*) of the Murabaha Facility Agreement in accordance with the instructions of the Majority Participants.

16. CHANGES TO THE PARTICIPANTS

16.1 Assignments and transfers by the Participants

Subject to this Clause 16, a Participant (the "**Existing Participant**") may:

(a) assign any of its rights; or

(b) transfer by novation any of its rights and obligations,

on a Deferred Payment Date (or at any time if an Event of Default is continuing) to another bank or financial institution or to a trust, fund or other entity which is regularly engaged in or established for the purpose of making, purchasing or investing in Purchase Contracts, securities or other financial assets (the "**New Participant**").

16.2 Conditions of assignment or transfer

(a) The consent of the Purchaser is not required for an assignment or transfer by an Existing Participant. The consent of the Investment Agent is required for an assignment or transfer by an Existing Participant, unless the assignment or transfer is to another Participant or an Affiliate of a Participant or a Related Fund of a Participant.

(b) An assignment will only be effective on:

(i) receipt by the Investment Agent (whether in the Assignment Agreement or otherwise) of written confirmation from the New Participant (in form and substance satisfactory to the Investment Agent) that the New Participant will assume the same obligations to the other Finance Parties as it would have been under if it was an Original Participant; and

(ii) performance by the Investment Agent of all necessary "know your customer" or other similar checks under all applicable laws and regulations in relation to such assignment to a New Participant, the completion of which the Investment Agent shall promptly notify to the Existing Participant and the New Participant.

(c) A transfer will only be effective if the procedure set out in Clause 16.5 (*Procedure for transfer*) is complied with.

(d) If:

(i) a Participant assigns or transfers any of its rights and obligations under the Finance Documents or changes its Facility Office; and

(ii) as a result of circumstances existing at the date the assignment, transfer or change occurs, the Purchaser would be obliged to pay a Tax Payment or an Increased Cost,

then the Purchaser need only pay that Tax Payment or Increased Cost to the same extent that it would have been obliged to if no assignment, transfer or change had occurred.

(e) Each New Participant, by executing the relevant Transfer Certificate or Assignment Agreement, confirms, for the avoidance of doubt, that the Investment Agent has authority to execute on its behalf any amendment or waiver that has been approved by or on behalf of the requisite Participant or Participants in accordance with this

Agreement on or prior to the date on which the transfer or assignment becomes effective in accordance with this Agreement and that it is bound by that decision to the same extent as the Existing Participant would have been had it remained a Participant.

(f) Any assignment or transfer must relate to a minimum amount of $2,500,000 of Facility Commitment and, following any assignment or transfer (other than an assignment or transfer of all the Existing Participant's Facility Commitment and Participation), the Facility Commitment of the Existing Participant must be no less than $2,500,000.

16.3 **Assignment or transfer fee**

The New Participant shall, on the date upon which an assignment or transfer takes effect, pay to the Investment Agent (for its own account) a fee of U.S.$2,000.

16.4 **Limitation of responsibility of Existing Participants**

(a) Unless expressly agreed to the contrary, an Existing Participant makes no representation or warranty and assumes no responsibility to a New Participant for:

(i) the legality, validity, effectiveness, adequacy or enforceability of the Finance Documents or any other documents;

(ii) the financial condition of the Obligors;

(iii) the performance and observance by the Obligors of their obligations under the Finance Documents or any other documents;

(iv) the Shari'ah compliance of the Finance Documents and the transactions contemplated thereby; or

(v) the accuracy of any statements (whether written or oral) made in or in connection with any Finance Document or any other document,

and any representations or warranties implied by law are excluded.

(b) Each New Participant confirms to the Existing Participant and the other Finance Parties that it:

(i) has made (and shall continue to make) its own independent investigation and assessment of the financial condition and affairs of the Obligors and its related entities in connection with its participation in this Agreement and has not relied exclusively on any information provided to it by the Existing Participant in connection with any Finance Document; and

(ii) will continue to make its own independent appraisal of the creditworthiness of the Obligors and its related entities whilst any amount is or may be outstanding under the Finance Documents or any Participation is in force.

(c) Nothing in any Finance Document obliges an Existing Participant to:

(i) accept a re-transfer or re-assignment from a New Participant of any of the rights and obligations assigned or transferred under this Clause 16; or

(ii) support any losses directly or indirectly incurred by the New Participant by reason of the non-performance by the Purchaser of its obligations under the Finance Documents or otherwise.

16.5 **Procedure for transfer**

(a) Subject to the conditions set out in Clause 16.2 (*Conditions of assignment or transfer*) a transfer is effected in accordance with paragraph (c) below when the Investment Agent executes an otherwise duly completed Transfer Certificate delivered to it by the Existing Participant and the New Participant. The Investment Agent shall, subject to paragraph (b) below, as soon as reasonably practicable after receipt by it of a duly completed Transfer Certificate appearing on its face to comply with the terms of this Agreement and delivered in accordance with the terms of this Agreement, execute that Transfer Certificate.

(b) The Investment Agent shall only be obliged to execute a Transfer Certificate delivered to it by the Existing Participant and the New Participant once it is satisfied it has complied with all necessary "know your customer" or other similar checks under all applicable laws and regulations in relation to the transfer to such New Participant.

(c) On the Transfer Date:

(i) to the extent that in the Transfer Certificate the Existing Participant seeks to transfer by novation its rights and obligations under the Finance Documents each of the Obligors and the Existing Participant shall be released from further obligations towards one another under the Finance Documents and their respective rights against one another under the Finance Documents shall be cancelled (being the "**Discharged Rights and Obligations**");

(ii) each of the Purchaser and the New Participant shall assume obligations towards one another and/or acquire rights against one another which differ from the Discharged Rights and Obligations only insofar as the Purchaser and the New Participant have assumed and/or acquired the same in place of the Purchaser and the Existing Participant;

(iii) the Investment Agent, the Arranger, the New Participant and other Participants shall acquire the same rights and assume the same obligations between themselves as they would have acquired and assumed had the New Participant been an Original Participant with the rights and/or obligations acquired or assumed by it as a result of the transfer and to that extent the Investment Agent, the Arranger and the Existing Participant shall each be released from further obligations to each other under the Finance Documents; and

(iv) the New Participant shall become a Party as a "Participant".

16.6 **Procedure for assignment**

(a) Subject to the conditions set out in Clause 16.2 (*Conditions of assignment or transfer*) an assignment may be effected in accordance with paragraph (c) below when the Investment Agent executes an otherwise duly completed Assignment Agreement delivered to it by the Existing Participant and the New Participant. The Investment Agent shall, subject to paragraph (b) below, as soon as reasonably practicable after receipt by it of a duly completed Assignment Agreement appearing on its face to comply with the terms of this Agreement and delivered in accordance with the terms of this Agreement, execute that Assignment Agreement.

(b) The Investment Agent shall only be obliged to execute an Assignment Agreement delivered to it by the Existing Participant and the New Participant once it is satisfied it has complied with all necessary "know your customer" or other similar checks under all applicable laws and regulations in relation to the assignment to such New Participant.

(c) On the Transfer Date:

(i) the Existing Participant will assign absolutely to the New Participant the rights under the Finance Documents expressed to be the subject of the assignment in the Assignment Agreement;

(ii) the Existing Participant will be released by the Obligors and the other Finance Parties from the obligations owed by it (the "**Relevant Obligations**") and expressed to be the subject of the release in the Assignment Agreement; and

(iii) the New Participant shall become a Party as a "Participant" and will be bound by obligations equivalent to the Relevant Obligations.

(d) Participants may utilise procedures other than those set out in this Clause 16.6 to assign their rights under the Finance Documents (but not unless in accordance with Clause 16.5 (*Procedure for transfer*), to obtain a release by the Obligors from the obligations owed to the Obligors by the Participants nor the assumption of equivalent obligations by a New Participant) **provided that** they comply with the conditions set out in Clause 16.2 (*Conditions of assignment or transfer*).

16.7 **Copy of Transfer Certificate or Assignment Agreement to Purchaser**

The Investment Agent shall, as soon as reasonably practicable after it has executed a Transfer Certificate or an Assignment Agreement, send to the Purchaser a copy of that Transfer Certificate or Assignment Agreement.

16.8 **Security over Participants' rights**

In addition to the other rights provided to Participants under this Clause 16, each Participant may without consulting with or obtaining consent from the Obligors, at any time charge, assign or otherwise create Security in or over (whether by way of collateral or otherwise) all or any of its rights under any Finance Document to secure obligations of that Participant including, without limitation:

(a) any charge, assignment or other Security to secure obligations to a federal reserve or central bank; and

(b) in the case of any Participant which is a fund, any charge, assignment or other Security granted to any holders (or trustee or representatives of holders) of obligations owed, or securities issued, by that Participant as security for those obligations or securities,

except that no such charge, assignment or Security shall:

(i) release a Participant from any of its obligations under the Finance Documents or substitute the beneficiary of the relevant charge, assignment or Security for the Participant as a party to any of the Finance Documents; or

(ii) require any payments to be made by the Obligors other than or in excess of, or grant to any person any more extensive rights than, those required to be made or granted to the relevant Participant under the Finance Documents.

16.9 **Participation Purchase Transaction**

The Purchaser shall not (and shall procure that none of its Affiliates will) enter into any Participation Purchase Transaction.

16.10 **Evidence of Contributions; Register; Participants' Books and Records.**

(a) *Participants' Evidence of Contributions.* Each Participant shall maintain on its internal records an account or accounts evidencing the obligations of the Purchaser to such Participant, including the amounts of the Contributions made by it and each payment and prepayment in respect thereof. Any such recordation shall be conclusive and binding on the Obligors, absent manifest error or omission; provided, that the parties agree that any such errors or omissions shall be permitted to be corrected in the Register; and provided further, in the event of any inconsistency between the Register and any Participant's records, the recordations in the Register shall govern.

(b) *Register.* The Investment Agent (or its agent or sub-agent appointed by it) shall maintain at its principal office a register for the recordation of the names and addresses of Participants and the Facility Commitments and Participations of each Participant from time to time (the "**Register**"). The Register shall be available for inspection by the Purchaser or any Participant (with respect to (i) any entry relating to such Participant's Contributions and (ii) the identity of the other Participant's (but not any information with respect to such other Participants' Contributions) at any reasonable time and from time to time upon reasonable prior notice. The Investment Agent shall record, or shall cause to be recorded, in the Register the Facility Commitments and the Contributions (as they may be transferred or assigned in accordance with the provisions of this Clause 16, and each payment or prepayment in respect of the principal amount of the Contributions, and any such recordation shall be conclusive and binding on the Purchaser and each Participant, absent manifest error or omission; provided, that the parties agree that any such errors or omissions shall be permitted to be corrected in the Register. The Purchaser hereby designates the Investment Agent (or its agent or sub-agent appointed by it) to serve as the Purchaser's agent solely for purposes of maintaining the Register as provided in this Clause 16.10(b).

17. ROLE OF INVESTMENT AGENT AND THE ARRANGER

17.1 **Duties of the Investment Agent**

(a) Subject to paragraph (b) below, the Investment Agent shall promptly forward to a Party the original or a copy of any document which is delivered to the Investment Agent for that Party by any other Party.

(b) Without prejudice to Clause 16.7 (*Copy of Transfer Certificate or Assignment Agreement to Purchaser*), paragraph (a) above shall not apply to any Transfer Certificate or to any Assignment Agreement.

(c) Except where a Finance Document specifically provides otherwise, the Investment Agent is not obliged to review or check the adequacy, accuracy or completeness of any document it forwards to another Party.

(d) If the Investment Agent receives notice from a Party referring to a Finance Document, describing a Default, it shall promptly notify the Finance Parties.

(e) If the Investment Agent is aware of the non-payment of any amount payable to a Participant under this Agreement it shall promptly notify the other Participants.

(f) The Investment Agent's duties under the Finance Documents are solely mechanical and administrative in nature.

17.2 **Role of the Arranger**

Except as specifically provided in the Finance Documents, the Arranger has no obligations of any kind to any other Party under or in connection with the Finance Documents.

17.3 **No fiduciary duties**

(a) Nothing in the Finance Documents constitutes the Investment Agent or the Arranger as a trustee or fiduciary of any other person.

(b) Neither the Investment Agent nor the Arranger shall be bound to account to any Participant for any sum or the profit element of any sum received by it for its own account.

17.4 **Business with the Group**

The Investment Agent and the Arranger may generally engage in any kind of banking or other business with any member of the Group.

17.5 **Rights and discretions of the Investment Agent**

(a) The Investment Agent may rely on:

(i) any representation, notice or document believed by it to be genuine, correct and appropriately authorised; and

(ii) any statement made by a director, authorised signatory or employee of any person regarding any matters which may reasonably be assumed to be within his knowledge or within his power to verify.

(b) The Investment Agent may assume (unless it has received notice to the contrary in its capacity as agent for the Participants) that:

(i) no Default has occurred (unless it has actual knowledge of a Default arising under Clause 16.1 (*Non-payment*) of the Murabaha Facility Agreement); and

(ii) any right, power, authority or discretion vested in any Party or the Majority Participants or Super Majority Participants has not been exercised.

(c) The Investment Agent may engage, pay for and rely on the advice or services of any lawyers, accountants, surveyors or other experts.

(d) The Investment Agent may act in relation to the Finance Documents through its personnel and agents.

(e) Subject to the terms of each Finance Document, the Investment Agent may disclose to any other Party any information it reasonably believes it has received as agent under this Agreement.

(f) Notwithstanding any other provision of any Finance Document to the contrary, neither the Investment Agent nor the Arranger is obliged to do or omit to do anything if it would or might in its reasonable opinion constitute a breach of any law or regulation, a breach of any Shari'ah principle or a breach of a fiduciary duty or duty of confidentiality.

(g) The Investment Agent may not disclose to any Finance Party any details of the rate notified to the Investment Agent by any Participant or the identity of any such Participant for the purpose of Clause 18.7 (*Market Disruption*) of the Murabaha Facility Agreement

17.6 **Majority Participants' instructions**

(a) Unless a contrary indication appears in a Finance Document, the Investment Agent shall (i) exercise any right, power, authority or discretion vested in it as Investment Agent in accordance with any instructions given to it by the Majority Participants (or, if so instructed by the Majority Participants, refrain from exercising any right, power, authority or discretion vested in it as Investment Agent) and (ii) not be liable for any act (or omission) if it acts (or refrains from taking any action) in accordance with an instruction of the Majority Participants.

(b) Unless a contrary indication appears in a Finance Document, any instructions given by the Majority Participants will be binding on all the Finance Parties.

(c) The Investment Agent may refrain from acting in accordance with the instructions of the Majority Participants (or, if appropriate, the Participants) until it has received such security as it may require for any actual cost, loss or liability (together with any associated VAT) which it may incur in complying with the instructions.

(d) In the absence of instructions from the Majority Participants (or, if appropriate, the Participants), the Investment Agent may act (or refrain from taking action) as it considers to be in the best interest of the Participants.

(e) The Investment Agent is not authorised to act on behalf of a Participant (without first obtaining that Participant's consent) in any legal or arbitration proceedings relating to any Finance Document.

17.7 **Responsibility for documentation**

Neither the Investment Agent nor the Arranger is responsible for:

(a) the adequacy, accuracy and/or completeness of any information (whether oral or written) supplied by the Investment Agent, the Arranger, the Purchaser or any other person given in or in connection with any Finance Document;

(b) the legality, validity, effectiveness, adequacy or enforceability of any Finance Document or any other agreement, arrangement or document entered into, made or executed in anticipation of or in connection with any Finance Document; or

(c) any determination as to whether any information provided or to be provided to any Finance Party is non-public information the use of which may be regulated or prohibited by applicable law or regulation relating to insider dealing or otherwise.

17.8 **Exclusion of liability**

(a) Without limiting paragraph (b) below and without prejudice to the provisions of paragraph (e) of Clause 21.13 (*Disruption to payment systems etc.*), the Investment Agent will not be liable for any action taken by it under or in connection with any Finance Document, unless directly caused by its gross negligence or wilful misconduct.

(b) No Party (other than the Investment Agent) may take any proceedings against any officer, employee or agent of the Investment Agent in respect of any claim it might

have against the Investment Agent or in respect of any act or omission of any kind by that officer, employee or agent in relation to any Finance Document and any officer, employee or agent of the Investment Agent may rely on this Clause.

(c) The Investment Agent will not be liable for any delay (or any related consequences) in crediting an account with an amount required under the Finance Documents to be paid by the Investment Agent if the Investment Agent has taken all necessary steps as soon as reasonably practicable to comply with the regulations or operating procedures of any recognised clearing or settlement system used by the Investment Agent for that purpose.

(d) Nothing in this Agreement shall oblige the Investment Agent or the Arranger to carry out any "know your customer" or other checks in relation to any person on behalf of any Participant and each Participant confirms to the Investment Agent or the Arranger that it is solely responsible for any such checks it is required to carry out and that it may not rely on any statement in relation to such checks made by the Investment Agent or the Arranger.

17.9 **Participants' Indemnity to the Investment Agent**

Each Participant shall (in proportion to its Percentage or, if the Total Commitments are then zero, to its Percentage immediately prior to their reduction to zero) indemnify the Investment Agent, within three Business Days of demand, against any cost, loss or liability incurred by the Investment Agent (otherwise than by reason of the Investment Agent's gross negligence or wilful misconduct) (or, in the case of any cost, loss or liability pursuant to Clause 21.13 (*Disruptions to payment systems etc.*), notwithstanding the Investment Agent's negligence, gross negligence or any other category of liability whatsoever but not including any claim based on the fraud of the Investment Agent) in acting as Investment Agent under the Finance Documents (unless the Investment Agent has been reimbursed by the Purchaser pursuant to a Finance Document).

17.10 **Resignation of the Investment Agent**

(a) The Investment Agent may resign and appoint one of its Affiliates as successor by giving notice to the other Finance Parties and the Purchaser.

(b) Alternatively the Investment Agent may resign by giving 30 days' notice to the other Finance Parties and the Purchaser, in which case the Majority Participants (with the approval of the Purchaser (not to be unreasonably withheld or delayed) may appoint a successor Investment Agent.

(c) If the Majority Participants have not appointed a successor Investment Agent in accordance with paragraph (b) above within 20 days after notice of resignation was given, the retiring Investment Agent (after consultation with the Purchaser) may appoint a successor Investment Agent.

(d) The retiring Investment Agent shall, at its own cost, make available to the successor Investment Agent such documents and records and provide such assistance as the successor Investment Agent may reasonably request for the purposes of performing its functions as Investment Agent under the Finance Documents.

(e) The Investment Agent's resignation notice shall only take effect upon the appointment of a successor.

(f) Upon the appointment of a successor, the retiring Investment Agent shall be discharged from any further obligation in respect of the Finance Documents but shall

remain entitled to the benefit of this Clause 17. Its successor and each of the other Parties shall have the same rights and obligations amongst themselves as they would have had if such successor had been an original Party.

(g) After consultation with the Purchaser, the Majority Participants may, by notice to the Investment Agent, require it to resign in accordance with paragraph (b) above. In this event, the Investment Agent shall resign in accordance with paragraph (b) above.

(h) The Investment Agent shall resign in accordance with paragraph (b) above (and, to the extent applicable, shall use reasonable endeavours to appoint a successor Investment Agent pursuant to paragraph (c) above) if on or after the date which is three months before the earliest FATCA Application Date relating to any payment to the Investment Agent under the Finance Documents, either:

(i) the Investment Agent fails to respond to a request under Clause 11.2 (*FATCA Information*) and a Participant reasonably believes that the Investment Agent will not be (or will have ceased to be) a FATCA Exempt Party on or after that FATCA Application Date;

(ii) the information supplied by the Investment Agent pursuant to Clause 11.2 (*FATCA Information*) indicates that the Investment Agent will not be (or will have ceased to be) a FATCA Exempt Party on or after that FATCA Application Date; or

(iii) the Investment Agent notifies the Purchaser and the Participants that the Investment Agent will not be (or will have ceased to be) a FATCA Exempt Party on or after that FATCA Application Date;

and (in each case) the Purchaser or a Participant reasonably believes that a Party will be required to make a FATCA Deduction that would not be required if the Investment Agent were a FATCA Exempt Party, and the Purchaser or that Participant, by notice to the Investment Agent, requires it to resign.

17.11 **Replacement of the Investment Agent**

(a) With the consent of the Purchaser (not to be unreasonably withheld or delayed), the Majority Participants may, by giving 30 days' notice to the Investment Agent (or, at any time the Investment Agent is an Impaired Agent, by giving any shorter notice determined by the Majority Participants) replace the Investment Agent by appointing a successor Investment Agent.

(b) The retiring Investment Agent shall (at its own cost if it is an Impaired Agent and otherwise at the expense of the Participants) make available to the successor Investment Agent such documents and records and provide such assistance as the successor Investment Agent may reasonably request for the purposes of performing its functions as Investment Agent under the Finance Documents.

(c) The appointment of the successor Investment Agent shall take effect on the date specified in the notice from the Majority Participants to the retiring Investment Agent. As from this date, the retiring Investment Agent shall be discharged from any further obligation in respect of the Finance Documents but shall remain entitled to the benefit of this Clause 17 (and the retiring Investment Agent shall be entitled to its agency fee up to (and such fees shall be payable on) that date).

(d) Any successor Investment Agent and each of the other Parties shall have the same rights and obligations amongst themselves as they would have had if such successor had been an original Party.

17.12 **Confidentiality**

(a) In acting as investment agent for the Participants, the Investment Agent shall be regarded as acting through its agency division which shall be treated as a separate entity from any other of its divisions or departments.

(b) If information is received by another division or department of the Investment Agent, it may be treated as confidential to that division or department and the Investment Agent shall not be deemed to have notice of it.

17.13 **Relationship with the Participants**

(a) The Investment Agent may treat the person shown in its records as Participant at the opening of business (in the place of the Investment Agent's principal office as notified to the Finance Parties from time to time) as the Participant acting through its Facility Office:

(i) entitled to or liable for any payment due under any Finance Document on that day; and

(ii) entitled to receive and act upon any notice, request, document or communication or make any decision or determination under any Finance Document made or delivered on that day,

unless it has received not less than five Business Days' prior notice from that Participant to the contrary in accordance with the terms of this Agreement.

(b) Each Participant shall supply the Investment Agent with any information required by the Investment Agent to calculate the Mandatory Cost in accordance with the Murabaha Facility Agreement.

(c) Any Participant may by notice to the Investment Agent appoint a person to receive on its behalf all notices, communications, information and documents to be made or despatched to that Participant under the Finance Documents. Such notice shall contain the address, fax number and (where communication by electronic mail or other electronic means is permitted under Clause 23.6 (*Electronic communication*)) electronic mail address and/or any other information required to enable the sending and receipt of information by that means (and, in each case, the department or officer, if any, for whose attention communication is to be made) and be treated as a notification of a substitute address, fax number, electronic mail address, department and officer by that Participant for the purposes of Clause 23.2 (*Addresses*) and paragraph (a)(iii) of Clause 23.6 (*Electronic communication*) and the Investment Agent shall be entitled to treat such person as the person entitled to receive all such notices, communications, information and documents as though that person were that Participant.

17.14 **Investment Agent's management time**

Any amount payable to the Investment Agent under Clauses 18 (*Indemnities*) and 17.2 (*Expenses*) of the Murabaha Facility Agreement and Clause 17.9 (*Participants' Indemnity to the Investment Agent*) shall include the cost of utilising the Investment Agent's management time or other resources and will be calculated on the basis of such reasonable daily or hourly

rates as the Investment Agent may notify to the Participants and the Purchaser, and is in addition to any other fee paid or payable to the Investment Agent.

17.15 **Credit appraisal by the Participants**

Without affecting the responsibility of any Obligor for information supplied by it or on its behalf in connection with any Finance Document, each Participant confirms to the Investment Agent and the Arranger that it has been, and will continue to be, solely responsible for making its own independent appraisal and investigation of all risks arising under or in connection with any Finance Document including but not limited to:

(a) the financial condition, status and nature of each member of the Group;

(b) the legality, validity, effectiveness, adequacy or enforceability of any Finance Document and any other agreement, arrangement or document entered into, made or executed in anticipation of, under or in connection with any Finance Document;

(c) whether that Participant has recourse, and the nature and extent of that recourse, against any Party or any of its respective assets under or in connection with any Finance Document, the transactions contemplated by the Finance Documents or any other agreement, arrangement or document entered into, made or executed in anticipation of, under or in connection with any Finance Document; and

(d) the adequacy, accuracy and/or completeness of any information provided by the Investment Agent, any Party or by any other person under or in connection with any Finance Document, the transactions contemplated by the Finance Documents or any other agreement, arrangement or document entered into, made or executed in anticipation of, under or in connection with any Finance Document.

17.16 **Shari'ah compliance**

(a) Each Participant and the Purchaser confirms that it has not relied upon any representation made by the Investment Agent as to the Shari'ah compliance of the transactions contemplated by this Agreement and the other Finance Documents.

(b) Each Participant and the Purchaser acknowledge that the Finance Documents and the transactions contemplated by them have been pronounced compliant with the principles of Shari'ah by a Shari'ah adviser approved by the Purchaser and it has not and will not dispute or contest such pronouncement or seek to otherwise challenge the validity or enforceability of any Finance Document on the basis of non-compliance with the principles of Shari'ah.

17.17 **Deduction from amounts payable by the Investment Agent**

If any Party owes an amount to the Investment Agent under the Finance Documents the Investment Agent may, after giving notice to that Party, deduct an amount not exceeding that amount from any payment to that Party which the Investment Agent would otherwise be obliged to make under the Finance Documents and apply the amount deducted in or towards satisfaction of the amount owed. For the purposes of the Finance Documents that Party shall be regarded as having received any amount so deducted.

18. CONDUCT OF BUSINESS BY THE FINANCE PARTIES

No provision of this Agreement will:

(a) interfere with the right of any Finance Party to arrange its affairs (tax or otherwise) in whatever manner it thinks fit;

(b) oblige any Finance Party to investigate or claim any credit, relief, remission or repayment available to it or the extent, order and manner of any claim; or

(c) oblige any Finance Party to disclose any information relating to its affairs (tax or otherwise) or any computations in respect of Tax.

19. ROLE OF THE SECURITY AGENT

19.1 Appointment of the Security Agent

(a) Each other Secured Party appoints the Security Agent to act as security trustee under and in connection with the Finance Documents and any other security interest which the Security Agent has from time to time designated to the other Secured Parties.

(b) Each other Finance Party authorises the Security Agent to exercise the rights, powers, authorities and discretions specifically given to it under or in connection with the Finance Documents together with any other incidental rights, powers, authorities and discretions.

19.2 Duties of the Investment Agent and the Security Agent

(a) The Investment Agent shall promptly send to the Security Agent such certification as the Security Agent may require pursuant to Clause 19.23 (*Basis of distribution*).

(b) The duties of the Security Agent under the Finance Documents are solely mechanical and administrative in nature.

19.3 Role of the Security Agent

The Security Agent shall not be an agent of (except as expressly provided in any Finance Document) any Secured Party under or in connection with any Finance Document.

19.4 No fiduciary duties

(a) Nothing in this Deed constitutes the Security Agent (except as expressly provided in any Finance Document) as a trustee or a fiduciary of any other person.

(b) The Security Agent (except as expressly provided in any Finance Document) shall not be bound to account to any Secured Party for any sum or the profit element of any sum received by it for its own account.

19.5 Business with the Group

The Security Agent may accept deposits from, lend money to and generally engage in any kind of banking or other business with any member of the Group.

19.6 Rights and discretions of the Security Agent

(a) The Security Agent may rely on:

(i) any representation, notice or document believed by it to be genuine, correct and appropriately authorised; and

(ii) any statement made by a director, authorised signatory or employee of any person regarding any matters which may reasonably be assumed to be within his knowledge or within his power to verify.

(b) The Security Agent may assume, unless it has received notice to the contrary in its capacity as security agent or security trustee for the Secured Parties, that:

(i) no Default has occurred (unless it has actual knowledge of a Default arising under 16.1 (*Non-payment*) of the Murabaha Facility Agreement;

(ii) any right, power, authority or discretion vested in any Party or any Participants or Secured Parties has not been exercised; and

(iii) any notice or request made by the Purchaser under any Finance Document is made on behalf of and with the consent and knowledge of all the Obligors.

(c) The Security Agent may engage, pay for and rely on the advice or services of any lawyers, accountants, surveyors or other experts.

(d) The Security Agent may act in relation to the Finance Documents through its personnel and agents.

(e) Subject to the terms of each Finance Document, the Security Agent may disclose to any other Party any information it reasonably believes it has received as Security Agent.

(f) Notwithstanding any other provision of any Finance Document to the contrary, the Security Agent is not obliged to do or omit to do anything if it would or might in its reasonable opinion constitute a breach of any law or regulation or a breach of a fiduciary duty or duty of confidentiality.

19.7 **Majority Participants' instructions**

(a) Unless a contrary indication appears in a Finance Document, the Security Agent shall (i) exercise any right, power, authority or discretion vested in it as Security Agent in accordance with any instructions given to it by the Majority Participants (or, if so instructed by the Majority Participants, refrain from exercising any right, power, authority or discretion vested in it as Security Agent) and (ii) not be liable for any act (or omission) if it acts (or refrains from taking any action) in accordance with an instruction of the Majority Participants.

(b) Unless a contrary indication appears in a Finance Document, any instructions given by the Majority Participants will be binding on all the Secured Parties.

(c) The Security Agent may refrain from acting in accordance with the instructions of the Majority Participants (or, if appropriate, all of the Participants until it has received such security as it may require for any cost, loss or liability (together with any associated VAT) which it may incur in complying with the instructions.

(d) In the absence of instructions from the Majority Participants (or, if appropriate, all of the Participants), the Security Agent may act (or refrain from taking action) as considers to be in the best interest of the Secured Parties.

(e) The Security Agent is not authorised to act on behalf of a Secured Party (without first obtaining that Party's consent) in any legal or arbitration proceedings relating to any Finance Document.

19.8 **Responsibility for documentation**

The Security Agent is not responsible for:

(a) the adequacy, accuracy and/or completeness of any information (whether oral or written) supplied by the Security Agent, an Obligor or any other person given in or in connection with any Finance Document; or

(b) the legality, validity, effectiveness, adequacy or enforceability of any Finance Document or any other agreement, arrangement or document entered into, made or executed in anticipation of or in connection with any Finance Document.

19.9 **Exclusion of liability**

(a) Without limiting paragraph (b) below, the Security Agent will not be liable for any action taken by it under or in connection with any Finance Document, unless directly caused by its gross negligence or wilful misconduct.

(b) No Party (other than the Security Agent) may take any proceedings against any officer, employee or agent of the Security Agent in respect of any claim it might have against the Security Agent or in respect of any act or omission of any kind by that officer, employee or agent in relation to any Finance Document and any officer, employee or agent of the Security Agent may rely on this Clause.

(c) The Security Agent will not be liable for any delay (or any related consequences) in crediting an account with an amount required under the Finance Documents to be paid by it if it has taken all necessary steps as soon as reasonably practicable to comply with the regulations or operating procedures of any recognised clearing or settlement system used by it for that purpose.

(d) Nothing in this Deed shall oblige the Security Agent to carry out any "know your customer" or other checks in relation to any person on behalf of any Secured Party and each Secured Party confirms to the Security Agent that it is solely responsible for any such checks it is required to carry out and that it may not rely on any statement in relation to such checks made by the Security Agent.

19.10 **Secured Parties' indemnity to the Security Agent**

Each other Secured Party shall (in proportion to its share of the Secured Obligations then outstanding to all the Secured Obligations then outstanding and/or available for drawing under the relevant Finance Documents) indemnify the Security Agent, within three Business Days of demand, against any cost, loss or liability incurred by the Security Agent (otherwise than by reason of its gross negligence or wilful misconduct) in acting as Security Agent under the Finance Documents (unless it has been reimbursed by an Obligor pursuant to a Finance Document).

19.11 **Resignation of the Security Agent**

(a) The Security Agent may resign and appoint one of its Affiliates as successor by giving notice to the Investment Agent and the Purchaser.

(b) Alternatively the Security Agent may resign by giving 30 days' notice to the Investment Agent and the Purchaser, in which case the Majority Participants (after consultation with the Purchaser) may appoint a successor Security Agent.

(c) If the Majority Participants have not appointed a successor Security Agent in accordance with paragraph (b) above within 20 days after notice of resignation was given, the retiring Security Agent (after consultation with the Purchaser) may appoint a successor Security Agent.

(d) The retiring Security Agent shall, at its own cost, make available to its successor such documents and records and provide such assistance as its successor may reasonably request for the purposes of performing its functions as Security Agent under the Finance Documents.

(e) The resignation notice of the Security Agent shall only take effect upon the appointment of a successor and upon the transfer of all of the Charged Property to that successor.

(f) Upon the appointment of a successor, the retiring Security Agent shall be discharged from any further obligation in respect of the Finance Documents (other than its obligations under paragraph (d) above) but shall remain entitled to the benefit of this Clause 19. Its successor and each of the other Parties shall have the same rights and obligations amongst themselves as they would have had if such successor had been an original Party.

(g) After consultation with the Purchaser, the Majority Participants may, by notice to the Security Agent, require it to resign in accordance with paragraph (b) above. In this event, the Security Agent shall resign in accordance with paragraph (b) above but the cost referred to in paragraph (d) above shall be for the account of the Purchaser.

19.12 **Confidentiality**

(a) The Security Agent (in acting as security agent for the Secured Parties) shall be regarded as acting through its security agency division which shall be treated as a separate entity from any other of its divisions or departments.

(b) If information is received by another division or department of the Security Agent, it may be treated as confidential to that division or department and the Security Agent shall not be deemed to have notice of it.

19.13 **Credit appraisal by the Participants**

Without affecting the responsibility of any Obligor for information supplied by it or on its behalf in connection with any Finance Document, each Secured Party confirms to the Security Agent that it has been, and will continue to be, solely responsible for making its own independent appraisal and investigation of all risks arising under or in connection with any Finance Document including but not limited to:

(a) the financial condition, status and nature of each member of the Group;

(b) the legality, validity, effectiveness, adequacy or enforceability of any Finance Document and any other agreement, Security, arrangement or document entered into, made or executed in anticipation of, under or in connection with any Finance Document;

(c) whether that Participant has recourse, and the nature and extent of that recourse, against any Party or any of its respective assets under or in connection with any Finance Document, the transactions contemplated by the Finance Documents or any other agreement, Security, arrangement or document entered into, made or executed in anticipation of, under or in connection with any Finance Document; and

(d) the adequacy, accuracy and/or completeness of any information provided by the Security Agent, any Party or by any other person under or in connection with any Finance Document, the transactions contemplated by the Finance Documents or any

other agreement, Security, arrangement or document entered into, made or executed in anticipation of, under or in connection with any Finance Document.

19.14 **Deduction from amounts payable by the Security Agent**

If any Party owes an amount to the Security Agent under the Finance Documents, the Security Agent may, after giving notice to that Party, deduct an amount not exceeding that amount from any payment to that Party which the Security Agent would otherwise be obliged to make under the Finance Documents and apply the amount deducted in or towards satisfaction of the amount owed. For the purposes of the Finance Documents that Party shall be regarded as having received any amount so deducted.

19.15 **Authority of Security Agent**

(a) If, in connection with any enforcement action or any disposal permitted under the Finance Documents:

(i) the Security Agent (or any Receiver or Delegate) sells or otherwise disposes of (or proposes to sell or otherwise dispose of) any asset under any Security Document; or

(ii) a member of the Group sells or otherwise disposes of (or proposes to sell or otherwise dispose of) any asset at the request of the Security Agent or the Investment Agent,

the Security Agent may, and is hereby irrevocably authorised on behalf of each Party to:

(A) release the Security created pursuant to the Security Documents over the relevant asset;

(B) apply the net cash proceeds of sale or disposal in or towards payment of Secured Obligations in accordance with Clause 19.34 (*Application of Recoveries*); or

(C) if the relevant asset comprises all of the shares in the capital stock of any Subsidiary, release that Subsidiary and any of its Subsidiaries from all its or their past, present and future liabilities and/or obligations (both actual and contingent) as a guarantor of the whole or any part of the Secured Obligations and require the transfer of any relevant Secured Obligations due, owing or incurred by that Subsidiary and any of its Subsidiaries to one or more other Obligors.

(b) Each Party shall promptly enter into any release and/or other document and take any action which the Security Agent may reasonably require to give effect to paragraph (a) above.

(c) No such release under paragraph (a) above will affect the obligations and/or liabilities of any other member of the Group to the Secured Parties.

19.16 **Indemnity to the Security Agent**

The Purchaser shall promptly indemnify the Security Agent against any cost, loss or liability incurred by the Security Agent (acting reasonably) as a result of:

(a) investigating any event which it reasonably believes is a Default or Event of Default;

(b) acting or relying on any notice, request or instruction which it reasonably believes to be genuine, correct and appropriately authorised;

(c) taking, holding, protecting or enforcing any Security created pursuant to any Finance Document;

(d) exercising any of the rights, powers, discretions or remedies vested in it under any Finance Document or by law; or

(e) any other matter which otherwise relates to any of the Security created pursuant to any Finance Document or the performance of the terms of this Agreement,

other than any loss, cost or liability arising as a result of gross negligence or wilful misconduct of the Security Agent.

19.17 **Security Agent's management time and additional remuneration**

(a) Any amount payable to the Security Agent under Clause 19.10 (*Secured Parties' Indemnity to the Security Agent*), Clause 19.16 (*Indemnity to the Security Agent*) or Clause 17.2 (*Expenses*) of the Murabaha Facility Agreement shall include the cost of utilising the Security Agent's management time or other resources and will be calculated on the basis of such reasonable daily or hourly rates as the Security Agent may notify to the Parent, and is in addition to any other fee paid or payable to the Security Agent.

(b) Without prejudice to paragraph (a) above, in the event of:

(i) a Default; or

(ii) the Security Agent being requested by an Obligor or the Majority Participants to undertake duties which the Security Agent and the Parent agree to be of an exceptional nature or outside the scope of the normal duties of the Security Agent under the Finance Documents; or

(iii) the Security Agent and the Parent agreeing that it is otherwise appropriate in the circumstances,

the Parent shall pay to the Security Agent any additional remuneration (together with any applicable VAT) that may be agreed between them or determined pursuant to paragraph (c) below.

(c) If the Security Agent and the Parent fail to agree upon the nature of the duties or upon the additional remuneration referred to in paragraph (b) above or whether additional remuneration is appropriate in the circumstances, any dispute shall be determined by an investment bank (acting as an expert and not as an arbitrator) selected by the Security Agent and approved by the Parent or, failing approval, nominated (on the application of the Security Agent) by the President for the time being of the Law Society of England and Wales (the costs of the nomination and of the investment bank being payable by the Parent) and the determination of any investment bank shall be final and binding upon the Parties

19.18 **Declaration of trust**

The Security Agent and each other Secured Party agree that the Security Agent shall hold the Charged Property in trust for the benefit of the Secured Parties on the terms of this Agreement.

19.19 **Defects in security**

The Security Agent shall not be liable for any failure or omission to perfect, or defect in perfecting, the Security created pursuant to any Security Document, including:

(a) failure to obtain any Authorisation for the execution, validity, enforceability or admissibility in evidence of any Security Document; or

(b) failure to effect or procure registration of or otherwise protect or perfect any of the Security created by the Security Documents under any laws in any territory.

19.20 **No enquiry**

The Security Agent may accept without enquiry, requisition, objection or investigation such title as any Obligor may have to any Charged Property.

19.21 **Retention of documents**

The Security Agent may hold title deeds and other documents relating to any of the Charged Property in such manner as it sees fit (including allowing any Obligor to retain them).

19.22 **Indemnity out of Charged Property**

The Security Agent and every Receiver, Delegate, attorney, agent or other similar person appointed under any Security Document may indemnify itself out of the Charged Property against any cost, loss or liability incurred by it in that capacity described in Clause 19.16 (*Indemnity to the Security Agent*) (otherwise than by reason of its own gross negligence or wilful misconduct).

19.23 **Basis of distribution**

To enable it to make any distribution, the Security Agent may fix a date as at which the amount of the Secured Obligations is to be calculated and may require, and rely on, a certificate from any Secured Party giving details of:

(a) any sums due or owing to any Secured Party as at that date; and

(b) such other matters as it thinks fit.

19.24 **Rights of the Security Agent**

The Security Agent shall have all the rights, privileges and immunities which gratuitous trustees have or may have in England, even though it is entitled to remuneration.

19.25 **No duty to collect payments**

The Security Agent shall not have any duty:

(a) to ensure that any payment or other financial benefit in respect of any of the Charged Property or any of the Secured Obligations is duly and punctually paid, received or collected; or

(b) to ensure the taking up of any (or any offer of any) stocks, shares, rights, moneys or other property accruing or offered at any time by way of interest, dividend, redemption, bonus, rights, preference, option, warrant or otherwise in respect of any of the Charged Property or any of the Secured Obligations.

19.26 **Appropriation**

(a) Each Party irrevocably waives any right to appropriate any payment to, or other sum received, recovered or held by, the Security Agent in or towards payment of any particular part of the Secured Obligations and agrees that the Security Agent shall have the exclusive right to do so.

(b) Paragraph (a) above will override any application made or purported to be made by any other person.

19.27 **Investments**

All money received or held by the Security Agent under the Finance Documents may, in the name of, or under the control of, the Security Agent:

(a) be invested in any investment it may select; or

(b) be deposited at such bank or institution (including itself, any other Secured Party or any Affiliate of any Secured Party) as it thinks fit and shall use reasonable efforts to do so in a Shari'ah compliant profit bearing investment account.

19.28 **Suspense account**

Subject to Clause 19.29 (*Timing of distributions*), the Security Agent may:

(a) hold in a Shari'ah compliant profit bearing investment account suspense account any moneys received by it from any Obligor; and

(b) invest an amount equal to the balance from time to time standing to the credit of that suspense account in any of the investments authorised by Clause 19.27 (*Investments*).

19.29 **Timing of distributions**

Distributions by the Security Agent shall be made as and when determined by it.

19.30 **Delegation**

(a) The Security Agent may:

(i) employ and pay an agent selected by it to transact or conduct any business and to do all acts required to be done by it (including the receipt and payment of money);

(ii) delegate to any person on any terms (including power to sub-delegate) all or any of its functions; and

(iii) with the prior consent of the Majority Participants, appoint, on such terms as it may determine, or remove, any person to act either as separate or joint security agent with those rights and obligations vested in the Security Agent by this Deed or any Security Document.

(b) The Security Agent will not be:

(i) responsible to anyone for any misconduct or omission by any agent, delegate or security agent appointed by it pursuant to paragraph (a) above; or

(ii) bound to supervise the proceedings or acts of any such agent, delegate or security agent,

provided that it exercises reasonable care in selecting that agent, delegate or security trustee or agent.

19.31 **Unwinding**

Any appropriation or distribution which later transpires to have been or is agreed by the Security Agent to have been invalid or which has to be refunded shall be refunded and shall be deemed never to have been made.

19.32 **Party**

The Security Agent shall be entitled to assume that a Party is acting in a particular capacity stated in this Deed or an Accession Deed unless notified to the contrary.

19.33 **Disapplication**

Section 1 of the Trustee Act 2000 shall not apply to the duties and powers of the Security Agent in relation to the trusts constituted by any Finance Document save to the extent required by law. Where there are inconsistencies between the Trustee Act 1925 and the Trustee Act 2000 and the express provisions of any such Finance Document, the provisions of such Finance Document shall, to the extent allowed by law, prevail and, in the case of any such inconsistency with the Trustee Act 2000, the provisions of such Finance Document shall constitute a restriction or exclusion for the purposes of that Act.

19.34 **Application of Recoveries**

Subject to the rights of creditors mandatorily preferred by law applying to companies generally, the proceeds of enforcement of the Security conferred by the Security Documents, all recoveries by the Security Agent under guarantees of the Secured Obligations and all other amounts paid to the Security Agent pursuant to this Deed shall be applied in the following order:

(a) **first,** in or towards payment of any unpaid fees, costs, expenses and liabilities (including any profit thereon as provided in the Security Documents) incurred by or on behalf of the Security Agent (or any adviser, Receiver, Delegate, attorney or agent) and the remuneration of the Security Agent (or any adviser, Receiver, Delegate, attorney or agent) in connection with carrying out its duties or exercising powers or discretions under the Security Documents or this Deed;

(b) **second,** in or towards payment to the Investment Agent for application towards any unpaid costs and expenses incurred by or on behalf of any Finance Party in connection with such enforcement, recovery or other payment;

(c) **third,** in or towards payment to the Investment Agent for application towards the balance of the Secured Obligations and in accordance with the Finance Documents; and

(d) **fourth,** the balance, if any, in payment or distribution to the relevant Obligor.

19.35 **Clawback**

(a) Where a sum is to be paid to the Security Agent under the Finance Documents for another Party, the Security Agent is not obliged to pay that sum to that other Party (or

to enter into or perform any related exchange contract) until it has been able to establish to its satisfaction that it has actually received that sum.

(b) If the Security Agent pays an amount to another Party and it proves to be the case that it had not actually received that amount, then the Party to whom that amount (or the proceeds of any related exchange contract) was paid shall on demand refund the same to the Security Agent together with profit on that amount from the date of payment to the date of receipt by the Security Agent, calculated by it to reflect its actual cost of making arrangements to pay such amount.

19.36 **Payments**

All payments by the Obligors to the Security Agent under this Agreement (including damages for its breach) shall be made in Dollars and to such account, with such financial institution and in such other manner as the Security Agent may direct.

19.37 **Payments to the Security Agent**

Notwithstanding any other provision of any Finance Document, at any time after the Security created by or pursuant to any Security Document becomes enforceable, the Security Agent may require:

(a) any Obligor to pay all sums due under any Finance Document; or

(b) the Investment Agent to pay all sums received or recovered from an Obligor under any Finance Document,

in each case as the Security Agent may direct for application in accordance with the terms of this Deed.

20. SHARING AMONG THE FINANCE PARTIES

20.1 **Payments to Finance Parties**

If a Finance Party (a "**Recovering Finance Party**") receives or recovers any amount from the Purchaser other than in accordance with Clause 8 (*Remittances*), Clause 19 (*Role of Security Agent*) or Clause 21 (*Payment mechanics*) (a "**Recovered Amount**") and applies that amount to a payment due under the Finance Documents then:

(a) the Recovering Finance Party shall, within three Business Days, notify details of the receipt or recovery to the Investment Agent;

(b) the Investment Agent shall determine whether the receipt or recovery is in excess of the amount the Recovering Finance Party would have been paid had the receipt or recovery been received or made by the Investment Agent and distributed in accordance with Clause 8 (*Remittances*), Clause 19 (*Role of Security Agent*) or Clause 21 (*Payment mechanics*), without taking account of any Tax which would be imposed on the Investment Agent in relation to the receipt, recovery or distribution; and

(c) the Recovering Finance Party shall, within three Business Days of demand by the Investment Agent, pay to the Investment Agent an amount (the "**Sharing Payment**") equal to such receipt or recovery less any amount which the Investment Agent determines may be retained by the Recovering Finance Party as its share of any payment to be made, in accordance with Clause 21.6 (*Partial payments*).

20.2 **Redistribution of payments**

The Investment Agent shall treat the Sharing Payment as if it had been paid by the Obligor and distribute it between the Finance Parties (other than the Recovering Participant) (the "**Sharing Finance Parties**") in accordance with Clause 21.6 (*Partial payments*).

20.3 **Recovering Finance Party's rights**

On a distribution by the Investment Agent under Clause 20.2 (*Redistribution of payments*) of a payment received by a Recovering Finance Party from an Obligor, as between the Obligors and the Investment Agent and the Investment Agent and the Recovering Finance Party, an amount of the Recovered Amount equal to the Sharing Payment will be treated as not having been paid by the relevant Obligor.

20.4 **Reversal of redistribution**

If any part of the Sharing Payment received or recovered by a Recovering Finance Party becomes repayable and is repaid by that Recovering Finance Party, then:

(a) each Sharing Finance Party shall, upon request of the Investment Agent, pay to the Investment Agent for the account of that Recovering Finance Party an amount equal to the appropriate part of its share of the Sharing Payment (the "**Redistributed Amount**"); and

(b) as between the Purchaser and the Investment Agent and the Investment Agent and each relevant Sharing Finance Party, an amount equal to the relevant Redistributed Amount will be treated as not having been paid by the relevant Obligor.

20.5 **Exceptions**

(a) This Clause 20 shall not apply to the extent that the Recovering Finance Party would not, after making any payment pursuant to this Clause, have a valid and enforceable claim against the relevant Obligor.

(b) A Recovering Finance Party is not obliged to share with any other Finance Party any amount which the Recovering Finance Party has received or recovered as a result of taking legal or arbitration proceedings, if:

(i) it notified that other Finance Party of the legal or arbitration proceedings; and

(ii) that other Finance Party had an opportunity to participate in those legal or arbitration proceedings but did not do so as soon as reasonably practicable having received notice and did not take separate legal or arbitration proceedings.

21. PAYMENT MECHANICS

21.1 **Payments to the Investment Agent**

(a) On each date on which an Obligor or a Participant is required to make a payment under a Finance Document, that Obligor or Participant shall make the same available to the Investment Agent (unless a contrary indication appears in a Finance Document) for value on the due date at the time and in such funds specified by the Investment Agent as being customary at the time for settlement of transaction in the relevant currency in the place of payment.

(b) Payment shall be made to such account in the principal financial centre of the country of that currency with such bank as the Investment Agent specifies.

21.2 **Distributions by the Investment Agent**

Each payment received by the Investment Agent under the Finance Documents for another Party shall, subject to Clause 21.3 (*Distributions to the Obligors*) and Clause 21.4 (*Clawback*), be made available by the Investment Agent as soon as practicable after receipt to the Party entitled to receive payment in accordance with this Agreement (in the case of a Participant, for the account of its Facility Office), to such account as that Party may notify to the Investment Agent by not less than five Business Days' notice with a bank in the principal financial centre of the country of that currency.

21.3 **Distributions to the Obligors**

The Investment Agent may apply any amount received by it for an Obligor in or towards payment (on the date and in the currency and funds of receipt) of any amount due from that Obligor under the Finance Documents or in or towards purchase of any amount of any currency (at a market rate of exchange) to be so applied.

21.4 **Clawback**

(a) Where a sum is to be paid to the Investment Agent under the Finance Documents for another Party, the Investment Agent is not obliged to pay that sum to that other Party (or to enter into or perform any related exchange contract) until it has been able to establish to its satisfaction that it has actually received that sum.

(b) If the Investment Agent pays an amount to another Party and it proves to be the case that the Investment Agent had not actually received that amount, then the Party to whom that amount (or the proceeds of any related exchange contract) was paid by the Investment Agent shall on demand refund the same to the Investment Agent together with an amount, calculated by the Investment Agent to reflect its actual cost of making arrangements to pay such amount.

21.5 **Impaired Agent**

(a) If, at any time, the Investment Agent becomes an Impaired Agent, an Obligor or a Participant which is required to make a payment under the Finance Documents to the Investment Agent in accordance with Clause 21.1 (*Payments to the Investment Agent*) may instead either pay that amount directly to the required recipient or pay that amount to a Shari'ah compliant profit bearing account or, if no such account is available, a non interest-bearing account held with an Acceptable Bank and in relation to which no Insolvency Event has occurred and is continuing, in the name of the Purchaser or the Participant making the payment and designated as a trust account for the benefit of the Party or Parties beneficially entitled to that payment under the Finance Documents. In each case such payments must be made on the due date for payment under the Finance Documents.

(b) All profit accrued on the amount standing to the credit of the trust account shall be for the benefit of the beneficiaries of that trust account pro rata to their respective entitlements.

(c) A Party which has made a payment in accordance with this Clause 21.5 shall be discharged of the relevant payment obligation under the Finance Documents and shall not take any credit risk with respect to the amounts standing to the credit of the trust account.

(d) Promptly upon the appointment of a successor Investment Agent in accordance with Clause 17.11 (*Replacement of the Investment Agent*), each Party which has made a payment to a trust account in accordance with this Clause 21.5 shall give all requisite instructions to the bank with whom the trust account is held to transfer the amount (together with any accrued profit) to the successor Investment Agent for distribution in accordance with Clause 21.2 (*Distributions by the Investment Agent*).

21.6 **Partial payments**

(a) If the Investment Agent receives a payment that is insufficient to discharge all the amounts then due and payable by the Obligors under the Finance Documents, the Investment Agent shall apply that payment towards the obligations of the Obligors under the Finance Documents in the following order:

(i) **first**, in or towards payment pro rata of any unpaid fees, actual costs and expenses of the Investment Agent, Security Agent or the Arranger under the Finance Documents;

(ii) **secondly**, in or towards payment pro rata of any portion of a Remittance corresponding to the Profit Amount or Supplemental Profit or any portion of Administration Fee due but unpaid under the Finance Documents;

(iii) **thirdly**, in or towards payment pro rata of any portion of a Remittance corresponding to the Cost Price due but unpaid under the Finance Documents; and

(iv) **fourthly**, in or towards payment pro rata of any other sum due but unpaid under the Finance Documents.

(b) The Investment Agent shall, if so directed by the Majority Participants, vary the order set out in paragraphs (a)(ii) to (a)(iv) above.

(c) Paragraphs (a) and (b) above will override any appropriation made by an Obligor.

21.7 **Refund of payments**

(a) If at any time the Investment Agent becomes obliged:

(i) to pay to any liquidator, trustee or other person all or part of an amount previously paid to the Investment Agent (the "**Relevant Receipt**") by an Obligor; or

(ii) to indemnify any liquidator, trustee or other person in respect of a Relevant Receipt,

being in any such case an amount which the Investment Agent shall have paid, or, but for this Clause 21.7 would become liable to pay, to the Participants pursuant to this Agreement, then:

(A) the Investment Agent shall promptly notify each Participant of the relevant circumstances and of the amount (the "**Excess Amount**") to be repaid by the Investment Agent or, as the case may be, to be paid by way of indemnity by the Investment Agent;

(B) each Participant shall on demand pay to the Investment Agent an amount equal to its Percentage of the Excess Amount together with any compensation, costs, charges or expenses which the Investment

Agent shall have become liable to pay in respect of such Excess Amount; and

(C) any amount subsequently payable to a Participant pursuant to this Agreement on the basis of the Relevant Receipt shall be adjusted accordingly.

(b) The Purchaser shall promptly indemnify each Participant against any payment made by a Participant to the Investment Agent in connection with an Excess Amount payable pursuant to this Clause 21.7.

21.8 **Restructuring**

If, in connection with any moratorium, rescheduling, refinancing, suspension of payments or other similar arrangement or circumstance (a "**Restructuring**") affecting any Remittance or any other amount paid by the Investment Agent to the Participants:

(a) the Remittance (or other amount) is paid in whole or in part but the obligation of an Obligor in respect of the amount paid is substituted by any other payment obligation;

(b) any sum is paid into a blocked account or in non-convertible currency in or towards discharge or purported discharge of the payment or any part thereof; or

(c) the Investment Agent is obliged to provide funds in addition to the amount of the aggregate of the Facility Commitments, to any person,

then:

(i) in relation to paragraph (a) above, the Remittance or other amount will be deemed not to have been received by the Investment Agent for the purposes of this Agreement and any substitute payment obligation shall be treated as between the Participants and the Investment Agent in the same way as the relevant Remittance or other amount as if such obligation had been originally contained in the relevant Finance Documents for the purpose of ascertaining the right (if any) of the Participants to receive subsequent payments under this Agreement;

(ii) in relation to paragraph (b) above, such sum will be deemed not to have been received and the Investment Agent will (at the request and cost of a Participant) assign to the Participants the relevant Percentage of the Investment Agent's rights to any such blocked account or non-convertible currency as is referred to in paragraph (b) above; and

(iii) in relation to paragraph (c) above, each Participant shall be obliged to pay to the Investment Agent on demand an amount equal to its Percentage of such additional funds by way of additional Contribution in accordance with Clause 6.2 (*Payment of Contribution*).

21.9 **No set-off by the Obligors**

All payments to be made by the Purchaser to the Investment Agent pursuant to the Finance Documents shall be calculated and made without (and free and clear of any deduction for) set-off or counterclaim.

21.10 **Business Days**

Any payment which is due to be made on a day that is not a Business Day shall be made on the next Business Day in the same calendar month (if there is one) or the preceding Business Day (if there is not).

21.11 **Currency of account**

(a) Subject to paragraphs (b) and (c) below, Dollars is the currency of account and payment for any sum due from an Obligor or a Participant under any Finance Document.

(b) Each payment in respect of costs, expenses or Taxes shall be made in the currency in which the costs, expenses or Taxes are incurred.

(c) Any amount expressed to be payable in a currency other than Dollars shall be paid in that other currency.

21.12 **Change of currency**

(a) Unless otherwise prohibited by law, if more than one currency or currency unit are at the same time recognised by the central bank of any country as the lawful currency of that country, then:

(i) any reference in the Finance Documents to, and any obligations arising under the Finance Documents in, the currency of that country shall be translated into, or paid in, the currency or currency unit of that country designated by the Investment Agent (after consultation with the Purchaser); and

(ii) any translation from one currency or currency unit to another shall be at the official rate of exchange recognised by the central bank for the conversion of that currency or currency unit into the other, rounded up or down by the Investment Agent (acting reasonably).

(b) If a change in any currency of a country occurs, this Agreement will, to the extent the Investment Agent (acting reasonably and after consultation with the Purchaser) specifies to be necessary, be amended to comply with any generally accepted conventions and market practice in the London interbank market and otherwise to reflect the change in currency.

21.13 **Disruption to payment systems, etc.**

If either the Investment Agent determines (in its discretion) that a Disruption Event has occurred or the Investment Agent is notified by the Purchaser or a Participant that a Disruption Event has occurred:

(a) the Investment Agent may, and shall if requested to do so by the Purchaser or a Participant consult with the Purchaser or that Participant (as applicable) with a view to agreeing with the Purchaser or that Participant (as applicable) such changes to the operation or administration of the Finance Documents as the Investment Agent may deem necessary in the circumstances;

(b) the Investment Agent shall not be obliged to consult with the Purchaser or that Participant (as applicable) in relation to any changes mentioned in paragraph (a) above if, in its opinion, it is not practicable to do so in the circumstances and, in any event, shall have no obligation to agree to such changes;

(c) the Investment Agent may consult with the Finance Parties in relation to any changes mentioned in paragraph (a) above but shall not be obliged to do so if, in its opinion, it is not practicable to do so in the circumstances;

(d) any such changes agreed upon by the Investment Agent and the Purchaser or that Participant (as applicable) shall (whether or not it is finally determined that a Disruption Event has occurred) be binding upon the Parties as an amendment to (or, as the case may be, waiver of) the terms of the Finance Documents notwithstanding the provisions of Clause 27 (*Amendments and waivers*);

(e) the Investment Agent shall not be liable for any damages, costs or losses whatsoever (including, without limitation, for negligence, gross negligence or any other category of liability whatsoever but not including any claim based on the fraud of the Investment Agent) arising as a result of its taking, or failing to take, any actions pursuant to or in connection with this Clause 21.13; and

(f) the Investment Agent shall notify the Finance Parties and Purchaser of all changes agreed pursuant to paragraph (d) above.

22. SET-OFF

A Finance Party may set off any matured obligation due from the Purchaser under the Finance Documents (to the extent beneficially owned by that Finance Party) against any matured obligation owed by that Finance Party to the Purchaser, regardless of the place of payment, booking branch or currency of either obligation. If the obligations are in different currencies, the Finance Party may convert either obligation at a market rate of exchange in its usual course of business for the purpose of the set-off.

23. NOTICES

23.1 Communications in writing

Any communication to be made under or in connection with the Finance Documents shall be made in writing and, unless otherwise stated, may be made by fax or letter.

23.2 Addresses

The address and fax number (and the department or officer, if any, for whose attention the communication is to be made) of each Party for any communication or document to be made or delivered under or in connection with the Finance Documents is:

(a) in the case of the Purchaser, the Parent, the Investment Agent, the Security Agent and the Arranger, that identified with its name below; and

(b) in the case of each other Obligor and each Participant, that notified in writing to the Investment Agent on or prior to the date on which it becomes a Party,

or any substitute address, fax number or department or officer as the Party may notify to the Investment Agent (or the Investment Agent may notify to the other Parties, if a change is made by the Investment Agent) by not less than five Business Days' notice.

23.3 Delivery

(a) Any communication or document made or delivered by one person to another under or in connection with the Finance Documents will only be effective:

(i) if by way of fax, when received in legible form; or

(ii) if by way of letter, when it has been left at the relevant address or five Business Days after being deposited in the post postage prepaid in an envelope addressed to it at that address,

and, if a particular department or officer is specified as part of its address details provided under Clause 23.2 (*Addresses*), if addressed to that department or officer.

(b) Any communication or document to be made or delivered to the Investment Agent will be effective only when actually received by the Investment Agent and then only if it is expressly marked for the attention of the department or officer identified with the Investment Agent's signature below (or any substitute department or officer as the Investment Agent shall specify for this purpose).

(c) All notices from or to the Obligors shall be sent through the Investment Agent.

(d) Any communication or document which becomes effective, in accordance with paragraphs (a) to (c) above, after 5.00pm in the place of receipt shall be deemed only to become effective on the following day.

23.4 **Notification of address and fax number**

Promptly upon receipt of notification of an address and fax number or change of address or fax number pursuant to Clause 23.2 (*Addresses*) or changing its own address or fax number, the Investment Agent shall notify the other Parties.

23.5 **Communication when Investment Agent is Impaired Agent**

If the Investment Agent is an Impaired Agent the Parties may, instead of communicating with each other through the Investment Agent, communicate with each other directly and (while the Investment Agent is an Impaired Agent) all the provisions of the Finance Documents which require communications to be made or notices to be given to or by the Investment Agent shall be varied so that communications may be made and notices given to or by the relevant Parties directly. This provision shall not operate after a replacement Investment Agent has been appointed

23.6 **Electronic communication**

(a) Any communication to be made between any two Parties under or in connection with the Finance Documents may be made by electronic mail or other electronic means, if the relevant Parties:

(i) notify each other in writing of their electronic mail address and/or any other information required to enable the sending and receipt of information by that means; and

(ii) notify each other of any change to their address or any other such information supplied by them by not less than five Business Days' notice.

(b) Any electronic communication made between these two Parties will be effective only when actually received in readable form and in the case of any electronic communication made by a Party to the Investment Agent only if it is addressed in such a manner as the Investment Agent shall specify for this purpose.

(c) Any electronic communication which becomes effective, in accordance with paragraph (b) above, after 5.00pm in the place of receipt shall be deemed only to become effective on this following day.

23.7 **English language**

(a) Any notice given under or in connection with any Finance Document must be in English.

(b) All other documents provided under or in connection with any Finance Document must be:

(i) in English; or

(ii) if not in English, and if so required by the Investment Agent, accompanied by a certified English translation and, in this case, the English translation will prevail unless the document is a constitutional, statutory or other official document.

24. CALCULATIONS AND CERTIFICATES

24.1 **Accounts**

In any litigation or arbitration proceedings arising out of or in connection with a Finance Document, the entries made in the accounts maintained by a Finance Party are prima facie evidence of the matters to which they relate.

24.2 **Certificates and determinations**

Any certification or determination by a Finance Party of a rate or an amount under any Finance Document is, in the absence of manifest error, conclusive evidence of the matters to which it relates.

24.3 **Day count convention**

Any amount accruing under a Finance Document will accrue from day to day and is calculated on the basis of the actual number of days elapsed and a year of 360 days or, in any case where the practice in the London interbank market differs, in accordance with that market practice.

25. PARTIAL INVALIDITY

If, at any time, any provision of the Finance Documents is or becomes illegal, invalid or unenforceable in any respect under any law of any jurisdiction, neither the legality, validity or enforceability of the remaining provisions nor the legality, validity or enforceability of such provision under the law of any other jurisdiction will in any way be affected or impaired.

26. REMEDIES AND WAIVERS

No failure to exercise, nor any delay in exercising, on the part of any Finance Party, any right or remedy under the Finance Documents shall operate as a waiver of any such right or remedy or constitute an election to affirm any of the Finance Documents. No waiver or election to affirm any of the Finance Documents on the part of any Finance Party shall be effective unless in writing. No or partial exercise of any right or remedy shall prevent any further or other exercise or the exercise of any other right or remedy. The rights and remedies provided in the Finance Documents are cumulative and not exclusive of any rights or remedies provided by law.

27. AMENDMENTS AND WAIVERS

27.1 Required consents

(a) Subject to Clause 27.3 (*Exceptions*):

(i) any term of the Finance Documents may be amended only with the consent of the Majority Participants and the Purchaser; and

(ii) any right of the Finance Parties under the Finance Documents may be waived only with the consent of the Majority Participants,

and any such amendment or waiver will be binding on all Parties.

(b) The Investment Agent may effect, on behalf of any Finance Party, any amendment or waiver permitted by this Clause 27.

(c) No amendment or waiver may be made before the date falling ten Business Days after the terms of that amendment or waiver have been notified by the Investment Agent to the Participants, unless each Participant is a "FATCA Protected Participant". The Investment Agent shall notify the Participants reasonably promptly of any amendments or waivers proposed by the Purchaser.

27.2 Excluded Commitments

(a) Each Participant shall respond to a request for a consent, waiver or amendment of or in relation to any term of the Finance Documents or any other vote of the Participants under the Finance Documents within ten (10) Business Days after receipt of such request or notice, unless the Purchaser and the Investment Agent agree to a longer period in relation to any request.

(b) The Commitments and/or Participations (as applicable) of any Participant that fails to or does not provide a response within the time specified in paragraph (a) above shall not be included for purposes of calculating the Total Commitments or outstanding Participations under the relevant Facility when ascertaining whether any relevant percentage (including for the avoidance of doubt, unanimity, Majority Participants or Super Majority Participants) has been obtained to approve that request.

27.3 Exceptions

(a) An amendment or waiver that has the effect of changing or which relates to:

(i) the definitions of "Majority Participants" or Super Majority Participants in Clause 1.1 (*Definitions*);

(ii) any change to the currency of payment obligations under the Finance Documents;

(iii) an extension to the date of payment of any amount under the Finance Documents;

(iv) a reduction in the Profit Rate or a reduction in the amount of any payment or principal, profit, fees or commission or other amount due to the Participants (or the Investment Agent on their behalf) under the Finance Documents;

(v) an increase in or an extension of any Facility Commitment or Participation or any requirement that a cancellation of a Facility Commitment or Participation

reduces the Facility Commitment or the Participations of the Participants rateably under the relevant Facility;

(vi) Clause 16.11 (*Change of control*) of the Murabaha Facility Agreement (including a change to the definition of "Change of Control" in the Murabaha Facility Agreement) or any provision requiring prepayments or reductions in the Facility Limit to be applied either pro rata amongst Participants (or against the Participation or Facility Commitment of a specific Participant);

(vii) a change to the Purchaser or any Obligor (other than in accordance with Clause 22.4 (*Additional Guarantors*) or Clause 22.5 (*Registration of a Guarantor*) of the Murabaha Facility Agreement or Clause 5 (*Conversion to Exit Facility*) or as a result of a Permitted Disposal or Permitted Transaction;

(viii) (other than as expressly permitted by the provisions of any Finance Document) the nature or scope of:

(A) the guarantee and indemnity granted under Clause 11 (*Guarantee and Indemnity*) of the Murabaha Facility Agreement;

(B) the Charged Property; or

(C) the manner in which the proceeds of enforcement of the Transaction Security are distributed

(in each case except in connection with a Permitted Disposal, Permitted Transaction or otherwise expressly permitted under this Agreement or any other Finance Document);

(ix) the release of any guarantee and indemnity granted under Clause 11 (*Guarantee and Indemnity*) of the Murabaha Facility Agreement or of any Transaction Security unless permitted under this Agreement or any other Finance Document or as (or as part of) a Permitted Transaction or relating to a sale or disposal of an asset which is the subject of the Transaction Security where such sale or disposal is a Permitted Disposal or otherwise expressly permitted under this Agreement or any other Finance Document;

(x) any provision of the Finance Documents which expressly requires the consent of all the Participants; or

(xi) Clause 3 (*Finance Parties' rights and obligations*), Clause 16 (*Changes to the Participants*), Clause 19 (*Sharing among the Finance Parties*), or this Clause 27,

shall not be made without the prior consent of all the Participants or, in the case of paragraph (viii) above, the Super Majority Participants.

(b) An amendment or waiver which relates to the rights or obligations of the Investment Agent, the Security Agent or the Arranger (each in their capacity as such) may not be effected without the consent of the Investment Agent, the Security Agent or the Arranger, as the case may be.

(c) An amendment or waiver which relates to the rights or obligations of the Obligors under the Finance Documents may not be effected without the consent of the Parent.

(d)

(i) After the Exit Conversion Date, if the Investment Agent or a Participant reasonably believes that an amendment or waiver may constitute a "material modification" for the purposes of FATCA that may result (directly or indirectly) in a Party being required to make a FATCA Deduction and the Investment Agent or that Participant (as the case may be) notifies the Company and the Investment Agent accordingly, that amendment or waiver may, subject to paragraph (ii) below, not be effected without the consent of the Investment Agent or that Participant (as the case may be).

(ii) The consent of a Participant shall not be required pursuant to paragraph (i) above if that Participant is a FATCA Protected Participant.

27.4 **Replacement of Participant**

(a) If:

(i) any Participant becomes a Defaulting Participant;

(ii) any Participant becomes a Non-Consenting Participant (as defined in paragraph (d) below); or

(iii) the Purchaser becomes obliged to pay any amount under Clause 9.1 (Illegality), or to pay an additional amount pursuant to Clause 8 (Tax) or Clause 18.5 (Increased costs) of the Murabaha Facility Agreement, to any Participant,

then the Purchaser may, on ten (10) Business Days' prior written notice to the Investment Agent and such Participant, replace such Participant by requiring such Participant to (and, to the extent permitted by law, such Participant shall) transfer pursuant to Clause 16 (Changes to the Participants) all (and not part only) of its rights and obligations under this Agreement to a Participant or other bank, financial institution, trust, fund or other entity (a "Replacement Participant") selected by the Purchaser, and which confirms its willingness to assume and does assume all the obligations of the transferring Participant in accordance with Clause 16 (Changes to the Participants) for a purchase price in cash payable at the time of transfer in an amount equal to the outstanding principal amount of such Participant's Participations and other amounts payable in relation thereto under the Finance Documents.

(b) The replacement of a Participant pursuant to this Clause 27.4 shall be subject to the following conditions:

(i) the Purchaser shall have no right to replace the Investment Agent or Security Agent;

(ii) neither the Investment Agent nor the Participant shall have any obligation to the Purchaser to find a Replacement Participant;

(iii) in the event of a replacement of a Non-Consenting Participant such replacement must take place no later than thirty (30) Business Days after the date on which that Participant is deemed a Non-Consenting Participant;

(iv) in no event shall the Participant replaced under Clause 27.4 be required to pay or surrender to such Replacement Participant any of the fees received by such Participant pursuant to the Finance Documents; and

(v) the Participant shall only be obliged to transfer its rights and obligations pursuant to paragraph (a) above once it is satisfied that it has complied with all necessary "know your customer" or other similar checks under all applicable laws and regulations in relation to that transfer.

(c) A Participant shall perform the checks described in paragraph (b)(v) above as soon as reasonably practicable following delivery of a notice referred to in paragraph (a) above and shall notify the Investment Agent and the Purchaser when it is satisfied that it has complied with those checks.

(d) In the event that:

(i) the Purchaser or the Investment Agent (at the request of the Purchaser) has requested the Participants to give a consent in relation to, or to agree to a waiver or amendment of, any provisions of the Finance Documents;

(ii) the consent, waiver or amendment in question requires the approval of all the Participants; and

(iii) Participants whose Facility Commitments aggregate in the case of a consent, waiver or amendment requiring the approval of all the Participants, more than 85% of the Total Commitments (or, if the Total Commitments have been reduced to zero, aggregated more than 85% of the Total Commitments prior to that reduction), have consented or agreed to such waiver or amendment, then any Participant who does not and continues not to consent or agree to such waiver or amendment shall be deemed a "Non-Consenting Participant".

27.5 **Disenfranchisement of Defaulting Participants**

(a) For so long as a Defaulting Participant has any Facility Commitment, in ascertaining:

(i) the Majority Participants or the Super Majority Participants; or

(ii) whether any given percentage (including, for the avoidance of doubt, unanimity) of the Total Commitments,

has been obtained to approve any request for a consent, waiver, amendment or other vote of Participants under the Finance Documents, that Defaulting Participant's Commitments under the relevant Facility will be reduced by the amount of its Available Commitments under the relevant Facility and, to the extent that that reduction results in that Defaulting Participant's Commitments being zero, that Defaulting Participant shall be deemed not to be a Participant for the purposes of paragraphs (i) and (ii) above.

(b) For the purposes of this Clause 27.5, the Investment Agent may assume that the following Participants are Defaulting Participants:

(i) any Participant which has notified the Investment Agent that it has become a Defaulting Participant; and

(ii) any Participant in relation to which it is aware that any of the events or circumstances referred to in paragraphs (a), (b) or (c) of the definition of "Defaulting Participant" has occurred,

unless it has received notice to the contrary from the Participant concerned (together with any supporting evidence reasonably requested by the Investment Agent) or the

Investment Agent is otherwise aware that the Participant has ceased to be a Defaulting Participant.

28. CONFIDENTIALITY

28.1 Confidential Information

Each Finance Party agrees to keep all Confidential Information confidential and not to disclose it to anyone, save to the extent permitted by Clause 28.2 (*Disclosure of Confidential Information*), and to ensure that all Confidential Information is protected with security measures and a degree of care that would apply to its own confidential information.

28.2 Disclosure of Confidential Information

Any Finance Party may disclose:

(a) to any of its Affiliates and Related Funds and any of its or their officers, directors, employees, professional advisers, auditors, partners and Representatives such Confidential Information as that Finance Party shall consider appropriate if any person to whom the Confidential Information is to be given pursuant to this paragraph (a) is informed in writing of its confidential nature and that some or all of such Confidential Information may be price-sensitive information except that there shall be no such requirement to so inform if the recipient is subject to professional obligations to maintain the confidentiality of the information or is otherwise bound by requirements of confidentiality in relation to the Confidential Information;

(b) to any person:

(i) to (or through) whom it assigns or transfers (or may potentially assign or transfer) all or any of its rights and/or obligations under one or more Finance Documents and to any of that person's Affiliates, Related Funds, Representatives and professional advisers;

(ii) with (or through) whom it enters into (or may potentially enter into), whether directly or indirectly, any sub-participation in relation to, or any other transaction under which payments are to be made or may be made by reference to, one or more Finance Documents and/or the Purchaser and to any of that person's Affiliates, Related Funds, Representatives and professional advisers;

(iii) appointed by any Finance Party or by a person to whom paragraph (b)(i) or (b)(ii) above applies to receive communications, notices, information or documents delivered pursuant to the Finance Documents on its behalf (including, without limitation, any person appointed under paragraph (c) of Clause 17.13 (*Relationship with the Participants*));

(iv) who invests in or otherwise finances (or may potentially invest in or otherwise finance), directly or indirectly, any transaction referred to in paragraph (b)(i) or (b)(ii) above;

(v) to whom information is required or requested to be disclosed by any court of competent jurisdiction or any governmental, banking, taxation or other regulatory authority or similar body, the rules of any relevant stock exchange or pursuant to any applicable law or regulation;

(vi) to whom or for whose benefit that Finance Party charges, assigns or otherwise creates Security (or may do so) pursuant to Clause 16.8 (*Security over Participants' rights*);

(vii) to whom information is required to be disclosed in connection with, and for the purposes of, any litigation, arbitration, administrative or other investigations, proceedings or disputes;

(viii) who is a Party; or

(ix) with the consent of the Purchaser;

in each case, such Confidential Information as that Finance Party shall consider appropriate if:

(A) in relation to paragraphs (b)(i), (b)(ii) and b(iii) above, the person to whom the Confidential Information is to be given has entered into a Confidentiality Undertaking except that there shall be no requirement for a Confidentiality Undertaking if the recipient is a professional adviser and is subject to professional obligations to maintain the confidentiality of the Confidential Information;

(B) in relation to paragraph (b)(iv) above, the person to whom the Confidential Information is to be given has entered into a Confidentiality Undertaking or is otherwise bound by requirements of confidentiality in relation to the Confidential Information they receive and is informed that some or all of such Confidential Information may be price-sensitive information;

(C) in relation to paragraphs (b)(v), (b)(vi) and (b)(vii) above, the person to whom the Confidential Information is to be given is informed of its confidential nature and that some or all of such Confidential Information may be price-sensitive information except that there shall be no requirement to so inform if, in the opinion of that Finance Party, it is not practicable so to do in the circumstances;

(c) to any person appointed by that Finance Party or by a person to whom paragraph (b)(i) or (b)(ii) above applies to provide administration or settlement services in respect of one or more of the Finance Documents, such Confidential Information as may be required to be disclosed to enable such service provider to provide any of the services referred to in this paragraph (c) if the service provider to whom the Confidential Information is to be given has entered into a Confidentiality Undertaking; and

(d) to any rating agency (including its professional advisers) such Confidential Information as may be required to be disclosed to enable such rating agency to carry out its normal rating activities in relation to the Finance Documents and/or the Purchaser if the rating agency to whom the Confidential Information is to be given is informed of its confidential nature and that some or all of such Confidential Information may be price-sensitive information.

28.3 **Entire agreement**

This Clause 28 constitutes the entire agreement between the Parties in relation to the obligations of the Finance Parties under the Finance Documents regarding Confidential

Information and supersedes any previous agreement, whether express or implied, regarding Confidential Information.

28.4 **Inside information**

Each of the Finance Parties acknowledges that some or all of the Confidential Information is or may be price-sensitive information and that the use of such information may be regulated or prohibited by applicable legislation including securities law relating to insider dealing and market abuse and each of the Finance Parties undertakes not to use any Confidential Information for any unlawful purpose.

28.5 **Notification of disclosure**

Each of the Finance Parties agrees (to the extent permitted by law and regulation) to inform the Purchaser:

(a) of the circumstances of any disclosure of Confidential Information made pursuant to paragraph (b)(v) of Clause 28.2 (*Disclosure of Confidential Information*) except where such disclosure is made to any of the persons referred to in that paragraph during the ordinary course of its supervisory or regulatory function; and

(b) upon becoming aware that Confidential Information has been disclosed in breach of this Clause 28.

28.6 **Continuing obligations**

The obligations in this Clause 28 are continuing and, in particular, shall survive and remain binding on each Finance Party for a period of twelve months from the earlier of:

(a) the date on which all amounts payable by the Purchaser under or in connection with the Finance Documents have been paid in full and all Participations have been cancelled or otherwise cease to be available; and

(b) the date on which such Finance Party otherwise ceases to be a Finance Party.

29. COUNTERPARTS

Each Finance Document may be executed in any number of counterparts, and this has the same effect as if the signatures on the counterparts were on a single copy of the Finance Document.

30. GOVERNING LAW

This Agreement and any non-contractual obligations arising out of or in connection with it are governed by English law.

31. ENFORCEMENT

31.1 **Jurisdiction prior to the Exit Conversion Date**

IN RELATION TO ANY PROCEEDINGS COMMENCED PRIOR TO THE EXIT CONVERSION DATE, EACH OBLIGOR, THE INVESTMENT AGENT AND EACH OTHER PARTICIPANT IRREVOCABLY AND UNCONDITIONALLY SUBMITS, FOR ITSELF AND ITS PROPERTY, TO THE EXCLUSIVE JURISDICTION OF THE BANKRUPTCY COURT AND, IF THE BANKRUPTCY COURT DOES NOT HAVE (OR ABSTAINS FROM) JURISDICTION, OF THE COURTS OF THE STATE OF NEW YORK SITTING IN NEW YORK COUNTY AND OF THE UNITED STATES DISTRICT COURT

OF THE SOUTHERN DISTRICT OF NEW YORK, AND ANY APPELLATE COURT FROM ANY THEREOF, IN ANY ACTION OR PROCEEDING ARISING OUT OF OR RELATING TO THIS AGREEMENT OR ANY OTHER FINANCE DOCUMENT, OR FOR RECOGNITION OR ENFORCEMENT OF ANY JUDGMENT, AND EACH OF THE PARTIES HERETO IRREVOCABLY AND UNCONDITIONALLY AGREES THAT ALL CLAIMS IN RESPECT OF ANY SUCH ACTION OR PROCEEDING MAY BE HEARD AND DETERMINED IN SUCH NEW YORK STATE COURT OR, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, IN SUCH FEDERAL COURT. EACH OF THE PARTIES HERETO AGREES THAT A FINAL JUDGMENT IN ANY SUCH ACTION OR PROCEEDING SHALL BE CONCLUSIVE AND MAY BE ENFORCED IN OTHER JURISDICTIONS BY SUIT ON THE JUDGMENT OR IN ANY OTHER MANNER PROVIDED BY LAW. NOTHING IN THIS AGREEMENT OR IN ANY OTHER FINANCE DOCUMENT SHALL AFFECT ANY RIGHT TO BRING ANY ACTION OR PROCEEDING RELATING TO THIS AGREEMENT OR ANY OTHER FINANCE DOCUMENT AGAINST THE PURCHASER OR ANY OTHER OBLIGOR OR ITS PROPERTIES IN THE COURTS OF ANY JURISDICTION, INCLUDING THE RIGHT OF THE INVESTMENT AGENT TO BRING SUIT OR TAKE OTHER LEGAL ACTION IN ANY OTHER JURISDICTION TO REALIZE ON THE COLLATERAL OR ANY OTHER SECURITY FOR THE OBLIGATIONS, OR TO ENFORCE A JUDGMENT OR OTHER COURT ORDER IN FAVOUR OF INVESTMENT AGENT. THE PURCHASER EXPRESSLY SUBMITS AND CONSENTS IN ADVANCE TO SUCH JURISDICTION IN ANY ACTION OR SUIT COMMENCED IN ANY SUCH COURT, AND THE PURCHASER HEREBY WAIVES ANY OBJECTION THAT SUCH OBLIGOR MAY HAVE BASED UPON IMPROPER VENUE OR FORUM NON CONVENIENS AND HEREBY CONSENTS TO THE GRANTING OF SUCH LEGAL OR EQUITABLE RELIEF AS IS DEEMED APPROPRIATE BY SUCH COURT.

31.2 **Waiver of Jury Trial**

EACH PARTY HERETO HEREBY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN ANY LEGAL PROCEEDING DIRECTLY OR INDIRECTLY ARISING OUT OF OR RELATING TO THIS AGREEMENT, ANY OTHER FINANCE DOCUMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY OR THEREBY (WHETHER BASED ON CONTRACT, TORT OR ANY OTHER THEORY). EACH PARTY HERETO (A) CERTIFIES THAT NO REPRESENTATIVE, AGENT OR ATTORNEY OF ANY OTHER PARTY HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT SUCH OTHER PARTY WOULD NOT, IN THE EVENT OF LITIGATION, SEEK TO ENFORCE THE FOREGOING WAIVER AND (B) ACKNOWLEDGES THAT IT AND THE OTHER PARTIES HERETO HAVE BEEN INDUCED TO ENTER INTO THIS AGREEMENT BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS CLAUSE.

31.3 **Jurisdiction on and after Exit Conversion Date**

In relation to any proceedings commenced on and after the Exit Conversion Date:

(a) the courts of England have exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement (including a dispute relating to the existence, validity or termination of this Agreement or any non-contractual obligation arising out of or in connection with this Agreement) (a "**Dispute**");

(b) the Parties agree that the courts of England are the most appropriate and convenient courts to settle Disputes and accordingly no Party will argue to that contrary and

(c) this Clause 31.1 is for the benefit of the Finance Parties only. As a result, no Finance Party shall be prevented from taking proceedings relating to a Dispute in any other courts with jurisdiction. To the extent allowed by law, the Finance Parties may take concurrent proceedings in any number of jurisdictions.

31.4 **Service of process**

Without prejudice to any other mode of service allowed under any relevant law, each Obligor:

(a) irrevocably appoints Arcapita Limited of 15 Sloane Square, London, SW1W 8ER as its agent for service of process in relation to any proceedings before the English courts in connection with any Finance Document; and

(b) agrees that failure by a process agent to notify it of the process will not invalidate the proceedings concerned.

31.5 **Waiver of immunity**

Each Obligor irrevocably waives any claim to immunity in relation to any arbitration or court proceedings arising out of or connected with this Agreement, including without limitation, immunity from:

(a) jurisdiction of any court or tribunal;

(b) service of process;

(c) injunctive or other interim relief, or any order for specific performance or recovery of land or other property; and

(d) any process for execution of any award or judgment against its property.

In addition, in respect of any proceedings arising out of or connected with the enforcement and/or execution of any award or judgment made against it, each Obligor hereby submits to the jurisdiction of any court in which any such proceedings are brought.

31.6 **Waiver of Interest**

(a) The Parties recognise that the receipt and payment of interest is not permitted under Shari'ah and accordingly agree that if any claims for amounts due under any Finance Document are made in a court of law or arbitral tribunal and that court or arbitral tribunal, by applying the laws and regulations of its legal system, imposes an obligation to pay interest on the amounts being claimed, the Parties hereby irrevocably and unconditionally expressly waive and reject any entitlement to recover such interest.

(b) For the avoidance of doubt, nothing in this Clause 31.6 shall be construed as a waiver of rights in respect of Profit Amount payable by the Purchaser pursuant to the Finance Documents, howsoever such Profit Amount may be described or re-characterised by any court or arbitral tribunal. To the extent that any other amount (other than Profit Amount) payable by the Purchaser pursuant to the Finance Documents is described or re-characterised as interest, under any applicable law, by any court or arbitral tribunal, the Parties hereby irrevocably and unconditionally expressly waive and reject any entitlement to recover such amount.

This Agreement has been executed and delivered as a deed on the date stated at the beginning of this Agreement.

SCHEDULE 1

Part 1 - The Original Guarantors

1. Arcapita Bank B.S.C (c)
2. AEID II Holdings Limited
3. Arcapita LT Holdings Limited
4. RailInvest Holdings Limited
5. WindTurbine Holdings Limited
6. Arcapita (Europe) Limited
7. Arcapita (Singapore) Limited
8. Arcapita (US) Limited
9. Arcapita Inc.
10. Arcapita Industrial Management I Limited
11. Arcapita Investment Funding Limited
12. Arcapita Investment Management Limited
13. Arcapita Structured Finance Limited
14. Arcapita US Holding Co., Inc.
15. Arcapita Ventures LLC
16. AHQ Cayman Holdings Limited
17. AIDT India Holdings Limited
18. Arcapita Ventures I Holdings Limited
19. ArcIndustrial European Development Holdings Limited
20. ArcResidential Japan Holdings Limited
21. BT Holdings Limited
22. CEIP Holdings Limited
23. Chicago Condominium Holdings Limited
24. District Cooling Holdings Limited
25. Drillbit Holdings Limited
26. Earth Holdings Limited
27. ElectricInvest Holdings Limited
28. GAS Holdings Limited
29. India Growth Holdings Limited
30. JJ Holdings Limited
31. Logistics Holdings Limited
32. MS Surgery Holdings Limited
33. NavIndia Holdings Limited
34. Orlando Residential Holdings Limited
35. Outlet Center Holdings Limited
36. Palatine Holdings Limited
37. Perennial Holdings IV Limited
38. StoraFront Holdings Limited
39. Storapod Holdings Limited
40. TechInvest Holdings Limited
41. Victory Heights Lifestyle Holdings Limited
42. WaterWarf Holdings II Limited
43. WaterWarf Holdings Limited
44. Arcapita Ventures I WCF Limited
45. Arcapita WCF Limited
46. ArcResidential Japan WCF Limited
47. CEIP WCF Limited
48. Chicago Condominium WCF Limited
49. Condo Conversion WCF Limited
50. Drillbit WCF II Limited
51. Drillbit WCF Limited

52. Isoftechnology WCF Limited
53. US Senior Living WCF Limited
54. Windturbine WCF Limited

Part 2 - The Original Participants

Name of Original Participant	Participation (U.S.$.)	Percentage
Goldman Sachs International	175,000,000	100%
Total Commitments	**175,000,000**	**100%**

SCHEDULE 2
Form of Contribution Notice

From: Goldman Sachs International as Investment Agent

To: [*Name of Participant*]

Dated:

Dear Sirs

**Investment Agency Agreement dated [_____] 2013 (the "Agreement")
in relation to a Murabaha Facility Agreement dated [_____] 2013
between, inter alia, the Investment Agent and Arcapita Investment Holdings Limited Company
as Purchaser**

1 We refer to the Agreement. This is a Contribution Notice. Terms defined in the Agreement have the same meaning in this Contribution Notice unless given a different meaning in this Contribution Notice.

2 We hereby give you notice pursuant to Clause 6.1 (*Delivery of a Contribution Notice*) of the Agreement that we have received a duly completed Transaction Request from the Purchaser on the following terms:

Proposed Cost Price: U.S.$[_____]

Proposed Transaction Date: [_____]

Type of Commodities to be purchased: [_____]

Deferred Payment Date: [_____]

3 Your required Contribution to the Cost Price is U.S.$[_____].

4 Your Additional Profit Portion is U.S.$[_____].

5 Please make your Contribution (less Additional Profit Portion) available at the time and in the manner set out in Clause 4.2 (*Payment of Contribution*) of the Agreement to the following account:

[*insert Designated Account details*]

5 This Contribution Notice and any non-contractual obligations arising out of or in connection with it are governed by English law.

For and on behalf of

Goldman Sachs International

By:

SCHEDULE 3
Form of Transfer Certificate

To: Goldman Sachs International as Investment Agent

From: [*The Existing Participant*] (the **"Existing Participant"**) and [The New Participant] (the **"New Participant"**)

Dated:

Investment Agency Agreement
in relation to a Murabaha Facility Agreement dated [_____] 2013
between inter alia, the Investment Agent and Arcapita Investment Holdings Limited as Purchaser dated [_____] 2013 (the "Agreement")

1 We refer to the Agreement. This is a Transfer Certificate. Terms defined in the Agreement have the same meaning in this Transfer Certificate unless given a different meaning in this Transfer Certificate.

2 We refer to Clause 16.5 (*Procedure for transfer*) of the Agreement:

(a) The Existing Participant and the New Participant agree to the Existing Participant transferring to the New Participant by novation all or part of the Existing Participant's Participation, rights and obligations under this Agreement and the other Finance Documents referred to in the Schedule in accordance with Clause 16.5 (*Procedure for transfer*) of the Agreement.

(b) The proposed Transfer Date is [_____].

(c) The Facility Office and address, fax number and attention details for notices of the New Participant for the purposes of Clause 23.2 (*Addresses*) of the Agreement are set out in the Schedule.

3 The New Participant expressly acknowledges the limitations on the Existing Participant's obligations set out in paragraph (c) of Clause 16.4 (*Limitation of responsibility of Existing Participants*) of the Agreement.

4 This Transfer Certificate may be executed in any number of counterparts and this has the same effect as if the signatures on the counterparts were on a single copy of this Transfer Certificate.

5 This Transfer Certificate and any non-contractual obligations arising out of or in connection with it are governed by English law.

6 This Transfer Certificate has been entered into on the date stated at the beginning of this Transfer Certificate.

THE SCHEDULE

Participation/rights and obligations to be transferred

[*insert relevant details*]

[*Facility Office address, fax number and attention details for notices and account details for payments.*]

[Existing Participant]

By:

[New Participant]

By:

This Transfer Certificate is accepted by the Investment Agent and the Transfer Date is confirmed as [_____].

Goldman Sachs International

By:

SCHEDULE 4
Form of Assignment Agreement

To: Goldman Sachs International as Investment Agent

From: [the *Existing Participant*] (the "**Existing Participant**") and [the *New Participant*] (the "**New Participant**")

Dated:

Investment Agency Agreement
in relation to a Murabaha Facility Agreement dated [_____] 2013
between inter alia, the Investment Agent and Arcapita Investment Holdings Limited as Purchaser dated [_____] 2013 (the "Agreement")

1 We refer to the Agreement. This is an Assignment Agreement. Terms defined in the Agreement have the same meaning in this Assignment Agreement unless given a different meaning in this Assignment Agreement.

2 We refer to Clause 16.6 (*Procedure for assignment*) of the Agreement:

(a) The Existing Participant assigns absolutely to the New Participant all the rights of the Existing Participant under the Agreement and the other Finance Documents which relate to that portion of the Existing Participant's Participations and Contributions under the Agreement as specified in the Schedule.

(b) The Existing Participant is released from all the obligations of the Existing Participant which correspond to that portion of the Existing Participant's Participations and Contributions specified in the Schedule.

(c) The New Participant becomes a Party as a Participant and is bound by obligations equivalent to those from which the Existing Participant is released under paragraph (b) above.[1]

3 The proposed Transfer Date is [_____].

4 On the Transfer Date the New Participant becomes party to the Finance Documents as a Participant.

5 The Facility Office and address, fax number and attention details for notices of the New Participant for the purposes of Clause 23.2 (*Addresses*) of the Agreement are set out in the Schedule.

6 The New Participant expressly acknowledges the limitations on the Existing Participant's obligations set out in paragraph (c) of Clause 16.4 (*Limitation of responsibility of Existing Participants*) of the Agreement.

---

[1] If the Assignment Agreement is used in place of a Transfer Certificate in order to avoid a novation of rights/obligations for reasons relevant to a civil jurisdiction, local law advice should be sought to check the suitability of the Assignment Agreement due to the assumption of obligations contained in paragraph 2(c). This issue should be addressed at primary documentation stage.

7 This Assignment Agreement acts as notice to the Investment Agent (on behalf of each Finance Party) and, upon delivery in accordance with Clause 16.7 (*Copy of Transfer Certificate or Assignment Agreement to Purchaser*) of the Agreement, to the Purchaser of the assignment referred to in this Assignment Agreement.

8 This Assignment Agreement may be executed in any number of counterparts and this has the same effect as if the signatures on the counterparts were on a single copy of this Assignment Agreement.

9 This Assignment Agreement and any non-contractual obligations arising out of or in connection with it are governed by English law.

10 This Assignment Agreement has been entered into on the date stated at the beginning of this Assignment Agreement.

THE SCHEDULE

Rights to be assigned and obligations to be released and undertaken

[*insert relevant details*]

[*Facility office address, fax number and attention details for notices and account details for payments*]

[Existing Participant] [New Participant]

By: By:

This Assignment Agreement is accepted by the Investment Agent and the Transfer Date is confirmed as [_____].

Signature of this Assignment Agreement by the Investment Agent constitutes confirmation by the Investment Agent of receipt of notice of the assignment referred to herein, which notice the Investment Agent receives on behalf of each Finance Party.

Goldman Sachs International

By:

SCHEDULE 5
Timetables

"V-" refers to the number of Business Days before the Transaction Date.

Delivery of a duly completed Contribution Notice (Clause 6.1 (*Delivery of a Contribution Notice*))	V-2 no later than 9:00 a.m.
Payment by a Participant of a Contribution (Clause 6.2 (*Payment of Contribution*))	V-0 10:00 a.m.

EXECUTION PAGE OF INVESTMENT AGENCY AGREEMENT

THE DIP PURCHASER

Executed and delivered as a Deed)
for and on behalf of)
ARCAPITA INVESTMENT)
HOLDINGS LIMITED)

Mohammed Chowdhury
.....

By: Mohammed Chowdhury
Director/Authorised Signatory

In the presence of:

.....
Signature of witness

Carlito Lumarbio
.....
Name of witness P.O. Box 1406, Manama, Bahrain

Notice details for Purchaser:
Address: c/o Arcapita Bank, B.S.C.(c)
Arcapita Building
Road 4612, Area 346
Bahrain Bay, Manama
Kingdom of Bahrain
Fax: +44 20 7824 5415
Attention: General Counsel and Simon Dudley

ORIGINAL GUARANTORS

Executed and delivered as a Deed)
for and on behalf of each of)
AEID II HOLDINGS LIMITED)
)
AHQ CAYMAN HOLDINGS LIMITED)
)
AIDT INDIA HOLDINGS LIMITED)
)
ARCAPITA (EUROPE) LIMITED)
)
ARCAPITA (SINGAPORE) LIMITED)
)
ARCAPITA BANK B.S.C.(c))
)
Notice details for **ARCAPITA BANK**)
B.S.C.(c):)
)
Address: Arcapita Building)
Road 4612, Area 346)

Bahrain Bay, Manama)
Kingdom of Bahrain)
Fax: +44 20 7824 5415)
Attention: General Counsel and Simon Dudley)

ARCAPITA INDUSTRIAL MANAGEMENT I LIMITED)
)
ARCAPITA INVESTMENT FUNDING LIMITED)
)
ARCAPITA LT HOLDINGS LIMITED)
)
ARCAPITA STRUCTURED FINANCE LIMITED)
)
ARCAPITA VENTURES I HOLDINGS LIMITED)
)
ARCAPITA VENTURES I WCF LIMITED)
)
ARCINDUSTRIAL EUROPEAN DEVELOPMENT HOLDINGS LIMITED)
)
ARCRESIDENTIAL JAPAN HOLDINGS LIMITED)
)
ARCRESIDENTIAL JAPAN WCF LIMITED)
)
BT HOLDINGS LIMITED)
)
CEIP HOLDINGS LIMITED)
)
CEIP WCF LIMITED)
)
CHICAGO CONDOMINIUM HOLDINGS LIMITED)
)
CHICAGO CONDOMINIUM WCF LIMITED)
)
CONDO CONVERSION WCF LIMITED)
)
DISTRICT COOLING HOLDINGS LIMITED)
)
DRILLBIT HOLDINGS LIMITED)
)
DRILLBIT WCF II LIMITED)
)
DRILLBIT WCF LIMITED)
)

EARTH HOLDINGS LIMITED)
)
ELECTRICINVEST HOLDINGS LIMITED)
)
GAS HOLDINGS LIMITED)
)
INDIA GROWTH HOLDINGS LIMITED)
)
ISOFTECHNOLOGY WCF LIMITED)
)
JJ HOLDINGS LIMITED)
)
LOGISTICS HOLDINGS LIMITED)
)
MS SURGERY HOLDINGS LIMITED)
)
NAVINDIA HOLDINGS LIMITED)
)
ORLANDO RESIDENTIAL)
HOLDINGS LIMITED)
)
OUTLET CENTER HOLDINGS LIMITED)
)
PALATINE HOLDINGS LIMITED)
)
PERENNIAL HOLDINGS IV LIMITED)
)
RAILINVEST HOLDINGS LIMITED)
)
STORAFRONT HOLDINGS LIMITED)
)
STORAPOD HOLDINGS LIMITED)
)
TECHINVEST HOLDINGS LIMITED)
)
US SENIOR LIVING WCF LIMITED)
)
VICTORY HEIGHTS LIFESTYLE)
HOLDINGS LIMITED)
)
WATERWARF HOLDINGS II LIMITED)
)
WATERWARF HOLDINGS LIMITED)
)
WINDTURBINE HOLDINGS LIMITED)
)
WINDTURBINE WCF LIMITED)

By: Mohammed Chowdhury
Director/Authorised Signatory

In the presence of:

Signature of witness

CARLITO LIBARDO

Name of witness PO Box 1401, Manama, Bahrain

Executed and delivered as a Deed)
for and on behalf of each of)
ARCAPITA (US) LIMITED)
)
ARCAPITA INC.)
)
ARCAPITA INVESTMENT)
MANAGEMENT LIMITED)
)
ARCAPITA US HOLDING)
COMPANY, INC.)
)
ARCAPITA WCF LIMITED)

By: Henry Thompson .....
Director/Authorised Signatory

In the presence of:

.....
Signature of witness

.....
Name of witness

Executed and delivered as a Deed)
for and on behalf of)
ARCAPITA VENTURES LLC)
)
by: **ARCAPITA US HOLDING**)
COMPANY, INC. as its sole member)

.....
Henry Thompson
Director/Authorised Signatory

In the presence of:

.....
Signature of witness

.....
Name of witness

Signature of witness

.....
Name of witness

Executed and delivered as a Deed)
for and on behalf of each of)
ARCAPITA (US) LIMITED)
)
ARCAPITA INC.)
)
ARCAPITA INVESTMENT)
MANAGEMENT LIMITED)
)
ARCAPITA US HOLDING)
COMPANY, INC.)
)
ARCAPITA WCF LIMITED)

By: Henry Thompson
Director/Authorised Signatory

In the presence of:

.....
Signature of witness

CARLITO LOBARBIO
.....
Name of witness PO Box 1406, Manama, Bahrain

Executed and delivered as a Deed)
for and on behalf of)
ARCAPITA VENTURES LLC)
)
by: **ARCAPITA US HOLDING**)
COMPANY, INC. as its sole member)

.....
Henry Thompson
Director/Authorised Signatory

In the presence of:

.....
Signature of witness

CARLITO LOBARBIO
.....
Name of witness PO Box 1406, Manama, Bahrain

INVESTMENT AGENT

Executed and delivered as a Deed)
for and on behalf of)
GOLDMAN SACHS INTERNATIONAL)
as Investment Agent)

By: ROOPESH SHAH

In the presence of:

.....
Signature of witness

CHRIS B. IBECHUKWU
.....
Name of witness

Notice details for Investment Agent:
Address: Peterborough Court, 133 Fleet Street London, EC4A 2BB
Fax: +44.207.552.8554
Attention: Sarah Kemmis/Tiffany Levy

ORIGINAL PARTICIPANT

Executed and delivered as a Deed)
for and on behalf of)
GOLDMAN SACHS INTERNATIONAL)
as Original Participant)

By: ROOPESH SHAH

In the presence of:

.....
Signature of witness

CHRIS B. IBECHUKWU
.....
Name of witness

ARRANGER

Executed and delivered as a Deed)
for and on behalf of)
GOLDMAN SACHS INTERNATIONAL)
as Arranger)

By: ROOPESH SHAH

In the presence of:

Signature of witness

CHUKS B. IBECHUKWU

Name of witness

Notice details for Arranger:
Address: Peterborough Court, 133 Fleet Street London, EC4A 2BB
Fax: +44.207.552.8554
Attention: Sarah Kemmis/Tiffany Levy

SECURITY AGENT

Executed and delivered as a Deed)
for and on behalf of)
GOLDMAN SACHS INTERNATIONAL)
as Security Agent)

By: ROOPESH SHAH

In the presence of:

Signature of witness

CHUKS B. IBECHUKWU

Name of witness

Notice details for Security Agent:
Address: Peterborough Court, 133 Fleet Street London, EC4A 2BB
Fax: +44.207.552.8554
Attention: Sarah Kemmis/Tiffany Levy

Exhibit C

[2004] EWCA Civ 19 [2004] 1 W.L.R. 1784 [2004] 4 All E.R. 1072 [2004] 2 All E.R. (Comm) 312 [2004] 2 Lloyd's Rep. 1 [2004] 1 C.L.C. 216 (2004) 101(8) L.S.G. 29 Times, February 3, 2004 Official Transcript [2004] EWCA Civ 19 [2004] 1 W.L.R. 1784 [2004] 4 All E.R. 1072 [2004] 2 All E.R. (Comm) 312 [2004] 2 Lloyd's Rep. 1 [2004] 1 C.L.C. 216 (2004) 101(8) L.S.G. 29 Times, February 3, 2004 Official Transcript
(Cite as: [2004] 1 W.L.R. 1784)

[2004] EWCA Civ 19

***1784 Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd and others**

Court of Appeal

LJJ Potter, Laws, and Arden

2003 Dec 11, 12; 2004 Jan 28

Conflict of laws—Contract—Proper law—Parties entering into financing agreements—Clauses providing for agreements to be governed by English law subject to principles of Sharia law—Whether non-national system of law capable of being governing law—Contracts (Applicable Law) Act 1990 (c 36), Sch. 1, arts 1, 3

1

Contract—Construction—Proper law clause—Parties entering into financing agreements—Clauses providing for agreements to be governed by English law subject to principles of Sharia law—Whether clauses apt to incorporate principles of Sharia law into agreements

The claimant bank advanced moneys to the first and second defendants, two Bangladeshi pharmaceutical companies, under various financing agreements which were guaranteed by the third to fifth defendants. The bank was incorporated under the laws of Bahrain and, although the principles of Islamic law were not incorporated into the commercial law of Bahrain, the bank held itself out as applying Islamic principles in the course of its business. The financing agreements sought to circumvent the prohibition under Islamic law against the charging of interest upon a loan by taking the form of a sale contract, known as a Morabaha agreement, which was recognised as valid by Islamic law. The agreements each contained a governing law clause which stated that "Subject to the principles of the Glorious Sharia'a, this agreement shall be governed by and construed in accordance with the laws of England". The first and second defendants defaulted on their payments and the claimant bank applied for summary judgment against them and against the guarantors. The principal defence advanced by the defendants was that, on the true construction of the governing law clauses, the agreements were only enforceable in so far as they were valid both in accordance with the principles of the Sharia and in accordance with English law, and that the agreements did not in fact comply with Sharia law in that they were in truth disguised loans at interest. The judge gave judgment for the bank. The defendants appealed on the ground, inter alia, that the judge had failed to consider whether the clauses were apt to incorporate the principles of Sharia law into the agreements.

On appeal by the defendants-

Held, dismissing the appeal, that the doctrine of incorporation could only sensibly operate where the parties had by the terms of their contract sufficiently identified specific black letter provisions of a foreign law or an international code or set of rules apt to be incorporated as terms of the relevant contract; that the general reference in the clauses to principles of the Sharia afforded no reference to, or identification of, those aspects of Sharia law which were intended to be incorporated into the contract and stood unqualified as a reference to the body of Sharia law generally, which

was repugnant to the choice of English law as the law of the contract and rendered the contract self-contradictory and meaningless; that the references to Sharia law were intended merely to reflect the Islamic religious principles according to which the bank held itself out as doing business and were inadequate ***1785** to incorporate the principles of Sharia law, or any part of Sharia law, into the agreements; that, therefore, the validity of the agreements and the defendant's obligations thereunder were to be decided according to English law; and that, accordingly, the agreements were enforceable and the defendants were liable under them to the bank (post, paras 51–55, 61–63).

Per curiam. The Rome Convention on the Law Applicable to Contractual Obligations, scheduled to the Contracts (Applicable Law) Act 1990, contemplates that the law chosen to be the governing law of a contract shall be the law of a country as opposed to a non-national system of law such as Sharia law (post, paras 48, 62, 63).

Decision of Morison J [2003] EWHC 2118 (Comm); [2003] 2 All ER (Comm) 849 affirmed.

The following cases are referred to in the judgment of Potter LJ:

- Al-Bassam v Al-Bassam [2002] EWHC 2281 (Ch)
- Associated Japanese Bank (International) Ltd v Crédit du Nord SA [1989] 1 WLR 255; [1988] 3 All ER 902
- Bell v Lever Bros Ltd [1932] AC 161, HL(E)
- Brennan v Bolt Burdon [2003] EWHC 2493 (QB); [2004] 1 WLR 1240
- Furness Withy (Australia) Pty Ltd v Metal Distributors (UK) Ltd [1990] 1 Lloyd's Rep 236, CA
- Glencore International AG v Metro Trading International Inc [2001] 1 Lloyd's Rep 284
- Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd [2002] EWCA Civ 1407; [2003] QB 679; [2002] 3 WLR 1617; [2002] 4 All ER 689, CA
- Islamic Investment Co of the Gulf (Bahamas) Ltd v Symphony Gems NV (unreported) 13 February 2002, Tomlinson J
- Kleinwort Benson Ltd v Lincoln City Council [1999] 2 AC 349; [1998] 3 WLR 1095; [1998] 4 All ER 513, HL(E)
- Nea Agrex SA v Baltic Shipping Co Ltd [1976] QB 933; [1976] 2 WLR 925; [1976] 2 All ER 842, CA
- Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as H E Hansen-Tangen) [1976] 2 Lloyd's Rep 60, CA; [1976] 1 WLR 989; [1976] 3 All ER 570, HL(E)
- Swain v Hillman [2001] 1 All ER 91, CA

The following additional cases were cited in argument:

- American Motorists Insurance Co v Cellstar Corpn [2003] EWCA Civ 206; The Times, 1 April 2003, CA
- Kyrris v Oldham [2003] EWCA Civ 1506; The Times, 7 November 2003, CA
- Mauritius Oil Refineries Ltd v Stolt-Nielsen Nederlands BV [1997] 1 Lloyd's Rep 273
- SMAY Investments Ltd v Sachdev (Practice Note) [2003] EWHC 474 (Ch); [2003] 1 WLR 1973

The following additional cases, although not cited, were referred oto in the skeleton arguments:

- de Molestina v Ponton [2002] 1 All ER (Comm) 587; [2002] 1 Lloyd's Rep 271
- J (Specific Issue Orders: Muslim Upbringing and Circumcision), In re [1999] 2 FLR 678
- May & Butcher Ltd v The King (Note) [1934] 2 KB 17, HL(E)
- Scammell (G) & Nephew Ltd v Ouston [1941] AC 251; [1941] 1 All ER 14, HL(E)
- United Bank Ltd v Farooq Bros PLD 2002 SC 800

[2004] EWCA Civ 19 [2004] 1 W.L.R. 1784 [2004] 4 All E.R. 1072 [2004] 2 All E.R. (Comm) 312 [2004] 2 Lloyd's Rep. 1 [2004] 1 C.L.C. 216 (2004) 101(8) L.S.G. 29 Times, February 3, 2004 Official Transcript [2004] EWCA Civ 19 [2004] 1 W.L.R. 1784 [2004] 4 All E.R. 1072 [2004] 2 All E.R. (Comm) 312 [2004] 2 Lloyd's Rep. 1 [2004] 1 C.L.C. 216 (2004) 101(8) L.S.G. 29 Times, February 3, 2004 Official Transcript
(Cite as: [2004] 1 W.L.R. 1784)

APPEAL from Morison J

By a claim issued on 8 November 2002 the claimant, Shamil Bank of Bahrain EC, claimed from the defendants, Beximco Pharmaceuticals Ltd, ***1786** Bangladesh Export Import Co Ltd, Ahmed Sohail Fasiuhar Rahman, Ahmed Salman Fazlur Rahman and Beximco Holdings Ltd, around US$47m, moneys said to be due under financing agreements entered into by the first and second defendants and guaranteed by the third to fifth defendants. By an application notice filed on 12 May 2003 the claimant sought summary judgment of the claim under CPR Pt 24. On 1 October 2003 Morison J awarded the claimant summary judgment against the defendants jointly and severally in the total sum of US$49.7m.

By an appellant's notice filed on 29 August 2003, and pursuant to permission granted by Clarke LJ on 17 September 2003, the defendants appealed on the grounds, inter alia, (1) that the judge had erred in finding that the defendants were, in substance, contending that the agreements were "governed" by Sharia law, since their case had been that, although governed by English law, the agreements were subject to a condition precedent that they would only be enforceable to the extent that they were consistent with and did not offend the principles of Sharia; (2) that the judge had erred in approaching the defendant's case on the basis that they had argued that article 3(1) of theRome Convention on the Law Applicable to Contractual Obligations did not permit a contract, rather than parts of a contract, to be governed by the laws of two states since neither side had submitted that it did and the defendants had accepted that it did not; (3) that the judge had erred in finding that the construction advocated by the defendants offended article 3(1) of the Rome Convention; (4) that the judge's finding that article 1(1) of the Rome Convention precluded the choice of Sharia law as a governing law since it was not the law of a country was irrelevant as neither party had contended that it constituted the governing law of the agreements; (5) that the judge's finding that the wording of the relevant clauses could not be construed as a choice of Sharia law as the governing law of the agreements was irrelevant as neither side had in fact submitted that it could or should be so construed; (6) that the judge had erred in rejecting the defendant's submission that their construction of the Sharia clause produced a result no different from the incorporation of a codified system of rules, such as the Hague Rules or the Warsaw Convention, into a contract governed by English law; (7) that the judge's finding that the parties could not possibly have intended to ask an English secular court to determine whether the agreements were compliant with the principles of Sharia was fatally flawed in that it depended upon (a) a finding that the reference to the "principles" of Sharia was a reference to religious as opposed to legal principles, (b) an unwarranted rejection of the evidence of the defendant's Sharia expert that the principles of Sharia relied upon by the defendants were both basic and wholly uncontroversial and (c) a rejection of the defendant's argument that the English courts were well versed, with the assistance of appropriate expert evidence, in resolving issues of Sharia law which came before them; (8) that the judge's construction rendered otiose the reference in the relevant clauses to "the principles of the Glorious Sharia'a" in that it failed to attribute any meaning at all to the words and thus rendered them wholly superfluous; (9) that had the judge reached the correct conclusion on the proper construction of the Sharia clause he would or should have concluded that the guarantees were unenforceable; and (10) that the judge had erred in concluding that the mistake upon which the third to fifth defendants relied would not have rendered the guarantees unenforceable in any event, being a mistake of law.***1787**

By a respondent's notice filed on 8 October 2003 the claimant sought to uphold the order of Morison J for the reasons given in his judgment.

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The facts are stated in the judgment of Potter LJ.

Representation

• Richard Hacker QC and Mark Arnold for the defendants.
• Brian Doctor QC and Sara Partington, solicitor, for the bank.

Cur adv vult

POTTER LJ

28 January. The following judgments were handed down.

Introduction

1 This is an appeal from the judgment of Morison J dated 1 August 2003 whereby he gave summary judgment in favour of the claimant Shamil Bank of Bahrain EC ("the bank") against the first and second defendants as principal debtors in respect of moneys advanced to them by the bank under various financing agreements and against the third, fourth and fifth defendants as guarantors of certain of those agreements. The total judgment sum awarded was some US$49.7m. The appellants were refused permission to appeal by Morison J, but permission was granted by Clarke LJ on 17 September 2003 in relation to a single issue relating to the construction and effect of the form of the governing law clause contained in the financing agreements. That clause reads as follows: "Subject to the principles of the Glorious Sharia'a, this agreement shall be governed by and construed in accordance with the laws of England"

2 It is not in dispute that "the principles of the Glorious Sharia'a" referred to are the principles described by the defendant's expert, Mr Khalil-Ur-Rehman Khan (formerly Khan J), as

"the law laid down by the Qur'an, which is the holy book of Islam, and the Sunnah (the sayings, teachings and actions of Prophet Mohammad (PBUH)). These are the principal sources of the Sharia. The Sunnah is the most important source of the Islamic faith after the Qur'an and refers essentially to the Prophet's example as indicated by his practice of the faith. The only way to know the Sunnah is through the collection of Ahadith, which consists of reports about the sayings, deeds and reactions of the Prophet…"

3 One principle expressly stated in the Qur'an and Sunnah is that the charging of interest upon a loan, in whatever form, is "Riba" and is contrary to the Sharia. At Sura II, 275–279 of the Qur'an it is stated that:

"Allah has made buying and selling lawful and has made the taking of interest unlawful. Remember, therefore, that he who desists because of the admonition that has come to him from his Lord, may retain what he has received in the past; and his affair is committed to Allah. But those who revert to the practice, they are the inmates of the fire; therein shall they abide… O Ye who believe, be mindful of your duty to Allah and relinquish your claim to what remains of interest, if you are truly believers. But if you do not, then beware of war from the side of Allah and his Messenger. If, however, you desist, you will still have your capital sums; thus you will commit no wrong, nor suffer any wrong yourself."***1788** Sura III, 130 states: "O Ye who believe, devour not interest, for it goes on multiplying itself; and be mindful of your obligation to Allah that you may prosper." (The Qur'an, translated by Muhammad Zafrulla Khan (1971).)

The factual background

4 The bank is incorporated under the laws of Bahrain and licensed to act as a bank by the Ministry of

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Commerce and Bahrain Monetary Agency. The Kingdom of Bahrain is a constitutional monarchy and 95% of its population are muslims. None the less, while embracing and encouraging Islamic banking practice as a national policy, the principles of Islamic law, in particular the prohibition of Riba, have not been incorporated into the commercial law of Bahrain and there is an absence of any legal prescription as to what does and does not constitute "Islamic" banking or finance. In his survey of the commercial laws of the Arab Middle East, Professor Ballantyne (*Commercial Law in the Arab Middle East: The Gulf States* (1986), p 133) states that:

"In our other jurisdictions, banking interest is, in practice, tolerated (Saudi Arabia) and even sanctioned by banking laws (Bahrain, Qatar and Oman), while any theoretical or hypothetical conflicts have been largely ignored."

5 The unchallenged position as far as the charging of interest in Bahrain is concerned is that stated in *Nabil Saleh, Unlawful Gain and Legitimate Profit in Islamic Law*, 2nd ed (1992), p 9:

"The matter of interest is regulated as far as commercial transactions are concerned by the provisions of article 81 of the Commercial Code of 1987. The latest amendment of article 81, effectuated by Law No 4 of 1992, gives the following instructions to courts: (1) interest on overdue payments of commercial debts becomes due by the mere occurrence of maturity dates unless otherwise provided for by law or agreement. (2) Under no circumstances, and with regard to debts whose settlement does not exceed a period of seven years, may the aggregate amount of interest paid to the creditor exceed the initial indebtedness. (3) The provisions of the preceding (2) do not apply to debts which were contracted in foreign currencies. (4) The creditor is entitled to claim complementary damages in addition to interest on overdue payments with no need to prove that the additional damage he suffered was caused by the debtor's fraud or his serious fault."

6 None the less, the bank holds itself out as applying Islamic principles in the course of its business. The bank's full title is "Shamil Bank of Bahrain EC (Islamic Bankers)". The main objects clause in its memorandum of association is in general terms:

"3.Notwithstanding the provisions of this article, the company shall undertake at all times to comply with the Bahrain Monetary Agency Law and any circulars, rules or regulations issued by the Bahrain Monetary Agency from time to time… According to the above, the company will carry on all banking, investment, financial activities, offshore units and all services relating thereto of various commercial, industrial, agricultural, real estate, tourism, housing and other services in the State of Bahrain and outside it."***1789** However, clause 34 of the articles of association provides for the ordinary general meeting to elect and appoint a religious supervisory board "which shall comprise at least three persons who are recognised specialists and qualified in Islamic jurisprudence, religious provisions and Islamic economy".

7 Clauses 35 and 36 of the articles provide:

"35(a)The religious supervisory board shall ascertain that the company's investments and activities (and the activities of its subsidiary and affiliated companies) conform with the principles and provisions of Islamic Sharia'a. It shall, in particular, discuss with the members of the board of directors, managers of the company or of any subsidiary or affiliated company under its control, such conformity and the business carried out by them and shall request any information it deems necessary. In particular, the religious supervisory board shall adopt all the crucial decisions for applying the provisions of Islamic Sharia'a to ensure the realisation of the objects for which the company

was incorporated. Also to ensure that the members of the board of directors, managers and employees are co-ordinating their activities according to such decisions which will be binding on all the shareholders. The religious supervisory board shall within six months from the end of the company's financial year, submit a written report stating that it fulfilled the obligations indicated herein and ascertained that the company's investments and business activities (including its subsidiary companies) conform with the provisions of Islamic Sharia'a."

"36.The board of directors shall take the necessary actions to ensure that all the investments and other business transactions have been referred to the religious supervisory board for approval before carrying out any other business transactions by the company or by any subsidiary or affiliate company under its control."

8 As made clear by the bank's expert witness, provisions of this kind are not unusual. In the absence of legal prescription as to what does and what does not constitute "Islamic" banking or finance, most Islamic banks create religious or Sharia supervisory boards which review annually the operations of the bank and determine whether or not these have been carried out in accordance with Islamic law. They examine on a test basis each type of transaction entered into by the bank and evidence to show that the transaction and dealings entered into by the bank are in compliance with Sharia rules and principles, submitting an annual report to the shareholders in that respect. In this case the bank's own religious supervisory board certified in respect of the years 1995 and 1996 that "The board believes that all the bank's business throughout the said year, including investment activities and banking services, were in full compliance with Glorious Islamic Sharia'a"

9 A certificate of compliance was also issued for that period by the bank's auditors, reviewing the bank's operation on the basis of the financial accounting standards issued by the Accounting and Auditing Organisation for Islamic Financial Institutions.

10 Until their defences were filed in this action, the appellants had never given any indication to the bank that they were dissatisfied on religious grounds with the arrangements agreed between the parties or that they ***1790** sought to challenge them on the grounds that they did not comply with the principles of Sharia.

11 The first two defendants are Bangladeshi companies (part of the Beximco group) involved in the manufacture, export and import of pharmaceuticals. The third and fourth defendants are directors of the first and second defendants and of the fifth defendant which is their parent company. I shall refer to the third, fourth and fifth defendants collectively as "the guarantors".

12 In 1995 the Beximco group wished to raise additional working capital to be used in its commercial activities. To this end, there were meetings between the bank and, principally, Mr Chowdhury the Beximco Group Director of Finance and a director of the first and second defendants. The moneys were advanced pursuant to the terms of two "Morabaha financing agreements" which, in form, related to the sale of goods.

13 It is not in dispute that a Morabaha agreement is a sale contract recognised as valid by Islamic law whereby the seller (the financier) agrees to purchase goods desired by the buyer and to sell them to the buyer (the client) for a deferred price, the difference between the original purchase price to be paid by the financier and the deferred price payable by the client being a stated profit known to and agreed upon by both seller and buyer. In order to avoid the appearance or characteristics of a loan at interest and to provide

for and preserve the features of a contract of sale, the financier purchases the goods in its own name, and the goods must come into its possession (actual or constructive), remaining at its risk until the commodity is sold to the client. However, for that purpose the financier may appoint the client as agent for the purchase on behalf of the financier and, once the client effects such purchase as the agent of the financier, the client may retain possession of the commodity on its own behalf. The detailed form and content of Morabaha agreements varies. There are no standard forms and, in practice, the detailed terms and conditions will be agreed by the bank and its customer around the essential characteristics I have mentioned. It is the function of an Islamic bank's religious supervisory board to ensure that the Morabaha agreement complies with Islamic law as interpreted by the religious supervisory board.

14 Following negotiations in which each side was advised, the bank and the first and second defendants entered into a Morabaha financing agreement dated 28 December 1995 ("the 1995 Morabaha agreement") under which, pursuant to clauses 2.1, 2.2 and 4.2, the bank agreed to purchase, through the second defendant acting as its agent, certain goods from specified sellers for immediate onward sale to the first defendant. In return, pursuant to clause 2.1, the first defendant agreed to pay to the bank the Morabaha price, defined in the agreement as the aggregate of the purchase price of goods purchased plus the profit element, calculated by reference to clause 2 of a market rate agreement also entered into between the parties. Pursuant to clause 4.5 of the Morabaha agreement, the payments to be made were set out in a letter from the bank to the defendants dated 28 December 1995 ("the 1995 payment schedule letter"). Pursuant to clause 3 of the 1995 market rate agreement, if any payment due remained unpaid for any period after its due date, compensation would be payable to the bank.

15 In accordance with clause 4.1 of the 1995 Morabaha agreement, the bank advanced to the second defendant US$15m ostensibly for the ***1791** purposes of purchasing the specified goods. Between 28 March 1996 and 28 September 1997, the first defendant made seven payments in accordance with the 1995 payment schedule letter.

16 In April 1996, following an approach by the second defendant seeking further funds, the bank agreed to advance the second defendant a further sum of US$15m. On 11 July 1996 the bank and the first and second defendants entered into a further Morabaha agreement ("the 1996 Morabaha agreement") and market rate agreement in terms similar to those of the 1995 agreements.

17 In accordance with clause 4.1 of the 1996 Morabaha agreement, on 15 July 1996, the bank paid to the first defendant US$15m ostensibly for the purpose of purchasing the specified goods. Between 15 October 1996 and 12 August 1997, the second defendant made four payments in accordance with the 1996 payment schedule letter.

18 By December 1999 the first and second defendants had not paid the amounts due under the 1995 and 1996 Morabaha agreements, although admitting and agreeing in writing that such sums were owed. Following negotiations, the bank and the first and second defendants agreed to enter into new agreements to discharge the first and second defendant's obligations in exchange for the first and second defendants undertaking alternative obligations to the bank which the third, fourth and fifth defendants were to guarantee.

19 On 14 September 1999 the bank and the first and second defendants entered into two exchange in satisfaction and user agreements, one relating to the 1995 Morabaha agreement ("the first ESUA") and the other relating to the 1996 Morabaha agreement ("the second ESUA") which were each subsequently amended and

restated by agreement on 4 February 2001 and 30 January 2002. The re-amended ESUAs became effective on 4 April 2002. Under clause 2.1 of the ESUAs the bank agreed to discharge on the effective date the amount then outstanding under the 1995 and 1996 Morabaha agreements in exchange for being granted the right to receive unencumbered title to certain assets. Pursuant to clauses 3.1 and 3.3, the bank agreed to grant the first and second defendants the right to use those assets in the ordinary course of their respective businesses in consideration for payment by instalments of a user fee determined in accordance with clause 3.4. The first and second defendants were also obliged to make certain payments of accrued compensation. Under clause 4.1 of the ESUAs, it was a condition precedent that the third, fourth and fifth defendants guaranteed the first and second defendant's obligations under the ESUAs.

20 The form of the ESUAs, whereby the bank, having acquired the ownership of the first and second defendant's assets, permitted their retention and use in return for regular payment of the scheduled user fees was in principle a method of financing recognised as legitimate by the Sharia as "Ijarah", the giving of something in rent. However, when that method of financing is adopted by a bank in place of a simple interest-bearing loan, the question of whether the transaction is legitimate according to the principles of Sharia depends upon an analysis of the particular terms and conditions of the agreement and may prove controversial.

21 In this case, various defaults and "termination events" provided for under the ESUAs occurred and, as the bank was entitled to do, it sent two default letters dated 18 August 2002 to the defendants under the terms of the ***1792** first and second ESUAs in respect of the sums subsequently claimed in this action.

The bank's claims against the first and second defendants

22 The bank's claims against the first and second defendants are made up as follows:

"(1)US$25,207,000 being the amount due under the first ESUA relating to the 1995 Morabaha agreement;

(2)US$21,472,800 being the amount due under the second ESUA relating to the 1996 Morabaha agreement;

(3)US$1,147,540.76 being accrued compensation due under clause 4.2.4 of the first ESUA;

(4)US$1,884,169.75 being accrued compensation due under clause 4.2.4 of the second ESUA."

The bank's claims against the guarantors

23 On 6 February 2001 the bank and the third and fourth defendants entered into two personal guarantees, one relating to the first ESUA and one relating to the second ESUA ("the personal guarantees"). On the same date the bank and the fifth defendant entered into two corporate guarantees, one relating to the first ESUA and one relating to the second ESUA ("the corporate guarantees"). The guarantees were all in materially similar terms. Each states that it is "governed by and shall be construed in accordance with English law", with provision also for the jurisdiction of the English courts. There is no reference to the principles of Sharia.

24 Each guarantee recites the relevant Morabaha financing agreement, the "outstanding amount" pursuant thereto and the relevant ESUA agreement as amended.

25 The relevant provisions of the guarantee for the

purposes of this appeal are as follows:

"2.1Covenant to pay Covenant to pay. In consideration of Shamil agreeing to discharge the outstanding amount in return for being granted the right to acquire title to the assets and Shamil permitting Beximco and BEIC to use the assets in return for the user fee pursuant to the exchange agreement"i.e., the ESUA-"the guarantor hereby guarantees to Shamil Beximco and BEIC's obligation to transfer title to the assets to Shamil and guarantee to pay to Shamil, on demand by Shamil, the user fee and all moneys and discharge all obligations and liabilities now or hereafter due, owing or incurred by Beximco and BEIC (or either of them as the case may be) to Shamil under or pursuant to the exchange agreement and the other new transaction documents when the same become due for payment or discharge whether by acceleration or otherwise, and whether such moneys, obligations or liabilities are express or implied, present, future or contingent, joint or several, incurred as principal or surety, originally owing to Shamil or purchased or otherwise acquired by it, denominated in dollars or in any other currency, or incurred on a banking account or any other manner whatsoever…

"2.2Guarantor as principal debtor; indemnity Guarantor as principal debtor; indemnity. As a separate and independent stipulation, the guarantor agrees that if any purported obligation or liability of Beximco and/or BEIC (as the case may be) which would have been the subject of this guarantee had it been valid and enforceable is not or ceases to be valid or enforceable against Beximco ***1793** and/or BEIC (as the case may be) on any ground whatsoever whether or not known to Shamil (including, without limitation, any irregular exercise or absence of any corporate power or lack of authority of, or breach of duty by, any person purporting to act on behalf of Beximco and/or BEIC (as the case may be) or any legal or other limitation… the guarantor shall nevertheless be liable to Shamil in respect of that purported obligation or liability as if the same were fully valid and enforceable and the guarantor were the principal debtor in respect thereof…"

26 The bank claims against each of the guarantors the same sums as are claimed against the debtors as set out in para 22 above.

The issues on this appeal

27 A number of defences were advanced by the defendants before the judge below, certain of which were regarded by the judge as having the hallmarks of trumped-up defences designed to avoid or delay payment. However, the principal defence advanced was that (a) on a true construction of the governing law clause quoted in para 1 of this judgment, the Morabaha agreements and the ESUAs were only enforceable in so far as they were valid and enforceable both (i) in accordance with the principles of the Sharia (i e the rules or laws of Islam) and (ii) in accordance with English law; (b) in fact, the agreements were unlawful, invalid and unenforceable under the principles of the Sharia in that, despite their form as Morabaha agreements, in the case of the 1995 and 1996 Morabaha agreements, and as Ijarah leases, in the case of the first and second ESUAs (which would be enforceable if they were a true reflection of the underlying transaction), the transactions were in truth disguised loans at interest. As such they amounted to unlawful agreements to pay Riba and were thus void and/or unenforceable.

28 In this connection it was stated in the witness statement of Mr Chowdhury for the defendants that he made it clear that the moneys sought from the bank by the first and second defendants were required as working capital for the Beximco group and that it was the bank which required that the transaction be structured in the forms adopted in order to comply with Sharia law. The fourth defendant, as a director of the first, second and fifth defendant's and a personal

guarantor of the ESUAs, stated that

"it is not uncommon for banks, in their enthusiasm to make profitable loans, to use a Morabaha agreement to disguise what is, as a matter of commercial reality, an interest-bearing loan. That is precisely what happened in the present case and both the claimant and the defendants were quite content that this should happen. Neither was under any illusion as to the commercial realities of the transactions, and the claimant was happy to dress the loan transactions up as Morabaha sales (or Ijarah leases), whilst taking no interest in whether the proper formalities of such a sale or lease were actually complied with."

29 The rival expert evidence as to the validity of the agreements under Islamic law was as follows. The bank's expert, Dr Lau, the former director of the Centre of Islamic and Middle Eastern Law, stated that the precise scope and content of Islamic law in general, and Islamic banking in particular, are marked by a degree of controversy within the Islamic world, ***1794** best exemplified by the fact that the actual practice of Islamic banking differs widely within the Islamic world. Even within particular jurisdictions such as Pakistan, which are committed and constitutionally obliged to introduce Islamic financial systems, the issue is subject to ongoing debate and a high degree of uncertainty. In the absence of any agreement on the boundaries of "Islamic banking" or, indeed, on what ought to be the precise ingredients of a Morabaha agreement, it is in practice up to individual banks to determine the issue. In the absence of any legal prescription as to what does and what does not constitute Islamic banking or finance, most Islamic banks, including those in Bahrain, seek the advice of Islamic scholars who examine and approve particular agreements and forms of agreement, the role of the Religious Supervisory Committee being to formulate the bank's interpretation of the Sharia.

30 Strictly interpreted "the Glorious Sharia'a" refers to the divine law as contained in the Qur'an and Sunnah. However, most of the classical Islamic law on financial transactions is not contained as "rules" or "law" in the Qur'an and Sunnah but is based on the often divergent views held by established schools of law formed in a period roughly between 700 and 850 CE. The particular form and content of Morabaha agreements varies. If a bank's religious supervisory board is satisfied that the bank's activities are in accordance with Sharia law, that concludes the matter, there being no provision in Bahrain law, or Islamic law generally, for an appeal by a customer of the bank against the board's rulings and certifications. Finally, even if the relevant agreements amounted to agreements to pay Riba, the principal sums advanced could be validly claimed.

31 Dr Lau's conclusion was that the concern of the defendants that the sums advanced were not used to purchase the goods and/or equipment, the subject of the 1995 and 1996 Morabaha agreements, but rather as part of the general working capital of the first and second defendants was of no relevance to the question whether or not the Morabaha agreements complied with Islamic law. He stated:

"In my opinion for the Morabaha agreements to be in accordance with Islamic law all that is required is that they are certified as such by Shamil Bank's Religious Supervisory Board and the principal amounts are disbursed in accordance with the terms of the 1995 and 1996 Morabaha agreements."

32 The position of the defendant's expert, Mr Khan, formerly Khan J, chairman of the Sharia Appellate Bench of the Supreme Court of Pakistan, shortly stated was as follows. He acknowledged that "wherever a question of interpretation of the principles contained in the Qur'an and Sunnah is involved, the application of the rules of Sharia'a has and will con-

tinue to give rise to disputes between different jurists". He also did not contradict the assertion of Dr Lau that most of the classical Islamic law on financial transactions was not to be found in the Qur'an and Sunnah. However, he made clear (as Dr Lau did not dispute) that the injunction against the payment of Riba is contained in both those holy books and that it is uncontroversial that under Islamic law interest charged on loans by banks is Riba and prohibited. Equally, any agreement in which, in substance, interest is being charged upon a loan is unlawful, void and unenforceable.

33 Mr Khan acknowledged that the Sharia recognises two modes of financing as permissible, namely Morabaha and Ijarah agreements, but ***1795** asserted that, for such transactions to be valid, the requirements prescribed and provided for in the agreement must be fulfilled, failing which the transaction as a whole will be void according to the principles and rules of Sharia. On the basis of the (uncontradicted) assertion of the defendants that the advances were never applied or intended to be applied in the purchase or lease of any property, the relevant agreements were void. The ESUAs were similarly void and unenforceable on the basis of a number of arguments advanced, the principal one of which was that, irrespective of their form as purported Ijarah leases of assets, the ESUAs simply constituted a rescheduling or roll-over of the 1995 and 1996 Morabaha agreements, the bank charging interest or an additional amount over and above the sums due in consideration of the giving of time. This too was Riba and accordingly prohibited and void.

34 Finally, so far as the position of the bank's religious supervisory board was concerned, Mr Khan stated that certification by the board that the operations of the bank were according to the Sharia would not be a decision binding on any court dealing with the dispute under the law of Sharia. The dispute would fall to be resolved by the court in the light of its own view of the position under Sharia law. In any event there was no evidence that the board had had knowledge of, nor was it required to approve, the particular transaction in this case, its function being one of overall supervision and approval of the methods and procedures adopted by the bank in the course of its business.

35 So far as the liability of the guarantors was concerned, two arguments were advanced before the judge which are of relevance to this appeal. The first was simply that, under the general law of guarantee, if the principal debtor was discharged from liability in respect of the obligations guaranteed, then the guarantors were similarly discharged.

36 The second defence raised was that the guarantees had been entered into by the parties on the basis of a common mistake of a fundamental nature, namely that the first and second defendants were under enforceable obligations to the bank under the Morabaha agreements at the time when, and in respect of which, the ESUAs and guarantees were entered into.

The decision of Morison J

37 The paragraph numbers referred to in this section reflect the numbered paragraphs of the judgment of Morison J [2003] 2 All ER (Comm) 849.

38 The judge held, and it is accepted by the bank on this appeal, that if, on a proper construction of the applicable law clause, the court is obliged to concern itself with the application of Sharia law and its impact on the lawfulness of the agreements, it is arguable which of the two partie's experts was right and that it would offend the principles underlying CPR Pt 24 to seek to resolve the conflict between them before a trial. That is so not only in respect of the recoverability of sums which were effectively interest upon the capital sums advanced, but also of the capital sums themselves: pp 857–858, paras 32 and 33.

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39 However the judge concluded that, on the proper construction of the applicable law clause, he was not concerned with the principles of Sharia at all for the following reasons.

40 First, it was common ground by concession that there could not be two separate systems of law governing the contract: p 857, para 30. Yet, by ***1796** contending that Sharia law and not English law would determine the enforceability of the agreement, the appellants were in substance contending that the agreements were governed both by English and Sharia law: p 858, para 35. The judge declined to construe the wording of the clause as a choice of Sharia law as the governing law for the following reasons. First, article 3(1) of the Rome Convention on the Law Applicable to Contractual Obligations (which by section 2(1) of the Contracts (Applicable Law) Act 1990 has the force of law in the United Kingdom) contemplates that a contract "shall be governed by *the* law chosen by the parties" and article 1(1) of the Rome Convention makes it clear that the reference to the partie's choice of the law to govern a contract is a reference to the law of a country. There is no provision for the choice or application of a non-national system of law such as Sharia law: pp 856, 858 and 859, paras 27, 35 and 38. In any event, the principles of the Sharia are not simply principles of law but principles which apply to other aspects of life and behaviour: p 859, para 38. Even treating the principles of Sharia as principles of law, the application of such principles in relation to matters of commerce and banking were plainly matters of controversy: pp 858 and 859, paras 36 and 39. In particular there is controversy as to the strictness with which principles of Sharia law will be interpreted or applied. In consequence it was highly improbable that the parties to the agreements intended an English court to determine any dispute as to the nature or application of such controversial religious principles which would involve it in the task of deciding between opposing points of view which themselves might be based on geopolitical and particular religious beliefs: pp 858–859, paras 36–40.

41 The judge accepted the submission of the bank that the words "subject to the principles of Glorious Sharia'a" were no more than a reference to the fact that the bank purported to conduct all its affairs according to the principles of Sharia. However, in respect of what those principles were and their effect upon the contract, the judge concluded the relevant part of his judgment as follows, at p 859:

"39.Whilst in one sense this court will answer any question posed of it, however difficult, it is improbable, in the extreme, that the parties were truly asking this court to get into matters of Islamic religion and orthodoxy. This is especially so when the bank has its own religious board to monitor the compliance of the bank with the board's own perception of Islamic principles of law in an international banking context.

"40.So far as the bank was concerned, that is likely to have been sufficient for its own regulatory purposes and there is no suggestion that the defendants were in any way concerned about the principles of Sharia'a law either at the time the agreement was made or at any time before the proceedings were started. The Sharia'a law defence is, I think, a lawyer's construct but, for the reasons I have given, in my view it does not work."

The submissions of the appellants

42 Before this court, Mr Hacker for the appellants has not resiled from his concession that there can only be one governing law of the agreements. He accepts, and indeed asserts that it was his case below, that the governing law is English law and English law alone. However, he submits that this ***1797** does not preclude the possibility that the principles of Sharia have relevance. He submits that all the parties have done is to choose English law as the governing law but, at the

same time to stipulate as a condition precedent that the contract is only to be enforceable in so far as it is consistent with the principles of Sharia, which principles amount to legal rules ascertainable and applicable by an English court. He submits that that is something different from an assertion that Sharia law governs the agreements.

43 Mr Hacker accepts that the Rome Convention precludes the choice of Sharia, as a governing law, being concerned only with a potential choice between the laws of different countries. However, he submits that the construction of the governing law clause for which he contends produces a result no different from the incorporation by reference of a codified system of rules, such as the Hague Rules or the Warsaw Convention, into a contract governed by English law (cf Nea Agrex SA v Baltic Shipping Co Ltd [1976] QB 933) in which this court rejected the conclusion of Donaldson J at first instance that a paramount clause provision was to be treated as ineffective to incorporate the Hague Rules into a charterparty. He submits that such a construction is fully consistent with the bank's self-proclaimed mode of business as an Islamic bank carrying on an Islamic banking business.

44 Mr Hacker submits that, contrary to the view of the judge, it is neither unusual nor improbable that the parties to the contract should intend the English court to determine and apply the Sharia, nor, as he submits, is the English court ill-equipped to do so when assisted by expert evidence, in which respect he refers to the decision of Moore-Bick J in Glencore International AG v Metro Trading International Inc [2001] 1 Lloyd's Rep 283, 313–315, paras 113–125 and that of Hart J in Al-Bassam v Al-Bassam [2002] EWHC 2281 (Ch).

45 He further submits that the reasoning of the judge was influenced by an erroneous view that the principles of Sharia constituted a body of controversial religious (as opposed to legal) principles, which view he was wrong to form on the evidence before him. In this respect, Mr Hacker relies heavily upon the fact that the evidence of Mr Khan was that the principles of Sharia *raised in this case*, i e the proscription of Riba and the essentials of a valid Morabaha agreement, are not controversial. In this respect he referred us to the judgment of Tomlinson J in Islamic Investment Co of the Gulf (Bahamas) Ltd v Symphony Gems NV (unreported) 13 February 2002 in which, it is clear that, when giving expert evidence in that case, Dr Lau did not suggest that there was any difficulty in identifying the requirements for an effective Morabaha contract under Sharia law. He therefore submits that the judge's conclusion that the principles of Sharia law *relevant to this case* were controversial, so as to render it improbable that the parties would have chosen the English court to resolve a dispute as to the enforceability of the agreements, was incorrect or, at the very least, involved him in conducting a mini-trial in relation to the partie's expert evidence contrary to the principles laid down in Swain v Hillman [2001] 1 All ER 91.

Discussion

The governing law clause

46 The central question in this appeal is one of construction in respect of the relevant "governing law" clause, expressly so described and couched in the short form already quoted in para 1 of this judgment. The task of ***1798** construction is to ascertain the presumed intention of the parties bearing in mind that

"In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating": Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as H E Hansen-Tangen) [1976] 1 WLR 989,

995–996, per Lord Wilberforce.

47 It is common ground in the context of the summary judgment application that, when the parties entered into the Morabaha agreements and subsequently, neither side was under any illusion as to the commercial realities of the transactions, namely the provision by the bank of working capital on terms providing for long term repayment, and both were content "to dress the loan transactions up as Morabaha sales (or Ijarah leases), whilst taking no interest in whether the proper formalities of such a sale or lease were actually complied with" (see para 28 above). Nor, as Mr Hacker expressly accepted at the outset, was it ever intended in relation to any of the agreements made that they should be other than binding on the parties. In those circumstances, as it seems to me, the court, in approaching its task, should lean against a construction which would or might defeat the commercial purpose of the agreements. Accordingly, in so far as each of the clauses provides in clear terms that "this agreement shall be governed by and construed in accordance with the laws of England", the proviso that such provision shall be "subject to the principles of the Glorious Sharia'a" should be approached on a basis which is reconcilable with the purpose evident from the words which follow, rather than operating to defeat such purpose.

48 It is conceded by Mr Hacker that there cannot be two governing laws in respect of these agreements. He further concedes that the governing law is that of England. It seems to me that he is rightly driven to this concession. The wording of article 1(1) of the Rome Convention ("The rules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries") is not on the face of it applicable to a choice between the law of a country and a *non*-national system of law, such as the lex mercatoria, or "general principles of law", or as in this case, the law of Sharia. Nevertheless, that wording, taken with article 3(1) ("A contract shall be governed by *the* law chosen by the parties") and the reference to choice of a "foreign law" in article 3(3), makes it clear that the Convention as a whole only contemplates and sanctions the choice of the law of a country: cf *Dicey & Morris, The Conflict of Laws*, 13th ed (2000), vol 2, p 1223, para 32–079 and *Briggs, The Conflict of Laws* (2002), p 159.

49 Mr Hacker thus opts for a construction that the wording is apt, and intended, to incorporate into English law for the purposes of its application to the contract, the "principles of… Sharia". In this respect, and no doubt to avoid the difficulty that the principles of Sharia, generally stated, are of broad nature and application (indeed they are unexplored for the purposes of this litigation), Mr Hacker argues that the clause should be read as incorporating simply those specific rules of Sharia which relate to interest and to the nature of Morabaha and Ijarah contracts, thus qualifying the choice of English law as the governing law only to that extent.***1799**

50 In that respect, he seeks to rely upon the passage in *Dicey & Morris*, 13th ed, vol 2, p 1226, para 32–086, which expounds the distinction between reference to a foreign law as a choice of law to govern the contract (or part of a contract) on the one hand and incorporation of some provisions of a foreign law as a term or terms of the contract in question. While observing that it is sometimes difficult to draw the distinction in practice, it is there stated that

"32–086… It is open to the parties to an English contract to agree, e g that the liability of an agent to his principal shall be determined in accordance with the relevant articles of the French Civil Code. In such a case the foreign law becomes a source of law upon which the governing law may draw. The effect is not to make French law the governing law of the contract but rather to incorporate the French articles as contractual terms into an English contract. This is a con-

venient 'shorthand' alternative to setting out the French articles verbatim. The court will then have to construe the English contract, 'Treading into it as if they were written into it the words' of the French statute.

"32–087.It often happens that statutes governing the liability of a sea carrier, such as the former Harter Act in the United States, or statutes implementing the Hague Rules… are thus 'incorporated' in a contract governed by a law other than that of which the statute forms part. The statute then operates not as a statute but as a set of contractual terms agreed upon between the parties. The parties may make an express choice of one law (e g English law) and then incorporate the terms of a foreign statute. In such a case the incorporation of the foreign statute would only have effect as a matter of contract."

51 It does not seem to me that the passage cited or the authorities referred to in the notes thereto, assist the defendants. The doctrine of incorporation can only sensibly operate where the parties have by the terms of their contract sufficiently identified specific "black letter" provisions of a foreign law or an international code or set of rules apt to be incorporated *as terms of the relevant contract* such as a particular article or articles of the French Civil Code or the Hague Rules. By that method, English law is applied as the governing law to a contract into which the foreign rules have been incorporated. In such a case, in construing and applying those rules, where there is ambiguity or doubt as to their ambit or effect, it may be appropriate for the court to have regard to evidence from experts in foreign law as to the way in which the provisions identified have been interpreted and applied in their "home" jurisdiction. However, that is still only as an end to interpretation by the English court in the course of applying English law and rules of construction to the contract with which it is concerned. The authority of Nea Agrex SA v Baltic Shipping Co Ltd [1976] QB 933 is no more than an illustration of this. The trial judge had held that a reference in the contract to the incorporation of a "paramount clause" was ineffective for uncertainty, finding that he could not say whether the parties intended to incorporate the Hague Rules or part of the Hague Rules or, if so, which part. However, the Court of Appeal held that the clear meaning of "paramount clause" was that

"It brings the Hague Rules into the charterparty so as to render the voyage, or voyages, subject to the Hague Rules, so far as applicable ***1800** thereto; and it makes those rules prevail over any of the exceptions in the charterparty. The judge, however, took a different view. He said that there are many different paramount clauses and he could not say which of them was applicable… I do not share the judge's view. It seems to me that when the 'paramount clause' is incorporated, without any words of qualification, it means that all the Hague Rules are incorporated. If the parties intend only to incorporate part of the rules (for example article IV), or only so far as compulsorily applicable, they say so. In the absence of any such qualification, it seems to me that a 'clause paramount' is a clause which incorporates all the Hague Rules": per Lord Denning MR, at pp 943–944.

52 The general reference to principles of Sharia in this case affords no reference to, or identification of, those aspects of Sharia law which are intended to be incorporated into the contract, let alone the terms in which they are framed. It is plainly insufficient for the defendants to contend that the basic rules of the Sharia applicable *in this case* are not controversial. Such "basic rules" are neither referred to nor identified. Thus the reference to the "principles of… Sharia" stands unqualified as a reference to the body of Sharia law generally. As such, they are inevitably repugnant to the choice of English law as the law of the contract and render the clause self-contradictory and therefore meaningless.

53 In these circumstances, having rightly conceded that English law is the governing law of the contract, Mr Hacker is left with little room for manoeuvre, save to assert that the court should accept his submission on the basis that otherwise the proviso to the governing law clause would be mere surplusage.

54 I do not agree. It seems to me that there is an appropriate alternative construction, namely that favoured by the judge, i e that the words are intended simply to reflect the Islamic religious principles according to which the bank holds itself out as doing business rather than a system of law intended to "trump" the application of English law as the law to be applied in ascertaining the liability of the parties under the terms of the agreement. English law is a law commonly adopted internationally as the governing law for banking and commercial contracts, having a well known and well developed jurisprudence in that respect which is not open to doubt or disputation on the basis of religious or philosophical principle. I share the judge's view that, having chosen English law as the governing law, it would be both unusual and improbable for the parties to intend that the English court should proceed to determine and apply the Sharia in relation to the legality or enforceability of the obligations clearly set out in the contract. Reference to authority does not assist the defendants in this respect. In Glencore International AG v Metro Trading International Inc [2001] 1 Lloyd's Rep 283 the judge was concerned with, and heard evidence in relation to, the meaning and scope of the word "ghasb" (misappropriation) as a term used but undefined in article 1326 of the Fujairah Civil Code which was the governing law in the case before him. As such he was obliged to interpret and apply the term in the dispute before him, with the assistance of rival experts in the law of Fujairah. The decision has no relevance to this case. As to the decision in Al-Bassam v Al-Bassam [2002] EWHC 2281 (Ch) the court was concerned with Sharia law as being the law which the parties agreed was the law of succession applied in Saudi Arabia as the ***1801** country of the deceased's domicile at the date of his death. Again, it has no relevance to this case, other than demonstrating that, where it is clear that a particular system of law governs a dispute before the English court, the court is obliged to apply it, with the assistance of expert evidence. Neither case was concerned with the construction of a disputed choice of law clause.

55 Finally, so far as the "principles of… Sharia" are concerned, it was the evidence of both experts that there are indeed areas of considerable controversy and difficulty arising not only from the need to translate into propositions of modern law texts which centuries ago were set out as religious and moral codes, but because of the existence of a variety of schools of thought with which the court may have to concern itself in any given case before reaching a conclusion upon the principle or rule in dispute. The fact that there may be general consensus upon the proscription of Riba and the essentials of a valid Morabaha agreement does no more than indicate that, if the Sharia law proviso *were* sufficient to incorporate the principles of Sharia law into the partie's agreements, the defendants would have been likely to succeed. However, since I would hold that the proviso is plainly inadequate for that purpose, the validity of the contract and the defendant's obligations thereunder fall to be decided according to English law. It is conceded in this appeal that, if that is so, the first and second defendants are liable to the bank.

The guarantor's liability

56 It has necessarily been conceded that, if that is so, then the guarantors are similarly liable. The sole point relied on in this appeal to avoid their liability is the plea that the bank and the guarantors entered into the guarantees on the basis of a mutual mistake, namely that the ESUAs constituted a binding obligation on the part of the bank to discharge a pre-existing enforcea-

ble obligation, i e payment of the outstanding amounts as defined in the ESUAs. In this connection the guarantors rely upon the general law of guarantee and the fact that the opening line of the covenant to pay in clause 2.1 of the guarantees expressly made clear that they were given in consideration of the bank agreeing to discharge the outstanding amount under the Morabaha agreements.

57 Although it is not necessary so to decide, I consider that the judge was correct in his view that a common mistake as to the legal consequences of the Morabaha agreements in this case would not qualify as a mistake apt to give rise to a defence.

58 Mr Hacker relies on recent authority to submit that, for the doctrine of mutual mistake to be operative at common law, it is no longer necessary for it to be a mistake of fact as opposed to a "mere" mistake of law. He relies upon the decision of the House of Lords in Kleinwort Benson Ltd v Lincoln City Council [1999] 2 AC 349, in which the House of Lords held that there is no rule that only a mistake of fact would entitle a party to claim restitution on the grounds of mistake; also upon the statement of the position in *Chitty on Contracts*, 28th ed (1999), p 303, para 5–018 and the recent decision of Morland J in Brennan v Bolt Burdon [2004] 1 WLR 1240 concerning the setting aside of a compromise agreement on the grounds of mistake of law when that agreement had been reached on the basis of a decision of the court of first instance which was subsequently overturned by the Court of Appeal. In coming to his decision that the agreement should be set aside, Morland J relied upon the speeches of Lord Goff of Chieveley and Lord ***1802** Hoffmann in the Kleinwort Benson case [1999] 2 AC 349, 379f and 398–399 respectively and the paragraph in *Chitty*, as well as upon persuasive Commonwealth authority. Assuming, without deciding, that the decision of Morland J was correct, it was none the less reached upon the basis that the partie's common mistaken assumption as to the law "was the fundamental basis for and precondition of the compromise agreement, indeed its only springboard" [2004] 1 WLR 1240, 1253, para 52.

59 Before this court Mr Hacker has submitted that the mistake as to Sharia law was properly to be regarded as a mistake of fact by analogy with the position in respect of a mistake of *foreign* law: see Furness Withy (Australia) Pty Ltd v Metal Distributers (UK) Ltd [1990] 1 Lloyd's Rep 236, 250, per Dillon LJ.

60 If that analogy is correct, it is of course necessary for the guarantors to show that the mistake is such as to "render the subject matter of the contract essentially and radically different from the subject matter which the parties believed to exist" (Associated Japanese Bank (International Ltd) v Crédit du Nord SA [1989] 1 WLR 255, 268, per Steyn J) or that it renders the thing contracted for "essentially different from the thing as it was believed to be" (Bell v Lever Bros Ltd [1932] AC 161, 218, per Lord Atkin, as adopted and confirmed by this court in Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd [2003] QB 679, 694, para 47). Whether the mistake asserted should rightly be regarded as a mistake of fact or of law, it is plain to me that it is not a mistake based on a common assumption fundamental to the agreements in question. In that respect, the submissions of Mr Hacker inevitably founder upon the factual assertions of the defendants themselves, which demonstrate that their sole interest was to obtain advances of funds to be used as working capital and that they were indifferent to the form of the agreements required by the bank or the impact of Sharia law upon their validity.

Conclusion

61 In my view the judge was correct in the conclusion to which he came, broadly for the reasons which he gave. I would dismiss this appeal.

[2004] EWCA Civ 19 [2004] 1 W.L.R. 1784 [2004] 4 All E.R. 1072 [2004] 2 All E.R. (Comm) 312 [2004] 2 Lloyd's Rep. 1 [2004] 1 C.L.C. 216 (2004) 101(8) L.S.G. 29 Times, February 3, 2004 Official Transcript [2004] EWCA Civ 19 [2004] 1 W.L.R. 1784 [2004] 4 All E.R. 1072 [2004] 2 All E.R. (Comm) 312 [2004] 2 Lloyd's Rep. 1 [2004] 1 C.L.C. 216 (2004) 101(8) L.S.G. 29 Times, February 3, 2004 Official Transcript
(Cite as: [2004] 1 W.L.R. 1784)
LAWS LJ

62 I agree.

ARDEN LJ

63 I also agree.Appeal dismissed.

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1. Contracts (Applicable Law) Act 1990, Sch. 1, art 1(1): see post, para 48. Art 3(1): see post, para 48.

END OF DOCUMENT

Exhibit D

For the avoidance of doubt, this Users Guide, the Primary Documents and the Users Guide to the Recommended Form of Primary Documents are in a non-binding, recommended form. Their intention is to be used as a starting point for negotiation only. Individual parties are free to depart from their terms and should always satisfy themselves of the regulatory implications of their use.

USERS GUIDE

TO

ISLAMIC FINANCE DOCUMENTS

20 FEBRUARY 2007

CONTENTS

1. IMPORTANT NOTICE

This Users Guide has been prepared for the Loan Market Association ("**LMA**") as a consequence of the growing market for Islamic finance products amongst LMA members. This guide follows the structure of the Users Guide produced by the LMA in connection with the recommended forms of primary loan agreements (the "**Primary Documents**"). Whilst every care has been taken in the preparation of this Users Guide, no representation or warranty is given by the LMA, Clifford Chance LLP ("**Clifford Chance**") or any other member of the Users Guide Working Group as to:

- the suitability of any of the suggested solutions or explanations provided in this Users Guide for any particular transaction; and
- the accuracy or completeness of the contents of this Users Guide.

This Users Guide provides limited guidance only on how terms commonly seen in the Primary Documents are imported into a typical Islamic facility. The Users Guide focuses on *murabaha* facilities and is intended to be a practical guide, rather than scholarly analysis of the relevant issues and is not intended to be a comprehensive analysis of Islamic finance structures. However, aspects of this Users Guide will be applicable in helping develop a wider understanding amongst LMA members of issues that arise in all types of Islamic financing transactions.

Users should satisfy themselves as to the taxation, regulatory and accounting implications of any Islamic finance transactions that they enter into.

The LMA, Clifford Chance and members of the Users Guide Working Group are not liable for any losses suffered by any person as a result of any contract made on the terms suggested or described in this Users Guide or which may arise from the presence of any errors or omissions in this Users Guide and no proceedings shall be taken by any person in relation to such losses.

For the avoidance of doubt, where specific clauses have been considered in this Users Guide, their sole intended purpose is to be used as a starting point for consideration. Individual financiers are free to depart from their terms.

2. INTRODUCTION

2.1 Purpose and Scope

The purpose of this Users Guide is to:

- help promote liquidity for Islamic products amongst LMA members and the banking market generally;
- consider how provisions of the Primary Documents may be addressed or otherwise dealt with in Islamic facilities; and
- serve as an introductory guide for new investors in Islamic facilities or investors who are not yet fully familiar with structures seen in the Islamic finance market.

The LMA has produced a "Users Guide to the Recommended Form of Primary Documents" (last updated in January 2007) and a similar format has been followed for the purposes of this Users Guide.

The principal form of Islamic facility which is described in this Users Guide is a *murabaha* facility. Reference is made both to a traditional *murabaha* (as further described in Section 2.5(a)) and the term reverse *murabaha* or '*tawarruq*' (as further described in Section 2.5(b)). Whilst this is the Islamic finance product that is most typically seen as being analogous to a conventional, syndicated facility, many of the issues addressed in the Users Guide are also relevant in the context of other Islamic financing structures, including *ijara* facilities and *musharakas*. (See Section 2.5 below for a summary of the principal Islamic financing structures).

2.2 Evolution of the Islamic Finance Market

Islamic finance has grown at a rate of 15 per cent per annum for each of the last three years and, at the date of issue of this Users Guide, is estimated to be worth USD300bn per annum. With the introduction of a licensed Islamic retail and investment bank in the UK and the Finance Act 2005 creating a level playing field between certain Islamic products and their conventional counterparts, the industry is no longer specific to the Middle East and South East Asia but must now be seen as both a global industry and a real alternative to certain conventional financing arrangements.

The current unprecedented level of interest in Islamic finance has been generated by a growth in the wealth of a number of Islamic states together with a change in the socio-political climate in the world over the last few years. This has led to greater demand for opportunities which allow Muslims to invest in accordance with their personal beliefs and in the manner prescribed by Islam. These investments have been made on the basis of traditional techniques and structures that have been available for centuries but which have evolved and been refined, within the parameters of Islamic jurisprudence, to accommodate modern financial institutions and modern financing requirements.

2.3 Overview of the Main Features of Islamic Banking

Islamic banking transactions are based on Islamic principles and jurisprudence (*Shari'a*) which are derived from a number of sources, including, primarily, the Qu'ran. These

principles must be kept in mind when trying to determine the Islamic acceptability of proposed financing techniques. *Shari'a* is not a codified system of law and interpretations of the key principles can vary, particularly between the different "schools of thought". The four main schools are Shafi (followed predominantly in the Far East e.g. Malaysia), Hanbali (followed predominantly in the Middle East e.g. Saudi Arabia), Hanafi (followed predominantly in South East Asia e.g. Pakistan) and Maliki (followed predominantly in Africa).

Some of the key principles include the following:

(a) ***Speculation (maisir)***

Under Islamic law, contracts which involve speculation are not permissible (*haram*) and are considered void. Islamic law does not, however, prohibit general commercial speculation (which is evident in most commercial transactions). The concern is to prohibit forms of speculation which are regarded as akin to gambling. The test is whether something has been gained by chance, rather than by productive effort.

In each case, the commercial substance of the transaction must be analysed to evaluate whether or not it is permissible under Islamic law.

(b) ***Unjust enrichment/Unfair exploitation***

Contracts where one party is regarded as having unjustly gained at the expense of another also are considered void under Islamic law. The *Shari'a* principle of unjust enrichment is wide in its scope; whilst it applies to an enrichment of one party at the expense of another which cannot be justified, it also extends to the enrichment of one party who exercises undue influence or duress over another. For example, it is not possible for a creditor to benefit financially from penalising a non-performing or defaulting debtor by charging and retaining a default fee. It is, however, usually permitted to charge a default fee and pay the proceeds of that fee to charity, since it is considered that the obligation to pay this fee would serve to encourage the debtor to discharge its contractual obligations in a timely manner.

(c) ***Interest (riba)***

Under Islamic law, money is regarded as having no intrinsic value and also no time value - it is seen merely as a means of exchange. Islamic principles require that any return on funds provided by the financiers be earned by way of profit derived from a commercial risk taken by the financiers. The payment and receipt of interest (*riba*) under Islamic law is prohibited and any obligation to pay interest is considered void.

(d) ***Uncertainty (gharrar)***

Contracts which contain uncertainty (*gharrar*), particularly any uncertainty as to one of the fundamental terms of the contract (such as subject matter, price or time for delivery), are again considered void under Islamic law. The Islamic principle of *gharrar* is wide as it requires absolute certainty on all fundamental terms. In addition, the *Shari'a* does not permit a contract where uncertainty may arise out of the actual subject matter or substance of a contract. For example, a conventional insurance arrangement is not

permissible on the basis of, amongst other things, uncertainty (*gharrar*), it being uncertain whether the insured event will occur.

(e) ***Unethical investments***

Proceeds raised through Islamic financing cannot be used for the purposes of purchasing or investing in products that are prohibited under *Shari'a* law. These include alcohol, pornography and gambling.

2.4 **Shari'a Board/Committee**

Most Islamic banks or conventional banks that have an Islamic 'window' (i.e. banks who have capital committed to Islamic business) have a religious board which scrutinises proposed transactions to ensure compliance with Islamic precepts and maintains an overall review of the bank's financing methods and operations. This board is referred to as the bank's *Shari'a* board or committee.

The board comprises a number of eminent Islamic scholars, who meet at regular intervals to discuss policy and/or specific transactions. Although a single issue may give rise to differing views held by different *Shari'a* boards as a result of the various schools of thought within Islamic jurisprudence, this is partly mitigated by the fact that the four main schools of thought within Islamic jurisprudence are in mutual agreement on the majority of issues. In addition, many modern day scholars sit on the *Shari'a* boards of a number of different Islamic institutions.

The relevant *Shari'a* board will issue its "fatwa" (religious order) as a condition to the transaction proceeding. Following this initial approval, there is usually no need for any subsequent review as to whether a particular financing remains *Shari'a* compliant in the opinion of the relevant *Shari'a* board.

2.5 **Islamic Financing Techniques**

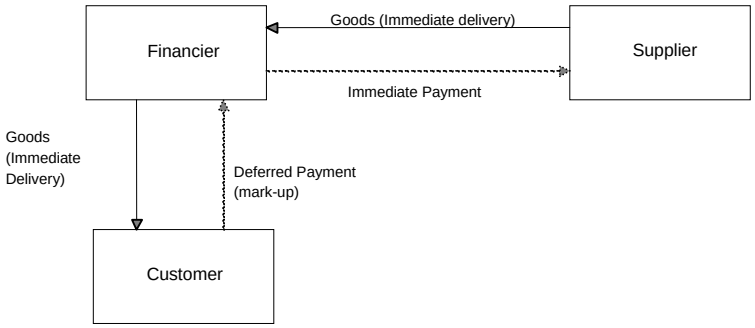
A number of financing techniques have been developed to comply with Islamic principles. They tend to have a common reliance on physical assets as a fundamental part of the contract, since this is a classic method of addressing speculation and *riba* concerns. Another possibility is to demonstrate that the financiers have assumed some responsibility for the commercial risk inherent in the underlying venture. Sometimes these approaches are combined.

Whilst details of the main structures are set out below, readers should note that many variations of these structures are seen in the Islamic finance market.

(a) ***Murabaha (cost plus financing)***

This method of Islamic financing is frequently used in trade financing arrangements and has also been used for the acquisition of shares. The financier will buy the asset in question from the Supplier (either directly or through an agent (who is often its customer acting in a different capacity)) and will then on-sell the asset to the customer at an agreed marked-up price. The financier may hold title to the asset for a brief period, perhaps just a few seconds, but the profit generated by the financier on the marked-up sale price is

nevertheless regarded as a profit derived from a sale of goods transaction and is not therefore prohibited as interest paid on monies lent. The marked up sale price may be payable immediately or deferred for payment at a later date. Typically, the mark-up charged will be based on a benchmark such as LIBOR plus a margin, so the economic effect is similar to an interest calculation under a conventional facility.



The principal steps of a *murabaha* transaction are as follows:

(i) The customer indicates an interest to purchase a particular asset from the financier for a certain price (a combination of cost price plus profit) at a certain time (the utilisation date).

(ii) The financier acquires the asset and offers to sell it to the customer. (Often the financier will appoint the customer as its agent to acquire the asset on the financier's behalf.)

(iii) The customer accepts the offer and the financier immediately sells the asset to the customer, with payment due on the agreed date in the future.

The *murabaha* agreement will also contain the covenant package for the transaction as well as financier protection provisions such as indemnities.

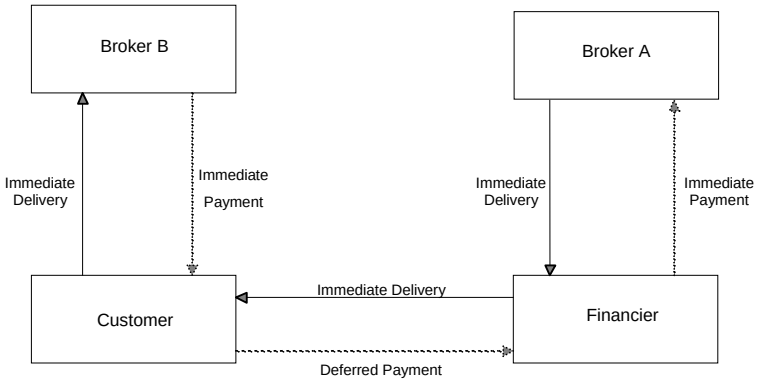
Whilst the contracts scheduled to the *murabaha* agreement will only be entered into between the financier and the customer (in each case in the appropriate capacities as buyer, seller or agent), the financier could be a party to a *murabaha* agreement as a fronting entity for a syndicate of other financiers, e.g. as *mudareb* under a *mudaraba* agreement, or as Investment Agent under an investment agency agreement. A *mudaraba* agreement or investment agency agreement (both referred to as "**funding agreements**") will contain the funding mechanics as between the financiers and also voting and sharing provisions. Accordingly, the *murabaha* agreement and relevant funding agreement together will contain provisions analogous to those in one of the Primary Documents.

(b) ***Tawarruq/Reverse Murabaha***

This product is a relatively new development in Islamic finance. The *tawarruq* facility enables *Shari'a* compliant funding for customers who require a cash sum to be advanced to them.

In general terms, the financier (either directly or indirectly) purchases an asset at market value for spot delivery and spot payment and then immediately sells the asset at an

agreed mark-up price to the customer on a spot delivery and deferred payment basis. The customer then immediately sells the asset at market value to a third party for spot delivery and spot payment. (The third sale contract is often documented separately to avoid any inference that the three back-to-back sale contracts are merely a disguised loan.)



The end result is that the customer receives a cash amount and has a deferred payment obligation for the marked-up price to the financier. Under a conventional facility, the primary risk is that of the borrowing entity whereas under a *tawarruq* structure, the financier takes both asset risk and risk on the third party Supplier (in addition to the customer risk).

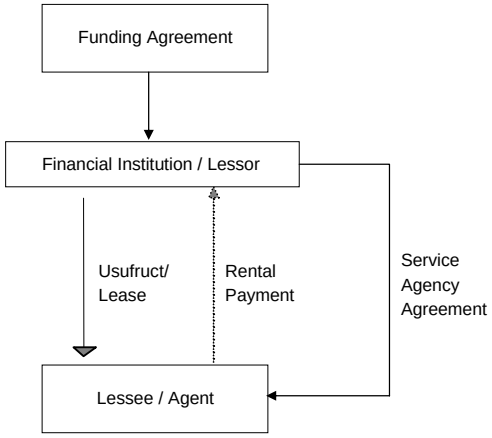
As with a *murabaha* financing, the financier that is a party to the *tawarruq* could be acting on behalf of other financiers pursuant to a funding agreement.

The concept of a "revolving" *tawarruq* has also been developed in recent years. Whilst this is akin to a conventional revolving facility in certain respects, the 'rollover' mechanics are dealt with differently. There are a number of different methods used to deal with rollovers on Islamic facilities but the most common approach, albeit not universally accepted, is to 'net-off' the cashflows from each of the maturing and new Murabaha Contracts on the equivalent of the "rollover date". This is usually done pursuant to a "netting letter" between Broker A, the Investment Agent, the Purchaser and Broker B, whereby the four parties will agree to the netting of the cashflows. The settlement risk is usually mitigated to some extent by having all the relevant currency accounts held with the same Account Financier.

(c) ***Ijara (lease)***

This is Islamic financing's equivalent of leasing and may be seen as a hybrid between conventional operating and finance leases. As with *murabaha* financings, *ijara* rental payments will reflect an agreed profit element (again, typically calculated using LIBOR as a benchmark) and comparisons with rentals on conventional leases (where interest considerations would often be relevant) can readily be made. If the intention is to provide the lessee with title to the goods at the end of the lease this can be achieved through a variant of *ijara* called *ijara wa-iktina*.

Unlike a finance lease, the obligation to insure and undertake any major maintenance to the leased asset remains with the lessor, although the lessor will typically appoint the lessee as its service agent or manager with responsibility for discharging these obligations. In addition, the lessee is only responsible for payment of rent whilst the use of the asset continues. If, therefore, the lessee is no longer able to use the leased asset due to its total destruction, the lease payments will cease. In these circumstances, however, to the extent insurance proceeds are not sufficient or are not paid within an agreed period, it may be a requirement for the lessee (in its capacity as service agent or manager) to compensate the lessor for a failure to arrange adequate insurance, although there are divergent views amongst *Shari'a* scholars on this point.



The lessor could be acting on behalf of other financiers under a funding agreement. Typically, the covenant package would be contained in the lease agreement, save for those particular covenants that address the obligations of the servicer (which will be included in the Service Agency Agreement).

As there are certain issues that need careful consideration as a result of risks inherent from the use of an *ijara* structure (such as owner liability, regulatory and tax issues), there is occasionally a preference in some jurisdictions for an SPV to own the relevant asset and act as lessor rather than a financial institution. As a result, in those markets it is quite common to see the use of an SPV with the facility structured so that the SPV borrows funds under a conventional facility and then uses these funds to acquire an asset and lease it to the relevant customer under a *Shari'a* compliant *ijara* structure. (It should also be noted that for similar reasons, SPVs are sometimes also used in other Islamic structures (including *murabahas*).)

(d) ***Musharaka (equity financing)***

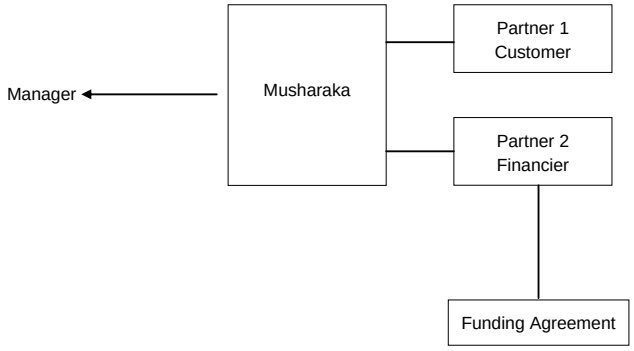
Under a simple *musharaka* arrangement, the financier and the customer provide financing for a project in agreed proportions in the form of either cash contributions or contributions in kind. The *musharaka* partners share the profit in agreed proportions but losses are shared in proportion to their initial investment. The customer will usually act as manager of the *musharaka* with the responsibility for investing the *musharaka* assets to earn a return for the *musharaka* partners. Typically, the profit sharing arrangements are structured in a way that ensures the financier receives his initial contribution plus an

agreed profit. The party providing the management or technical expertise may charge a fee, although typically this will be nominal.

A variation of this is the *diminishing musharaka* where the investment participation of the financier decreases gradually over time as its ownership interest is transferred to the customer, in return for payment.

A financier could enter into the *musharaka* on behalf of other financiers under a funding agreement.

The management agreement would usually contain the covenant package and, upon an event of default, the customer will be obliged to buy out the financier's share of the *musharaka* at a price that will be calculated in a way that ensures that the financier would be entitled to the full amount of its investment plus anticipated profit (as at the relevant date) being repaid.



(e) ***Mudaraba (participation financing) and Investment Agency Agreements***

A *mudaraba* is a contractual arrangement between a group of investors (*Rab al Maal*) and a manager (*Mudareb*). The investors put up capital which the manager invests. This arrangement is flexible and may be used in a number of ways. For example, it may be:

- considered akin to a funded participation arrangement in conventional financing where the investors are similar to the participants who provide funds to the grantor or, in this case, *Mudareb*, who in turn has a direct relationship with the customer; and

- used for the establishment of investment funds with the fund manager acting as *Mudareb*. Customers subscribe to the *mudaraba* fund where the *Mudareb* exercises its professional investment skills.

Although the *Mudareb* can be any entity, the *Mudareb*'s investments have to be *Shari'a* compliant. In each case, the *Mudareb* will charge a fee for providing its expertise, customarily a proportion of the profits. Savings accounts operated by Islamic financiers operate on this basis, striving to provide a rate of return which is comparable to conventional savings accounts by investing those funds in *Shari'a* compliant transactions.

A *mudaraba* arrangement can also be used as part of a syndicated *murabaha* facility with the financiers as the *Rab al Maal* and the *Mudareb* as the fronting entity.

An investment agency agreement is a common alternative structure. The main distinctions between a *Mudareb* and an Investment Agent are that:

- an Investment Agent has very limited autonomy and will often act on specific instructions from the financiers;
- a *Mudareb* will often have more autonomy with regard to management of the funding;
- a *Mudareb* (at least in *Shari'a*) is perceived to underwrite the financing so the Purchaser is reliant solely upon the *Mudareb* for funding and not the Participants (although the *Mudareb* will share its profits with the Participants); and
- a *Mudareb* can set-off any losses it may make firstly against any profits it may generate and, to the extent such profits are insufficient, against the capital provided by the *Rab-al-Maal*.

Current market preference is to use an investment agency structure on the basis that this is most similar to the 'facility agent/bank' role in a conventional facility and an equivalent to a *Mudareb*-financier relationship is generally not contemplated under a conventional facility. This Users Guide therefore uses the term Investment Agent in the remainder of this document.

(f) ***Istisna'a (construction financing)***

An *Istisna'a* is used for the advance funding of major industrial projects or large items of equipment such as ships or aircraft where the financiers fund the supplier, acquire title to the equipment on completion and immediately pass title to the purchaser on agreed deferred payment terms or lease the asset to the developer under an *ijara-wa-iktina*.

(g) ***Bai salam (forward financing)***

This technique may be used to provide working capital. Essentially *bai salam* financing is a forward financing transaction where the financiers pay in advance for the purchase of specified assets which the seller will supply on a pre-agreed date. As a mode of financing, the financiers are able to acquire the assets by advance payment at a discounted price. The financiers may sell the asset to be acquired on delivery for an increased price or may enter into a parallel *bai salam* contract. The sale by the financiers will not be back to the original seller. This financing technique can be used when providing a pre-export facility.

(h) ***Sukuk (Islamic Bond)***

A *sukuk* is a type of certificate or note which represents or evidences a proportionate interest in an underlying tangible asset and revenue. It is a negotiable instrument which, depending on the underlying asset, can be sold and purchased in the secondary market. It is used in conjunction with another underlying Islamic structure such as a *musharaka* or an *ijara*. In the latter, for example, lease revenues form the profit to be passed to the

sukuk holders and the *sukuk* holders will have a pro rata ownership interest in the asset being leased. The purchaser of a *sukuk* replaces the seller in the pro rata ownership of the relevant assets and acquires all the rights and obligations of the original subscriber. Although the *sukuk* may be considered the Islamic equivalent of a bond or capital market debt instrument, it is important to distinguish between a *sukuk* and a conventional bond. The *sukuk* is an asset based security where the primary credit risk is that of the issuer which is obliged to pay the *sukuk* holder irrespective of the performance of the underlying asset. To the extent that the *sukuk* is rated, the rating cannot exceed the rating given to the entity which is ultimately responsible for providing the funds for the repayment of principal on maturity or early redemption of the *sukuk*. A conventional unsecured bond, although with a similar risk profile, does not give any ownership rights in an underlying asset but rather just a contractual claim against the issuer. It is also important to distinguish the *sukuk* from a traditional securitisation. In a securitisation the bondholder takes credit risk on the cash-flow being securitised, with the issuer simply being used to pass through the underlying debtor credit risk. Accordingly, to the extent a securitisation is rated, the rating of the issuing entity may be improved by credit enhancement features and may also exceed the rating given to the parent of the issuing entity.

2.6 **Legal and Practical Issues**

The contracts and techniques used in Islamic financing, such as *ijara* and *Murabaha*, may give rise to risks and liabilities for the financiers or for the transaction that need to be assessed and, if appropriate, mitigated. However, many of these arise in conventional financing structures, such as traditional leasing, and are not unique to Islamic finance. For example:

- Owner liability may be incurred if the financiers own an asset for a period before transferring it to the end-user, such as liability for death or injury or environmental damage. Although typically a financier would seek to ensure that it does not own the asset for any period of time so as to avoid this risk, this may not be avoidable in instances where the asset is to be leased by the financier to the end-user.

- A financier may want to obtain insurance against such liabilities (although Islamic insurance (*takaful*) is increasingly available and could be used).

- Tax liability - e.g. do taxes arise on the acquisition or on-sale of an asset? What are the income and capital gains tax consequences for a financier? How can the transaction be made tax neutral?

- Warranties - e.g. is the financier, as owner or seller of an asset, making any warranty (e.g. as to its title to the asset or the condition or usability of the asset) which it would want to disclaim?

- Effectively interposing a third party between a supplier and an end-user may give rise to certain issues - e.g. can the end-user receive the benefit of a supplier's warranties?

- Loss, destruction or delays in the production or construction of the asset may be an issue for the Islamic financier: if there is no 'deliverable' asset, can the Islamic financier claim any payments from the end-user? In other words, can the Islamic financier pass on the asset risk to its customer?

- Loss (total or partial) in the operating phase of the *ijara* may also raise issues. If there is no asset (and therefore no usufruct) can the financier continue to claim payments from the end-user?

3. PARTIES TO AN ISLAMIC FACILITY

3.1 Introduction

As a number of *murabaha* structures have been developed over the last few years, the terms used to refer to certain parties may differ (as discussed in Section 2.1 (*Purpose and Scope*)). Similarly, terminology may differ depending on whether the Purchaser is appointed as an agent (or "*Wakeel*") for the Investment Agent under a specific agreement to purchase the relevant Commodity or acts as the undisclosed agent for the Investment Agent in purchasing the relevant Commodity itself. This section sets out the most common terminology used to describe parties in *murabaha* structures.

In addition (and as with conventional finance transactions), the parties will differ depending on whether the financing is bilateral or syndicated. On a syndicated transaction, it is more common to have a mudaraba agreement or investment agency agreement (in each case in addition to a *murabaha* agreement) which will, subject to the areas specifically set out in this Users Guide, contain all of the 'financier specific' provisions found in conventional facilities documentation, such as funding mechanisms.

(a) The Purchaser

In a *murabaha* facility, the Purchaser is the equivalent of a borrower in a conventional facility. Whilst the exact role of the Purchaser can vary depending on the type of *murabaha* transaction it is party to, one certainty in all *murabaha* transactions is that the Purchaser is under an obligation to purchase the Commodity from the Investment Agent.

In cases where the Purchaser is appointed as agent for the Investment Agent, the Purchaser's role is also to procure the relevant Commodity from the Supplier.

(b) Investment Agent

In addition to a Purchaser, each syndicated *murabaha* agreement must also have an Investment Agent as a party. The Investment Agent represents the financier group and is therefore akin to a 'facility agent' on a conventional transaction. Whilst certain facilities may refer to a *Mudareb*, the rights and obligations of a *Mudareb* are slightly different (see Section 2.5(e)).

Whilst the Investment Agent will enter into the *murabaha* agreement on behalf of itself and the other financiers (or Participants), the relationship between the Investment Agent and the other Participants will be governed by an investment agency agreement.

In addition to entering into the *murabaha* agreement with the Purchaser, the Investment Agent will countersign the offer and acceptance documents with the Purchaser to effect each *murabaha* transaction. Typically, the Participants will not enter into any agreement directly with the Purchaser, although sometimes this does happen, for example, to enable the Purchaser to have a right to consent in relation to transfers by Participants.

(c) Wakeel

The Purchaser may occasionally be appointed as agent (*Wakeel*) by the Investment Agent to (i) obtain the Commodity as agent for the Investment Agent and then (ii) purchase it

from the Investment Agent. In such cases, the Purchaser is appointed as a *Wakeel* under a separate Wakala Agreement between the Investment Agent and the *Wakeel*. The decision as to whether this appointment should happen is dependant on whether the Purchaser wants its relationship with the Suppliers interrupted. In a *murabaha* trade financing, the Purchaser will often be appointed by the Investment Agent as its undisclosed buying agent. The appointment of a *Wakeel* is less common in a reverse *murabaha*/*tawarruq* transaction.

(d) **The Participants**

The financiers on each syndicated *murabaha* transaction are commonly referred to as 'Participants'. The Participants enter into an investment agency agreement with the Investment Agent to govern the relationship between the agent and the financier group. Whereas in conventional facilities this would normally be dealt with within a single facility agreement, this is not possible in the case of a *murabaha* agreement, which documents a Purchaser/seller relationship.

The investment agency agreement will usually contain the standard agency provisions/protections which financiers would normally expect to be covered in a facility agreement in a conventional transaction. This includes provisions on the appointment of the Investment Agent, powers of the Investment Agent, payments by the Participants, payments by the Investment Agent, refunds of payments, sharing provisions, duties and discretions of the Investment Agent, indemnities and any relevant commission or other costs provisions.

(e) **Commodity Broker/Supplier**

A reverse *murabaha*/*tawarruq* transaction will require the involvement of commodity brokers. Whilst these brokers will not be a party to the *murabaha* agreement itself, their involvement in the transaction will be documented in separate commodity sale and purchase agreements.

In a reverse *murabaha* transaction, the commodity brokers will be involved at both the initial and final stages of each *murabaha* transaction. The first broker will be involved in selling the chosen Commodity to the Investment Agent (or the Purchaser as the Investment Agent's *Wakeel*). After conclusion of the *murabaha* contract, the Purchaser will then on-sell the Commodity to a second broker. For *Shari'a* purposes, it is important that the two brokers are not the same.

If the transaction is a trade financing (i.e. the Commodity is required by the Purchaser and will not be on-sold to a broker), the choice of Supplier will be at the Purchaser's discretion as the Commodity being acquired will be for its business/operations. In a reverse *murabaha*, the broker will usually be an entity which has provided competitive pricing for supplying the Commodity.

4. DEFINITIONS

4.1 **Introduction**

This Section is only intended to include those additional definitions (compared to those in a conventional facility agreement) which are exclusive to a typical *murabaha* facility. Any definition which would be common to both a *murabaha* facility and a conventional loan facility is not defined here and reference should be made to the Users Guide to the Recommended Form of Primary Documents.

Those definitions which are exclusive for a reverse *murabaha*/*tawarruq* are marked with an asterisk (*).

Note that the definitions contained herein are not agreed definitions and are only provided as guidance. Definitions should be drafted as required for specific transactions.

4.2 **Definitions**

"**Acceptance Notice**" means an acceptance notice sent by the Purchaser to the Investment Agent.

"**Account Financier**" means [*insert name of institution*].*

"**Accounts**" means the Purchaser Currency Account, the Broker A Currency Account and the Broker B Currency Account and "**Account**" shall mean any one of them.*

"**Broker A**" means [*insert name of Broker*], or such other broker as may be agreed in writing from time to time by the Parties.*

"**Broker A Currency Account**" means the account of the Broker denominated in [*insert currency of facility*] and held with the Account Financier.*

"**Broker B**" means [*insert name of Broker*], or such other broker as may be agreed in writing from time to time by the Parties.*

"**Broker B Commodity Account**" means the commodity account of Broker B held with Broker A to reflect Commodity owned by Broker B from to time to time.*

"**Broker B Currency Account**" means the account of Broker B denominated in [*insert currency of facility*] and held with the Account Financier.*

"**Broker Documents**" means, collectively, the Broker Letters, the Commodity Administration Fee Letter, the Commodity On-Sale Agreement, the Commodity Purchase Agreement and the Settlement Deed.*

"**Broker Letters**" means the letters in the agreed form between (i) the Investment Agent and Broker A and (ii) the Investment Agent and Broker B, in each case relating to the crediting and debiting by the Investment Agent of the Accounts, and "**Broker Letter**" shall mean either one of them.*

"**Commodity**" means [*insert name of asset to be financed*]/[London Metal Exchange off-market platinum or other metals (other than gold or silver), or any other *Shari'a* compliant goods acceptable to the Investment Agent.*]

"**Commodity Administration Fee Letter**" means the commodity administration fee letter in the agreed form between the Investment Agent, the Purchaser and Broker A.*

"**Commodity On-Sale Agreement**" means the agreement in the agreed form between the Purchaser and Broker B.*

"**Commodity Purchase Agreement**" means the agreement in the agreed form between the Investment Agent and Broker A.*

"**Commodity Tax**" means any tax payable in connection with the purchase or sale of the Commodity by the Purchaser including, without limitation, any value added tax, sales tax, goods and service tax, import or excise tax or any other similar tax or duty.

"**Deferred Payment Date**" means the Maturity Date of the relevant Murabaha Contract.

"**Deferred Payment Price**" means, in relation to a Murabaha Contract, the sum payable by the Purchaser to the Investment Agent for the Commodity on the Deferred Payment Date and shall be the aggregate of the Purchase Price and the Profit Amount.

"**Investment Agency Agreement**" means the investment agency agreement dated on or about the date of this [Master Murabaha] Agreement and made between the Investment Agent and certain financiers and financial institutions (as Participants).

"**Murabaha Contract**" means an individual contract made by the exchange of an Offer Notice and a corresponding Acceptance Notice between the Investment Agent and the Purchaser.

"**Notice of Intent to Purchase**" means a notice of intention to purchase the Commodity sent by the Purchaser to the Investment Agent.

"**Offer Notice**" means the offer from the Investment Agent to sell the Commodity purchased from the [Broker/Supplier] to the Purchaser.

"**Offer Notice Date**" means the date on which the Investment Agent issues a duly completed Offer Notice which, for the avoidance of doubt, shall be the same as the Value Date.

"**Participant**" means, in accordance with the provisions of the Investment Agency Agreement, certain financiers and financial institutions (from time to time) which advance funds to the Investment Agent for the purposes of this Agreement, collectively the "**Participants**".

"**Principal Murabaha Outstandings**" means the aggregate Purchase Price of all outstanding Murabaha Contracts.

"**Profit Amount**" means the aggregate of the Purchase Price multiplied by a profit return rate equal to the applicable [*insert relevant reference rate e.g. LIBOR, EURIBOR*] plus the Margin in the Profit Rate Period (based on the actual number of days in a year of 360 days).

"**Profit Rate Period**" means with respect to any Murabaha Contract, a period of [*insert period of deferral for payment of purchase price*] commencing on the relevant Value Date of a proposed Murabaha Contract.

"**Purchase Price**" means, in relation to a Murabaha Contract, the aggregate of (i) the amount payable by the Investment Agent to the Broker for the purchase of the Commodity described in the Offer Notice; (ii) any Commodity Taxes applicable to that purchase; and (iii) any other direct or indirect costs and expenses, including without limitation, insurance and transport expenses applicable to that purchase.

"**Purchaser Commodity Account**" means the commodity account of the Purchaser held with Broker A to reflect Commodity owned by the Purchaser from time to time.*

"**Purchaser Currency Account**" means the account of the Purchaser denominated in [*insert currency of facility*] and held with the Account Financier.*

"**Settlement Deed**" means the deed in the agreed form between the Investment Agent, the Purchaser, Broker A and Broker B.*

"**Supplier**" means the entity from which the Investment Agent will purchase the Commodity requested by the Purchaser from time to time, being [*insert name of Supplier*] on the date of this Agreement.

"**Value Date**" means the date of payment of the Purchase Price by the Investment Agent to the Broker, described as such in the relevant Notice of Intent to Purchase.

"**Wakala Agreement**" means the agreement dated on the date of the Master Murabaha Agreement between the Investment Agent as principal and the Purchaser as buying agent of the Investment Agent.

4.3 **Third Party Rights**

As the *murabaha* agreement is usually a bilateral agreement between the Investment Agent and the Purchaser, the Participants will require the benefit of certain of the clauses in the *murabaha* facility. Such clauses include the tax gross-up, costs and expenses, increased costs (to the extent applicable) and various indemnities. In an English law governed transaction, this is often achieved by granting the Participants rights under the *murabaha* agreement pursuant to the Contracts (Rights of Third Parties) Act 1999.

5. THE FACILITIES

5.1 Introduction

As in the LMA's Primary Documents, a *murabaha* agreement will include a section dealing with the mechanics and structure of the *murabaha* facility (for example, the conditions precedent to each *murabaha* transaction and the steps required to complete each *murabaha* transaction).

5.2 Conditions of Utilisation

The conditions required to be satisfied prior to the submission of a Notice of Intent to Purchase by the Purchaser are similar to those seen on conventional facilities. Examples of conditions which need to be satisfied before a Notice of Intent to Purchase can be submitted are:

(i) conditions that have to be met before the first Notice of Intent to Purchase can be submitted (i.e. usual corporate authorisations and any transaction specific requirements);

(ii) the Notice of Intent to Purchase must be submitted on a Business Day during the availability period;

(iii) the Notice of Intent to Purchase must be above a certain minimum level (akin to minimum drawdown amounts);

(iv) no default is continuing or would result from the proposed Murabaha Contract; and

(v) the amount of the Purchase Price cost price is equal to or less than the available commitment.

Upon the relevant conditions being met the Investment Agent (or, where appropriate, the Purchaser as *Wakeel*) purchases the Commodity from the Supplier in accordance with the terms of the Notice of Intent to Purchase, determines the Profit Amount and the Deferred Payment Price, and sends the Purchaser an Offer Notice. Upon receipt of a valid Offer Notice, the Purchaser then purchases the Commodity from the Investment Agent by sending the Investment Agent an Acceptance Notice.

It is common for *murabaha* facilities to specify the point at which the Murabaha Contract is completed between the Investment Agent and Purchaser to ensure that it is clear when title and risk to the Commodity passes over to the Purchaser.

5.3 Mitigation of Risk

As the financier (or the Investment Agent on behalf of the financiers) will be the legal owner of the Commodity for a brief period of time, the financiers will be taking additional risk over and above that which they would customarily take in a conventional facility. Please see Section 2.6 for an overview of the additional risks that could be involved. Whilst documentation safeguards may be put in place to mitigate against some of these risks, it will not be possible to completely remove these as the transaction would no longer be *Shari'a* compliant.

As the financiers will be the owners of the Commodity, they will take all the risks associated with ownership, including any devaluation of the price of the Commodity and any third party liability arising from ownership.

To mitigate against price devaluation risk, it is usual to limit the length of time for which the financier will be the owner. It is not uncommon to see a 'time is of the essence' clause which imposes a time limit on the Purchaser to accept the Offer Notice. To the extent the Acceptance Notice is not issued within that pre-agreed time frame, the financier would then be free to cancel the offer and dispose of the Commodity to a third party. If the financiers suffer any loss as a result of the price devaluation, they may seek to recover the difference from the Purchaser by virtue of a covenant that will usually be included in the Notice of Intent to Purchase.

As the financiers will be owning and selling an asset, it will be important to ensure that no warranties are given by the financiers by virtue of the operation of law or otherwise. This therefore needs to be expressly excluded, to the extent possible.

5.4 **Other clauses**

Other common clauses which are found in this section of the *murabaha* agreement are:

(i) limitations on the number of Murabaha Contracts which can be entered into whilst others are outstanding (similar to outstanding 'loans' on conventional facilities); and

(ii) payment of the Purchase Price plus Profit Amount. It is customary to see an undertaking from the Purchaser to pay the Deferred Payment Price in respect of each Murabaha Contract on the relevant Deferred Payment Date either as a lump sum at the end of the term for that transaction or, alternatively, amortised, whichever is the commercially agreed position.

6. PAYMENT, PREPAYMENT AND CANCELLATION

6.1 Payment

Payment of the Deferred Payment Price will normally take place at a designated date specified in the initial documentation at the time that the Murabaha Contract is concluded.

6.2 Prepayment

On a conventional financing, prepayments can be beneficial from a borrower's perspective in saving the 'interest' portion for the remaining period of that 'loan'. On Islamic transactions, however, as the Profit Amount is determined at the outset (on the day the Murabaha Contract is entered into), the amount outstanding at any given time is inclusive of the total 'profit' amount.

Whilst there is a consensus among *Shari'a* scholars that prepayment under Islamic facilities is possible, there is no clear direction on how the Purchaser obtains the benefit of any prepayment. As almost all *murabaha* agreements include the right for the Purchaser to prepay the Deferred Payment Price, it is important that provisions concerning entitlement to any rebate are appropriately documented.

Whilst prepayment can be at the discretion of the Purchaser, whether any benefit is given to the Purchaser in respect of such prepayment is at the discretion of the Investment Agent and the Participants. It is not possible for the *murabaha* agreement to *oblige* the Investment Agent to provide a rebate to the Purchaser as the Murabaha Contract has already been entered into and the payment terms agreed between the parties. In most cases, the *murabaha* agreement will state that if the Investment Agent so decides (following the agreement of either all or the Majority Participants) a portion of the Profit Amount in respect of the Deferred Payment Price may be refunded to the Purchaser.

As with conventional facilities, notice periods for prepayment will be applicable and a minimum amount will be stipulated for prepayment. As Islamic financings are generally trade or leasing transactions, it is not usual for Participants to be able to recover break costs in the event of a prepayment.

6.3 Cancellation

A Purchaser will usually have the ability to cancel part of the available facility. As with prepayments, notice periods and minimum amounts are applicable to any cancellation. However, as *Shari'a* does not permit a person to simply use money to make money and charge a commitment fee for making money available, there is often no economic benefit to the Purchaser in cancelling the available facility. Conversely, as it is not possible to charge a commitment fee, it is in the financiers' interest to keep the available facility period as short as possible.

7. COSTS OF UTILISATION

7.1 Determination of Profit

'Profit' is the term given to the return obtained (i.e. the equivalent of 'interest' earned under a conventional facility) on an Islamic transaction. It is calculated on the Value Date, using LIBOR or another reference rate and is used to calculate the Deferred Payment Price to be paid.

A key element of a Murabaha Contract is that the Profit Amount is calculated at the time the transaction is entered into. This is essential as the Deferred Payment Price needs to be made known at the outset.

7.2 Late payment amounts

In the event that the Purchaser fails to make a payment due to the Investment Agent and/or a Participant, an additional amount is payable for such a default. Whilst this is normally referred to as 'default interest' in a conventional facility, the usual term in a *murabaha* facility is 'late payment amount'.

Whilst there are no rules under *Shari'a* on the permitted level of late payment amounts, it is typically dealt with in the same way as on conventional facilities (i.e. by reference to the quantum of the unpaid amount, a reference rate such as LIBOR and a pre-agreed margin).

A common practice/standard has been developed as to how late payment amounts, once paid, should be treated. It is now common to direct all late payments to an Islamic charity. If not expressly named in the *murabaha* agreement, the charity will normally be one of the Purchaser's choice (as approved by the Majority Participants). In certain cases, it may also be left to the recommendation of the Investment Agent's *Shari'a* supervisory board.

The Investment Agent may be entitled to deduct any actual costs it (or the Participants) has incurred as a result of late payment of the unpaid sum before the remaining amount is donated, on behalf of the Purchaser, to charity.

It is important to note that certain Islamic institutions still do not approve of the charging of any late payment amount.

7.3 Commitment Fees

Whilst commitment fees are a key part of any conventional financing, they are not expressly provided for in Islamic financings. This is primarily because *Shari'a* forbids a person to charge money as a result of simply making money available. To mitigate the exposure of banks in this regard, Availability Periods under *murabaha* facilities are usually of a short duration (e.g. one month).

8. ADDITIONAL PAYMENT OBLIGATIONS

8.1 Tax Gross-up and indemnities

As in the Primary Documents, a *murabaha* agreement will also include a section dealing with the protection of the Participants from imposition of tax on amounts received from the Purchaser.

(a) Tax gross-up

The provisions of the *murabaha* agreement will provide that if the Purchaser is required by law to deduct tax from a payment under the *murabaha* agreement, the Purchaser must make a payment which puts the relevant Participant in the position it would have been in had there been no deduction.

(b) Tax indemnity

Provisions of the *murabaha* agreement will operate to require the Purchaser to indemnify the Participants against any tax (other than normal profits tax) imposed on or in relation to sums received or receivable by any Participant.

(c) Stamp taxes

Murabaha agreements will also customarily provide for an undertaking from the Purchaser to indemnify the Participants for any stamp duty or similar tax arising on the execution of the finance documents.

8.2 Increased Costs

Murabaha agreements may include a mechanism to permit a Participant to recover any increased costs incurred.

Different approaches are adopted by different *Shari'a* scholars. However, to the extent it is accepted that increased costs can be recovered, it is not customarily recovered by way of indemnity but rather is addressed by being added to the Profit Amount of the first Murabaha Contract concluded after the date the increased costs were incurred. The effect is that the Participants are able to recover the full amount of increased costs incurred although there will be a time delay from the conventional "on-demand" indemnity.

8.3 Asset/Commodities indemnities

As indicated above (see Sections 2.6 and 5.3), owner liability may be incurred as a result of the financiers owning the Commodities for a period of time before transferring these to the Purchaser. Typically, *murabaha* agreements will provide for an undertaking of the Purchaser to indemnify the Participants against actions, claims, costs and expenses incurred in connection with the Commodities other than any such actions, claims, costs and expenses that arise from ownership by the Participants.

8.4 **Other Indemnities**

As in the Primary Documents, *murabaha* agreements would also include indemnities against certain risks, costs or liabilities, including currency indemnity and indemnities to the Investment Agent.

8.5 **Mitigation by Participants**

Murabaha agreements will usually include a provision requiring the Participants to take reasonable steps to mitigate any circumstances resulting in an additional payment obligation for the Purchaser.

Although the *murabaha* agreement is usually a bilateral agreement between the Purchaser and the Investment Agent, the Participants require the benefit of these indemnities. In an English law governed transaction, this is often achieved by granting the Participants rights pursuant to the Contracts (Rights of Third Parties) Act 1999.

9. REPRESENTATIONS, UNDERTAKINGS, EVENTS OF DEFAULT AND TERMINATION EVENTS

As with the Primary Documents, the *murabaha* agreement will contain representations, undertakings and events of default. Although the scope of these representations, undertakings and events of default will largely be driven by credit requirements of the financiers which will include jurisdictional based requirements of the Purchaser, a number of *Shari'a* factors do need to borne in mind.

9.1 Representations

The representations to be included are largely a matter for commercial negotiation. However it would not be uncommon to ask the Purchaser to provide a non-*Shari'a* reliance representation, or in other words, confirmation that it has not relied upon the Investment Agent or any of the Participants in establishing the *Shari'a* compliant nature of the transaction and documentation. This seeks to remove any possible duty of care in relation to *Shari'a* compliance.

9.2 General undertakings

The extent and purpose of the covenants required from the Purchaser will depend upon the terms of the transaction and the nature of the business conducted by the Purchaser. However to the extent there is an agreement to incorporate a disposals covenant this will need to be drafted to permit the disposal of Commodities as part of the financing arrangements.

It is also common to amend the conventional "financial indebtedness" definition to refer to Islamic finance and often it is expressly contemplated in the covenant package that a Purchaser's insurance and hedging arrangements must be carried out in a *Shari'a* compliant manner.

9.3 Events of Default and Termination Events

It is often necessary to distinguish between Purchaser fault based events on the one hand (i.e. events of default) and non-fault based events on the other (i.e. termination events).

Purchaser fault based events, or events of default, are usually those events that arise as a result of the action or inaction of the Purchaser e.g. failure to pay. Non-fault based events, or termination events, are usually those that arise as a result of no action or inaction of the Purchaser e.g. appropriation of the Purchaser's assets by a third party/nationalisation.

There is no difference in the consequences of the occurrence of either an event of default or a termination event and both will result in the same as the consequence of an event of default under a conventional facility i.e. undrawn commitment may be immediately cancelled or Murabaha Contracts become immediately due and payable, etc.

10. CHANGES TO PARTIES

As with conventional facilities, Participants in a *murabaha* facility usually require the ability to transfer their relevant 'commitment' and/or participation to other financial institutions. These provisions are usually contained in the Investment Agency Agreement, which is the principal 'investor' document (see Section 2.5(e)). Whilst there are no issues under *Shari'a* with trading undrawn commitments, consideration needs to be given to the *Shari'a* issues which arise on transfer of funded participations or existing Murabaha Contracts.

One fundamental *Shari'a* requirement of any debt transfer is that it must be made at *par* value (i.e. at no profit to the exiting Participant). Whilst this does not raise any issues in the context of the transfer of an 'unfunded' amount (i.e. commitment), issues do arise when contemplating the transfer of a 'funded' Murabaha Contract. Whilst there is no uniform accepted method of dealing with this issue in documentation, two solutions are widely accepted in the market:

(i) the documentation may state that any assignments and transfers must be carried out in a *Shari'a* compliant manner. In relation to what is "*Shari'a* compliant" for such purposes, the *Shari'a* board of a particular financier or that of the Investment Agent is often stated as being the reference point for such matters. (In such cases the transfer provisions will be a slightly modified version of those in a typical conventional facility); or

(ii) the documentation may stay silent on any additional requirements for an effective assignment or transfer on the basis that it is for each financial institution to make its own determination on whether it can only transfer in accordance with the *Shari'a* (and if so, what should be used as the *Shari'a* reference point). (In such cases the transfer provisions will be the same as those in a typical conventional facility).

Notwithstanding that the Investment Agency Agreement is usually between the Investment Agent and the Participants, the Purchaser may require the benefit of certain of the clauses (e.g. a right to give its consent to proposed transfers). In an English law governed transaction, this is often achieved by granting the Purchaser rights under relevant provisions of the Investment Agency Agreement pursuant to the Contracts (Rights of Third Parties) Act 1999.

11. GOVERNING LAW

The governing law and jurisdiction provisions in an Islamic facility are typically the same as for any equivalent conventional facility.

An issue is sometimes raised as to whether a reference to *Shari'a* law should be made in the governing law clause, either by providing that *Shari'a* law should govern the relevant agreement or that the chosen governing law should be interpreted subject to *Shari'a* law. (The issues were considered at a case before the Court of Appeal in England in 2004[1].)

In practice, neither of these methods is likely to be recognised by an English court, which will only recognise the laws of a particular country as being the governing law, so "*Shari'a* law" could not in itself be a valid choice of law for a contract. Although it is possible for specific black-letter provisions of the *Shari'a* to be incorporated (in the same way as, for example, it is possible for references to a Hague Convention to be incorporated which in itself is not a part of English law), the bankability of the transaction may be likely to be impaired.

[1] Beximco Pharmaceuticals Ltd v Shamil Bank of Bahrain, EC [2004] EWCA Civ 19.

Exhibit E

مملكة البحرين
وزارة العدل والشئون الإسلامية
مكتب التوثيق

التوثيق

سجل
الرقم المسلسل 2010043057
رقم ايصال الرسوم RC08201042527

هامش

النظام الأساسي المعدّل
بنك آركابيتا ش.م.ب. (مقفلة)

في يوم الأربعاء الموافق ١٣ من شهر شوال للعام ألف وأربعمائة وواحد وثلاثين للهجرة الموافق ٢٢ من شهر سبتمبر للعام الفين وعشرة للميلاد.

لدي أنا الموثقه اول باسمة أحمد السماهيجي موثقة لدى مكتب التوثيق بوزارة العدل في مملكة البحرين.

حضر لدي:

السيد/ عاطف أحمد يوسف عبدالملك، بحريني الجنسية، يحمل بطاقة سكانية رقم ٦٦٠٠٠٤٦٧٤، بصفته الرئيس التنفيذي ومفوض بالتوقيع عن بنك آركابيتا ش.م.ب.(مقفلة) (**"الشركة"**) وممثلا عن المساهمين في الشركة بناءً على قرارات الجمعية العمومية غير العادية المنعقدة بتاريخ ١٩ أغسطس ٢٠١٠.

أ) تأسس بنك آركابيتا ش.م.ب. (مقفلة) بتاريخ ٢ نوفمبر ١٩٩٦، بموجب أحكام قانون الشركات التجارية الصادر بالمرسوم بقانون رقم ٢٨ لسنة ١٩٧٥، وتعديلاته ولائحته التنفيذية ("القانون")، وهو مسجل في السجل التجاري تحت قيد رقم ٣٦٤٠٣، وقد تم توثيق عقد التأسيس والنظام الأساسي للشركة المؤرخين في ٢٣ أكتوبر ١٩٩٦ لدى مكتب التوثيق تحت مسلسل رقم ٩٦٠٢٨٥١٢، وقد عدلا فيما بعد بموجب عقد التأسيس والنظام الأساسي المعدلين المؤرخين في ٢٥ يونيو ١٩٩٧ والموثقان لدى مكتب التوثيق تحت مسلسل رقم ٩٧٠١٢٤٥٠، وقد عدلا فيما بعد بموجب عقد التأسيس والنظام الأساسي المعدلين المؤرخين في ١٠ ديسمبر ١٩٩٧ والموثقان لدى مكتب التوثيق تحت مسلسل رقم ٩٧٠٢٣٤٠٨. وقد عدلا فيما بعد بموجب عقد التأسيس والنظام الأساسي المعدلين المؤرخين في ٤ يناير ٢٠٠٥ لدى مكتب التوثيق تحت مسلسل رقم ٢٠٠٥٠٠٠٤٩٦ وقد عدلا فيما بعد بموجب عقد التأسيس والنظام الأساسي المعدلين المؤرخين في ٢٠ مارس ٢٠٠٥ والمسجلين لدى مكتب التوثيق تحت مسلسل رقم ٢٠٠٥٠٠٨٢٧٩؛

AMENDED AND RESTATED ARTICLES OF ASSOCIATION
ARCAPITA BANK B.S.C. (CLOSED)

On Wednesday 13th of Shawal of the year One Thousand Four Hundred Thirty One of Hijra year, corresponding to 22nd of September of the year Two Thousand and Ten of the Gregorian Calendar year.

Before me,
a Notary in the Notary Office in the Ministry of Justice in the Kingdom of Bahrain.

Attended before me:

Mr. Atif Ahmed Yousif Abdulmalik, Bahraini National, holder of CPR No. 660004674, in his capacity as the Chief Executive Officer and Authorised Signatory of Arcapita Bank B.S.C.(c) (the "**Company**") and representing the shareholders of the Company as per the resolutions passed at the Extraordinary General Meeting held on 19 August 2010.

a) Arcapita Bank B.S.C. (closed) was incorporated on 2 November 1996, according to the provisions of the Bahrain Commercial Companies Law promulgated by Legislative Decree No.28 of 1975, the amendments thereto and the Ministerial Orders issued thereunder, (the "Law"), and registered under the Commercial Registry under No. 36403. The Memorandum and Articles of Association dated 23 October 1996 were recorded in the Notary Public Office under No. 96028512 and were subsequently amended on 25 June 1997 recorded in the Notary Public office under No. 97012450, by an Amended and Restated Memorandum and Articles of Association dated 10 December 1997 recorded in the Notary Public office under No. 97023408, by an Amended and Restated Memorandum and Articles of Association dated 4 January 2005 recorded in the Notary Public Office under No. 2005000496, by an Amended and Restated Memorandum and Articles of Association dated 20 March 2005 recorded in the Notary Public Office under No. 2005008279, by an Amended and Restated

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Atif Ahmed Yousif Abdulmalik

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- ٢ -

وبموجب عقد التأسيس والنظام الأساسي المعدلين والمؤرخين في ٢ مايو ٢٠٠٦ والمسجلين لدى مكتب التوثيق تحت مسلسل رقم ٢٠٠٦٠١٧٠٢٨ وبموجب عقد التأسيس والنظام الأساسي المعدلين والمؤرخين في ١ نوفمبر ٢٠٠٦ والمسجلين لدى مكتب التوثيق تحت مسلسل رقم ٢٠٠٦٠٤٠١٤٨ وبموجب عقد التأسيس والنظام الأساسي المعدلين والمؤرخين في ١٥ أكتوبر ٢٠٠٨ والمسجلين لدى كاتب العدل برقم ٢٠٠٨٠٤٥٦٥٧؛ وبموجب عقد التأسيس والنظام الأساسي المعدلين والمؤرخين في ٢ ديسمبر ٢٠٠٨ والمسجلين لدى كاتب العدل برقم ٢٠٠٨٠٥٣٢٣٨، وبموجب عقد التأسيس والنظام الأساسي المعدلين المؤرخين في ٢٠ أغسطس ٢٠٠٩ والمسجلين لدى كاتب العدل برقم ٢٠٠٩٠٣٣٢٨٤، وبموجب عقد التأسيس والنظام الأساسي المعدلين والمؤرخين في ١٦ مايو ٢٠١٠ والمسجلين لدى كاتب العدل برقم ٢٠١٠٠٢٢٧٢٧.

ب) في اجتماع الجمعية العمومية غير العادية للشركة المنعقد بتاريخ ١٩ أغسطس ٢٠١٠، وافق المساهمون على تعديل المادة (٤٥) (ب) واعتماد نظام أساسي جديد للشركة. وبناءً عليه، يحل النظام الأساسي المعدل هذا محل النظام الأساسي السابق للشركة؛

ج) وبموجب قرار اتخذ في الاجتماع المذكور، تم تعيين السيد/ عاطف أحمد يوسف عبدالملك، بحريني الجنسية، يحمل بطاقة سكانية رقم ٦٦٠٠٠٤٦٧٤، ممثلا مفوضا عن الشركة ومخول بصلاحية اتخاذ جميع الإجراءات المناسبة والتوقيع على جميع المستندات المطلوبة من قبل مكتب التوثيق ووزارة الصناعة والتجارة بمملكة البحرين لإنفاذ وتسجيل النظام الأساسي المعدل للشركة والوارد أدناه ("النظام الأساسي") في السجل التجاري.

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Memorandum and Articles of Association dated 2 May 2006 recorded in the Notary Public Office under No. 2006017028, by an Amended and Restated Memorandum and Articles of Association dated 1 November 2006 recorded in the Notary Public Office under No. 2006040148, by an Amended and Restated Memorandum and Articles of Association dated 15 October 2008 recorded in the Notary Public Office under No. 2008045657, by an Amended and Restated Memorandum and Articles of Association dated 2 December 2008 recorded in the Notary Public Office under No. 2008053238, by an Amended and Restated Memorandum and Articles of Association dated 20 August 2009 recorded in the Notary Public Office under No. 2009033284, and by an Amended and Restated Memorandum and Articles of Association dated 16 May 2010 recorded in the Notary Public Office under No. 2010022727.

b) At the Extraordinary General Assembly of the Company held on 19 August 2010, the shareholders approved to amend Article (45) (b) and to adopt a new set of Articles of Association for the Company. Accordingly, this Amended and Restated Articles of Association will replace the previous Articles of Association of the Company;

c) By a resolution taken at the said meeting, Mr. Atif Ahmed Yousif Abdulmalik, Bahraini National, holder of CPR No. 660004674, was appointed as an authorized representative of the Company and was empowered to take all measures and to sign all documents required by the Notary Public, and the Ministry of Industry and Commerce of the Kingdom of Bahrain in order to effect and register the Amended and Restated Articles of Association of the Company set out hereinafter (the "Articles") in the Commercial Register.

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الباب الخامس
مدققو الحسابات
المادة ٤٢

يكون للشركة مدقق حسابات واحد أو أكثر من المدققين المرخص لهم بمزاولة المهنة. ويتم تعينهم في اجتماع جمعية عمومية عادية، والتي بدورها تحدد أتعابهم والمدة التي عينوا لها أو يتم تفويض الرئيس التنفيذي أو مجلس إدارة الشركة بتحديد تلك الأتعاب.

إذا كان للشركة أكثر من مدقق وكانوا مسئولين في الخطأ يكونوا مسئولين أمام الشركة بالتضامن. ويخضع مدققو الحسابات في سلطتهم ومسئوليتهم للقواعد المقررة في المواد من ٢١٧ حتى ٢٢٢ من القانون.

الباب السادس
هيئة الفتوى والرقابة الشرعية

المادة ٤٣
التعيين

أ) تعين جمعية عمومية عادية للشركة، بناء على توصية مجلس إدارة الشركة، هيئة للفتوى والرقابة الشرعية، مكونة من ثلاثة إلى سبعة أعضاء من أهل العلم البارزين والمتمرسين في أحكام الشريعة الإسلامية المتعلقة بالمؤسسات والمعاملات المالية. ويلتزم أعضاء هيئة الفتوى والرقابة الشرعية بالمحافظة على السرية التامة في إطار الخطوات العملية والآليات التنفيذية في الشركة.

ب) يتم تعيين أي عضو من أعضاء هيئة الفتوى والرقابة الشرعية لمدة خمس سنوات قابلة للتجديد في اجتماع جمعية عمومية عادية للمساهمين لفترة (أو فترات) مماثلة بناء على توصية مجلس إدارة الشركة، ولا يجوز إيقافه عن العمل أو عزله من منصبه إلا بقرار من الجمعية العمومية.

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Part Five
Auditors
Article 42

The Company shall have one Auditor or more from among the body of accountants who are duly authorized to practise. They shall be appointed by the Ordinary General Meeting that shall determine their remuneration and the term of office for which they are appointed, or authorise the Chief Executive Officer or the Board of directors of the Company to fix such remuneration.

If the Company has more than one auditor responsible for an error, they shall be jointly liable towards the Company. In the exercise of their powers and responsibilities the auditors shall be subject to the rules prescribed in Articles 217 to 222 of the Law.

Part Six
Shari'a Supervisory Board

Article 43
Appointment

a) The Company's shareholders in an Ordinary General Meeting, upon the recommendation of the Board of directors of the Company, shall appoint to the Shari'a Supervisory Board between three and seven individuals who are highly knowledgeable and proficient in Shari'a provisions related to financial institutions and transactions. The Shari'a Supervisory Board members shall maintain complete confidentiality within the framework of practical steps and implementation mechanisms of the Company.

b) Any Shari'a Supervisory Board member shall be appointed for a five year term of office which term shall be renewable by an Ordinary General Meeting of shareholders upon the recommendation of the Board of directors of the Company for similar term(s) and may not be suspended or terminated from his assignment except by a decision of the General Meeting.

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Article 43 - continued

The Shari'a Supervisory Board may delegate all or some of its powers and authority to a Shari'a Executive Committee, in accordance with rules established by the Shari'a Supervisory Board.

c) The Board of directors of the Company and the Chief Executive Officer shall obtain the written approval of the Shari'a Supervisory Board as regards the rules and regulations of the Company's business transactions as well as concerning all matters relating to the Company's business activities to ensure that they are free of any Islamic prohibitions, particularly in respect of transactions involving usury or suspicious dealings and shall adhere to such approvals.

d) Decisions issued by the Shari'a Supervisory Board shall be binding on the Company.

e) The Shari'a Supervisory Board shall submit an annual report to the Board of directors of the Company giving a summary of the matters referred thereto and the opinions given in respect of the Company's business activities carried on in accordance with the applicable rules and regulations. This report shall be read out along with the report of the Company's Auditors at the Ordinary General Meeting. The powers, procedures and responsibilities of the Shari'a Supervisory Board shall be as per the detailed provisions contained in the Procedures and Policies Manual of the Company.

Part Seven
Financial Rules

Article 44
Financial Year

The Company's financial year shall commence on 1st July and shall end on 30th June in every year.

المادة ٤٣ - تتمة

لهيئة الفتوى والرقابة الشرعية أن تفوض أيا من وكافة صلاحياتها ومهامها إلى لجنة تنفيذية شرعية وذلك وفقاً للقواعد التي تضعها هيئة الفتوى والرقابة الشرعية.

ج) على مجلس إدارة الشركة والرئيس التنفيذي الحصول على موافقة كتابية من هيئة الفتوى والرقابة الشرعية على قواعد وإجراءات صفقات أعمال الشركة وكافة المسائل المتعلقة بأنشطة أعمال الشركة للتأكد من خلوها من أي محظورات شرعية إسلامية وخاصة فيما يتعلق بالصفقات التي تشتمل على تعاملات ربوية أو تعاملات مشبوهة. ويجب على مجلس الإدارة والرئيس التنفيذي الالتزام بهذه الموافقات.

د) تكون قرارات هيئة الفتوى والرقابة الشرعية ملزمة للشركة.

هـ) سوف تقوم الهيئة بتقديم تقرير سنوي لمجلس مجلس إدارة الشركة تبين فيه خلاصة ما تم عرضه عليها من حالات وما جرى بيانه من آراء فيما يتعلق بأعمال الشركة التي تم تنفيذها وفق اللوائح والقوانين المعمول بها. ويجب تلاوة هذا التقرير مع تقرير مراقب حسابات الشركة في اجتماع الجمعية العمومية العادية. ويجب أن تكون الصلاحيات والإجراءات والمسئوليات المتعلقة بهيئة الرقابة الشرعية وفقاً للشروط التفصيلية الواردة في دليل إجراءات وسياسات الشركة.

الباب السابع
النظام المالي

المادة ٤٤
السنة المالية

تبدأ السنة المالية للشركة في ١ يوليو وتنتهي في ٣٠ يونيه من كل سنة.

عاطف أحمد يوسف عبدالملك
Atif Ahmed Yousif Abdulmalik

Exhibit F

ARCAPITA

June 18, 2013

Arcapita Bank B.S.C.(c)
P.O. Box 1406
Manama
Bahrain

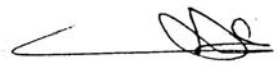
Gentlemen:

The management of Arcapita Bank B.S.C.(c) (the "Bank") on behalf of itself, Arcapita Investment Holdings Limited ("AIHL") and certain other wholly-owned subsidiaries of the Bank (together with AIHL and Bank, the "Obligors") has presented to the Shari'ah Executive Committee the structure, mechanism and documentation relating to the Debtor-In-Possession and Exit Murabaha Facility for AIHL with Goldman Sachs International as investment agent (the "Facility"). After consultation with the Bank's management, we are of the opinion that it is permissible for the Obligors to enter into this Facility and that the transaction has been executed and documented in accordance with Islamic Shari'ah principles as they relate to the Obligors.

We have instructed the management of the Bank to ensure that all future operational and financial requirements and activities of the Facility comply with Islamic Shari'ah principles. We will monitor the activities from time to time to ensure conformity to such principles.

Sincerely,

Shari'ah Executive Committee



Dr. Abdul Sattar A.K. Abu Ghuddah

Exhibit G

MOURANT OZANNES

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

FSD CAUSE NO. 45 OF 2012

IN THE MATTER OF THE COMPANIES LAW (2011 REVISION) (THE "LAW")

AND IN THE MATTER OF ARCAPITA INVESTMENT HOLDINGS LIMITED (THE "COMPANY")

ORDER

GRAND COURT CAYMAN ISLANDS

UPON hearing Leading Counsel for the Company;

AND UPON the Company's directors wishing to formulate a compromise or arrangement which can be presented for approval to the Company's creditors pursuant to a principal bankruptcy case filed under Chapter 11 of Title 11 of the United States Code (the "**US Bankruptcy Code**") (or, alternatively, under sections 86-88 of the Law if for any reason a Chapter 11 Plan cannot be confirmed through the US Bankruptcy Proceedings (as defined below);

AND UPON the Company and other companies in its group, including its parent Arcapita Bank B.S.C.(c), filing principal Chapter 11 bankruptcy proceedings (the "**US Bankruptcy Proceedings**") in the United States Bankruptcy Court for the Southern District of New York (the "**Bankruptcy Court**");

AND UPON the Company issuing a summons seeking ancillary relief from the Grand Court of the Cayman Islands (the "**Court**") with a view to facilitating the US Bankruptcy Proceedings and, if subsequently necessary, an arrangement, by invoking section 97 of the Law such that no suit, action or other proceedings, including criminal proceedings, shall be proceeded with or commenced against the Company except with the leave of the Court and subject to such terms as the Court may impose;

AND UPON reading the Affidavits of Isa Zainal and Michael Rosenthal;

IT IS HEREBY ORDERED THAT:

1. Gordon MacRae of Zolfo Cooper, 4th Floor Bermuda House, Dr Roy's Drive, P.O. Box 1102, Grand Cayman KY1-1102, Cayman Islands and Simon Appell of Zolfo Cooper LLP, 10 Fleet Place, London. EC4M 7 RB, United Kingdom, be appointed Joint Provisional Liquidators of the Company (the "**Provisional Liquidators**") and have the power to act jointly and severally under section 104(3) of the Law, with the powers set out in, and subject to, the following provisions of this Order, on the ground that the Company is or is likely to become unable to pay its debts within the meaning of section 93 of the Law and the Company intends to present a compromise or arrangement to its creditors.

2. The directors of the Company are authorized to continue to exercise all powers of management conferred on them by the Company immediately prior to the date of this Order and to remain the representatives of the Company in its capacity as debtor in possession under s.1107 of the US Bankruptcy Code, subject to the Provisional Liquidators overseeing, monitoring and assisting the directors in the exercise of such powers (but not superseding the directors or their authority to control and direct the Company's US Bankruptcy Proceedings). Without prejudice to the generality of the foregoing, the directors of the Company are authorized to take all necessary steps with a view to formulating and presenting a compromise or arrangement to the Company's creditors and, in particular, to take such steps and proceedings on behalf of the Company as may be required in relation to the US Bankruptcy Proceedings.

3. The Provisional Liquidators and the Company acting by its directors shall seek to agree, within 14 days, a protocol which sets out the terms upon which the Provisional Liquidators shall oversee, monitor and assist, the exercise of the directors' powers of management and the Company's participation in the US Bankruptcy Proceedings (but not supersede the directors or their authority to control and direct the Company's US Bankruptcy Proceedings), liberty to apply to the Court for the purposes of approving the protocol or in the case of no agreement for further directions.

4. For the avoidance of doubt, no payment or other disposition of the Company's property shall be made or effected without the Provisional Liquidators being consulted. Without

prejudice to the generality of the foregoing and without prejudice to such terms as may be agreed under the protocol, the Provisional Liquidators shall be consulted, and if not in agreement, shall be authorised to appear before the US Bankruptcy Court where:

i. The Company seeks to dispose of any business operation, subsidiary, division or other significant asset of the Company's business, including the whole or any of its under taking as a going concern; and

ii. The Company seeks to incur debt or borrows money, and/or grants security in respect of the same and/or guarantees indebtedness or borrowed money of affiliates.

5. For the avoidance of doubt the Provisional Liquidators are not being appointed as "foreign representatives" within the meaning of s.101(24) of the US Bankruptcy Code and are not authorised or required to seek recognition under Chapter 15 of the US Bankruptcy Code.

6. For the purposes set out in paragraph 2 above, the Provisional Liquidators may exercise the following powers:

a. To open and maintain bank accounts in the name of the Company.

b. The power to engage staff (whether or not as employees of the Company) whether in the Cayman Islands or elsewhere as they may consider necessary to assist them in the performance of their functions and on such terms as they may think fit and to pay for same out of the assets of the Company.

c. The power to engage attorneys and other professionally qualified persons (whether or not as employees of the Company) whether in the Cayman Islands or elsewhere as they may consider necessary to assist them in the performance of their functions and on such terms as they may think fit and to pay for same out of the assets of the Company.

7. The Provisional Liquidators are directed to provide this Court with a written report as to the financial affairs of the Company and the progress of the US Bankruptcy Proceedings every two months or more frequently should the Provisional Liquidator believe that there are material developments which should be drawn to this Court's attention.

8. For the avoidance of doubt, pursuant to s.97(1) Companies Law (2011) Revision no suit, action or other proceeding, including criminal proceedings, shall be proceeded with or commenced against the Company except with the leave of the Court and subject to such terms as the Court may impose.

9. The remuneration and expenses of the Provisional Liquidators, including the expenses associated with exercise of their powers, shall be paid out of the assets of the Company, subject to the approval of the Court.

10. The Winding Up Petition shall be adjourned to a date to be fixed upon the application of the Company or upon the application of any creditor or contributory.

11. The Company's costs of and occasioned by this summons shall be paid out of the assets of the Company.

12. Such further and/or other relief be granted as this Honourable Court deems fit.

DATED this 19th day of March 2012

FILED this 21 day of March 2012

THE HONOURABLE CHIEF JUSTICE
JUDGE OF THE GRAND COURT

GRAND COURT - CAYMAN ISLANDS

This Order was filed by Mourant Ozannes, Attorneys-at-Law for AIHL, Second Floor, Harbour Centre, P.O. Box 1348, George Town, Grand Cayman. 3042199/DICKI/MdFJ/4048090/1

Exhibit H

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 45 of 2012 - ASCJ

BEFORE THE HONOURABLE CHIEF JUSTICE

IN CHAMBERS ON 6 JUNE 2013

IN THE MATTER OF THE COMPANIES LAW (2012 REVISION)

AND IN THE MATTER OF ARCAPITA INVESTMENT HOLDINGS LIMITED (IN PROVISIONAL LIQUIDATION)

ORDER

UPON the application by summons of Arcapita Investment Holdings Limited (in Provisional Liquidation) (the "**Company**") dated 27 May 2013 coming on for hearing;

AND UPON reading the Sixth Affidavit of Mohammed Chowdhury sworn on 3 June 2013;

AND UPON hearing Counsel for the Company and Counsel for Goldman Sachs International;

IT IS HEREBY ORDERED THAT:

1. Pursuant to section 99 of the Companies Law (2012 Revision)(the "**Law**"), no disposition of the Company's property made under, in connection with or resulting from the proposed Debtor-in-Possession Murabaha facility or the proposed exit Murabaha facility with Goldman Sachs International (together the "**Goldman Sachs Facilities**"), and the budget prepared by the Company and agreed thereunder (the "**DIP Budget**") including but not limited to:

a) the grant of security over the property and assets of the Company (including over shares in the Company's subsidiaries);

b) the purchases and sales of commodities in the Goldman Sachs Facilities;

c) the making of all payments required under the Goldman Sachs Facilities, including any repayments thereunder;

d) the making of all payments and other dispositions, including all costs and expenses (including legal fees) in accordance with the DIP Budget; and

e) the release which is proposed to be granted by the Company to the Finance Parties (as defined in the Goldman Sachs Facilities)

in accordance with such Orders of the United States Bankruptcy Court for the Southern District of New York (the "**Bankruptcy Court**") as are entered on or around 11 June 2013 (the "**US Orders**") shall be void in the event that the Company is wound up.

2. Pursuant to section 99 of the Law, no transfer of the Company's shares made by virtue of, or by way of perfection or enforcement of, the charges over the Company's shares to be granted as part of the Goldman Sachs Facilities in accordance with the US Orders, shall be void in the event that the Company is wound up.

3. Effective immediately upon entry into the Initial DIP Purchase Contract (as defined in the Goldman Sachs Facilities) under the Goldman Sachs Facilities, the Secured Parties (as defined in the US Orders) shall have leave pursuant to section 97(1) of the Law to take any action necessary to enforce their rights under the Goldman Sachs Facilities and US Orders, and neither paragraph 8 of this Court's Order dated 19 March 2012 (as amended) nor any other provision of any other Order this Court has made to date shall operate so as to prevent any such action being taken.

4. For the avoidance of doubt, paragraph 3 of this Order relates only to enforcement proceedings commenced by the Secured Parties (as defined in the US Orders) to enforce their rights under the Goldman Sachs Facilities and US Orders and should not be construed as any wider modification of paragraph 8 of this Court's Order of 19 March 2012, nor any broader leave pursuant to section 97(1) of the Law than is provided by paragraph 3 of this Order.

5. The Provisional Liquidators' costs of this application shall be paid out of the assets of the Company as an expense of the provisional liquidation and the Company's costs of this application shall be paid out of the assets of the Company, provided that this costs order is made without prejudice to any subsequent reallocation of costs between the Company and Arcapita Bank B.S.C.(c) and, for the avoidance of doubt, does not obviate the need for the amount of the Company's costs to be approved by the Bankruptcy Court.

DATED this 6th day of June 2013

FILED this day of June 2013

THE HONOURABLE CHIEF JUSTICE
JUDGE OF THE GRAND COURT
FINANCIAL SERVICES DIVISION

THIS ORDER was filed by Mourant Ozannes, attorneys for the Company, whose address for service is 94 Solaris Avenue, Camana Bay, Grand Cayman, Cayman Islands (Ref: 3042199/56310878/1)