

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**

	§	
<b>IN RE:</b>	§	
	§	<b>Chapter 11</b>
<b>ARCAPITA BANK B.S.C.(c), et al.,</b>	§	
<b>Debtors.</b>	§	<b>Case No. 12-11076-shl</b>
	§	<b>Jointly Administered</b>
	§	
<b>IN RE:</b>	§	
	§	<b>Chapter 11</b>
<b>FALCON GAS STORAGE CO., INC.</b>	§	
<b>Debtor.</b>	§	<b>Case No. 12-11790-shl</b>
	§	<b>(Jointly Administered under</b>
	§	<b>Case No. 12-11076)</b>

**TIDE’S RESPONSE TO JOINDER OF OFFICIAL COMMITTEE OF UNSECURED  
CREDITORS IN SUPPORT OF THE DEBTORS’ MEMORANDUM OF LAW  
REGARDING SUBORDINATION OF TIDE’S CLAIMS**

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”),<sup>1</sup> by their undersigned counsel, hereby file this Response to the Joinder (the “Committee Joinder”) of Official Committee of Unsecured Creditors in Support of the Debtors’ Memorandum of Law Regarding Subordination of Tide’s Claims. In support thereof, Tide respectfully submits as follows:

## I. RESPONSE

1. In response to the Committee Joinder, Tide incorporates herein by reference its Memorandum of Law Opposed to Subordination of the Tide Claims as Proposed in the Debtors’ Joint Plan (“Tide’s Memorandum”). Like the Debtors, the Committee misinterprets § 510(b) and the cases applying it. As detailed in Tide’s Memorandum, the Committee’s misinterpretation (i) defies the fundamentals of statutory interpretation by failing to give meaning to all of the words in § 510(b); (ii) contravenes applicable case law; and (iii) produces an inequitable result inconsistent with congressional intent.

2. The correct application of § 510(b) is detailed in Tide’s Memorandum and requires that a securities claim be subordinated to claims that are “senior to or equal the claim or interest ... represented by such security.” 11 U.S.C. § 510(b). This does not mean automatic “super subordination”, which is equivalent to disallowance. Rather, it means that a claim based on a security should “follow the security.” In this instance, that means that Tide’s claims for fraud are general unsecured claims against Falcon based on Tide’s purchase of NorTex equity. Tide’s claims are therefore subordinated to other general unsecured claims against Falcon, but ahead of the Interests in Falcon. The same is true for Tide’s claims against Arcapita—they

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<sup>1</sup> Capitalized terms used herein and not otherwise defined shall have the meaning ascribed to them in the Plan and Disclosure Statement.

should be subordinated to other general unsecured claims against Arcapita, but ahead of any Interests in Arcapita.

3. Additionally, the “common stock” exception cannot be used to further *lower* the priority of Tide’s Claims to the level of the Interests in Falcon. In this case, the claims of Tide are not based on common stock, which means they are entitled to “follow the security”, placing them below general unsecured claims but above the Interests in Falcon.

4. The legislative history referenced in the Committee Joinder is offered to support the contention that LLC membership interests were not intended by Congress to be included in the “common stock exception” of § 510(b). Because the “common stock exception” does not apply to Tide’s claims, the legislative history cited by the Committee is irrelevant.

5. What is relevant is the fact that Congress intended for § 510(b) to prevent a party that bargains for risks and rewards of equity from bootstrapping itself to a *pari passu* position with general unsecured creditors of the entity in which the claimant bought its equity. See H.R. Rep. No. 95-595, p. 186-188 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6156; see also, Slain, John J. and Homer Kripke, *The Interface between Securities Regulation and Bankruptcy*, 48 N.Y.U. L. Rev. 261 (1973). Congress never intended for § 510(b) to be distorted into “super subordination” that would allow parent-debtors like Arcapita to profit from their own fraud and the fraud of their subsidiaries. Yet that is the outcome that the Debtors and Committee propose by suggesting that the Tide Claims should be subordinated to Interests in Falcon.

**PRAYER**

WHEREFORE, Tide requests that the Court deny the subordination of the Tide Claims as sought by the Debtors. Tide further 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](mailto:Marvin.Lange@bgllp.com)  
[Jennifer.Feldsher@bgllp.com](mailto: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](mailto:Stephen.Crain@bgllp.com)  
[Trey.Wood@bgllp.com](mailto:Trey.Wood@bgllp.com)  
[Edmund.Robb@bgllp.com](mailto:Edmund.Robb@bgllp.com)  
[Jason.Cohen@bgllp.com](mailto:Jason.Cohen@bgllp.com)

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