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Hearing Date and Time: August 1, 2012 at 11:00 a.m.
Objection Deadline: July 29, 2012 at 5:00 p.m.

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 MOTION FOR AN ORDER LIFTING THE AUTOMATIC STAY PURSUANT TO 11 U.S.C. § 362(d) TO ALLOW CONTINUANCE OF DISTRICT COURT ACTION

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"), by their undersigned counsel, hereby file this Motion for an Order Lifting the Automatic Stay

Pursuant to 11 U.S.C. § 362(d) to Allow Continuance of District Court Action. In support thereof, Tide respectfully submits as follows:

I. PRELIMINARY STATEMENT

1. By this Motion, Tide seeks relief from the automatic stay so that it may liquidate its claims against Falcon Gas Storage Co., Inc. ("Falcon") and Arcapita Bank B.S.C. ("Arcapita" and, together with Falcon, the "Debtors") in Cause No. 10-CIV-5821 in the Southern District of New York District Court (the "District Court Action"). As described in more detail below, the District Court Action has been pending for almost two years, the Honorable Judge Kimba Wood has issued substantive rulings in the case, fact discovery was underway and the case was set for trial in September 2012 when the Debtors filed bankruptcy.

2. Falcon is a non-operating entity with no employees and no cash flow. It has no business to reorganize and no employees to protect. Other than an intercompany receivable owed to it by its parent Arcapita, Falcon has one significant asset (a disputed interest in $70 million in escrow which is the subject of the District Court Action), no secured creditors, no priority creditors, and a single general unsecured creditor (in the amount of $536.30) that is not listed as "contingent," "unliquidated," or "disputed." It exists only as a shell company to continue existing litigation, including the District Court Action pending before Judge Wood in the Southern District of New York. That litigation will determine, among other things, the ownership of $70 million currently in escrow (the "Escrow Funds").

3. Arcapita is also a defendant in the District Court Action. Following Arcapita's petition for relief under chapter 11 in this Court, Tide moved to sever Arcapita from the District Court Action so that the District Court Action could proceed against Falcon and the remaining non-debtor defendants. Falcon then filed for bankruptcy protection, stating that its filing "was

intended to prevent 'piecemeal litigation' [of the claims in the District Court Action] and to ensure that the resolution and liquidation of any claims as to Falcon was coordinated as to those same claims against Arcapita Bank." (Dkt. No. 178, Case No. 12-11076). According to the Debtors, such "coordination will insure that the prevention of piecemeal resolution of litigation—a well-recognized purpose of chapter 11—is observed." (*Id.*).

4. If the claims of Tide against the Debtors are to be decided in a single forum, the District Court is the appropriate forum, as detailed below. Tide therefore seeks relief from the automatic stay as to Arcapita and Falcon. Such relief would, among other things, result in complete resolution of the dispute regarding ownership of the Escrow Funds, determine the viability of proceeding with the Falcon bankruptcy case, benefit all creditors, and further judicial economy and economical resolution of the issues. However, to the extent that the Court finds that relief from the automatic stay as to Arcapita is not appropriate at this time, then Tide requests that relief as to Falcon be granted so that ownership of the Escrow Funds may be determined by the District Court.

5. Finally, it should be noted that John M. Hopper, *et al.* (the "Hopper Parties") have filed Adversary Number 12-01662 in this bankruptcy case (the "Hopper Adversary") and have named Falcon, but not Tide, as a defendant. In the Hopper Adversary, the Hopper Parties claim that right, title and interest in $8.25 million of the Escrow Funds has vested in Falcon and has been assigned to the Hopper Parties. The Hopper Parties seek immediate payment of the $8.25 million. However, ownership of *all* of the Escrow Funds is currently at issue between Tide and Falcon in the District Court Action, where Judge Wood has ruled that none of the escrow funds can be released at this juncture. Consequently, the relief sought in the Hopper Adversary is

barred by existing orders in the District Court and the Hopper Adversary cannot be decided until ownership of the $70 million in escrow is decided in the District Court Action.

II. JURISDICTION

6. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This Motion constitutes a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(G). Venue of this Motion is proper pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory basis for the relief sought in this Motion is 11 U.S.C. § 362(d)(1).

III. RELEVANT BACKGROUND

7. Tide is the plaintiff in the District Court Action, which is civil action number 10-CIV-5821 (KMW), and is currently pending in the United States District Court for the Southern District of New York. Falcon, Arcapita, and Arcapita, Inc. are defendants in the District Court Action. The escrow agent, HSBC Bank USA, N.A, is a nominal defendant.

8. The District Court Action arises out of Falcon and its controlling affiliates' misrepresentations to Tide in connection with a half-billion dollar transaction for the sale of a natural gas storage business called "NorTex Gas Storage Company, LLC" ("NorTex").

A. The NorTex Sale

9. NorTex, formerly a subsidiary of Falcon, is in the business of storing and processing natural gas in and from two underground gas storage facilities (the "Storage Facilities") located in northern Texas.

10. In March 2010, Tide and Falcon entered into a Purchase Agreement (the "Purchase Agreement") whereby Tide agreed to purchase all of Falcon's interest in NorTex. Tide thereby acquired the entire gas storage business of NorTex. The transaction closed on April 1, 2010. The purchase price at that time was $515 million. However, $70 million of that

purchase price, i.e. the Escrow Funds, was placed in escrow with HSBC Bank USA, N.A., where the funds remain today.

B. The Representations and Warranties of Falcon Related to the NorTex Sale

11. During the course of negotiations and due diligence, Falcon and its controlling affiliate, Arcapita, provided Tide and its representatives with certain detailed and specific financial information regarding NorTex's operations and the value of the Storage Facilities. Among that information were certain specific representations regarding the quantities and value of "pad gas" contained in the respective Storage Facilities, the operating costs associated with the consumption of fuel in the operations of the respective Storage Facilities, and the source of hydrocarbons extracted during operation of NorTex's two NGL extraction plants.

12. For example, Falcon and Arcapita provided financial statements and related materials for fiscal years 2007 through 2009 containing inventory values for pad gas in the Storage Facilities that, taken together, represented there was a combined historical inventory value of $70,337,515 of pad gas in the two Storage Facilities as of March 31, 2009.[1] Those representations were corroborated by a "management presentation" and supposed "pressure test data" that Falcon and Arcapita provided Tide in February 2010 in the process of due diligence for the purchase and sale of NorTex. Those documents represented that, based on actual pressure testing and engineering analysis, there were 14 billion cubic feet ("bcf") of pad gas in the Storage Facilities.

[1] "Pad gas" is of fundamental importance to the operation of a natural gas storage facility. "Pad gas" is the base amount of gas necessary to maintain storage field pressure and deliverability of the customers' gas stored in the facility.

13. Additional and specific representations and warranties made by Falcon and Arcapita to Tide are detailed in Tide's Complaint in the District Court Action, a copy of which is attached hereto as **Exhibit A**.

14. Falcon and Arcapita made representations in the course of due diligence regarding the sale of NorTex because they knew that potential buyers such as Tide would require information about the quantities and values of pad gas in the Storage Facilities, the source of compressor fuel and associated operating expense, and the source of hydrocarbons produced during NGL extraction facility operations as material components in evaluating the gas storage assets and operations. Further, Falcon and Arcapita made these representations specifically in response to inquiries from Tide regarding the quantities of pad gas, the consumption of compressor fuel, and the extraction of hydrocarbons as NGLs, each as reflected in Falcon's records, knowing that Tide would rely on the information provided. Falcon and Arcapita made these representations intending that Tide would rely on them in proceeding with the purchase of NorTex.

15. Between March 15, 2010, and April 1, 2010, in reasonable reliance on these representations from Falcon and Arcapita regarding pad gas quantities, compressor fuel consumption, and the source of hydrocarbons produced during NGL extraction facility operations, Tide entered into the Purchase Agreement, along with ancillary agreements, and proceeded to close the purchase and sale of NorTex.

C. Falcon's Fraud

16. In or around May 2010, after closing the purchase of NorTex, Tide conducted a shut-in pressure test on one of the Storage Facilities. A proper engineering analysis of the results of Tide's test indicated a shortfall of both NorTex's pad gas as well as customer gas, totaling

approximately 4 bcf at the Hill-Lake Facility alone. Further investigation has indicated a likely shortfall of 6 bcf or more between the two Storage Facilities combined.

17. Tide has also learned that, contrary to Falcon's and Arcapita's representations in the 2007, 2008, and 2009 financial statements and elsewhere, Falcon failed to conduct regular and consistent shut-in pressure testing and related volumetric calculations and measurements of the quantities of gas within the Storage Facilities, and failed to conduct thorough and proper analyses of the results of those tests to ensure NorTex's financial records were accurate.

18. Tide has also learned that Falcon and Arcapita failed to properly calculate and account for "shrinkage" resulting from the extraction of NGLs from the gas within the Storage Facilities.[2] In addition, the gas flows associated with NGL extraction operations were incorrectly portrayed in a materially different way in the Material Balance information provided to Tide by Falcon and Arcapita's representatives.

19. Additional and specific instances of Falcon's fraudulent actions are detailed in Tide's Complaint in the District Court Action, a copy of which is attached hereto as **Exhibit A**.

20. Tide has discovered that Falcon and Arcapita knew of these problems, and therefore the falsity of the information, at the time they were making representations and warranties to Tide regarding NorTex's financial condition, the value and quantity of gas in the Storage Facilities, the source and cost of compressor fuel, the source of and economic value of hydrocarbons produced during NGL extraction facility operations, and the absence of materially adverse changes or events in the company's operations and assets.

[2] "Shrinkage" refers to the amount of natural gas that is transformed into liquid products such as ethane, propane, and butane during processing of natural gas at NGL extraction plants such as exist at the Storage Facilities.

21. This omitted financial data and other information represents material information which Falcon and Arcapita knew and had a duty to disclose to Tide, and which would have reduced significantly the economic value Tide attributed to NorTex's business.

22. In sum, Tide purchased the natural gas storage business on the strength of various material representations and warranties from Falcon and its affiliates, including representations about NorTex's business and the value of certain of NorTex's assets, in particular the amount of "pad gas" in the Storage Facilities, the operating costs associated with fuel consumption of the Storage Facilities, and the source of hydrocarbons extracted during the operation of NorTex's two natural gas liquid extraction plants. After taking possession of NorTex, Tide discovered not only that those representations were materially false, but that both Falcon and its controlling affiliates had actual knowledge of the falsity at the time Tide agreed to purchase NorTex.

D. The District Court Action

23. Tide was deceived by Falcon and Arcapita into spending over a half-billion dollars for NorTex, and Tide was materially defrauded and harmed as a direct result of Falcon's and Arcapita's misrepresentations and material omissions of facts regarding NorTex's assets and operations. Accordingly, on August 2, 2010, Tide brought the District Court Action, alleging, among other things, fraud, fraudulent inducement, breach of express warranty, breach of contract, and various securities violations, and seeking, alternatively, money damages for the economic harm Tide has suffered, disgorgement of Falcon's unjust gains from the transaction, or rescission of the purchase and sale of NorTex.

24. In answering Tide's complaint in the District Court Action, Falcon asserted counterclaims against Tide including a claim for a declaratory judgment that the Escrow Funds should be released to Falcon and a breach of contract claim related to the escrow agreement.

Falcon then filed a motion for summary judgment asking the District Court, among other things, to rule in Falcon's favor on the declaratory judgment counterclaim and to enter an order releasing the Escrow Funds to Falcon. Judge Wood denied the summary judgment motion, ruling that Tide had made a prima facie showing of fraud and, as a result, since a party cannot be compelled to perform an agreement induced by fraud, the $70 million in escrow funds may not be released until Tide's fraud claims are resolved. *See Tide Natural Gas Storage I, L.P. v. Falcon Gas Storage Co., et al.*, No. 10 Civ. 5821, 2011 U.S. Dist. LEXIS 111532, at *44 (S.D.N.Y. Sept. 29, 2011) (order and opinion denying Falcon motion for summary judgment)*; Tide Natural Gas Storage I, L.P. v. Falcon Gas Storage Co., et al.*, No 10 Civ. 5821, 2012 U.S. Dist. LEXIS 63540, at *10 (S.D.N.Y. May 4, 2012) (order and opinion denying motion for reconsideration) (both opinions attached hereto as **Exhibits B-1 and B-2**).

25. On March 21, 2012, Arcapita filed a Suggestion of Bankruptcy in the District Court Action as a result of Arcapita's bankruptcy filing before this Court on March 19, 2012.

26. On April 12, 2012, the Hopper Parties filed a Motion to Intervene in the District Court Action, which is still pending.

27. On April 26, 2012, Tide filed a motion to sever Arcapita from the District Court Action so that Tide could continue to prosecute its claims against Falcon. Four days later, Falcon filed its petition for relief under chapter 11 of the Bankruptcy Code.

28. As Falcon stated in its motion for joint administration and application of various orders (Dkt. No. 5), following the sale of NorTex, Falcon was left with no operations, employees or cash flow, and Falcon's primary asset is its alleged and disputed interest in the $70 million Escrow Funds.

IV. RELIEF REQUESTED

29. By this Motion, Tide seeks the entry of an order lifting the automatic stay as to the Debtors pursuant to 11 U.S.C. § 362(d) to allow Tide to continue prosecution of the District Court Action.

V. BASIS FOR RELIEF

30. Section 362 of the Bankruptcy Code provides that the filing of a bankruptcy petition automatically stays the continuation of a judicial action against the debtor. *See* 11 U.S.C. § 362(a)(1). However, under Bankruptcy Code section 362(d)(1), on request of a party in interest and after notice and a hearing, the court shall grant relief from the stay for cause. *See* 11 U.S.C. § 362(d)(1).

31. To determine whether cause exists to modify the automatic stay for a party to pursue litigation against a debtor in another forum, courts in the Southern District of New York have utilized the twelve factors first enumerated in *In re Curtis*, 40 B.R. 795, 799-800 (Bankr. D. Utah 1984). *See In re Sonnax Indust., Inc.*, 907 F.2d 1280, 1286 (2d Cir. 1990). Those factors are: (1) whether relief would result in a partial or complete resolution of the issues; (2) lack of any connection with or interference with the bankruptcy case; (3) whether the other proceeding involves the debtor as a fiduciary; (4) whether a specialized tribunal with the necessary expertise has been established to hear the cause of action; (5) whether the debtor's insurer has assumed full responsibility for defending it; (6) whether the action primarily involves third parties; (7) whether litigation in another forum would prejudice the interests of other creditors; (8) whether the judgment claim arising from the other action is subject to equitable subordination; (9) whether movant's success in the other proceeding would result in a judicial lien avoidable by the debtor; (10) the interests of judicial economy and the expeditious and economical resolution of

litigation; (11) whether the parties are ready for trial in the other proceeding; and (12) impact of the stay on the parties and the balance of harms. *Curtis*, 40 B.R. at 799-800.

32. "These factors need not be assigned equal weight and only those factors relevant to the particular case need be considered." *In re Keene Corp*., 171 B.R. 180 (Bankr. S.D.N.Y. 1994). Furthermore, in deciding whether to lift the automatic stay and allow a creditor to continue litigation in another forum, a bankruptcy court should consider the "particular circumstances of the case, and ascertain what is just to the claimants, the debtor and the estate." *In re The Containership Co.*, 466 B.R. 219, 226 (Bankr. S.D.N.Y. 2012) (citing *In re Touloumis*, 170 B.R. 825, 828 (Bankr. S.D.N.Y. 1994)).

33. In this case, the applicable factors include: (1) whether relief would result in a partial or complete resolution of the issues; (2) lack of any connection with or interference with the bankruptcy case; (3) whether litigation in another forum would prejudice the interests of other creditors; (4) the interests of judicial economy and the expeditious and economical resolution of litigation; (5) whether the parties are ready for trial in the other proceeding; and (6) the impact of the stay on the parties and the balance of harms.

A. Relief Will Result in Complete Resolution of the Issues

34. Permitting relief from the automatic stay to allow the District Court Action to go forward would result in a complete resolution of the fraud claims, breach of contract claims, and securities violation claims currently before that court. As a result of the resolution of these issues, the ownership of the Escrow Funds will also be completely resolved—either Tide will prevail on its claims and the Escrow Funds will belong to Tide, or Tide will lose and the Escrow Funds will belong to Falcon.

B. The District Court Action Will Not Interfere with the Bankruptcy

35. Prosecution of the District Court Action will not interfere with Falcon's bankruptcy case. Falcon certainly is not in need of a "breathing spell" because it is non-operating, with no employees, no cash flow, and no plans for rehabilitation. In fact, prosecution of the District Court Action will greatly assist the bankruptcy case, because the bankruptcy case cannot proceed in a meaningful way until ownership of Falcon's primary alleged asset, the Escrow Funds, is determined. *See In re Project Orange Assoc., LLC*, 432 B.R. 89, 108 (Bankr. S.D.N.Y. 2010) (stay lifted to allow state court action to proceed because bankruptcy could not proceed absent state court decision).

36. Prosecution of the District Court Action will not interfere with Arcapita's bankruptcy case either. The interests of Arcapita and Falcon are directly aligned in the District Court Action and they are both represented by King & Spalding LLP. The marginal cost of lifting the stay as to Arcapita in addition to Falcon is negligible. Furthermore, to the extent that Arcapita claims it needs a "breathing spell," it is too late because the Hopper Parties have already initiated the Hopper Adversary, which requires resolution in some forum of all of the issues at play in the District Court Action, including the claims against Arcapita.

37. Additionally, there is no extra cost of delay associated with continuing the District Court Action since ownership of the Escrow Funds must be determined in one forum or another, and the district court is familiar with the legal and factual issues and has already made several key rulings in the case. *See In re Containership*, 466 B.R. at 232-33 (evaluating cost of delay under second *Sonnax* factor). Furthermore, since Falcon is non-operating, has no employees, has no tangible personal property, and has only one non-contingent, liquidated, undisputed claim (a

trade payable for $536.30, *see* Falcon's Schedule F, Dkt. No. 231), there is really no bankruptcy case with which to interfere.

C. The District Court Action Will Not Prejudice Other Creditors

38. Proceeding with the District Court Action presents no prejudice to other creditors. Falcon's case has no secured creditors and no priority creditors. (*See* Schedules of Assets and Liabilities, Dkt. No. 231). Falcon lists only *one* general unsecured claim that is not contingent, unliquidated, or disputed—a trade payable in the amount of $536.30. The remaining general unsecured creditors consist of litigation parties involved in either the District Court Action (i.e., the Hopper Parties) or a Texas state court action related to employee option agreements. Allowing the District Court Action to proceed will not have a direct effect on the trade payable claimant or Texas state court litigants. Both parties may continue to pursue their own claims in the appropriate forums. In fact, allowing the District Court Action to go forward will benefit the other creditors of Falcon's estate because resolution of the District Court Action will provide much needed clarity regarding Falcon's assets and liabilities. Specifically, the District Court Action will determine whether Falcon or Tide owns the $70 million held in escrow. The District Court Action also will determine the size of any general unsecured claim that Tide may have. Resolution of these key issues will assist the other parties in the Falcon case in determining their own courses forward with regard to various adversaries, contested motions, and plan proceedings.

39. As for the Hopper Parties, they have already filed a Motion to Intervene in the District Court Action. (Dkt. No. 123 in District Court Action). The Hopper Adversary also cannot proceed absent resolution of the claims in the District Court Action, because the Hopper Parties seek release of $8.25 million in Escrow Funds allegedly promised to them by Falcon.

However, whether Falcon or Tide own the Escrow Funds must be determined first, and that is the issue before the District Court.

40. Allowing the District Court Action to proceed would benefit the Hopper Parties because their claims in the adversary proceeding are dependent upon, and cannot proceed in this Court without adjudication of the District Court Action.

41. Creditors of the Arcapita estate will not be prejudiced by lifting the automatic stay either. As discussed above, the interests of Falcon and Arcapita in the District Court Action are the same, so, to the extent Falcon will proceed in the District Court Action, there is minimal extra cost for Arcapita to proceed.

D. Lifting the Stay Promotes Judicial Economy

42. When Congress drafted section 362, it intended "that one of the factors to consider when determining whether to modify the stay is whether doing so would permit pending litigation involving the debtor to continue in a non-bankruptcy forum," as "[i]t will often be more appropriate to permit proceedings to continue in their place of origin, where no great prejudice to the bankruptcy estate would result, in order to leave the parties to their chosen forum and to relieve the bankruptcy court from duties that may be handled elsewhere." H.R. Rep. No. 95-595, at 341 (1977); U.S. Code Cong. & Admin. News 1978, at 5963, 6297; S. Rep. No. 95-989, at 50 (1978); U.S. Code. Cong. & Admin. News 1978, at 5787, 5836.

43. Allowing the District Court Action to continue in its original forum will favor judicial economy and the expeditious and economical resolution of litigation. The parties had been proceeding in the District Court Action for close to two years when the case was stayed by this bankruptcy. Under the District Court's then-applicable scheduling order, fact discovery was to be completed by June 15, 2012. Tide was scheduled to serve its expert report upon the

Debtors on May 30, 2012, and the Debtors were to serve their expert rebuttal reports on June 29, 2012. Parties were to be ready for trial on September 10, 2012. Likewise, Judge Wood has already denied the Debtor's motion for summary judgment, and the Hopper Parties' Motion to Intervene is currently pending before Judge Wood. It will certainly entail a duplication of judicial efforts if the causes of action in the District Court Action must now be brought before this Court. Lifting the automatic stay is the most efficacious solution.

E. The District Court Action is Not Far from Trial

44. The District Court Action is not yet ready for trial, but, as discussed above, prior to this bankruptcy filing, trial was scheduled for September 10, 2012.

F. The Parties are Harmed by the Stay in this Case

45. The impact of the stay on the parties is detrimental for both Falcon and Tide and therefore the balance of harm weighs in favor of lifting the stay. The Falcon bankruptcy proceeding is essentially incapacitated pending a determination of ownership of the Escrow Funds because such funds are the Falcon estate's primary alleged asset (other than Falcon's intercompany claim against Arcapita), and that matter is squarely before Judge Wood in the District Court Action. If Tide's ownership of the Escrow Funds is vindicated in the District Court Action, Falcon will have no substantial assets (other than Falcon's intercompany claim against Arcapita), no employees, no operations, and no intention of rehabilitating as a going-concern, in which case the propriety of the Falcon bankruptcy case continuing in chapter 11 will be questionable. The longer the District Court Action is stayed and the Falcon bankruptcy continues, the greater the threat that the Falcon estate is harmed by accumulating bankruptcy related expenses that may not be able to pay.

46. Moreover, it is worth noting that the Debtors will not be burdened by the need to travel to a new jurisdiction or to hire new counsel if this motion is granted. The Debtors have already sought and obtained authority to retain King & Spalding to represent them in the District Court Action and the Southern District of New York has original jurisdiction over both the bankruptcy and the District Court Action.

47. On the other hand, Tide is specifically harmed by imposition of the automatic stay because it must await vindication of its rights, including the liquidation of its total claim against the Debtors and actual possession of $70 million. Tide is also harmed by having its interests threatened in two different forums, as exemplified by the Hopper Adversary, wherein the Hopper Parties demand that $8.25 million of the Escrow Funds be released to them. Questions of ownership and release of the Escrow Funds are squarely before Judge Wood in the District Court Action. With the stay in place, there is a risk of conflicting judicial decisions. Finally, Tide is further harmed by imposition of the automatic stay to the extent that Falcon is using this filing to "impede, delay, forum shop, or obtain a tactical advantage regarding litigation in a non-bankruptcy forum . . . ." *In re Silberkraus*, 253 B.R. 890, 905 (Bankr. C.D. Cal. 2000) (citing *In re SGL Carbon Corp.*, 200 F.3d 154 (3d Cir. 1999)).

VI. PRAYER

WHEREFORE, Tide requests that the Court lift the automatic stay to allow Tide to proceed with the District Court Action, and that the Court grant Tide such other and further relief as the Court deems just.

Respectfully submitted,

BRACEWELL & GIULIANI LLP

By: */s/ William A. (Trey) Wood III*

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EXHIBIT A

JUDGE WOOD

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TIDE NATURAL GAS STORAGE I, LP and TIDE NATURAL GAS STORAGE II, LP, Plaintiffs, v. FALCON GAS STORAGE COMPANY, INC.; ARCAPITA BANK B.S.C.; ARCAPITA, INC.; and HSBC BANK USA, NATIONAL ASSOCIATION, Defendants.	10 CIV 5821 ECF CASE Civil Action No. **COMPLAINT**

Plaintiffs TIDE NATURAL GAS STORAGE I, LP and TIDE NATURAL GAS STORAGE II, LP (together, "Plaintiffs") for their Complaint against Defendants FALCON GAS STORAGE COMPANY, INC., ARCAPITA BANK B.S.C., ARCAPITA, INC., and nominal defendant HSBC BANK USA, NATIONAL ASSOCIATION ("HSBC") (collectively, "Defendants") allege as follows:

JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction because certain claims asserted herein arise under § 10 of the Securities Exchange Act of 1934 (the "Act") (15 U.S.C. § 78j(b)). Jurisdiction is conferred by § 27 of the Act (15 U.S.C. § 78aa). This Court has supplemental jurisdiction over all state law and other claims asserted herein pursuant to 28 U.S.C. § 1367.

2. This Court has personal jurisdiction over all parties to this action because all parties do business within the State of New York as the term "doing business" is understood in law, have the requisite "minimum contacts" with the State of New York as the term "minimum contacts" is understood in law, have purposefully availed themselves of the protections and benefits of the laws of the State of New York as required to establish *in personam* jurisdiction, or

have expressly consented to the jurisdiction of this Court and of the Courts of the State of New York. This Court's exercise of personal jurisdiction over all Defendants will not offend traditional notions of fair play and substantial justice.

3. Venue is proper in this district pursuant to § 27 of the Act (15 U.S.C. § 78aa) because Defendants transact business in this district. Venue is also authorized in this district under 28 U.S.C. § 1391(a)(2) because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this district. Venue is also proper in this district by agreement of the parties.

PARTIES

4. Plaintiff TIDE NATURAL GAS STORAGE I, LP is formerly known as Alinda Natural Gas Storage I, LP, and hereafter, together with Tide Natural Gas Storage II, LP (formerly Alinda Natural Gas Storage II, LP), shall be referred to as "Plaintiffs." Tide Natural Gas Storage I, LP is now and at all relevant times has been a limited partnership organized and existing under the laws of the State of Delaware.

5. Plaintiff TIDE NATURAL GAS STORAGE II, LP is formerly known as Alinda Natural Gas Storage II, LP, and hereafter, together with Tide Natural Gas Storage I, LP (formerly Alinda Natural Gas Storage I, LP), shall be referred to as "Plaintiffs." Tide Natural Gas Storage II, LP is now and at all relevant times has been a limited partnership organized and existing under the laws of the State of Delaware.

6. Defendant FALCON GAS STORAGE COMPANY, INC. (hereafter, "Falcon") is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business located in Atlanta, Georgia. Pursuant to Section 11.1 of the Purchase Agreement by and between Falcon and Plaintiffs, Falcon may be served with process via U.S.

certified mail, c/o Arcapita, at 75 Fourteenth Street, 24th Floor, Atlanta, Georgia, 30309, with a copy to Raymond E. Baltz, King & Spalding, 1180 Peachtree Street, Atlanta, Georgia, 30309.

7. Defendant ARCAPITA BANK B.S.C. (hereafter, together with Arcapita, Inc., "Arcapita") is a joint stock company incorporated in the Kingdom of Bahrain. Its principal place of business in the United States is 75 Fourteenth Street, 24th Floor, Atlanta, Georgia, 30309. Pursuant to Section 3.4 of the Guaranty Agreement between Arcapita Bank B.S.C. and Plaintiffs, Arcapita Bank B.S.C. may be served with process via U.S. certified mail, c/o Arcapita Inc., at 75 Fourteenth Street, 24th Floor, Atlanta, Georgia, 30309, attention Brian R. McCabe, with a copy to Raymond E. Baltz, King & Spalding, 1180 Peachtree Street, Atlanta, Georgia 30309.

8. Defendant ARCAPITA, INC. (hereafter, together with Arcapita Bank B.S.C., "Arcapita") is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business located at 75 Fourteenth Street, 24th Floor, Atlanta, Georgia 30309. Arcapita, Inc. does not have a registered agent for service of process in the State of New York. Arcapita, Inc. may be served with process pursuant to Federal Rule of Civil Procedure 4(h)(1) by delivering a copy to its registered agent, RL&F Service Corporation, One Rodney Square, 10th Floor, Wilmington, Delaware 19801.

9. Defendant HSBC BANK USA, NATIONAL ASSOCIATION, in its capacity as escrow agent ("HSBC"), is a national banking association. HSBC's principal place of business is 1800 Tysons Boulevard, Suite 50, McLean, Virginia 22102. HSBC may be served with process pursuant to Federal Rule of Civil Procedure 4(h)(1) by delivering a copy to its registered agent, Legal Processing, 12th Floor, One HSBC Center, Buffalo, New York 14203. HSBC is a nominal defendant in this matter; it has been named solely because injunctive relief is sought with respect

to certain funds that are in HSBC's possession as escrow agent pursuant to an agreement between the other parties.

FACTS

A. Overview of Case

10. This lawsuit arises out of Falcon's and its controlling affiliates' misrepresentations to Plaintiffs in connection with a half-billion dollar transaction for the sale of a natural gas storage business, NorTex Gas Storage Company, LLC ("NorTex"). Plaintiffs purchased the natural gas storage business on the strength of various material representations and warranties from Falcon and its affiliates, including representations about NorTex's business and the value of certain of NorTex's assets, in particular the amount of "pad gas" in the natural gas storage facilities, the operating costs associated with fuel consumption, and the source of hydrocarbons extracted during operation of NorTex's two natural gas liquid ("NGL") extraction plants. Plaintiffs have recently discovered not only that those representations and warranties were false, but that both Falcon and its controlling affiliates had actual knowledge of the falsity at the time Plaintiffs agreed to purchase NorTex.

11. The difference in value between the quantities of pad gas as represented and the quantities of pad gas actually present exceeds $30 million, and the implications of this shortfall and the mechanisms by which the shortfall was created has an impact on the economics of NorTex's gas storage business that far exceeds that amount. Plaintiffs therefore bring this action seeking, alternatively, money damages for the economic harm they have suffered, disgorgement of Falcon's unjust gains from the transaction, or rescission of the purchase and sale of NorTex. In addition, because the transaction was the product of a fraud, and because Falcon's controlling affiliates have demonstrated an intent to move certain proceeds from the purchase and sale beyond the jurisdictional reach of this Court, Plaintiffs further seek injunctive relief preventing

Falcon or its affiliates from removing certain escrowed proceeds of the sale from the escrow account where those funds are currently held.

B. Plaintiffs' Purchase Of NorTex

12. NorTex, formerly a subsidiary of Falcon, is in the business of storing and processing natural gas in and from two underground gas storage facilities located in northern Texas, sometimes referred to as the "Worsham-Steed Facility" and the "Hill-Lake Facility," respectively, and collectively referred to as the "Storage Facilities."[1]

13. In March 2010, Plaintiffs and Falcon entered into a Purchase Agreement ("the Purchase Agreement") whereby Plaintiffs agreed to purchase all of Falcon's interest in NorTex. Plaintiffs thereby acquired the entire gas storage business of NorTex, including NorTex's ownership in the Worsham-Steed and Hill-Lake entities and their respective ownership and operation of the Worsham-Steed and Hill-Lake Facilities. The transaction closed on April 1, 2010; at that time, Plaintiffs paid Falcon a total of $515 million for NorTex.[2]

C. Defendants' Specific Representations To Plaintiffs

14. During the course of negotiations and due diligence, Falcon and its controlling affiliate, Arcapita, provided Plaintiffs and their representatives with certain detailed and specific financial information regarding NorTex's operations and the value of the assets owned by NorTex and the Worsham-Steed and Hill-Lake entities. Among that information were certain

[1] Specifically, NorTex owns all the interests in two sets of subsidiaries: (1) Worsham-Steed GP, Inc. and Worsham-Steed Gas Storage, L.P. (together, "Worsham-Steed") and (2) Hill-Lake GP, Inc. and Hill-Lake Gas Storage, L.P. (together, "Hill-Lake"). The Worsham-Steed and Hill-Lake entities in turn own and operate the two underground natural gas storage facilities and related processing facilities.

[2] As noted below, $70 million of that purchase price was placed in escrow with Nominal Defendant HSBC pursuant to a First Amendment to Purchase Agreement dated April 1, 2010 ("the First Amendment") and an Escrow Agreement. That $70 million represents a material part of the consideration paid by Plaintiffs for the purchase of NorTex and is the subject of Plaintiffs' claims for injunctive relief and alternative claims for money damages or rescission as set out in more detail below.

specific representations regarding the quantities and value of "pad gas" contained in the respective Storage Facilities, the operating costs associated with the consumption of fuel in the operations of the respective Storage Facilities, and the source of hydrocarbons extracted during operation of NorTex's two NGL extraction plants.

15. For example, Falcon and Arcapita provided financial statements and related materials for fiscal year 2007 through 2009 containing inventory values for pad gas in the Storage Facilities that, taken together, represented there was a combined historical inventory value of $70,337,515 of pad gas in the two Storage Facilities as of March 31, 2009. Those representations were corroborated by a "management presentation" and supposed "pressure test data" that Falcon and Arcapita provided Plaintiffs in February 2010, in the process of due diligence for the purchase and sale of NorTex. Those documents represented that, based on actual pressure testing and engineering analysis, there were 4 billion cubic feet ("bcf") of pad gas in the Hill-Lake Facility and 10 bcf of pad gas in the Worsham-Steed Facility.

16. In addition, in February 2010, in connection with due diligence for the sale of NorTex, Falcon and Arcapita provided Plaintiffs with financial statements for Falcon's and NorTex's fiscal years from 2007 through 2009. In those financial statements, Falcon and Arcapita gave inaccurate information regarding operating expenses from fuel consumption in the operation of the Storage Facilities. In connection with those financial statements, Falcon and Arcapita instead represented that the fuel consumption from operations was offset by a phenomenon they described as "Btu enhancement"; essentially, they represented that native hydrocarbons in the Storage Facilities were enhancing the heating value of customer gas sufficient to offset the fuel consumed in operating the Storage Facilities. Falcon and Arcapita

also represented that the extraction of NGLs from within the Storage Facilities had no effect on the quantities of gas present in the Storage Facilities.

17. In the financial statements and purported pressure testing data, Falcon and Arcapita represented that they performed regular pressure tests and engineering measurements of the volume of pad gas in the Storage Facilities.

18. The financial statements, management presentations, and purported pressure test data were prepared by Falcon's representatives acting within the course and scope of their employment by Falcon and, on information and belief, by representatives of Arcapita acting within the course and scope of their employment by Arcapita.

19. "Pad gas" is of fundamental importance to the operation of a natural gas storage facility. "Pad gas" is the base amount of gas necessary to maintain storage field pressure and deliverability of the customers' gas stored in the facility. Without sufficient pad gas, the Storage Facilities would be unable to withdraw and deliver customer gas at levels required for services such as "firm storage service" ("FSS"), "load-following hourly balancing" ("LFHB"), and "park-and-loan" ("PAL") agreements with customers. In other words, the quantity of pad gas in the Storage Facilities is material information because, without sufficient pad gas in the Storage Facilities, NorTex cannot meet its obligations to its customers and cannot operate its gas storage business. Likewise, the information regarding fuel consumption and the source of hydrocarbons extracted during NGL facility operations is essential in accurately evaluating the economic value of NorTex and the assets it owns and operates and, thus, material to any potential purchaser.

20. In the Purchase Agreement, Falcon expressly represented and warranted that "each balance sheet included in the Financial Statements (including the related notes and schedules) has been prepared in accordance with GAAP and fairly presents in all material

respects the consolidated financial position of the Company and its Subsidiaries as of the date of each such balance sheet . . . ."

21. Also in the Purchase Agreement, Falcon represented that neither NorTex nor its subsidiaries have experienced a "Material Adverse Effect . . . or other disposition of any material assets" since March 31, 2009.

22. In addition, in the course of due diligence, Plaintiffs inquired of Falcon regarding why Falcon's records did not show any change in value over time for the pad gas present in the Storage Facilities, and why there was no entry in the records for the cost, expense, or consumption of fuel consumed in the process of extracting natural gas liquids from the gas stored in the facilities. Falcon and Arcapita responded by referring Plaintiffs to a January 2010 memorandum with a subject of "NGL Material Balance & Shrink," a Microsoft Excel file, and a February 2010 "Material Balance" presentation which Falcon and Arcapita had caused to be provided in the due diligence "data room" and made available to Plaintiffs. That "Material Balance" presentation and the other associated information represented, in summary, that the consumption of pad gas as fuel in the storage and processing of gas contained in the Storage Facilities was offset by a phenomenon they described as "Btu enhancement." This information also represented that the source of hydrocarbons produced during NGL extraction facility operations was native fluids contained in the Storage Facilities, and not pad gas or customer gas being injected from gas pipelines for storage and later withdrawal.

23. Falcon and Arcapita made the foregoing representations in the course of due diligence regarding the sale of NorTex because they knew that potential buyers such as Plaintiffs would require information about the quantities and values of pad gas in the Storage Facilities, the source of compressor fuel and associated operating expense, and the source of hydrocarbons

produced during NGL extraction facility operations as material components in evaluating the gas storage assets and operations. Further, Falcon and Arcapita made these representations specifically in response to inquiries from Plaintiffs regarding the quantities of pad gas, the consumption of compressor fuel, and the extraction of hydrocarbons as NGLs, each as reflected in Falcon's records, knowing that Plaintiffs would rely on the information provided. Falcon and Arcapita made these representations intending that Plaintiffs would rely on them in proceeding with the purchase of NorTex.

24. Between March 15, 2010 and April 1, 2010, in reasonable reliance on these representations from Falcon and Arcapita regarding pad gas quantities, compressor fuel consumption, and the source of hydrocarbons produced during NGL extraction facility operations, Plaintiffs entered into the Purchase Agreement, the First Amendment, and the Escrow Agreement, and proceeded to close the purchase and sale of NorTex and pay over half a billion dollars to Falcon, including the $70 million escrow fund.

D. Defendants' Misrepresentations

25. In or around May 2010, after closing the purchase of NorTex, Plaintiffs conducted a shut-in pressure test on the Hill-Lake Facility. A proper engineering analysis of the results of Plaintiffs' test indicated a shortfall of both NorTex's pad gas as well as customer gas,[3] totaling approximately 4 bcf at the Hill-Lake Facility alone. Further investigation has indicated a likely shortfall of 6 bcf or more between the two Storage Facilities combined.

26. Since that time, Plaintiffs have been engaged in rigorous investigation into the root causes for the shortfalls in pad gas and customer gas. Plaintiffs have discovered that the shortfalls are the result of a number of shoddy and fraudulent practices by Falcon during its

[3] "Customer gas" is the amount of gas that customers have stored in the Storage Facilities as part of gas storage agreements with NorTex.

ownership and operation of NorTex and the Storage Facilities over a period at least two years preceding the closing of Plaintiffs' purchase of NorTex. The causes for the gas shortfalls are disturbing and indicative of gross neglect, if not outright deception, on the part of Falcon and Arcapita.

27. For example, Plaintiffs have learned that, during its operation of NorTex and the Storage Facilities, Falcon failed to properly account for and record fuel usage in compression of gas in the Storage Facilities, and that consumption of fuel in the compression operations actually drew upon and depleted the quantities of gas within the Storage Facilities to a degree that was not offset by Falcon's represented "Btu enhancement" theory. In reality, at the Hill-Lake Facility alone, fuel consumption represents over $3 million in annual operating expenses that were completely omitted from the financial statements Falcon and Arcapita provided to Plaintiffs. At the Worsham-Steed Facility, the figure is over $4 million annually. The combined economic impact of the omitted operating expenses associated with fuel consumed in the compression operations at the Hill-Lake and Worsham-Steed Facilities is over $40 million. This omitted financial data represents material information which Falcon and Arcapita knew and had a duty to disclose to Plaintiffs, and which would have significantly reduced the economic value Plaintiffs attributed to NorTex's business.

28. Further, Plaintiffs have discovered that the supposed "pressure test" data Falcon and Arcapita provided in due diligence was not actual pressure testing and engineering analysis as represented. Rather, the documents reflected mere "in-and-out" calculations derived from old, inaccurate baseline assumptions regarding "starting quantities" of pad gas in the two Storage Facilities and relied on inaccurate or incomplete in-and-out flows.

29. Plaintiffs have also discovered that Falcon did not properly monitor, record, or analyze the volume or composition of gas flows in and out of the Storage Facilities and related systems.

30. Plaintiffs have also learned that Falcon failed to properly calculate and account for "shrinkage" resulting from the extraction of NGLs from the gas within the Storage Facilities. "Shrinkage" refers to the amount of natural gas that is transformed into liquid products such as ethane, propane, and butane during processing of natural gas at NGL extraction plants such as exist at both the Hill-Lake and Worsham-Steed Facilities. In addition, the gas flows associated with NGL extraction operations were incorrectly portrayed in a materially different way in the Material Balance information provided to Plaintiffs by Falcon and Arcapita's representatives.

31. Plaintiffs have also learned that, contrary to Falcon's and Arcapita's representations in the 2007, 2008, and 2009 financial statements and elsewhere, Falcon failed to conduct regular and consistent shut-in pressure testing and related volumetric calculations and measurements of the quantities of gas within the Storage Facilities, and failed to conduct thorough and proper analyses of the results of those tests to ensure NorTex's financial records were accurate.

32. Plaintiffs have discovered that both Falcon and Arcapita knew of these problems, and therefore the falsity of the information, at the time they were making representations and warranties to Plaintiffs regarding NorTex's financial condition, the value and quantity of gas in the Storage Facilities, the source and cost of compressor fuel, the source of and economic value of hydrocarbons produced during NGL extraction facility operations, and the absence of materially adverse changes or events in the company's operations and assets.

33. Specifically, in early 2009, NorTex management communicated to Arcapita that the Storage Facilities had "deliverability issues" related to gas shortfalls. NorTex discussed with Falcon and Arcapita the possible purchase of additional pad gas to make up for the shortfalls and resolve the deliverability issues; Falcon and Arcapita rejected the purchase of additional pad gas. Instead, Falcon and Arcapita caused NorTex to enter into "park-and-loan" arrangements that, in essence, "borrowed" 1.5 bcf of gas to aid with immediate deliverability problems. This temporary "fix" concealed the depleted pad gas and did nothing to correct the inaccurate records, flawed processes, and shoddy operations and recordkeeping that led to the overstatement of the quantities and values of the pad gas and customer gas to begin with, thereby perpetuating the problem with the full knowledge of Falcon and Arcapita. Not surprising, none of that information was disclosed to Plaintiffs in the course of negotiation and due diligence for its half-billion-dollar purchase of NorTex.

34. Further, in or around October 2009, Falcon and, on information and belief, Arcapita, received a report from Platt, Sparks & Associates that attempted to correlate pressure readings from the Hill-Lake Facility with gas inventories reported in Hill-Lakes' regulatory filings. The information contained in the report made it clear that either the Hill-Lake Facility inventory levels contained in the regulatory filings were inaccurate or that the Hill-Lake Facility was losing gas. Again, Falcon and Arcapita failed to disclose that information to Plaintiffs in the course of negotiation and due diligence for its half-billion-dollar purchase of NorTex.

35. Plaintiffs have also discovered since closing the purchase of NorTex that, in late 2009 and early 2010, Falcon management became aware that NorTex was encountering additional deliverability issues due specifically to shortfalls and depletion of pad gas. Once

again, Falcon and Arcapita failed to disclose that information to Plaintiffs in the course of negotiation and due diligence for its half-billion-dollar purchase of NorTex.

36. This omitted financial data and other information represents material information which Falcon and Arcapita knew and had a duty to disclose to Plaintiffs, and which would have significantly reduced the economic value Plaintiffs attributed to NorTex's business.

E. Damage To Plaintiffs

37. As a result of Falcon's and Arcapita's misrepresentations, Plaintiffs have purchased and now own NorTex and its gas storage operations, but find themselves owning far less than they bargained for and far less than what was represented. In the immediate term, Plaintiffs (through NorTex) have been forced to mitigate further losses by implementing a program to strategically and opportunistically purchase approximately 4 bcf of gas to make up for the shortfall in pad gas and customer gas at the Hill-Lake Facility and ensure continued compliance with customer contracts. At current market prices, the loss to Plaintiffs as a result of having to cover these gas shortfalls is approximately $20 million, and Plaintiffs believe in reasonable probability the future costs to cover such shortfalls at the combined Storage Facilities will exceed an additional $10 million.

38. Further, as a result of Falcon's and Arcapita's misrepresentations regarding the source and cost of fuel consumed in the compression of gas at the Storage Facilities, Plaintiffs will incur additional, unbargained-for annual operating expenses that were completely omitted from the financial statements Falcon and Arcapita provided to Plaintiffs. Specifically, at the Hill-Lake Facility alone, fuel consumption represents over $3 million in annual operating expenses, expenses that were omitted from the financial statements provided by Falcon and Arcapita and relied upon by Plaintiffs. At the Worsham-Steed Facility, the figure is over $4 million annually. The undisclosed operating expenses associated with fuel consumed in the

compression operations of the combined Storage Facilities have an economic impact of over $40 million on the value of the assets Plaintiffs purchased.

39. Moreover, Plaintiffs have also suffered significant economic losses in connection with the extraction of NGLs from the gas in the Hill-Lake Facility and possibly the Worsham-Steed Facility. It was represented to the Plaintiffs that NGLs extracted at the gas storage facilities came from native fluids contained in the Storage Facilities, and not pad gas or customer gas being injected from gas pipelines for storage and later withdrawal. Plaintiffs have determined that a significant portion of the NGLs extracted from the Hill-Lake Facility, primarily ethane, actually come from customer gas being injected for storage. Economic losses to the Plaintiffs include the cost of customer gas shrinkage that has not been reflected on the income statement; severance and royalties paid on NGLs coming from that shrinkage; and unattractive revised economics for continued extraction plant operation. For the Hill-Lake NGL extraction plant alone, economic value will be reduced by over $3 million just due to customer gas shrinkage. If the combined impact of shrinkage and unaccounted for compressor fuel use renders the NGL extraction plant uneconomic to operate, the total reduction in economic value will be over $15 million. The Worsham-Steed NGL extraction plant could have similar, or even higher reductions in economic value.

40. In short, Plaintiffs have been deceived into spending over a half-billion dollars for NorTex and materially defrauded and harmed as a direct result of Falcon's and Arcapita's misrepresentations and material omissions of facts regarding NorTex's assets and operations.

FIRST CAUSE OF ACTION

(Fraud/Fraudulent Inducement)

41. Plaintiffs hereby re-allege and incorporate by reference the allegations and facts contained in the foregoing paragraphs.

42. During the course of negotiations between Plaintiffs and Falcon, Falcon and its controlling affiliate, Arcapita, made specific, material representations regarding NorTex's operations and the quantities and value of pad gas contained in the Storage Facilities owned by NorTex. Falcon and Arcapita knew that such information would be essential in valuing NorTex's gas storage assets and operations because pad gas is of fundamental importance to the operation of a natural gas storage facility, and because the information regarding the costs associated with NorTex's operations materially impacts the value of NorTex and its assets.

43. Falcon and Arcapita made the above representations during Plaintiffs' evaluation of and due diligence regarding the purchase of NorTex and in response to specific inquiries from Plaintiffs regarding the quantities of pad gas and consumption of compressor fuel reflected in Falcon's records, intending and knowing that Plaintiffs would rely on the information provided. Plaintiffs did, in fact, reasonably rely on the representations from Falcon and Arcapita regarding pad gas, certain operational costs, and the source of hydrocarbons extracted in the operation of NorTex's NGL business, and were induced to enter into the Purchase Agreement, the First Amendment, and the Escrow Agreement on the basis of these representations.

44. Falcon and Arcapita's representations regarding NorTex's operations and the quantities and value of the pad gas contained in the Storage Facilities were false. Preliminary results indicate a shortfall of approximately 4 bcf of gas at the Hill-Lake Facility alone and likely 6 bcf or more at the two Storage Facilities combined. Further, Plaintiffs have discovered material, undisclosed information regarding fuel consumption and NorTex's NGL operations that significantly affect the value of NorTex and its assets.

45. Both Falcon and Arcapita knew of the gas shortfall and its root causes as early as 2008, well before the execution and negotiation of the Purchase Agreement. Falcon and

Arcapita had a duty to provide accurate information regarding NorTex's operations and the quantities and value of pad gas contained in the Storage Facilities—information that directly correlated to the value attached to those Storage Facilities—and to disclose the fact that the Storage Facilities were experiencing gas shortfalls as early as 2008.

46. Falcon and Arcapita's failure to provide accurate information deceived Plaintiffs into agreeing to contractual terms that they would not have otherwise agreed to had they been provided the true facts. Section 10.7 and Section 4.26 of the Purchase Agreement, and any other purported waivers of rights and claims, are invalid because they are a product of the fraud perpetrated upon Plaintiffs.

47. Thus, Falcon and Arcapita made certain material misrepresentations of existing facts which were false or omissions of material facts which it had a duty to disclose; Falcon and Arcapita either knew the misrepresentations were false or were reckless with respect to their falsity; the misrepresentations or omission were made for the purpose of inducing Plaintiffs to rely upon them; Plaintiffs did justifiably and reasonably rely on the misrepresentations and omissions; and Plaintiffs have been injured as a result of the material misrepresentations or omissions.

48. As a natural and probable result of, or as a proximate result of, the fraudulent conduct of Falcon and Arcapita, Plaintiffs were induced to enter into a transaction and have suffered economic damages. Plaintiffs therefore, pursuant to this fraud claim, seek damages, including attorneys' fees, plus all prejudgment and post-judgment interest allowed by law. Further, and in the alternative, Plaintiffs seek disgorgement from Falcon and Arcapita of any monies obtained from Plaintiffs as a result of the fraud. Further, and in the alternative, Plaintiffs

seek rescission of the Purchase Agreement, the First Amendment, and the Escrow Agreement, and ask this Court to return the parties to their earlier positions as if no Agreement had existed.

SECOND CAUSE OF ACTION

(Breach of Express Warranty)

49. Plaintiffs hereby re-allege and incorporate by reference the facts and allegations contained in the foregoing paragraphs.

50. Falcon made certain express warranties and representations in connection with the Agreement.

51. In Section 4.9 of the Purchase Agreement, Falcon represented that "each balance sheet included in the Financial Statements (including the related notes and schedules) has been prepared in accordance with GAAP and fairly presents in all material respects the consolidated financial position of the Company and its Subsidiaries as of the date of each such balance sheet . . . ." In light of the representations in Falcon's financial statements regarding the value of the pad gas in the Storage Facilities, the operating expenses (or purported lack thereof) related to operation of the Storage Facilities, and the fact that there was a material shortfall of pad gas and customer gas in the Storage Facilities, the representations and warranties in Section 4.9 of the Purchase Agreement proved to be false; Falcon (and through it, Arcapita) breached this representation and warranty and as a result Plaintiffs have suffered actual economic harm.

52. In Section 4.11 of the Purchase Agreement, Falcon represented that neither NorTex nor its subsidiaries have experienced a "Material Adverse Effect . . . or other disposition of any material assets" since March 31, 2009. In light of the quantities and value of the pad gas in issue, and in light of the fact that a significant portion of the shortfall in pad gas and customer gas occurred between March 31, 2009 and March 31, 2010, there clearly has been a "Material Adverse Effect" and/or a "disposition of material assets" after March 31, 2009. Thus, the

representations and warranties in Section 4.11 of the Purchase Agreement proved to be false; Falcon (and through it, Arcapita) breached this representation and warranty; and, as a result, Plaintiffs have suffered actual economic harm.

53. As detailed above, Falcon breached each of the foregoing express warranties and representations contained in the Purchase Agreement. Falcon made an assurance of the existence of a material fact upon which Plaintiffs relied; the assurance was false; and Plaintiffs were injured as a result of the breach of warranty. Section 10.1 of the Purchase Agreement expressly entitles Plaintiffs to indemnification for damages, including attorneys' fees, arising out of or relating to breach or inaccuracy of any representation or warranty made by Falcon. Arcapita absolutely, unconditionally, and irrevocably guaranteed any payment obligations under Section 10 of the Purchase Agreement, including Section 10.1, pursuant to the April 1, 2010 Guaranty Agreement between Arcapita and Plaintiffs.

54. As a natural and probable result of, or as a proximate result of, the breach of warranty by Falcon, Plaintiffs have suffered economic damages. Plaintiffs therefore, pursuant to this breach of express warranty claim, seek damages, including attorneys' fees, plus all prejudgment and post-judgment interest allowed by law.

THIRD CAUSE OF ACTION

(Breach of Contract)

55. Plaintiffs hereby re-allege and incorporate by reference the facts and allegations contained in the foregoing paragraphs.

56. Pursuant to the Purchase Agreement and the First Amendment, Falcon agreed to deliver assets that contained specific quantities of pad gas and exhibited specific operational characteristics. Plaintiffs, in exchange, agreed to pay the purchase price. Although Plaintiffs fulfilled their duties under the Purchase Agreement and Second Amendment, Falcon materially

breached the contract because, in actuality, the assets that it sold contained less pad gas than it represented and was contemplated by the agreement of the parties. Further, the fuel consumption of the Storage Facilities' compressors and the resulting depletion of stored gas in the Storage Facilities is far greater than Plaintiffs bargained and paid for based on Falcon's and Arcapita's misrepresentations. Moreover, the source of hydrocarbons extracted during the operation of the Storage Facilities' NGL extraction facilities was misrepresented. The cost of this stored gas "shrinkage," combined with NGL extraction plant fuel use is so significant as to potentially render NGL extraction plant operations economically non-viable.

57. Thus, a valid contract existed between Plaintiffs and Falcon; Plaintiffs performed as required by the terms of the contract; Falcon materially breached the contract; and Plaintiffs have incurred damages as a result of Falcon's breach.

58. As a natural and probable result of, or as a proximate result of, the breach of contract by Falcon, Plaintiffs have suffered economic damages. Plaintiffs therefore, pursuant to this breach of contract claim, seek damages, including attorneys' fees, plus all prejudgment and post-judgment interest allowed by law.

FOURTH CAUSE OF ACTION

(Violations of § 10 and Rule 10b-5 of the Securities Exchange Act of 1934)

59. Plaintiffs hereby re-allege and incorporate by reference the facts and allegations contained in the foregoing paragraphs.

60. The ownership interests and units of NorTex and/or its subsidiaries that Plaintiffs purchased under the Purchase Agreement were "securities" within the meaning of the Act. In connection with the sale of all outstanding ownership interests and units of NorTex to Plaintiffs, Falcon and Arcapita, sellers of those securities, made several material misstatements or omissions to Plaintiffs.

61. For example, Falcon and Arcapita provided financial statements and related materials for fiscal year 2007 through 2009 containing inventory values and historical cost assumptions for pad gas in the Storage Facilities that, taken together, represented there was a combined 14 bcf of pad gas in the two Storage Facilities as of March 31, 2009. Those representations were corroborated by a "management presentation" and supposed "pressure test data" that Falcon and Arcapita provided Plaintiffs in February 2010, in the process of due diligence for the purchase and sale of NorTex. Those documents also represented that, based on actual pressure testing and engineering analysis, there was 14 bcf of pad gas in the two Storage Facilities.

62. In addition, in February 2010, in connection with due diligence for the sale of NorTex, Falcon and Arcapita provided Plaintiffs with financial statements for Falcon's and NorTex's fiscal years from 2007 through 2009. Those financial statements, in conjunction with other data Falcon and Arcapita provided, indicated that there were no operating costs associated with the compressor fuel utilized in the operation of the Hill-Lake and Worsham-Steed Facilities. In support of their conclusions regarding the purported lack of operating expenses, Falcon and Arcapita represented that the fuel consumption from operations was offset by a phenomenon they described as "Btu enhancement"; essentially, they represented that native hydrocarbons in the Storage Facilities were enhancing the heating value of customer gas sufficient to offset the fuel consumed in operating the Storage Facilities.

63. Further, Falcon and Arcapita represented that the extraction of NGLs from the gas within the Storage Facilities had no affect on the quantities of gas present in the Storage Facilities.

64. In the financial statements and purported pressure testing data, Falcon and Arcapita represented that they performed regular pressure tests and engineering measurements of the volume of pad gas in the Storage Facilities.

65. The financial statements, management presentations, and purported pressure test data were prepared by Falcon's representatives acting within the course and scope of their employment by Falcon, and, on information and belief, by representatives of Arcapita acting within the course and scope of their employment by Arcapita.

66. Further, Falcon represented in the Purchase Agreement that: (1) "each balance sheet included in the Financial Statements (including the related notes and schedules) has been prepared in accordance with GAAP and fairly presents in all material respects the consolidated financial position of the Company and its Subsidiaries as of the date of each such balance sheet"; and (2) that neither NorTex nor its subsidiaries have experienced a "Material Adverse Effect . . . or other disposition of any material assets" since March 31, 2009. Considering the fact that the Storage Facilities are missing more than 6 *billion* cubic feet of gas, the falsity of these representations is evident, as is the inaccuracy of the representations contained in the financial statements and related documents indicating that there was a combined 14 bcf of pad gas in the two Storage Facilities as of March 31, 2009.

67. Falcon and Arcapita made material misstatements and omissions in the context of Plaintiffs' due diligence regarding the purchase of NorTex, intending that Plaintiffs rely upon the information provided. In addition to the misstatements and omissions regarding the quantities and values of pad gas, Plaintiffs have learned that, during its operation of NorTex and the Storage Facilities, Falcon failed to properly account for and record fuel usage in compression of gas in the Storage Facilities, and that consumption of fuel in the compression operations actually

drew upon and depleted the quantities of gas within the Storage Facilities to a degree that was not offset by Falcon's represented "Btu enhancement" theory.

68. Further, Plaintiffs have discovered that the supposed "pressure test" data Falcon and Arcapita provided in due diligence was not actual pressure testing and engineering analysis as represented. Rather, the documents reflected mere "in-and-out" calculations derived from old, inaccurate baseline assumptions regarding "starting quantities" of pad gas in the two Storage Facilities.

69. Plaintiffs have also discovered that, contrary to assertions in the financial statements and related data, Falcon did not properly monitor, record, or analyze the volume or composition of gas flows in and out of the Storage Facilities and related systems.

70. Plaintiffs have also learned that Falcon incorrectly represented gas flows, and failed to make proper or adequate calculations or records of shrinkage resulting from the extraction of NGLs from the gas within the Storage Facilities, resulting in a material misstatement or omission.

71. Plaintiffs have also learned that, contrary to Falcon's and Arcapita's representations in the 2007, 2008, and 2009 financial statements and elsewhere, Falcon failed to conduct regular and consistent shut-in pressure testing and related volumetric calculations and measurements of the quantities of gas within the Storage Facilities, and failed to conduct thorough and proper analyses of the results of those tests to ensure NorTex's financial records were accurate. These failures occurred during a period when deliverability problems indicated a critical need to perform these tests, calculations, and measurements and to properly analyze and report the results.

72. Plaintiffs have discovered that both Falcon and Arcapita knew of these problems, and therefore the falsity of the information, at the time they were making representations and warranties to Plaintiffs regarding NorTex's financial condition, the value and quantity of gas in the Storage Facilities, and the absence of materially adverse changes or events in the company's operations and assets.

73. These material misstatements and omissions have caused Plaintiffs economic loss. As a result of Falcon's and Arcapita's misrepresentations, Plaintiffs (through NorTex) have been forced to mitigate further losses by implementing a program to strategically and opportunistically purchase approximately 4 bcf of gas to make up for the shortfall in pad gas and customer gas at the Hill-Lake Facility and ensure ongoing compliance with customer contracts. At current market prices, the loss to Plaintiffs as a result of having to cover these gas shortfalls is approximately $20 million, and Plaintiffs believe in reasonable probability the future costs to cover such shortfalls at the combined Storage Facilities will exceed an additional $10 million. Further, as a result of Falcon's and Arcapita's misrepresentations regarding the source and cost of fuel consumed in the compression of gas in the Storage Facilities, Plaintiffs will incur additional, unbargained-for annual operating expenses that were completely omitted from the financial statements Falcon and Arcapita provided to Plaintiffs. The undisclosed operating expenses associated with fuel consumed in the compression operations of the combined Storage Facilities have an economic impact of over $40 million on the value of the assets Plaintiffs purchased. Likewise, the undisclosed practice of extracting NGLs from stored gas rather than from native hydrocarbons present in the Storage Facilities has a material, adverse economic impact on the value of NorTex's NGL extraction business. Had the truth been revealed regarding the quantities and values of pad gas contained in the Storage Facilities, the operating costs associated with fuel

compression, and the impact of shrinkage on NorTex's NGL extraction operations, Plaintiffs would not have agreed to the purchase price ultimately reflected in the Purchase Agreement.

74. Thus, Falcon and Arcapita, sellers of securities, made material misstatements or omissions in connection with the sale of securities to Plaintiffs; Falcon and Arcapita knew the misstatements or omissions were false; Plaintiffs relied on the material misstatements or omissions; Plaintiffs suffered economic loss because of the material misstatements or omissions; and there is a causal connection between the material misstatements or omissions and Plaintiffs' economic loss.

75. As a natural and probable result of, or as a proximate result of, violations of § 10 of the Act and Rule 10b-5, Plaintiffs have suffered economic damages. Plaintiffs therefore, pursuant to this claim under § 10 of the Act and Rule 10b-5, seek damages, including attorneys' fees, plus all prejudgment and post-judgment interest allowed by law.

FIFTH CAUSE OF ACTION

(Request for Injunctive Relief)

76. Plaintiffs hereby re-allege and incorporate by reference the facts and allegations contained in the foregoing paragraphs.

77. On April 1, 2010, Plaintiffs and Defendants Falcon and HSBC entered into an Escrow Agreement in connection with the purchase by Plaintiffs of all of the issued and outstanding interests in NorTex. Pursuant to the terms of the Escrow Agreement, Plaintiffs deposited $70 million with HSBC; HSBC, in turn, agreed to deposit the funds in an account (the "Escrow Account").

78. Plaintiffs seek the assistance of the equitable powers of this Court to assure that Defendants do not wrongfully collect an additional $70 million as a reward for their fraudulent and wrongful conduct and transfer those fraudulently obtained funds beyond the reach of this

Court and Plaintiffs. Falcon and Arcapita contend that they are entitled to the immediate release of the Escrow Account, and have stated their intent to pursue such release. Falcon and Arcapita claim that they are entitled to the $70 million currently held in the Escrow Account in connection with the fraudulent sale of NorTex to Plaintiffs, a sale in which Falcon and Arcapita misrepresented the value of the Storage Facilities owned by NorTex in order to induce payment of the purchase price. Plaintiffs have already paid over $500 million in exchange for assets whose value Falcon and Arcapita materially misrepresented and that are worth substantially less than the amount Plaintiffs were defrauded into paying. This Court must prevent the Falcon and Arcapita Defendants from collecting additional funds as an additional windfall for the fraud perpetrated upon Plaintiffs.

79. The release of the Escrow Account threatens immediate and irreparable harm to Plaintiffs that cannot be remedied at law. Thus, Plaintiffs seek a permanent injunction restraining Falcon and HSBC from disbursing any funds from the Escrow Account, except pursuant to the Expense Notices referenced in Section 3.7 of the Purchase Agreement. If this Court does not enter a permanent injunction as specified above, Plaintiffs will be irreparably damaged because the funds in the Escrow Account will be immediately released to Arcapita, a Bahrain bank, and removed from the jurisdiction of this Court. Thus, Falcon and Arcapita will be effectively rewarded for their fraudulent and wrongful conduct and Plaintiffs will have no recourse in connection with same.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs demand that judgment be entered against Defendants for:

(a) actual damages;

(b) a permanent injunction;

(c) in the alternative, disgorgement of any monies obtained from Plaintiffs as a result of fraud;

(d) in the alternative, rescission of the Purchase Agreement;

(e) reasonable and necessary attorneys' fees;

(f) court costs; and

(g) such other and further relief to which Plaintiffs are justly entitled.

Dated: New York, New York
August 2, 2010

BRACEWELL & GIULIANI LLP

By: _____

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EXHIBIT B-1

2 of 2 DOCUMENTS

TIDE NATURAL GAS STORAGE I, L.P. and TIDE NATURAL GAS STORAGE II, L.P., Plaintiffs/Counterclaim Defendants, -against- FALCON GAS STORAGE COMPANY, INC.;, Defendant/Counterclaim and Crossclaim Plaintiff, ARCAPITA BANK B.S.C.; and ARCAPITA, INC.; Defendants, and HSBC BANK USA, NATIONAL ASSOCIATION, Defendant/Crossclaim Defendant.

10 Civ. 5821

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2011 U.S. Dist. LEXIS 111532

September 28, 2011, Decided
September 29, 2011, Filed

SUBSEQUENT HISTORY: Reconsideration denied by *Tide Natural Gas Storage v. Falcon Gas Storage Co., 2012 U.S. Dist. LEXIS 63540 (S.D.N.Y., May 4, 2012)*

COUNSEL: [*1] For For Tide Natural Gas Storage I, LP, Plaintiff: Douglas A. Daniels, Linda R. Rovira, Stephen B. Crain, PRO HAC VICE, Bracewell & Giuliani, L.L.P., Houston, TX; Jeffrey Ian Wasserman, Marvin Robert Lange, Bracewell & Giuliani, L.L.P., New York, NY.

For Tide Natural Gas Storage II, LP, Plaintiff: Linda R. Rovira, PRO HAC VICE, Douglas A. Daniels, Bracewell & Giuliani, L.L.P., Houston, TX; Jeffrey Ian Wasserman, Marvin Robert Lange, Bracewell & Giuliani, L.L.P., New York, NY.

For Falcon Gas Storage Company, Inc., Arcapita Bank B.S.C., Arcapita, Inc., Defendants, Cross Claimants, Counter Claimants: C Brannon Robertson, PRO HAC VICE, King & Spalding LLP (TX), Houston, TX; Richard T. Marooney, Jr, King & Spalding LLP (NYC), New York, NY.

For HSBC Bank USA, National Association, Defendant, Cross Defendant: Pieter H.B. Van Tol, III, LEAD ATTORNEY, Hogan Lovells US LLP (nyc), New York, NY.

For Tide Natural Gas Storage I, LP, Tide Natural Gas Storage II, LP, Counter Defendants: Douglas A. Daniels, PRO HAC VICE, Jeffrey Ian Wasserman, Marvin Robert Lange, Bracewell & Giuliani, L.L.P., Houston, TX.

JUDGES: KIMBA M. WOOD, United States District Judge.

OPINION BY: KIMBA M. WOOD

OPINION

Opinion & Order

KIMBA M. WOOD, U.S.D.J.:

Plaintiffs/Counterclaim [*2] Defendants Tide Natural Gas Storage I, L.P. and Tide Natural Gas Storage II, L.P. (collectively, "Tide") bring this action against Defendant/Counterclaim/Crossclaim Plaintiff Falcon Gas Storage Company, Inc. ("Falcon") and Defendants Arcapita Bank, B.S.C.(c) and Arcapita, Inc. (together, "Arcapita"). Tide's claims--which sound in common law fraud, securities fraud, breach of warranty, and breach of contract--arise out of Tide's purchase of Falcon's interest in the NorTex Gas Storage Company, LLC ("NorTex").

Four motions are now before the Court. First, Falcon and Arcapita (collectively "Defendants") move for judgment on the pleadings dismissing Tide's Complaint, pursuant to *Federal Rule of Civil Procedure Rule 12(c).*

The remaining three motions relate to funds that are currently being held in escrow pursuant to the purchase agreements for NorTex. Tide, in the Fifth Cause of Ac-

tion of its Complaint, seeks a permanent injunction restraining the disbursement of the escrowed funds. Falcon and Arcapita move for partial summary judgment dismissing Tide's claim for a permanent injunction. Falcon has also filed a Counterclaim and Crossclaim, the First Cause of Action of which seeks a judgment [*3] declaring that Defendant HSBC Bank USA, National Association ("HSBC") must disburse the escrowed funds to Falcon. Falcon moves for partial summary judgment on this request for declaratory relief. Finally, Tide cross-moves for an order of attachment against the debts and property of Falcon and Arcapita, in the event that the escrowed funds are released.

For the reasons stated below, the Court (a) DENIES Falcon's and Arcapita's motion for judgment on the pleadings; (b) DENIES Falcon's and Arcapita's motion for partial summary judgment dismissing the Fifth Cause of Action of Tide's Complaint; (c) DENIES Falcon's motion for partial summary judgment on the First Cause of Action of its Counterclaim and Crossclaim; and (d) DENIES Tide's cross-motion for an order of attachment.

BACKGROUND

I. The Underlying Dispute[1]

> 1 Unless otherwise noted, the following facts are undisputed and are taken from the parties' *Local Rule 56.1* statements, affidavits, and other submissions. The Court construes all evidence in a light most favorable to the non-moving party, and draws all inferences in the non-moving party's favor. See, e.g., *Sledge v. Kooi, 564 F.3d 105, 108 (2d Cir. 2009).*

A. Tide's Purchase of NorTex

On [*4] March 15, 2010, Tide and Falcon entered into a Purchase Agreement in which Tide agreed to purchase Falcon's 100 percent interest in NorTex, an operator of two natural gas storage reservoirs in Texas for $515 million. (Compl. ¶¶ 12-13.) On March 29, 2010--two days before the NorTex acquisition was scheduled to close--a group of Falcon's minority shareholders filed lawsuits in Texas courts (collectively, the "Hopper Litigation") in an effort to stop the deal from closing. (Plaintiff's Response to Defendants' Statement of Undisputed and Material Facts Pursuant to *Rule 56.1* ("Pl.'s 56.1 Resp.") ¶ 15.) The Hopper Litigation plaintiffs also filed notices of *lis pendens* in Jack and Eastland Counties, in which the NorTex facilities (the "Facilities") are located. (Id. ¶ 18.)

In order to ensure that the NorTex deal would close despite the Hopper Litigation, the parties to the instant action entered into an amended Purchase Agreement ("Amended Agreement") and an Escrow Agreement (collectively, the "Agreements"). The parties designed the Escrow Agreement to protect Tide from any expenses or liability that might be incurred in connection with the Hopper Litigation. (Id. ¶¶ 24, 36.) The Escrow Agreement [*5] provided that $70 million of the purchase price (the "Escrowed Amount") would be placed into escrow with HSBC. (Id.)

Disbursement of the Escrowed Amount is governed by Section 3.7(a) of the Amended Agreement. That provision states that Tide and Falcon "shall deliver to [HSBC] joint instructions to disburse the balance of the Escrowed Amount" upon the occurrence of either one of the following "Escrow Breakage Triggers":

> (i) a final non-appealable order of each court of competent jurisdiction with respect to the Hopper Claim or
>
> (ii) (A) an agreed dismissal with prejudice of the Hopper Claim . . . ,
>
> (B) a complete release by all of the Participants under the Hopper Claim . . . , and
>
> (C) the final non-appealable release or expungement of the Lis Pendens . . . .

(Anderson Decl., Ex. B § 3.7(a).) With the foregoing agreements in place, and with the Escrowed Amount deposited at HSBC, the NorTex transaction closed on April 1, 2010. (Pl.'s 56.1 Resp. ¶ 35.)

On July 27, 2010, Falcon and the Hopper Litigation plaintiffs entered into a written settlement agreement. (Id. ¶ 39.) The actions were dismissed with prejudice when the Hopper Litigation plaintiffs filed nonsuits in each of the courts in which [*6] their actions were pending, and the court in Eastland County entered orders expunging the notices of *lis pendens*. (Id. ¶¶ 40, 42.)

On August 2, 2010, Tide filed this lawsuit against Falcon and Arcapita. (Dkt. No. 1.)

II. Procedural History

Tide's Complaint contains five claims for relief based on misstatements allegedly made by Falcon and Arcapita in connection with the sale of NorTex. (Compl. ¶¶ 10-11.) Tide states that Falcon made specific representations regarding the quantities and value of "pad gas"[2] contained in the storage facilities, the operating costs associated with the consumption of fuel in the facilities' operation, and the source of hydrocarbons extracted during the operation of NorTex's natural gas liquid extraction plants. (Id. at ¶ 14.) Tide states that, after

closing on the purchase of NorTex, it conducted engineering analyses that revealed a shortfall of billions of cubic feet of NorTex's pad gas. (Id. at ¶ 25.) Tide says that it also discovered that Falcon had neither recorded nor accounted for the fuel used to compress the gas for storage and that the consumption of fuel in that compression process had further depleted the quantities of gas within the facilities. [*7] (Id. at ¶ 27.) Finally, Tide states that it also learned that Falcon did not calculate or account for "shrinkage" in gas quantities resulting from the extraction of natural gas liquids from the storage facilities. (Id. at ¶ 30.) Tide estimates the combined economic impact of the gas shortfalls and omitted operating expenses at more than $70 million. (Id. at ¶¶ 37-39.)

2 Pad gas is the base amount of gas necessary to maintain storage field pressure and deliverability of the gas customers have stored in the facility.

Tide brings five claims for relief based on these misstatements. First, Tide alleges that Falcon and Arcapita fraudulently misrepresented material facts about the value of NorTex on which Tide relied in its decision to purchase the facility. Second, Tide alleges that Falcon breached express warranties that Falcon made in the Amended Agreement for NorTex. Third, Tide brings a breach of contract claim, on the ground that Falcon failed to deliver all of the assets represented in the Amended Agreement. Fourth, Tide claims that Falcon's misrepresentations violated *section 10* and *Rule 10b-5* of the Securities Exchange Act of 1934. Finally, Tide seeks a permanent injunction restraining [*8] HSBC from disbursing any funds from the Escrow Account, except pursuant to Section 3.7 of the Purchase Agreement.

Defendants Falcon and Arcapita answered Tide's Complaint, and Defendant Falcon filed a Counterclaim and Crossclaim (1) seeking a declaratory judgment ordering the disbursement of the funds in the Escrow Account and (2) alleging breach of contract by Tide. (See Defs.' Ans. & Countercl., Dkt. No. 6.) Tide asserted various affirmative defenses to Falcon's counterclaims, including that: (1) "Falcon's claims fail because [Falcon] is not entitled to enforce the provisions of agreements procured by fraud"; (2) "Falcon's claims fail because the fraud in the underlying transaction supersedes the obligations set forth in the Escrow and Purchase Agreements"; and (3) "Falcon's claims are barred because Tide is entitled to rescission of the Purchase Agreement." (See Pl.'s Ans. to Defs.' Countercl., Dkt. No. 29, ¶¶ 46, 48, 52.)

DISCUSSION

I. Defendants' Motion for Judgment on the Pleadings

A. Overview

Defendants move, pursuant to *Rule 12(c)*, for judgment on the pleadings dismissing Claims I through IV of Tide's Complaint. Defendants offer four main grounds on which they argue that the claims [*9] should be dismissed. First, Defendants note that, in the Amended Agreement, Tide expressly disclaims reliance on any representations or warranties outside of Section IV of the Amended Agreement. Defendants argue that Claims I through IV of the Complaint are not actionable because they are based on alleged misrepresentations that were not included in Article IV. Second, Defendants note that because the Amended Agreement limits Tide's remedies to actions for breach of the indemnity provisions, Tide's common law fraud claim should be dismissed. Third, Defendants contend that Tide failed to plead its federal securities fraud claims with the particularity required under applicable law. Finally, Defendants argue that Tide failed to support its common law fraud and securities fraud claims with adequate allegations of scienter.

B. *Rule 12(c)* Standard

In deciding a *Rule 12(c)* motion, courts "apply the same standard as that applicable to a motion under *Rule 12(b)(6)*." *Hayden v. Paterson, 594 F.3d 150, 160 (2d Cir. 2010)*. In order to survive a motion for judgment on the pleadings, a plaintiff must have pleaded sufficient factual allegations "to [*10] state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*; *Desiano v. Warner-Lambert & Co., 467 F.3d 85, 89 (2d Cir. 2006)*. A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556U.S.662 , 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*. The Court must accept as true all well-pleaded factual allegations in the complaint, and "draw[ ] all inferences in the plaintiff's favor." *Allaire Corp. v. Okumus, 433 F.3d 248, 249-50 (2d Cir. 2006)* (quotations omitted).

In considering a motion to dismiss, a court may consider "any written instrument attached to [the complaint] as an exhibit or any statements or documents incorporated in it by reference." *Cortec Indus., Inc. v. Sum Holding L.P., 949 F.2d 42, 47 (2d Cir. 1991)*. In addition, a court may consider a particular document, which is integral to the claims at issue, of which the plaintiff has notice. *Yak v. Bank Brussels Lambert, 252 F.3d 127, 130-31 (2d Cir. 2001)*.

C. Discussion

1. Sections 4.26 and 5.5 Do Not Bar The Claims Asserted Here

Defendants first argue [*11] that Claims I through IV of Tide's Complaint must be dismissed because, in Sections 4.26 and 5.5 of the Amended Agreement, Tide disclaims reliance on any representations except those set forth in Article IV of the Amended Agreement. (Defs.' Mem. of Law in Support of Their Mot. for Judgment on the Pleadings ("Defs.' Mem.") at 10-14.) Section 4.26 of the Amended Agreement ("Section 4.26"), entitled "Disclaimer of Additional Representations and Warranties," provides, in pertinent part, that Falcon

> shall not be deemed to have made to [Tide] any representation or warranty other than as expressly made in this Article IV or the schedules accompanying Article IV. Except as expressly set forth in this Article IV, [Falcon] disclaims all liability and responsibility for any representation, warranty, projection, forecast, statement, or information made, communicated or furnished . . . to [Tide] . . . .

(Declaration of Richard T. Marooney dated October 27, 2010 ("Marooney Decl.") Ex. 2 § 4.26 (emphasis added) (capitalization omitted).)[3] Section 5.5 of the Amended Agreement ("Section 5.5"), entitled "Reliance," provides that Tide "has not relied on, nor is it relying on any statement, representation [*12] or warranty, either express or implied, concerning [NorTex], . . . other than those expressly made in Article IV or the Schedules accompanying Article IV." (Id. § 5.5 (emphasis added).)

> 3 The Court considers the Amended Agreement and the Financial Statements referenced in Article IV of the Amended Agreement because they are integral to the Complaint and incorporated in it by reference, and they were documents that Tide had in its possession and upon which it relied in bringing suit. *Cortec Indus., 949 F.2d at 47*.

Tide, however, specifically alleges in its Complaint that it relied on two representations made by Defendants in Article IV. Tide states that it relied on representations in Section 4.9 of the Amended Agreement ("Section 4.9") regarding the accuracy of the Financial Statements Falcon provided in order to ascertain the value of the pad gas in the storage reservoirs and the cost of fuel used to operate the facilities. (Compl. ¶¶ 15, 20-21, 51-52.) Tide also states that it relied on representations in Section 4.11 of the Amended Agreement ("Section 4.11") that there had not been any disposition of material NorTex assets between March 31, 2009 and the closing. In its complaint, Tide [*13] alleges that both of those Article IV representations were false. (Compl. ¶¶ 15, 20-21, 51-52.)

a. Alleged Misrepresentation in Section 4.9

In pertinent part, Section 4.9 states:

> [e]ach balance sheet included in the Financial Statements (including the related notes and schedules) has been prepared in accordance with GAAP and fairly presents in all material respects the consolidated financial position of [NorTex] and its Subsidiaries as of the date of each such balance sheet. . . .

(Marooney Decl. Ex. 2 § 4.9 (emphasis added).)[4]

> 4 "Financial Statements" is defined to include: (1) "the audited consolidated balance sheet of [NorTex] and its Subsidiaries as of March 31, 2009, the audited consolidated statements of income, members' equity and cash flows of [NorTex] and its Subsidiaries for the twelve (12)-month period then ended"; and (2) "the unaudited consolidated balance sheet of [NorTex] and its Subsidiaries as of December 31, 2009, the unaudited consolidated statements of income, members' equity and cash flows of [NorTex] and its Subsidiaries for the nine (9)-month period then ended." (Id. § 1.1.)

Tide alleges that Section 4.9 contains misrepresentations because, contrary to its terms, the [*14] Financial Statements (and related notes and schedules) do not "fairly present[ ] in all material respects the consolidated financial position of [NorTex] and its Subsidiaries . . . ." (Id. § 4.9.) Tide contends that at least two specific components of the Financial Statements render that representation false.

First, "Note A" to the Financial Statements as of March 31, 2009 states that NorTex "includes recoverable pad gas (cushion gas) as a component of [the] property and equipment [table in the financial statement] at historical cost." (Declaration of Sean Dolan dated September 9, 2010 ("Dolan Decl.") Ex. A at 7; Marooney Decl. Ex. 3 at 7.) Tide states that, immediately after closing on the purchase of NorTex, it discovered a shortfall in the quantities of pad and customer gas and that the Financial Statements therefore did not fairly present in all material respects NorTex's consolidated financial position. (Compl. ¶ 25.)

Second, the Financial Statements include "Facility operating expenses" as a component of "Operating Expenses." (Dolan Decl. Ex. A at 4; Marooney Decl. Ex. 3 at 4.) Tide states that Falcon failed to properly account for and record the fuel used to compress gas in the [*15] storage facilities and also omitted material information from the operating expenses listed on the balance sheet. (Compl. ¶ 27.)

Tide's allegations regarding misrepresentations in Section 4.9 are sufficient to state a plausible claim to relief that is not precluded by the terms of Sections 4.26 or 5.5 of the Amended Agreement.

b. Alleged Misrepresentation in Section 4.11

In pertinent part, Section 4.11 states that neither NorTex nor its subsidiaries experienced a "Material Adverse Effect,"[5] or a "disposition of any material assets" since March 31, 2009. (Dolan Decl. Ex. A § 4.11; Marooney Decl. Ex. 2 § 4.11)

> 5 "Material Adverse Effect" is defined as "any state of facts" that "is, or would [be] reasonably likely to be . . . materially adverse to the condition (financial or otherwise), business, results of operations, properties, assets or liabilities of [NorTex] and its Subsidiaries taken as a whole . . ." (Amended Agreement § 1.1.)

Tide contends that, contrary to the representation made in Section 4.11, NorTex experienced a change in material assets that adversely affected its financial condition during the relevant time period. (Compl. ¶¶ 32-36.) Defendants reply that Tide has failed [*16] to allege "any facts showing what the alleged 'Material Adverse Effect' actually is or how [Tide's] allegations fit within the definition of that term . . . ." (Defs.' Mem. at 13.)

Tide alleges particular facts giving rise to its claim. First, Tide alleges that, in early 2009, NorTex management communicated to Arcapita that the storage facilities were experiencing deliverability issues because of gas shortfalls. (Compl. ¶ 33.) Second, Tide alleges that, in October 2009, Falcon and Arcapita received an engineering report stating that either the gas inventory levels contained in the regulatory filings were inaccurate or that one of the storage facilities was losing gas. (Compl. ¶ 34.) Third, Tide alleges that, in late 2009 and early 2010, Falcon became aware that NorTex encountered further deliverability problems because of the shortfalls in pad gas. (Compl. ¶ 35.)

Defendants further contend that there exists no "benchmark" by which to establish whether the alleged shortfall in pad gas constitutes a "Material Adverse Effect," because the Purchase Agreement contains no representation regarding the amount or value of pad gas present in the Facilities. As previously discussed, the Amended [*17] Agreement defines "Material Adverse Effect" to include "any state of facts . . . that . . . is, or would [be] reasonably likely to be . . . adverse to the condition (financial or otherwise) . . . of [NorTex] . . . ." (Marooney Decl. Ex. 2 § 1.1 (emphasis added).) The facts alleged by Tide would constitute a state of facts likely to adversely affect the condition of NorTex. The Amended Agreement nowhere requires the satisfaction of any additional benchmarks.

Tide's allegations regarding misrepresentations in Section 4.11 are sufficient to state a plausible claim to relief that is not precluded by the terms of Sections 4.26 or 5.5 of the Amended Agreement.

2. Tide's Common Law Fraud Claim Is Not Barred By Section 10.7

Defendants contend that Section 10.7 of the Amended Agreement ("Section 10.7") bars Tide's common law fraud claim. Section 10.7, entitled "Exclusive Remedy," states that the contractual indemnification provisions of the Amended Agreement provide the exclusive remedy as to all claims relating to the sale. (Marooney Decl. Ex. 2 § 10.7.) Pursuant to Section 10.7, the parties purported to waive (1) "any and all other rights, claims and causes of action," and (2) "any and all tort [*18] claims and causes of action that may . . . relate to this Agreement (including any tort claim or cause of action . . . related to any representation or warranty made in or in connection with this Agreement or as an inducement to enter this Agreement.)" (Id.)

New York courts enforce contractual waivers and exculpatory provisions such as those included in Section 10.7 of the Amended Agreement. See, e.g., *Metro. Life Ins. Co. v. Noble Lowndes Int'l, Inc., 84 N.Y.2d 430, 436, 643 N.E.2d 504, 618 N.Y.S.2d 882 (1994)*; *Kalisch-Jarcho, Inc. v. New York, 58 N.Y.2d 377, 384, 448 N.E.2d 413, 461 N.Y.S.2d 746 (1983)*; *Baidu, Inc. v. Register.com, Inc., 760 F. Supp. 2d 312, 317-18 (S.D.N.Y. 2010)*.

Nevertheless, "an exculpatory agreement, no matter how flat and unqualified its terms, will not exonerate a party from liability" for "willful or grossly negligent acts." *Kalisch-Jarcho, 58 N.Y.2d at 384-85*. See also *Turkish v. Kasenetz, 27 F.3d 23, 27-28 (2d Cir. 1994)* ("It is well settled that parties cannot use contractual limitation of liability clauses to shield themselves from liability for their own fraudulent conduct."); *Citibank, N.A. v. Itochu Int'l, Inc., No. 01 Civ. 6007, 2003 WL 1797847, at *2 (S.D.N.Y. Apr. 4, 2003)* (same). The New York Court of Appeals has [*19] emphasized that

> an exculpatory clause is unenforceable when, in contravention of acceptable notions of morality, the misconduct for which it would grant immunity smacks of intentional wrongdoing. This can be explicit, as when it is fraudulent, malicious or prompted by the sinister intention of one acting in bad faith. Or, when, as in gross negligence, it betokens a reckless indifference to the rights of others, it may be implicit.

Kalisch-Jarcho, Inc., 58 N.Y.2d at 385. Whether the challenged conduct rises to the level of "intentional wrongdoing" is a question of fact. See *David Gutter Furs v. Jewelers Prot. Servs., Ltd., 79 N.Y.2d 1027, 1028-29, 594 N.E.2d 924, 584 N.Y.S.2d 430 (1992)*; *Sommer v. Fed. Signal Corp., 79 N.Y.2d 540, 554, 593 N.E.2d 1365, 583 N.Y.S.2d 957 (1992)*; *Kalisch-Jarcho, Inc., 58 N.Y.2d at 384-385*.

Because Tide's Complaint is replete with allegations that Defendants engaged in intentional wrongdoing, the Court cannot dismiss Tide's common law fraud claim pursuant to Section 10.7.[6]

> 6 In a footnote, Defendants argue that Tide's common law fraud claim should also be dismissed as duplicative of its contract claim. (See Defs.' Mem. at 15 n.6.) As the Second Circuit has noted, a fraud claim may proceed in tandem with a contract claim where [*20] a defendant-seller allegedly misrepresented facts as to the present condition of its property, even though these facts were warranted in the parties' contract. *Merrill Lynch & Co. Inc. v. Allegheny Energy, Inc., 500 F.3d 171, 184 (2d Cir. 2007)* (citing *Jo Ann Homes at Bellmore, Inc. v. Dworetz, 25 N.Y.2d 112, 119-20, 250 N.E.2d 214, 302 N.Y.S.2d 799 (1969))*. That is, "New York distinguishes between a promissory statement of what will be done in the future that gives rise only to a breach of contract cause of action and a misrepresentation of a present fact that gives rise to a separate cause of action for fraudulent inducement." *Allegheny Energy, 500 F.3d at 184*.

3. Tide's Fraud Claims Are Sufficiently Pleaded

Falcon and Arcapita argue that Tide's common law fraud claim (First Cause of Action) and its federal securities fraud claim (Fourth Cause of Action) fall short of the pleading standards required by *Rule 9(b)* and the Private Securities Litigation Reform Act of 1995 ("PSLRA") *15 U.S.C. § 78u-4(b)*. (Defs.' Mem. at 16.)

a. Elements of the Claims

To state a claim for a violation of *Section 10(b)* of the Securities Exchange Act of 1934 and *Rule 10b-5*, "a plaintiff must plead that the defendant, in connection with the purchase [*21] or sale of securities, made a materially false statement or omitted a material fact, with scienter, and that the plaintiff's reliance on the defendant's action caused injury to the plaintiff." *Ganino v. Citizens Utils. Co., 228 F.3d 154, 161 (2d Cir. 2000)*.

The elements of common law fraud in New York are "essentially the same" as those that must be alleged to state a claim under *Section 10(b)* and *Rule 10b-5*. *In re Merrill Lynch Auction Rate Sec. Litig., No. 09 MD 2030, 2011 U.S. Dist. LEXIS 35363, 2011 WL 1330847, at *11 (S.D.N.Y. Mar. 29, 2011)* (quotations omitted) (noting that a plaintiff asserting a common law fraud claim must show: (1) a material representation or omission of fact; (2) made with knowledge of its falsity; (3) with scienter or an intent to defraud; (4) upon which the plaintiff reasonably relied; and (5) that such reliance caused damage to the plaintiff).

b. Heightened Pleading Standards

Rule 9(b) of the Federal Rules of Civil Procedure sets forth heightened pleading requirements for fraud claims: "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged [*22] generally." *Fed. R. Civ. P. 9(b)*; see also *In re Pfizer Inc. Sec. Litig., 584 F. Supp. 2d 621, 632-33 (S.D.N.Y. 2008)*. This standard requires plaintiffs to "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Rombach v. Chang, 355 F.3d 164, 170 (2d Cir. 2004)* (citations omitted).

Plaintiffs alleging violations of the federal securities laws must, in addition to the requirements of *Rule 9(b)*, meet the heightened pleading standards set forth in the PSLRA. In pertinent part, the PSLRA requires such plaintiffs to "state with particularity both the facts constituting the alleged [securities fraud] violation" and the other elements of the 10(b) cause of action. *Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 313, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007)*. This standard requires plaintiffs to (1) specify each statement alleged to have been misleading and the reason or reasons why the statement is misleading, and (2) state with particularity facts giving rise to a "strong inference" that the defendant acted with the required state of mind. *15 U.S.C. § 78u-4(b)(1)-(2)*; [*23] *Teamsters Local 445 Freight*

Div. Pension Fund v. Dynex Cap., Inc., 531 F.3d 190, 194 (2d Cir. 2008).

c. The Scienter Element

Plaintiffs may establish an inference of fraudulent intent by alleging facts that, if true, would (1) demonstrate that defendants had both the motive and the opportunity to commit fraud or (2) constitute strong circumstantial evidence of the defendants' conscious misbehavior or recklessness. *Eternity Global Master Fund, Ltd. v. Morgan Guar. Trust Co., 375 F.3d 168, 187 (2d Cir. 2004)*.

To qualify as "strong," an "inference of scienter must be more than merely plausible or reasonable--it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent." *Tellabs, Inc., 551 U.S. at 314*. The Tellabs Court framed the inquiry as follows: "When the allegations are accepted as true and taken collectively, would a reasonable person deem the inference of scienter at least as strong as any opposing inference?" *Id. at 326*.

The Second Circuit has summarized the foregoing by noting that the requisite "strong inference"

> may arise where the complaint sufficiently alleges that the defendants: (1) benefitted in a concrete and personal way from the purported [*24] fraud; (2) engaged in deliberately illegal behavior; (3) knew facts or had access to information suggesting that their public statements were not accurate; or (4) failed to check information they had a duty to monitor.

Dynex Cap., Inc., 531 F.3d at 194 (citing *Novak v. Kasaks, 216 F.3d 300, 311 (2d Cir. 2008))*.

d. Tide's Fraud Claims Are Pleaded With Particularity

Defendants contend that Tide's fraud claims should be dismissed because they are not pleaded with the particularity required by *Rule 9(b)* and the PSLRA. Specifically, Defendants argue that Tide has not (1) specified the statements that Tide alleges were fraudulent (Defs.' Mem. at 16-17); or (2) pleaded with particularity the falsity of the representations at issue (id. at 17; Defs.' Reply at 5).

As previously noted, the Complaint alleges with specificity that Sections 4.9 and 4.11 of the Amended Agreement contained fraudulent statements. (See Compl. ¶¶ 20-21, 51-52, 59, 66 (quoting from Sections 4.9 and 4.11).) Tide has specified statements in the Amended Agreement, identified Falcon as the party that made the statements, and explained what facts lead Tide to believe the statements were fraudulent. Tide has thus satisfied the [*25] requirements of *Rule 9(b)* with regard to its claims against Falcon.

Although the Complaint's allegations against Arcapita are not a model of clarity, the Complaint does contain specific allegations of misrepresentations made by the Arcapita entities (Compl. ¶¶ 14-18; 22-24; 27-28; 31-36.) For instance, the Complaint states that in January 2010 the Arcapita defendants, together with Falcon, provided Financial Statements for NorTex that contained inaccurate information regarding inventories of pad gas and operating expenses from fuel consumption. (Id. ¶¶ 15-16.) Similarly, the Complaint alleges that, in the course of due diligence, the Arcapita entities and Falcon together provided Tide with a specific memorandum entitled "NGL Material Balance & Shrink," a particular Microsoft Excel file, and a slide presentation entitled "Material Balance." (Id. ¶ 22.) Tide alleges specific facts indicating that Arcapita knew that these documents were inaccurate but nevertheless provided them in response to Tide's queries, with the expectation that Tide would rely on them. (Id. ¶¶ 22-23; 33-35.) Thus, the Complaint specifies false or deceptive statements it alleges were made by Arcapita and the contexts [*26] in which they were made, as well as the reasons why Tide believes they are false. The Complaint is sufficiently pleaded to give Arcapita notice of the claims with which they are charged with the particularity required by *Rule 9(b)*. *Goldman v. Belden, 754 F.2d 1059, 1069-70 (2d Cir. 1985)* (finding the complaint specific enough that it "gives each defendant notice of precisely what he is charged with. No more is required by *Rule 9(b)*.").

In light of the foregoing, the Court finds that Tide has pleaded its fraud claims with regard to Falcon and Arcapita with the particularity required by *Rule 9(b)*.

e. Tide Has Alleged Facts Giving Rise to a Strong Inference of Scienter

Defendants contend that Tide's common law fraud and federal securities fraud claims should be dismissed because they are not supported by allegations establishing scienter. However, Tide has alleged facts sufficient to give to the "strong inference" of scienter that is required.

First, Tide alleges that the Defendants were aware of the existence of "shortfalls" in, and depletions of, pad gas at NorTex's Facilities. Tide claims that, in early 2009, NorTex management advised Arcapita that the Facilities had "'deliverability issues' [*27] related to [pad] gas shortfalls." (Compl. ¶ 33.) Falcon and Arcapita allegedly declined to purchase additional pad gas to remedy the shortfalls. (Id.) According to Tide, Defendants instead

caused NorTex to enter into "park-and-loan" arrangements in which NorTex "borrowed" pad gas from other sources. (Id.) Such arrangements allegedly "concealed the depleted pad gas and did nothing to correct the inaccurate records, flawed processes, and shoddy operations and recordkeeping that led to the overstatement of the quantities and values of the pad gas and customer gas . . . ." (Id.) Tide also alleges that, in late 2009 and early 2010, Falcon management learned that NorTex "was encountering additional deliverability issues due specifically to shortfalls [in] and depletion of pad gas." (Id. ¶ 35.)

Second, Tide alleges that, in or around October 2009, Defendants received a report from Platt, Sparks & Associates, which made it clear that gas inventories reported in NorTex's regulatory filings were inaccurate, or that one of NorTex's Facilities was losing gas. (Id. ¶ 34.)

Third, Tide alleges that Defendants (1) failed to conduct "regular and consistent shut-in pressure testing and related volumetric [*28] calculations and measurements of the quantities of gas within the Storage Facilities," and thus (2) failed to ensure that NorTex's financial records were accurate. (Id. ¶ 71.) According to Tide, such failures "occurred during a period when deliverability problems indicated a critical need to perform these tests, calculations, and measurements[,] and to properly analyze and report the results." (Id.)

Defendants allegedly failed to account for the foregoing, known inaccuracies in the Financial Statements. (See, e.g., id. ¶¶ 33-35, 72.) Tide has alleged facts that, if true, would constitute strong circumstantial evidence of Defendants' conscious misbehavior or recklessness. See *Eternity Global Master Fund, Ltd., 375 F.3d at 187*. Accepted as true, Tide's allegations would give rise to the inference (1) that Defendants knew that the representations in Sections 4.9 and 4.11 of the Purchase Agreement were false, see *Novak, 216 F.3d at 311*; or (2) that Defendants acted recklessly, because they knew facts or had access to information suggesting that statements made in Sections 4.9 and 4.11 were not accurate. See id.

The Court finds that the resulting inference of scienter is "cogent and at least [*29] as compelling as any opposing inference of nonfraudulent intent." See *Tellabs, 551 U.S. at 314*. That is, when Tide's allegations are "accepted as true[,] and taken collectively," the Court concludes that a reasonable person would deem the inference of scienter at least as strong as any opposing inference. Id.; see also *Novak, 216 F.3d at 308*.

D. Summary

For the foregoing reasons, Defendants' motion for a judgment on the pleadings is DENIED.

II. Defendants' Motion for Summary Judgment

A. Defendants' Motion

Falcon and Arcapita answered Tide's Complaint and Falcon also filed a Counterclaim and Crossclaim. Falcon and Arcapita now move for partial summary judgment on two claims. (Dkt. No. 32.) First, Defendants move for summary judgment on Tide's Fifth Cause of Action, arguing that, as a matter of law, Tide is not entitled to a permanent injunction restraining the funds in the Escrow Account. Second, Defendants move for summary judgment on their first crossclaim, arguing that Falcon is entitled to the immediate disbursement of all funds remaining in the Escrow Account.

B. Summary Judgment Standard

Summary judgment must be granted where, based on the pleadings, the discovery and disclosure materials, [*30] and any affidavits, "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*; see also *Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. "The role of the court in deciding a motion for summary judgment 'is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party.'" *Wilson v. Nw. Mut. Ins. Co., 625 F.3d 54, 59-60 (2d Cir. 2010)* (quoting *Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 11 (2d Cir. 1986))*. A "genuine issue of material fact" exists if the evidence is such that a reasonable jury could find in favor of the non-moving party. *SCR Joint Venture L.P. v. Warshawsky, 559 F.3d 133, 137 (2d Cir. 2009)*. A "material" fact is one that might "affect the outcome of the suit under the governing law." Id. The moving party bears "the burden of demonstrating that no material fact exists." *Miner v. Clinton Cnty., N.Y., 541 F.3d 464, 471 (2d Cir. 2008)* (citing *McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 202 (2d Cir. 2007))*.

In determining whether summary judgment [*31] is appropriate, the Court must construe the evidence in a light most favorable to the non-moving party and draw all reasonable inferences in that party's favor. *Sledge v. Kooi, 564 F.3d 105, 108 (2d Cir. 2009)* (citing *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-50, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986))*. To avoid summary judgment, the non-moving party must show sufficient evidence to support a claimed factual dispute, such that a judge or jury is required to resolve differing versions of events. See *Kessler v. Westchester County Dep't of Soc. Servs., 461 F.3d 199, 206 (2d Cir. 2006)* (citing *Anderson, 477 U.S. at 248-49*). Where the non-moving party relies on an affirmative defense to defeat summary

judgment, that party must adduce evidence which--when viewed in a light most favorable to that party, and when drawing all reasonable inferences in that party's favor--"would permit judgment for the non-moving party on the basis of that defense." *Internet Law Library, Inc. v. Southridge Capital Mgmt., LLC, No. 01 Civ. 6600, 2005 U.S. Dist. LEXIS 32299, 2005 WL 3370542, at *4 (S.D.N.Y. Dec. 12, 2005)*; see also *WestRM-West Risk Mkts., Ltd. v. Lumbermens Mut. Cas. Co., 314 F. Supp. 2d 229, 232 (S.D.N.Y. 2004)*.

C. Tide's Fifth Cause of Action

In [*32] its Fifth Cause of Action, Tide seeks "a permanent injunction restraining Falcon and HSBC from disbursing any funds from the Escrow Account, except pursuant to the Expense Notices referenced in Section 3.7 of the Purchase Agreement." (Compl. ¶ 79.) Tide has not at this point moved for summary judgment on this, or any, claim and it is not clear from the Complaint whether Tide intends to seek injunctive relief during the litigation or only at its conclusion. Falcon and Arcapita, however, move for summary judgment arguing that Tide is not, as a matter of law, entitled to a permanent injunction.

The Defendants cite to Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Funding, Inc., in which the Supreme Court considered whether, in an action for money damages, a district court has the power to issue a preliminary injunction that prevents a defendant from transferring assets in which no lien or equitable interest is claimed. *527 U.S. 308, 310, 119 S. Ct. 1961, 144 L. Ed. 2d 319 (1999)*. The Court held that a district court lacks the authority to issue a preliminary injunction restraining a defendant's funds pending adjudication of a damages claim. *Id. at 333*. The significance of Grupo Mexicano was that the plaintiff in that [*33] case was seeking a preliminary injunction "that would render unlawful conduct that would otherwise be permissible, in order to protect the anticipated judgment of the court." *Id. at 315*.

Unless and until Tide moves for an injunction, Falcon's and Arcapita's motion for summary judgment is premature. The Court accordingly DENIES Defendants' motion for partial summary judgment dismissing Tide's Fifth Cause of Action.

D. Falcon's First Cause of Action

Falcon also moves for partial summary judgment on its request for declaratory relief as set forth in its Counterclaim and Crossclaim. Specifically, Falcon seeks a judgment declaring that HSBC "should disburse the escrow funds to Falcon in accordance with the parties' agreements." (Countercl. ¶ 3; see also id. ¶¶ 30-32.) Tide asserts that such agreements are not enforceable because they were procured by fraud.

1. Threshold Issues

The Court must resolve two threshold issues before considering whether Falcon is entitled to partial summary judgment on this claim.

First, the Court considers whether any provisions in the Agreements bar Tide's fraud-based affirmative defense. Second, the Court examines Falcon's contention that Tide's "further" performance [*34] under the Agreements cannot be excused, because Tide has already fully performed by paying the contractual purchase price for NorTex and the money in the Escrow Account. (See Defs.' Reply at 5-7.)

a. Waiver of Claims and Disclaimer of Representations

The Court first considers whether Tide may assert its fraud-based affirmative defense to performance of its obligations under the Amended Agreements. As in its motion for a judgment on the pleadings, Falcon again contends that Tide is precluded from raising any fraud-related arguments because (1) Tide waived its right to assert tort "claims and causes of action" in Section 10.7; and (2) the alleged misrepresentations are not actionable under Section 4.26, which bars a party from relying on representations extrinsic to Article IV of the Purchase Agreement ("Article IV"). The Court briefly reexamines each of Falcon's contentions.

Section 10.7 states that the contractual indemnification provisions of the Agreement provide the exclusive remedy as to all claims relating to the Agreement. (Declaration of Jeremiah J. Anderson dated August 31, 2010 ("Anderson Decl.") Ex. A § 10.7.) At issue now, however, is whether Falcon is entitled to summary judgment [*35] on its First Cause of Action, notwithstanding Tide's assertion of an affirmative defense. Section 10.7 does not, by its terms, waive any affirmative defenses, and Falcon does not argue otherwise. Section 10.7 includes "claims and causes of action," but an affirmative defense is not a claim but "a lineal descendent of the common law plea by way of 'confession and avoidance.'" 5 C. Wright & A. Miller, Federal Practice & Procedure § 1270 (3d ed.). The Court therefore finds that Section 10.7 does not bar Tide's affirmative defense.

Falcon similarly argues that Tide cannot, consistent with Section 4.26 of the Purchase Agreement, "allege a fraud claim" based on misrepresentations extrinsic to Article IV. (Defs.' SJ Reply at 8; see also Defs.' SJ Mem. at 10.) As previously discussed, Section 4.26 provides that Falcon "shall not be deemed to have made to [Tide] any representation or warranty other than as expressly made in this Article IV or the schedules accompanying

Article IV." (Anderson Decl. Ex. A § 4.26 (capitalization omitted).) Tide has submitted evidence in conjunction with this motion for summary judgment to further bolster its claims that statements in Sections 4.9 and 4.11 are [*36] false.

In its Rule 56.1 statements and accompanying declarations, Tide has submitted evidence to the effect that Defendants inflated the value of pad gas included in the Financial Statements by approximately $30 million. (Compl. ¶ 73; Pl.'s Counterstatement. ¶¶ 90-94, 102-04; Dolan Decl. ¶¶ 13-14, 22-24; id. Ex. A-F, G.) Tide has also submitted evidence to the effect that the Financial Statements failed to include the value of fuel burned as part of the "facility operating expenses," and that Defendants thus misstated such expenses by approximately $40 million. (Compl. ¶ 73; Pl.'s Counterstatement ¶¶ 95-101; Dolan Decl. ¶ 16; id. Ex. A; Declaration of Mike Gallup dated September 9, 2010 ("Gallup Decl.") ¶ 22.) The foregoing evidence gives rise to an issue of fact as to whether the representation contained in Section 4.9 that the Financial Statements fairly presented in all material respects the consolidated financial position of NorTex was fraudulent.

Tide also alleges that statements in Section 4.11 are false because NorTex did experience a material adverse effect between March 31, 2009 and the closing date. Tide offers evidence demonstrating that, in 2009 and early 2010, Falcon management [*37] became aware that NorTex was encountering deliverability issues due specifically to shortfalls and depletion of pad gas. (Gallup Decl. ¶ 39, Exs. U-V.) Tide alleges that Defendants did not disclose such issues to Tide. (Gallup Decl. ¶ 23.) Following its purchase of NorTex, Tide states that it learned that NorTex at that point had a shortfall in pad gas of over 6 billion cubic feet. (Id. ¶¶ 14-15.) NorTex cannot operate its business absent sufficient pad gas. (Id. ¶ 7.) The foregoing evidence raises an issue of fact as to whether, contrary to the representation expressly made in Section 4.11, NorTex experienced a "Material Adverse Effect" or a "disposition of any material assets" during the relevant time period.

In light of the foregoing, the Court finds that Sections 10.7 and 4.26 do not preclude Tide from offering evidence with respect to its fraud-based affirmative defense.

b. Remaining Performance

Falcon contends that Tide's further performance under the Agreements cannot be excused because Tide has already fully performed and the money in the Escrow Account belonged to Falcon as soon as the escrow conditions were met. (See Defs.' Reply at 5.)

Section 3 of the Escrow Agreement, entitled [*38] "Distributions from the Escrow Account," states that the Escrowed Amount "shall be . . . transferred only in accordance with Section 3.7 of the [Amended Agreement]." (Anderson Decl. Ex. C § 3.) Section 3.7 of the Amended Agreement provides that, upon the occurrence of either of the defined Escrow Breakage Triggers, the parties "shall deliver to [HSBC] joint instructions to disburse the balance of the Escrowed Amount . . . ." (Id. Ex. B § 3.7(a).) Tide acknowledges that the Escrow Breakage Triggers have been satisfied, (see Marooney Decl. Ex. 9; Conf. Tr. 4:12), but contends that Defendants' fraud excuses Tide from fully performing Section 3.7--i.e., from issuing joint instructions to HSBC to release the Escrowed Amount to Falcon.

Falcon disputes the contention that any non-ministerial obligation under the Agreements remains to be performed. (See Defs.' Reply at 7 n.6 ("The [Amended Agreement] does not give plaintiffs discretion in instructing the Escrow Agent.").) According to Falcon, "[w]hat entitles [it] to the release of the funds is not the joint instructions, but the satisfaction of the escrow conditions." (Defs.' Reply at 7.)

Under New York law, property in escrow should be released [*39] only after the conditions precedent are satisfied. See *In re Pan Trading Corp., S.A., 125 B.R. 869, 878 (Bankr. S.D.N.Y. 1991)* ("Only after the requisite conditions are satisfied, can an escrow be fully transferred to the grantee."). Courts are generally reluctant to override the clear terms of an escrow agreement. *Netherby Ltd. v. G.V. Licensing, Inc., No. 92-4239, 1995 U.S. Dist. LEXIS 11725, 1995 WL 491489, at *3 (S.D.N.Y. Aug. 17, 1995)* ("Because there are no reasons to override the clear terms of the amended escrow agreement, and because none of the conditions for release of the escrowed funds contained in that agreement have been met, plaintiff's motion [to compel release of escrowed funds] is denied."). In the case before the Court, however, the conditions for the release of the escrowed funds contained in the agreement have been met, creating a valid reason to override its terms. Nevertheless, Tide argues that fraud in the inducement of the contract means it should not be required to perform its obligations.

Because Tide claims that its remaining performance is excused by Falcon's fraud, the Court must determine whether Tide has presented specific facts related to that defense showing that there is a genuine [*40] issue of material fact.[7] See, e.g., *Internet Law Library, Inc., 2005 U.S. Dist. LEXIS 32299, 2005 WL 3370542, at *4*. The Court now turns to that inquiry.

7 Falcon cites to *Marriott Corp. v. Rogers & Wells, 81 A.D.2d 556, 438 N.Y.S.2d 330 (1st*

Dep't 1981), for the proposition that the Escrowed Amount "belonged to Falcon, subject only to the satisfaction of the escrow conditions." (Defs.' Reply at 6.) As the Court has noted, however, the escrow "conditions" here have not been satisfied. Marriott Corp. is inapposite for another reason: the party opposing the transfer of escrowed funds in that case did not raise an affirmative defense of fraud; indeed, there were no issues of fact warranting a denial of summary judgment in that case. *438 N.Y.S.2d at 331*.

3. Discussion

a. Applicable Law

Pursuant to New York law,[8] a party may not compel performance of an agreement that was induced by fraud. *Nat'l Union Fire Ins. Co. v. Turtur, 892 F.2d 199, 203 (2d Cir. 1989)* (citing cases).

8 The Purchase Agreement is governed by the laws of the State of New York. (Anderson Decl. Ex. A § 11.5.)

To withstand Defendants' motion for summary judgment based on a defense of fraudulent inducement, Tide must come forward with evidence that would allow a reasonable [*41] jury to find, by clear and convincing evidence,[9] that each of the elements of fraud has been satisfied. *SCNB Corp. Fin. Ltd. v. Schuster, 877 F. Supp. 820, 826 (S.D.N.Y. 1994)*. Accordingly, Tide must offer facts showing that there is a genuine issue for trial as to the following elements: (1) that Defendants made a representation, (2) as to a material fact, (3) which was false, (4) and known to be false by Defendants, (5) that was made for the purpose of inducing Tide to rely upon it, (6) that Tide "rightfully did so rely," (7) in ignorance of its falsity, (8) to Tide's injury. See *Cohen v. Koenig, 25 F.3d 1168, 1172 (2d Cir. 1994)*; *Internet Law Library, Inc., 2005 U.S. Dist. LEXIS 32299, 2005 WL 3370542, at *5*; *Cont'l Airlines, Inc. v. Lelakis, 943 F. Supp. 300, 305 (S.D.N.Y. 1996)*.

9 See *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* ("[C]lear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions"); *Glidepath Holding B.V. v. Spherion Corp., No. 04 Civ. 9758, 2010 U.S. Dist. LEXIS 33255, 2010 WL 1372553, at *5, (S.D.N.Y. Mar. 26, 2010)*.

b. Application of Law to Facts

In opposing the instant motion for partial summary judgment, Tide has adduced particularized evidence that would allow a [*42] reasonable jury to find, by clear and convincing evidence, that each of the elements of fraud has been satisfied. See *Schuster, 877 F. Supp. at 826*. As previously discussed, Tide has demonstrated that Falcon made two principal representations in Article IV of the Purchase Agreement that were allegedly false: (1) that "[c]omplete and accurate copies of the Financial Statements have been made available to [Tide]," and that "[e]ach balance sheet included in the Financial Statements (including the related notes and schedules) . . . fairly presents in all material respects the consolidated financial position of [NorTex]," (Anderson Decl. Ex. A § 4.9); and (2) that since March 31, 2009, NorTex has not experienced a "disposition of any material assets" or a "Material Adverse Effect," which is defined as "any state of facts" that is "materially adverse to the condition (financial or otherwise), business, results of operations, properties, assets or liabilities of [NorTex] . . . ." (Anderson Decl. Ex. A § 4.9, § 1.1.) These alleged misrepresentations, which related to the value of NorTex's current assets, were "plainly" material. See, e.g., *Cohen, 25 F.3d at 1172* (stating that defendant's alleged [*43] overstatements regarding net income and the value of current assets "plainly were representations as to material facts").

Tide has also proffered sufficient evidence to raise issues of fact as to whether the alleged misrepresentations were (1) known to be false by Falcon, and (2) made for the purpose of inducing Tide to rely on them. First, Tide presents evidence to the effect that, by 2009, both Falcon and Arcapita knew that there was a shortfall of pad gas at one of NorTex's Facilities and that Defendants discussed restating NorTex's Financial Statements to address this shortfall, but never did so. (Pl.'s 56.1 Counterstatement ¶¶ 133-35, 139-43; Gallup Decl. ¶¶ 37-39, Exs. U-V.) Second, the evidence permits a reasonable inference that Defendants made the alleged misrepresentations for the purpose of inducing Tide's reliance: Section 10.6 of the Purchase Agreement states that each party "shall be entitled to rely upon the representations, warranties, covenants and agreements of the other Party set forth herein . . . ." (Anderson Decl. Ex. A § 10.6.)

Finally, the proffered evidence creates triable issues as to whether Tide (1) reasonably relied on the alleged misrepresentations, (2) [*44] in ignorance of their falsity, and (3) to Tide's injury. Tide has submitted testimony to the effect that it relied on the alleged misrepresentations in ignorance of their falsity. (See, e.g., Dolan Decl. ¶ 39; Pl.'s 56.1 Counterstatement ¶ 161.) The reasonableness of reliance is ordinarily a question of fact left to a jury. *Glidepath Holding B.V., 2010 U.S. Dist. LEXIS 33255, 2010 WL 1372553, at *8*. Tide has also submitted evidence of the adverse consequences of De-

fendants' alleged fraud. (See Gallup Decl. ¶¶ 41-50; Pl.'s 56.1 Counterstatement ¶¶ 166-175.)

Because Tide has come forward with evidence that would allow a reasonable jury to find, by clear and convincing evidence, that each of the elements of fraud has been satisfied, Falcon is not, at least at this juncture, entitled to the declaratory relief it seeks.[10]

10 In light of this conclusion, the Court need not address whether Tide's further performance of the Purchase Agreement is excused by Defendants' alleged material breach of the Purchase Agreement. (See Pl.'s Opp. at 21-22.)

F. Summary

For the reasons stated above, the Court (1) DENIES Falcon's and Arcapita's motion for partial summary judgment dismissing Tide's Fifth Cause of Action; and (2) DENIES Falcon's [*45] and Arcapita's motion for partial summary judgment on the First Cause of Action of its Counterclaim. (Dkt. No. 32.)

III. Tide's Motion to Attach the Escrowed Funds

Tide cross-moves for an order of attachment "[i]n the event that this Court" grants Falcon's motion for partial summary judgment. (See Pl.'s Mem., Dkt. No. 77, at 2; see also Pl.'s Mem., Dkt. No. 38, at 24.)

Because the Court has denied Falcon's motion for partial summary judgment, Tide's motion for attachment is DENIED as moot. (Dkt. No. 82.)

IV. Conclusion

The Court has considered Defendants' remaining contentions and finds them to be without merit. For the reasons stated above, the Court (a) DENIES Defendants' motion for judgment on the pleadings (Dkt. No. 94); (b) DENIES Defendants' motion for partial summary judgment (Dkt. Entry No. 32.); and (c) DENIES Tide's cross-motion for an order of attachment (Dkt. No. 82).

By no later than October 28, 2011, the parties shall submit via ECF and facsimile a Joint Status Letter detailing how they intend to proceed, and whether they wish to be referred to a magistrate judge for settlement discussions. The parties shall attach to their Joint Status Letter a Scheduling Order that provides [*46] for this case to be tried no later than January 17, 2012.

SO ORDERED.

DATED: New York, New York

September 28, 2011

/s/ Kimba M. Wood

KIMBA M. WOOD

United States District Judge

EXHIBIT B-2

TIDE NATURAL GAS STORAGE I, L.P. and TIDE NATURAL GAS STORAGE II, L.P., Plaintiffs/Counterclaim Defendants, -against- FALCON GAS STORAGE COMPANY, INC.; Defendant/Counterclaim and Crossclaim Plaintiff, ARCAPITA BANK B.S.C.; and ARCAPITA, INC.; Defendants, and HSBC BANK USA, NATIONAL ASSOCIATION, Defendant/Crossclaim Defendant.

10 CV 5821

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2012 U.S. Dist. LEXIS 63540

May 4, 2012, Decided
May 4, 2012, Filed

PRIOR HISTORY: *Tide Natural Gas Storage I, L.P. v. Falcon Gas Storage Co., 2011 U.S. Dist. LEXIS 111532 (S.D.N.Y., Sept. 28, 2011)*

COUNSEL: [*1] For Tide Natural Gas Storage I, LP, Tide Natural Gas Storage II, LP, Plaintiffs: Douglas A. Daniels, Edmund W. Robb IV, Jonathon K. Hance, Linda R. Rovira, Stephen B. Crain, PRO HAC VICE, Bracewell & Giuliani, L.L.P., Houston, TX; Jeffrey Ian Wasserman, Marvin Robert Lange, Bracewell & Giuliani, LLP, New York, NY.

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For Arcapita Bank B.S.C., Arcapita, Inc., Defendants: Andrew C. Schirrmeister, III, William W. Russell, PRO HAC VICE, Schirrmeister Diaz-Arrastia Brem LLP, Houston, TX; C Brannon Robertson, PRO HAC VICE, King & Spalding LLP (TX), Houston, TX; Richard T. Marooney, Jr, King & Spalding LLP (NYC), New York, NY.

For HSBC Bank USA, National Association, Defendant, Cross Defendant: Pieter H.B. Van Tol, III, LEAD ATTORNEY, Hogan Lovells US LLP (nyc), New York, NY.

For John M. Hopper, Intervenor: Cassandra Lynn Porsch, LEAD ATTORNEY, Andrews Kurth LLP, New York, NY.

For Arcapita, Inc., Arcapita Bank B.S.C., Cross Claimants, [*2] Counter Claimants: Andrew C. Schirrmeister, III, William W. Russell, PRO HAC VICE, Schirrmeister Diaz-Arrastia Brem LLP, Houston, TX; Richard T. Marooney, Jr, King & Spalding LLP (NYC), New York, NY.

For Falcon Gas Storage Company, Inc., Cross Claimant, Counter Claimant: William W. Russell, PRO HAC VICE, Schirrmeister Diaz-Arrastia Brem LLP, Houston, TX; Richard T. Marooney, Jr, King & Spalding LLP (NYC), New York, NY.

For Tide Natural Gas Storage I, LP, Tide Natural Gas Storage II, LP, Counter Defendants: Douglas A. Daniels, Stephen B. Crain, Bracewell & Giuliani, L.L.P., Houston, TX; Jeffrey Ian Wasserman, Marvin Robert Lange, Bracewell & Giuliani, LLP, New York, NY.

JUDGES: KIMBA M. WOOD, United States District Judge.

OPINION BY: KIMBA M. WOOD

OPINION

Opinion & Order

KIMBA M. WOOD, U.S.D.J.:

Pursuant to *Rule 60 of the Federal Rules of Civil Procedure* and *Local Rule 6.3*, Defendants Falcon Gas Storage Company, Inc. ("Falcon"), Arcapita Bank, B.S.C.(c) and Arcapita, Inc. ("Arcapita") (collectively, "Defendants") move for reconsideration of the portion of this Court's September 28, 2011 Order that: (1) denied Defendants' partial summary judgment motion for a declaratory judgment ordering the escrowed funds to be disbursed [*3] to Falcon; and (2) denied Defendants' partial summary judgment dismissing Plaintiffs Tide Natural Gas Storage I, L.P. and Tide Natural Gas Storage II, L.P.'s (collectively, "Tide") request for a permanent injunction restraining the disbursement of escrowed funds. *Tide Natural Gas Storage I, L.P. v. Falcon Gas Storage Co., Inc. (the "September 28, 2011 Order"), 10 CV 5821, 2011 U.S. Dist. LEXIS 111532, 2011 WL 4526517 (S.D.N.Y. Sept. 28, 2011).*

For the reasons stated below, the motion for reconsideration is denied.

BACKGROUND

I. The Underlying Dispute

On March 15, 2010, Tide and Falcon entered into a Purchase Agreement, whereby Falcon agreed to sell its entire interest in Nortex Gas Storage Company, LLC ("Nortex") to Tide for $515 million. (Compl. ¶¶ 12-13.) Two days before the closing of the deal, a group of minority shareholders filed lawsuits in Texas courts (collectively, the "Hopper Litigation"), in an attempt to stop the transaction from closing. (Plaintiff's Response to Defendants' Statement of Undisputed and Material Facts Pursuant to Rule 56.1 ("Pl.'s 56.1 Resp.") ¶ 15.) The Hopper Litigation plaintiffs also filed notices of *lis pendens*, in connection with their lawsuits. (Id. ¶ 18.)

Consequently, the parties [*4] agreed to place $70 million of the purchase price into an escrow account (the "Escrow Account") with HSBC Bank USA, National Association ("HSBC") as protection against any expenses or liability Tide might incur as a result of the Hopper Litigation. (Id. ¶¶ 24, 36.) On April 1, 2010, the parties executed an Amended Purchase Agreement in tandem with an Escrow Agreement: Section 3.7(a) of the Amended Purchase Agreement governs the disbursement of the monies escrowed with HSBC. Section 3.7(a) provides that Tide and Falcon "shall deliver to [HSBC] joint instructions to disburse the balance of the Escrowed Amount" upon the occurrence of either one of the following two conditions:

> (i) a final non-appealable order of each court of competent jurisdiction with respect to the Hopper Claim or
>
> (ii) (A) an agreed dismissal with prejudice of the Hopper Claim . . .,
>
> (B) a complete release by all of the Participants under the Hopper Claim . . ., and
>
> (C) the final non-appealable release or expungement of the Lis Pendens . . . .

(Declaration of Jeremiah J. Anderson, dated Aug. 31, 2010, Ex. B, Amended Purchase Agreement § 3.7(a).) On April 1, 2010, with the abovementioned agreements in place, the Nortex transaction [*5] closed. (Pl.'s 56.1 Resp. ¶ 35.)

On July 27, 2010, Falcon and the Hopper Litigation plaintiffs reached a settlement, pursuant to which the Hopper Litigation plaintiffs filed nonsuits in each of the courts in which their actions were pending. (Id. ¶ 39.) Subsequently, the Court in Eastland County entered an order expunging the notices of *lis pendens*. (Id. ¶¶ 40, 42.)

Tide filed the instant action against Falcon and Arcapita on August 2, 2010. (Dkt. No. 1.)

II. Procedural History

Tide's complaint contains four causes of action arising out of alleged misstatements made by Defendants in connection with the Nortex sale. Tide alleges: (1) fraudulent misrepresentation; (2) breach of warranty; (3) breach of contract; and (4) violation of *Section 10* and *Rule 10b-5* of the Securities Exchange Act of 1934. (Compl. ¶¶ 10-11.) In addition, Tide seeks a permanent injunction preventing Falcon and HSBC from disbursing any funds from the Escrow Account, except pursuant to Section 3.7 of the Amended Purchase Agreement.

Defendants answered Tide's complaint, and Falcon filed a Counterclaim and Crossclaim, seeking, *inter alia*, [*6] a declaratory judgment ordering the disbursement of the funds in the Escrow Account.

Defendants Falcon and Arcapita, pursuant to *Federal Rule of Procedure 12(c)*, filed a motion for judgment on the pleadings to dismiss Claims I through IV of Tide's complaint. Defendants also moved for partial summary judgment on two claims: (1) Falcon's first cause of action of its Counterclaim and Crossclaim, requesting a judgment declaring that HSBC must disburse the escrowed funds to Falcon; and (2) Tide's request for a permanent injunction restraining the disbursement of the escrow funds. In its September 28, 2011 Order, the Court denied each of Defendants' motions. *Tide, 2011 U.S. Dist. LEXIS 111532, 2011 WL 4526517, at *15.*

DISCUSSION

I. Defendants' Motion for Reconsideration

A. Legal Standard

Local Rule 6.3 provides that a party may submit a motion for reconsideration "setting forth concisely the matters or controlling decisions which counsel believes the court has overlooked." *Local R. 6.3*. The "major grounds justifying reconsideration are an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *United States v. Plugh, 648 F.3d 118, 123-24 (2d Cir. 2011)* [*7] (quotation marks and citation omitted). Reconsideration may be granted where the moving party can point to matters "that might reasonably be expected to alter the conclusion reached by the court." *Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995)*.

A Court should not grant a motion for reconsideration in order to allow a party to "advance new facts, issues or arguments not previously presented to the Court." *Williams v. Smith, 02 CV 4558, 2009 U.S. Dist. LEXIS 120417, 2009 WL 5103230 at *1 (S.D.N.Y. Dec. 23, 2009)* (Cote, J.) (quotation marks and citation omitted). Similarly, a "motion to reconsider should not be granted where the moving party is solely attempting to relitigate an issue that already has been decided." *Shrader, 70 F.3d at 257*.

B. Discussion

The Defendants ask the Court to reconsider only the portion of its September 28, 2011 Order denying Defendants' motion for partial summary judgment on: (1) Falcon and Arcapita's request for a declaratory judgment ordering the disbursement of the escrowed funds; and (2) Tide's request for a permanent injunction restraining the escrowed funds. The Court considers each in turn.

Defendants argue that the Court has overlooked "the fact that the escrow was created [*8] for a purpose entirely separate and unrelated to plaintiff's fraud claims." (Memorandum of Law in Support of Defendants' Motion for Reconsideration ("Defs.' Mem.") at 2.) However, the relatedness of the agreements was considered by this Court in its September 28, 2011 Order. *Tide, 2011 U.S. Dist. LEXIS 111532, 2011 WL 4526517, at *13* ("Section 3 of the Escrow Agreement, entitled 'Distributions from the Escrow Account,' states that the Escrowed Amount 'shall be . . . transferred only in accordance with Section 3.7 of the [Amended Agreement].'"). Defendants seek to reargue the merits of this Court's previous decision, and present no controlling decisions or facts which the Court did not already consider. Accordingly, the Court dismisses Defendants' motion for reconsideration of their request for a declaratory judgment.

Even if Defendants had met the strict standard required for reconsideration, their claim fails. The Amended Purchase Agreement and the Escrow Agreement are interconnected. Each agreement was entered into in conjunction with the other, each agreement references the other, and neither agreement can stand alone. It is true, as Defendants point out, that the funds were placed in escrow as a response to [*9] the Hopper Litigation. (Defs.' Mem at 5.) Nevertheless, the conditions of the escrow release are incorporated into the Purchase Agreement through the First Amendment to that Agreement, entered into on April 1, 2010. The Escrow Agreement itself does not provide instructions for the withdrawal and transfer of the escrowed funds, but refers to Section 3.7 of the Amended Purchase Agreement. Thus, the release of the escrowed funds is part and parcel of the Amended Purchase Agreement. The agreements are interdependent--neither would have been entered into without the other--and thus the distribution of the funds in the Escrow Account is intertwined with Tide's underlying fraud claims related to the Amended Purchase Agreement.

Defendants' contention that the parties had not contemplated an Escrow Agreement at the time they entered into the original Purchase Agreement is not persuasive, because the transaction itself was governed by the Amended Purchase Agreement, not the original Purchase Agreement. Defendants clearly contemplated the Escrow Agreement at the time they entered into the Amended Purchase Agreement because the Amended Purchase Agreement governs the distribution of the escrowed funds.

Defendants [*10] also argue that because Tide's fraud claims arise out of breaches of Sections 4.9 and 4.11 of the Amended Purchase Agreement, rather than Section 3.7, "Tide's allegations of fraud have nothing to do with . . . the escrow." (Defs.' Mem. at 4.) Tide, however, alleges fraud in the inducement of the entire Amended Purchase Agreement. Because the terms of the Amended Purchase Agreement govern the distribution of the escrowed funds, Tide's remaining performance under Section 3.7 of the Amended Purchase Agreement may be excused pending resolution of Tide's claims that the Amended Purchase Agreement was fraudulently induced.

Defendants also argue that "the escrow conditions have been met" and that therefore "the escrow must be released." (Defs. Mem. at 6.) In its September 28, 2011 Order, the Court also addressed this issue, finding that Tide had sufficiently alleged fraud in the inducement of the Amended Purchase Agreement and recognizing the

settled law that a party may not compel performance of an agreement that was induced by fraud. *Tide, 2011 U.S. Dist. LEXIS 111532, 2011 WL 4526517, at *14* ("Because Tide has come forward with evidence that would allow a reasonable jury to find, by clear and convincing evidence, that [*11] each of the elements of fraud has been satisfied, Falcon is not, at least at this juncture, entitled to the declaratory relief it seeks.").

Thus, even considering the request for a declaratory judgment on the merits, the Court comes to the same conclusion, that it must be denied pending adjudication of Tide's claims that the whole Amended Purchase Agreement was fraudulently induced.

Defendants also ask this Court to reconsider its decision denying their motion for summary judgment on Tide's request for a permanent injunction restraining the escrowed funds. The issue raised in Defendants' motion was fully considered and decided by this Court in its September 28, 2011 Order. *Tide, 2011 U.S. Dist. LEXIS 111532, 2011 WL 4526517, at *11* ("Unless and until Tide moves for an injunction, Falcon's and Arcapita's motion for summary judgment is premature."). Tide's complaint has established viable claims under its first four causes of action. If those claims are ultimately successful and Tide can establish Defendants' liability, at that point Tide could request a permanent injunction. *Chiste v. Hotels.com L.P., 756 F. Supp. 2d 382, 407-08 (S.D.N.Y. 2010)* (McMahon, J.). Foreclosing that potential remedy at this preliminary stage [*12] would be premature. Defendants have failed to identify any controlling decisions or data which would merit reconsideration of this conclusion.

CONCLUSION

For the reasons stated above, Defendants' motion for reconsideration is DENIED.

SO ORDERED.

DATED: New York, New York

May 4, 2012

/s/ Kimba M. Wood

KIMBA M. WOOD

United States District Judge

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)**

ORDER GRANTING TIDE'S MOTION FOR AN ORDER LIFTING THE AUTOMATIC STAY PURSUANT TO 11 U.S.C. § 362(d) TO ALLOW CONTINUANCE OF DISTRICT COURT ACTION

Upon the Motion (the "Motion") of Tide Natural Gas Storage I, LP and Tide Natural Gas Storage II, LP (together, "Tide") for an Order Lifting the Automatic Stay Pursuant to 11 U.S.C. § 362(d) to Allow Continuance of District Court Action (as defined below), and the Court having jurisdiction to consider the Motion and the relief requested therein in accordance with 28 U.S.C. §§ 157 and 1334 and Amended Standing Order of Reference M-431, dated January 31, 2012 (Preska, C.J.); and consideration of the Motion and the relief requested therein being a core proceeding within the meaning of 28 U.S.C. §§ 157; and a hearing to consider the relief requested in the Motion and any objection(s) thereto having been held on August 1, 2012 (the "Hearing"); and, at such Hearing, the Court having found and determined that Tide has shown cause pursuant to section 362(d)(1) of the Bankruptcy Code to modify the automatic stay so as to allow Tide to liquidate its claims against Falcon Gas Storage Co., Inc. ("Falcon") and

Arcapita Bank B.S.C. ("Arcapita" and, together with Falcon, the "Debtors") in Cause No. 10-CIV-5821 in the Southern District of New York District Court (the "District Court Action"); it is

ORDERED that the Motion is granted in its entirety; and it is further

ORDERED that the automatic stay imposed by section 362(a) of the Bankruptcy Code is modified under section 362(d) of the Bankruptcy Code in order to allow the District Court Action to continue in all respects; and it is further

ORDERED that this Court shall retain jurisdiction to hear and determine all matters arising from or related to this Order.

Dated:_____

SEAN H. LANE
UNITED STATES BANKRUPTCY JUDGE

Marvin R. Lange (ML1854)
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William A. (Trey) Wood III
Edmund W. Robb IV
Jason G. Cohen
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Counsel to Tide Natural Gas Storage I, LP and Tide Natural Gas Storage II, LP

Hearing Date and Time: August 1, 2012 at 11:00 a.m.
Objection Deadline: July 29, 2012 at 5:00 p.m.

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)**

NOTICE OF HEARING ON TIDE'S MOTION FOR AN ORDER LIFTING THE AUTOMATIC STAY PURSUANT TO 11 U.S.C. § 362(D) TO ALLOW CONTINUANCE OF DISTRICT COURT ACTION

PLEASE TAKE NOTICE that a hearing will be held at 11:00 a.m. on August 1, 2012, or as soon thereafter as counsel can be heard (the "Hearing") before the Honorable Sean H. Lane, United States Bankruptcy Judge for the Southern District of New York, Room 701, One Bowling Green, New York, New York 10004 to consider Tide's Motion for an Order Lifting the

Automatic Stay Pursuant to 11 U.S.C. § 362(d) to Allow Continuance of District Court Action (the "Motion").

PLEASE TAKE FURTHER NOTICE that responses, if any to the Motion must (i) be in writing; (ii) state the name and address of the responding party and nature of the claim or interest of such part; (iii) state with particularity the legal and factual bases of such response; (iv) conform to the Federal Rules of Bankruptcy Procedure and Local Bankruptcy Rules; (v) be filed with the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court") together with proof of service, electronically, in accordance with General Order M-399 (which can be found at www.nysb.uscourts.gov), by registered users of the Court's Electronic Case Filing System, and by all other parties in interest on a 3.5 inch disk, compact disk, or flash drive, preferably in Portable Document Format (PDF), Word, Wordperfect or any other Windows-based word processing format (with a hard copy delivered directly to Chambers) no later than July 29, 2012 at 5:00 pm. (the "Response Deadline") and (vi) be served upon (a) counsel to Tide at Bracewell & Giuliani LLP, 1251 Avenue of the Americas, 49th Floor, New York, New York 10020 (Attn: Marvin R. Lange, Stephen B. Crain, William A. (Trey) Wood III, and Jason G. Cohen); (b) counsel to the Debtors at Gibson, Dunn & Crutcher LLP, 200 Park Avenue, New York, New York, 10166 (Attn: Michael A. Rosenthal, Janet M. Weiss, and Matthew K. Kelsey); (c) counsel to the Official Committee of Unsecured Creditors at Milbank, Tweed, Hadley & McCloy LLP, 1 Chase Manhattan Plaza, New York, New York 100005 (Attn: Dennis F. Dunne, Abhilash M. Raval, and Even R. Fleck); and (d) the Office of the United States Trustee for the Southern District of New York, 33 Whitehall Street, 21st Floor, New York, New York 10004 (Attn: Richard Morrissey).

PLEASE TAKE FURTHER NOTICE that if a response to the Motion is not received by the Response Deadline, the relief requested shall be deemed unopposed, and the Bankruptcy Court may enter and order granting the relief sought without a hearing.

PLEASE TAKE FURTHER NOTICE that objecting parties are required to attend the Hearing, and failure to appear may result in relief being granted or denied upon default.

Respectfully submitted,

BRACEWELL & GIULIANI LLP

By: */s/ William A. (Trey) Wood III*

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