

Hearing Date and Time: May 7, 2012 at 11:00 a.m.
Objection Deadline: April 30, 2012 at 5:00 p.m.

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

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

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

Commerzbank Aktiengesellschaft ("Commerzbank") respectfully submits this motion (the "Motion") for an order granting relief from the automatic stay to allow delivery of a claim notice to Arcapita Bank B.S.C.(c). ("Arcapita") with respect to a Guarantee (as defined below) made by Arcapita in support of deferred payment obligations of PVC Lux as Purchaser under a Murabaha Facility (as each such term is defined below) in order to allow Commerzbank to perfect, crystallize and otherwise preserve its claim under the laws of Bahrain which govern the Guarantee. A copy of a proposed order is attached hereto as Exhibit A. In support of this Motion, Commerzbank respectfully represents as follows:

INTRODUCTION

1. On March 19, 2012 (the "Petition Date"), Arcapita and certain of its affiliates, as debtors and debtors in possession (collectively, the "Debtors"), filed voluntary petitions for relief under Chapter 11 of title 11 of the United States Code, as amended (the "Bankruptcy Code")

with this Court. The Debtors' chapter 11 cases are being jointly administered pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure and the Order of this Court entered on March 22, 2012 directing joint administration of related chapter 11 cases [Dkt. No. 16].

2. On April 5, 2012, the United States Trustee for the Southern District of New York appointed the Official Committee of Unsecured Creditors (the "Creditors Committee") [Dkt. No. 60].¹ As of the date hereof, no trustee or examiner has been appointed in these cases.

JURISDICTION

3. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157(a) and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

4. The statutory predicates for the relief requested herein are Bankruptcy Code sections 105(a) and 362(d), Bankruptcy Rule 4001(a) and Rule 4001-1 of the Local Bankruptcy Rules for the United States Bankruptcy Court for the Southern District of New York (the "Local Rules").

BACKGROUND

5. Arcapita is the "Guarantor" under that certain Guarantee, dated May 16, 2008 (and confirmed in a letter dated 9 November 2010), issued by Arcapita in favor of Commerzbank, as successor to Dresdner Bank AG, the initial beneficiary of the guarantee (the "Guarantee"). Under the Guarantee, Arcapita guaranteed the deferred payment obligations of one of its indirect subsidiaries, PVC (Lux) Holding Company S.á.r.l. ("PVC Lux") which, in turn, is indirectly the sole shareholder of an operating portfolio subsidiary called Profine GmbH. PVC Lux's obligations guaranteed by Arcapita arise under an Amended and Restated Murabaha

¹ Commerzbank is a member of the Creditors Committee.

Facility Agreement dated as of May 16, 2008 (as amended and restated as of November 9, 2010) among, *inter alia*, PVC (Lux), as "Purchaser," and Commerzbank, as "Facility Provider" (the "Murabaha Facility").

6. Pursuant to the Murabaha Facility, Commerzbank made available to PVC Lux a Sharia compliant revolving funding facility in a principal amount of up to €125,000,000. Events of default under the Murabaha Facility have occurred and are continuing since no later than March 12, 2012. By letter dated March 12, 2012, Commerzbank delivered to PVC Lux a Notice of Acceleration and Termination.

7. Pursuant to the Guarantee, Arcapita has irrevocably and unconditionally guaranteed the obligations of PVC Lux under the Murabaha Facility. The maximum amount payable by Arcapita under the Guarantee is €125,000,000. A copy of the Guarantee and the related confirmation letter are attached hereto as composite Exhibit B.

8. The Guarantee provides that payment in respect of the guaranteed obligations is due from Arcapita immediately upon demand from Commerzbank, which demand must not be earlier than 14 days after the date such guaranteed obligations became due and payable under the Murabaha Facility. The voluntary commencement of these chapter 11 cases by Arcapita and its debtor affiliates occurred on March 19, 2012, just seven days after the date Commerzbank delivered the Notice of Acceleration and Termination to PVC Lux. As a result of the commencement of these cases and out of an abundance of caution and respect for these proceedings, Commerzbank has not yet delivered a claim notice to Arcapita under the Guarantee.

9. The Guarantee, by its terms, is governed by Bahrain law. Therefore, the "perfection" or "crystallization" of Commerzbank's claim under the Guarantee may depend upon the delivery of a claim notice. Commerzbank seeks the relief in this Motion in order to deliver a

claim notice, substantially in the form attached hereto as Exhibit C, to avoid the possibility that Arcapita could challenge the validity of Commerzbank's claim based upon Commerzbank's failure to perform a ministerial act that may be stayed by section 362(a) of the Bankruptcy Code.

RELIEF REQUESTED

10. By this Motion, Commerzbank seeks the entry of an order granting limited relief from the automatic stay pursuant to sections 362(d) and 105(a) of the Bankruptcy Code to allow Commerzbank to deliver a claim notice to Arcapita (substantially in the form of Exhibit C), in order to crystallize its claim against Arcapita and avoid the unjust result that Arcapita could use the imposition of the automatic stay as a basis to challenge the validity of Commerzbank's claim under the Guarantee. The claim notice contains specific and express acknowledgment by Commerzbank that Arcapita is a debtor in a case under chapter 11 of the Bankruptcy Code and that the exercise of remedies is subject to the automatic stay and other debtor protections. Commerzbank seeks relief only to perform a ministerial act to preserve its claim against Arcapita, and does not, at this time, seek any further relief outside of the chapter 11 cases.²

11. Prior to the filing of this Motion, Commerzbank engaged in discussion with Arcapita to obtain consent and stipulate to the requested relief but was unable to obtain such consent.

BASIS OF RELIEF

12. Under section 362(a) of the Bankruptcy Code, the automatic stay has the effect of staying all actions, whether judicial or private, that seek to recover on a claim or "obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate" or to "collect, assess, or recover a claim against the debtor that arose

² Under Bahrain law, further proceedings, including commercial arbitration, may become necessary to fully crystallize Commerzbank's claim. Commerzbank therefore reserves the right to seek further and additional relief in this Court if necessary.

before the commencement of the case." 11 U.S.C. § 362 (a)(3) and (6). In this case, Commerzbank seeks only to deliver the claim notice to Arcapita to crystallize its claim and guard against a challenge based upon the failure to perform such act, an action which does not constitute an attempt to obtain possession of or control property of the estate or to collect, assess or recover on a claim.

13. Commerzbank's delivery of the claim notice is a ministerial act in nature. Delivery of the claim notice is essentially a clerical task in continuation of Commerzbank's prior procedure of notification to PVC Lux. Commerzbank had already begun its process of crystallizing its claim prior to the commencement of Arcapita's chapter 11 case when it delivered the Notice of Acceleration and Termination to PVC Lux on March 12, 2012. Courts have recognized that ministerial acts do not fall under the automatic stay. *See Soares v. Brockton Credit Union (In re Soares)*, 107 F.3d 969, 973 (1st Cir. 1997) (noting, in *dicta*, that ministerial acts do not violate the automatic stay); *Rexnord Holdings, Inc. v. Biderman*, 21 F.3d 522, 527 (2d Cir. 1994) (entry, after commencement of bankruptcy case, of judgment that was "so ordered" prior to commencement was ministerial act not subject to automatic stay). Accordingly, as Commerzbank's delivery of the claim notice is ministerial, it may not be subject to the automatic stay.

14. Even under an interpretation that Commerzbank's delivery of the claim notice falls under the automatic stay, Commerzbank should be granted limited relief from the stay for cause. Relief from the automatic stay is permitted under section 362(d)(1) of the Bankruptcy Code which provides, in pertinent part, that:

On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying or conditioning such stay – (1) for cause,

11 U.S.C. § 362(d)(1). The decision of whether "cause" exists to modify the automatic stay is left to the sound discretion of the bankruptcy court, *See Sonmax Indus., Inc. v. Tri Component Prods. Corp. (In re Sonmax Indus., Inc.)*, 907 F.2d 1280, 1285 (2d Cir. 1990), and when deciding whether to modify the automatic stay, courts "must consider the particular circumstances of the case and ascertain what is just to the claimants, the debtor, and the estate." *In re M.J. & K Co., Inc.*, 161 B.R. 586, 590 (Bankr. S.D.N.Y. 1993) (*quoting In re Mego Int'l Inc.*, 28 B.R. 324, 326 (Bankr. S.D.N.Y. 1983)).

15. Although "cause" is not defined in the Bankruptcy Code, courts in this Circuit routinely refer to the twelve factors outlined in *Sonmax Indus.* *See Sonmax*, 907 F.2d at 1286 (citing factors originally set forth in *In re Curtis*, 40 B.R. 795, 799-800 (Bankr. D. Utah 1984)). As all twelve factors are not applicable to most cases, courts need consider only those factors relevant to the particular case and need not assign them equal weight. *See Burger Boys, Inc. v. South Street Seaport Ltd. P'ship (In re Burger Boys, Inc.)*, 183 B.R. 682, 688 (S.D.N.Y. 1994); *In re Quigley Co., Inc.*, 361 B.R. 723, 743-44 (Bankr. S.D.N.Y. 2007). The issue of whether to grant relief or modify an automatic stay must be determined on a case-by-case basis. *Sonmax*, 907 F.2d at 1286.

16. Courts have found that the fundamental question in determining whether to grant relief from the automatic stay lies in evaluating the balance of harms to all parties. *See Sonmax*, 907 F.2d at 1286. Courts in this Circuit have granted stay relief for cause where, as here, there would be no interference with the bankruptcy case, the interests of creditors would not be jeopardized, and the balance of harms to the parties involved weighs in favor of the moving party. *See, e.g., Hudson Valley Cablevision Corp. v. Route 202 Dev., Inc.*, 170 B.R. 798, 799 (S.D.N.Y. 1994); *In re G.S. Distribution, Inc.*, 331 B.R. 552 (Bankr. S.D.N.Y. 2005). The

specific facts of this case render it appropriate for the court to grant relief from the stay to allow Commerzbank to deliver a claim notice to Arcapita when considering the balance of harms to Commerzbank, the Debtors and their creditors.

17. Commerzbank may potentially suffer great harm if the automatic stay is not modified to allow delivery of a claim notice to Arcapita. Absent relief from the automatic stay, Commerzbank would be prevented from crystallizing its claim against Arcapita and potentially face a challenge to its claim by Arcapita on the basis that Commerzbank failed to deliver the notice and that such delivery is a prerequisite to a claim under the Guarantee.

18. Arcapita's obligations under the Guarantee are of payment (as opposed to collection), and Arcapita and Commerzbank intended that Arcapita be liable as a primary obligor and not merely as a surety. This contention is evidenced by, *inter alia*, the fact that Arcapita waived any and all defenses to payment under the Guarantee, including, without limitation, any insolvency or similar proceedings. *See* Guarantee § 4(g). The requirement to wait 14 days before delivering the notice is administrative in nature, not meant to excuse performance under the Guarantee. The procedural 14-day waiting period for delivering a claim notice under the Guarantee should not preclude a beneficiary from crystallizing its claim, particularly where, as here, the intervening chapter 11 filing and imposition of the automatic stay prevented delivery of the notice. Moreover, if the stay is not modified in this case, it could serve as an incentive for debtors in other cases to strategically manipulate the timing of the filings of their Chapter 11 petitions to occur before the termination of notice waiting periods and thereby escape liability. This would essentially create a loophole in the bankruptcy system for debtors to ignore, rather than restructure, their contractual obligations.

19. Granting the requested stay relief will not harm other creditors of Arcapita in this case as Commerzbank seeks only to send a claim notice in order to crystallize its claim, which it could not do prior to the commencement of Arcapita's chapter 11 case. Sending the notice now will not interfere with Arcapita's efforts to reorganize, burden the estate with any additional costs or litigation or have a negative effect on any property right.

20. The purpose of the automatic stay is to protect debtors as a shield in bankruptcy; it is not meant to harm creditors. *In re Texaco, Inc.*, 81 B.R. 804, 806 (Bankr. S.D.N.Y. 1988). It would be inequitable to permit Arcapita to use the automatic stay as a sword to permanently estop Commerzbank from asserting a claim in the chapter 11 cases by preventing it from completing a ministerial act.

21. In comparing the balance of harms in this case to Commerzbank, on the one hand, and the Debtors and creditors, on the other hand, it is clear that the balance weighs in favor of granting the limited relief from the automatic stay sought in the Motion to allow Commerzbank to deliver a claim notice to Arcapita. While the Debtors and creditors would suffer no harm if relief from the automatic stay is granted, Commerzbank could suffer grave harm if the request for relief from the automatic stay is denied. Commerzbank's entire claim against Arcapita, which was validly contracted under the Guarantee, would be potentially jeopardized.

NOTICE

22. No previous request for the relief sought herein has been made by Commerzbank to this or any other court.

MEMORANDUM OF LAW

23. This Motion includes citations to the applicable authorities and a discussion of their application to this Motion. Accordingly, Commerzbank respectfully submits that such citations and discussion satisfy the requirement of Rule 9013-1(a) of the Local Rules.

CONCLUSION

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

Dated: New York, New York
April 23, 2012

Respectfully submitted,

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Exhibit A

(Form of Order)

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

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In re :
 : Chapter 11
ARCAPITA BANK B.S.C.(c), *et al.*, :
 : Case No. 12-11076 (SHL)
Debtors. :
 : (Jointly Administered)
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**ORDER MODIFYING THE AUTOMATIC STAY TO
PERMIT COMMERZBANK AKTIENGESELLSCHAFT
TO DELIVER A CLAIM NOTICE**

Upon consideration of the motion of Commerzbank Aktiengesellschaft ("Commerzbank"), dated April 23, 2012 [Dkt No. ___] (the "Motion"), for entry of an order granting relief from the automatic stay to permit Commerzbank to deliver to Arcapita Bank B.S.C. (c) ("Arcapita") a claim notice under the Guarantee¹; and the Court having found that it has jurisdiction to consider the Motion pursuant to 28 U.S.C. §§ 157 and 1334; and the Court having found that jurisdiction and venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and the Court having found that (a) the relief requested in the motion will not interfere with these chapter 11 cases or jeopardize the interests of creditors and (b) the balance of harms weighs in favor of granting the relief requested in the Motion; and notice of the Motion and the opportunity for a hearing on the Motion was appropriate under the particular circumstances; and the Court having reviewed the Motion and having considered the statements in support of the relief requested therein at a hearing before the

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

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

IT IS HEREBY ORDERED:

1. The Motion is GRANTED in its entirety.
2. The automatic stay in these chapter 11 cases is hereby modified to the extent necessary to permit Commerzbank to deliver a claim notice to Arcapita (as more fully described in the Motion), in Commerzbank's discretion, with respect to the Guarantee.
3. The modification of the stay granted by this Order shall take effect immediately upon entry of this Order and shall not be stayed by operation of Bankruptcy Rule 4001(a)(3).
4. This Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation of this Order.

Dated: New York, New York
May __, 2012

THE HONORABLE SEAN H. LANE
UNITED STATES BANKRUPTCY JUDGE

Exhibit B

(Guarantee and Confirmation Letter)

GUARANTEE

GUARANTEE, dated 16 May 2008 (the "*Guarantee*"), made by Arcapita Bank B.S.C.(c), joint stock company incorporated in the Kingdom of Bahrain (the "*Guarantor*"), in favor of Dresdner Bank AG (the "*Facility Provider*").

PRELIMINARY STATEMENTS:

(1) The Facility Provider has entered into that certain Murabaha Facility Agreement, dated 16 May 2008, with PVC (Lux) Holding Company S.à.r.l., a Luxemburg société à responsabilité limitée (private limited liability company) incorporated under the laws of Luxemburg (the "*Purchaser*"), Arcapita Investment Funding Limited, a Cayman Islands limited liability company, and AIA Limited, a Cayman Islands limited liability company (said Agreement, as it may hereafter be amended, supplemented or otherwise modified from time to time, the "*Facility Agreement*"). The terms used herein and not otherwise defined shall have the meanings set forth in the Facility Agreement.

(2) Pursuant to the terms and conditions of the Facility Agreement, the Facility Provider has agreed to provide to the Purchaser financial accommodations consisting of a deferred payment purchasing facility in the amounts set forth in the Facility Agreement.

(3) It is a condition precedent to the Facility Provider making the Facility available to the Purchaser under the Facility Agreement that the Guarantor shall have executed and delivered this Guarantee.

NOW, THEREFORE, in consideration of the premises and in order to induce the Facility Provider to make the Facility available to the Purchaser under the Facility Agreement, the Guarantor hereby agrees as follows:

SECTION 1. Guarantee.

The Guarantor irrevocably and unconditionally guarantees to the Facility Provider the payment of each amount due and payable under the Facility Agreement subject to a maximum amount as calculated in accordance with Section 3 below immediately upon demand made not earlier than 14 days after the date such amount became due and payable under the Facility Agreement.

SECTION 2. Reinstatement.

If any payment under the Facility Agreement or this Guarantee is avoided or reduced as a result of insolvency or any similar event (a) the liability of the Guarantor shall continue to the extent of the amount of such avoidance or reduction and (b) the Facility Provider shall be entitled to recover from the Guarantor the amount of such payment to the extent of the amount of such avoidance or reduction.

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SECTION 3. Maximum Amount.

3.1 The maximum amount payable by the Guarantor on any date pursuant to this Guarantee is €125,000,000 less the aggregate (without double counting) of:

- (a) the Guarantee Reduction Amount as at such date;
- (b) the amount of all payments made by the Guarantor pursuant hereto on or prior to such date; and
- (c) the amount by which any obligations under the Facility Agreement have been paid (save as a consequence of (a) above) on or prior to such date unless the Purchaser and the Facility Provider agree otherwise.

3.2 If the calculation set out in clause 3.1 above produces a negative amount, the maximum amount payable by the Guarantor shall be zero and this Guarantee shall automatically terminate;

3.3 For the purposes of clause 3.1 above, the *Guarantee Reduction Amount* is the amount by which the liability of the Guarantor hereunder has reduced in accordance with the following provisions:

- (a) if on the last day of any calendar month falling on or after 28 February 2009, Adjusted EBITDA equals or exceeds €95,000,000, the liability of the Guarantor hereunder will reduce by €125,000,000 and this Guarantee shall automatically terminate;
- (b) if on the last day of any calendar month falling on or after 28 February 2009, Adjusted EBITDA equals or exceeds €85,000,000 but is less than €95,000,000, then the liability of the Guarantor hereunder will reduce by:
 - (i) €6,000,000 for each €1,000,000 by which Adjusted EBITDA exceeds €85,000,000; less
 - (ii) the amount of all previous reductions of liability pursuant to this sub-paragraph (b).

3.4 The definitions applicable to clause 3.3 above are set out in the Schedule hereto.

SECTION 4. Waiver of Defenses.

The obligations of the Guarantor under this Guarantee will not be affected by any act, omission, matter or thing which, but for this Section 4, 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 Facility Agreement or any other document or security;
- (f) any unenforceability, illegality, non-provability or invalidity of any obligation of any person under the Facility Agreement or any other document or security, or the failure by the Purchaser to enter into or be bound by the Facility Agreement; or
- (g) any insolvency or similar proceedings.

SECTION 5. Appropriations.

Until all amounts which may be or become payable by the Purchaser under or in connection with the Facility Agreement have been irrevocably paid in full, the Facility Provider (or any trustee or agent on its behalf) may without affecting the liability of the Guarantor under this Guarantee:

- (a) refrain from applying or enforcing any other moneys, security or rights held or received by the Facility Provider (or any trustee or agent on its behalf) in respect of those amounts, or apply and enforce the same in such manner and order as it sees fit (whether against those amounts or otherwise), and the Guarantor shall not be entitled to the benefit of the same; and
- (b) hold in a suspense account any moneys received from the Guarantor or on account of the Guarantor's liability under this Guarantee.

SECTION 6. Deferral of Guarantor's Rights.

Until all amounts which may be or become payable by the Purchaser under or in connection with the Facility Agreement 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 Purchaser's obligations under the Facility Agreement:

- (a) to be indemnified by the Purchaser;
- (b) to claim any contribution from any other guarantor of the Purchaser's obligations under the Facility Agreement; and/or
- (c) to take the benefit (in whole or in part and whether by way of subrogation or otherwise) of any rights of the Facility Provider under the Facility Agreement or of any other guarantee or security taken pursuant to, or in connection with, the Facility Agreement by the Facility Provider.

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SECTION 7. 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.

SECTION 8. 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 Purchaser and this Guarantee.

SECTION 9. 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 10. Addresses for Notices.

All notices and other communications provided for hereunder shall be in writing (including teletype communication) and mailed, telecopied or delivered to it, if to the Guarantor, Arcapita Bank B.S.C.(c), P.O. Box 1406, Manama, Kingdom of Bahrain, teletype no. +973 17 217 555, Attention: Legal Department, and if to the Facility Provider, at its address specified in the Facility Agreement, or, 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 11. Tax Matters.

11.1 If a tax deduction or withholding for on account of tax 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 12. Governing Law.

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

SECTION 13. 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.

SCHEDULE

For the purposes of clause 3.3:

Accounting Principles means generally accepted accounting principles in Luxembourg including IFRS.

Acquisition means the acquisition by the Purchaser of all of the shares in HT Luxembourg S.à r.l.

Acquisition Costs means all non-periodic fees, costs and expenses, stamp, registration and other taxes incurred by the Purchaser or any member of the Group in connection with the Acquisition or the documents entered into to evidence the Acquisition and the financing thereof.

Adjusted EBITDA means, for any period of twelve months ending on the last day of a calendar month, EBITDA adjusted as follows:

(a) if the total of the run rate net adjustments which relate to actions taken in the relevant twelve month period are greater than or equal to 3/17 of EBITDA, the maximum amount of such run rate net adjustments shall be 3/17 of EBITDA; and

(b) if the total of the run rate net adjustments which relate to actions taken in the relevant twelve month period are less than 3/17 of EBITDA then full amount of such run rate net adjustments shall be included,

provided that any calculation of Adjusted EBITDA will be effective for the purposes of this Guarantee only after:

- (i) it has been certified by two directors of PVC (Germany) Acquisitions GmbH; and
- (ii) it has been verified by KPMG (or such other firm of international accountants as has been approved by the Facility Provider, such approval not to be unreasonably withheld) as consistent with the calculation of Adjusted EBITDA set out above, in such form as is consistent with the policies of KPMG (or such other firm) from time to time.

Borrowings means, at any time, the aggregate outstanding principal, capital or nominal amount (and any fixed or minimum premium payable on prepayment or redemption) of any indebtedness of members of the Group for or in respect of:

- (a) moneys borrowed and debit balances at banks or other financial institutions;
- (b) any acceptances under any acceptance credit or bill discount facility (or dematerialised equivalent);
- (c) any note purchase facility or the issue of bonds (but not trade instruments), notes, debentures, loan stock or any similar instrument;
- (d) any Finance Lease;

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- (e) receivables sold or discounted (other than any receivables to the extent they are sold on a non-recourse basis);
- (f) any counter-indemnity obligation in respect of a guarantee, bond, standby or documentary letter of credit or any other instrument (but not, in any case, trade instruments) issued by a bank or financial institution in respect of an underlying liability of an entity which is not a member of the Group which liability would fall within one of the other paragraphs of this definition;
- (g) any amount raised by the issue of shares which are redeemable (other than at the option of the issuer) before 31 December 2016 or are otherwise classified as borrowings under the Accounting Principles;
- (h) any amount of any liability under an advance or deferred purchase agreement if (i) one of the primary reasons behind the entry into the agreement is to raise finance or to finance the acquisition or construction of the asset or service in question or (ii) the agreement is in respect of the supply of assets or services and payment is due more than 20 days after the date of supply;
- (i) any amount raised under any other transaction (including any forward sale or purchase agreement, sale and sale back or sale and leaseback agreement) classified as borrowings under the Accounting Principles; and
- (j) (without double counting) the amount of any liability in respect of any guarantee or indemnity for any of the items referred to in paragraphs (a) to (i) above, but excluding liabilities in respect of any existing receivables purchase facility of the Group (up to a maximum amount of € 60,000,000).

EBIT means, in respect of any twelve month period, the consolidated operating profit of the Group before taxation:

- (a) **before deducting** any Finance Charges;
- (b) **not including** any accrued interest owing to any member of the Group;
- (c) **before taking into account** any Exceptional Items;
- (d) **before deducting** any Acquisition Costs;
- (e) **after deducting** the amount of any profit (or adding back the amount of any loss) of any member of the Group which is attributable to minority interests;
- (f) **after deducting** the amount of any profit of any Non-Group Entity to the extent that the amount of the profit included in the financial statements of the Group

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exceeds the amount actually received in cash by members of the Group through distributions by the Non-Group Entity;

- (g) **before taking into account** any gain or loss arising from an upward or downward revaluation of any other asset;
- (h) **before taking into account** any Pension Items;
- (i) **excluding** the charge to profit represented by the expensing of stock options and other non cash management fee or similar charge,

in each case, to the extent added, deducted or taken into account, as the case may be, for the purposes of determining operating profits of the Group before taxation.

EBITDA means, in respect of any twelve month period ending on the last day of any calendar month, EBIT for that twelve month period **after adding back** any amount attributable to the amortisation, depreciation or impairment of assets of members of the Group (and taking no account of the reversal of any previous impairment charge made in such period).

Exceptional Items means any material items of an unusual or non-recurring nature which represent gains or losses including those arising on:

- (a) the restructuring of the activities of an entity and reversals of any provisions for the cost of restructuring;
- (b) disposals, revaluations or impairment of non-current assets;
- (c) disposals of assets associated with discontinued operations; and
- (d) any other examples of "exceptional items".

Finance Charges means, for any twelve month period, the aggregate amount of the accrued interest, commission, fees, discounts, prepayment fees, premiums or charges and other finance payments in respect of Borrowings (but excluding agency fees) whether paid, payable or capitalised by any member of the Group (calculated on a consolidated basis) in respect of that twelve month period:

- (a) **excluding** any upfront fees or costs;
- (b) **including** the interest (but not the capital) element of payments in respect of Finance Leases;
- (c) **including** any commission, fees, discounts and other finance payments payable by (and deducting any such amounts payable to) any member of the Group under any interest rate hedging arrangement;
- (d) **excluding** any Acquisition Costs;

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- (e) **excluding** any interest cost or expected return on plan assets in relation to any post-employment benefit schemes;
- (f) **taking no account** of any unrealised gains or losses on any derivative instruments other than any derivative instruments which are accounted for on a hedge accounting basis; and
- (g) **excluding** (i) any capitalised interest in respect of any external debt borrowed by the Company and (ii) interest (capitalised or otherwise) in respect of any debt owed by the Purchaser or any member of the Group to PVC Investment Limited or any other shareholder of the Purchaser,

and so that no amount shall be added (or deducted) more than once.

Finance Leases means any lease or hire purchase contract which would, in accordance with the Accounting Principles, be treated as a finance or capital lease.

Group means PVC (Germany) Acquisitions GmbH and each of its respective Subsidiaries for the time being.

Non-Group Entity means any investment or entity (which is not itself a member of the Group (including associates and joint ventures)) in which any member of the Group has an ownership interest.

Pension Items means any income or charge attributable to a post-employment benefit scheme other than the current service costs and any past service costs and curtailments and settlements attributable to the scheme.

Subsidiary means a subsidiary within the meaning of sections 15 to 17 of the German Stock Corporation Act (*Aktiengesetz*) in relation to any company or corporation and any company or corporation:

- (a) which is controlled, directly or indirectly, by the first mentioned company or corporation;
- (b) more than half the issued share capital of which is beneficially owned, directly or indirectly by the first mentioned company or corporation; or
- (c) which is a Subsidiary of another Subsidiary of the first mentioned company or corporation,

and for this purpose, a company or corporation shall be treated as being controlled by another if that other company or corporation is able to direct its affairs and/or to control the composition of its board of directors or equivalent body.

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


Name: HENRY THOMPSON

Title: EXECUTIVE DIRECTOR

ARCAPITA

To: Commerzbank Aktiengesellschaft (as legal successor of Dresdner Bank AG)

Date: 9 November 2010

Dear Sirs,

Re: Guarantee dated 16 May 2008 made by Arcapita Bank B.S.C.(c) in favour of Dresdner Bank AG (as subsequently merged with Commerzbank Aktiengesellschaft, with Commerzbank Aktiengesellschaft being the surviving entity) – Confirmation Letter

1. We refer to the guarantee dated 16 May 2008 executed by Arcapita Bank B.S.C.(c) joint stock company incorporated in the Kingdom of Bahrain (the "Guarantor") in favour of Dresdner Bank AG (as subsequently merged with Commerzbank Aktiengesellschaft, with Commerzbank Aktiengesellschaft being the surviving entity) (the "Facility Provider"), (the "Guarantee") in respect of a Murabaha Facility Agreement originally dated 16 May 2008 between Commerzbank Aktiengesellschaft, Filiale Luxemburg (as legal successor of Dresdner Bank AG, Niederlassung Luxemburg) as Funding, PVC (Lux) Holding Company S. à r.l. a société à responsabilité limitée (private limited liability company), incorporated under the laws of Luxembourg as OpCo, Arcapita Investment Funding Limited as agent for Funding, and AIA Limited. as agent for OpCo as amended and restated pursuant to an amended and restated Murabaha Facility Agreement dated on or about 9 November 2010 (the "Amended and Restated Murabaha Facility Agreement").

Unless otherwise provided, defined terms used in this Confirmation Letter shall have the meaning ascribed to them in the Amended and Restated Murabaha Facility Agreement.

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ARCAPITA

2. For the purposes of Section 4 of the Guarantee, the Guarantor hereby
 - i. acknowledges and consents to the content of the Amended and Restated Murabaha Facility Agreement and the amendments and restatement contemplated and effected thereby;
 - ii. confirms and agrees that the amendments and restatement contemplated and effected by the Amended and Restated Murabaha Facility Agreement do not invalidate, limit, reduce, release or otherwise prejudice its obligations under the Guarantee;
 - iii. confirms and agrees that the Guarantee remains in full force and effect taking into account the amendments and restatement contemplated and effected pursuant to the Amended and Restated Murabaha Facility Agreement; and
 - iv. acknowledges the merger of Dresdner Bank AG with Commerzbank Aktiengesellschaft, and the succession of Commerzbank Aktiengesellschaft to all rights and liabilities of Dresdner Bank AG, including, without limitation, all rights and liabilities arising under the Guarantee and the Amended and Restated Murabaha Facility Agreement.

ARCAPITA

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

Arcapita Bank B.S.C.(c)

Name: Mohammed Chowdhury

Title: Executive Director

Arcapita Bank B.S.C.(c)

Name: Henry Thompson

Title: Executive Director

Exhibit C

(Form of Claim Notice)

Draft
19.04.12

CLAIM 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

[] 2012

Dear Sirs

GUARANTEE DATED 16 MAY 2008

1. We refer to:

- (a) a EUR 125,000,000 murabaha facility agreement originally dated as of 16 May 2008 between, amongst others, PVC (Lux) Holding Company S.à r.l. ("**Luxco**") as opco and Commerzbank Aktiengesellschaft, Filiale Luxemburg (being the legal successor of Dresdner Bank AG, Niederlassung Luxemburg) as funding ("**Funding**") (as amended and restated as of 9 November 2010, the "**Murabaha Facility Agreement**"); and
- (b) a guarantee dated 16 May 2008 entered into by the Guarantor in favour of Dresdner Bank AG (of whom we are the legal successor) in respect of the obligations of Luxco under the Murabaha Facility Agreement and which was confirmed in a letter dated 9 November 2010 issued by the Guarantor to Commerzbank Aktiengesellschaft (the "**Guarantee**").

DEMAND

2. On 12 March 2012 Funding sent by a fax a notice of acceleration in respect of the Murabaha Facility Agreement to Luxco. As a result, all amounts outstanding under the Murabaha Facility Agreement, including, without limitation, the Aggregate Deferred Price (as defined therein) (such amounts being the "**Murabaha Obligations**") have become due and payable. As of the date hereof, the Murabaha Obligations amount to [●]¹ and remain due but unpaid.
3. Pursuant to Section 1 of the Guarantee, the Guarantor irrevocably and unconditionally guaranteed the payment of each amount due and payable under the Murabaha Facility Agreement immediately upon demand not earlier than 14 days after the date such amount became due and payable under the Murabaha Facility Agreement.
4. The amount payable by the Guarantor is limited to a maximum amount to be calculated in accordance with Section 3 of the Guarantee. This maximum amount, as calculated in accordance with Section 3 of the Guarantee, amounts to EUR 125,000,000. As a

¹ Principal plus unpaid profit element. Commerzbank to confirm exact amount.

Draft
19.04.12

result, the payment obligations of the Guarantor under Section 1 of the Guarantee amount to EUR 125,000,000 (the "**Guarantee Liabilities**").

5. Solely the purposes of (i) complying with the requirement for the issuance of a demand as provided for under Section 1 of the Guarantee and (ii) safeguarding our rights and claims under the Guarantee, we hereby issue this notice to the Guarantor as a formal demand for payment of the Guarantee Liabilities by the Guarantor.
6. This notice is without prejudice to and shall not be construed as a waiver of any other rights or remedies which we may have. All such rights and remedies are reserved.

MISCELLANEOUS

7. This notice is given in accordance with Section 10 of the Guarantee.
8. This notice shall be governed by and construed in accordance with the laws of Bahrain.
9. We acknowledge that the Guarantor has commenced a voluntary case under chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York and that the exercise by us of any further rights and remedies under the Guarantee are subject to the automatic stay and other protections applicable in the chapter 11 case.

Yours faithfully

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For and on behalf of

Commerzbank Aktiengesellschaft