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

In Re:	§	**Chapter 11**
	§	
A HANDY CORPORATION	§	**Case No. 13-33755**
B HANDY CORPORATION	§	**Case No. 13-33756**
C HANDY CORPORATION	§	**Case No. 13-33757**
	§	
DEBTORS.	§	**Jointly Administered under**
	§	**Case No. 13-33763**

VANTAGE DRILLING COMPANY'S EMERGENCY MOTION FOR STAY PENDING APPEAL OF THE

ORDER REGARDING DISPOSITION OF F3-VTG SHARES IN CONJUNCTION WITH THE CONFIRMATION OF THE JOINT PLAN OF REORGANIZATION FOR

A HANDY CORPORATION

B HANDY CORPORATION

C HANDY CORPORATION

[RELATES TO DKT NO. 1354 AND 1369]

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 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 14, 2014, AT 1:30 P.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 Disposition Of F3-VTG Shares In Conjunction With The Confirmation Of The Joint Plan Of Reorganization For A Handy Corporation, B Handy Corporation, C Handy Corporation* (the "Share Pledge Order") [Bk. Dkt. No. 1354].

PRELIMINARY STATEMENT AND BASIS FOR EMERGENCY CONSIDERATION[1]

1. Vantage seeks to stay this Court's April 8, 2014 Share Pledge Order which authorizes the granting of a lien in favor of the Plan Sponsor, CarVal, as a "Disposition" of the F3-VTG Shares in the registry of the Court to secure an Exit Facility in connection with the confirmation of the First Amended Plan of Reorganization (the "Handy Plan") for A Handy Corporation, B Handy Corporation and C Handy Corporation (collectively, the "Handy Debtors"), pending Vantage's appeal of that order.

2. The Share Pledge Order is premised on the purported rights of the Debtors:[2] (a) to use the F3-VTG Shares in the underlying jointly administered bankruptcy cases pursuant to the

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

[2] The Debtors in the underlying 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.

Escrow Order without regard to and in derogation of Vantage's assertion of superior equitable title to those shares; and (b) to pledge, and thereby grant liens on, 1,750,000 of the F3-VTG Shares (the "Handy Plan Shares") in favor of the DIP Lender pursuant to the Final DIP Order.

3. Both the Escrow Order and the Final DIP Order are currently on appeal to the Fifth Circuit. In that appeal, Vantage has requested, inter alia, that the Fifth Circuit (a) reverse the Escrow Order and disallow the use of the F3-VTG Shares by the Court and the Debtors, and (b) nullify the liens imposed by the Final DIP Order on the F3-VTG Shares. If the use by the Court and the Debtors of the F3-VTG Shares and the Bankruptcy Courts' imposition of liens thereon is ultimately invalidated by the Fifth Circuit as Vantage has requested (or at minimum subordinated to Vantage's pre-existing equitable title), but in the interim, the Exit Lender has been granted a lien on the Handy Plan Shares and has exercised its rights to sell that collateral on a default under the Handy Plan, Vantage's ability to obtain relief in respect of the Handy Plan Shares in the pending Fifth Circuit Appeal would be circumvented.[3]

4. In this respect, Vantage submits that an immediate stay of the Share Pledge Order is appropriate because (i) Vantage is likely to succeed on the merits of its appeal(s) because it has presented a substantial case on the merits on the serious legal questions raised on appeal; (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] *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").

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]

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.

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[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.

7. On October 9, 2013, the District Court, exercising original bankruptcy jurisdiction entered the *Interim Order (I) Authorizing Post-Petition Secured Financing and (II) Providing Related Relief* [Dist. Dkt. No. 139] and on November 7, 2013, the Bankruptcy Court entered the Final DIP Order. *See* Bk. Dkt. No. 699. (The two DIP Orders are collectively referred to herein a the "Final DIP Order.") 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]

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

[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").

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 [Escrow Order]"). 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.").

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

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 Share Pledge 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;
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> (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;
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> (d) whether the Appealed Orders deprived Vantage of its interests in the F3-VTG Shares without due process of law;
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> (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.

D. The Bankruptcy Court Entered the Share Pledge Order (1) Authorizing the DIP Lender to Waive its Rights to the Handy Plan Shares Under the Final DIP Order in Exchange for Partial Payment, and (2) Imposing Liens in Favor of the Exit Lender and the Debtors' Estate.

10. On March 28, 2014, the Court held a hearing on the Handy Plan. On April 7, 2014, the Court held a hearing on the form of orders in connection with the confirmation of the Handy Plan, and on April 8, 2014, entered the Share Pledge Order.

11. The Handy Plan provides for the entry by the Handy Debtors into two lending facilities financed by the Plan Sponsor, CVI CVF II Lux Master SARL: the "New Facility" and the "Exit Facility." The Plan Sponsor or its designee is the "Exit Lender." The approximately $7 million Exit Facility is secured by the F3 Capital Guarantee and the Share Pledge Order provides for the grant of a lien in favor of the Exit Lender in support of that guarantee.

12. Pursuant to the Handy Plan and the Share Pledge Order, in exchange for the payment of $4 million, the DIP Lender will agree to waive its lien on the Handy Plan Shares granted under the Final DIP Order. To avoid the appearance of an alteration or amendment of the Appealed Orders, the Share Pledge Order provides that the Exit Lender "shall have the same rights in and with respect to the F3-VTG Shares as those granted to the DIP Lender under the Final DIP Order and the term sheet attached to the Final DIP Order . . . ." Thus, under the mechanism in the Handy Plan and the Share Pledge Order, the Exit Lender will purportedly "step into the shoes" of the DIP Lender and accede to the DIP Lender's rights under the Final DIP Order even though such a "Disposition" is neither described in nor contemplated by the Final DIP Order currently on appeal. Moreover, the Share Pledge Order creates a new junior lien on the Handy Plan Shares in favor of all of the Debtors' bankruptcy estates.

13. On April 9, 2014, Vantage filed its Notice of Appeal of the Share Pledge Order. *See* Bk. Dkt. No. 1369. By this Motion, Vantage respectfully requests this Court to stay the

Share Pledge Order pending the conclusion of the earlier of the Fifth Circuit Appeal or Vantage's appeal of the Share Pledge Order.

ARGUMENT AND AUTHORITIES

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

14. 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.

15. 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).[8] 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. 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

[8] 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)).

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.

16. 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).

17. 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 Share Pledge Order is premised on two prior orders that are subject to pending appeals that may be vacated by the Fifth Circuit; and (b) the Share Pledge Order approved a disposition of non-estate property that this Court had no authority to approve.[9]

[9] Vantage further argues that this Court did not have jurisdiction to enter the Share Pledge Order to the extent the order permits relief that was not granted in the Final DIP Order or Escrow Order or otherwise alters or amends the Final DIP Order or Escrow Order or circumvents the Fifth Circuit Appeal. Neither the Escrow Order nor the Final DIP Order authorized the transfer of the DIP Lender's lien to another party, nor do they permit the disposition of the shares by that third party without notice, hearing, and a subsequent order from this Court approving the sale. To the

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

18. Vantage respectfully acknowledges this Court's prior rulings that the F3-VTG Shares became "property of the estate" during the case. 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 this Court had no subject matter jurisdiction over Vantage's state law claims or interests, no authority to adjudicate Vantage's claims or interests, and no 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.

19. Vantage further submits that the Final DIP Order erred by granting a lien on the F3-VTG Shares notwithstanding the fact 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."

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

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extent the Share Pledge Order purports to preapprove future sales by the Exit Lender that the Final DIP Order did not "preapprove" and instead conditioned approval on notice, hearing, and subsequent orders to effectuate such sales, the Share Pledge 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 Share Pledge 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.

(b) This Court Did Not Have the Statutory Authority to Approve A Disposition of the Handy Plan Shares Under the Share Pledge Order.

21. 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").[10]

22. The Share Pledge Order contemplates that upon a payment to the DIP Lender, the DIP Lender will waive its lien on the Handy Plan Shares under the Final DIP Order and the accession of the Exit Lender to that secured position. Essentially, what is proposed is the sale of the DIP Lenders' rights in the Handy Plan Shares to the Exit Lender. But the DIP Lender's rights in those shares can be no greater than the rights of F3 Capital, the holder of legal title to the shares. F3 Capital can pass no greater title to those shares than it holds, and at all times since it obtained legal title thereto, it has held the shares subject to the equitable claims of Vantage. F3 Capital's allowing the use of the shares by the Debtors' bankruptcy estates in no way altered or enhanced F3 Capital's interest in the shares.

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*

[10] "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).

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 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).[11]

24. 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 Escrow 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

[11] *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").

interest in the shares.[12] Vantage recognizes that, at the March 28, 2014 hearing, this Court announced on the record its determination that the F3-VTG Shares, and thus, the Handy Plan Shares, are "property of the estate" under section 541,[13] but respectfully submits that this Court had no jurisdiction to make this determination given the pendency of that very issue in the Fifth Circuit Appeal.[14]

25. Similarly, the use of the Handy Plan Shares in furtherance of the Handy Plan does not transform them into property of the estate. Nor does the procedural posture of a plan confirmation and related Share Pledge Order alter the fact that the DIP Lender's security interest in the Handy Plan Shares is grounded in the Final DIP Order and that interest in the shares is now purportedly being transferred to the Exit Lender.

26. Vantage argued to the Fifth Circuit and will continue to argue that the F3-VTG Shares remain property of a third party, non-debtor and neither the shares, nor any interest in them, was transformed into "property of the estate" simply because they were used to secure DIP financing *or* exit financing pursuant to the Handy Plan.[15] Moreover, whatever "interest" in the

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[12] *See* Handy Plan, § 102(54) (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(63) (defining the F3-VTG Shares as "1,750,000 of the Escrowed VTG shares of Vantage Drilling Company ***owned by F3 Capital,*** as permitted to be released pursuant to the DIP Stipulation").

[13] *See* Mar. 28, 2014 Hr'g. Tr. at pp. 231:25-232-1 (The Court: "All right. I think this is property of the estate, and I don't really think it's that close of a call for me."); *id.* at pp. 232:24-233:13 ("The language of the [Escrow Order] gives the estate not ownership of the shares, but a protected property interest to deal in the shares. That is property of the estate, just as much as the ownership of the dollar bill is property of the estate. . . . The estate acquired this, and if it was property, it is property of the estate. The hard question is, what did the estate get?"); *id.* at pp. 233:20-234:9 ("[F3's waiver] means that the Debtors can deal in F3 shares without F3's consent. That's the function of the waiver at the end. If there hadn't been a waiver, there wouldn't be a case. The estates clearly had . . . the ability to deal in the shares. This is ***not exclusive*** property of the estate. It is, however, property of the estate. ***Legal title is owned by F3, residual rights are owned by F3***.") (emphasis added); *id.* at p. 235:4-8 ("I think it is unusual property of the estate, in that ***it's not property in which the estate has both the beneficial and legal title***. But the estate definitely has an interest that is a property interest, allowing it deal in the shares.") (emphasis added).

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

[15] Vantage has argued 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 Share Pledge Order, the Debtors

shares the Debtors purportedly acquired under the Escrow Order, which the Court only now, and during the pendency of the appeal of that order, appears to have defined as a right to "control" (but not own) solely the bare legal title to the F3-VTG Shares can be no greater than the rights of F3 Capital in those shares. And that "interest" must, as a matter of law, be subject to Vantage's beneficial title and equitable claims. The Court has no jurisdiction to bolster its findings regarding its orders at issue in the Fifth Circuit Appeal or to make any determination in the dispute between Vantage and Su over the equitable title to the F3-VTG Shares at issue in the Vantage Suit.

27. The Court further erred in authorizing the disposition of F3-VTG Shares to secure the obligation of a non-debtor. That is to say, the Handy Plan Shares are not being used to secure any obligation of the Handy Debtors—rather, pursuant to the Share Pledge Order, the Handy Plan Shares are being pledged to secure the **F3 Capital Guarantee**. Nothing in Bankruptcy Code sections 363 or 364 or, indeed, 1123 authorizes this Court to grant a lien on purported "property of the estate" to secure the obligation of a non-debtor.

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

28. Vantage will suffer severe and irreparable harm if the Exit Lender is given a lien on the shares in derogation of Vantage's pre-existing dispute over the title to those shares. The Exit Lender is fully on notice of Vantage's claims. Moreover, if the Handy Debtors default under the Exit Facility and the Exit Lender sells the shares on which the Court granted a lien under the Share Pledge Order, sales of the F3-VTG Shares to undisclosed third parties without notice of Vantage's claims would arguably preclude Vantage from preserving its equitable title

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acquired no "interest" in the F3-VTG Shares. Ownership and all reversionary interests remained with the F3 Capital.

to those shares, and deprive Vantage of the right both to obtain both a full recovery in the Vantage Suit and complete relief from the Fifth Circuit pursuant to the pending Fifth Circuit Appeal or Vantage's appeal of the Share Pledge Order. 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 (under which the Plan purports to transfer the DIP Lender's rights to the Exit Lender), yet Vantage would still appear tobe precluded from recovering the shares because this Court authorized the liens on and "pre-authorized" a future foreclosure 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.

29. 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 Share Pledge Order. In other words, Vantage need offer no proof of irreparable harm—that harm exists as a matter of law. 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). *See also In re Pacific Lumber Co.*, 584 F.3d 229, 243 (5th Cir. 2009) (admonishing bankruptcy court for failing to stay a confirmation order to preserve appellate rights because "substantial legal issues can and ought to be preserved for review").

30. Moreover, Vantage has alleged in the pending Vantage Suit that all of the F3-VTG Shares were issued to F3 Capital as a result of Su's fraud and breaches of fiduciary duty, i.e., the shares never should have been issued from Vantage's treasury stock. That issuance, based on alleged tortious conduct, diluted the ownership interests of Vantage's other shareholders. Vantage seeks the return of those shares in the Vantage Suit—a remedy that would, if granted, reverse the shareholder dilution caused by Su's tortious conduct. Even if Vantage were to successfully execute on a judgment obtained against Su, the payment of monetary damages would not fully compensate for the loss of its ability to recover the Handy Plan Shares if they are sold to a bona fide purchaser without knowledge of the claims in an unsupervised sale by the Exit Lender pursuant to the Share Pledge Order.

31. Accordingly, unless a stay is granted, the lien on the Handy Shares will be imposed and the shares will be subject to a future foreclosure sale by the Exit Lender 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 Share Pledge 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.

32. No shares or proceeds from any sale of the F3-VTG Shares under the orders are proposed to be allocated to the other Debtors' estates or creditors. The Handy Debtors' creditors

will not be substantially harmed by a stay. The Handy Debtors' secured creditors receive no proceeds from the Exit Facility secured by the Handy Plan Shares. The DIP Lender, which the Handy Plan proposes to pay $4 million, could receive that payment or not and still be fully secured by liens on other collateral granted under the Final DIP Order and, if Vantage is unsuccessful in its appeals, a significant equity cushion in F3-VTG Shares other than the Handy Plan Shares. The Handy Plan proposes to use the remaining approximately $3 million of proceeds of the Exit Facility to pay unsecured creditors and administrative claims and initial operating costs. The Exit Lenders, who are also the lenders under the Handy Plan's "New Facility," are granted a security interest in three vessels, ownership interests in the reorganized Handy Debtors and the right to receive payment of the two-year term Exit Facility out of the post-petition operations of the reorganized Handy Debtors.

33. Moreover, staying the Share Pledge Order and the grant of liens on the Handy Plan Shares during the pendency of Vantage's appeals will not cause harm to the parties-in-interest in the Handy Plan because neither F3 Capital nor the Debtors can transfer or otherwise hypothecate the F3-VTG Shares without potentially running afoul of a freezing injunction entered against Su in the United Kingdom's High Court of Justice, Queen's Bench Division, Commercial Court, (the "Lakatamia Order") attached as **Exhibit A** and an injunction entered against F3 Capital by the Grand Court of the Cayman Islands, Financial Services Division attached as **Exhibit B**.[16] For example, the freezing injunction states that Su and his affiliates must not:

[16] The Court can take judicial notice of these foreign judgments and orders. *See* FED. R. EVID. 201(b)(2); *see also Lichtenstein v. Cader*, No. 13 Civ. 2690, 2013 WL 4774717 (S.D.N.Y. Sept. 6, 2013) (acknowledging that "foreign judgments are matters subject to judicial notice") (numerous citations omitted); *Gabbanelli Accordions & Imports, L.L.C. v. Gabbanelli*, 575 F.3d 693 (7th Cir. 2009) ("An American court can take judicial notice of a foreign judgment.") (citations omitted).

> In any way dispose of, deal with or diminish the value of any of their assets whether they are in or outside England and Wales up to the [value of $48,824,440.24].
>
> [this injunction] applies to all of the Defendants' assets whether or not they are in their own names and whether they are solely or jointly owned. For purpose of this Order the Defendants' assets include any asset which they have the power, directly or indirectly, to dispose of or deal with as if it were their own. The Defendants are to be regarded as having such power if a third party holds or controls the asset in accordance with their direct or indirect instructions.

Exhibit A, p. 2. Moreover, the first page of the freezing injunction contains a "Penal Notice" warning:

> Any other person who knows of this Order and does anything which helps or permits any of the Defendants to breach the terms of this Order may also be held to be in contempt of Court and may be sent to prison, fined or have their assets seized.

34. Neither the Debtors, the Handy Debtors, F3 Capital or other parties in interest can deal with the Handy Plan Shares delivered to the registry of the Court by F3 Capital at the direction of Su with any assurance or certainty that by doing so they will not be in violation of these, and perhaps other, orders enjoining their transfer.[17]

35. Thus, staying the Share Pledge Order will maintain the *status quo* and any harm from that stay cannot be attributed solely to a delay caused by Vantage should its appeals be unsuccessful.

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[17] Vantage has previously disclosed the freezing injunctions both to this Court and to the District Court for the Southern District of Texas. *See Vantage Drilling Company's (1) Supplement to Brief in Opposition to Hsin-Chi Su's Brief and (2) Objection to Expedited Motion to Approve Share Escrow Agreement* [Bk. Dkt. No. 258] filed August 15, 2013 and attaching as exhibits the following pleadings filed in the Vantage Suit, then pending before Judge Hughes as cause no. 4-12-cv-03131:

> *Plaintiff's Motion for Leave to Conduct Expedited Discovery* [D. Dkt. No. 17] filed February 26, 2013, and attaching the Lakatamia Order as Exhibit 9 thereto; and
>
> *Vantage Drilling Company's Application for Preliminary Injunction and Motion for Expedited Discovery* [Dist. Dkt. No. 75], filed August 14, 2013, and attaching as Exhibit 1 thereto, the Lakatamia Order and other similar evidence of Su's "difficulties" in foreign courts.

4. Granting the Stay is in the Public Interest.

36. The public interest factor also favors granting a stay of the Share Pledge Order.

37. 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 Share Pledge Order will moot a portion of Vantage's Fifth Circuit Appeal.

38. Second, the liens on the F3-VTG Shares under the Share Pledge Order and the Exit Lender's sale of those shares upon default by the post-confirmation Handy Debtors 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 manipulated to cleanse title to fraudulently obtained property.

39. 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 Exit 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.

APPROPRIATE ORDER PROTECTING PARTIES' RIGHTS

40. Vantage submits that it has satisfied the legal standards for the stay of the Share Pledge Order to maintain the status quo during the pendency of its appeals. Vantage requests that upon the entry of a stay of the Share Pledge Order, the Court, if it deems it necessary, enter an "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.

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 Exit Lender or the Handy 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 Share Pledge Order pending the conclusion of the earlier of Vantage's Fifth Circuit Appeal or Vantage's appeal of the Share Pledge Order; and (B) grant Vantage such other and further relief to which it may be entitled, either in law or equity.

Dated: April 11, 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.

/s/ William R. Greendyke
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CERTIFICATE OF SERVICE

I certify that on April 11, 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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