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**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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**DEBTORS’ RESPONSE TO TIDE’S SUPPLEMENTAL OBJECTION TO SECOND
AMENDED JOINT PLAN OF REORGANIZATION**

1. In its *Supplemental Objection to Debtors’ Second Amended joint Plan of Reorganization* (the “*Supplemental Objection*”) [Docket No. 1232], Tide requested that the Court refuse to confirm the Falcon Plan if it included a waiver of chapter 5 actions against the Hopper Parties. See Supplemental Objection ¶ 11. To resolve and potential impediment to confirmation, the Debtors and the Hopper Parties have mutually agreed to withdraw the waiver of any potential Avoidance Action as defined in the Plan as to the Hopper Parties.

2. In the Supplemental Objection, Tide objects to the *Notice of Plan Support Agreement with the Hopper Parties* (the “*Hopper Agreement Notice*”), which was attached as

Annex 24 to the *Notice of Filing of Plan Supplement Documents* [Docket No. 1195].

Specifically, Tide argues that the Hopper Agreement Notice is “improper” because it (i) constitutes a “settlement,” (ii) provides for the Debtors’ improper purchase of votes, and (iii) releases estate claims such as subordination claims and avoidance actions. Supplemental Objection ¶ 6.

3. First, the Debtors have not truly “settled” any claims against the Hopper Parties; with the Committee’s concurrence, the Hopper Agreement Notice is intended to reflect, clarify and make express the Debtors’ long-held position with respect to the Hopper Parties as fully disclosed in the Disclosure Agreement. It also made express that the \$1,072,500 payment due the Hopper Parties from GStorage Investment II LLC will be fully credited against the Hopper Parties’ \$8.25 million claim.

4. With respect to any subordination actions against the Hopper Parties, the Debtors stated in the Disclosure Statement:

The Plan expressly reserves the right of the Debtors and the Reorganized Debtors (or any other Person authorized to prosecute the rights of the Debtors’ Estates) to file an adversary proceeding or other appropriate proceeding, before or after the Effective Date, to subordinate any Claim subject to subordination, to the extent not subordinated under the Plan. Tide has informed the Debtors that it asserts that the Claims filed by the Hopper Parties are subject to subordination pursuant to section 510(b) of the Bankruptcy Code and has said that it will file an adversary proceeding to subordinate the Claims of the Hopper Parties in the event that Falcon does not. **Falcon disagrees and will not file an adversary action to subordinate the Claims of the Hopper Parties.**

Disclosure Statement § V.H.5 (emphasis added).

5. In short, neither the Debtors nor the Committee believe it is in the Falcon estate’s interest to pursue a subordination action against the Hopper Parties. The Debtors have reviewed the applicable authorities cited by the Hopper Parties in briefs to this Court and, as stated in the

Disclosure Statement, the Debtors will not pursue any subordination actions against the Hopper Parties. Tide has filed an adversary proceeding to subordinate the Hopper Claims, and nothing in the Plan prevents Tide from prosecuting that action.

6. Second, with respect to any potential avoidance actions against the Hopper Parties, the Debtors represented in the Disclosure Statement as follows:

The Debtors are in the process of evaluating potential Avoidance Actions but do not believe that Falcon possesses any valuable Avoidance Actions. Tide asserts that there may be valuable Avoidance Actions that could be brought against Arcapita Bank and/or the Hopper Parties. **The Debtors disagree.**

Disclosure Statement § V.H.7 (emphasis added).

7. The Debtors still believe there are no meritorious Avoidance Actions against the Hopper Parties. Nevertheless, to resolve any issue raised by the Tide Supplemental Objection, as originally stated in the Plan, and with the consent of the Hopper Parties, the waiver of Avoidance Actions in Section 9.2.2 of the Plan shall not apply to Falcon or any Avoidance Action the Falcon estate may have against the Hopper Parties (or any other party).¹

8. Third, the Debtors did not “buy” the Hopper Parties’ vote. The Hopper Parties are included in Class 5(g). As Tide even noted in the Supplemental Objection, Class 5(g) would still have accepted the Plan even if the Hopper Parties’ vote were disregarded—by virtue of all other Creditors in Class 5(g) who voted to accept the Plan. Supplemental Objection ¶ 9 n.3; *see also Amended Declaration of Jeffrey S. Stein of the Garden City Group, Inc. Certifying the Methodology for the Tabulation of Votes on and Results of Voting With Respect to the Debtors’*

¹ As noted in the *Debtors’ Memorandum of Law in Support of Confirmation of Second Amended Joint Plan of Reorganization (“Confirmation Brief”)*[Docket No. 1218], the Plan will be amended to clarify that it does not affect the rights of Tide or other parties in interest to object to claims. Confirmation Brief ¶ 142.

Second Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code

[Docket No. 1193]. Hence, the Debtors do not need the Hopper Parties' vote, and there is no evidence to suggest the Debtors' agreement with the Hopper Parties was anything but appropriate.

Dated: New York, New York
June 10, 2013

Respectfully submitted,

/s/ Craig H. Millet
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