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

IN RE:	§	
	§	**Chapter 11**
ARCAPITA BANK B.S.C.(c), ***et al.*****,**	§	
	§	**Case No. 12-11076-shl**
Debtors.	§	**Jointly Administered**
	§	
IN RE:	§	
	§	**Chapter 11**
FALCON GAS STORAGE CO., INC.	§	
	§	**Case No. 12-11790-shl**
Debtor.	§	**(Jointly Administered under Case No. 12-11076)**

**TIDE'S SUPPLEMENTAL OBJECTION TO
<u>DEBTORS' SECOND AMENDED JOINT PLAN OF REORGANIZATION</u>**

TO THE HONORABLE SEAN H. LANE
UNITED STATES BANKRUPTCY JUDGE:

Tide Natural Gas Storage I, LP and Tide Natural Gas Storage II, LP (together, "Tide"),[1] by their undersigned counsel, hereby file the following supplemental objection to the Debtors' Second Amended Joint Plan of Reorganization (the "Supplemental Objection"). In support thereof, Tide respectfully submits as follows:

I. RELEVANT BACKGROUND

1. Arcapita Bank B.S.C.(c) ("Arcapita") and certain affiliates filed for chapter 11 protection on March 19, 2012. Falcon filed for bankruptcy on April 30, 2012.

2. On April 25, 2013, the Debtors filed their (i) Second Amended Disclosure Statement in Support of the Joint Plan of Reorganization of Arcapita Bank B.S.C.(c) and Related Debtors under Chapter 11 of the Bankruptcy Code ("Disclosure Statement") and (ii) Second Amended Joint Plan of Reorganization of Arcapita Bank B.S.C.(c) and Related Debtors under Chapter 11 of the Bankruptcy Code ("Joint Plan").

3. On May 20, 2013, the Debtors and the Hopper Parties filed a stipulation (the "Hopper Stipulation") pursuant to which the Hopper Parties' claims were allowed in an undisclosed amount solely for purposes of voting on the Joint Plan. Hopper Parties voted to accept the Joint Plan.

4. On May 29, 2013, Tide filed its Limited Objections to Debtors' Second Amended Joint Plan of Reorganization (the "Plan Objection"), and a complaint to subordinate the Hopper Parties' claims under section 510(b). As part of its Plan Objection, Tide sought to preserve its rights to seek to subordinate Hopper Parties' claims and to pursue possible Chapter 5 causes of action.

[1] Capitalized terms used herein and not otherwise defined shall have the meaning ascribed to them in the Joint Plan and Disclosure Statement.

5. On June 4, 2013, the Debtors filed a *Notice of Filing of Plan Supplement Documents* (the "Plan Supplement Documents"). Buried in the Plan Supplement Documents is a *Notice of Plan Support Agreement with the Hopper Parties* (the "Hopper Parties' Settlement Notice"). The Hopper Parties' Settlement Notice states that the Debtors have reached an agreement (the "Hopper Settlement") with the Hopper Parties (as defined in the Hopper Parties' Settlement Notice) pursuant to which the Hopper Parties will support the Joint Plan in exchange for (i) a payment of $1,072,000.00 from GAStorage Investments II LLC; (ii) an allowed claim in the amount of $8.25 million against Falcon; and (iii) a release and waiver by the Debtors of subordination claims and chapter 5 causes of action against the Hopper Parties.

II. TIDE'S SUPPLEMENTAL OBJECTION

6. Tide objects to the Hopper Settlement as improper because the settlement (i) does not comply with Bankruptcy Rule 9019; (ii) provides for the Debtors' improper purchase of plan votes; and (iii) releases valuable subordination claims and avoidance actions that should be preserved for the benefit of the estates.

7. The proposed Hopper Settlement does not comply with Bankruptcy Rule 9019's requirement that settlements be approved only after notice and a hearing. *See* Fed. R. Bankr. P. 9019(a). Rather, the Hopper Parties' Settlement Notice is embedded together with over 480 pages of other Plan Supplement Documents and merely provides that the estate's waiver of claims against the Hopper Parties would be "reflected in the Confirmation Order". (Hopper Parties' Settlement Notice, p.2).

8. The Debtors have not shown, and cannot show, that the proposed Hopper Settlement is fair and equitable under Bankruptcy Rule 9019 pursuant to the seven (7) factor test adopted by courts in the Second Circuit. *See Guippone v. BH S&B Holdings, LLC*, 2011 U.S. Dist. LEXIS 126026, *12 (S.D.N.Y. Oct. 28, 2011) (identifying the factors set forth by courts in

the Second Circuit for evaluating whether a settlement is fair and equitable under Bankruptcy Rule 9019).[2]

9. The Hopper Settlement is not fair and equitable because it provides no benefit to the Debtors' estates. To the contrary, the Hopper Settlement is not in the estates' best interest because it proposes to allow the Hopper Parties' claims and grant the Hopper Parties releases from all subordination claims and chapter 5 causes of action in exchange for something the Debtors have already received – the Hopper Parties' vote in favor of the Joint Plan. Therefore, even if granting allowed claims and releasing estate claims in exchange for plan votes were proper, which it is not as discussed below, such an exchange/settlement still provides no benefit to the estate where, as is the case here, the Hopper Parties have already voted in favor of the Joint Plan and did not timely object to the Joint Plain.[3]

10. In addition, the Hopper Settlement constitutes an improper solicitation of plan votes because the Debtors are proposing to *buy* the Hopper Parties' plan vote. As consideration for the Hopper Parties' vote, the Debtors propose to give the Hopper Parties allowed claims and release the Hopper Parties from subordination claims and all chapter 5 causes of action. This constitutes consideration to which the Hopper Parties would otherwise not be entitled to. Such a purchase and sale of votes is impermissible and constitutes bad faith, particularly where, as is the case here, the consideration provided by the Debtors to the Hopper Parties for their votes is over

[2] The seven (7) factors are: (1) the balance between the litigation's possibility of success and the settlement's future benefits; (2) the likelihood of complex and protracted litigation, "with its attendant expense, inconvenience, and delay," including the difficulty in collecting on the judgment; (3) "the paramount interests of the creditors," including each affected class's relative benefits "and the degree to which creditors either do not object to or affirmatively support the proposed settlement"; (4) whether other parties in interest support the settlement; (5) the "competency and experience of counsel" supporting, and "[t]he experience and knowledge of the bankruptcy court judge" reviewing, the settlement; (6) "the nature and breadth of releases to be obtained by officers and directors"; and (7) "the extent to which the settlement is the product of arm's length bargaining." *Guippone*, 2011 U.S. Dist. LEXIS 126026 at *12.

[3] Additionally, the Debtors do not need Hopper Parties' vote because the only other creditor to vote in that class voted to accept the Joint Plan

and above what other creditors of the Debtors are receiving under the plan. *See Dish Network Corp. v. DBSD N. Am., Inc. (In re DBSD N. Am., Inc.)*, 634 F.3d 79, 102 (2d Cir. 2010) (noting that bad faith is implicated in the vote solicitation/procurement process when parties attempt to obtain some benefit to which they were not entitled); *In re Featherworks Corp.*, 25 B.R. 634 (Bankr. E.D.N.Y. 1984) (finding creditor's vote was made in bad faith because vote was procured by payment that enabled the creditor to receive consideration over and above what other creditors were receiving under the plan); *In re Holly Knoll P'ship,* 167 B.R. 381, 388 (Bankr. E.D. Pa. 1994) (finding that unlike a creditor who purchases claims to protect or maximize its rights as a creditor, a plan proponent acted in bad faith where it purchased claims to vote in favor of plan). Accordingly, the Debtors' attempt to give the Hopper Parties something for their vote that no other creditor of the Debtors is receiving for their vote, is improper, and the Hopper Settlement should be denied.

11. Finally, the Hopper Settlement should also be denied because the claims sought to be released by the Debtors under the settlement are valuable and preservation of those claims may therefore provide a substantial benefit to the estates. As noted, Tide has already filed a complaint to subordinate the Hopper Parties' claims under section 510(b). In addition, to the extent Judge Wood finds that Tide's claims are valid, Hopper Parties' claims (and any pre-petition payments made on account of those claims) would be avoidable and recoverable as fraudulent transfers and obligations to shareholders of an insolvent corporation. *In re Adelphia Comms. Corp.*, 323 B.R. 345, 377 n. 104 (Bankr. S.D.N.Y. 2005) ("Distributions from insolvent entities are classic fraudulent conveyances, and are also prohibited by law.");. *In re Trace Intern. Holdings, Inc.,* 289 B.R. 548, 561 (Bankr. S.D.N.Y, 2003) ("An insolvent corporation must prefer its creditors to its stockholders. . The insolvent corporation cannot make distributions to its

shareholders, by redemption or dividend, and it matters not at all whether the corporation declares a dividend, purports to enter into a contract to pay one, or is assessed damages in the amount of the dividend based on its failure to pay it. . . The unlawful dividend is voidable and may be recovered by the trustee as a fraudulent transfer.) Accordingly, pending Judge Wood's ruling, the Court should not approve any release of chapter 5 causes of action against the Hopper Parties, particularly where, as is the case here, the Hopper Parties have provided no consideration in exchange for such releases and the consideration provided to the Hopper Parties is above and beyond what other creditors of the Debtors are receiving under the Plan.

PRAYER

WHEREFORE, Tide requests that the Court sustain its Objections and grant Tide such other and further relief as the Court deems just.

Respectfully submitted,

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