



Tide Natural Gas Storage I, LP and Tide Natural Gas Storage II, LP (together, “Tide”),<sup>1</sup> by their undersigned counsel, hereby file the following limited objections to the Debtors’ Second Amended Joint Plan of Reorganization (the “Objection”). In support thereof, Tide respectfully submits as follows:

### **I. SUMMARY OF TIDE’S LIMITED OBJECTIONS**

1. In its objections to the Debtors’ Disclosure Statement, Tide raised certain objections to the Debtors’ Plan, the majority of which have been resolved in Debtors’ Second Amended Plan.<sup>2</sup> Tide’s remaining objections are not intended to prevent the Debtors from confirming liquidating plans of reorganization and exiting bankruptcy, but instead to protect and preserve Tide’s rights to distributions under any such plans as provided in the Bankruptcy Code.

2. As detailed in Tide’s Memorandum of Law in Opposition to Subordination of Tide’s Claims as Proposed in the Debtors’ Joint Plan (the “Subordination Memorandum”),<sup>3</sup> the Debtors’ Joint Plan misapplies § 510(b) in seeking to subordinate Tide’s Claims to all claims and interests of all Debtors. Accordingly, Tide objects to the Joint Plan to the extent it seeks to improperly subordinate Tide’s Claims resulting in Tide receiving less than it is otherwise entitled to receive under the Bankruptcy Code.

3. In addition to its subordination objections, Tide objects to the following provisions of the Debtors’ Joint Plan (but only as they relate to the Falcon Plan):

- (1) Falcon’s Plan improperly allows the Interests in Falcon at an inflated amount in excess of the true value of those Interests.

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<sup>1</sup> Capitalized terms used herein and not otherwise defined shall have the meaning ascribed to them in the Joint Plan and Disclosure Statement.

<sup>2</sup> For example, Tide originally objected to the Plan because it proposed to settle Falcon’s claims against the other Debtors for \$100. That provision was removed from the First Amended Plan resulting in a potential \$15 million recovery for Falcon’s estate.

<sup>3</sup> Tide filed its subordination Memorandum contemporaneously with the filing of this Objection and incorporates its Subordination Memorandum by reference into this Objection as if fully restated herein.

- (2) Falcon's Plan does not provide for the possibility that the Interests in Falcon may be subordinate under § 510(c).
- (3) Falcon's Plan denies Tide's right to object to other claims/interests and to seek subordination of these claims and interests under §§ 510(b) and (c).
- (4) Falcon's Plan allows Falcon to settle and allow claims and causes of action without notice and opportunity for objection and hearing.

## **II. RELEVANT BACKGROUND**

4. 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.

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

## **III. TIDE'S LIMITED OBJECTIONS**

### **A. Tide Objects to The Joint Plan To The Extent It Seeks To Improperly Subordinate Tide's Claim**

6. The Disclosure Statement provides, among other things, that "to the extent that the Tide Claims are Allowed in whole or in part, then the Tide Claims shall be treated as provided in Classes 10(a) and 10(g)." (Disclosure Statement Art. V(H)(5)). The Falcon Plan provides, among other things, that Classes 10(a) and 10(g) are "Super-Subordinated Claims" situated below Interests in Arcapita and Falcon, respectively. Such claims "shall not receive any Distributions or retain any property on account of such Claims." (Joint Plan § 4.10).

7. As detailed in Tide's Subordination Memorandum, Tide's Claims should not be "super subordinated" to Class 10(g) nor subordinated to a Class 8(g) that shares *pro rata* with Interests.

8. Accordingly, Tide objects to the Debtors' Joint Plan because it does not comply with § 510(b) in violation of § 1129(a)(1), allows a junior class (Class 9(g)) to receive property without paying Tide's Claims in full in violation of § 1129(b)(2)(B), and results in Tide receiving less than it would in a chapter 7 liquidation in violation of § 1129(a)(7).

**B. Tide Objects to Falcon's Plan to the Extent It Improperly Allows Arcapita's Interests in Falcon**

9. Under Falcon's Plan, the Interests in Falcon are assigned a value of \$70 million, which is alleged to be the "approximate equity value of Falcon immediately following the Nortex Sale ...." (Disclosure Statement Art. I(B)(1)). This calculation, however, fails to account for the following:

- (a) Claims against Falcon (including Tide's Claims), which reduce the value of the Interests in Falcon. Equity is the residual interest in the assets of an entity that remains after deducting liabilities, not the gross value of the company's assets;
- (b) The possibility that Judge Wood may rule that the \$70 million belongs to Tide, in which case the value of the Interests would be zero; and
- (c) The possibility that the Interests may be subordinated to all Claims and Interests under § 510(c) to the extent Judge Wood finds that that the \$70 million is the product of Arcapita's fraud.

10. Debtors' Disclosure Statement indicates that there will be no distributions to Class 8(g) and 9(g) until Judge Wood rules on Tide's Claims in the District Court Action. Therefore, there is no need to fix the amounts or priority of the Interests in Class 9(g) pending Judge Wood's ruling.

11. As currently proposed, the Falcon Plan attempts to fix the amount and priority of Arcapita's interest in Falcon without giving any effect to the Claims being asserted against Falcon and any potential ruling by Judge Wood. Accordingly, Tide objects to the proposed treatment of Class 9(g) because it (i) is not proposed in good faith in violation of § 1129(a)(3), (ii) is contrary to applicable provisions of the Bankruptcy Code (including Tide's right to object to the allowance of the Interests and to seek subordination of the Interests under § 510(c) should Judge Wood find that the Escrow Funds are the product of the Debtors' fraud), in violation of § 1129(a)(1), and (iii) results in Tide receiving less than it would in a chapter 7 in violation of § 1129(a)(7) (should this Court rule that Tide's Claims share *pari passu* with the Interests).

**C. Tide Objects to Falcon's Plan to The Extent It Improperly Denies Tide's Right To Object To Claims And Interests And To Assert Causes of Action**

12. The Falcon Plan provides that "After the Effective Date, no party in interest shall have the right to object to Claims against or Interests in the Debtors or their Estates other than the Reorganized Debtors." (Joint Plan § 8.11). The Falcon Plan also provides that "The applicable Reorganized Debtor(s), ... , shall retain and may exclusively enforce any and all such Causes of Action (other than Released Actions); *provided, however*, that the Committee may enforce any Causes of Action that the Committee has standing to prosecute pursuant to a Final Order." (Joint Plan § 7.18).

13. Tide objects to the Falcon Plan to the extent it denies Tide's right to object to claims and pursue (or seek to pursue) Causes of Action. The Bankruptcy Code provides that any party in interest may object to a proof of claim or interest. *See* 11 U.S.C. § 502(a).<sup>4</sup> Additionally, courts have frequently authorized creditors to commence and prosecute causes of

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<sup>4</sup> At the Disclosure Statement Hearing, this Court specifically held that Tide's right to object to claims would be preserved and Falcon's counsel agreed that Tide had that right. (Transcript, April 26, 2013, p. 58).

action on behalf of debtors in possession. *See Image Innovation Holdings, Inc.*, 391 B.R. 255, 259 (Bankr. S.D.N.Y. 2008); *In re Adelpia Comm. Corp.*, 330 B.R. 364, 373 (Bankr. S.D.N.Y. 2005)(“The practice of authorizing the prosecution of actions on behalf of an estate by committees, and even by individual creditors, upon a showing that such is in the best interests of the estate, is one of long standing and nearly universally recognized.”); *In re STN Enterprises*, 779 F.2d 901, 904-5 (2d Cir. 1985).

14. The inability to raise these objections and causes of action could negatively affect Tide’s recovery in Falcon’s case.<sup>5</sup> Accordingly, Tide objects to Falcon’s Plan to the extent it seeks to deny Tide rights it would otherwise have under the Bankruptcy Code in violation of § 1129(a)(1).

**D. Tide Objects To Falcon’s Plan To The Extent It Allows Falcon To Settle And Allow Claims Without Notice And Opportunity For Objection and Hearing**

15. Falcon’s Plan provides that “From and after the Effective Date, and without any further approval by the Bankruptcy Court, the Reorganized Debtors may compromise and settle all Claims and Causes of Action.” (Joint Plan § 8.10). Falcon has filed a number of claim objections to claims improperly filed against Falcon. (See Dkt. Nos. 1049 to 1053). Allowance of these Claims (and the release of Causes of Actions of Falcon’s estate) could directly and materially affect Tide’s recovery under Falcon’s Plan.<sup>6</sup> Accordingly, Tide objects to Falcon’s Plan to the extent it would allow Falcon to compromise and settle these Claims or other causes of action without notice and an opportunity for objection and hearing.

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<sup>5</sup> For example, Tide has already filed a complaint to subordinate the Hopper Claims and the Debtors have stated their Disclosure Statement that they do not intend to seek subordination of these claims.

<sup>6</sup> Tide also notes that Arcapita, Inc. has filed a proof of claim against Falcon in an unspecified amount. Arcapita, Inc. currently manages the day-to-day operations of Falcon. Falcon should not be permitted to unilaterally allow this claim without notice to creditors and an opportunity for objection and hearing.

**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,

**BRACEWELL & GIULIANI LLP**

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