

**Response Deadline: June 3, 2014 at 4:00 p.m. (prevailing Eastern Time)**  
**Hearing Date and Time: June 10, 2014 at 11:00 a.m. (prevailing Eastern Time)**

**ASK LLP**

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*Counsel for the Reorganized Debtors*

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

In re:

Arcapita Bank B.S.C.(c), *et al.*,

Reorganized Debtors.

Case No. 12-11076 (SHL)

Chapter 11

**NOTICE OF HEARING ON REORGANIZED DEBTORS' OBJECTION TO CLAIM  
NUMBER 505 FILED BY COMMERZBANK AG**

PLEASE TAKE NOTICE, that the above-captioned Reorganized Debtors, by and through their undersigned counsel, shall move before the Honorable Sean H. Lane, United States Bankruptcy Judge, on **June 10, 2014 at 11:00 a.m. (prevailing Eastern Time)**, at the United States Bankruptcy Court for the Southern District of New York, One Bowling Green, New York, New York 10004-1408, Courtroom 701, seeking entry of an order pursuant to sections 105, 502, 510 and 548 of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* and Rule 3007 of the Federal Rules of Bankruptcy Procedure, disallowing and/or subordinating proof of claim number 505 filed by Commerzbank AG (the "Objection").

PLEASE TAKE FURTHER NOTICE, that responses or objections (each, a "Response"), to the Objection must be in writing, must conform to the Bankruptcy Rules and the Bankruptcy

Court's Local Bankruptcy Rules, must set forth the name of the objecting party, the basis for the objection and the specific grounds therefore, and must be filed with the Bankruptcy Court, electronically in accordance with General Order M-399 (General Order M-399 and the User's Manual for the Electronic Case Filing System may be found at [www.nysb.uscourts.gov](http://www.nysb.uscourts.gov), the official website for the Bankruptcy Court) by registered users of the Bankruptcy Court's case filing system, and by all other parties in interest on a 3.5 inch disk, preferably in Portable Document Format (PDF), WordPerfect, or any other Windows-based word processing format (with a hard copy delivered directly to the Chambers of Judge Lane, One Bowling Green, New York, New York 10004), and served in accordance with General Order M-399 upon: (i) ASK LLP, 151 West 46<sup>th</sup> Street, 4<sup>th</sup> Floor, New York, New York 10036 (Attn.: Edward E. Neiger, Esq.) and (ii) the Office of the United States Trustee for the Southern District of New York, U.S. Federal Office Building, 201 Varick Street, Suite 1006, New York, New York 10014 (Attn.: Richard Morrissey, Esq.) so as to be filed and received by the foregoing no later than **June 3, 2014 at 4:00 p.m. (prevailing Eastern Time)**.

**PLEASE TAKE FURTHER NOTICE**, that unless a timely Response is filed, the Court may elect to enter an order granting the Objection without a hearing.

Dated: April 30, 2014  
New York, New York

**ASK LLP**

/s/ Edward E. Neiger

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

In re:

Arcapita Bank B.S.C.(c), *et al.*,<sup>1</sup>

Reorganized Debtors.

Case No. 12-11076 (SHL)

Chapter 11

**REORGANIZED DEBTORS' OBJECTION TO CLAIM NUMBER 505  
FILED BY COMMERZBANK AG**

The above-captioned Reorganized Debtors, by and through their undersigned counsel, hereby submit, pursuant to sections 105, 502, 510 and 548 of title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (as amended, the "Bankruptcy Code") and Rule 3007 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), this objection (the "Objection") to proof of claim number 505 (the "Claim"),<sup>2</sup> filed by Commerzbank AG (the "Claimant"). In support of the Objection, the Reorganized Debtors respectfully represent the following:

<sup>1</sup> The "Reorganized Debtors" in these Chapter 11 cases and, prior to the Confirmation Order and Falcon Confirmation Order (as defined below), the "Debtors," are: Arcapita Bank B.S.C.(c), Arcapita Investment Holdings Limited, Arcapita LT Holdings Limited, Windturbine Holdings Limited, AEID II Holdings Limited, Railinvest Holdings Limited, and Falcon Gas Storage Company, Inc.

<sup>2</sup> A copy of the Claim is attached hereto as Exhibit A.

### **JURISDICTION AND VENUE**

1. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334. Venue in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409.
2. This is a core proceeding pursuant to 28 U.S.C. § 157(b).
3. The predicates for the relief requested herein are sections 105, 502, 510 and 548 of the Bankruptcy Code and Bankruptcy Rule 3007.

### **PROCEDURAL BACKGROUND**

4. On March 19, 2012 (the "Petition Date"), the Debtors, other than Falcon Gas Storage Company, Inc. ("Falcon"), each commenced a case by filing a voluntary petition for relief in this Court under Chapter 11 of the Bankruptcy Code. Thereafter, on April 30, 2012, Falcon commenced a case by filing a voluntary petition for relief in this Court under Chapter 11 of the Bankruptcy Code.

5. On March 22, 2012, the Court entered an order authorizing the joint administration of the Debtors' Chapter 11 cases for procedural purposes pursuant to Bankruptcy Rule 1015(b) [Docket No. 16].<sup>3</sup> On June 12, 2012, the Court entered an order, among other things, authorizing the joint administration of Falcon's Chapter 11 case with those of the other Debtors [Docket No. 239].

6. On June 11, 2013, the Debtors filed the *Debtors' Second Amended Joint Plan of Reorganization of Arcapita Bank B.S.C.(c) and Related Debtors Under Chapter 11 of the Bankruptcy Code (With First Technical Modifications)* [Docket No. 1251] (the "Plan").

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<sup>3</sup> All Docket items referenced are from Case No. 12-11076, under which the bankruptcy cases are jointly administered.

7. On June 17, 2013, the Court confirmed the Plan and entered the *Findings of Fact, Conclusions of Law, and Order Confirming the Second Amended Joint Plan of Reorganization of Arcapita Bank B.S.C.(c) and Related Debtors With Respect to Each Debtor Other Than Falcon Gas Storage Company, Inc. Under Chapter 11 of the Bankruptcy Code* [Docket No. 1262] (the “Confirmation Order”).

8. On January 31, 2014, the Court entered the *Order Confirming the Second Amended Joint Plan of Reorganization as to Falcon Gas Storage Company Under Chapter 11 of the Bankruptcy Code* [Docket No. 1759] (the “Falcon Confirmation Order”).

9. Section 8.11 of the Plan provides that all objections to claims asserted against the Debtors “must be filed by the Claims Objection Bar Date,” which is defined as “the 180th day following the latest of the Effective Date, the date such Claim is Filed, and such later date as may be established from time to time by the Bankruptcy Court as the last date for filing objections to such Claim.” See Plan § 8.11; Plan Appendix A ¶ 45.

10. The Effective Date of the Plan occurred on September 17, 2013. Therefore, the Claims Objection Bar Date was established as March 16, 2014.

11. On March 13, 2014, the Reorganized Debtors timely filed the *Reorganized Debtors’ Motion for Entry of an Order Extending the Claims Objection Bar Date* [Docket No. 1802].

12. On March 31, 2014, the Court entered the *Order Extending Claims Objection Bar Date* [Docket No. 1910], extending the Claims Objection Bar Date through and including April 30, 2014.

## **FACTUAL BACKGROUND**

### **A. The Claim**

13. On August 30, 2012, the Claimant filed the Claim, asserting an unsecured non-priority claim against Arcapita Bank B.S.C.(c) ("Arcapita"), one of the Debtors, in the amount of \$17,214,600.00.<sup>4</sup>

### **B. The Guarantee**

14. The Claim is alleged to arise pursuant to that certain Guarantee, dated January 6, 2012 (the "Guarantee") issued by Arcapita Bank for the benefit of PVC (Lux) Holding Company S.a.r.l. ("PVC Lux"), a Luxembourg limited liability company. Specifically, under the Guarantee, Arcapita is alleged to have guaranteed the obligation of PVC Lux's parent, PVC Investments Limited, a Cayman Islands limited liability company ("Parent") to make an equity infusion in the amount of €13,000,000 to PVC Lux no later than January 31, 2012.

### **C. Events Leading to Execution of the Guarantee**

15. In October 2007, Arcapita invested in Profine GmbH., a German manufacturer of PVC profiles, sheets and shutters with operations in Europe, North America and Asia ("Profine").

16. Arcapita, together with third party investors, was the indirect controlling shareholder of Profine with representatives on the boards of the various companies in Profine.

17. Arcapita's initial investment was made through PVC Lux, an investment holding company established specifically for the purposes of the investment. PVC Lux and Parent are each approximately 61.5% indirectly owned by Arcapita. The principal operating subsidiary of

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<sup>4</sup> The claim amount was originally denominated in Euro in the amount of €13,000,000.00. The amount listed on the Claim was alleged to be calculated based on the Federal Reserve System's records of the historical currency exchange rate on the Petition Date of 1.3242 USD/EUR, which in turn is based on the Noon buying rates on that date in New York for cable transfers payable in foreign countries.

Profine is a German entity approximately 94.9% owned by PVC Lux, headquartered in Berlin, Germany, called HT Troplast GmbH (the "Company").

18. Upon information and belief, Arcapita was insolvent on a balance sheet basis as of September, 2010.

19. On or about November 9, 2010, Claimant, PVC Lux, the Company and Parent entered into that certain Framework Agreement (the "Framework Agreement") pursuant to which, among other things, Parent was required to make equity infusions in the amount of €45,000,000 to PVC Lux by December, 31 2011 or maintain a minimum liquidity covenant of €20,000,000 at Profine.

20. In December 2011, €13,000,000 of the €45,000,000 additional equity infusion as per the Framework Agreement was still outstanding and the minimum liquidity covenant was not met.

21. On or about January 6, 2012, Claimant, PVC Lux, Parent and the Company entered into an amendment to the Framework Agreement (the "Amendment Agreement") extending Parent's deadline to make the outstanding equity infusion of €13,000,000 to PVC Lux on or before January 31, 2012 (the "Contribution Deadline").

22. In conjunction with the Amendment Agreement, Arcapita was required by Commerzbank to execute the Guarantee.

23. Upon information and belief, due to the global economic downturn and, in particular, the Eurozone debt crisis, Parent was unable to make its required equity infusion by the Contribution Deadline, triggering Arcapita's alleged equity infusion obligation under the Guarantee.



24. Upon information and belief, all of the factors delineated above simultaneously rendered Arcapita insolvent during this same time period. Specifically, upon information and belief, these events hampered the Debtors' ability to obtain necessary liquidity from capital markets, reduced the Debtors' assets values, and rendered the Debtors unable to pay various debts as they came due, including the Debtors' \$1.1 billion syndicated facility, which came due on March 28, 2012.

25. Therefore, Arcapita failed to make the equity infusion to PVC Lux alleged to be required by the Guarantee.

26. PVC Lux thereafter filed for insolvency with the Regional Court of Luxembourg in Luxembourg, Grand-Duchy of Luxembourg on April 12, 2012.

#### **RELIEF REQUESTED**

27. Section 502(a) of the Bankruptcy Code provides that “[a] claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest . . . objects.” 11 U.S.C. §502(a). A debtor has the duty to object to the allowance of any claim that is improper. 11 U.S.C. §704(a)(5), 1106(a)(1) and 1107(a); *see also Int'l Yacht & Tennis, Inc. v. Wasserman Tennis, Inc. (In re Int'l Yacht & Tennis, Inc.)*, 922 F.2d 659, 661-62 (11th Cir. 1991).

28. As set forth in Bankruptcy Rule 3001(f), a properly executed and filed proof of claim constitutes *prima facie* evidence of the validity and the amount of the claim under section 502(a) of the Bankruptcy Code. *See In re Rockefeller Ctr. Props.*, 272 B.R. 524, n.13 (Bankr. S.D.N.Y. 2000). To receive the benefit of *prima facie* validity, however, the “proof of claim must ‘set forth facts necessary to support the claim.’” *In re Marino*, 90 B.R. 25, 28 (Bankr. D. Conn. 1988). Additionally, a claimant's proof of claim is entitled to the presumption of *prima facie* validity under Bankruptcy Rule 3001(f) only until an objecting party refutes “at least one of

the allegations that is essential to the claim's legal sufficiency." *In re WorldCom, Inc.*, 2005 WL 3832065, at \*4 (Bankr. S.D.N.Y. 2005) (citations omitted). Once such allegation is refuted, "the burden reverts to the claimant to prove the validity of the claim by the preponderance of the evidence." *Id.*

29. In other words, once the *prima facie* validity of a claim is rebutted, "it is for the claimant to prove his claim, not for the objector to disprove it." *In re Kahn*, 114 B.R. 40, 44 (Bankr. S.D.N.Y. 1990) (citations omitted).

**A. The Claim Must Be Disallowed Pursuant to Sections 502(d) and/or 548 of the Bankruptcy Code**

30. Section 502(d) of the Bankruptcy Code provides that the court shall disallow any claim of any entity that is a transferee of a transfer avoidable under, among others, sections 544, 547, 548 or 549 of the Bankruptcy Code. Courts have recognized that a claim may be defeated by the defensive assertion of section 502(d) without the filing of an avoidance action. *See In re Eye Contact, Inc.*, 97 B.R. 990, 992 (Bankr. W.D. Wis. 1989) (disallowing claim under section 502(d) even though no avoidance action was filed).

31. Courts have further held that section 502(d) may be asserted defensively to disallow a claim even when the objecting party is barred from bringing an avoidance action, such as where the applicable statute of limitations has expired. *See Enron Corp. v. Ave. Special Situations Fund II, LP (In re Enron Corp.)*, 340 B.R. 180, 191 (Bankr. S.D.N.Y. 2006) (citations omitted), *vacated sub nom. on other grounds Enron Corp. v. Springfield Assoc., L.L.C. (In re Enron Corp.)*, 379 B.R. 425 (S.D.N.Y. 2007) (noting there is no prohibition against "asserting section 502(d) as an affirmative defense to a claim of a creditor even if the trustee's claim is time-barred or otherwise nonrecoverable"); *U.S. Lines, Inc. v. United States (In re McLean Indus., Inc.)*, 196 B.R. 670, 676 (S.D.N.Y. 1996) (holding transfer avoidable for 502(d) purposes

even if the trustee is unable to recover such transfer from the transferee); *In re Mid Atl. Fund, Inc.*, 60 B.R. 604, 610 (Bankr. S.D.N.Y. 1986) (holding that section 502(d) may be used to disallow claim after statute of limitations to commence underlying avoidance action expires); *El Paso v. Am. W. Airlines, Inc. (In re Am. W. Airlines, Inc.)*, 217 F.3d 1161, 1165-66 (9th Cir. 2000) (same); *Parker N. Am. Corp. v. Resolution Trust Corp. (In re Parker N. Am. Corp.)*, 24 F.3d 1145, 1155 (9th Cir. 1994) (noting that by invoking section 502(d) a party transforms an avoidance action into an affirmative defense to a proof of claim); *Comm. of Unsecured Creditors v. Commodity Credit Corp. (In re KF Dairies, Inc.)*, 143 B.R. 734 (B.A.P. 9th Cir. 1992) (“Application of the time-bar to objections based on section 502(d) would undercut the statutory language, the purpose of the bankruptcy code, and the general rule that statutory time-bars are inapplicable to matters of defense, where no affirmative relief is sought.”); *In re Sierra-Cal*, 210 B.R. 168, 173 (Bankr. E.D. Cal. 1997); *In re Badger Lines, Inc.*, 199 B.R. 934, 939-40 (Bankr. E.D. Wis. 1996), *rev’d on other grounds*, 202 F.3d 945 (7th Cir. 2000); *see also In re McKenzie*, 2012 WL 4742708, at \*8 (E.D. Tenn. Oct. 2, 2012) (stating majority of courts allow a trustee to use section 502(d) defensively); *Brown v. I.R.S. (In re Larry’s Marineland of Richmond, Inc.)*, 166 B.R. 871 (Bankr. E.D. Ky. 1993) (inability of trustee to obtain affirmative monetary recovery from IRS under section 106(b) of the Bankruptcy Code did not prevent trustee’s use of 502(d)). *See also* Arthur Steinberg, *Bankruptcy Code Section 502(d): Back Door to Avoidance?*, 28 UCC Law J. 73, 75-76 (1995) (“The clear majority of cases hold that a trustee may object to the allowance of a claim on the ground that the claimant received an avoidable transfer, notwithstanding that under Section 546(a), the two-year limit for commencing an avoidance action has expired.”).

32. Moreover, the notion that an objection predicated upon section 502(d) is not dependent on the assertion of an avoidance action is consistent with the overarching purpose of the statute: to restore the “equality of a distribution disturbed by the illicit [transfer].” *KF Dairies*, 143 B.R. at 736. “Claim objections and avoidance actions . . . are separate and distinct proceedings which use different rules and procedures to accomplish distinct and discrete portions of the administration of a bankruptcy estate.” *In re Stoecker*, 143 B.R. 118, 133 (Bankr. N.D. Ill.), *aff’d in part and rev’d in part and remanded, on other grounds*, 143 B.R. 879 (N.D. Ill. 1992), *aff’d in part and vacated in part and remanded*, 5 F.3d 1022 (7th Cir. 1993). The claims objection process is a mechanism by which a creditor’s allowed claim is fixed for purposes of distribution. An avoidance action, however, is a method used to return assets to a debtor’s estate that were unlawfully diverted out of the estate, which can only occur through the commencement of an adversary proceeding. Thus, allowing the defensive use of section 502(d) is consistent with the longstanding “general rule that statutory time-bars are inapplicable to matters of defense, where no affirmative relief is sought.” *In re KF Dairies, Inc.*, 143 B.R. at 737-38.

33. Furthermore, even when section 548 of the Bankruptcy Code can no longer be used offensively, it may be used as a defensive measure to disallow a claim based upon a fraudulent obligation without invoking section 502(d) of the Bankruptcy Code. *See In re First State Bancorporation*, 498 B.R. 322, 333 (Bankr. D.N.M. 2013) (“[t]he use of 11 U.S.C. § 548 defensively to avoid the obligation upon which a claim against the bankruptcy estate is based is analogous to the defensive use of 11 U.S.C. § 502(d) in the claims adjudication process. Under that section, a creditor’s claim will be disallowed if the creditor has not paid monies or turned over property recoverable by the trustee under 11 U.S.C. § 548 and other specified sections of the Bankruptcy Code.”)

34. Similarly, courts regularly allow defensive use of trustee strong arm powers under section 544 of the Bankruptcy Code after expiration of the statute of limitations to commence an adversary proceeding asserting same. *See, e.g., In re Loewn Grp., Int'l*, 292 B.R. 522, 528 (Bankr. D. Del. 2003) (permitting the trustee to assert strong arm powers under section 544(a)(3) of the Bankruptcy Code to defeat claim that property was held in resulting trust after expiration of applicable statute of limitations); *Bank of N.Y. v. Sheeley*, 2014 WL 1233094, \*8 (S.D. Ohio Mar. 25, 2014) (allowing trustee to defensively raise status of hypothetical bona fide purchaser after expiration of statute of limitations to commence action under section 544 of the Bankruptcy Code); *In re Rent-A-Tent, Inc.*, 468 B.R. 442, 455-56 (Bankr. N.D. Ga. 2012) (same); *In re Block*, 259 B.R. 498, 502 (Bankr. D.R.I. 2001) (same); *In re Coan*, 96 B.R. 828, 831, 831 (Bankr. N.D. Ill. 1989) (same).

35. While the Debtors' statute of limitations for initiation of avoidance actions expired on March 19, 2014 pursuant to section 546(a) of the Bankruptcy Code, the Claim should still be disallowed as Arcapita's execution of the Guarantee was a constructive fraudulent conveyance.

36. The constructive fraud statute, 11 U.S.C. § 548(a)(1)(B), provides in pertinent part :

(a)(1) The trustee may avoid any transfer ... of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily—

....

(B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii) (I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; [or]

(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured....

See 11 U.S.C. § 548(a)(1)(B).

37. The requisite elements of section 548(a)(1)(B) of the Bankruptcy Code are satisfied herein as (i) Arcapita did not receive reasonably equivalent value or fair consideration for the obligations it incurred under the Guarantee, and (ii) it was insolvent when it incurred the obligations under the Guarantee.

38. As to the first element, Arcapita received no direct or indirect benefit from the one-month forbearance extended to Parent in connection with Parent's obligation to make the €13,000,000 equity contribution to PVC Lux. Guaranties of third-party obligations are not made for sufficient consideration where, as here, a debtor does not receive a tangible indirect benefit. *Rubin v. Manufacturers Hanover Trust Co.*, 661 F.2d 979, 991 (2d Cir. 1981) ("transfers solely for the benefit of third parties do not furnish fair consideration") (internal quotations omitted). "The most straightforward indirect benefit" occurs when the debtor receives from the third party "some of the consideration paid to it." *In re Image Worldwide, Ltd.*, 139 F.3d 574, 578 (7th Cir. 1998).

39. Furthermore, Arcapita held only an indirect approximately 61.5% ownership interest in Parent and PVC Lux. Such interest was further rendered valueless by PVC Lux's own insolvency. "Courts have found a parent's transfer of assets to a subsidiary to be for less than reasonably equivalent value when the subsidiary was insolvent at the time of transfer." *In re Worldcom, Inc.*, 2003 WL 23861928 at \*41 (Bankr. S.D.N.Y. Oct. 31, 2003), citing *In re Duque Rodriguez*, 77 B.R. 939, 941-42 (Bankr. S.D. Fla. 1987), *aff'd*, *In re Rodriguez*, 895 F.2d 725

(11th Cir.1990); *In re Chase & Sanborn Corp.*, 68 B.R. 530 (Bankr. S.D. Fla. 1986), *aff'd*, 848 F.2d 1196 (11th Cir.1988). Therefore, Arcapita derived no benefit from guaranteeing Parent's obligation to make an additional equity infusion into PVC Lux.

40. As to the second element, upon information and belief, Arcapita was insolvent at the time it entered into the Guarantee. Upon information and belief, the global economic downturn and, in particular, the Eurozone debt crisis adversely impacted the Debtors and rendered them insolvent. Specifically, upon information and belief, in or about the same timeframe, the Debtors were unable to obtain necessary liquidity from capital markets, had simultaneously reduced asset values, and were unable to pay various debts as they came due, including the Debtors' \$1.1 billion syndicated facility, which came due on March 28, 2012.

41. As both elements of section 548(a)(1)(B) of the Bankruptcy Code are satisfied herein, Arcapita's execution of the Guarantee was a constructive fraudulent conveyance, and the Claim should therefore be disallowed for all purposes pursuant to sections 502(d) and/or 548 of the Bankruptcy Code.

**B. The Claim Should Be Subordinated Under Section 510(b) of the Bankruptcy Code**

42. In addition, the Claim should be subordinated in priority below general unsecured claims pursuant to section 510(b) of the Bankruptcy Code.<sup>5</sup> Section 510(b) of the Bankruptcy Code states:

[A] claim . . . for damages arising from the purchase or sale of [a security of the debtor or an affiliate of the debtor] or for reimbursement or contribution allowed under section 502 on account of such a claim . . . shall be subordinated to all claims or interests that are senior to or equal the claim or interest represented by

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<sup>5</sup> The Reorganized Debtors need not commence an Adversary Proceeding because the Claim is not yet "allowed." Fed. R. Bankr. P. 7001(8) ("The following are adversary proceedings... (8) a proceeding to subordinate any allowed claim or interest, *except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for subordination*") (emphasis added).

such security, except that if such security is common stock, such claim has the same priority as common stock.

*Id.* Section 101(49) of the Bankruptcy Code defines “security” very broadly to include notes, stock, bonds, debentures, and any other claim or interest commonly referred to as a security. 11 U.S.C. § 101(49). As detailed below, the Claim falls squarely within the plain text of section 510(b) of the Bankruptcy Code. Therefore, subordination of the Claim is mandatory.

43. The Second Circuit Court of Appeals along with the bankruptcy courts within the Second Circuit have uniformly applied a broad interpretation of section 510(b) of the Bankruptcy Code. *See In re Lehman Brothers Inc.*, 503 B.R. 778, 782-83 (Bankr. S.D.N.Y. 2014). To wit, in *Rombro v. Dufrayne (In re Med Diversified)*, 461 F.3d 251, 256 (2d Cir. 2006), the Second Circuit explained that section 510(b) is to be construed broadly, reflecting “a Congressional judgment that, as between shareholders and general unsecured creditors, it is shareholders who should bear the risk of illegality in the issuance of stock in the event the issuer enters bankruptcy.” *Id.* at 256 (quoting *Baroda Hill Inv., Ltd. v. Telegroup, Inc. (In re Telegroup)*, 281 F.3d 133, 141 (3d Cir. 2002) (citation omitted); *see also In re Enron Corp.*, 341 B.R. 141, 163-66 (Bankr. S.D.N.Y. 2006) (“Congress enacted § 510(b) to prevent disappointed shareholders from recovering their investment loss by using fraud and other securities claims to bootstrap their way to parity with general unsecured creditors in a bankruptcy proceeding.”) (quoting *In re Telegroup*, 281 F.3d at 142). As the *In re Med Diversified* Court held, a claim arises from a securities transaction whenever the claimant “had the potential benefit of the proceeds of the enterprise deriving from ownership of the securities.” 461 F.3d at 256-57.

44. For a claim to fall within the scope of section 510(b), the injury alleged by a claimant “need not directly result from the purchase [of securities]” as long as there is “some nexus or causal relationship between the claim and the [purchase] of the security.” *In re Enron*



*Corp.*, 341 B.R. at 152 (quoting *In re Telegroup, Inc.*, 281 F.3d at 138) (internal quotations omitted). Accordingly, a claim that would not have arisen “but for” the purchase or sale of securities is properly subordinated under section 510(b). See *Int’l Wireless Commc’ns, Inc. v. Int’l Wireless Commc’ns Holdings, Inc. (In re Int’l Wireless Commc’ns Holdings, Inc.)*, 68 F. App’x 275, 278 (3d Cir. 2003) (where claim was based on amounts owed under an agreement that was entered into in connection with a proposed initial public offering, even though the agreement did not address the purchase or sale of securities, the court subordinated the claim because the claimant’s damages would not exist “but for [the claimant’s] stock ownership”); *In re Telegroup, Inc.*, 281 F.3d at 138 (subordinating a claim asserting damages for the debtor’s failure to ensure the claimant’s shares were registered and freely tradable because the claim “would not have arisen but for the purchase of [debtor’s] stock and allege[d] . . . breach of a provision of the stock purchase agreement.”); see also *In re NAL Fin. Grp., Inc.*, 237 B.R. 225, 235 (Bankr. S.D. Fla. 1999) (subordinating claims for breach of registration rights agreement because the agreement was executed contemporaneously with a securities purchase agreement and, while the breach occurred subsequently, the non-breaching party’s cause of action arises from the execution of the securities purchase agreement).

45. In the case at bar, the Claim arose by virtue of the failure of Parent, a Debtor affiliate within meaning of section 101(2)(B) of the Bankruptcy Code, to make a required equity infusion to PVC Lux. Put differently, Arcapita’s alleged obligation under Guarantee would not have arisen but for (i) Parent’s obligation to make an equity infusion to PVC Lux and (ii) Parent’s breach of such obligation.

46. A breach of a requirement to make an equity infusion is directly analogous to a breach of an agreement to purchase or sell a security, in that the party making such an equity

infusion would, in return, receive an equity stake in such entity – which is precisely the same as receiving a stock certificate or the like in connection with purchasing a security. In both cases, the party receives an ownership interest in the funded entity. Therefore, it follows that the maker of an equity infusion to a corporation would also be subject to mandatory subordination under section 510(b) of the Bankruptcy Code in a Chapter 11 scenario. *See Federal Deposit Ins. Corp. v. Jenkins*, 888 F.2d 1537, 1545 (11th Cir. 1989) (noting that section 510(b) of the Bankruptcy Code applies “to equity contributions in corporations by requiring that the providers of the equity (the stockholders) not seek recovery of corporate assets until general creditors’ claims have been satisfied.”). Since a claim arising out of Parent’s obligation to make an equity infusion would be subordinated under section 510(b) of the Bankruptcy Code, a claim arising out of Parent’s failure to satisfy such obligation will likewise be subordinated under 510(b) of the Bankruptcy Code. Holding otherwise would allow for an end run around section 510(b) of the Bankruptcy Code. *See generally In re Seaquest Driving, LP*, 579 F.3d 411 (5th Cir. 2009) (claim for damages based in part on underlying failure to repay equity contribution subordinated under section 510(b) of the Bankruptcy Code).

47. For all of the foregoing reasons, the Claim should be subordinated below general unsecured claims pursuant to section 510(b) of the Bankruptcy Code.

### **CONCLUSION**

48. As discussed in greater detail above, Arcapita’s execution of the Guarantee was a constructive fraudulent conveyance, and the Claim should therefore be disallowed for all purposes pursuant to sections 502(d) and/or 548 of the Bankruptcy Code. Alternatively, the Claim should be subordinated pursuant to section 510(b) of the Bankruptcy Code as it arises from a Debtor affiliate’s failure to satisfy its equity infusion obligation.

**RESERVATION OF RIGHTS**

49. The Reorganized Debtors hereby reserve their right to object on any grounds whatsoever to the Claim if it is not disallowed in its entirety as requested in this Objection, and further reserves the right to amend, modify, and/or supplement this Objection, including, without limitation, to object to an amended claim.

50. Notwithstanding anything contained in this Objection, nothing herein shall be construed as a waiver of any rights that the Reorganized Debtors may have to exercise their rights of setoff and/or recoupment.

**NOTICE AND NO PRIOR REQUEST**

51. Notice of this Objection has been provided to (a) the Office of the United States Trustee for the Southern District of New York and (b) the Claimant. The Reorganized Debtors submit that such notice is sufficient and no other or further notice need be provided.

52. No prior request for the relief requested herein has been made to this or any other Court.

**WHEREFORE**, the Reorganized Debtors respectfully request that the Court grant the relief requested herein and such other and further relief as may be just and proper.

Dated: April 30, 2014

**ASK LLP**

/s/ Edward E. Neiger

Edward E. Neiger, Esq.

151 West 46<sup>th</sup> Street, 4th Floor

New York, New York 10036

Telephone: (212) 267-7342

Facsimile: (212) 918-3427

*Counsel for the Reorganized Debtors*

# **EXHIBIT A**



GCG Number: 7059538



UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PROOF OF CLAIM

Name of Debtor (Check Only One): Case No.

<input checked="" type="checkbox"/> Arcapita Bank B.S.C.(c)	12-11076	<input type="checkbox"/> Windturbine Holdings Limited	12-11079
<input type="checkbox"/> Arcapita Investment Holdings Limited	12-11077	<input type="checkbox"/> AED II Holdings Limited	12-11080
<input type="checkbox"/> Arcapita LT Holdings Limited	12-11078	<input type="checkbox"/> Railinvest Holdings Limited	12-11081
		<input type="checkbox"/> Falcon Gas Storage Company, Inc.	12-11790

Your Claim is Scheduled As Follows:

NOTE: Do not use this form to make a claim for an administrative expense that arises after the bankruptcy filing. You may file a request for payment of an administrative expense according to 11 U.S.C. § 503.

Name of Creditor (the person or other entity to whom the debtor owes money or property): Commerzbank AG

Check this box to indicate that this claim amends a previously filed claim.

Court Claim Number:

(If known)

Filed on: \_\_\_\_\_

Name and address where notices should be sent:

COMMERZBANK AG  
GRM-IC CI  
Gallusanlage 7 (Gallileo)  
60329 Frankfurt am Main  
Germany  
ATTENTION: Joachim Ballerstaedt

Telephone number: +49 69 136 22864

Email Address: joachim.ballerstaedt@commerzbank.com

Check this box if you are aware that anyone else has filed a proof of claim relating to this claim. Attach copy of statement giving particulars.

If an amount is identified above, you have a claim scheduled by one of the Debtors as shown. (This scheduled amount of your claim may be an amendment to a previously scheduled amount.) If you agree with the amount and priority of your claim as scheduled by the Debtor and you have no other claim against the Debtor, you do not need to file this proof of claim form, EXCEPT AS FOLLOWS: If the amount shown is listed as any of DISPUTED, UNLIQUIDATED, or CONTINGENT, a proof of claim MUST be filed in order to receive any distribution in respect of your claim. If you have already filed a proof of claim in accordance with the attached instructions, you need not file again.

Name and address where payment should be sent (if different from above):

Telephone number:  
Email Address:

1. Amount of Claim as of Date Case Filed: \$ See attached

If all or part of the claim is secured, complete item 4.

If all or part of the claim is entitled to priority, complete item 5.

Check this box if the claim includes interest or other charges in addition to the principal amount of the claim. Attach a statement that itemizes interest or charges.

2. Basis for Claim: See attached.  
(See instruction #2)

3. Last four digits of any number by which creditor identifies debtor:

3a. Debtor may have scheduled account as:

(See instruction #3a)

3b. Uniform Claim Identifier (optional):

(See instruction #3b)

4. Secured Claim (See instruction #4)

Check the appropriate box if the claim is secured by a lien on property or a right of setoff, attach required redacted documents, and provide the requested information.

Nature of property or right of setoff:  Real Estate  Motor Vehicle  Other

Describe: \_\_\_\_\_

Value of Property: \$ \_\_\_\_\_

Annual Interest Rate \_\_\_\_\_%  Fixed or  Variable (when case was filed)

Amount of arrearage and other charges, as of the time case was filed, included in secured claim, if any:

\$ \_\_\_\_\_

Basis for perfection: \_\_\_\_\_

Amount of Secured Claim: \$ \_\_\_\_\_

Amount Unsecured: \$ \_\_\_\_\_

5. Amount of Claim Entitled to Priority under 11 U.S.C. § 507 (a). If any part of the claim falls into one of the following categories, check the box specifying the priority and state the amount.

Domestic support obligations under 11 U.S.C. § 507 (a)(1)(A) or (a)(1)(B).

Wages, salaries, or commissions (up to \$11,725\*) earned within 180 days before the case was filed or the debtor's business ceased, whichever is earlier - 11 U.S.C. § 507 (a)(4).

Contributions to an employee benefit plan - 11 U.S.C. § 507 (a)(5).

Amount entitled to priority: \_\_\_\_\_

Up to \$2,600\* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. § 507 (a) (7).

Taxes or penalties owed to governmental units - 11 U.S.C. § 507 (a)(8).

Other - Specify applicable paragraph of 11 U.S.C. § 507 (a)( ) \$ \_\_\_\_\_



Control Number: 1599074333

\*Amounts are subject to adjustment on 4/1/13 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.

6. Credits. The amount of all payments on this claim has been credited for the purpose of making this proof of claim. (See instruction #6)

U.S. BANKRUPTCY COURT  
2012 AUG 30 12:55  
FILED

7. Documents: Attached are redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. If the claim is secured, box 4 has been completed, and redacted copies of documents providing evidence of perfection of a security interest are attached. (See instruction #7, and the definition of "redacted".)

DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.

If the documents are not available, please explain: See attached

8. Signature: (See instruction #8) Check the appropriate box.

- I am the creditor     I am the creditor's authorized agent. (Attach copy of power of attorney, if any.)     I am the trustee, or the debtor, or their authorized agent. (See Bankruptcy Rule 3004.)     I am a guarantor, surety, indorser, or other codebtor. (See Bankruptcy Rule 3005.)

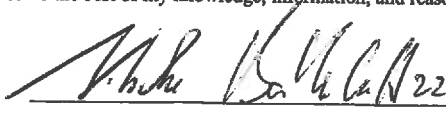
I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.

Print Name: Joachim Ballerstaedt; Bernd Nitsche

Title: Authorized Signatory

Company: Commerzbank AG

Address and telephone number (if different from notice address above): \_\_\_\_\_

 22 August 2012  
(Signature) (Date)

Telephone number: \_\_\_\_\_ email: \_\_\_\_\_

Penalty for presenting fraudulent claim: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571. Modified B10 (GCG) (12/11)

**INSTRUCTIONS FOR PROOF OF CLAIM FORM**

The instructions and definitions below are general explanations of the law. In certain circumstances, such as bankruptcy cases not filed voluntarily by the Debtor, exceptions to these general rules may apply. The attorneys for the Debtors and their court-appointed claims agent, GCG, are not authorized and are not providing you with any legal advice.

PLEASE SEND YOUR ORIGINAL, COMPLETED CLAIM FORM AS FOLLOWS: IF BY MAIL: ATTN: ARCAPITA BANK B.S.C.(c), C/O GCG, P.O. BOX 9881 DUBLIN, OHIO 43017-5781. IF BY HAND OR OVERNIGHT COURIER: ATTN: ARCAPITA BANK B.S.C.(c), C/O GCG, 5151 BLAZER PARKWAY, STE A, DUBLIN, OH 43017. ANY PROOF OF CLAIM SUBMITTED BY FACSIMILE OR EMAIL WILL NOT BE ACCEPTED.

THE GENERAL BAR DATE IN THESE CHAPTER 11 CASES IS AUGUST 30, 2012 AT 5:00 P.M. (PREVAILING EASTERN TIME)

THE GOVERNMENTAL BAR DATE IN THESE CHAPTER 11 CASES IS SEPTEMBER 17, 2012 AT 5:00 P.M. (PREVAILING EASTERN TIME)

**Items to be completed in Proof of Claim form**

**Bankruptcy Court Information:**

All of these chapter 11 cases other than Falcon Gas Storage Company, Inc. were commenced on March 19, 2012. Falcon Gas Storage Company, Inc. filed its chapter 11 petition on April 30, 2012. You should select the Debtor against which you are asserting your claim from the list provided.

**A SEPARATE PROOF OF CLAIM FORM MUST BE FILED AGAINST EACH DEBTOR.**

**Creditor's Name and Address:**

Fill in the name of the person or entity asserting a claim and the name and address of the person who should receive notices issued during the bankruptcy case. Please provide us with a valid email address. A separate space is provided for the payment address if it differs from the notice address. The creditor has a continuing obligation to keep the court informed of its current address. See Federal Rule of Bankruptcy Procedure (FRBP) 2002(g).

**1. Amount of Claim as of Date Case Filed:**

State the total amount owed to the creditor on the date of the bankruptcy filing. Follow the instructions concerning whether to complete items 4 and 5. Check the box if interest or other charges are included in the claim.

**2. Basis for Claim:**

State the type of debt or how it was incurred. Examples include goods sold, money loaned, services performed, personal injury/wrongful death, car loan, mortgage note, and credit card. If the claim is based on delivering health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information. You may be required to provide additional disclosure if an interested party objects to your claim.

**3. Last Four Digits of Any Number by Which Creditor Identifies Debtor:**

State only the last four digits of the Debtor's account or other number used by the creditor to identify the Debtor.

**3a. Debtor May Have Scheduled Account As:**

Report a change in the creditor's name, a transferred claim, or any other information that clarifies a difference between this proof of claim and the claim as scheduled by the Debtor.

**3b. Uniform Claim Identifier:**

If you use a uniform claim identifier, you may report it here. A uniform claim identifier is an optional 24-character identifier that certain large creditors use to facilitate electronic payment in chapter 13 cases.

**4. Secured Claim:**

Check whether the claim is fully or partially secured. Skip this section if the claim is entirely unsecured. (See Definitions.) If the claim is secured, check the box for the nature and value of property that secures the claim, attach copies of lien documentation, and state, as of the date of the bankruptcy filing, the annual interest rate (and whether it is fixed or variable), and the amount past due on the claim.

**5. Amount of Claim Entitled to Priority Under 11 U.S.C. § 507 (a):**

If any portion of the claim falls into any category shown, check the appropriate box(es) and state the amount entitled to priority. (See Definitions.) A claim may be partly priority and partly non-priority. For example, in some of the categories, the law limits the amount entitled to priority.

**6. Credits:**

An authorized signature on this proof of claim serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the Debtor credit for any payments received toward the debt.

**7. Documents:**

Attach redacted copies of any documents that show the debt exists and a lien secures the debt. You must also attach copies of documents that evidence perfection of any security interest. You may also attach a summary in addition to the documents themselves. FRBP 3001(c) and (d). If the claim is based on delivering health care goods or services, limit disclosing confidential health care information. Do not send original documents, as attachments may be destroyed after scanning.

**8. Date and Signature:**

The individual completing this proof of claim must sign and date it. FRBP 9011. If the claim is filed electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what constitutes a signature. If you sign this form, you declare under penalty of perjury that the information provided is true and correct to the best of your knowledge, information, and reasonable belief. Your signature is also a certification that the claim meets the requirements of FRBP 9011(b). Whether the claim is filed electronically or in person, if your name is on the signature line, you are responsible for the declaration. Print the name and title, if any, of the creditor or other person authorized to file this claim. State the filer's address and telephone number if it differs from the address given on the top of the form for purposes of receiving notices. If the claim is filed by an authorized agent, attach a complete copy of any power of attorney, and provide both the name of the individual filing the claim and the name of the agent. If the authorized agent is a servicer, identify the corporate servicer as the company. Criminal penalties apply for making a false statement on a proof of claim.

**DEFINITIONS**

**INFORMATION**

**Debtor**

A debtor is the person, corporation, or other entity that has filed a bankruptcy case.

**Creditor**

A creditor is the person, corporation, or other entity to whom the Debtor owes a debt that was incurred before the date of the bankruptcy filing. See 11 U.S.C. § 101 (10).

**Claim**

A claim is the creditor's right to receive payment for a debt owed by the Debtor on the date of the bankruptcy filing. See 11 U.S.C. § 101 (5). A claim may be secured or unsecured.

**Proof of Claim**

A proof of claim is a form used by the creditor to indicate the amount of the debt owed by the Debtor on the date of the bankruptcy filing. The creditor must file the form with GCG as described in the instructions above and in the Bar Date Notice.

**Secured Claim Under 11 U.S.C. § 506 (a)**

A secured claim is one backed by a lien on property of the Debtor. The claim is secured so long as the creditor has the right to be paid from the property prior to other creditors. The amount of the secured claim cannot exceed the value of the property. Any amount owed to the creditor in excess of the value of the property is an unsecured claim. Examples of liens on property include a mortgage on real estate or a security interest in a car. A lien may be voluntarily granted by a Debtor or may be obtained through a court proceeding. In some states, a court judgment is a lien. A claim also may be secured if the creditor owes the Debtor money (has a right to setoff).

**Unsecured Claim**

An unsecured claim is one that does not meet the requirements of a secured claim. A claim may be partly unsecured if the amount of the claim exceeds the value of the property on which the creditor has a lien.

**Claim Entitled to Priority Under 11 U.S.C. § 507 (a)**

Priority claims are certain categories of unsecured claims that are paid from the available money or property in a bankruptcy case before other unsecured claims.

**Redacted**

A document has been redacted when the person filing it has masked, edited out, or otherwise deleted, certain information. A creditor must show only the last four digits of any social-security, individual's tax-identification, or financial-account number, only the initials of a minor's name, and only the year of any person's date of birth. If the claim is based on the delivery of health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information.

**Evidence of Perfection**

Evidence of perfection may include a mortgage, lien, certificate of title, financing statement, or other document showing that the lien has been filed or recorded.

**Acknowledgment of Filing of Claim**

To receive a date-stamped copy of your claim form, please provide a self-addressed stamped envelope and a copy of your proof of claim form when you submit the original to GCG.

**Offers to Purchase a Claim**

Certain entities are in the business of purchasing claims for an amount less than the face value of the claims. One or more of these entities may contact the creditor and offer to purchase the claim. Some of the written communications from these entities may easily be confused with official court documentation or communications from the Debtor. These entities do not represent the bankruptcy court or the Debtor. The creditor has no obligation to sell its claim. However, if the creditor decides to sell its claim, any transfer of such claim is subject to FRBP 3001(e), any applicable provisions of the Bankruptcy Code (11 U.S.C. § 101 *et seq.*), and any applicable orders of the bankruptcy court.

**List of Debtors and Case Numbers**

Indicate on the face of the Proof of Claim form the Debtor against which you assert a claim.  
Choose only one Debtor for each Proof of Claim form.

Arcapita Bank B.S.C.(c) 12-11076  
Arcapita Investment Holdings Limited 12-11077  
Arcapita LT Holdings Limited 12-11078  
Windturbine Holdings Limited 12-11079  
AEID II Holdings Limited 12-11080  
Railinvest Holdings Limited 12-11081  
Falcon Gas Storage Company, Inc. 12-11790

**ATTACHMENT TO PROOF OF CLAIM  
OF COMMERZBANK AG AGAINST ARCAPITA BANK B.S.C. (c)**

Commerzbank AG ("Claimant") hereby submits this attachment to its proof of claim (the "Claim") against Arcapita Bank B.S.C.(c). (the "Debtor"). The claims set forth herein are in the amount of no less than \$17,214.600<sup>1</sup> as of the Petition Date and arise under that certain Guarantee and related agreements as set forth below.

**Introduction**

1. On March 19, 2012 (the "Petition Date"), the Debtor and certain of its affiliates voluntarily filed petitions for relief under Chapter 11 of Title 11 of the United States Code with this Court.

**The Claims**

**Guarantee Claim**

2. The Claim arises under that certain Guarantee, dated January 6, 2012 (the "Guarantee") issued by the Debtor for the benefit of PVC (Lux) Holding Company S.à r.l. ("PVC (Lux)"), a Luxembourg limited liability company. Under the Guarantee, the Debtor guaranteed to Claimant the obligation of PVC Lux's parent, PVC Investment Limited, a Cayman Islands limited liability company ("Parent") to contribute capital in the amount of €13,000,000 to PVC (Lux) no later than January 31, 2012. A copy of the Guarantee is attached hereto as Exhibit A.

3. The terms of the Guarantee provide that it may be called by Claimant. Accordingly, by letter dated February 1, 2012 (the "Demand Letter"), Claimant demanded

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<sup>1</sup> The Claim is originally denominated in Euro in the amount of €13,000,000. The amount claimed herein in United States currency is calculated based on the Federal Reserve System's records of the historical currency exchange rate on the Petition Date of 1.3242 USD/EUR, which in turn is based on the noon buying rates on that date in New York for cable transfers payable in foreign countries.



payment from the Debtor under the Guarantee. A copy of the Demand Letter is attached hereto as Exhibit B.

4. Parent did not contribute any capital to PVC (Lux) by January 31, 2012 or at anytime thereafter. As a result, PVC (Lux), as the beneficiary of the Guarantee, holds a claim in the amount of no less than €13,000,000 against the Debtor (the "Guarantee Claim").

5. Due in large part to the Debtor's failure to support PVC (Lux), on April 12, 2012, the directors of PVC (Lux) filed for insolvency with the Regional Court of Luxembourg in Luxembourg, Grand-Duchy of Luxembourg (the "Luxembourg Insolvency Court"). On the same day, the Luxembourg Insolvency Court appointed Yann Baden as insolvency administrator for PVC (Lux) (in such capacity, the "Insolvency Administrator").

6. On August 29, 2012, the Insolvency Administrator and Claimant entered into (a) a Sale and Purchase Agreement Relating to a Guarantee Claim and (b) Assignment Agreement Relating to a Guarantee Claim, under which the Insolvency Administrator sold and assigned the Guarantee Claim to Claimant.<sup>2</sup>

#### Damages Claim

7. Claimant and PVC (Lux) are parties to that certain Amended and Restated Murabaha Facility Agreement, dated as of May 16, 2008 (the "Murabaha Facility"), pursuant to which Claimant made available to PVC (Lux) a Sharia compliant revolving funding facility in a principal amount of up to €125,000,000. Events of default occurred under the Murabaha Facility and by letter dated March 12, 2012, Claimant accelerated and terminated the Murabaha Facility.

8. The Debtor's failure to perform under the Guarantee as set forth above caused or contributed to PVC (Lux)'s defaults under the Murabaha Facility. As a result, Claimant asserts,

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<sup>2</sup> The Sale and Purchase Agreement Relating to Guarantee Claim and the Assignment Agreement Relating to Guarantee Claim contain confidential information and are therefore not filed with this Proof of Claim. Copies of the agreements may be reviewed upon request and conditioned on appropriate confidentiality arrangements.

as an additional basis for its claims herein, damages in an amount not less than the €13,000,000 the Debtor was obligated to but failed to contribute to PVC (Lux).

**Reservation of Rights**

9. Claimant expressly reserves the right to amend or supplement this Claim at any time, in any respect and for any reason, including but not limited to, for the purposes of (a) fixing, increasing, or amending the amounts referred to herein, and (b) adding or amending documents and other information and further describing the claims. The Claimant does not waive any right to amounts due for any claim asserted herein, and Claimant reserves the right to amend or supplement this proof of claim if Claimant should deem it necessary or appropriate, to assert and state an amount for any such claim.

10. This Claim is made without prejudice to the filing by Claimant and any related entities of additional proofs of claim for any additional claims against the Debtor and any debtor and non-debtor entities affiliated with the Debtor of any kind or nature, including, without limitation, claims for administrative expenses, additional interest, late charges, and related costs and expenses, and any and all other charges and obligations reserved under the applicable documents and other transaction documents, and claims for reimbursement in amounts that are not fully ascertainable.

11. The filing of this Claim is not intended and shall not be deemed to be or construed as a waiver or release of any right to claim specific assets; any rights of setoff, recoupment, or counterclaim; or any right, rights of action, causes of action, or claims, whether now existing or hereinafter arising, that Claimant has or may have against the Debtors, their affiliated entities or any other person, or persons, and Claimant expressly reserves all rights.

12. Nothing herein modifies, alters, amends and/or waives any right Claimant may have under applicable law or any agreement or understanding to assert and recover from the Debtor, its debtor and non-debtor affiliated entities or any other person or persons, upon rights, claims, and monies.

13. In executing and filing this Claim, Claimant does not submit itself to the jurisdiction of this Court for any other purpose than with respect to this Claim. This Claim is not intended to be, and shall not be construed as (i) an election of remedies, (ii) a waiver of any past, present or future defaults, or (iii) a waiver or limitation of any rights remedies, claims or interests of Claimant.

#### Notices

14. All notices, communications and distributions with respect to this Claim should be sent to:

Commerzbank AG  
Gallusanlage 7 (Galileo)  
60329 Frankfurt Am Main  
Germany  
Telephone: +49 69 136 22864  
Fax: +49 69 136 29477  
Attention: Joachim Ballerstaedt  
Email: [Joachim.ballerstaedt@commerzbank.com](mailto:Joachim.ballerstaedt@commerzbank.com)

With a copy to:

Clifford Chance US LLP  
31 West 52nd Street  
New York, NY 10019  
Telephone: (212) 878-8000  
Fax: (212) 878-8375  
Attention: Rick Antonoff, Esq.  
Email: [rick.antonoff@cliffordchance.com](mailto:rick.antonoff@cliffordchance.com)

**EXHIBIT "A"**

## GUARANTEE

**GUARANTEE**, dated 6 January 2012 (the "*Guarantee*"), by Arcapita Bank B.S.C.(c), a joint stock company incorporated in the Kingdom of Bahrain (the "*Guarantor*"), for the benefit of PVC (Lux) Holding Company S. á r.l. ("*Luxco*"), a private limited liability company incorporated under the laws of Luxembourg, to be called by Commerzbank Aktiengesellschaft, a stock corporation incorporated under the laws of Germany (the "*Facility Provider*"), for the benefit of Luxco.

### PRELIMINARY STATEMENTS:

(1) The Facility Provider has entered into a Murabaha Facility Agreement dated 16 May 2008 (as amended and restated on 9 November 2010) (the "*Murabaha Facility*"), with (i) Luxco, (ii) Arcapita Investment Funding Limited, a Cayman Islands limited liability company, and (iii) AIA Limited, a Cayman Islands limited liability company. Under the Murabaha Facility the Facility Provider has provided a facility and is therefore the beneficiary of the repayment of such facility.

(2) The Facility Provider has also entered into a Framework Agreement dated 9 November 2010 (as amended on or about the date hereof) (the "*Framework Agreement*"), with (i) Commerzbank Aktiengesellschaft, Filiale Luxemburg, (ii) Commerzbank Aktiengesellschaft, London Branch, (iii) PVC Investments Limited, (the "*Parent*"), a private limited liability company incorporated under the laws of the Cayman Islands, (iv) Luxco, and (v) PVC (Germany) Acquisitions GmbH (subsequently merged with HT Troplast GmbH, with HT Troplast as the surviving entity), a limited liability company registered in Germany.

(3) Sec. 11, 12 and 13 of the Framework Agreement provide for equity injections by the Parent to Luxco in the total amount of EUR 45,000,000 (in words: forty-five million Euro) until 31 December 2011 (the "*Long Stop Date*"). Should the Parent (partly or entirely) fail to make such additional equity injections, the Facility Provider is entitled to request the transfer of 75.01 per cent of the shares in Luxco which are currently held by a third party fiduciary (sec. 14 of the Framework Agreement) to the Facility Provider or one or more third parties. To date, the Parent has made equity injections in the total amount of EUR 32,000,000 (in words: thirty-two million Euro), so that an amount of EUR 13,000,000 (in words: thirteen million) is still outstanding.

(4) The Facility Provider has agreed to extend the Long Stop Date until 31 January 2012 (the "*Extended Long Stop Date*") if the remaining equity injection in the amount of EUR 13,000,000 (in words: thirteen million Euro) is guaranteed to be made by no later than such Extended Long Stop Date.

**NOW, THEREFORE**, in consideration of the premises and in order to induce the Facility Provider to agree to an extension of the Long Stop Date under the Framework Agreement, the Guarantor hereby guarantees as follows:

**SECTION 1. Guarantee.**

The Guarantor irrevocably and unconditionally guarantees to the Facility Provider that an additional equity injection to Luxco in the total amount of EUR 13,000,000 (in words: thirteen million Euro) will be made on or prior to the Extended Long Stop Date.

**SECTION 2. Penalty.**

Should an additional equity injection pursuant to sec. 1 (entirely or partly) not be made on or prior to the Extended Long Stop Date, the Guarantor is obliged on first demand of the Facility Provider to pay the difference between EUR 13,000,000 (in words: thirteen million Euro) and the amount of any additional equity injection(s) which are made on or after the date of this Guarantee to Luxco but by no later than the Extended Long Stop Date.

For purposes of the correct treatment e.g. for accounting and tax purposes, any payment made by the Guarantor to Luxco under this sec. 2 shall be treated, to the extent legally permissible, vis-à-vis Luxco as an equity injection by Parent as the direct shareholder of Luxco.. In relation between Guarantor and Parent, the legal basis for such payment is subject to a separate (written or non-written) agreement. The rights and claims of the Facility Provider under and in connection with the Framework Agreement shall remain unaffected.

**SECTION 3. Waiver.**

The Guarantor waives any right it may have to require from the Facility Provider to proceed against, or enforce any other rights or security or claim payment from, any other party before the Facility Provider may assert any rights against the Guarantor under this Guarantee (*Verzicht auf Einrede der Vorausklage*).

The obligations of the Guarantor under this Guarantee will not be affected by any act, omission, matter or thing which, but for this Section 3, would reduce, release or prejudice any of its obligations under this Guarantee (without limitation and whether or not known to it or the Facility Provider) including:

- (a) any time, waiver or consent granted to any person;
- (b) the release of any person under the terms of any arrangement;
- (c) the taking, variation, compromise, exchange, renewal or release of, or refusal or neglect to perfect, take up or enforce, any rights against, or security over assets of, any person or any non-presentation or non-observance of any formality or other requirement in respect of any instrument or any failure to realize the full value of any security;
- (d) any incapacity or lack of power, authority or legal personality of or dissolution or change in the members or status of any person;
- (e) where (in each case) consent has been granted by the Guarantor, any amendment, novation, supplement, extension (whether of maturity or otherwise) or restatement, (in each or any case, however fundamental and of whatsoever nature) or replacement of the Framework Agreement or any other document or security;

(f) any unenforceability, illegality, non-provability or invalidity of any obligation of the Parent or of any other party to be bound by the Framework Agreement or the amendment agreement in respect thereof; or

(g) any insolvency or similar proceedings.

***SECTION 4. Deferral of Guarantor's Rights.***

The Guarantor acknowledges that there is no recourse against the Parent, Luxco, Intertrust Luxembourg S.A. or any of their respective subsidiaries under any security or guarantee granted for the benefit of the Facility Provider by the Parent, Luxco, Intertrust Luxembourg S.A. or any of their respective subsidiaries. The Guarantor may enter into internal arrangements and / or agreements with the Parent regarding this Guarantee and may have rights of recourse and other claims against the Parent under such arrangements and agreements. However, until all amounts which may be or become payable by the Parent and Luxco under or in connection with the Framework Agreement or otherwise to the Facility Provider have been irrevocably paid in full and unless the Facility Provider otherwise directs, the Guarantor will not exercise any rights which it may have by reason of performance by it of the Parent's obligations under the Framework Agreement to be indemnified by the Parent

***SECTION 5. Additional Security.***

This Guarantee is in addition to and is not in any way prejudiced by any other guarantee or security now or subsequently held by the Facility Provider, in particular the EUR 125,000,000 (in words: one hundred twenty-five million Euro) guarantee by the Guarantor in favour of Dresdner Bank (the legal predecessor of the Facility Provider) dated 16 May 2008.

***SECTION 6. Duration.***

Any and all obligations pursuant to this Guarantee shall cease to exist upon expiry of two weeks after the Extended Long Stop Date, unless the Facility Provider has claimed a payment to Luxco under this Guarantee by written notice to the Guarantor before such period has expired.

***SECTION 7. Waiver of Notice.***

The Guarantor hereby waives promptness, diligence, notice of acceptance and any other notice with respect to any of the obligations of the Parent and this Guarantee.

***SECTION 8. Amendments, etc.***

No amendment or waiver of any provision of this Guarantee, and no consent to any departure by the Guarantor herefrom, shall in any event be effective unless the same shall be in writing and signed by the Facility Provider, and then such waiver or consent shall be effective only in the specific instance and for the specific purpose for which given.

***SECTION 9. Addresses for Notices.***

All notices and other communications provided for hereunder shall be in writing (including telecopy communication) and mailed, telecopied or delivered to it,



(i) if to the Guarantor: Arcapita Bank B.S.C.(c), P.O. Box 1406. Manama, Kingdom of Bahrain, telecopy no. +973 17 217 555, Attention: Legal Department,

(ii) if to the Facility Provider: Commerzbank Aktiengesellschaft, Corporates & Markets - Leveraged Finance, Mainzer Landstr. 153, DLZ-Geb. 2, Händlerhaus, 60327 Frankfurt am Main, Germany, telecopy no. +49 69 136 429 01, Attention: Christoph Reinhard / Christoph Neff / Christian Rodde, or,

(iii) as to either party, at such other address as shall be designated by such party in a written notice to the other party.

All such notices and other communications shall be effective upon receipt.

***SECTION 10. Tax Matters.***

If a tax deduction or withholding from a payment under this Guarantee is required by law to be made by the Guarantor, the amount of the payment due from the Guarantor will be increased to an amount which (after making the tax deduction) leaves an amount equal to the payment which would have been due if no tax deduction had been required.

***SECTION 11. Governing Law.***

This Guarantee shall be governed by, and construed in accordance with, the laws of Bahrain.

***SECTION 12. Jurisdiction.***

Any controversy or claim arising out of or relating to this Guarantee, or the breach thereof, shall be settled by arbitration, conducted in Bahrain under the rules and procedures of the GCC Commercial Arbitration Centre, and before a panel of three arbitrators. The panel of arbitrators shall be constituted by the Guarantor designating one arbitrator and the Facility Provider designating another arbitrator and the two designated arbitrators selecting the third arbitrator, *provided* that if the two arbitrators designated by the parties fail to agree on the appointment of a third arbitrator within ten days after the date on which the second of the two arbitrators has been designated, then the Secretary General of the GCC Commercial Arbitration Centre shall select the third arbitrator upon the written request of either party. Any award made by the said panel shall be final and binding and not subject to any appeal.

*[Remainder of page left blank intentionally.]*



IN WITNESS WHEREOF, the Guarantor has caused this Guarantee to be duly executed and delivered as of the date first above written.

ARCAPITA BANK B.S.C.(c)

By Mohammed Choudhury  
Name: MOHAMMED CHOWDHURY  
Title: EXECUTIVE DIRECTOR  
"A" SIGNATORY

Abdulhameed Juma  
Name: ABDULHAMEED JUMA  
Title: DIRECTOR  
"A" SIGNATORY

**EXHIBIT "B"**



**DEMAND NOTICE**

To: Arcapita Bank B.S.C.(c) (the "**Guarantor**")  
P.O. Box 1406, Manama, Kingdom of Bahrain

Attn: Legal Department  
Telecopy: +973 17 217 555

1 February 2012

Dear Sirs

**GUARANTEE DATED 6 JANUARY 2012**

1. We refer to:
  - (a) a Framework Agreement dated 9 November 2010 between, amongst others, Commerzbank Aktiengesellschaft, Commerzbank Aktiengesellschaft, Filiale Luxemburg, Commerzbank Aktiengesellschaft, London Branch, PVC Investments Limited and PVC (Lux) Holding Company S.á r.l. ("**Luxco**") (as amended on 6 January 2012, the "**Framework Agreement**"); and
  - (b) a guarantee dated 6 January 2012 entered into by yourselves for the benefit of Luxco in respect of certain obligations of PVC Investments Limited under the Framework Agreement and which is to be called by Commerzbank Aktiengesellschaft for the benefit of Luxco (the "**Guarantee**").

**DEMAND**

2. Pursuant to the Framework Agreement, PVC Investments Limited was required to make an additional equity injection to Luxco in the amount of EUR 13,000,000 by no later than 31 January 2012 (the "**Additional Equity Injection**"). PVC Investments Limited has not complied with its obligation to make the Additional Equity Injection.
3. Pursuant to Sections 1 and Section 2 of the Guarantee,:
  - (a) the Guarantor irrevocably and unconditionally guaranteed that the Additional Equity Injection would be made on or prior to 31 January 2012; and
  - (b) in the event that of a failure to make the Additional Equity Injection by no later than 31 January 2012, the Guarantor is obliged to pay to Luxco upon first demand by us, for the benefit of Luxco, the difference between EUR 13,000,000 and the amount of any equity injections made to Luxco in the period from 6 January 2012 until 31 January

Chairman of the Supervisory Board: Klaus-Peter Müller

Board of Managing Directors: Martin Blessing (Chairman), Frank Annuscheit, Markus Beumer, Achim Kassow, Jochen Klösges, Michael Reuther, Stefan Schmittmann, Ulrich Sieber, Eric Strutz

Commerzbank Aktiengesellschaft, Frankfurt am Main  
Handelsregister: Amtsgericht Frankfurt am Main, HRB 32000  
USt-IdNr.: DE 114 103 614

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2012. No such equity injections were made in the relevant period. As a result, your payment obligations to Luxco under Section 2 of the Guarantee amount to EUR 13,000,000.

4. Accordingly, we hereby, for the benefit of Luxco, demand that you make immediate payment of EUR 13,000,000 to Luxco in accordance with Section 2 of the Guarantee.
5. The demands contained herein are without prejudice to and shall not be construed as a waiver of any other rights or remedies which we and/or Luxco may have including, without limitation, the right to make further demands in respect of sums payable under the Framework Agreement or otherwise. All such rights and remedies are reserved.

**MISCELLANEOUS**

6. This notice is given in accordance with Section 6 and Section 9 of the Guarantee.
7. This notice shall be governed by and construed in accordance with the laws of Bahrain.

Yours faithfully

**COMMERZBANK**  
AG



Hans Joachim Weidtmann (Managing Director)



Christian Rodde (Managing Director)

For and on behalf of

**Commerzbank Aktiengesellschaft**

## Faxsendebestätigung

Datum/Uhrzt. : 01-FEB-2012 10:42 MI  
 Faxnummer : +49 69 71994000  
 Name : 33.14  
 Gerätemame : WorkCentre 4260

Gescannte Seiten, gesamt:		2					
Nr.	Gegenstelle	Beginn	Dauer	Seite	Modus	Auftr.art	Ergebn.
001	90097317217555	01-02 10:40	01'05	002/002	EC	HS	Erfolg

**Abkürzungen:**

HS: Host Send      PL: Polled Local      EC: Error Correct      TS: Terminated by System  
 HR: Host Receive      PR: Polled Remote      MP: Mailbox Print      RP: Report  
 WS: Waiting Send      MS: Mailbox Save      TU: Terminated by User      G3: Group3



**DEMAND NOTICE**

To: Arcapita Bank B.S.C (c) (the "Guarantor")  
 P.O. Box 1406, Manama, Kingdom of Bahrain  
 Attn: Legal Department  
 Telecopy: +973 17 217 556

1 February 2012

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- (a) a Framework Agreement dated 9 November 2010 between, amongst others, Commerzbank Aktiengesellschaft, Commerzbank Aktiengesellschaft, Filiale Luxemburg, Commerzbank Aktiengesellschaft, London Branch, PVC Investments Limited and PVC (Lux) Holding Company S.à r.l. ("Luxco") (as amended on 6 January 2012, the "Framework Agreement"); and
- (b) a guarantee dated 6 January 2012 entered into by yourselves for the benefit of Luxco in respect of certain obligations of PVC Investments Limited under the Framework Agreement and which is to be called by Commerzbank Aktiengesellschaft for the benefit of Luxco (the "Guarantee").

**DEMAND**

- 2 Pursuant to the Framework Agreement, PVC Investments Limited was required to make an additional equity injection to Luxco in the amount of EUR 13,000,000 by no later than 31 January 2012 (the "Additional Equity Injection"). PVC Investments Limited has not complied with its obligation to make the Additional Equity Injection.
- 3 Pursuant to Sections 1 and Section 2 of the Guarantee:
  - (a) the Guarantor irrevocably and unconditionally guaranteed that the Additional Equity Injection would be made on or prior to 31 January 2012; and
  - (b) in the event that of a failure to make the Additional Equity Injection by no later than 31 January 2012, the Guarantor is obliged to pay to Luxco upon first demand by us, for the benefit of Luxco, the difference between EUR 13,000,000 and the amount of any equity injections made to Luxco in the period from 6 January 2012 until 31 January

Chairman of the Supervisory Board: Hans-Joachim Lauth  
 Board of Managing Directors: Martin Blessing (Chairman), Frank Arndt, Michael  
 Reuter, Achim Rossmann, Jürgen Stoltenberg, Michael Freyler, Stefan Schmalzer, Ulrich  
 Stöck, Eric Stutz  
 Commerzbank Aktiengesellschaft Kapital der Bank  
 Hauptverwaltung Am Hauptbahnhof 100 10000 Berlin  
 USt-IdNr. DE 134 582 514