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

In Re:	§	**Chapter 11**
	§	
TMT PROCUREMENT CORP., *et al.*,[1]	§	**Case No. 13-33763**
	§	
DEBTORS.	§	**Jointly Administered**

VANTAGE DRILLING COMPANY'S EMERGENCY MOTION FOR STAY PENDING APPEAL OF THE ORDER REGARDING DIP LOAN AND THE FINAL DIP ORDER
[RELATES TO DKT NOS. 699 & 1294]

NOTICE UNDER BLR 9013-1

THIS MOTION SEEKS AN ORDER THAT MAY ADVERSELY AFFECT YOU. IF YOU OPPOSE THE MOTION, YOU SHOULD IMMEDIATELY CONTACT THE MOVING PARTY TO RESOLVE THE DISPUTE. IF YOU AND THE MOVING PARTY CANNOT AGREE, YOU MUST FILE A RESPONSE AND SEND A COPY TO THE MOVING PARTY. YOU MUST FILE AND SERVE YOUR RESPONSE WITHIN 21 DAYS OF THE DATE THIS WAS SERVED ON YOU. YOUR RESPONSE MUST STATE WHY THE MOTION SHOULD NOT BE GRANTED. IF YOU DO NOT FILE A TIMELY RESPONSE, THE RELIEF MAY BE GRANTED WITHOUT FURTHER NOTICE TO YOU. IF YOU OPPOSE THE MOTION AND HAVE NOT REACHED AN AGREEMENT, YOU MUST ATTEND THE HEARING. UNLESS THE PARTIES AGREE OTHERWISE, THE COURT MAY CONSIDER EVIDENCE AT THE HEARING AND MAY DECIDE THE MOTION AT THE HEARING.

REPRESENTED PARTIES SHOULD ACT THROUGH THEIR ATTORNEY.

EMERGENCY RELIEF HAS BEEN REQUESTED. IF THE COURT CONSIDERS THE MOTION ON AN EMERGENCY BASIS, THEN YOU WILL HAVE LESS THAN 21 DAYS TO ANSWER. IF YOU OBJECT TO

[1] The Debtors in these chapter 11 cases are: (1) A Whale Corporation; (2) B Whale Corporation; (3) C Whale Corporation; (4) D Whale Corporation; (5) E Whale Corporation; (6) G Whale Corporation; (7) H Whale Corporation; (8) A Duckling Corporation; (9) F Elephant Inc.; (10) A Ladybug Corporation; (11) C Ladybug Corporation; (12) D Ladybug Corporation; (13) A Handy Corporation; (14) B Handy Corporation; (15) C Handy Corporation; (16) B Max Corporation; (17) New Flagship Investment Co., Ltd; (18) RoRo Line Corporation; (19) Ugly Duckling Holding Corporation; (20) Great Elephant Corporation; and (21) TMT Procurement Corporation.

THE REQUESTED RELIEF OR IF YOU BELIEVE THAT THE EMERGENCY CONSIDERATION IS NOT WARRANTED, YOU SHOULD FILE AN IMMEDIATE RESPONSE.

A HEARING HAS BEEN SET ON THIS MOTION FOR APRIL 7, 2014, AT 9:00 A.M. IN COURTROOM 404, UNITED STATES COURTHOUSE, 515 RUSK AVENUE, HOUSTON, TEXAS 77002.

Vantage Drilling Company ("Vantage"), a party-in-interest with respect to these chapter 11 cases, files this *Emergency Motion for Stay Pending Appeal* (the "Motion") of this Court's *Order Regarding DIP Loan* (the "Supplemental DIP Order") [Bk. Dkt. No. 1294] and the *Final Order (I) Authorizing Post-Petition Secured Financing and (II) Providing Related Relief* (the "Final DIP Order") [Bk. Dkt. No. 699].

PRELIMINARY STATEMENT AND BASIS FOR EMERGENCY CONSIDERATION[2]

1. Vantage seeks to stay this Court's March 28, 2014 Supplemental DIP Order and the Final DIP Order to the extent they authorize the DIP Lender to effectuate a "disposition" (i.e., sale) of F3-VTG Shares pending Vantage's appeal of those orders. Specifically, the Supplemental DIP Order is premised upon liens granted under the Final DIP Order and Escrow Order, both of which are currently on appeal before the Fifth Circuit wherein Vantage has requested that the Fifth Circuit nullify the liens imposed on the F3-VTG Shares in favor of the DIP Lender and the Debtors' prepetition lenders. If such liens are ultimately invalidated by the Fifth Circuit as Vantage has requested (or at minimum subordinated to Vantage's pre-existing equitable title), the DIP Lender would necessarily be precluded from effectuating any "disposition" under either the Supplemental DIP Order and/or Final DIP Order. Thus, allowing

[2] All capitalized terms not otherwise defined in the Preliminary Statement are defined below.

the DIP Lender the current ability to dispose of the shares would only serve to circumvent Vantage's appellate rights in the pending Fifth Circuit Appeal.[3]

2. In this respect, Vantage submits that an immediate stay of the Supplemental DIP Order and/or the Final DIP Order is appropriate because (i) Vantage is likely to succeed on the merits of its appeal(s) in light of the legal errors committed by the Bankruptcy Court; (ii) Vantage will suffer substantial, and irreparable harm if a stay is not issued; (iii) the Debtors' estates will not suffer substantial harm if the stay is granted; and (iv) granting of a stay is in the public interest.

3. As to the first factor, Vantage acknowledges that this Court has previously ruled that the F3-VTG Shares are "property of the estate" and that Vantage has no current legal or equitable interest in the shares. Nonetheless, Vantage submits that its pending Fifth Circuit Appeal (and forthcoming appeal of the Supplemental DIP Order) raises substantial legal issues regarding, *inter alia*, bankruptcy court jurisdiction and authority. These are legal issues that the Fifth Circuit will soon address given that oral argument in the Fifth Circuit Appeal was heard on March 31, 2014. Further, any disposition of the F3-VTG Shares will indisputably irreparably harm Vantage by extinguishing Vantage's preexisting state law claims and equitable title to any F3-VTG Shares sold under those orders, and would preclude Vantage from obtaining complete and effective relief in the pending state court lawsuit and Fifth Circuit Appeal. The imposition of a stay, on the other hand, would impose minimal, if any, harm to the Debtors' estates, particularly given the default interest that would continue to accrue for the benefit of the DIP

[3] See March 28, 2014 Hr'g Tr. at p. 243:24-25 (In discussing Vantage's likely stay pending appeal request, the Court acknowledged: "You might want to bring it to me, but **I'm really doing my best to preserve your appellate rights**.") (emphasis added); *see also Bank of NY Trust Co. v. Official Unsecured Creditors' Committee (In re Pac. Lumber Co.)*, 584 F.3d 229, 243 (5th Cir. 2009) (In admonishing bankruptcy courts for failing to take proactive steps to preserve appellate rights, the Fifth Circuit stated that "substantial legal issues can and ought to preserved for review").

Lender (for which Vantage is willing to bond) and the significant equity cushion that currently exists in the F3-VTG Shares.

4. Accordingly, given the substantial legal issues before the Fifth Circuit and the balance of the equities, there is no justification for precluding effective appellate review by denying a stay.

FACTUAL AND PROCEDURAL BACKGROUND[4]

A. Vantage's Equitable Interest in the Vantage Shares Arose Long Before the Debtors Commenced these Bankruptcy Cases.

5. Vantage has an equitable interest in the F3-VTG Shares (defined below) that arose when Hsin-Chi-Su a/k/a Nobu Su ("Su") obtained the F3-VTG Shares by fraud and breach of fiduciary duty. *See Vantage Drilling Co. v. Hsin-Chi-Su a/k/a Nobu Su,* Cause No. 2012-47755, in the 295th District Court of Harris County, Texas (the "Vantage Suit"). Vantage's equitable title is not some future interest that arises only on the date the state court enters an order finding that Su obtained the shares by fraud or breach of fiduciary duty. Under clear state law precedent, Vantage's equitable title arose the moment the shares were obtained by fraud or breach of fiduciary duty—in this case, a date that long preceded these bankruptcy cases. Moreover, Vantage's equitable title continues to follow the shares and burdens the legal title thereto until the shares are acquired by a bona fide purchaser without notice of Vantage's preexisting claims.[5]

[4] Vantage expressly incorporates herein the factual and procedural background set forth in Vantage's Plan Objection. *See* Bk. Dkt. No. 1248. In addition, Vantage summarizes certain additional facts below.

[5] Vantage expressly incorporates herein the authority cited in its Plan Objection and in its Objection to First Supplement to Stipulation and Agreed Order. *See* Bk. Dkt. Nos. 1248 & 1273.

B. The Escrow Order and Final DIP Order Subjected the F3-VTG Shares to Claims of the Debtors' Creditors Notwithstanding Vantage's Pre-Existing State Law Claims and Interests.

6. Notwithstanding the pending Vantage Suit and Vantage's claims and interests in the F3-VTG Shares, on July 23, 2013, the Court entered its *Order Regarding Shares* (the "Escrow Order") that, along with a related addendum, took possession in *custodia legis* of approximately 30 million shares in Vantage (the "F3-VTG Shares") transferred by Su through his designee, F3 Capital. *See* Bk. Dkt. No. 134, at ¶¶ 1-3. The Escrow Order was subsequently affirmed by the District Court. *See* Dist. Dkt. No. 146.

7. On November 7, 2013, the Court entered the Final DIP Order. *See* Bk. Dkt. No. 699. The Final DIP Order granted the DIP Lender a lien on the F3-VTG Shares and further provided that the DIP Lender could seek authority from this Court to sell the F3-VTG Shares to satisfy the DIP Lender's claim. *Id.*, at ¶¶ I(4) & 19.b(2).[6]

[6] Vantage submits that the Final DIP Order did not preapprove any dispositions of the F3-VTG Shares but rather required notice, hearing, and a subsequent order approving any such disposition from this Court. The Final DIP Order expressly provides that this "Court shall control the manner and methods for effectuation of all remedies under the DIP facility" including "***the manner in which*** . . . ***the F3-VTG Shares are to disposed*** . . . ." *See* Final DIP Order, at ¶19(a) (emphasis added); *see also id.* (acknowledging that with respect to "effectuation of remedies[,]" "relief may be sought on an expedited basis"); *id.* at ¶20(b)(8) (acknowledging that a future motion seeking approval of any "disposition" was required, stating: "the DIP Lender shall be entitled to seek relief from this Court in furtherance of any Disposition"). Moreover, as set forth in Vantage's *Objection to the First Supplement to Stipulation and Agreed Order Regarding the Final DIP Order and DIP Term Sheet* [Bk. Dkt. No. 1273], this Court repeatedly stated on the record that no shares would be sold without notice, a hearing, and a subsequent order from this Court.

Indeed, rather than preapproving any sale or other disposition of the F3-VTG Shares, the Final DIP Order merely granted the DIP Lender a "Protected Claim" under the Escrow Order and granted a lien to secure that claim pursuant to the Escrow Order. *See* Bk. Dkt. No. 699-2, at § H(2)(b) (providing that the DIP Lender shall be "the senior beneficiary of the Order Regarding Shares pursuant to paragraph 4(b) thereof and ***otherwise subject to all the terms and conditions of the [Escrow Order]***" and its obligations "shall be a 'Protected Claim' defined in paragraph 4(B) of the Order Regarding Shares"). The Escrow Order gave holders of "Protected Claims"—such as the DIP Lender—only the right to file a motion seeking a "***further***" order from the Court approving a disposition of the shares to satisfy their claims. *See* Escrow Order, at ¶3 ("The share certificates will only be released by further Court order. Any party in interest, with a claim that is a Protected Claim, may seek an order of disposition of all or some of the shares. The shares will only be sold pursuant to a Court order. While held in custodia legis, the shares may not be sold, hypothecated, pledged, traded, exchanged, or disposed of except on further order of this Court.").

C. Vantage Appealed the Escrow Order and Final DIP Order

8. Vantage timely appealed five orders entered in these bankruptcy cases, including the District Court's Order Affirming the Escrow Order on October 18, 2013 [Dist. Dkt. No. 153] and this Court's Final DIP Order on November 11, 2013 [Bk. Dkt. No. 715].[7] Vantage's appeal of the three District Court Orders and direct appeal of the two Bankruptcy Court Orders (the "Appealed Orders") are consolidated under USCA No. 13-20622, before the Fifth Circuit Court of Appeals (the "Fifth Circuit Appeal"). The Fifth Circuit Appeal is fully briefed and oral argument was heard on March 31, 2014.

9. Vantage's Fifth Circuit Appeal challenges many of the same issues upon which the Supplemental DIP Order is premised, including, *inter alia*,

> (a) whether the lower courts lacked jurisdiction under 28 U.S.C. § 1334 or 28 U.S.C. § 157(b) or (c) to enter the original Appealed Orders;
>
> (b) whether the Bankruptcy Code permits a bankruptcy court (i) to exercise jurisdiction over the F3-VTG Shares that are not property of the Debtors' bankruptcy estates, (ii) impose priming liens on the F3-VTG Shares and subject them to liquidation to pay creditors' claims against those bankruptcy estates, notwithstanding the existence of prior, competing claims to the F3-VTG Shares pending in non-bankruptcy litigation between parties who are neither Debtors nor creditors of the Debtors;
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> (c) whether the lower courts, purporting to exercise jurisdiction over non-estate assets, the F3-VTG Shares, that form the res of unrelated litigation pending between non-debtors that is neither arising in, arising under or related to the Debtors' bankruptcy cases, can deny Vantage effective relief in the Vantage Suit based upon an advisory opinion that prejudges the merits of that case and ignores long-settled Texas law recognizing that a party who takes possession of stock or other assets with knowledge of competing equitable claims to the assets can obtain no better title than was owned by the transferor;
>
> (d) whether the Appealed Orders deprived Vantage of its interests in the F3-VTG Shares without due process of law;

[7] Vantage also appealed the District Court's Interim DIP Order and DIP Addendum and this Court's final Cash Collateral Order.

(e) whether the lower courts exceeded their statutory authority under sections 363 and/or 364 of the Bankruptcy Code by entering the Appealed Orders which imposed liens and security interests on the F3-VTG Shares;

(f) whether the lower courts erred by finding/concluding that they could grant "good faith lender" protections under either sections 363(m) or 364(e) of the Bankruptcy Code notwithstanding the DIP Lender's actual knowledge of Vantage's prior adverse claims to the F3-VTG Shares and even though none of the Appealed Orders involved the "sale or lease" of estate property; and

(g) whether the Bankruptcy Court exceeded its constitutional authority in entering the Final DIP Order.

10. Based on the clear requirements of this Court's prior order and its statements on the record at various hearings that no F3-VTG Shares would be sold without notice, hearing, and a subsequent order (that could be appealed and stayed), Vantage did not previously seek a stay of the Final DIP Order.

D. The Bankruptcy Court Entered the Supplemental DIP Order Authorizing the DIP Lender to Exercise its Default Rights Under the Final DIP Order.

11. On March 25, 2014, the Debtors filed as a proposed order the *First Supplement to Stipulation and Agreed Order Regarding the Final DIP* (the "DIP Supplement") [Bk. Dkt. No. 1251].[8] The DIP Supplement set forth various procedures and timeframes within which the Debtors and DIP Lender would begin liquidating the F3-VTG Shares pursuant to a secret sale process and timeframe wholly immune from oversight by this Court and interested parties. The proceeds from this sale process—a process dictated under the sole and absolute discretion of Raymond James (Bk. Dkt. No. 1251 at Annex A, at ¶¶ 10 & 29)—would be used to satisfy the DIP Lender's claims and to pay the DIP Lenders' professional fees. *Id*., Annex A, at ¶¶ 7 & 35.

[8] On February 28, 2014, this Court previously entered a *Stipulation and Agreed Order Regarding (A) the Final Order (I) Authorizing Post-Petition Secured Financing and (II) Providing Related Relief and (B) the DIP Term Sheet* (the "First Supplement") [Bk. Dkt. No. 1170]. The First Supplement was simply a forbearance agreement between the Debtors and the DIP Lender; it did not alter or amend any rights granted under the Final DIP Order as to the "disposition" of shares. Indeed, this Court lacked jurisdiction to alter or amend the Final DIP Order in light of the pending the Fifth Circuit Appeals.

Moreover, the DIP Supplement asked this Court to predetermine that such share sales—which have not yet occurred to yet-to-be determined parties—would satisfy Bankruptcy Code Section 363's requirements thereby entitling such prospective purchasers with the protections afforded by Sections 363(f) and (m) of the Bankruptcy Code.

12. Vantage filed an objection to the DIP Supplement, asserting that this Court did not have the jurisdiction or authority to approve the DIP Supplement. Vantage argued that the Fifth Circuit Appeal divested this Court of jurisdiction over the Final DIP Order and accordingly this Court had no jurisdiction to alter or expand upon the Final DIP Order by granting protections afforded by section 363(f) and (m) that were not approved under the Final DIP Order. Vantage further argued that the F3-VTG Shares are not "property of the estate" and the Court accordingly had no jurisdiction or statutory authority to approve the sale of the shares or constitutional authority to release Vantage's claims and interests in the shares as the DIP Supplement requested. *See* Bk. Dkt. No. 1273.

13. On March 28, 2014, the Court held a hearing on the DIP Supplement and the Handy Debtors' *Joint Plan of Reorganization.* At the hearing, this Court acknowledged that it did not have jurisdiction to alter or amend the Final DIP Order. For that reason, the Court declined to approve the DIP Supplement and instead entered the Supplemental DIP Order that authorizes the DIP Lender to effectuate a disposition of the F3-VTG Shares to the extent permitted under the Final DIP Order and without the requested section 363(f) and 363(m) protections. *See* Bk. Dkt. No. 1294, at ¶ 2 ("If the Debtors do not make the specified reductions, the DIP Lender may exercise its default rights including Dispositions under the Final DIP Order."). The Supplemental DIP Order expressly provides that "[n]othing in this Order alters the Final DIP Order." *Id.*, at ¶ 5.

14. On April 4, 2014, Vantage filed its Notice of Appeal of the Supplemental DIP Order. *See* Bk. Dkt. No. 1324. By this Motion, Vantage respectfully requests this Court to stay the Supplemental DIP Order and the Final DIP Order (to the extent this Court interprets the Final DIP Order as authorizing dispositions of the F3-VTG Shares without notice, hearing, and further order) pending the conclusion of Vantage's Fifth Circuit Appeal and the appeal of the Supplemental DIP Order.

ARGUMENT AND AUTHORITIES

A. Legal Standard For Granting A Motion For Stay Pending Appeal.

15. Rule 8005 of the Federal Rules of Bankruptcy Procedure provides:

> A motion for stay of the judgment, order, or decree of a bankruptcy judge, for approval of a supersedeas bond, or for other relief pending appeal must ordinarily be presented to the bankruptcy judge in the first instance. . . . [T]he bankruptcy judge may suspend or order the continuation of other proceedings in the case under the Code or make any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest . . . .

FED. R. BANKR. P. 8005.

16. The Fifth Circuit employs a four part test in determining whether to grant a stay pending appeal:

> (1) whether the movant has made a showing of likelihood of success on the merits; (2) whether the movant has made a showing of irreparable injury if the stay is not granted; (3) whether the granting of the stay would substantially harm the other parties; and (4) whether the granting of the stay would serve the public interest.

Ruiz v. Estelle, 666 F.2d 854, 856 (5th Cir. 1982); *accord Arnold v. Garlock, Inc.*, 278 F.3d 426, 438-39 (5th Cir. 2001).[9] The Fifth Circuit, however, "has refused to apply these factors in a rigid mechanical fashion." *Reading & Bates Petroleum Co. v. Musslewhite*, 14 F.3d 271, 272 (5th Cir.

[9] This same test applies to granting a stay pending appeal pursuant to Bankruptcy Rule 8005. *In re Texas Equip. Co., Inc.*, 283 B.R. 222, 227 (Bankr. N.D. Tex. 2002) (citing *Turner v. Citizens Nat'l Bank of Hammond* (*In re Turner*), 207 B.R. 373, 375 (B.A.P. 2d. Cir. 1997)); *In re Edwards*, 228 B.R. 573, 575 (Bankr. E.D. Pa. 1999); *In re Westwood Plaza Apartments, Ltd.*, 150 B.R. 163, 168 (Bankr. E.D. Tex. 1993)).

1994). Accordingly, some courts within the Fifth Circuit have determined that "the absence of any one factor is not fatal to a successful motion for stay." *In re Permian Producers Drilling, Inc.*, 263 B.R. 510, 515 (W.D. Tex. 2000) (citing *In re First S. Savs. Ass'n*, 820 F.2d 700, 709 n.10 (5th Cir. 1987)); *cf. Arnold*, 278 F.3d at 438-39 (noting that while "each part [of the stay pending appeal test] must be met[,]" the standard for meeting the likelihood of success on the merits prong could be altered as described *infra*).

B. Each of the Four Factors Supports an Immediate Stay Pending Appeal.

1. Vantage is Likely to Succeed on the Merits of its Appeal.

17. The "likelihood of success" element does not require the movant to convince the bankruptcy court that it committed error. The movant "need not always show a 'probability' of success on the merits; instead, the movant need only present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay." *Arnold*, 278 F.3d at 439 (quoting *Ruiz v. Estelle*, 666 F.2d 854, 856 (5th Cir. 1982)); *In re Friendship Dairies*, 2014 WL 527232, at *2 (Bankr. N.D. Tex. Feb. 10, 2014). Moreover, when the issues on appeal present "questions involving application of law, or when the law has not been definitively addressed by a higher court, the movant more easily satisfies the first element." *In re Texas Equip. Co., Inc.*, 283 B.R. 222, 227 (Bankr. N.D. Tex. 2002) (citing *In re Westwood Plaza Apartments*, 150 B.R. 163, 168 (Bankr. E.D. Tex. 1993)) (internal citations omitted).

18. Vantage's appeal raises substantial questions of law regarding bankruptcy court jurisdiction and authority that have not yet been addressed by the Fifth Circuit. Moreover, Vantage respectfully submits that its appeals are likely to succeed on the merits for at least two reasons: (a) the Supplemental DIP Order is premised on two prior orders that are subject to

pending appeals that may be vacated by the Fifth Circuit; and (b) the Supplemental DIP Order approved a disposition of non-estate property that this Court had no authority to approve.[10]

(a) The Supplemental DIP Order is Premised on Rights Granted Under Orders that are Likely to be Vacated on Appeal.

19. Vantage respectfully acknowledges this Court's prior rulings that Vantage has no interest in the F3-VTG Shares and that the shares are "property of the estate." Nevertheless, Vantage submits that the transfer of non-estate property subject to a pending state court lawsuit to a bankruptcy court clerk to be held in escrow and then subjecting that property to priming liens raises substantial legal issues. Vantage argues in the Fifth Circuit Appeal that his Court had no subject matter jurisdiction over Vantage's state law claims or interests, authority to adjudicate Vantage's claims or interests, or authority to impose liens on the F3-VTG Shares in derogation of Vantage's preexisting rights and interests as this Court did through the appealed Final DIP Order and Escrow Order.

20. Vantage further submits that the Final DIP Order erred by granting a lien on the F3-VTG Shares notwithstanding that section 364 authorizes liens only on "property of the estate" and, as further explained below, Vantage submits that this Court erred by determining that the F3-VTG Share are "property of the estate."

[10] Vantage further argues that this Court did not have jurisdiction to enter the Supplemental DIP Order to the extent the order permits relief that was not granted in the Final DIP Order or otherwise alters or amends the Final DIP Order or Escrow Order or circumvents the Fifth Circuit Appeals. As set forth in Vantage's DIP Supplement Objection [Bk. Dkt. No. 1273], the Final DIP Order did not authorize the DIP Lender to effectuate a disposition of the shares without notice, hearing, and a subsequent order from this Court approving the sale. To the extent the Supplemental DIP Order purports to preapprove sales that the Final DIP Order did not "preapprove" but, rather, conditioned approval on notice, hearing, and subsequent orders to effectuate, the Supplemental DIP Order impermissibly alters and amends the Final DIP Order by waiving the notice, hearing, and subsequent order requirements imposed by the Final DIP Order. As set forth in Vantage's Objection to the DIP Supplement, Vantage's pending appeal of the Final DIP Order divested this Court of jurisdiction to alter, amend, or expand upon the Final DIP Order. Vantage reserves all rights to contest on appeal this Court's jurisdiction to enter the Supplemental DIP Order to the extent the order is interpreted, effectuated, or enforced in a manner that alters or amends the Final DIP Order or Escrow Order or otherwise circumvents the pending Fifth Circuit Appeal.

21. As set forth above, the Fifth Circuit Appeal has been fully briefed and argued, and thus is ripe for decision.

(b) This Court Did Not Have the Statutory Authority to Approve A Disposition of the F3–VTG Shares Under the DIP Loan Order.

22. Bankruptcy Code section 363 authorizes bankruptcy courts to approve the disposition of property of the estate. And, as the Supreme Court restated just one month ago, bankruptcy courts have no authority under section 105 or otherwise to issue orders that are outside the confines of unambiguous statutory provisions. *See Law v. Siegel* , 134 S.Ct. 1188, 1194–97 (2014); *Bread Political Action Comm. v. FEC*, 455 U.S. 577, 580 (1982) ("[a]bsent a clearly expressed legislative intention to the contrary, that language [of the statute] must ordinarily be regarded as conclusive").[11]

23. Section 363 is unambiguous—a bankruptcy court can only authorize the sale or other disposition of "property of the estate." 11 U.S.C. § 363(b)(1) ("The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, *property of the estate* . . . ") (emphasis added); *see also* COLLIER ON BANKRUPTCY, ¶ 363.01 (16th ed. rev. 2013) ("the trustee may sell only property of the estate under" section 363); *Anderson v. Connie (In re Robertson)*, 203 F.3d 855, 863 (5th Cir. 2000) (trustee could not sell property owned by debtor's former spouse); *Darby v. P.J. Zimmerman (In re Popp)*, 323 B.R. 260, 271 (B.A.P. 9th Cir. 2005) (relief granted in sale order was not authorized by section 363, as courts must "distinguish cases such as this—where the predicate showings for application of section 363 have not been made—and those cases in which the estate acts properly and does not attempt to

[11] "The task of resolving the dispute over the meaning of [a section of the Bankruptcy Code] begins where all such inquiries must begin: with the language of the statute itself. In this case it is also where the inquiry should end, for where, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989).

expropriate non-estate property"); *Cinicola v. Scharffenberger*, 248 F.3d 110, 121 (3d Cir. 2001) (estate could not sell property that it did now own); *In re Manning*, 831 F.2d 205, 212 (10th Cir. 1987) (trustee lacked authority under section 363(f) to sell partnership assets that were not property of the estate). Indeed, extending section 363's reach to non-estate property would violate the most basic tenant of bankruptcy jurisdiction. *See In re Apex Long Term Acute Care-Katy, L.P.*, 465 B.R. 452, 464 (Bankr. S.D. Tex. 2011) (J. Isgur) (acknowledging that bankruptcy court subject matter jurisdiction is essentially *in rem* and "[b]ecause the bankruptcy courts' *in rem* jurisdiction applies only to property of the estate," bankruptcy courts have no authority over property that is not property of the estate).[12]

24. Vantage recognizes that, at the March 28, 2014 hearing, this Court determined that the F3-VTG Shares are "property of the estate" under section 541, but respectfully submits that this determination was inconsistent with the precedent cited in Vantage's briefs.[13] Vantage has argued and will continue to argue to the Fifth Circuit that the F3-VTG Shares that this Court authorized the disposition of under the Supplemental DIP Order and/or Final DIP Order were not "property of the estate." As this Court and the Debtors repeatedly acknowledged, the Debtors do not have legal title, equitable title, or a contingent reversionary interest in the shares.[14]

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[12] *See also Torkelsen v. Maggio (In re Guild & Gallery Plus, Inc.)*, 72 F.3d 1171 (3d Cir. 1996) (court had no authority over cause of action regarding property that was not "property of the estate"); *In re Gallucci*, 931 F.2d 738, 742 (11th Cir. 1991) ("If the action does not involve property of the estate, then not only is it a noncore proceeding, it is an unrelated matter completely beyond the bankruptcy court's subject–matter jurisdiction."); *Cuhen v. Forman (In re Raimondo)*, Adv. No. 06-01847, 2007 WL 2248068, at *8 (Bankr. D.N.J. July 31, 2007) ("as the property is not property of the estate, an *in rem* action is outside the purview of this Court's jurisdiction").

[13] *See* Bk. Dkt. Nos. 1248 & 1273.

[14] *See* Handy Debtors' Plan, § 102(51) (defining the Escrowed F3-VTG Shares as "the shares of Vantage Drilling Company ***owned by F3 Capital*** and deposited with the clerk of the Bankruptcy Court"); *id.* at § 1.02(61) (defining the F3-VTG Shares as "so many of the Escrowed VTG shares of Vantage Drilling Company ***owned by F3 Capital*** that are permitted to be released pursuant to the DIP Stipulation").

25. Vantage argued to the Fifth Circuit and will continue to argue that the F3-VTG Shares remain property of a non-debtor and were not transformed into "property of the estate" simply because they were used to secure DIP financing.[15]

2. Vantage Will Suffer Immediate And Irreparable Harm If The Court Does Not Issue A Stay.

26. Vantage will suffer severe and irreparable harm if the DIP Lender is authorized to sell shares under the Supplemental DIP Order and the Final DIP Order (as early as April 7, according to the DIP Supplement which was not ultimately approved). Sales of the F3-VTG Shares to undisclosed third parties without notice of Vantage's claims would preclude Vantage from preserving its equitable title to those shares, deprive Vantage of the right to obtain a full recovery in the Vantage Suit, as well as to obtain complete relief from the Fifth Circuit pursuant to the pending Fifth Circuit Appeal. In other words, the state court in the Vantage Suit could find that the F3-VTG Shares were obtained by fraud or breaches of fiduciary duty and the Fifth Circuit could reverse the Escrow Order and invalidate the liens granted under the Final DIP Order, yet Vantage would still be precluded from recovering the shares because this Court authorized the sale of the shares notwithstanding the pendency of the Vantage Suit and the Fifth Circuit Appeal. Vantage, a non-creditor involuntarily forced into these cases because of Su and F3 Capital's transfer of possession of the F3-VTG Shares to this Court, will have effectively been stripped of its state law claims against a ***non-debtor*** and ***non-estate*** property by an Article I bankruptcy court with no jurisdiction or authority over such claims.

[15] Vantage will argue on appeal that this Court's reliance on section 541(a)(7) was erroneous. Section 541(a)(7) provides that only an "***interest*** in property that the estate acquires after the commencement of the case" is "property of the estate." 11 U.S.C. § 541(a)(7) (emphasis added). As of the date of the Supplemental DIP Order, the Debtors acquired no "interest" in the F3-VTG Shares. Ownership and all reversionary interests remained with the F3 Capital. Whatever "interest" in the shares the Debtors purportedly acquired under the Escrow Order has not been defined or specified but must, as a matter of law, be subject to Vantage's claims.

27. Courts consistently find that the irreparable harm requirement is satisfied when an appellant's right would be vitiated absent a stay as Vantage's rights would be via implementation of the Supplemental DIP Order and Final DIP Order. For example, in *ACC Bondholder Group v. Adelphia Commc'ns Corp. (In re Adelphia Commc'ns Corp.)*, 361 B.R. 337 (S.D.N.Y. 2007), the District Court for the Southern District of New York, in issuing a stay pending appeal of the bankruptcy court's confirmation order, emphasized that the loss of appellate review is a "quintessential form of prejudice." *Id.* at 347-48. There, the court concluded that "where the denial of a stay pending appeal risks mooting *any* appeal of *significant* claims of error, the irreparable harm requirement is satisfied." *Id*. at 348; *see also Manges v. Seattle-First Nat'l Bank (In re Manges*), 29 F.3d 1034, 1039 (5th Cir. 1994); *In re Texas Equip. Co., Inc.*, 283 B.R. 222, 228 (Bankr. N.D. Tex. 2002) (unless the party obtains a stay of a sale order, there would be no effective remedies).

28. Accordingly, unless a stay is granted, the disposition of the F3-VTG Shares is imminent and, as a result, Vantage will likely not have an adequate remedy at law to correct the infirmities associated with the Escrow Order, the Final DIP Order, and the Supplemental DIP Order. Absent a stay, "effective judicial relief would be no longer available, even though there may still be a viable dispute between the parties on appeal." *In re Manges*, 29 F.3d at 1039.

3. Other Parties Will Not Suffer Substantial Harm if a Stay is Granted.

29. The Debtors' creditors will not be harmed by a stay. No shares or proceeds from any sale of the F3-VTG Shares under the orders would be allocated to the Debtors' estates or creditors other than the DIP Lender.

30. Though a stay may delay the DIP Lender's possible payment in full, the DIP Lender will continue to accrue default interest on the DIP Loan balance. The DIP Lender is unlikely to earn a rate of return on any use of the sale proceeds that exceeds the generous default

interest rate. Moreover, the DIP Lender's claim, along with any accrued default interest, is over 200% secured by the F3-VTG Shares alone, and the Final DIP Order secured the DIP Lender's claim with six additional sources of collateral. *See* Bk. Dkt. No. 699, at ¶ 19b(2). Accordingly, a stay would impose no risk that the DIP Lender's claim, including any accrued default interest, would not be satisfied if Vantage is unsuccessful on appeal.

31. The Debtors may be prejudiced to the extent that the delay causes the estates to accrue default interest. However, an appropriate bond as described above would protect the Debtors from this potential prejudice.

4. Granting the Stay is in the Public Interest.

32. The public interest factor also favors granting a stay of the Supplemental DIP Order and/or the Final DIP Order.

33. First, there is a strong public interest in preserving the integrity of the statutory right of appellate review which will be substantially eviscerated if a stay is not granted:

> The ability to review decisions of the lower courts is the guarantee of accountability in our judicial system. In other words, no single judge or court can violate the Constitution and laws of the United States, or the rules that govern court proceedings, with impunity, because nearly all decisions are subject to appellate review. At the end of the appellate process, all parties and the public accept the decision of the courts because we, as a nation, are governed by the rule of law. Thus, the ability to appeal a lower court ruling is a substantial and important right.

See In re Adelphia Commc'ns Corp., 361 B.R. at 342. As set forth above, enforcement of the Supplemental DIP Order and/or Final DIP Order will moot a substantial portion of Vantage's Fifth Circuit Appeal.

34. Second, a sale of the F3-VTG Shares under the Supplemental DIP Order and/or Final DIP Order would obliterate Vantage's constitutional rights, signaling to the public that defrauding parties can retain the benefit of the fruits of their fraud and insulate those fraudulently

obtained assets from pending non-bankruptcy litigation merely by posting them as collateral for post-petition loans in a bankruptcy case—in essence "laundering" those assets, as Su has done—despite a lender's full knowledge of those adverse claims. Such a result is not only contrary to public policy, but it would signal that the bankruptcy process could be used to cleanse the title to fraudulently obtained property.

35. Third, there is a strong public interest in a court adhering to jurisdictional, statutory, and constitutional limitations and recognizing a party's rights under state law and the United States Constitution. To the extent the Court permits the DIP Lender to sell shares subject to Vantage's pending claims and equitable interest, this Court would be violating Vantage's due process rights, Seventh Amendment jury trial rights, as well as exercising Article III authority this Court does not have.

SUPERSEDEAS BOND/SECURITY

36. The DIP Lender is abundantly collateralized. The Bankruptcy Court holds in *custodia legis* 26,007,142 F3-VTG Shares that have been pledged for the benefit of the DIP Lender to secure its $20.2 million DIP loan.[16] Based on the share price of Vantage as of close of business on April 3, 2014 (i.e., $1.68/share), the DIP Lender's $20.2 million claim is currently secured by $43,691,998.56 in shares—in other words, the DIP Lender is over 200% over-secured. The Final DIP Order also granted the DIP Lender a lien on multiple other sources of collateral.

[16] While an additional 4,000,000 so-called "Addendum Shares" are also currently held by the Bankruptcy Court in *custodia legis*, those Addendum Shares have not been pledged to the DIP Lender and are not at issue in either the Handy Debtors' Plan, the Handy Debtors' Confirmation Order, the Final DIP Order, the DIP Supplement and/or the Supplemental DIP Order.

37. To the extent this Court imposes a stay conditioned on the posting of a bond/security, that amount should be reasonable, not constitute a windfall to the appellees and should not cover speculative or "self-inflicted" damages.

38. Vantage submits that any required bond should not exceed the amount necessary to satisfy default interest estimated to be accrued during the next six months and beginning April 7, 2014 (the first day the Debtors and DIP Lender proposed to commence selling shares under the DIP Supplement that was ultimately not approved).[17]

CONCLUSION AND PRAYER

As amply demonstrated above, Vantage has shown that: (i) there is a likelihood of success on the merits; (ii) Vantage would suffer irreparable injury if the stay is not granted; (iii) the granting of the stay would not substantially harm the DIP Lender or the Debtors' estates; and (iv) the granting of the stay would serve the public interest, thereby satisfying the standard for the imposition of a stay pending appeal. Accordingly, Vantage respectfully requests that this Court (A) stay the Supplemental DIP Order and/or Final DIP Order (to the extent this Court interprets the Final DIP Order as authorizing the disposition of F3-VTG Shares without notice, hearing, and further order) pending Vantage's pending Fifth Circuit Appeal and appeal of the Supplemental DIP Order; and (B) grant Vantage such other and further relief to which it may be entitled, either in law or equity.

[17] Vantage notes that various vessels will be sold in the coming months, presumably reducing the DIP Loan balance substantially. Any bond should take this principal balance reduction into account.

Dated: April 4, 2014
Houston, Texas

Respectfully submitted,

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CERTIFICATE OF ACCURACY PURSUANT TO
BANKRUPTCY LOCAL RULE 9013-1(i)

I hereby certify that the information contained in the foregoing emergency Motion is true and correct to the best of my knowledge.

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CERTIFICATE OF SERVICE

I certify that on April 4, 2014, a true and correct copy of the foregoing was served by CM/ECF to all parties entitled to receive such notice.

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