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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 REPLY TO THE OBJECTIONS OF DEBTORS, HOPPER CLAIMANTS AND COMMITTEE TO 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
(relates to Dkt. Nos. 279, 352, 354, 355)

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 Reply to the Objections of the Debtors, Hopper

Parties and Committee to 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 ("Tide's Motion"). In support thereof, Tide respectfully submits as follows:

I. REPLY

1. The Objections to Tide's Motion are nothing more than forum shopping camouflaged by empty legal rhetoric. The Southern District of New York District Court is the best forum for resolution of Tide's federal securities law claims and state-law claims for fraud, fraudulent inducement, breach of express warranty, and breach of contract. These are not "core" bankruptcy issues, and these issues should be resolved by Judge Wood, who is intimately familiar with these claims as evidenced by two substantive, published opinions. Indeed, resolution of these claims will determine the indispensable question: Who is entitled to the Escrow Funds? And, as explained below, because Tide would be willing to withdraw its opposition to the Hopper Parties' motion to intervene in the District Court Action if this Court lifts the stay, all of the parties can seek the answer to this threshold question in a single, convenient forum.

A. Tide Consents to Intervention of the Hopper Parties in the District Court Action

2. In order to preserve the resources of all parties, centralize the disputes regarding ownership of the Escrow Funds in one forum, maximize judicial economy, and minimize the risk of conflicting judicial decisions, if Tide's Motion to Lift the Stay is granted, *Tide will withdraw its opposition to, and offer its support of, the intervention of the Hopper Parties in the District Court Action.* Tide's consent to the Hopper Parties' intervention would facilitate the parties' complete resolution of all issues regarding the ownership of the Escrow Funds in the single, original forum of the District Court.

3. Notably, both the Debtors and Hopper Parties assert that if this Court lifts the stay, the Hopper Parties will be prejudiced because they will lack a forum to protect their alleged rights and claims to $8.25 million of the Escrow Funds. Tide's consent to intervention resolves this issue entirely. With each party that has any possible right to the Escrow Funds resolving that fundamental issue in the District Court, one must strain to see how Falcon's other creditors would be harmed.

B. Debtors' Claim for a Breathing Spell is a Red Herring

i. The Debtors are Impermissibly Forum Shopping

4. Although the Debtors and Committee devote thousands of words to their brief, their argument is simple; they claim that lifting the automatic stay to allow the District Court Action to proceed would divert the attention of the Debtors' management and deplete estate resources. This argument is as much incorrect as it is a red herring. The Debtors' real goal is to forum shop their way out of the District Court—a forum where they have lost every substantive motion that they have raised.

5. Interestingly, the Debtors are not actually interested in focusing just on their "reorganization efforts." Indeed, the Debtors state that "the issue of ownership of the Escrow Funds is already before this Court . . . ." (Debtors' Objection to the Lift Stay Motion, Dkt. No. 354 ¶ 25 (emphasis in the original)). Moreover, in response to the Hopper Parties' complaint in this Court seeking to adjudicate ownership of the Escrow Funds (*see* Hopper Parties' Complaint, attached hereto as **Exhibit A**), the Debtors urged that Tide must be joined as an indispensable party:

> Plaintiffs [Hopper Parties] have failed to join indispensable parties as required by Federal Rule of Civil Procedure 19 and Federal Rule of Bankruptcy Procedure 7019. Specifically, Tide Natural Gas Storage I, LP, Tide Natural Gas Storage II, LP (as successors in interest to Alinda Natural Gas Storage I, L.P. and Alinda

> Natural Gas Storage II, L.P., respectively), and HSBC who have competing claims to the Escrowed Money and who are parties that must be joined to the present action in accordance with Federal Rule of Civil Procedure 19(a)(1)(A) & (B).

(Debtors' Answer in the Hopper Adversary, Dkt. No. 4, Adv. No. 12-1662) (attached as **Exhibit B**). Thus, according to the Debtors, both Tide itself, and the issue of the ownership of the Escrow Funds, is and should be before this Court. These words stand in stark contrast to the Debtors' asserted need for a "breathing spell."

6. Even so, in the context of the Motion to Lift Stay, the Debtors complain that litigating such issues in *district court* will be so time and resource consuming that the Debtors will be distracted from their "laser focused" efforts at reorganization. This is not true. Unless the Debtors and Hopper Parties plan to abate the Hopper Adversary, the "fact-intensive questions," "extensive discovery," and "byzantine analyses" that the Debtors complain of will occur sooner rather than later either in the Hopper Adversary or in the District Court should this Court lift the stay. The only question is in what forum.

7. It should also be noted that Falcon is a non-operating shell company that essentially has a single asset, an asserted claim to the disputed Escrow Funds. It cannot need a breathing spell because it conducts no business. Further, the Debtors' argument—that Arcapita needs a similar breathing spell—rings hollow. Both Falcon and Arcapita have retained special counsel to represent them in the District Court Action, allowing lead bankruptcy counsel to "laser focus" on reorganization. Management's time can also be conserved by thoughtful scheduling orders, just as would be necessary if the Hopper Adversary were allowed to proceed.

8. Simply put, the Debtors are not really concerned with an illusory breathing spell. Rather, the Debtors are seeking to improperly use the Bankruptcy Code as a means to forum shop. *See In re Silberkraus*, 253 B.R. 890, 905 (Bankr. C.D. Cal. 2000) (bankruptcy should not

be used to "impede, delay, forum shop, or obtain a tactical advantage regarding litigation in a nonbankruptcy forum . . . ." (citing *In re SGL Carbon Corp.*, 200 F.3d 154 (3d Cir. 1999))).

ii. *District Court is the Proper Forum*

9. The district court is the proper forum for the District Court Action, which will determine the ownership of the Escrow Funds. The Debtors and Hopper Parties attempt to paint the issue of ownership of the Escrow Funds as arising under the Bankruptcy Code. The causes of action asserted in the District Court Action, however, are fraud based claims arising under state law (with the addition of securities law causes of action under federal law). When a defendant files for bankruptcy protection, state law claims are not instantly transformed into bankruptcy based claims just because they might touch on property of the estate.

10. Regardless, Tide is not requesting to lift the stay to proceed in state court. Tide seeks to lift the stay to proceed in district court, which has original and exclusive jurisdiction over all cases under Title 11 pursuant to 28 U.S.C. § 1334. Even if the claims of ownership of the Escrow Funds are "core" proceedings (which they are not), the Debtors' arguments that such claims must proceed in this Court are unfounded based on actual jurisdiction. In addition, the Hopper Parties have now raised claims against Tide (which claims are nonsensical and wholly and categorically denied and will be addressed at the proper time) and such claims are between two non-debtor parties, unrelated to the Debtors' bankruptcies, and best suited for district court.

11. Assuming that the Debtors are right, and the ownership of the Escrow Funds involves "fact-intensive questions," "extensive discovery," and "byzantine analyses," Tide expects that a trial on such issues would require at least three weeks. The district court is better suited to handle such matters. The district court is also better suited to adjudicate ownership of the Escrow Funds because Judge Wood already has intimate familiarity with the facts and law

surrounding the dispute, as evidenced by two lengthy published opinions already issued, which prevent release of the Escrow Funds pending the outcome of the fraud litigation. (Attached hereto as **Exhibit C**).

12. By attempting to forum shop the dispute to this Court, the Debtors and Hopper Parties seek to reverse or sidestep the final decisions issued in the district court. For example, Judge Wood has already found that:

- The Escrow Funds may not be released:
    - "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 [i.e. disbursement of the Escrow Funds]." *Tide v. Falcon, et al.*, 2011 U.S. Dist. LEXIS 111532, *14 (S.D.N.Y. August 2, 2010).
    - "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 v. Falcon, et al.*, 2012 U.S. Dist. LEXIS 63540, *10 (S.D.N.Y. May 4, 2012).
- Tide has met its *prima facie* burden to establish fraud:
    - "Tide has thus satisfied the requirements of Rule 9(b) with regard to its claims against Falcon" and "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)." *Tide*, 2011 U.S. Dist. LEXIS 111532 at *24-25.
- The Purchase Agreement and Escrow Agreement are interconnected and fraud as to one applies to both:
    - "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 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." *Tide*, 2012 U.S. Dist. LEXIS 63540 at *8-9.

- Tide's fraud claims are not barred by provisions of the Purchase Agreement:
  - "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." *Tide*, 2012 U.S. Dist. LEXIS 63540 at *15.
  - "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." *Tide*, 2012 U.S. Dist. LEXIS 63540 at *17.
  - "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 [Exclusive Remedy]." *Tide*, 2011 U.S. Dist. LEXIS 111532 at *19.

13. In spite of these explicit substantive findings, the Debtors and Hopper Parties now claim that the District Court Action has barely progressed and ask this Court to allow "immediate" release (Hopper Complaint) and immediate "use" (Falcon Objection to Motion to Lift Stay) of the Escrow Funds. It is improper to use the Hopper Adversary as a means to reverse rulings in the district court.

C. <u>Tide Has Previously Suggested Mediation in the District Court Action</u>

14. The parties currently are contemplating mediation of the District Court Action. Consequently, Tide was surprised by the fact that the Debtors now request that this Court order the Debtors and Tide to mediation. Although Tide continues to support mediation in the District Court Action once the stay is lifted, there is no basis for this Court to order the parties to mediation, as the only current live issue between Tide and the Debtors before this Court is the Motion to Lift Stay. Tide does not think mediation over the Motion to Lift Stay is necessary.

WHEREFORE, Tide requests that the Court deny the objections of the Debtors, Hopper Parties, and Committee, lift the automatic stay to allow Tide to proceed with the District Court Action, and grant Tide such other and further relief as the Court deems just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was served by ECF notice on those parties set up for ECF on this 31st day of July, 2012.

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