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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

TIDE'S OBJECTIONS TO DISCLOSURE STATEMENT
IN SUPPORT OF FALCON PLAN

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 this Objections to the Debtors' Motion for an Order Approving the Disclosure Statement in Support of the Falcon Plan.[2] 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. On April 5, 2012, the United States Trustee appointed an official committee of unsecured creditors (the "Committee") in the Arcapita case. The Committee consists of creditors of Arcapita and AIHL, but no creditors of Falcon Gas Storage Company, Inc. ("Falcon"). Falcon filed for bankruptcy on April 30, 2012.

2. Subsequent to Falcon's bankruptcy filing, Arcapita filed its Motion for an Order Pursuant to Section 105(a) of the Bankruptcy Code Directing that Certain Orders in the Chapter 11 Cases of Arcapita Bank B.S.C.(c) *et al*. Be Made Applicable to Subsequent Debtor [Falcon]. The Court granted this motion over Tide's objection, on June 12, 2012, ordering joint administration of the Falcon case with the Arcapita case, but not substantively consolidating the cases.

3. On February 8, 2013, the Debtors filed their (i) 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"), (ii) Joint Plan of Reorganization of Arcapita Bank B.S.C.(c) and Related Debtors under Chapter 11 of the Bankruptcy Code ("Joint Plan"), and Motion for an Order (I) Approving the Disclosure Statement and the Form and Manner of Notice of the Disclosure Statement Hearing, (II) Establishing Solicitation and

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

[2] Tide only objects to the Disclosure Statement as it applies to Falcon.

Voting Procedures, (III) Scheduling a Confirmation Hearing, and (IV) Establishing Notice and Objection Procedures for Confirmation of the Debtors' Joint Chapter 11 Plan ("Motion").

4. The Joint Plan consists of several "subplans" including the subplan for Falcon Gas Storage Co. Inc. (the "Falcon Plan").

5. Tide hereby files these Objections to the Motion and the Disclosure Statement as they relate to the Falcon Plan.

II. OBJECTION

6. The Disclosure Statement fails to provide adequate information with regard to the Falcon Plan as required under § 1125. As drafted, the Falcon Plan is also patently unconfirmable on numerous bases. Consequently, Tide objects to the Disclosure Statement and requests that the relief requested in the Motion, insofar as it pertains to Falcon, be denied.

A. THE DISCLOSURE STATEMENT FAILS TO PROVIDE "ADEQUATE INFORMATION"

7. Section 1125 of the Bankruptcy Code requires the distribution of a disclosure statement before or at the time of solicitation of a plan of reorganization. "[I]t is understood that the general purpose of the disclosure statement is to provide 'adequate information' to enable 'impaired' classes of creditors and interest holders to make an informed judgment about the proposed plan." *In re Phoenix Petroleum Co.*, 278 B.R. 385, 392 (Bankr. E.D. Pa. 2001) (citation omitted). The Bankruptcy Code defines "adequate information" in relevant part as:

> information of a kind, and in sufficient detail, as far as reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of claims or interests in the relevant class to make an informed judgment about the plan . . .

11 U.S.C. § 1125(a)(1).

8. The Second Circuit has long emphasized the importance of the debtor's "full" and "fair" disclosure. *See Momentum Manufacturing Corp. v. Employee Creditors Committee*, 25

F.3d 1132, 1136 (2d Cir. 1994) ("Of prime importance in the reorganization process is the principle of disclosure. The Code obliges a Debtor to engage in full and fair disclosure, providing to creditors' 'of a kind, and in sufficient detail, as far as is reasonably practicable . . . that would enable a hypothetical reasonable investor typical of claims or interests of the relevant class to make an informed judgment about the plan…'"); *In re Crowthers McCall Pattern, Inc.* 120 B.R. 279, 300 (Bankr. S.D.N.Y. 1990) ("At the 'heart' of the chapter 11 process is the requirement that holders of claims in impaired classes be furnished a proper disclosure statement 'that would enable a hypothetical reasonable investor typical of claims or interests of the relevant class to make an informed judgment about the plan.'"); *In re Copy Crafters Quickprint, Inc.*, 92 B.R. 973, 979 (Bankr. N.D.N.Y. 1988) ("What constitutes adequate information is to be determined on a case-specific basis under a flexible standard that can promote the policy of Chapter 11 towards fair settlement through a negotiation process between informed interested parties.").

9. A disclosure statement must contain "simple and clear language delineating the consequences of the proposed plan on [creditors'] claims and the possible [Bankruptcy] Code alternatives so that [creditors] can intelligently accept or reject the Plan." *In re Copy Crafters Quickprint, Inc.*, 92 B.R. at 981; *see also In re Ferretti*, 128 B.R. 16, 19 (Bankr. D.N.H. 1991) (a disclosure statement "must clearly and succinctly inform the average [] creditor what it is going to get, when it is going to get it, and what contingencies there are to getting its distribution").

10. The Disclosure Statement, as it relates to Falcon, should not be approved because it fails to provide full and fair disclosure as required by the Bankruptcy Code and applicable case law.

i. The Disclosure Statement Fails to Adequately Disclose Administrative Claims

11. The Disclosure Statement provides that "Just because Arcapita Bank paid an administrative expense does not mean that its estate should bear the full burden of that expense. Rather the cost should be allocated equitably among the Debtors based on the benefit that each Debtor received with respect to such expense." (Disclosure Statement Art. VI(B)(2)). However, the Disclosure Statement makes no mention of what such allocation will be. This allocation is critical to the Falcon Plan, as Falcon appears to be administratively insolvent with no source available to meet administrative expenses upon the Effective Date. Consequently, the Debtors should disclose the amount of administrative expenses that will be allocated to the Falcon estate.

ii. The Disclosure Statement Fails to Disclose Means for Funding Reorganized Falcon

12. The Disclosure Statement provides a lengthy description of litigation in which Falcon is engaged, including the District Court Action and Thronson litigation. In fact, with regard to the District Court Action, the Disclosure Statement provides that "The Debtors estimate that it may take 2 to 3 years to resolve the Tide Claims in the District Court Action and that the cost of defending the District Court Action will exceed $5 million." (Disclosure Statement Art. V(H)(5). Yet the Disclosure Statement provides absolutely no information regarding how Falcon intends to fund this potential $5 million liability, nor is there a disclosure that Falcon has no means whatsoever to fund this potential liability. Absent such information, the Disclosure Statement should not be approved.

iii. The Disclosure Statement Fails to Disclose Adequate Information to Justify Releases

13. As described below in paragraphs 29 to 34, the Falcon Plan contains numerous releases that do not appear to be supported by consideration and are not allowable under

applicable case law, rendering the Falcon Plan unconfirmable. In the context of the Disclosure Statement, Falcon should disclose the following information related to the releases:

(a) Whether Falcon has completed, let alone even begun, any investigation of potential claims and causes of action against *each* of the Released Parties (as used herein, "Released Parties" includes the additional parties against whom Released Avoidance Actions are released);

(b) The nature of the claims and causes of action that are being released against *each* of the Released Parties;

(c) The estimated value of the potential claims and causes of action against each of the Released Parties;

(d) Any consideration purportedly paid by each of the Released Parties for the releases;

(e) Why it is necessary for each of the Released Parties to receive the releases from Falcon; and

(f) How the grant of the releases to each of the Released Parties complies with established case law in this Circuit.

iv. The Disclosure Statement Fails to Disclose Avoidance Actions

14. The Disclosure Statement provides no disclosure of possible Avoidance Actions that Falcon might pursue. Creditors have a right to know both that they may be a target of an Avoidance Action, and that the Falcon estate may benefit from proceeds of Avoidance Actions. For example, the Disclosure Statement fails to disclose that if Tide is successful in the District Court Action—i.e., Falcon is found to have committed fraud by improperly inflating the price of NorTex—then any equity distribution made to Arcapita as a result of the NorTex Sale will be challengeable as a fraudulent transfer. By the same token, the $6,500,000 payment already made to the Hopper Parties under their settlement agreement with Falcon will be challengeable as a fraudulent transfer, as will the alleged assignment by Falcon to the Hopper Parties of $8,250,000 under the settlement agreement. These claims should be disclosed and explicitly preserved.

v. The Disclosure Statement Fails to Properly Disclose the Priority of Claims and Likely Litigation/Claim Objections to Follow under the Falcon Plan

15. The Disclosure Statement singles out Tide and various alleged objections to the Tide Claim to the exclusion of disclosing priority and allowance disputes related to other claims.

To provide adequate information to creditors evaluating the Falcon Plan, the Disclosure Statement must disclose all likely post-confirmation litigation.

16. In any proceeding to subordinate the Tide Claims, Tide will seek to subordinate or disallow other claims in the Falcon case (assuming Falcon fails to act to subordinate these claims). The majority of claims against Falcon are either (1) investor claims ("Investor Claims"), (2) the claims of the Hopper Parties (the "Hopper Claims"), or (3) employee claims based on a stock option plan ("Employee Stock Option Claims").

17. The Investor Claims appear to be duplicate claims of those asserted against other Debtors and it does not appear that Falcon is liable for such claims. While the Disclosure Statement provides that such claims are duplicates, it fails to disclose that such claims will be objected to and disallowance sought. Falcon should disclose that it will object to these claims. To the extent that Falcon fails to object, Falcon should disclose that Tide will object to these claims if they are senior or *pari passu* with any Tide Claims.

18. The Hopper Parties were equity owners in Falcon who sued Falcon based on the sale of equity in NorTex. In settlement of that suit, and also for the purchase of the Hopper Parties' equity in Falcon, Falcon paid the Hopper Parties $6,500,000 and promised to pay another $8,250,000. The Hopper Parties now assert a claim against Falcon in the amount of $8,250,000 as a result of the settlement. These claims are subject to subordination under § 510(c). The Disclosure Statement should disclose that Falcon will seek subordination of these claims or, in the alternative, Tide will seek subordination of these claims if they are senior or *pari passu* with any Tide Claims.

19. The Employee Stock Option Claims are based on employee stock option plans that constitute a purchase and sale of securities for the purposes of § 510(b) and claims arising

from such plans are subject to subordination under § 510(b). The Disclosures Statement should disclose that Falcon will seek subordination of these claims or, in the alternative, Tide will seek subordination of these claims if they are senior or *pari passu* with any Tide Claims.

20. Finally, since § 510(b) only requires subordination of a particular claim to "all claims and interest that are senior to or equal the claim …", if Tide is subordinated and other claims are subordinated, Tide will challenge the allowance and priority of, among others, the Hopper Claims and the Employee Stock Option Claims.[3] Specifically, Tide's claim for fraud is a direct claim against Falcon based on Falcon's sale of subsidiary equity (i.e. NorTex) to Tide. The Hopper Parties' claim, in contrast, is a claim against Falcon based on Hopper's ownership of Falcon's equity. To the extent that Tide's claim is somehow subordinated, it is structurally superior to any subordinated claim of the Hopper Parties (and other claims, such as the Employee Stock Option Claims), because Tide's claim is not based on Falcon equity, but the claims of the Hopper Parties and employees are based on Falcon equity. The Hopper Parties' claim may also be subject to disallowance as a fraudulent transfer as discussed above.

vi. The Disclosure Statement Fails to Adequately Disclose that the Plan Authorizes the Potential Merger of Falcon

21. Buried in the Disclosure Statement and Falcon Plan is the following: "in connection with implementation of the Plan … the Debtors … may merge … or otherwise consolidate any of the Debtors in furtherance of the Plan…." (*See* Plan § 7.6; Disclosure Statement Art. IX(F)). Furthermore, "Any such transaction may be effected prior to, on or subsequent to the Effective Date without the necessity for any further authorization by Holders of Interests or the directors, managers or other responsible persons of any of the Debtors." (*Id.*). Falcon should disclose who has authority to make this critical and unsupervised decision, what

[3] Nothing in this section is intended to limit the rights of Tide against any party, and all such rights are reserved.

the criteria for such a decision will be, and how such a decision will affect distributions from the Falcon estate.

vii. The Disclosure Statement Fails to Include a Liquidation Analysis

22. The Disclosure Statement does not include a liquidation analysis. Absent a liquidation analysis, creditors have no means to evaluate the "best interests test" of 11 U.S.C. § 1129(a)(7).

viii. The Disclosure Statement Fails to Adequately Disclose Post-Confirmation Management and Conflicts of Interest

23. Section 1129(a)(5)(A)(i) provides that a proponent of a plan must disclose the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor …." 11 U.S.C. § 1129(a)(5)(A)(i). As it stands, the Falcon Plan and Disclosure Statement do not specifically disclose the identity of any officers or directors except to state that current directors, managers, and senior officers shall remain in place. The Falcon Plan should disclose the specific identity and affiliation of each individual proposed to serve.

24. More importantly, the Disclosure Statement ignores the inherent conflicts of interest between current management and Falcon creditors. Current management is and has been controlled by Arcapita. Arcapita has a vested interest in minimizing Falcon creditor returns and maximizing Falcon equity returns. This conflict of interest is manifest in the Falcon Plan, which consistently favors Arcapita over Falcon's creditors. (See discussion below at Paragraph 37). Without knowledge of this key information, creditors cannot make informed decisions as to whether the continuance of current management is in the estate's best interests.

ix. The Disclosure Statement Fails to Disclose the Treatment of Falcon's Executory Contracts

25. Neither the Disclosure Statement nor Plan discuss the executory contracts of Falcon or their proposed treatment. Falcon should disclose whether it believes it has any executory contracts and whether it intends to accept or reject such contracts.

B. Approval of the Disclosure Statement Should Be Denied Because Falcon's Plan Is Patently Unconfirmable

26. "If [a] plan is patently unconfirmable on its face, the application to approve the disclosure statement must be denied, as solicitation of the vote would be futile." *In re Quigley Co., Inc.*, 377 B.R. 110, 115-116 (Bankr. S.D.N.Y. 2007). In this case, the Falcon Plan is fatally deficient in several regards and therefore the Motion should be denied with regard to Falcon.[4]

i. Discharge Is Not Appropriate

27. Under 11 U.S.C. § 1141(d)(3), "the confirmation of a plan does not discharge a debtor if the plan provides for the liquidation of all or substantially all of the property of the estate; the debtor does not engage in business after consummation of the plan; and the debtor would be denied a discharge under section 727(a) of this title if the case were converted to a case under chapter 7 of this title." 11 U.S.C. § 1141(d)(3).

28. The Falcon Plan is a plan to liquidate all of Falcon's assets and then distribute such assets to creditors. Falcon has no operations, no employees, and no cash flow, and does not propose to carry on any business after confirmation and consummation of the proposed Falcon Plan. If this case were a chapter 7 proceeding, Falcon would not be entitled to a discharge because Falcon is not an individual. *See* 11 U.S.C. § 727(a)(1). Despite the foregoing, the Falcon Plan provides that, upon the Effective Date, Falcon and its assets shall be discharged "from all Claims, demands, liabilities, other debts and Interests that arose on or before the

[4] The Falcon Plan objections discussed herein are without limitation or prejudice to Tide's right to further object to the Falcon Plan. Tide reserves all rights.

Effective Date…." (Plan § 9.1). As such, the Falcon Plan fails to comply with provisions of Title 11 as required by 11 U.S.C. § 1129(a)(1) and is unconfirmable.

ii. The Plan Provides Improper Releases of Third Parties

29. The Falcon Plan provides for the release, waiver and discharge of "Released Avoidance Actions" and "the Released Parties" from and against all claims arising prior to the Effective Date and in any way related to the Debtors. (See Plan § 9.2).

30. "Released Avoidance Actions" is defined as "any Avoidance Actions against any Released Parties, Qatar Islamic Bank Q.S.C., QInvest LLC, Holders of Interests in any member of the Arcapita Group, and any Persons that have deposited funds with Arcapita Bank B.S.C.(c) (other than Placement Banks or their Affiliates)" and "Released Parties" is defined as "(i) each of the Debtors, (ii) the Committee and its members, solely in their capacities as members of the Committee, (iii) the JPLs, solely in their capacities as joint provisional liquidators, (iv) SCB, and the respective current and former officers, directors, employees, managers, Professionals, professionals, and agents of each of the foregoing, along with the successors, assigns and Affiliates of each of the foregoing." (See Plan definitions 155, 156).

31. As described above, Falcon may have valuable Avoidance Actions against Arcapita as a result of equity distributions made after the NorTex Sale. The release of these Avoidance Actions purports to be granted in exchange for "good and valuable consideration, the adequacy of which is hereby confirmed …." (Plan § 9.2). However, Falcon has not received any consideration for these releases nor offered any explanation for why the granting of such releases benefits the Falcon estate.

32. Bankruptcy courts in this District have evaluated the appropriateness of estate releases of third parties by considering whether such a release is a valid exercise of the Debtors'

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business judgment, is fair, reasonable and in the best interests of the estate. *In re DBSD N. Am., Inc.*, 419 B.R. 179, 217 (Bankr. S.D.N.Y. 2009). However, in adopting this approach, these bankruptcy courts have not articulated a standard for such an evaluation. *See*, *e.g.*, *In re Motors Liquidation Co.*, 447 B.R. 198, 220 fn. 63 (Bankr. S.D.N.Y. 2011) ("In DBSD, I found that the debtor releases were both an appropriate exercise of business judgment and in the best interests of the estate, and in *Chemtura*, I recognized the issue but didn't need to decide it . . . Here I likewise don't need to decide the appropriate standard, since I expressly find, as a mixed question of fact and law, that the Old GM estate's release of claims it owns satisfied both requirements.") (internal citations and quotes omitted).

33. Absent a standard, the factors evaluated by the United States Bankruptcy Court for the District of Delaware in *In re Spansion, Inc.* and *In re Washington Mutual, Inc.* provide guidance. In both cases, the bankruptcy courts considered the following factors in evaluating whether a debtor's release of non-debtor third parties was a valid exercise of the debtor's business judgment, fair, reasonable, and in the best interests of the estate:

a. substantial contribution by the non-debtor of assets to the reorganization;

b. the identity of interest between the debtor and the third party, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete assets of the estate;

c. the essential nature of the injunction to the reorganization to the extent that, without the injunction, there is little likelihood of success;

d. an agreement by a substantial majority of creditors to support the injunction, specifically if the impacted class or classes "overwhelmingly" votes to accept the plan; and

e. provision in the plan for payment of all or substantially all of the claims of the class or classes affected by the injunction.

In re Wash. Mut., Inc., 422 B.R. 314, 346-47 (Bankr. D. Del. 2011) ("The Third Circuit has

refused to articulate a test for when releases by Debtors are appropriate in the chapter 11 context. However, the Court continues to believe that the factors articulated in *Master Mortgage* form the foundation for such an analysis, with due consideration of other factors that may be relevant to this case) (internal citation omitted); *In re Spansion Inc.*, 426 B.R. 114, 142-143 (Bankr. D. Del. 2010) (citing with approval the *DBSD* court's consideration of the debtor's business judgment, fairness, reasonableness, and the best interests of the estate in evaluating debtor releases of third parties) *citing In re Zenith Elec. Corp.*, 241 B.R. 92, 110 (Bankr. D. Del. 1999) (*citing In re Master Mortgage Inv. Fund, Inc.* 168 B.R. 930, 937 (Bankr. W.D. Mo. 1994).

34. Falcon's estate, and its creditors, are not receiving any consideration from the Released Parties or the additional parties mentioned in the definition of "Released Avoidance Actions" for the releases. If anything, the insider released parties stand to improperly benefit under the Falcon Plan, as explained above. The releases are completely gratuitous. Also, there is no identity of interest between Falcon and the various released parties. In terms of the remaining factors, the releases are in no way necessary to a restructuring, as Falcon is liquidating, there is no evidence that they are "overwhelmingly" accepted by the affected creditors, and there is no plan provision providing for payment in full of any class. There is simply no justifiable basis under which the releases should be granted, in any form, in the Falcon case. As such, to the extent that these releases remain in the Falcon Plan, the Falcon Plan is unconfirmable and its face and the Disclosure Statement should be rejected.

iii. Plan Is Not Proposed in Good Faith

35. Section 1129(a)(3) requires that a plan be proposed in "good faith." 11 U.S.C. § 1129(a)(3). "As several courts have observed, the good faith requirement should be viewed in light of the totality of the circumstances surrounding the plan, and the requirement of Section

1129(a)(3) speaks more to the process of plan development than to the content of the plan." *In re 20 Bayard Views, LLC*, 445 B.R. 83, 96 (Bankr. E.D.N.Y. 2011) (internal citations omitted).

36. The Joint Plan was negotiated between Arcapita and AIHL, on the one hand, and the Committee, on the other hand. (See Debtors' Motion to Further Extend Exclusive Periods, Dkt. No. 806: "Throughout the process of evaluating various options for reorganization, the Debtors, the Committee, and the JPLs have engaged in an ongoing analysis of how to allocate the assets between the creditors of Arcapita Bank and the creditors of AIHL. Indeed, the Debtors, the Committee, and the JPLs have worked jointly in an attempt to develop a value allocation model that is reasonably acceptable to both groups of creditors."). Falcon creditors were excluded from the process and were not consulted in the formulation of the Falcon Plan. As a result, the Falcon Plan is conspicuously designed to benefit equity (i.e. Arcapita) at the expense of Falcon's creditors.

37. The conflicts in interest in having Arcapita and its creditors formulate and propose the Falcon Plan are manifest in the fact that the Falcon Plan:

- settles Falcon's $15 million claim against Arcapita for one hundred dollars and allows Arcapita to enforce any intercompany claim against Falcon in full (Plan § 4.7.1.3);
- allows Falcon to be merged with any other Debtor without any authorization from the Court of any Falcon creditors (Plan § 7.6);
- makes Falcon liable on the new Exit Facility, New SCB Facility, and Sukuk Facility, all of which will satisfy creditors to whom Falcon has no liability (Plan §§ 7.2.1, 7.2.2, 7.2.3, 7.2.4);
- allows Arcapita and its creditors to allocate administrative expenses to Falcon without any oversight (Disclosure Statement Art. VI(B)(2));
- improperly releases (i) the other Debtors, their current and former officers, directors, employees, managers, professionals, and agents of each of the foregoing, along with the successors, assigns and Affiliates, (ii) the Committee and its members, solely in their capacities as members of the Committee, (iii) Qatar Islamic Bank Q.S.C., QInvest LLC, Holders of Interests in any member of the Arcapita Group, and any Persons that have deposited funds with Arcapita Bank B.S.C.(c) (other than Placement Banks or

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their Affiliates. and (iv) a number of other parties, for "good and valuable consideration", yet Falcon has received nothing for such release (Plan § 9.2);

- improperly requires Falcon's subordinated creditors to share *pari passu* with Falcon's equity (Plan § 4.8.2.2); and
- inflates the worth of Falcon's equity to $515 million at the expense of Falcon's creditors (Plan § 4.9.2.3).

iv. Plan Is Not Feasible

38. A proponent of a liquidating plan is still required to meet the feasibility element of § 1129(a)(11). "In the context of a liquidating plan, feasibility is established by demonstrating the debtor's ability to satisfy the conditions precedent to the Effective Date and otherwise have sufficient funds to pay for the costs of administering and fully consummating the Plan and closing the Chapter 11 Cases." *In re Finlay Enters.*, 2010 Bankr. LEXIS 5592 (Bankr. S.D.N.Y. May 18, 2010). Payments need not be guaranteed, but must be likely. *Id.*; 11 U.S.C. § 1129(a)(11). Of course, in addition to funding plan administration on a current basis, a debtor must satisfy administrative claims in full in cash on the effective date of the plan under § 1129(a)(9), unless otherwise agreed.

39. In Falcon's case, it has not, and cannot, demonstrate any ability to fund the costs of exiting chapter 11 or administering the Falcon Plan and closing the estates. To date, Falcon does not appear to have paid for any administrative expenses related to its case. Under the Joint Plan, the Debtors intend to allocate administrative expenses to respective Debtors "based on the benefit that each Debtor received with respect to each expense." (Disclosure Statement Art. VI(2)(b)). However, as discussed above, it is unclear who will determine this allocation, and Arcapita and the Committee have a conflict of interest that should preclude them from the decision making process. According to Falcon's most recent monthly operating report (January 1, 2013, to January 31, 2013, filed at Dkt. No. 834), Falcon maintained a cash balance of $618,336.00 as of January 31, 2013. Since Falcon has no operations, its net income for the

month of January was –$4,130 (December 2012 was –$10,075). Also, during the first interim fee period, King & Spalding, as special counsel for Falcon related to the District Court Action/Tide litigation, has sought and attained interim approval of $234,796.00 in fees purportedly attributable to the Falcon estate. During the second interim fee period, King and Spalding has sought and attained approval of another $425,167.00 purportedly attributable to the Falcon estate. In the months since, King & Spalding has continued to bill large sums for Falcon related work with creditors seeing few tangible results: November 2012—$104,766.29; December 2012—$127,125.83; January 2013—$99,547.63. In sum, from only July 1, 2012, through January 31, 2013, King & Spalding has billed $1,000,402.75 related to the District Court Action/Falcon estate, and nothing of note has happened in the Falcon case. This sum does not include any "overhead" that Debtors' lead counsel and numerous other professionals may seek to attribute to the Falcon estate. In short, Falcon *is already administratively insolvent* and does not have funds or the prospect of funds to pay this amount upon the proposed Effective Date.

40. Assuming the Falcon Plan somehow becomes effective, then Falcon, with no income and limited cash, will have no ability to fund administration and consummation of the plan. For example the "Debtors estimate that it may take 2 to 3 years to resolve the Tide Claims in the District Court Action and that defending the cost of the District Court Action will exceed $5 million." (Disclosure Statement Art. III(H)(5)). The Falcon Plan and Disclosure Statement provide no explanation for how these expenses will be met. The hope of litigation recovery is not sufficient to satisfy feasibility. *In re BH S&B*, 439 B.R. at 350 (citing *In re FRGR Managing Member LLC*, 419 B.R. 576, 583 (Bankr. S.D.N.Y. 2009) ("[M]ost cases reject the need to evaluate the merits of a debtor's litigation claims in deciding whether to dismiss or convert a

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chapter 11 case."); *In re Ameribuild Const. Mgmt., Inc.*, 399 B.R. 129, 134 (Bankr. S.D.N.Y. 2009)).

41. Also, as currently drafted, the Joint Plan provides for an Exit Facility, New SCB Facility and Sukuk Facility and the obligors under each of these facilities are defined as including the Reorganized Debtors, which includes Falcon. Falcon is a distinct entity that had no prepetition or postpetition liability to any of the creditors that will be the beneficiaries of the Exit Facility, New SCB Facility and Sukuk Facility. Falcon should not be liable on any of these facilities. Falcon also has no capability for meeting any such liabilities. On its face, the Falcon Plan is not feasible due to a lack of liquidity and therefore the Disclosure Statement should not be approved.

v. The Plan Is Not in the Best Interests of Creditors

42. In short, § 1129(a)(7) of the Bankruptcy Code requires that, as a condition to confirmation, a chapter 11 plan provides that any non-accepting class receives more than it would if the case were liquidated in chapter 7. This is commonly referred to as the "best interests" test. "To make these findings, the bankruptcy court must: (a) estimate the cash liquidation proceeds that a chapter 7 trustee would generate if the debtor's chapter 11 case was converted to a chapter 7 case and the assets of the debtor's estate were liquidated; (b) determine the liquidation distribution that each non-accepting holder of a claim or an equity interest would receive from such liquidation proceeds under the priority scheme dictated in chapter 7; and (c) compare such holder's liquidation distribution to the distribution under the plan that such holder would receive if the plan were confirmed." (Disclosure Statement § XVII(B)(1)). The Falcon Disclosure Statement provides no information whatsoever regarding the contrast between treatment under chapter 7 and chapter 11. Rather, the Disclosure Statement summarily

concludes that "The Plan complies with the "best interests" test of section 1129(a)(7) of the Bankruptcy Code" with no analysis. (Disclosure Statement § XVII(B)(1)).

43. The Disclosure Statement provides that "To the extent that the Tide Claims are Allowed in whole or in part, then the Tide Claims shall be treated in either Classes 8(a) and 8(g) or Classes 10(a) and 10(g), depending on the ruling of the Bankruptcy Court as to the proper level of subordination." The Disclosure Statement then goes on to provide that "The Plan expressly reserves the right of the Debtors and the Reorganized Debtors … to file an adversary proceeding or other appropriate proceeding, … to subordinate the Tide Claims …." (Disclosure Statement Art. V(H)(6)). Classes 8(a) and 8(g) are for "Subordinated Claims." Classes 10(a) and 10(g) are for "Super-Subordinate Claims." As written, the Disclosure Statement is ambiguous as to classification of the Tide Claims. It appears to assert that the Tide Claims, if Allowed, will automatically be subordinated or super-subordinated. However, it then goes on to assert that the Debtors reserve the right to file an adversary to subordinate the Tide Claims.

44. To the extent that the Debtors seek to effect a *de facto* subordination of the Tide Claims via the Disclosure Statement and Falcon Plan, such treatment is improper. Under section 502(a) of the Bankruptcy Code, a proof of claim filed under section 501 is deemed allowed unless a party in interest objects under Bankruptcy Rule 3007 and such objection is sustained. See 11 U.S.C. § 502(a). In order for a creditor's claim to be subordinated for voting/distribution purposes, subordination must be sought through an adversary proceeding and granted by the Court. See Fed. R. Bankr. P. 7001(8) (a proceeding to subordinate a claim is an adversary proceeding). Tide objects to the denial of its due process rights under the Bankruptcy Code and Rules and the *de facto* subordination of its claim for voting purposes or any other purpose. Because the Falcon Plan improperly seeks subordination of the Tide Claims, it fails to comply

with the Bankruptcy Code and Bankruptcy Rules and is unconfirmable under 11 U.S.C. § 1129(a)(1). Likewise, because the Falcon Plan delivers to Tide less than Tide would receive in a chapter 7 proceeding, where a trustee would properly evaluate and, if necessary, challenge the Tide claim under the Bankruptcy Code and Rules, the Falcon Plan is unconfirmable under 11 U.S.C. § 1129(a)(7) and not in Tide's best interests.

45. The remaining task for the Falcon estate are primarily: (1) pursuing and defending claims and causes of action, and (2) making distributions of available cash to creditors and interest holders. Under the proposed Falcon Plan, Falcon (a) compromises its $15 million claim against Arcapita for $100.00; (b) releases any potential Avoidance Action against Arcapita, including fraudulent transfer claims for equity distributions made from proceeds of the NorTex Sale; (c) inflates Arcapita's equity value in Falcon to $515 million to the detriment of creditors; (d) is made liable for the Exit Facility, New SCB Facility, and Sukuk Facility, all which fund non-Falcon creditors; (e) fails to disclose and preserve valuable avoidance actions against the Hopper Parties; and (f) fails to seek subordination of the Hopper Claims and Employee Stock Option Claims. In a chapter 7 proceeding all of these issues would be preserved for the benefit of creditors, and therefore creditors would be better off in a chapter 7.

46. The Falcon Plan delivers to Tide less than a chapter 7 proceeding by providing for equal treatment of subordinated claims and equity interests. Under § 510(b), a general unsecured claim that arises from, among other things, damages from the purchase or sale of a security, is subordinated to "all claims and interest that are senior to or equal the claim …" 11 U.S.C. § 510(b). Thus, to the extent a general unsecured claim is properly subordinated by court order, that claim will be junior to (1) claims that are senior to general unsecured claims and (2) general unsecured claims that would otherwise be equal to the subordinated claim. However, the

Bankruptcy Code does not provide that the subordinated claim is equal to or junior to equity interests.

47. Under the Falcon Plan, subordinated claims are placed in Class 8(g). Equity Interests in Falcon are placed in the lower Class 9(g). This is appropriate since subordinated claims remain senior to equity interests under § 510(b). The Code requires that the holders of claims in Class 8(g) be paid in full prior to holders of claims in any junior class (i.e. 9(g)) receiving a distribution. *See* 11 U.S.C. § 1129(b)(2)(B)(ii). Yet, the Falcon Plan provides that Classes 8(g) and 9(g) split any remaining proceeds and therefore Class 8(g) will receive less than it would in a chapter 7.

48. The Falcon Plan further mistreats the Tide Claims compared to a chapter 7 proceeding by proposing a calculus to determine a proportionate split of funds between subordinated claims and equity. Of course, any payment to equity before full satisfaction of subordinated claims is prohibited as discussed above. Falcon proposes that subordinated claim holders should split distributions pro rata with equity, and that equity should be assigned a value of $515,000,000.00, which allegedly is the "approximate equity value of Falcon immediately following the Nortex Sale …." (Disclosure Statement Art. I(B)(1)). This equity valuation has no basis in fact.

49. The purchase price for the membership interests in NorTex Gas Storage Company, LLC ("NorTex") was $515,000,000. Of that amount, $70,000,000 was placed in escrow. Arcapita is now "double dipping" by claiming it had equity of $515,000,000. First, if Tide's claims are allowed, the equity value is zero and Arcapita will not be entitled to any distribution. Second, the purchase price was either put into escrow or previously distributed to or for the benefit of equity. Thus the effect of the plan is to either improperly elevate the value

of equity or double dip on values equity has already received. In either case, creditors receive less than they would in a chapter 7 proceeding.

50. Additionally, since § 510(b) only requires subordination of a particular claim to "all claims and interest that are senior to or equal the claim …" Tide would fare better in a chapter 7 proceeding where a disinterested trustee can properly challenge the allowance and priority of, among others, the Hopper Parties' Claims and the Employee Stock Option Claims, as described above in paragraph 20.

51. As discussed above in paragraphs 29 to 34 , the Falcon Plan improperly releases claims against third parties for little or no consideration to Falcon. Such claims would not be released in a chapter 7 proceeding and recoveries would be available for distribution to creditors.

52. In a chapter 7 proceeding, the Falcon estate would not be threatened with unmonitored merger as provided in the Falcon Plan. (*See* Plan § 7.6).

53. In a chapter 7 proceeding, Falcon would not be made liable for unrelated exit facilities of its affiliates such as the Exit Facility, New SCB Facility and Sukuk Facility. Under the Falcon Plan, Falcon is liable for these facilities. (*See* Plan §§ 7.2.1, 7.2.2, 7.2.3, 7.2.4).

vi. The Plan Fails to Disclose the Identity and Affiliations of Management and Their Conflicts of Interest

54. The Falcon Plan does not comply with 11 U.S.C. § 1129(a)(5) because it does not specifically disclose the identity of any officers or directors except to state that current directors, managers, and senior officers shall remain in place. Furthermore, to the extent that current management remains in position post-effective date, the Falcon Plan is objectionable because retention of such individuals violates § 1129(a)(5)(ii), which requires that any continuance of management must be consistent with the interest of creditors, equity holders, and public policy. 11 U.S.C. § 1129(a)(5)(ii). The retention of current management is not consistent with the

interests of creditors or public policy because current management is inherently conflicted between its allegiance to Arcapita and its fiduciary duties to the Falcon estate, as discussed above.

PRAYER

WHEREFORE, Tide requests that the Court deny approval of the Disclosure Statement with regard to Falcon, and grant Tide such other and further relief as the Court deems just.

Respectfully submitted,

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