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

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In re:	:	Chapter 11
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ARCAPITA BANK B.S.C.(C), <i>et al.</i> ,	:	Case No. 12-11076 (SHL)
	:	
Debtors.	:	Jointly Administered
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**OPPOSITION OF THE HOPPER CLAIMANTS 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**

The Hopper Claimants¹ file this opposition to the motion to lift the automatic stay [Docket #279] filed by Tide Natural Gas Storage I, LP and Tide Natural Gas Storage II, LP (collectively, “Tide”).

¹ John M. Hopper, Edmund A. Knolle, Jeffrey H. Foutch, Keith L. Chandler, The Estate of Steven B. Toon, deceased, Thomas B. Wynne, Jr., Steven Jenkins, Tamara Jenkins, Alexander Cocke Trust, Dianne G. Foutch, Lesli Paige Leonard, Sally H. Hopper, Ellecia A. Knolle, Michelle P. Foutch, Deborah J. Toon, Rachel Ann Chandler and Daniel Leonard (collectively the “Hopper Claimants”).

I. Introduction

1. Allowing Tide to proceed with its prepetition federal district court case (the “New York Action”) against the Debtors would amount to a preference in Tide’s favor. In the New York Action, Tide has asserted common law fraud claims as the basis to seize the principal asset of Falcon Gas Storage Co., Inc. (“Falcon”) as the debtor-in-possession (the “Falcon Debtor”) - - its interest in the \$70 million escrowed money (the “Escrowed Money”). If allowed to proceed and if successful, Tide would transform its prepetition unsecured fraud claims into a non-bankruptcy court declared turnover of the Falcon Debtor’s property to Tide, to the exclusion and harm of Falcon’s other claimants - - mainly the Hopper Claimants.

2. The Escrowed Money (net of \$8.25 million that has been irrevocably assigned to the Hopper Claimants) rightfully is the property of the bankruptcy estate. Any claims against the estate’s property, including Tide’s, the Hopper Claimants’, the Debtors’ estates and any other creditors’ rights to that money, and any equitable subordination of the claims, should all be decided in a coordinated and efficient fashion in this bankruptcy court (the “Court” or the “Bankruptcy Court”). Tide has failed to meet its burden to demonstrate cause for lifting the stay. The Court should deny Tide’s motion.

II. Factual Background

3. The story regarding the Falcon Debtor’s principal interest in property - - the Escrowed Money - - actually has its origin in a lawsuit (the “Original Hopper Lawsuit”) the Hopper Claimants filed in Texas to enjoin the NorTex (defined below) sale. The money was placed into escrow to compensate the Hopper Claimants if they were successful on claims they had brought against Tide and Falcon. Both Tide and the bankruptcy estate (as successor-in-interest to Falcon), as well as all other defendants in the Original Hopper Lawsuit, agreed among

themselves to place the money into escrow to serve as a source of funds to settle any claims successfully brought by the Hopper Claimants.

A. The Hopper Claimants Sue to Enjoin the NorTex Sale

4. The Hopper Claimants were minority shareholders of Falcon, which owned NorTex Gas Storage Company, L.L.C. (“Nortex”). When it was announced that Falcon and Tide had signed an agreement for Falcon to sell NorTex to Tide for \$515 million, the Hopper Claimants filed lawsuits in Texas to enjoin the sale. The Hopper Claimants alleged that the Falcon officers and directors had breached their fiduciary duties to the Hopper Claimants as minority shareholders and had agreed to sell the valuable NorTex assets at a price well below the then fair market value. The Hopper Claimants also filed lis pendens liens (the “Lis Pendens”) on NorTex properties in Texas.

5. Tide and Falcon wanted to proceed to close the sale. To do so, they needed to convince the Texas courts not to enjoin the pending transaction. Tide and Falcon represented to the Texas courts that they would put \$70 million of the sale consideration in escrow to compensate the Hopper Claimants should they be successful on their claims. With that security, the Texas courts declined to enjoin the sale, and the Hopper Claimants elected not to appeal the injunction denial.

B. The Sale Closes with the Escrow Account Being Established

6. On April 1, 2010, Tide and Falcon executed an escrow agreement (the “Escrow Agreement”) with HSBC Bank USA (“HSBC”), and Tide paid \$70 million of the \$515 million sale price into escrow with HSBC. With the promised escrow satisfied, on April 1, 2010, the NorTex sale closed.

7. In the Escrow Agreement and a first amendment to the NorTex sale agreement, Tide and Falcon agreed that, upon occurrence of three (3) conditions, they would perform the ministerial act of instructing the escrow agent and the escrow agent would be obligated to pay the balance of the Escrowed Money (after payments for the Texas cases and escrow agent's fees and expenses) to Falcon. The three conditions were:

- (A) a dismissal with prejudice of the Texas cases (the "First Condition"),
- (B) a complete release of all defendants in the Texas cases (the "Second Condition"), and
- (C) a non-appealable release or expungement of the Lis Pendens the Hopper Claimants had filed against the NorTex assets (the "Third Condition," and collectively with the First Condition and Second Condition, the "Escrow Payment Conditions").

C. The Texas Cases Are Settled and the Escrow Payment Conditions are Satisfied

8. In July 2010, the Hopper Claimants agreed to settle their Texas cases for \$14,750,000. In the Settlement Agreement (the "Settlement Agreement"), the Hopper Claimants agreed to take actions to satisfy all three Escrow Payment Conditions. In return, Falcon paid the Hopper Claimants \$6,500,000 of the \$14,750,000 total consideration under the Settlement Agreement. Falcon also agreed to irrevocably assign to the Hopper Claimants its interest in the first \$8.25 million of the Escrowed Money, which was to be paid to the Hopper Claimants upon the Escrow Payment Conditions being satisfied.

9. By the end of the day on July 29, 2010, all three Escrow Payment Conditions were satisfied. The Hopper Claimants had executed the required release for the Second Condition and the Texas courts, on July 29, 2010, had signed orders dismissing the Texas cases with prejudice and an order expunging the Lis Pendens. All of this was done with Tide's full knowledge.

D. Upon Dismissal of the Texas Cases and Release of the Lis Pendens, Tide Sues in New York to Block Payment of the Escrowed Money

10. Tide knew the Texas cases were being settled and that the Escrow Payment Conditions would be satisfied when the settlement agreements were executed. Tide also was fully aware of the details of the settlement agreement among the parties, having been provided with drafts of the settlement agreements as the settlement was being negotiated. In fact, Tide led Falcon and the Hopper Claimants to believe that Tide would execute the Settlement Agreement once it had been finalized, but at the 11th hour refused to do so (and gave no indication that they intended to pursue any claims against Falcon that would have the effect of frustrating the Settlement Agreement). Tide let all this occur before filing its New York Action because it benefitted from the settlement in many respects. First, Tide received releases from the Hopper Claimants and dismissals with prejudice of the Texas cases against them. Second, they received an expungement of Lis Pendens against their purchased NorTex assets, security that the Hopper Claimants could have executed upon to satisfy a judgment had they pursued the Texas lawsuits and been successful. And third, Tide benefited from a liquidation and reduction in the Hopper Claimants' claim against Falcon and the Escrowed Money.

11. Tide quite obviously was secretly harboring all along an intent to block payment of a portion of the Escrowed Money to the Hopper Claimants in frustration of the Settlement Agreement. On August 2, 2012 (two business days after the Texas case and Lis Pendens dismissals occurred), Tide simultaneously launched a 26-page complaint against the Falcon and Arcapita Debtors (collectively, the "Debtors") in New York federal district court and wrote to the escrow agent asking that it not disburse any of the Escrowed Money to either Falcon or the Hopper Claimants.

12. Tide's complaint asserts five causes of action against the Debtors for their alleged false oral and written representations in the NorTex sale to Tide: (1) fraud and fraudulent inducement, (2) breach of express warranties in the sale documents; (3) breach of contract; (4) securities law violations; and (5) permanent injunction against disbursement of the Escrowed Money to anyone other than Tide. As remedies for its fraud and permanent injunction claims, Tide seeks to rescind the sale transaction and seeks a judicial order for turnover of the Escrowed Money to it. Tide now wants the automatic stay lifted so it can proceed with these claims and capture what remains of the sole asset of the Falcon Debtor to the exclusion of the Hopper Claimants.²

III. Argument And Authorities

13. Cause does not exist to lift the automatic stay pursuant to 11 U.S.C. § 362(d)(1) to allow Tide to pursue its New York Action and the remedies sought therein. As set forth below, application of the twelve factors weigh heavily against lifting the stay. Moreover, the circumstances that exist make it highly unjust and prejudicial to the Hopper Claimants and the bankruptcy estates to force the under-funded Debtors to defend what will be a protracted and complicated case against them in the New York Action.

A. Whether Relief Would Result in a Partial or Complete Resolution of the Issues

14. Tide asserts that allowing the New York Action to proceed would yield complete resolution of rightful ownership of the Escrowed Money. It would not. The Hopper Claimants have competing claims to at least a portion of that money, and Tide has opposed the Hopper Claimants' attempt to intervene in the New York Action. Tide can't have it both ways; and

² The Hopper Claimants have filed an adversary proceeding in this Bankruptcy Case to declare their rights to \$8.25 million of the Escrowed Money. The Hopper Claimants contend in that proceeding that \$8.25 million of the Escrowed Funds are not property of Falcon's estate and that such funds belong to them. Nothing in this Response is with prejudice to the claims made by the Hopper Claimants in the adversary proceeding.

regardless, the proper venue for adjudicating the Hopper Claimants' claim to its portion of the Escrowed Money lies in this Bankruptcy Court, not in the court where the New York Action was filed by Tide.

15. Moreover, close examination of the causes of action and the remedies that Tide seeks for recovery on those causes of action reveals a necessary involvement by the Bankruptcy Court. As a remedy for its fraud/fraudulent inducement cause of action, Tide seeks rescission of the NorTex sale and return of the parties to the pre-sale status quo. How can returning a debtor to a three-year-ago status quo not require continuing involvement of the Bankruptcy Court? It could not. Moreover, it would not resolve the issues facing Falcon and the Hopper Claimants in the bankruptcy case. Instead, such a remedy would only confuse the issues facing the Debtors, their estates, and their creditors. The practical effect of Tide's motion would be to have the district court act as a bankruptcy court - - except that not all of Falcon's creditors - - namely the Hopper Claimants, are parties to the New York Action.

16. For its fifth cause of action for a permanent injunction, Tide asks the district court to use its "equitable powers" to award the \$70 million Escrowed Money to Tide. Now that Falcon is a debtor-in-possession, the key issue with respect to the \$70 million is whether all or a portion of it is property of Falcon's estate. That is a core bankruptcy issue facing this Court and no other. Tide wants the district court to act as the bankruptcy court and determine core issues in the first instance. With Falcon and Arcapita being debtors-in-possession, it is this Bankruptcy Court, a court of equity, that is the proper court to adjust any equities among the Debtors, Tide and the Hopper Claimants.

17. Accordingly, this factor weighs against lifting the automatic stay.

B. Whether the Action Primarily Involves Third Parties

18. Tide ignored this factor, apparently contending it is inapplicable. But it is applicable, and it weighs against lifting the stay. Now that Falcon is a debtor-in-possession, there is the question of whether the \$70 million in Escrowed Money constitutes property of Falcon's estate. The Hopper Claimants contend that all but \$8.25 million of the \$70 million is Falcon's property. At best, Tide is a creditor with an as yet unadjudicated claim against Falcon. The New York Action does not primarily involve third parties. It primarily involves Falcon and its property.

19. Accordingly, this applicable factor weighs against lifting the stay.

C. Whether the Litigation Would Prejudice the Interests of Other Creditors

20. Allowing Tide to proceed with the New York Action and obtain judicial orders for turnover or rights to the Escrowed Money most definitely prejudices other creditors, as it has the potential for taking away the single asset with which Falcon can pay its creditors.

21. Tide attempts to belittle the amount of claims against Falcon's estate. What Tide doesn't discuss in its motion is that the Hopper Claimants either own \$8.25 million of the Escrowed Money outright or they are creditors of Falcon in the amount of \$8.25 million - - a claim that even Falcon does not dispute the validity of. That is not a tiny trade claim as Tide would suggest to the Bankruptcy Court.

22. If the Hopper Claimants own the first \$8.25 million of the Escrowed Money - - which the Hopper Claimants believe is the case - - then allowing the New York Action to proceed first could result in the court awarding all of the Escrowed Money to Tide without properly hearing all the issues and claims in favor of the Hopper Claimants' rights. Tide says that the Hopper Claimants filed a motion to intervene in that action. They did. But Tide objected to the intervention, and the district court has yet to rule whether it would allow the

Hopper Claimants' intervention. And there is no logical reason why one creditor's claims of ownership - - specifically Tide's - - ought to be heard and decided before another's, specifically, the Hopper Claimants. That is precisely why bankruptcy courts exist.

23. On the other hand, if the Hopper Claimants are creditors of Falcon for \$8.25 million, then allowing the New York Action to proceed would allow Tide to transform its common law fraud claim into a right of entitlement to the Debtor's property. It could prefer, thus, one creditor to others, prejudicing their interests.

24. Accordingly, this factor strongly weighs against lifting the stay.

D. Whether a Judgment Claim Arising from the New York Action is Subject to Equitable Subordination

25. Given the circumstances discussed above, including Tide lying in the weeds, fully aware that the Hopper Claimants were going to release their claims and rights against Tide, Falcon, and the NorTex assets while Tide clearly was preparing all along to launch the New York Action to block the Hopper Claimants' right to their settlement proceeds, could and should make Tide's claims, if any, subject to equitable subordination to the Hopper Claimants' claims.

26. Accordingly, this factor, which Tide did not discuss, weighs against lifting the stay.

E. The Interests of Judicial Economy and Expeditious and Economical Resolution of Litigation

27. This factor weighs heavily against lifting the stay. The very purpose of this bankruptcy case will be frustrated if the stay is lifted. While Falcon may appear to be a solvent debtor, it gets its funding from the Arcapita group of companies. As is true with most debtors, Arcapita does not have unlimited funds to spend litigating disputes involving eight figures, or more. That is why the Falcon case was filed. Any competing claims to the \$70 million can be far more economically resolved in this Court through the claims administration process than the

district court - - especially considering that Tide has objected to the Hopper Claimants joining that litigation. If Tide were to have its way, then not only would they have this Court lift the stay so that the New York Action could proceed outside of the bankruptcy proceedings, but then Tide would also have the Hopper Claimants denied the ability to prosecute their rightful claims for \$8.25 million of the Escrowed Money in the New York Action. Tide's position and the results that it would produce are simply unconscionable and cannot be allowed to carry the day.

28. Accordingly, this factor weighs against lifting the stay.

F. Whether the Parties Are Ready for Trial in the Other Proceeding

29. Tide concedes that the district court case is not ready for trial. Tide offers no evidence that any substantive discovery has occurred, and the Hopper Claimants have good reason to believe that none has.

30. Accordingly, this factor weighs against lifting the stay.

G. Impact of the Stay on the Claimants and the Balance of Harms

31. The balance of harms and equities favors not lifting the stay. The harm posed to the Hopper Claimants in lifting the automatic stay is severe while there is no ascertainable harm to any party in not lifting the stay. As discussed above, if this Court lifts the stay, the Hopper Plaintiffs could lose their entire interest in the first \$8.25 million of the Escrowed Money if the district court awards the Escrowed Money to Tide, without even the ability of the Hopper Claimants to put forward their position in the New York Action. Moreover, such a scenario, in addition to the costs to the Debtors' estates of defending the New York Action, would deprive the estate of assets available for distribution to other creditors in the bankruptcy case.

32. On the other hand, if this Court refuses to lift the stay, then both Tide and the Hopper Claimants will have the opportunity to have their claims resolved as creditors in the

claims allowance process, a result that would not be harmful to either party or any other party in interest to the bankruptcy case.

33. Accordingly, this factor weighs against lifting the stay.

IV. Conclusion

34. Application of the relevant factors from *Sonnax Industries*, 907 F.2d 1280, weighs heavily against lifting the stay. In summary: (i) relief from the stay would not result in a complete resolution of the issues since the New York Action does not involve all of the parties in interest to the bankruptcy case - - namely, the Hopper Claimants; (ii) the New York Action is closely connected with and interferes with the bankruptcy case since it deals with core issues in the bankruptcy case involving the estate and the claims against it; (iii) the parties to the New York Action are not primarily third parties because the proceeding primarily involves the Debtors; (iv) the New York Action would severely prejudice the interests of the Hopper Claimants and other potential creditors since it could take away the single asset with which Falcon could pay its creditors; (v) any judgment claim arising from the district court proceeding could be subject to equitable subordination given Tide's highly questionable conduct in these matters; (vi) the interests of judicial economy and expeditious and economical resolution of the New York Action favor resolution of Tide's claims in this Court since the assets of the Debtors' estates would otherwise be wastefully drained; (vii) the parties in the New York Action are not ready for trial; and (viii) the balance of harms weighs heavily in favor of not lifting the stay since the Hopper Claimants and the Debtors' estate stand to be harmed severely while there would be no harm to any party in resolving Tide's claims as part of the bankruptcy case.

WHEREFORE, the Hopper Claimants request that this Court enter an order denying Tide's motion to lift the automatic stay.

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