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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	Chapter 11
	)	
GARRETT MOTION INC., *et al.*,[1]	)	Case No. 20-12212 (MEW)
	)	
Debtors.	)	Jointly Administered
	)	

REPLY IN SUPPORT OF MOTION OF THE OFFICIAL COMMITTEE OF EQUITY SECURITIES HOLDERS FOR ENTRY OF AN ORDER AUTHORIZING REIMBURSEMENT OF CERTAIN FEES AND EXPENSES INCURRED BY POTENTIAL EQUITY FINANCING PARTIES

[1] The last four digits of Garrett Motion Inc.'s tax identification number are 3189. Due to the large number of debtor entities in these Chapter 11 Cases, which are being jointly administered, a complete list of the Debtors and the last four digits of their federal tax identification numbers is not provided herein. A complete list of such information may be obtained on the website of the Debtors' claims and noticing agent at http://www.kccllc.net/garrettmotion. The Debtors' corporate headquarters is located at La Pièce 16, Rolle, Switzerland.

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The Equity Committee[2] respectfully submits this reply to the objections filed by the Debtors [Dkt. No. 718] (the "Debtors' Objection") and the Official Committee of Unsecured Creditors [Dkt. No. 703] (the "Committee's Objection"), and the joinder of the COH Group and certain affiliated shareholders thereto [Dkt. No. 719] (together with the Debtors' Objection and the Committee Objection, the "Objections"), and in further support of the Expense Reimbursement Motion. For the reasons set forth below, in the Expense Reimbursement Motion and the *Supplemental Declaration of Lorie R. Beers in Support of the Expense Reimbursement Motion* filed contemporaneously herewith (the "Supplemental Beers Declaration" or "Supp. Beers Decl."), the Court should overrule the Objections and grant the relief requested by the Equity Committee.

PRELIMINARY STATEMENT

The Debtors are solvent by hundreds of millions of dollars using any reasonable metric and as reflected in every bid received in the recently concluded auction process. Under these circumstances, unaligned shareholder interests and preferences should determine the outcome of these cases. Instead, the Debtors have consistently disregarded them. At the conclusion of a vigorous auction process, the Debtors obtained two bids, each of which (i) provided more value to unaligned shareholders than the COH Group Bid and (ii) expressly facilitated the Equity Committee's continued efforts to develop an actionable stand-alone plan over a brief specified period. Against the Equity Committee's clear, consistent, and strenuous opposition, the Debtors nevertheless chose to pursue what the Debtors believe is the path of least resistance rather than the path to maximize shareholder value, in abdication of their fiduciary duties to the estate and

[2] Capitalized terms not otherwise defined herein shall have the meanings ascribed to them below and in the *Motion of the Official Committee of Equity Securities Holders for Entry of an Order Authorizing Reimbursement of Certain Fees and Expenses Incurred by Potential Equity Financing Parties* [Dkt. No. 678] (the "Expense Reimbursement Motion").

shareholders. They have chosen to proceed with a proposal from the COH Group that was the worst of all proposals submitted during the auction process because it (a) impedes development of an Equity Committee stand-alone plan and (b) shifts massive amounts of the Debtors' value from unaligned shareholders, who are entitled to that value, to insider shareholders selected to participate in the COH Group bid, who are not. The Equity Committee made clear to the Debtors that the Plan the Debtors filed at the conclusion of the Auction last Friday, January 8, 2020 (with KPS as the Successful Bidder), was and remains the best currently available bid (subject to the development of a stand-alone plan) and would achieve the highest and best recovery for shareholders.

The Expense Reimbursement Motion involves what should be a simple determination to pay relatively small out-of-pocket expenses that would enable the Equity Committee to obtain preferred stock financing, for the benefit of the estate, on terms that are much more favorable than any other option presented to date. The potential equity financing represents the last and best chance to maximize shareholder value because the Debtors seek to shut down any and all alternatives.

Before the filing of the Expense Reimbursement Motion, the Debtors agreed that they would support the Equity Committee's efforts to formulate and propose a stand-alone plan that would maximize value by eliminating the massive shareholder dilution threatened by competing bids, including the COH Group Bid that they now champion, but which they had previously criticized at every turn. The Debtors agreed to the proposed expense reimbursement – *while the auction process was ongoing* – for parties that would provide redeemable and non-convertible preferred stock to ensure that the Equity Committee's efforts to formulate a stand-alone plan would proceed even after the auction concluded. The Equity Committee relied on the Debtors'

consent to the expenses when it filed the Expense Reimbursement Motion. Furthermore, the Debtors' position induced the Potential Equity Financing Parties to continue their due diligence and incur substantial fees and expenses pending the hearing on the Expense Reimbursement Motion.

As a result of its efforts, the Equity Committee has obtained a commitment letter from one of the Potential Equity Financing Parties, Atlantic Park Strategic Capital Fund, LP ("Atlantic Park"). Given the time and process constraints, the Equity Committee has determined to proceed only with Atlantic Park (and to disclose its proposal) because (i) it is significantly further along in its due diligence than the other party, (ii) the Equity Committee has determined that Atlantic Park is more likely to close, and (iii) the Equity Committee wishes to reduce costs. Unlike the Debtors, who championed an $84 million stalking horse break-up fee and expenses as "necessary to preserve the value of estate assets,"[3] the Equity Committee is laser-focused on minimizing costs borne by its constituency, namely all shareholders. Thus, the Equity Committee now seeks authority to obtain reimbursement of up to only $1.25 million, not the $2.5 million it originally requested.

Atlantic Park's commitment letter provides the following key benefits:

- It would provide $800 million of preferred stock financing (excluding fees) to fund a plan of reorganization.
- The preferred stock under the stand-alone plan would be redeemable on or after three years and would not be convertible but would include at the money warrants for 15% of the Company's equity. By contrast, the $1.25 billion of preferred stock in the COH Group Bid would be convertible into 82.5% of the Debtors' common stock, assuming the rights offering is not fully subscribed.
- The preferred stock would be offered ratably to all eligible shareholders, other than a 25% backstop minimum for Atlantic Park (75% available to all shareholders), in contrast to the preferred stock in the COH Group Bid, in which

[3] *See* Dkt. No. 18 ¶ 66.

> only $200 million of $1.25 billion (16%) is open to pre-petition shareholders (inclusive of the pre-petition shareholders in the COH Group).

The Debtors now unabashedly seek to thwart the Equity Committee's efforts – weeks after the Equity Committee's proposed financing sources started due diligence in reliance on the Debtors' agreement – based on a draconian, unenforceable "no-shop" provision with the COH Group.[4] Notably, as a result of the "no-shop," the Equity Committee is the only remaining fiduciary that can and will actively seek a better solution on behalf of shareholders. Finally, to further frustrate the Equity Committee's efforts to propose a more democratic plan, the Debtors have cancelled scheduled meetings with management – *expected to last as little as five hours in total* – to enable the Equity Committee's financing sources to complete due diligence for fully committed preferred stock (they have committed only to provide data room access, again, based on the COH Group Bid's no-shop provision).

The Court should grant the Expense Reimbursement Motion to give the Equity Committee what may be its only opportunity to pursue a stand-alone plan for the benefit of shareholders and order the Debtors to comply with Atlantic Park's reasonable pending due diligence requests. The cost of this potential benefit is insignificant relative to the hundreds of millions of dollars in potential value it would preserve for existing shareholders, as demonstrated on Exhibit G to the Supplemental Beers Declaration, and is paltry by comparison to the $84 million in bid protections offered by the Debtors to KPS. Further, because shareholders are the undisputed fulcrum class in this case, it is the only class that will be affected by the proposed payment.

[4] It is not lost on the Equity Committee that the COH Group – which now seeks to preclude all competition via their no-shop provision – refused to participate in the auction and argued that their proposed plan should be considered by the Court *regardless of that refusal*.

There is ample legal justification for the relief requested in the Expense Reimbursement Motion, which rests on two axiomatic propositions. *First*, in exchange for the right to operate the debtor's business in Chapter 11 pursuant to Section 1107(a) of the Bankruptcy Code, the debtor in possession assumes a concomitant duty to maximize the value of estate assets. The Debtors' decision to support the COH Group Bid – with their abdication of the search for higher and better proposals as required by their fiduciary duties – mandates that the Equity Committee exercise the Debtors' rights to have the estates fund appropriate costs needed to maximize value. *Second*, the debtor in possession's business decisions remain subject to review and audit by the Equity Committee, which is a statutory "watchdog" of the debtor in possession. Section 1103 of the Bankruptcy Code authorizes an official committee to "participate in the formulation of a plan" and "perform such other services as are in the interest of those represented." Approval of the Fee and Expense Reimbursement is necessary to allow the Equity Committee to perform its statutory duties to its constituents. Furthermore, the Court should approve the Fee and Expense Reimbursement for the additional reason that the Debtors, which induced Atlantic Park to incur fees and expenses to complete its due diligence, will benefit from the prospect of the significantly higher value that a stand-alone plan will provide. Thus, these expenditures therefore constitute "necessary costs and expenses of preserving the estate" and are entitled to priority under Section 503(b)(1) of the Bankruptcy Code.

* * * * *

The extraordinary background of these Chapter 11 cases demonstrates the need and urgency of the Expense Reimbursement Motion.

At the outset of the Chapter 11 Cases, the Debtors claimed that they needed to restructure their purportedly unsustainable liability burden inherited from Honeywell following the 2018

spin-off.[5] In fact, the only real burden they sought to restructure was a "financially extraordinary indemnity contract" that Honeywell imposed on Garrett ASASCO Inc. ("ASASCO"), to reimburse Honeywell for legacy asbestos exposure arising from an unrelated Honeywell business, up to $5.25 billion over 30 years.[6] Central to the Debtors' strategy was an effort to liquidate and limit Honeywell's claims. The Debtors filed a motion to estimate Honeywell's claims pursuant to Section 502(c) of the Bankruptcy Code. The Debtors argued that estimation of the maximum allowable amount of Honeywell's claims was a "gating" issue that "*is mandatory under the Bankruptcy Code*," and that the resolution of that issue would "help parties and the Court evaluate the appropriate restructuring options and how to implement any such option."[7] Based on these arguments, the Court scheduled a hearing on the Debtors' estimation motion for February 2021. Second, the Debtors commenced an adversary proceeding against Honeywell, asserting several theories of liability and seeking to invalidate or limit ASASCO's purported obligations to Honeywell. That adversary proceeding is pending before the Court, but the Debtors would abandon it if the COH Group Bid prevails.

The Debtors' latest gambit completely repudiates their rationale for filing these Chapter 11 Cases. By agreeing to the COH Group Bid, the following has occurred:

- Honeywell will have an allowed claim of $1.3 billion (based on an asserted claim of approximately $1.9 billion). In contrast, the Equity Committee has calculated that at the COH Group's assumed discount rate, the present value of the claim is, at most, approximately $959 million.

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[5] *See Declaration of Sean Deason in Support of the Debtors' Chapter 11 Petitions and First Day Pleadings* ¶ 3 [Dkt. No. 15] (the "First Day Declaration").

[6] *See id.*

[7] *See Debtors' Motion Pursuant to Sections 105(a) and 502(c) to Establish Procedures for Estimating the Maximum Amount of Honeywell's Claims and Related Relief* ¶¶ 28, 42 [Dkt. No. 309] ("Debtors' Estimation Motion"); *Reply in Support of Debtors' Motion Pursuant to Sections 105(a) and 502(c) to Establish Procedures for Estimating the Maximum Amount of Honeywell's Claims and Related Relief* ¶ 20 [Dkt. No. 384] ("Debtors' Estimation Reply").

- Depending on various factors in assessing the Honeywell claim, the COH Group treatment represents a maximum savings of approximately $150-200 million on a present value basis but may actually be greater than what Honeywell would be due through an estimation proceeding. For this "benefit" the COH Group deal transfers over $1 billion in future value from shareholders outside of the COH Group to shareholders inside the COH Group.[8]

- The Debtors will have spent approximately $300 million in process costs to achieve this treatment of the Honeywell claim, including $84 million payable to KPS for its break-up fee and expense reimbursement, which, as described above, the Debtors argued was "necessary to preserve the value of estate assets." Later events have shown that KPS was in fact willing to increase its bid from $2.1 billion to $2.9 billion in the recently concluded auction, calling into doubt the wisdom of the Debtors' original assertion. Thus, taking these process costs into account, there is no real net savings on the Honeywell claim.

- The Debtors have completely abandoned the process to estimate Honeywell's claims to enable other parties to propose appropriate treatment of those claims.

- The Equity Committee has run a discounted cash flow analysis using the Debtors' public projections. This analysis shows that the value flowing to shareholders would be approximately $9.73 per share on the prepetition capital structure and the prepetition Honeywell claims. This excludes approximately nearly $4 per share if the lost process costs had never been spent. Notwithstanding these sunk costs, shareholders would have been better off had this proceeding never been filed.

In addition to the strategy to limit the Honeywell obligation, the Debtors sought to sell all their assets to KPS for approximately $2.1 billion under Section 363 of the Bankruptcy Code; this, they claimed, was part of their purported "focus on a competitive marketing process for the purchase of the Debtors' business by a financial sponsor."[9] Upon the filing of the sale motion, two of the Debtors' shareholders, Centerbridge and Oaktree, announced an agreement with Honeywell that provided for (i) the settlement of Honeywell's claims against ASASCO; and (ii) the transfer of virtually all of the Debtors' equity value to Centerbridge, Oaktree and a select

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[8] As the Court has observed, "[t]he problem with special allocations in rights offering, or with private placements that are limited to the bigger creditors who sat at the negotiating table, or big backstop fees that are paid to the bigger creditors who sat at the negotiating table but that are not even open to other creditors (and in particular to other creditors in the same class), is that it is far too easy for the people who sit at the negotiating table to use those tools primarily to take for themselves a bigger recovery than smaller creditors in the same classes will get." *In re Pac. Drilling S.A.*, Case No. 17-13193 (MEW) (Bankr. S.D.N.Y. Oct. 1, 2018) at 5.

[9] *See* First Day Declaration ¶ 77.

group of the Debtors' shareholders in return for their support. The COH Group then filed a motion to terminate exclusivity to pursue a plan predicated on this agreement.

In opposing the COH Group's motion to terminate exclusivity, the Debtors described the COH Group's proposal as a "coercive," "sweetheart deal" that would provide for the sale of "virtually all of the voting power and residual economic value of GMI to a handful of institutional investors for cash."[10] The Debtors argued that "*the value of the left-behind common stock . . . is virtually nothing* . . . because that series A preferred [given to Centerbridge and Oaktree] represents the economic value of the company."[11]

Tellingly, the Debtors also opposed the COH Group's attempt "to negotiate a full and final settlement of [Honeywell's] claims . . . *seeking to short-circuit the judicial process and reward [Honeywell] with a windfall by inflating its claims and thereby usurping the reorganization process.*"[12] The Debtors further argued that the COH Group's proposal "also *deprives* us, the estate, of any opportunity to litigate with Honeywell about its claim or about our claims against Honeywell."[13] The Court denied without prejudice the COH Group's motion to modify exclusivity.[14]

During the ensuing months, the Debtors continued the sale process leading to the auction. The Debtors repeatedly assured the Equity Committee that they remained open to considering alternatives to the KPS bid, including a stand-alone plan proposed by the Equity Committee (or other stakeholders).

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[10] *See* Oct. 21, 2020 Hr'g Tr. 44:21-22, 45:6-7 (Dietderich); Debtors' Estimation Reply ¶ 5; *Debtors' Objection to Motion to Modify Exclusivity* ¶ 9 [Dkt. No. 389].

[11] *See* Oct. 21, 2020 Hr'g Tr. 46:23-47:2 (Dietderich).

[12] *See* Debtors' Estimation Motion ¶ 5 (emphasis added).

[13] *See* Oct. 21, 2020 Hr'g Tr. 47:6-8 (Dietderich) (emphasis added).

[14] *See* Dkt. No. 477.

Earlier this week, the Debtors, in their mercurial and arbitrary exercise of "business judgment," abruptly ended the auction by demanding "best and final bids" while the bidding was ongoing, citing the need to "get out of this bankruptcy which is now 110 days long." Notably, the Debtors financial performance has improved, not deteriorated, during the pendency of these cases, and the Debtors have advanced no evidence to support this immediate need for emergence at the expense of stakeholders. Despite their assurances to the Equity Committee that they would allow the Equity Committee a meaningful opportunity to pursue a stand-alone plan, they now seek to eliminate one of the key financial tools to do this. The Debtors have announced that they "will be pursuing the transaction contemplated by the Final COH Group Bid . . . and [that they] no longer believe approval of [the Fee and Expense Reimbursement] is in the best interests of the Debtors' estates."[15]

The Debtors' decision to pursue the COH Group Bid accomplishes only one thing: it would end any competitive process to obtain a higher and better proposal, and would cement the COH Group even if higher and better alternatives are available. As the Debtors have acknowledged, without the Fee and Expense Reimbursement, Atlantic Park will not complete its due diligence. *Even if* the COH Group's proposal were the best proposal currently available to the Debtors and their estates – *in reality, it is the worst one* – the Court should approve the Fee and Expense Reimbursement because there is no valid justification for stopping the competitive process for the benefit of the Debtors' stakeholders.

The COH Group's current proposal – just like its original proposal that the Debtors categorically rejected – provides for a settlement of Honeywell's claims against ASASCO and a sale of the Debtors' equity to Centerbridge, Oaktree and a subset of the Debtors' shareholders,

[15] *See* Debtors' Objection ¶¶ 3-4.

with a new $6.25 "cash-out" option for the Debtors' other shareholders. The Debtors' support of this proposal is baffling because it seeks to accomplish exactly what the Debtors vociferously opposed since the beginning of the Chapter 11 Cases: a "coercive," "sweetheart" deal with a subset of the Debtors' shareholders, handing them the voting power and residual economic value of GMI, and settling Honeywell's claims without any judicial determination concerning their merit. Worse still, the Equity Committee's analysis shows that, if approved, over $1 billion of future value will be transferred to the COH Group from existing shareholders.

The Debtors do not explain how what was once anathema to them now "represents an overwhelmingly successful conclusion of their competitive process."[16] This is particularly true given the fact that they have no shareholder support – other than the parties to the COH Group Bid who will receive additional investment rights not offered to the entire class of shareholders. Following conversations with numerous shareholders that the Equity Committee estimates represent between 40% and 50% of the unaligned GMI shareholders, the Equity Committee believes that the overwhelming majority of that group opposes the COH Group Bid.

The Debtors have consistently disregarded the views of the Equity Committee and unaligned shareholders. They have not adequately explained why they decided to support a proposal that, as explained herein, is significantly worse than the KPS bid and a bid submitted by the OWJ Group, *both of which included unfettered "go-shop" provisions that expressly allowed the Equity Committee to continue exploring a superior stand-alone plan.* Nonetheless, in choosing between the KPS and the COH Group proposals, the Debtors demanded that the Equity Committee waive any right to pursue a stand-alone plan as a condition to their agreement to

[16] Debtors' Objection ¶ 4.

choose KPS as the winner of the auction (even though KPS did not require this). When the Equity Committee refused, the Debtors chose the COH Group Bid.

The auction process has been an abject failure. While the Debtors touted that a competitive process would increase value for minority shareholders, the opposite has proven true. In selecting the COH Group Bid, the Debtors seek to declare as the Successful Bidder the only bidder that failed to participate in the court-approved auction process in good faith and pursuant to the Court-approved bidding procedures, and toss out both the improved (and superior) bid received from KPS and the possibility of a further stand-alone proposal from the Equity Committee. Accordingly, the Equity Committee respectfully requests that the Court give the Equity Committee the tools needed to secure a higher and better proposal.

Time is of the essence. The RSA negotiated by the Debtors requires the Debtors' secured lenders to vote in favor of any plan that provides for payment of principal and simple interest (they have waived default interest), if the disclosure statement for such a plan is approved on or before February 22, 2021. The Equity Committee intends to meet this deadline (assuming it is not extended) with the Court's assistance. Thus, if the Equity Committee abided the outcome of the Debtors' plan with the COH Group Bid, it may forfeit the opportunity to use the RSA and jeopardize its ability to pursue a stand-alone plan.

Accordingly, and as further explained below and in the Expense Reimbursement Motion, the Court should approve the Fee and Expense Reimbursement.

FACTUAL BACKGROUND ON THE AUCTION, PSA, AND ESTIMATION

I. The Auction and Plan Support Agreement

1. The Debtors commenced the auction in accordance with the Bid Procedures on December 21, 2020. In addition to the stalking horse bid submitted by KPS, two other bids were submitted: one (the "COH Group Bid") by Centerbridge Partners, L.P. ("Centerbridge"),

Oaktree Capital Management, L.P. ("Oaktree,") and Honeywell International Inc. ("Honeywell," and, together with Centerbridge and Honeywell, the "COH Group") and one by Owl Creek Asset Management, L.P., Warlander Asset Management, L.P., Jefferies LLC and other investors (the "OWJ Group" and the "OWJ Group Bid"). Throughout the auction, KPS and the OWJ Group improved their bids. The Equity Committee analyzed all of the bids and concluded that the COH Group Bid is significantly inferior to the KPS bid and the OWJ Group Bid. *See* Supp. Beers Decl., Exhibit G. The Equity Committee shared its views with the Debtors on numerous occasions before, throughout and after the auction. The Debtors concluded the auction on January 8, 2021 and declared KPS the winner.[17] On January 11, 2021, however, the Debtors declared that they had signed the PSA and decided to support the COH Group Bid.

2. The PSA among the Debtors and the COH Group includes a "no-shop" provision that purports to prevent the Debtors from actively exploring alternative, value-maximizing plans:[18]

> During the Effective Period, (i) the Debtors shall, and shall instruct, direct and cause any person acting on the Debtors' behalf to, immediately cease and terminate any ongoing solicitation, discussions and negotiations with respect to any Alternative Transaction and (ii) *the Debtors shall not, and the Debtors shall instruct, direct and cause any person acting on the Debtors' behalf not to, directly or indirectly, initiate, solicit, engage in or participate in any discussions, inquiries or negotiations in connection with any proposal or offer relating to an Alternative Transaction, afford access to the business properties, assets, books or records of or provide any non-public information relating to the Debtors to, otherwise cooperate in any way with, or knowingly assist, participate in, facilitate, or encourage any effort by any entity or person with respect to any Alternative Transaction that such entity or person is seeking to make or has made, in each of cases (i) and (ii) unless with the consent of the Plan Sponsors, Honeywell and the Requisite Additional Investors* (such consent not to be unreasonably withheld, conditioned or delayed) or as the Court may order.

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17 *See* Dkt. No. 711.

18 *See* Plan Support Agreement § 5.04 [Dkt. No. 717] (emphasis added).

3. Relying on this provision – which is either unenforceable *ipso facto* or is a transaction out of the ordinary course of business that the Court has not approved – the Debtors have improperly cut off management access to the Equity Committee and canceled due diligence sessions that they had scheduled or were pending with Atlantic Park. Further to the relief requested in the Expense Reimbursement Motion, the Equity Committee intends to seek termination of exclusivity once it has determined which alternative is higher and better than the COH Group Bid.

4. The term sheet for the COH Group Bid attached to the PSA (the "Term Sheet") calls for a full and final settlement of Honeywell's claims. The PSA Term Sheet provides Honeywell with over $1.209 billion in payments, comprised of an initial payment of $375 million in cash, and new series B preferred stock of the reorganized company, providing for $834.8 in total payment, provided in yearly payments starting in 2022 through 2030. Under the Term Sheet, Honeywell has a "put" option whereby the Debtors are required to pay the full amount of Honeywell's claims in advance if certain EBITDA levels are achieved.

II. The Estimation Proceeding

5. On November 2, 2020, the Debtors filed their Estimation Motion, pursuant to Sections 105(a) and 502(c) of the Bankruptcy Code, seeking to establish procedures for estimating the maximum amount of Honeywell's claims. Following a hearing on November 18, 2020 in connection with the Debtors' Estimation Motion, the Court entered the *Order Establishing Procedures for the Estimation of Claims of Honeywell et al. Against the Debtors* on December 11, 2020 (the "Estimation Procedures Order"), which established dates for an evidentiary hearing to be held on the Estimation Motion (the "Evidentiary Hearing") and related pre-trial proceedings [Dkt. No. 540]. On December 18, 2020, the Court entered the Stipulation

and Order authorizing the Equity Committee to participate in the Evidentiary Hearing and related proceedings on the Debtors' Estimation Motion in all respects. [Dkt. No. 563].

6. Under the Estimation Procedures Order, the Evidentiary Hearing is scheduled for February 1 through February 5, 2021, and from February 8 through February 12, 2021. [Dkt. No. 540 ¶ 1]. In advance of the Evidentiary Hearing, the Debtors and Honeywell have substantially completed production of documents and, together with third parties, have collectively produced more than 34,000 documents totaling hundreds of thousands of pages collectively. Although fact depositions were to occur from January 5 through January 12, 2021 [Dkt. No. 540 ¶ 2], the Debtors and Honeywell adjourned the depositions that had been noticed. Additionally, the parties were to serve opening expert reports on January 16, 2021, serve rebuttal expert reports on January 23, 2021, and complete all expert depositions by January 29, 2021. [Dkt. No. 540 ¶ 2].

III. The Amended RSA Among the Debtors and Lenders

7. Under the amended restructuring support agreement among the Debtors and their lenders, which was made public on January 8, 2021, (i) the Debtors must obtain approval of the disclosure statement by February 22, 2021; (ii) the Debtors must obtain confirmation of the Debtors' Chapter 11 plan by April 9, 2021; and (iii) the plan effective date must occur by April 30, 2021.

REPLY

I. The Court Should Authorize and Direct the Debtors to Pay the Fee and Expense Reimbursement Pursuant to Sections 105(a), 363(b), 1103(c) and 1107(a) of the Bankruptcy Code

8. Section 1107(a) of the Bankruptcy Code accords debtors in possession the powers given to a trustee, including the power to operate the debtor's business pursuant to Section 1108

of the Bankruptcy Code. Those powers, however, are subject "to such limitations or conditions as the court prescribes." 11 U.S.C. § 1107(a).

9. It is axiomatic that a debtor in possession acts as a fiduciary for its creditors and shareholders. *See Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 355 (1985) ("[I]f a debtor remains in possession—that is, if a trustee is not appointed—the debtor's directors bear essentially the same fiduciary obligation to creditors and shareholders as would the trustee for a debtor out of possession."). As such, "the willingness of courts to leave debtors in possession 'is premised upon an assurance that the officers and managing employees can be depended upon to carry out the fiduciary responsibilities of a trustee.'" *Id.* (quoting *Wolf v. Weinstein*, 372 U.S. 633, 651 (1963)); *see also In re Advanced Contracting Solutions, LLC*, 582 B.R. 285, 304 (Bankr. S.D.N.Y. 2018) (same).

10. As a corollary of the foregoing, a court must "limit or condition" the powers of a debtor in possession under Section 1107(a) if it fails to "maximize the value of the estate." *See id.*; *see also In re Innkeepers USA Tr.*, 442 B.R. 227, 235 (Bankr. S.D.N.Y. 2010) (denying debtor's motion to assume a plan support agreement that included a "flawed" and limited fiduciary out, holding that "[i]n a bankruptcy case, it is 'Bankruptcy 101' that a debtor and its board of directors owe fiduciary duties to the debtor's creditors to maximize the value of the estate[.]"); *Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery*, 330 F.3d 548, 573 (3d Cir. 2003) ("In Chapter 11 cases where no trustee is appointed, § 1107(a) provides that the debtor in possession, *i.e.*, the debtor's management, enjoys the powers that would otherwise vest in the bankruptcy trustee. *Along with those powers, of course, comes the trustee's fiduciary duty to maximize the value of the bankruptcy estate*.") (emphasis added).

11. Section 105(a) of the Bankruptcy Code similarly provides that the court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). "Section 105(a) should be construed liberally to enjoin [actions] that might impede the reorganization process." *Momentum Mfg. Corp. v. Emp. Creditors Comm. (In re Momentum Mfg. Corp.)*, 25 F.3d 1132, 1136 (2d Cir. 1994). The court may therefore issue any order to ensure that the debtor upholds "the overarching goal of chapter 11," *i.e.*, "maximiz[ing] the value of the Debtors' estates for the benefit of all stakeholders." *See In re Patriot Coal Corp.*, 482 B.R. 718, 722 (Bankr. S.D.N.Y. 2012).

12. Where, as here, a debtor in possession fails to take action to maximize the value of its estate, the court must remedy that failure pursuant to Sections 105(a) and 1107(a) to ensure that creditors and shareholders are protected from the debtor's mismanagement. *See In re Gaslight Club, Inc.*, 782 F.2d 767, 770 (7th Cir. 1986) ("The case law demonstrates that the court has considerable authority to interfere with the management of a debtor corporation in order to protect the creditors' interests;" finding Sections 105(a) and 1107(a) provide authority for court to replace person designated to perform duties of debtor in possession); *In re Eddy*, 304 B.R. 591, 599 (Bankr. D. Mass. 2004) (Section 1107(a) "confers the right to serve as the estate representative, *but demands performance of the duties attendant to that responsibility*.") (emphasis added); *In re Lyon & Reboli, Inc.*, 24 B.R. 152, 154-55 (Bankr. E.D.N.Y. 1982) ("Section 1107(a) grants to a debtor-in-possession the powers of a trustee, 'subject to such limitations or conditions as the court prescribes.' . . . The absence of similar qualifying language in § 1108 [authorizing the trustee to 'operate the debtor's business'] 'suggests a desire to monitor debtors in possession but to allow fuller rein for trustees in the management of the estate.'") (citations omitted).

13. The Debtors' abrupt abandonment of the competitive marketing process, their agreement to a "no-shop" provision designed to thwart competition, and their refusal to support the Fee and Expense Reimbursement notwithstanding their earlier support for it, amounts to an abdication of their duty to maximize the value of their estates. That minimal expense – up to $1.25 million – would open a pathway to potential incremental value of *hundreds of millions of dollars* to the Debtors' shareholders, as evidenced by the conditional commitment letter already provided by Atlantic Park. *See* Supp. Beers Decl., Exhibit A.

14. Moreover, in reliance on the Debtors' representation that the relief requested in the Expense Reimbursement Motion would be uncontested, Atlantic Park has incurred substantial expenses, to which the Debtors are now objecting. That is the antithesis of the behavior expected of a debtor in possession when dealing with its stakeholders. In short, the Debtors have shown that they cannot "be depended upon to carry out the fiduciary responsibilities of a trustee." *See Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. at 355; *see also In re Adler*, 329 B.R. 406, 410 (Bankr. S.D.N.Y. 2005) ("a debtor must exhibit good faith at each stage of a bankruptcy case: in its commencement, during its prosecution, and at confirmation.").

15. As a corollary to granting the Expense Reimbursement Motion, the Court should direct the Debtors to resume their engagement with the Equity Committee and Atlantic Park to facilitate the completion of due diligence. *See In re L.A. Dodgers LLC*, 468 B.R. 652, 660 (Bankr. D. Del. 2011) (a "no-shop" provision "is not enforceable against a bankruptcy entity. The same is true under Delaware law which prohibits such clauses where, as here, the clause would prevent the exercise of the fiduciary duty to maximize value."); *see also In re Innkeepers*, 442 B.R. at 235 (denying debtor's motion to assume a plan support agreement with a "flawed"

fiduciary out that "prohibit[ed] the Debtors from taking action consistent with their fiduciary obligations."). Here, without continued active discussions with the Debtors' management and approval of the Fee and Expense Reimbursement, the Debtors' "fiduciary out" – which allows the Debtors only to consider, but not solicit, alternative proposals – will be meaningless. Significantly, both the KPS bid and the OWJ bid include "go-shop" provisions, which would allow the Debtors to engage with the Equity Committee on a stand-alone plan. *See* Supp. Beers Decl., Exhibits B, C.[19]

16. Moreover, it is well settled that the Court may allow an official committee to stand in the shoes of the debtor to maximize the value of the estate to use estate assets that the debtor unjustifiably refuses to pursue. *See In re STN Enterprises*, 779 F.2d 901, 904 (2d Cir. 1985) (official committees have implied right to use assets of the estate – legal claims -- in name of debtor when the debtor unjustifiably failed to bring them). The Court has the same authority where, as here, the debtor unjustifiably refuses to pursue value-maximizing transactions. *See* 11 U.S.C. § 105(a).

17. The Debtors' decision to proceed with the only proposal that precludes them from exploring superior alternatives is an abdication of their duty to maximize value. Moreover, it highlights the need for the Equity Committee to represent and protect the Debtors' stakeholders in the absence of any other fiduciary that is willing to do so. The Court should therefore approve the Fee and Expense Reimbursement to ensure that the Equity Committee can discharge its fiduciary duties and meaningfully "participate in the formulation of a plan" pursuant to Section 1103(c) of the Bankruptcy Code.

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[19] The Equity Committee reserves all rights in connection with the enforceability of the PSA.

18. The Equity Committee agrees with the Debtors' statement earlier in the case that the estimation of Honeywell's claims is mandatory under the Bankruptcy Code and is a "gating" issue that must be litigated before the implementation of any restructuring alternative. The Equity Committee should be allowed to litigate the Honeywell claims, which would enable it to put forth a value-maximizing stand-alone plan.

19. The Court should overrule the Debtors' Objection for the additional reason that the Debtors are unquestionably solvent. By definition, the shareholders will bear the cost of the Fee and Expense Reimbursement and their fiduciary, the Equity Committee, has determined that it would be money well spent. The Debtors' failure to protect the interests of their shareholders therefore violates a basic tenet of Delaware law that the fiduciary duty of a board of a solvent Delaware corporation runs to its shareholders. *See N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92, 99 (Del. 2007); *see also Tyco Int'l Ltd. v. Walsh*, 455 F. App'x 55, 57 (2d Cir. 2012) ("It is well established that whilst a company is solvent, its directors owe the company a fiduciary duty to act bona fide in the company's interest, and that 'the company' in this context is understood to mean the shareholders, present and future, as a whole.") (internal quotation marks and citation omitted). The Debtors' Objection to the $1.25 million Fee and Expense Reimbursement is all the more baffling in light of the fact that the Debtors agreed to an *$84 million* break-up fee to secure the KPS stalking horse $2.1 billion bid, which the Debtors now acknowledge is far from a sufficient price for the Debtors' assets.

20. Similarly, the Court should overrule the Committee's Objection because, contrary to the Committee's assertion, the Fee and Expense Reimbursement will not be borne by unsecured creditors, which are firmly "in the money."[20] Indeed, even the inferior COH Group

[20] *See* Committee's Objection ¶ 3.

Bid implies equity value of nearly $475 million (based on the cash-out option embedded in that bid), which clearly demonstrates that shareholders are the fulcrum class in the Chapter 11 Cases.

21. The Committee's argument that the Bid Procedures prohibit the relief requested in the Expense Reimbursement Motion fares no better.[21] The Bid Procedures provide that "[o]ther than the Stalking Horse Bid Protections as set forth in the Stalking Horse Purchase Agreement *or as separately approved by the Court*, no party submitting a bid shall be entitled to a transaction, termination, topping, work or break-up fee, expense reimbursement or any similar type of payment."[22] The Equity Committee is seeking the Court's approval of the Fee and Expense Reimbursement in accordance with the Bid Procedures.

22. The Debtors have the conditional right to administer their estates and exercise the powers accorded to trustees under the Bankruptcy Code. That right, however, is not a license to squander value-maximizing opportunities or make false representations to their stakeholders. In light of the foregoing, the Court should intervene and direct the Debtors to pay the Fee and Expense Reimbursement, subject to the Cap.

II. The Court Should Allow the Payment of the Fee and Expense Reimbursement as an Administrative Expense Pursuant to Section 503(b) of the Bankruptcy Code

23. The Court should allow payment of the Fee and Expense Reimbursement, subject to the Cap, because it constitutes "necessary costs and expenses of preserving the estate." 11 U.S.C. § 503(b)(1)(A).

24. The Debtors argue that the Fee and Expense Reimbursement is not "necessary" because the Equity Committee "remains free to work with existing plan proponents or to propose any alternative plan for the Debtors' consideration."[23] As shown above and in the Expense

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[21] *See id.* ¶ 6.

[22] Dkt. No. 282-1 ¶ 3 (emphasis added).

[23] *See* Debtors' Objection ¶ 6.

Reimbursement Motion, however, the Equity Committee will be unable to complete the due diligence process with Atlantic Park absent the Fee and Expense Reimbursement. Further hindering the Equity Committee's efforts is the Debtors' reliance on the impermissible no-shop PSA provision, their refusal to engage with the Equity Committee and their cancellation of a diligence meeting with Atlantic Park. The Fee and Expense Reimbursement is necessary because without it the competitive marketing process that the Debtors are obligated to conduct may be effectively over.

25. Moreover, even if the Debtors were correct that the COH Group's proposal is the best path forward (it is not), the Fee and Expense Reimbursement is necessary and beneficial to the estates because a stand-alone plan would provide optionality and enhance the Debtors' negotiating position vis-à-vis the COH Group, regardless of whether the Debtors choose to pursue an alternative stand-alone plan. *See In re Patient Educ. Media*, 221 B.R. 97, 103 (Bankr. S.D.N.Y. 1998) ("[P]rofit is not the test of 'benefit' under Section 503(b)(1)(A).").

26. Furthermore, the Fee and Expense Reimbursement should be accorded administrative expense priority because Atlantic Park was "'induced' by the debtor-in-possession" to incur expenditures in performing its due diligence. *In re Grubb & Ellis Co.*, 478 B.R. 622, 625 (Bankr. S.D.N.Y. 2012); *see also In re Drexel Burnham Lambert Grp. Inc.*, 134 B.R. 482, 489 (Bankr. S.D.N.Y. 1991) ("[I]f the inducement came from the debtor-in-possession, then the claims of the creditor are given [administrative expense] priority."). The Debtors' initial consent to the Fee and Expense Reimbursement is the best proof that it is necessary and beneficial to the estates.

27. Accordingly, the Court should accord the Fee and Expense Reimbursement, subject to the Cap, administrative expense status under Section 503(b)(1) of the Bankruptcy Code.

CONCLUSION

WHEREFORE, for the reasons stated in the Expense Reimbursement Motion and this Reply, the Equity Committee respectfully requests that the Court enter the proposed Order, substantially in the form attached to the Expense Reimbursement Motion as Exhibit A, granting the relief requested therein and such other and further relief as may be just and proper.

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