Jennifer Feldsher (JF 9773)
Marvin R. Lange (ML1854)
Stephen B. Crain
William A. (Trey) Wood III
Edmund W. Robb IV
Jason G. Cohen
BRACEWELL & GIULIANI LLP
1251 Avenue of the Americas, 49th Floor
New York, New York 10020
Telephone: (212) 508-6100
Facsimile: (212) 508-6101

Counsel to Tide Natural Gas Storage I, LP and Tide Natural Gas Storage II, LP

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 OBJECTIONS TO VOTING PROCEDURES FOR FALCON PLAN

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 Objection to the Debtors' Motion for an Order

Establishing Solicitation and Voting Procedures, insofar as such procedures apply to the Falcon Plan. In support thereof, Tide respectfully submits as follows:

I. BACKGROUND

1. Arcapita Bank B.S.C.(c) ("Arcapita") and certain affiliates filed for chapter 11 protection on March 19, 2012. On April 5, 2012, the United States Trustee appointed an official committee of unsecured creditors (the "Committee") in the Arcapita case. The Committee consists of creditors of Arcapita and AIHL, but no creditors of Falcon Gas Storage Company, Inc. ("Falcon"). Falcon filed for bankruptcy on April 30, 2012.

2. Subsequent to Falcon's bankruptcy filing, Arcapita filed its 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 [Falcon]. The Court granted this motion over Tide's objection, on June 12, 2012, ordering joint administration of the Falcon case with the Arcapita case, but not substantively consolidating the cases.

3. On February 8, 2013, the Debtors filed their (i) Disclosure Statement in Support of the Joint Plan of Reorganization of Arcapita Bank B.S.C.(c) and Related Debtors under Chapter 11 of the Bankruptcy Code ("Disclosure Statement"), (ii) Joint Plan of Reorganization of Arcapita Bank B.S.C.(c) and Related Debtors under Chapter 11 of the Bankruptcy Code ("Joint Plan"), and Motion for an Order (I) Approving the Disclosure Statement and the Form and Manner of Notice of the Disclosure Statement Hearing, (II) Establishing Solicitation and Voting Procedures, (III) Scheduling a Confirmation Hearing, and (IV) Establishing Notice and Objection Procedures for Confirmation of the Debtors' Joint Chapter 11 Plan ("Motion").[1]

[1] Capitalized terms used herein and not otherwise defined shall have the meaning ascribed to them in the Motion.

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

II. OBJECTIONS

5. Tide objects to the Motion to the extent that it seeks to apply ambiguous solicitation and voting procedures to the Falcon Plan, and Tide requests that any order granting the Motion include the following clarifications.

6. First, Tide requests that any order granting the Motion with respect to Tide provide that parties in interest may object to proofs of claims filed against Falcon for voting purposes on any permissible basis. Section 502(a) of the Bankruptcy Code provides that any party in interest may object to a claim. *See* 11 U.S.C. § 502(a); *In re Levy*, 54 B.R. 805, 808 (Bankr. S.D.N.Y. 1985) (noting that a creditor in a chapter 11 proceeding has the right to object to the allowance of another creditor's claim). In a chapter 11 case where no trustee has been appointed, a creditor may object to proofs of claim without first asking the debtor to object. *See In re Charter Co.*, 68 B.R. 225, 228 (Bankr. M.D. Fla. 1986) (holding that "[t]o require a chapter 11 creditor to first request the debtor in possession to take action would be an act of futility in most instances."); *see also In re Video Cassette Games, Inc.*, 108 B.R. 347 (Bankr. N.D. Ga. 1989) ("a creditor is not required to ask the debtor in possession to take appropriate action before he can object to the claim of another creditor"). This rule is partially based on the rationale that a debtor may have interests that militate against its objecting to the claim of a particular creditor. *See In re Revco D.S., Inc.*, 1990 Bankr. LEXIS 2966 (Bankr. N.D. Oh. 1990).

7. In this case, all creditors should enjoy the well-settled right to object to claims on any and all applicable grounds. Falcon is unlikely to object to claims of its insiders and affiliates and the Disclosure Statement discloses no intent to object to any claims but the Tide Claims. Thus, objections to such claims will have to come from the creditor body. Accordingly, Tide

asks that the Court enter an order providing that all parties in interest, including Tide, may object to proofs of claim filed against Falcon without first asking the Debtor to object.

8. Second, Tide requests that any order confirm that insider votes will not be counted for Plan confirmation purposes. Section 1129(a)(10) requires that "[i]f a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider." 11 U.S.C. § 1129(a)(10). Insiders of a debtor corporation include directors, officers, control persons, partnerships in which the debtor is a general partner, and general partners of the debtor. *See* 11 U.S.C. § 101(31)(B). Encompassed within the insider concept are entities or persons who can be classified as affiliates of the debtor or insiders of an affiliate, as both groups are presumed to have a close relationship with the debtor. *In re Missionary Baptist Found., Inc.*, 712 F.2d 206 (5th Cir. 1983); *see also In re MarketXT Holdings Corp.*, 361 B.R. 369, 386 (S.D.N.Y. 2007). An affiliate is defined as an entity that "directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor . . ." 11 U.S.C. § 101(2); *see also MarketXT*, 362 B.R. at 386-87. Falcon is ultimately owned by Arcapita. The votes of Arcapita should not be counted for confirmation purposes. Out of an abundance of caution, Tide requests that the Court confirm that votes of insiders will not be counted for purposes of determining whether an impaired class has accepted the Plan.

9. Third, it should be clarified that satisfaction of 11 U.S.C. § 1129(b)(10)—that at least one class of impaired claims has accepted the plan—shall apply on a subplan basis and that creditors may only vote in the subplan where they have a claim.

10. Fourth, it should be clarified that any estimation of the Tide Claims that may occur pursuant to a Temporary Allowance Motion shall be for voting purposes only, and shall

have no effect on, among other things, the District Court Action or the ultimate amount or allowance of the Tide Claims.

11. Fifth, Tide requests that the Court enter an order prohibiting the Debtors from classifying Tide's claim as a subordinated claim for voting purposes by fiat of the Disclosure Statement. Under section 502(a) of the Bankruptcy Code, a proof of claim filed under section 501 is deemed allowed unless a party in interest objects under Bankruptcy Rule 3007 and such objection is sustained. *See* 11 U.S.C. § 502(a). In order for a creditor's claim to be subordinated for voting purposes, subordination must be sought through an adversary proceeding and granted by the Court. *See* Fed. R. Bankr. P. 7001(8) (a proceeding to subordinate a claim is an adversary proceeding). Falcon attempts a *de facto* subordination of Tide by declaring that Tide is subordinated in the Disclosure Statement. Absent a final order by this Court subordinating the claims of Tide, Tide's proof of claim should remain *prima facie* valid under section 502(a).

12. Sixth, the Motion states that the ballots to be sent out will "set forth the amount the Debtor believes is the correct amount of a Claimant's Claim or Interest for voting purposes." (Motion ¶ 26). Tide objects to the Debtor establishing claim amounts for voting; claim amounts should be established by *prima facie* valid proofs of claim. Likewise, the Debtor should not be able to determine claim classification based on the Debtor's belief; classification should be determined by *prima facie* valid proofs of claim. As is, the voting procedures allow the Debtor to gerrymander votes and improperly shifts the burden to creditors to seek relief from the Court. Tide requests that any order approving the Motion provide that the amount and classification entered by a Claimant on its ballot shall control the Claim amount for voting purposes absent a proper objection by the Debtor.

III. PRAYER

WHEREFORE, Tide respectfully requests that any order approving the solicitation and voting procedures for Falcon also provide that (1) parties in interest may object to proofs of claims filed against Falcon for voting purposes; (2) the votes of Falcon's insiders will not be counted for Plan confirmation purposes; (3) each subplan must satisfy 1129(b)(10); (4) any estimation of the Tide claims pursuant to a Temporary Allowance Motion is for voting purposes only and will not affect distributions or the District Court Action; (5) the Debtors are prohibited from classifying Tide's claim as a subordinated claim for voting purposes; and (6) amounts entered by Claimants on a Ballot shall control for voting purposes absent a Claim Objection. Tide also respectfully requests 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*

Jennifer Feldsher (JF 9773)
Marvin R. Lange (ML1854)
1251 Avenue of the Americas
New York, New York 10020
Telephone: (212) 508-6100
Facsimile: (212) 508-6101
Marvin.Lange@bgllp.com
Jennifer.Feldsher@bgllp.com

-and-

Stephen B. Crain
William A. (Trey) Wood III
Edmund W. Robb IV
Jason G. Cohen
Bracewell & Giuliani LLP
711 Louisiana Street, Suite 2300
Houston, Texas 77002
Telephone: (713) 223-2300
Facsimile: (713) 221-1212

Stephen.Crain@bgllp.com
Trey.Wood@bgllp.com
Edmund.Robb@bgllp.com
Jason.Cohen@bgllp.com

COUNSEL FOR TIDE NATURAL GAS STORAGE I, LP AND TIDE NATURAL GAS STORAGE II, LP