IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	)	Chapter 11
BOUCHARD TRANSPORTATION CO., INC., *et al.*,[1]	)	Case No. 20-34682 (DRJ)
	)	(Jointly Administered)
Debtors.	)	

OBJECTION OF OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO DESIGNATION OF HARTREE PARTNERS, LP AS STALKING HORSE BIDDER AND APPROVAL OF BREAK-UP FEE AND EXPENSE REIMBURSEMENT IN CONNECTION THEREWITH

The Official Committee of Unsecured Creditors (the "Committee") of Bouchard Transportation Co., Inc., *et al.*, as debtors and debtors in possession in these cases (the "Debtors"), hereby objects (this "Objection") to the Debtors' proposed designation of Hartree Partners, LP ("Hartree") as the Stalking Horse Bidder and the approval of a Break-Up Fee and Expense Reimbursement in connection therewith.[2] In support hereof, the Committee respectfully states as follows:

PRELIMINARY STATEMENT

1. At the outset of the cases, the Debtors advised this Court that they were hopeful that unsecured creditors would receive a 100% distribution under a plan of reorganization, *see*

[1] Due to the large number of Debtors in these chapter 11 cases, a complete list of the Debtor entities and the last four digits of their federal tax identification numbers is not provided herein. A complete list may be obtained on the website of the Debtors' claims and noticing agent at https://cases.stretto.com/bouchard. The location of the Debtors' service address is: 58 South Service Road, Suite 150, Melville, New York 11747.

[2] Capitalized terms used but not defined herein have the meanings ascribed to them in the *Order (I) Approving Bidding Procedures for the Sale of the Debtors' Assets, (II) Approving Bid Protections, (III) Scheduling Certain Dates With Respect Thereto, (IV) Approving the Form and Manner of Notice Thereof, and (V) Approving Contract Assumption and Assignment Procedures* [Docket No. 956] (the "Bid Procedures Order").

Declaration of Matthew Ray of Portage Point Partners, LLC in Support of Chapter 11 Petitions and First Day Motions [Docket No. 79][3] ("The Debtors' goal is to pay creditors in full in cash on account of allowed claims."), and that the Debtors believed "there is equity value in excess of outstanding liabilities." *Id.* Unfortunately, after running an extended sale process and otherwise trying to turn the business around, the Debtors' hope will be unrealized. Indeed, any unsecured creditor recovery hinges largely on a potential "surcharge" claim against Wells Fargo Bank, National Association ("Wells Fargo"), for which funding is at risk because of, among other things, the Debtors' decision to anoint Hartree the Stalking Horse Bidder and offer Hartree, the former DIP lender, a 3% break-up fee (the "Break-Up Fee") and an expense reimbursement of up to $1.5 million (the "Expense Reimbursement") pursuant to the Bid Procedures Order (as defined below). For the reasons set forth below, the Committee opposes both the designation of Hartree as the Stalking Horse Bidder at the auction already held and the Break-Up Fee and Expense Reimbursement. Additionally, the Committee further objects to Hartree being designated and approved as the "back-up bidder" absent substantial modification to the Hartree APA (as defined below).

BACKGROUND

2. On September 28, 2020 and September 29, 2020, each Debtor filed with this Court a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtors are operating their businesses and managing their properties as debtors in possession pursuant to Bankruptcy Code sections 1107(a) and 1108. No trustee or examiner has been appointed in these cases.

[3] Unless otherwise indicated, all docket numbers referenced herein are to docket numbers in the chapter 11 case of Bouchard Transportation Co., Inc., *et al.*, Ch. 11 Case No. 20-34682 (DRJ).

3. On October 21, 2020, the Debtors filed a motion seeking this Court's approval to enter into a postpetition financing facility with Hartree as lender (the "Hartree DIP Facility"), pursuant to which Hartree agreed to provide the Debtors with a new money loan consisting of (a) an initial draw of $28.8 million upon entry of an order approving the Hartree DIP Facility on an interim basis, and (b) one or more additional draws of up to $31.2 million subject to the satisfaction of certain conditions precedent. Docket No. 102. The Hartree DIP Facility provided for a Structuring Fee equal to 1% of the maximum principal amount, an original issue discount (OID) of 5% of the maximum principal amount, and interest payable at a rate equal to LIBOR plus 7% per annum. *Id.* Further, the Hartree DIP Facility committed the Debtors and their estates to pay Hartree a $3 million Exit Fee. The Hartree DIP Facility was secured by a first priority lien on certain vessels that were not encumbered by any liens in favor of Wells Fargo, as prepetition secured lender (the "Hartree DIP Collateral"). *Id.*

4. On October 22, 2020, the Court entered an order approving the Hartree DIP Facility on an interim basis, and on December 21, 2020, the Court entered an order approving the Hartree DIP Facility on a final basis (the "Final DIP Order"). Docket Nos. 141 and 334. Subsequent to the entry of the Final DIP Order, the Debtors were unable to meet the conditions required to make additional draws under the Hartree DIP Facility, and on March 1, 2021, less than three (3) months after entry of the Final DIP Order, Hartree delivered a notice of an event of default and acceleration to the Debtors with respect to the Hartree DIP Facility notifying the Debtors of certain purported defaults and events of default.

5. As a result, and in need of additional funding for these chapter 11 cases, the Debtors sought, and on April 5, 2021 obtained, Court approval on an interim basis for a replacement debtor in possession financing facility from JMB Capital Partners Lending, LLC ("JMB") in the

principal amount of $90 million (the "JMB DIP Facility"), approximately $37.2 million of which was used to repay the outstanding principal, interest, fees, and expenses due to Hartree under the Hartree DIP Facility (including the $3 million Exit Fee). Docket No. 756.[4] The JMB DIP Facility was secured by, among other things, a first lien on all of the Debtors' vessels that secured the Hartree DIP Collateral, all of the other Debtors' vessels (in total, twenty-nine (29) vessels) that were not encumbered by liens securing either the Hartree DIP Facility or the Wells Fargo facility (together with the Hartree DIP Collateral, the "JMB First Lien Vessel Collateral") and a second lien on all vessels securing the Wells Fargo Facility (the "Wells Vessel Collateral").[5] The purpose for securing such additional funding was to enable the Debtors to both payoff the Hartree DIP Facility and explore the Debtors' restructuring alternatives by restarting the business.

6. Unfortunately, the Debtors efforts to restart the business failed and on May 25, 2021, the Debtors pivoted and filed a motion seeking, among other things, approval of bid procedures to market the Debtors' assets and solicit offers for the sale of such assets to the party or parties submitting the highest or otherwise best offer. Docket No. 907.

7. On June 8, 2021, the Court entered the Bid Procedures Order approving bid procedures and establishing a schedule governing the sale of the Debtors' assets. Although the Debtors did not have any stalking horse bidder in place at the time of entry of the Bid Procedures Order, they obtained the right to designate a Stalking Horse Bidder and provide the Stalking Horse Bidder with certain financial protections at an auction.

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[4] In total, the Committee estimates the Debtors paid Hartree over $3.6 million in fees on $31,754,978.97 in principal of a DIP facility that was outstanding for approximately 4.5 months, which equates to a more than 33% annualized return. This figure does not even take into account the additional interest, OID, and attorney's fees and other expenses that Hartree received under the Hartree DIP Facility.

[5] The JMB DIP Facility provided JMB with a first lien on the First Lien Vessel Collateral—that first lien did not prime existing or permitted liens on those vessels.

8. Specifically, section V in Exhibit 1 to the Bid Procedures Order provided "[t]he Debtors shall be authorized, but not obligated . . . to . . . in connection with any Stalking Horse Agreement with a Stalking Horse Bidder, offer . . . a breakup fee." *See* Bid Procedures Order, Ex. A. Additionally, the Debtors were given the authority to "reimburse reasonable and documented out-of-pocket fees and expenses of the Stalking Horse Bidder." *Id.* Critically, however, at the Committee's request in negotiations with the Debtors regarding the form of bid procedures order, and because no bidder had been identified at the time of the hearing on the Bid Procedures Motion, the Bid Procedures Order provided that if the Debtors designate "any Stalking Horse Bidder or Grant of Bid Protections," parties in interest had "[t]hree (3) business days following service of the applicable Stalking Horse Notice" to object to the designation or the awarding of any break-up fee or expense reimbursement. *Id.* at ¶ 2. The Bid Procedures Order further provided that "[if] a timely Stalking Horse Objection is filed, the proposed designation of the Stalking Horse Bidder and Bid Protections provided for under such Stalking Horse Agreement **shall not be deemed approved** unless approved by separate order of the Court." *Id.* at ¶ 11 (emphasis added). No separate order approving a break-up fee or expense reimbursement has been sought or entered.

9. The Bid Procedures Order set a deadline of June 25, 2021 for interested parties to submit Stalking Horse Bids. *Id.* The Debtors, after consulting with the Consultation Parties (as defined in the Bid Procedures Order) and with the Committee's consent, extended the Stalking Horse Bid deadline several times, with such deadline ultimately being extended to July 18, 2021 at 11:59 p.m. (CT), twelve (12) hours before the bid deadline and fifteen (15) hours before the scheduled commencement of the Auction. Docket No. 1076.

10. On the evening of July 18, 2021, the Debtors filed a notice stating that they had selected Hartree to act as the Stalking Horse Bidder in connection with a proposed sale of the JMB First Lien Vessel Collateral for an aggregate purchase price of $110 million (the "Stalking Horse Notice"). Docket No. 1077. The Stalking Horse Notice also advised parties in interest that the Debtors had agreed to provide Hartree the 3% Break-Up Fee and the Expense Reimbursement of up to $1,500,000. As a result, the Debtors designated Hartree as the Stalking Horse Bidder and advised parties in interest that they would move forward with the Hartree asset purchase agreement (the "Hartree APA") that included a potential administrative expense payment by the Debtors' estates to Hartree in the amount of up to $4,800,000 in the event the Debtors secured an overbid at the Auction to commence just hours later.

11. Although the Committee consented to the extensions of the Stalking Horse Bid Deadline, it did not consent to, and was not asked to consent to or approve, the designation of Hartree as the Stalking Horse Bidder or the Debtors' decision to offer Hartree the Break-Up Fee or the Expense Reimbursement. No order has been sought or entered approving the Break-Up Fee or the Expense Reimbursement.

12. On July 19, 2021, the Debtors conducted the Auction. After first conducting the auction with respect to the Wells First Lien Vessel Collateral, the Debtors commenced the auction for the JMB First Lien Vessel Collateral by pronouncing Hartree as the Stalking Horse Bidder and opening bidding on the JMB First Lien Vessel Collateral. At that point, JMB, the current DIP lender, bid $115.3 million for the JMB First Lien Vessel Collateral, which consisted of (i) cash and (ii) a "credit bid" of the outstanding amount of the DIP obligations to the extent that

the outstanding obligations owed to JMB were secured by the JMB First Lien Vessel Collateral.[6] At that point Committee counsel advised everyone on the record that it did not support Hartree receiving the Break-Up Fee and Expense Reimbursement. Again, at no time prior to the Auction was the Committee asked to support, nor did the Committee state that it supported, the Hartree APA as the Stalking Horse Bid with the Break-Up Fee and Expense Reimbursement provisions. In fact, the Committee had expressed serious concerns about the Hartree bid in light of Hartree's last minute change in position that it would not take the JMB First Lien Vessel Collateral subject to the Court approved charter agreements (the "Charter Agreements"). Docket No. 912. This last minute change further delayed the Auction and would have required the Debtors to incur an additional $5 million in administrative expenses that created serious plan confirmation issues.

13. Although Committee counsel attempted to resolve its objections to the Break-Up Fee and Expense Reimbursement with Hartree's counsel at a break during the Auction, after the break, Hartree did not submit another bid. Accordingly, the auction with respect to the JMB First Lien Vessel Collateral concluded with JMB, the current DIP Lender, being determined to have submitted the highest and best bid on such assets.

OBJECTION

14. Bidding protections, including break-up fees, may be appropriate when they are appropriately tailored to encourage potential purchasers to bid for assets and foster a competitive bidding process. *See In re S.N.A. Nut Co.*, 186 B.R. 98, 101 (Bankr. N.D. Ill. 1995) ("Agreements to provide break-up fees or reimbursement of fees and expenses are meant to compensate the potential acquirer who serves as a catalyst or 'stalking horse' which attracts more favorable

[6] Although the outstanding amount of the JMB DIP Facility is approximately $95 million, JMB was aware that the obligation was junior to the Carve Out (as defined in the Final DIP Order) and as a result, its secured DIP Claim may not be equal to the $95 million outstanding under the JMB DIP Facility.

offers."). Such protections, however, must be carefully scrutinized in light of the circumstances of the case. *See, e.g., In re America West Airlines, Inc.*, 166 B.R. 908, 912 (Bankr. D. Ariz. 1994) ("[T]he proposed break-up fee must be carefully scrutinized to insure that the debtor's estate is not unduly burdened and that the relative rights of the parties in interest are protected.").

15. Here, a review of the facts and circumstances warrants denying any request by the Debtors or Hartree to approve the Break-Up Fee or the Expense Reimbursement as well as any request to designate Hartree as the back-up bidder on the JMB First Lien Vessel Collateral.

I. THE COURT SHOULD REVIEW THE HARTREE BREAK-UP FEE AND EXPENSE REIMBURSEMENT REQUEST TO DETERMINE WHETHER THEY WERE ACTUAL AND NECESSARY EXPENSES OF THE ESTATES SATISFYING SECTION 503(b) OF THE BANKRUPTCY CODE

16. Bankruptcy courts are divided on whether to analyze a request for approval of bid protections such as those that were provided to Hartree under (a) a variant of the business judgment rule under section 363(b) of the Bankruptcy Code or (b) the administrative expense standard under section 503(b) of the Bankruptcy Code. *Compare In re Integrated Resources, Inc.*, 147 B.R. 650 (S.D.N.Y. 1992) (applying business judgment rule to approval of break-up fee and expense reimbursement), with *In re Reliant Energy Channelview LP*, 594 F.3d 200, 206 (3d Cir. 2010) (citing *Calpine Corp. v. O'Brien Env't Energy, Inc. (In re O'Brien Env't Energy, Inc.)*, 181 F.3d 527, 535 (3d Cir. 1999)) (applying administrative expense standard to approval of break-up fee and expense reimbursement).

17. The Fifth Circuit has applied a business judgment standard to a debtor's request for approval of prospective due diligence expense reimbursements for potential bidders. *See Asarco, Inc. v. Elliott Management (In re Asarco, L.L.C.)*, 650 F.3d 593 (5th Cir. 2011). The Fifth Circuit made clear in its ruling, however, that its application of the business judgment standard rather than the administrative expense standard was appropriate only because of the unique facts and

circumstances of that case. Specifically, in *Asarco*, the Court made clear that it was only approving reimbursement of prospective due diligence expenses, not a break-up fee such as the one provided to Hartree, which the court believed might be treated differently. *See id.* at 602 ("[T]he break-up fee provisions at issue in *Reliant* and *O'Brien* significantly differ from the due diligence reimbursement fees at issue in this case."). In addition, the debtors in *Asarco* sought court approval of reimbursement of due diligence expenses for a specified group of bidders prior to any those bidders' incurring due diligence expenses. *See id.* ("The unsuccessful bidders in *O'Brien* and *Reliant Energy* sought payment for expenses incurred without the court's pre-approval for reimbursement, and thus section 503 was the proper channel for requesting payment. In ASARCO's case, however, the bankruptcy court issued the Reimbursement Order before any potential qualified bidders, including the Intervenors, had incurred due diligence and work fees."). More importantly, the court in *Asarco* actually endorsed the application of the 503(b) administrative expense standard when courts consider approval of bid protections after the auction, as will have to be sought here. *See* Bid Procedures Order at ¶ 11 ("If a timely Stalking Horse Objection is filed, the proposed designation of the Stalking Horse Bidder and Bid Protections provided for under such Stalking Horse Agreement shall not be deemed approved unless approved by separate order of the Court."); Hartree APA § 6.8 ("[T]he payment of the Expense Reimbursement and Break-Up Fee shall become operative upon the approval (or deemed approval under the [Bid] Procedures Order) of this Agreement and the Break-Up Fee and the Expense Reimbursement by the Bankruptcy Court."). Finally, the bidders in *Asarco* were not previous secured lenders to the debtors that had already conducted significant due diligence on the underlying assets in connection with a separate loan transaction that plainly had value, as they were assets securing the DIP facilities. Rather, they were new bidders that needed to undertake

extensive due diligence on unique assets that might yield no value. *Id.* at 598, 602 (noting that "due diligence would entail highly sophisticated legal analysis" on a "very unique and very valuable but possibly worthless asset").

18. This Court's review of the Hartree Break-Up Fee under Bankruptcy Code section 503(b) is consistent with a recent district court decision within the Fifth Circuit in which a proposed break-up fee was reviewed under the more stringent administrative expense standard required by section 503(b)(1). *See In re Acis Cap. Mgmt., L.P.*, 604 B.R. 484, 519 (N.D. Tex. 2019) (finding that the bankruptcy court "properly applied the correct legal test—the § 503(b)(1)(A) standard—in coming to its conclusion that the Breakup Fee benefitted the estate").

19. Therefore, in determining whether Hartree is entitled to either the Break-Up Fee or Expense Reimbursement, the Court should evaluate any request by the Debtors or Hartree under section 503(b) of the Bankruptcy Code to determine whether the Break-Up Fee or the Expense Reimbursement were actual and necessary costs that benefited the Debtors' estates. *O'Brien*, 181 F.3d at 532 (the administrative expense standard is the proper method for evaluating bid protections because courts cannot "create a right to recover from the bankruptcy estate where no such rights exists under the Bankruptcy Code"). As set forth below, and as will be demonstrated at any hearing, the Break-Up Fee and Expense Reimbursement do not satisfy this standard.

II. THE BREAK-UP FEE AND EXPENSE REIMBURSEMENT FAIL TO SATSIFY SECTION 503(b)

20. Under the administrative expense standard, the movant bears the "heavy burden" of showing that the amount constitutes an actual, necessary cost and expense of preserving the estates. *See O'Brien*, 181 F.3d at 535 ("[T]he allowability of break-up fees, like that of other administrative expenses, depends upon the requesting party's ability to show that the fees were actually necessary to preserve the value of the estate."). "The words 'actual' and 'necessary' have

been construed narrowly: the debt must benefit [the] estate and its creditors." *Toma Steel Supply, Inc. v. TransAmerican Natural Gas Corp. (In re TransAmerican Natural Gas Corp.),* 978 F.2d 1409, 1416 (5th Cir. 1992) (citing *NL Indus., Inc. v. GHR Energy Corp.*, 940 F.2d 957, 966 (5th Cir. 1991)). The movant must demonstrate that the costs and expenses (a) arose out of a postpetition transaction with the debtor, (b) were necessary to preserve the value of estate assets, and (c) provided an actual benefit to the estate. *O'Brien*, 181 F.3d at 532–35. Neither the Debtors nor Hartree can carry this heavy burden.

A. There Is No Enforceable Transaction On Which The Administrative Expense Rests

21. "For a claim in its entirety to be entitled to first priority under [§ 503(b)(1)(A)], the debt must arise from a transaction with the debtor-in-possession . . . ." *O'Brien*, 181 F.3d at 532 (3d Cir. 1999) (internal citations omitted). The Hartree APA was not an enforceable postpetition transaction at the time the Debtors commenced the Auction. In fact, absent this Court's approval of the Hartree APA with the Break-Up Fee and Expense Reimbursement, there is no enforceable postpetition transaction on which Hartree may receive payment. Hartree, having sophisticated legal counsel, fully understood this risk as they were aware of the existing Bid Procedures Order and acknowledged that the Break-Up Fee and Expense Reimbursement needed separate Court approval if anyone opposed the Debtors designating Hartree as the Stalking Horse Bidder or the Break-Up Fee and Expense Reimbursement. *See* Hartree APA § 6.8 (stating payment of the Break-Up Fee and Expense Reimbursement "shall become operative upon the approval (or deemed approval under the [Bid] Procedures Order) of this Agreement and the Break-Up Fee and the Expense Reimbursement by the Bankruptcy Court."). Therefore, if the Hartree APA, the Break-Up Fee and the Expense Reimbursement are not separately approved, by the express terms of the Hartree APA, Hartree is not entitled to receive either the Break-Up Fee

or the Expense Reimbursement. To date, neither the Hartree APA nor the Break-Up Fee or Expense Reimbursement have been approved. Nor may the Break-Up Fee or the Expense Reimbursement be "deemed" approved because the Committee has timely filed this objection. At this point, the Debtors' pursuit of an order seeking approval of the Hartree APA and the Break-Up Fee and Expense Reimbursement is simply not consistent with the Debtors' fiduciary duties because it is not in the best interests of the estates and creditors.

B. Neither the Break-Up Fee Nor Expense Reimbursement Were Necessary Expenses Of The Debtors Estates

22. In addition to the requirement that they arise from an enforceable postpetition transaction, the Break-Up Fee and Expense Reimbursement must be necessary expenses to preserving or enhancing the value of the Debtors' estates. *See O'Brien*, 181 F.3d at 533 (3d Cir. 1999) (the "party seeking payments of costs and fees as an administrative expense must . . . [demonstrate] . . . that such costs and expenses were necessary to preserve the value of the estate assets"). The Break-Up Fee and Expense Reimbursement do not preserve or enhance the value of the JMB First Lien Vessel Collateral.

23. The Debtors agreed to the Break-Up Fee and Expense Reimbursement only hours before the Bid Deadline and Auction. The designation of Hartree as a Stalking Horse Bidder with a Break-Up Fee and Expense Reimbursement did not create a "floor" allowing other potential bidders time to investigate the JMB First Lien Vessel Collateral and formulate bids. The Auction was conducted mere hours after the designation on 29 vessels and the only other party to bid was JMB, which already had a complete analysis of the underlying assets as the current DIP lender and was highly motivated to bid in excess of the amount of the outstanding DIP obligations because of the subordination of its DIP claim to the Carve Out (as defined in the Final DIP Order). Any other interested bidder who saw the Stalking Horse Notice when it was filed just before

midnight on Sunday evening, just four business hours prior to the bid deadline, had already decided whether to bid. The Hartree bid simply did not set a floor and induce other bidders to investigate and consider making a competitive bid. Thus, the designation of Hartree as the Stalking Horse Bidder and agreement to pay Hartree a Break-Up Fee and Expense Reimbursement came far too late in the sale process for this Court to find that such payments were necessary to preserve the value of the JMB First Lien Vessel Collateral. *See In re Integrated Resources, Inc.*, 147 B.R. at 659 (A break-up fee is "an incentive payment to an unsuccessful bidder who placed the estate property in a sales configuration mode . . . to attract other bidders to the auction"); *see also In re Energy Future Holdings Corp.*, 904 F.3d 298, 313–14 (3d Cir. 2018) (internal citations omitted) (stating that one benefit of a break-up fee is "inducing a bid that otherwise would not have been made and without which bidding would have been limited").

24. Nor may the Court find that the Break-Up Fee and Expense Reimbursement were necessary to induce Hartree to bid on the JMB First Lien Vessel Collateral. First, it is clear that when Hartree bid at the Auction, Hartree knew that the Break-Up Fee and Expense Reimbursement were not deemed approved and might never be approved. See Hartree APA § 6.8. Nonetheless Hartree submitted its bid, and even though Committee counsel advised Hartree that it would contest the Break-Up Fee and Expense Reimbursement, Hartree did not withdraw its bid. Therefore, Hartree submitted to the process knowing it might not receive the Break-Up Fee or Expense Reimbursement. Under these facts, the Court cannot conclude that these bid protections were necessary to induce the Hartree bid. *See Reliant Energy*, 594 F.3d at 207 (finding that bidder's entry into bidding process with the entitlement to receive a break-up fee subject to court approval meant that the bidder did "make its bid without the assurance of a break-up fee, and this fact destroys [the debtors'] argument that the fee was needed to induce it to bid"); *see also id.* at

206 (citing *O'Brien*, 181 F.3d at 535) ("[A] break-up fee is not 'necessary to preserve the value of the estate' when the bidder would have bid even without the break-up fee.")); *Energy Future Holdings Corp.*, 904 F.3d at 313–14 (stating that one benefit of a break-up fee to a debtor's estate is "inducing a bid that otherwise would not have been made and without which bidding would have been limited") (internal citations omitted).

25. Finally, Hartree is a prior postpetition lender in these cases that was intimately familiar with much of the JMB First Lien Vessel Collateral before the sale process began and does not need to be compensated for its diligence. In fact, Hartree was already paid a significant sum related to the Hartree DIP Collateral in the form of fees, OID, interest, and expenses under the Hartree DIP Facility. Given the facts here, the Break-Up Fee and Expense Reimbursement were not necessary expenses.

C. Neither The Break-Up Fee Nor The Expense Reimbursement Provide The Debtors' Estates With An Actual Benefit

26. To be entitled to an administrative expense claim, the Break-Up Fee and the Expense Reimbursement must provide the Debtors' estates and its creditors with some actual benefit. *In Re Jack/Wade Drilling, Inc.*, 258 F.3d 385, 387 (5th Cir. 2001) (citing *Toma Steel Supply, Inc. v. TransAmerican Natural Gas Corp. (In Matter of TransAmerican Natural Gas Corp.)*, 978 F.2d 1409, 1416 (5th Cir. 1992)) ("In order to qualify as an 'actual and necessary cost' under section 503(b)(1)(A), a claim against the estate must have arisen post-petition and as a result of actions taken by the trustee that benefitted the estate."). In making that determination, the Court may rely on hindsight. *In re Energy Future Holdings, Inc.*, 990 F.3d 728, 744 (3d Cir. 2021) ("[A] hindsight-based analysis of the benefit to the estate requirement is appropriate."). Neither the Hartree APA nor the Break-Up Fee or Expense Reimbursement provide the Debtors'

estates with an actual benefit and, in fact, would have caused the administrative insolvency of certain Debtors by imposing on the Debtors an approximately $5 million administrative expense.

27. First, locking in the Stalking Horse Bidder did not yield benefits at the auction. JMB was ready to bid and did in fact bid. Moreover, JMB has not requested, and the Committee understands that it will not request, that its bid be modified downward if the Court does not approve the Hartree APA or the Break-Up Fee and Expense Reimbursement. Indeed, as discussed above, even without the Hartree bid, JMB had every reason to bid cash and its allowed secured claim because otherwise it could receive a reduced recovery on the JMB DIP Facility obligations and still have to fund the Carve Out. Thus, given that there were no other bids on the JMB First Lien Vessel Collateral, the Court simply cannot find that the Break-Up Fee or the Expense Reimbursement provided the estates and creditors an actual benefit.

28. Second, locking in Hartree as the Stalking Horse Bidder threatened to render certain of the Debtors' cases unconfirmable because of potential administrative insolvency. Hartree's bid was conditioned on the Debtors' rejection of the Charter Agreements, which would have created significant administrative expenses at the Debtor entities that are parties to the Charter Agreements. These Debtor entities would be left with insufficient funds to pay these administrative expenses, meaning the Debtors would have been unable to satisfy the plan confirmation requirements of section 1129(a)(9) as to these entities. Moreover, even with the JMB bid, funding of the Debtors' wind-down is thin and recoveries for unsecured creditors are highly speculative due to issues relating to the Carve Out and surcharge claims under section 506(c) against the Wells Vessel Collateral.

III. EVEN ASSUMING THAT THE COURT APPLIES THE BUSINESS JUDGMENT STANDARD, THE BREAK-UP FEE AND EXPENSE REIMBURSEMENT SHOULD NOT BE APPROVED

29. As set forth above, the administrative expense standard is proper for evaluating the Hartree APA, Break-Up Fee and Expense Reimbursement, but the Committee submits that such agreement and amounts should not be approved even if the Court were to apply the business judgment standard. *See In re Integrated Res., Inc.*, 147 B.R. at 659 (noting that even under the business judgment standard, the debtor has a duty to obtain "the greatest overall benefit possible for the estate").

30. The Debtors' fiduciary obligations to their estates and creditors requires them to forgo seeking approval of the Hartree APA and the Break-Up Fee and Expense Reimbursement because, as mentioned above, the Hartree APA, Break-Up Fee, and Expense Reimbursement (a) risk administrative insolvency at certain debtor entities because of Hartree's condition that the Debtors reject the Charter Agreements, (b) did not foster a competitive bidding process, (c) divert valuable estate assets away from creditors towards a prior lender that was already familiar with the assets, and (d) are otherwise not in the estates' best interest. *See In re Energy Future Holdings Corp.*, 575 B.R. 616, 635 (Bankr. D. Del. 2017), *aff'd*, 904 F.3d 298 (3d Cir. 2018) (citing *In re Mammoth Mart, Inc.*, 536 F.2d 950, 954 (1st Cir. 1976) (finding that a bankruptcy court may use hindsight when considering approval of a proposed break-up fee). While the Debtors' fiduciary obligations require them to not seek approval, Hartree still may file an administrative claim for the Break-Up Fee and Expense Reimbursement and the Debtor's post-reorganization trustee can object to or resolve that claim. Nonetheless, if the Debtors seek approval of the Hartree APA and Expense Reimbursement now, it would be in breach of their fiduciary obligation to maximize the value of their estates. *See, e.g., Love v. Tyson Foods, Inc.*, 677 F.3d 258, 273 n.11 (5th Cir. 2012) ("The debtor in possession performing the duties of the trustee is the representative of the estate

and is saddled with the same fiduciary duty as a trustee to maximize the value of the estate available to pay creditors.") (citations omitted).

31. Further, the Hartree bid nets effectively the same result as a converting the JMB DIP Facility Debtors to a chapter 7 liquidation. The Hartree bid provides no unsecured creditor recovery and because the JMB DIP Facility is subject to Carve Out and maritime liens, the Hartree APA transaction would have the same result as a liquidation. It therefore cannot have been a valid exercise of business judgment to agree to the Hartree Stalking Horse APA or to pay the Break-Up Fee and Expense Reimbursement when the Hartree bid on the JMB First Lien Vessel Collateral was no different than a liquidation.

CONCLUSION

32. For the foregoing reasons, the Committee respectfully requests that the Court disallow the Break-Up Fee and Expense Reimbursement and not approve the designated of Hartree as Stalking Horse Bidder.

Dated: July 21, 2021
New York, New York

Respectfully submitted,

ROPES & GRAY LLP

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