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**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

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<b>IN RE:</b>	: <b>Chapter 11</b>
	: :
<b>ARCAPITA BANK B.S.C.(c), et al.,</b>	: <b>Case No. 12-11076 (SHL)</b>
	: :
<b>Debtors.</b>	: <b>Jointly Administered</b>
	: :
-----X	
<b>IN RE:</b>	: <b>Chapter 11</b>
	: :
<b>FALCON GAS STORAGE CO., INC.,</b>	: <b>Case No. 12-11790 (SHL)</b>
	: :
<b>Debtor.</b>	: <b>Joint Administration Requested</b>
	: :
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**DEBTORS’ REPLY TO TIDE’S OBJECTION TO DEBTORS’ MOTION FOR AN  
ORDER PURSUANT TO SECTION 105(a) OF THE BANKRUPTCY CODE  
DIRECTING THAT CERTAIN ORDERS IN THE CHAPTER 11 CASES OF ARCAPITA  
BANK B.S.C.(c), et al. BE MADE APPLICABLE TO SUBSEQUENT DEBTOR**

Arcapita Bank B.S.C.(c) (“*Arcapita Bank*”)<sup>1</sup> and certain of its subsidiaries and affiliates, as debtors and debtors in possession, each of which commenced a case under chapter 11 of title 11 of the United States Code (the “*Bankruptcy Code*”) on March 19, 2012 (collectively, the “*First Filed Debtors*”), together with Falcon Gas Storage Company, Inc., an

affiliate of Arcapita that commenced a case under chapter 11 of the Bankruptcy Code on April 30, 2012 (“*Falcon*,” and collectively with the First Filed Debtors, the “*Debtors*”) hereby submit this reply (the “*Reply*”) to the objection [Dkt. 170] (the “*Objection*”) of Tide Natural Gas Storage I, LP and Tide Natural Gas Storage II, LP (collectively, “*Tide*”) filed in opposition to the Debtors’ Motion for an Order Pursuant to Section 105(a) of the Bankruptcy Code Directing that Certain Orders in the Chapter 11 Cases of Arcapita Bank B.S.C.(c), *et al.* Be Made Applicable to Subsequent Debtor [Dkt. 132] (the “*Motion*”). In support thereof, the Debtors respectfully represent:

### **PRELIMINARY STATEMENT**

1. Tide’s Objection is nothing more than an attempt to muddy the waters by raising unrelated substantive issues that are at the center of the litigation between Falcon and Tide that are better resolved at later stages in the case into what is otherwise a straightforward and purely procedural motion. Indeed, the Debtors’ Motion was simply an effort to save the unnecessary administrative costs of preparing largely duplicative “first day” motions and to preserve the value of their estates, a goal that is mutually beneficial to both Falcon and its creditors. Significantly, the Motion did not attempt to resolve — nor would it have been appropriate for it to do so — any of the substantive issues in the claims that Tide alleged against both Falcon *and* Arcapita Bank.

2. In its Objection, Tide implies that the Debtors are trying to unfairly obtain relief for Falcon that would otherwise not be available to it. This argument is misguided. Rather, the Motion seeks to seamlessly integrate Falcon into the First Filed Debtors’ cases. Accordingly, the Debtors took a broad view of the orders previously entered by the Court for the

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<sup>1</sup> All capitalized terms not otherwise defined in this Reply shall have the meanings set forth in the Motion.

First Filed Debtors that could potentially apply to Falcon — even if they do not currently apply to Falcon — to minimize the likelihood that they would have to make similar motions in the future. There is no harm in being over-inclusive because, if it turns out that an order never applied to Falcon, then that order would have no effect on Falcon and its creditors would not be harmed or prejudiced.

3. To avoid pointless litigation over orders that are unlikely to apply to Falcon in any event, the Debtors are willing to withdraw their request that the following motions and orders be made applicable to Falcon:

- Debtors' Application for an Order Approving the Employment and Retention of Rothschild Inc. and N M Rothschild & Sons Limited as Financial Advisors and Investment Bankers for the Debtors *Nunc Pro Tunc* to the Petition Date [Dkt. 53];
- Order Approving Specified Information Blocking Procedures and Permitting Trading in Claims Against the Debtors Upon Establishment of a Screening Wall [Dkt. 94];
- *Ex Parte* Bridge Order Extending the Time to File Reports of Financial Information Pursuant to Federal Rule of Bankruptcy Procedure 2015.3(a) and Schedules and Statements of Financial Affairs [Dkt. 105];
- Debtors' Application Pursuant to Sections 327(a) and 330 for the Bankruptcy Code for an Order Authorizing the Debtors to Retain and Employ KPMG LLP as Valuation Advisor to the Debtors *Nunc Pro Tunc* to the Petition Date [Dkt. 123];
- Final Order (a) Authorizing the Debtors to (a) Pay Certain Prepetition Wages, Salaries, and Reimbursable Employee Expenses, (b) Pay and Honor Employee Medical and Similar Benefits, and (c) Continue Employee Compensation and Employee Benefit Programs [Dkt. 136];<sup>2</sup>
- Order Authorizing the Debtors to Retain and Employ Trowers & Hamblin LLP as Bahraini Counsel *Nunc Pro Tunc* to the Petition Date [Dkt. 137];
- Order Granting Debtors Additional Time to File Reports of Financial Information Pursuant to Federal Rule of Bankruptcy Procedure 2015.3 [Dkt. 140];

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<sup>2</sup> Where applicable, references to orders that were interim orders when the Debtors filed their Motion have been updated to refer to the applicable final orders. For the avoidance of doubt, the Debtors are not seeking to have the relevant interim orders apply to Falcon either.

- Order Authorizing Debtors to Retain and Retain and Employ Linklaters LLP as Special Counsel to the Debtors *Nunc Pro Tunc* to the Petition Date [Dkt. 146]; and
- Final Order Authorizing (a) Debtors to Pay Certain Prepetition Claims of Critical and Foreign Vendors; and (b) Financial Institutions to Honor and Process Related Checks and Transfers [Dkt. 147].

### **ARGUMENT**

4. Applying certain orders from the First Filed Debtors' cases to Falcon's case would minimize the costs of administration and maximize the value of the estates for all creditors; it would not cause any harm to Tide. Tide's assertions that the Debtors are "essentially treating the estates as substantively consolidated," Opp. ¶ 17, and that joint administration would be unduly burdensome to Tide because it "would be required to review every motion filed in the Arcapita bankruptcy and object where the relief requested is not applicable to or appropriate for Falcon's case," Opp. ¶ 22, are unfounded. The Motion plainly does not seek to substantively consolidate the Falcon estate with the First Filed Debtors' estates or otherwise impair the rights of Falcon's creditors. Indeed, this concern was specifically raised at the First Filed Debtors' first day hearing on March 21, and was addressed by the order of the Court granting procedural consolidation of the First Filed Debtors' case. First Filed Debtors' Joint Administration Order [Dkt. 26] ¶ 9 ("This Order shall not be relied upon by any party in any proceeding as a basis to ignore the corporate separateness of the individual Debtors in these Chapter 11 Cases."). Therefore, the application of the first day orders to Falcon actually resolves this concern.

5. Further, if any relief requested in a particular motion is not applicable to Falcon, there is no harm or benefit to Falcon's creditors if the order is entered in the Falcon case; the order would simply have no effect on Falcon. If there is a legitimate dispute as to whether an order is appropriate for Falcon's case, it is likely that the issue would have arisen in Falcon's case even if it was administered separately. Moreover, although Tide will be required to monitor

the First Filed Debtors' docket, this administrative burden is comparatively small relative to the burden of having the First Filed Debtors' numerous creditors monitor separate dockets and the other cost savings that joint administration would confer. Indeed, Tide's purported burden would be minimized by the fact that "all pleadings shall indicate which Debtor or Debtors are parties to, or are affected by, the particular matter." *Id.* ¶ 5. In any event, one suspects that Tide will monitor the First Filed Debtors' docket whether or not joint administration is ordered.

6. In contrast to the *de minimus* burden on Tide, the benefits of applying certain orders from the First Filed Debtors' cases to Falcon's case would be substantial. As detailed below, several of the orders entered in the First Filed Debtors' cases are applicable, or potentially applicable, to Falcon and their application would spare Falcon from spending additional time and resources on preparing very similar filings and motions for its case.

7. In the pending NorTex Litigation, Tide has asserted the same damage claims against Arcapita Bank as it has against Falcon. Despite the bankruptcy filing of Arcapita Bank, Tide intended to proceed as to Falcon. The Falcon chapter 11 filing was intended to prevent "piecemeal litigation" and to ensure the resolution and liquidation of any claims as to Falcon was coordinated as to those same claims against Arcapita Bank. Despite joining both Falcon and Arcapita Bank as defendants in the underlying litigation and Tide's allegations that they are both liable for Tide's alleged damages, Tide now argues that the Falcon and Arcapita Bank bankruptcy proceedings should not be merely coordinated through the first day orders. However, coordination will insure that the prevention of piecemeal resolution of litigation — a well-recognized purpose of chapter 11 — is observed. *See, e.g., In re Worldcom, Inc.*, 2003 WL 22025051 (Bankr. S.D.N.Y. Jan. 30, 2003).

8. **Joint Administration Order [Dkt. 16]**: Courts routinely, and generally without controversy, approve joint administration of chapter 11 cases of affiliated debtors in this jurisdiction. *See, e.g., In re General Maritime Corp.*, Case No. 11-15285 (MG) (Bankr. S.D.N.Y. Nov. 18, 2011) [Dkt. 22]; *In re Marco Polo Seatrade, B.V.*, Case No. 11-13634 (JMP) (Bankr. S.D.N.Y. Aug. 3, 2011) [Dkt. 22]; *In re Sbarro, Inc.*, Case No. 11-11527 (SCC) (Bankr. S.D.N.Y. April 5, 2011) [Dkt. 37]; *In re MSR Resort Golf Course LLC*, Case No. 11-10372 (Bankr. S.D.N.Y. Feb. 2, 2011) [Dkt. 19]; *In re InSight Health Servs. Holdings Corp.*, Case No. 10-16564 (AJG) (Bankr. S.D.N.Y. Dec. 14, 2010) [Dkt. 46]; *In re Almatris, B.V.*, Case No. 10-12308 (MG) (Bankr. S.D.N.Y. April 30, 2010) [Dkt. 49]. Joint administration is purely procedural device that permits the maintenance of a joint docket, a combined pleading caption, and combined notice to creditors. As an affiliate of Arcapita, Falcon may be jointly administered with the First Filed Debtors. Fed R. Bankr. P. 1015. Tide’s allegations of “potential conflicts of interest” that prevent joint administration are a complete red herring. In nearly every large chapter 11 case that is jointly administered in this district, the various debtors have intercompany claims against one another. The mere fact that the Debtors have intercompany claims does not mean that there are any actual conflicts of interest between them—the various claims are what they are and are not disputed.

9. Joint administration is a procedural mechanism; it is not substantive consolidation. Contrary to Tide’s allegation that “the Debtors are essentially treating the estates as substantively consolidated,” Opp. ¶ 17, the Debtors have not treated the First Filed Debtors as substantively consolidated, nor would they do so with Falcon without filing a motion to substantively consolidate the cases. In fact, when appropriate the Debtors have carefully fashioned relief to suit the needs of each individual Debtor. For example, the Fourth Interim

Cash Management Order differentiates between the First Filed Debtors for certain reporting and approval requirements. Joint administration would not prevent the Debtors from taking similar steps with Falcon to ensure that there was a distinct action taken with respect to Falcon when appropriate.

10. **Order Extending the Time to File Schedules and Statements [Dkt.**

**141]**: Bankruptcy courts also routinely grant extensions of the deadlines to file schedules and statements. *See, e.g., In re TBS Shipping Services Inc.*, Case No. 12-22224 (RDD) (Bankr. S.D.N.Y. Feb. 8, 2012) [Dkt. 32] (granting 60-day extension and waiving requirement to file Schedules and Statements); *In re General Maritime Corp.*, Case No. 11-15285 (MG) (Bankr. S.D.N.Y. Nov. 18, 2011) [Dkt. 26] (granting 30-day extension); *In re Almatris B.V.*, Case No. 10-12308 (MG) (Bankr. S.D.N.Y. Apr. 30, 2010) [Dkt. 51] (granting 60-day extension). Here, applying the order extending the time to file schedules and statements to Falcon's case and requiring that the relevant information be filed by June 8, 2012 would result in less than a 30 day extension. It is more efficient for the Debtors to gather and produce all of the information at once, rather than piecemeal, and the comparatively short extension will not prejudice Tide.

11. **Order Confirming the Protections 362 and 365 of the Bankruptcy**

**Code and Restraining Any Action in Contravention Thereof [Dkt. 19]**: This order simply restates some of the most basic and fundamental protections granted by the Bankruptcy Code, and therefore this order could not be construed as imposing any additional burdens or any prejudice upon Tide. There is no reason it should not apply to Falcon.

12. **Order (a) Waiving Requirement that Each Debtor File a List of**

**Creditors and Equity Security Holders and Authorizing Maintenance of Consolidated List of Creditors In Lieu of a Matrix; (b) Authorizing Filing of a Consolidated List of Top 50**

**Unsecured Creditors; and (c) Approving Case Management Procedures [Dkt. 21]:** For effective and consistent administration of Falcon's case, it is essential that the Court adopt a case management procedure, and it would be most effective if this procedure was the same as the procedure adopted in the First Filed Debtors' cases. Tide does not even attempt to identify any deficiency with the case management procedures or propose alternative procedures, a tacit concession that the case management procedures would be equally effective and appropriate for Falcon's case.

13. In addition, a consolidated list of creditors makes imminent sense and promotes efficiency. Moreover, the Debtors agree that if this order is applied to Falcon, the Debtors will add each of Falcon's creditors to the master service list so that they will receive notices relevant to the Falcon case. It is difficult to conceive — and indeed Tide does not attempt to articulate — how a list with centralized information could possibly prejudice Tide.

14. **Final Order (a) Authorizing the Debtors to Continue Insurance Coverage Entered Into Prepetition and To Pay Obligations Relating Thereto; and (b) Authorizing Financial Institutions to Honor and Process Related Checks and Transfers [Dkt. 139]:** Although Falcon does not currently anticipate needing to make any payments in connection with future insurance coverage, it continues to have some payment obligations in connection with past insurance coverage. In fact, Falcon is currently aware of at least one outstanding insurance invoice. Even if Falcon did not currently have any outstanding payments, this insurance order would not threaten to harm Tide because it authorizes, but does not direct, the Debtors to make payments.

15. **Fourth Interim Cash Management Order [Dkt. 133]:** Rather than requesting the application of First Filed Debtors' orders in a piecemeal fashion, it is more



efficient to ask for the application of potentially applicable orders at once. Should Falcon need to utilize the cash management system in the future, there will already be an order in place, and Falcon will not have to expend unnecessary time and resources preparing a separate motion asking for the application of the order. If the need to utilize the cash management system never arises, the entry of this order would not have prejudiced Tide.

16. **Order Authorizing Debtors to Employ and Retain Certain**

**Professionals Utilized in the Ordinary Course of the Debtors' Business [Dkt. 145]:** This order is appropriate to apply to Falcon because it has at least one ordinary course professional who is advising Falcon in a dispute with an insurance provider.

17. **Order Authorizing Parties to Filed Under Seal Names of the Debtors'**

**Customers:** Although Falcon does not have investors, it should not be precluded from redacting the names of the First Filed Debtors' customers if such names are referenced in any pleading submitted to court. Indeed, the order already authorizes *any* party involved in the First Filed Debtors' cases parties to redact the names of the First Filed Debtors' customers, but Falcon would like to eliminate any doubt that the order also applies to Falcon.

18. **Retention Applications:** Tide also objects to the Debtors' Motion because

it asserts that Falcon would be responsible for paying for certain services that may be necessary for a large, complex bankruptcy case, but are unnecessary for a smaller entity with fewer creditors and fewer assets. Opp. ¶¶ 19- 20. First, Falcon would need to pay for some of these professional services even if its case were administered separately from the First Filed Debtors. Second, to the extent that Tide is concerned that joint administration would mean that Falcon would have to contribute a disproportionate share of the compensation owed to professionals, this concern is misplaced. The Debtors will allocate administrative costs, including professional

fees, such that the Falcon estate only bears the burden of those costs that are related to Falcon. Moreover, the professionals' fees are subject to review by the United States Trustee to ensure that the fees are reasonable and commensurate with the services rendered. Even as a comparatively small debtor with few assets, Falcon will benefit from some of the services rendered by professionals that the First Filed Debtors have already retained, particularly because these professionals are already familiar with the Debtors' business affairs and complicated corporate structure.

19. Tide additionally objects because it alleges that there are intercompany claims that were not disclosed and that those claims amount to an interest adverse to Falcon. Opp. ¶ 25. It is well-known that intercompany claims exist between the various Debtors and those intercompany claims have been disclosed to the Court and creditors. For example, Gibson, Dunn & Crutcher LLP ("**Gibson Dunn**") explicitly acknowledged that fact in its retention application. Rosenthal Declaration ¶¶17-18 [Dkt. 51-3]. In any event, the existence of intercompany claims does not preclude the retention of a single professional to represent related debtors, especially here, where the claims are not subject to dispute. *See, e.g., In re Adelpia Commc'ns Corp.*, 336 B.R. 610, 672-73 (Bankr. S.D.N.Y. 2006) ("As the Arahova Noteholders Committee acknowledges, recognizing the two decisions of the Second Circuit on point, the presence of intercompany claims between debtors represented by the same counsel does not automatically warrant the disqualification of that counsel. Rather, the Second Circuit and the lower courts, recognizing the substantial cost of requiring additional trustees or counsel in cases where individual debtors have claims against each other, have taken a 'wait and see,' fact-driven, approach, to determine the extent to which such is necessary."). Both the Official Committee of Unsecured Creditors and the Joint Provisional Liquidators appointed in the AIHL Cayman

proceedings are well aware of these alleged conflict issues and, like the First Filed Debtors, are working to protect the rights of all creditors of the First Filed Debtors and their non-debtor affiliates. In the event an actual dispute arises, conflicts counsel can be retained. However, this is not a proper matter to resolve by means of an objection to the application of first day orders to Falcon.

20. **GCG, Inc. (“GCG”) Orders [Dkt. 83 & 84]**: GCG has provided enormously valuable services to the First Filed Debtors, and the Debtors anticipate that GCG’s services will be equally valuable to Falcon. Regardless of the size and complexity of its business organizational structure, Falcon will need a professional to handle claims administration, noticing, and balloting.<sup>3</sup> GCG has already set up a claims administration website and is familiar with the relevant service procedures. Whereas hiring a new agent would require new, unnecessary set-up costs, retaining GCG to serve as the claims and noticing agent and administrative agent for Falcon would require a comparatively small incremental cost.

21. **Alvarez and Marsal (“A&M”) Interim Order [Dkt. 138]**: Although Falcon’s schedules and statements may be less complicated than some of the other Debtors, it still needs a professional to assist in their preparation since it has no employees of its own to complete this task. As with retaining GCG, it will be most efficient for A&M to prepare these documents because it already has considerable experience with the other Debtors and can do so at minimal cost.

22. **Gibson Dunn Order [Dkt. 142]**: Contrary to Tide’s suggestion that Falcon should be represented by less experienced, cheaper bankruptcy counsel, Falcon will benefit from Gibson Dunn’s extensive experience and expertise in large and complex bankruptcy

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<sup>3</sup> As Tide acknowledges, Falcon does not have any employees to perform these functions. *E.g.*, Opp. ¶ 1.

cases because Gibson Dunn is uniquely suited to assist Falcon with respect to the relationships between the Debtors and the nuanced legal issues presented by Falcon's particular case. Tide has no basis to challenge the appropriateness of Falcon's choice of counsel. Not only would adding new counsel be disruptive, it would result in unnecessary and avoidable expenses because new counsel would need to take additional time to get acquainted with the legal issues implicated by the Debtors' chapter 11 cases and the factual background. If any conflicts were to arise in connection with Gibson Dunn's representation of Falcon (and none are expected), hiring conflicts counsel would be the most efficient way of disposing with the issue, rather than preventing the joint administration of the cases altogether.

23. **KPMG LLP Application ("KPMG") [Dkt. 125]**: If tax issues arise, Falcon would like to have access to qualified tax advisors. Accordingly, Falcon would like any order authorizing the retention of KPMG as a tax consultant to apply to it as well as the First Filed Debtors. If tax consulting services are needed, Falcon would be to avoid the expense of filing a separate retention application and the attendant time delay in being able to employ KPMG's services. On the other hand, if KPMG's tax services are not needed, Falcon will not pay for any portion of KPMG's services.

24. **King & Spalding Application ("K&S") [Dkt. 149]**: Since the Debtors filed their Motion, the First Filed Debtors filed an application for an order authorizing the retention of K&S as special counsel. Falcon respectfully requests that any order authorizing retention of K&S to apply to its case because K&S already serves as counsel to Falcon in the pending NorTex Litigation, and Falcon will continue to rely on their services.

25. **Order Granting Debtors' Motion to Establish Procedures for Interim Compensation and Reimbursement of Expenses for Professionals and Committee Members**

**[Dkt. 159]:** This order merely establishes a procedure through which to pay professionals. It is another procedural motion that is routinely granted by bankruptcy courts. If the order is not applied through the present Motion, Falcon will be required to file a separate motion seeking this relief at the expense of Falcon's creditors. Nothing in the order or in the Motion allocates to Falcon the costs of administration not related to the administration of its estate.

**CONCLUSION**

Tide's efforts to derail this purely procedural motion should be rejected. Applying the above-referenced orders and motions from the First Filed Debtors' cases to Falcon's case will facilitate the integration of the cases for procedural purposes only and will reduce the administrative burden on Falcon's estate.

For the reasons set forth herein, the Debtors respectfully request that the Court overrule all of Tide's objections, except as to those orders the Debtors have agreed to withdraw from the purview of the Motion.

Dated: New York, New York  
May 25, 2012

Respectfully submitted,

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