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**ATTORNEYS FOR GSP FINANCE LLC, AS SECOND LIEN AGENT**

**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**FORT WORTH DIVISION**

| | | |
|---|---|---|
| **In re:** | § | |
| | § | |
| **TEXAS RANGERS BASEBALL** | § | **Case No. 10-43400 (DML)-11** |
| **PARTNERS** | § | **(Chapter 11)** |
| **Debtor.** | § | |
| | § | |

**POST-TRIAL BRIEF OF LENDER PARTIES ON MOTION FOR RECONSIDERATION OF COURT'S ORDER ADOPTING BIDDING PROCEDURES**

The Lender Parties[1] submit this post-trial brief in response to the invitation of this Court to the parties attending the hearing (the "Hearing") on the Motion for Reconsideration to submit briefs prior to noon on Friday, July 23, 2010. In response to that invitation, the Lender Parties make the following additional arguments to supplement their previously presented arguments and without waiving any other arguments:

**Argument**

At the Hearing, the Court stated that it was taking under advisement the consideration of the break-up fee contained in the Bidding Procedures (the "Break-Up Fee"). The Lender Parties continue to believe that any break-up fee is completely unnecessary and totally inappropriate in this case, and will only serve to increase the likelihood that the proposed auction will fail to attract qualified bidders – potentially leaving the Texas Rangers mired in bankruptcy longer than they otherwise would need to be. Simply put, rather than making competitive bidding more likely, the Break-Up Fee makes it far less likely. Maintaining the Break-Up Fee as part of the Bidding Procedures will ensure that, instead of the playing field being level for all bidders, it remains improperly tipped in favor of Rangers Baseball Express LLC (the "Greenberg Group").

As was clear from the testimony of Kevin M. Cofsky of Perella Weinberg Partners LP ("Perella Weinberg"), the Debtor's investment banker now in charge of the sale process, including the Break-Up Fee in the Bidding Procedures determines not only the size of the initial overbid required from any non-stalking horse bidder, but also

[1] Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Joint Brief of Ad Hoc Group of First Lien Lenders, JP Morgan Chase Bank, N.A., as First Lien Agent, and GSP Finance LLC, as Second Lien Agent, Regarding Certain Issues Related to Proposed Plan of Reorganization and Disclosure Statement, submitted on June 11, 2010 (the "June 11 Brief") (Docket No. 163) or the Lender Parties' Emergency Motion For Reconsideration (the "Motion for Reconsideration") (Docket No. 367), as applicable.

creates a built-in perpetual $10 million advantage for the Greenberg Group at every round of bidding.[2] As a result of the Greenberg Group's ability to credit the Break-Up Fee to its bid at every round, it could prevail over the other bidders at the auction even if its bid is not the highest or best bid for TRBP's assets. Given the history of the prepetition sale process,[3] allowing the Greenberg Group an unfair advantage at an auction that may lead to its winning with a bid lower than those submitted by other bidders will not be conducive to a fair process and will be like *déjà vu* to those bidders that participated in the prepetition process.

The Greenberg Group does not need the additional advantage that the Break-Up Fee provides to it. It already has had every advantage in this sale process. Unlike any other bidder, the Greenberg Group has had more than a three-month period to arrange for its financing (which it was not able to complete by the Petition Date).[4] (July 21 Hearing Tr. 108:18-24 ("At the time that the bankruptcy was filed, did you have all $160 million of your debt committed by lenders? A At the time of the filing of bankruptcy, no, we did not have all $160 [million]. Q You had $130 million of it

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[2] As of the time of this filing, the transcript of Mr. Cofsky's testimony was not available. The references contained herein are based on the good faith recollection of counsel.

[3] See Motion for Reconsideration at 2 (quoting Email from Glenn West (MLB-e 48850)).

[4] Mr .Greenberg's testimony that he did not have his full financing as of the Petition Date appears to be directly contradictory to the prior assertions made by his counsel. After repeatedly calling a "misrepresentation" a statement in a document that suggested Mr. Greenberg did not in April 2010 have the financing for his deal in place, the following exchange occurred:

> Q All right. So you're not aware that, in fact, the Greenberg-Ryan Group had commitments for financing for their full transaction well before April 2010, right?
>
> THE COURT: Just a minute.
>
> MR. LEBLANC: Assumes facts not in evidence.
>
> THE COURT: Sustained.
>
> MR. KURTZ: They'll be in evidence shortly, Your Honor.
>
> (July 20 Hearing Tr. 214:15-22.)

committed, correct? A I believe that's correct.")) The Greenberg Group had more than a month to negotiate the January APA; and another three months after that to negotiate the May APA. The Greenberg Group has had the full cooperation and support of both the Debtor and Major League Baseball from December 2009 through at least July 15, 2010. It has had exclusivity with the Debtor from at least January 23, 2010 until July 15, 2010, when the Court entered its Bidding Procedures.[5] Indeed, as Mr. Greenberg himself testified, the Greenberg Group did not permit the Debtor to have discussions with any other bidder even after the Petition Date, notwithstanding the direction from the Court that there was no limitation on the Debtor regarding talking with other bidders. (July 21 Hearing Tr. at 106:23-107:2 ("Q You took that position, that the Debtors couldn't negotiate with anyone [post-petition], notwithstanding anything the Court may have said. Correct? A Yes.")) Notwithstanding anything that the Debtor's counsel may have argued in closing, Mr. Cofsky clearly testified that Perella Weinberg did not begin a marketing program for the Debtor's assets until the Court entered its Bidding Procedures on July 15, 2010 – almost two months after the Petition Date and less than three weeks before bids are due under the Bidding Procedures.

More important, and as the evidence presented at the Hearing demonstrated, the Greenberg Group does not need any inducement to participate in the auction as the stalking horse bidder, whether in the form of the Break Up-Fee or otherwise (at least if the auction happens on August 4th, as the Court has suggested it

[5] Any assertion that the award of the Break-Up Fee was appropriate as consideration for the Greenberg Group's waiver of this exclusivity arrangement is simply wrong. Any exclusivity was a term in a prepetition contract that is not enforceable against the Debtor prior to assumption. See, e.g., In re Mirant Corp., 303 B.R. 319, 328 (Bankr. N.D. Tex. 2003) (noting that executory contracts may not be enforced against a debtor prior to assumption). The Greenberg Group cannot use its status as a party to a prepetition contract to gain standing in this matter while ignoring the limitations that such status imposes.

will). Indeed, Mr. Greenberg was clear that his investors and financers "are committed to the deal through August 12th." (July 21 hearing Tr. 120:19-22.)

As the Third Circuit has explained, "the allowability of break-up fees, like that of other administrative expenses, depends upon the requesting party's ability to show that the fees were actually ***necessary*** to preserve the value of the estate." Calpine Corp. v. O'Brien Envtl. Energy, Inc. (In re O'Brien Envtl. Energy, Inc.), 181 F. 3d 527, 535 (3d Cir. 1999) (emphasis added). Indeed, the Fifth Circuit has always maintained that, when requesting payment of an administrative expense, the claimant has "the burden of proving that its claim was for 'actual, ***necessary*** costs and expenses of preserving the estate.' The words 'actual' and 'necessary' have been construed narrowly: the debt must benefit the estate and its creditors." Toma Steel Supply, Inc. v. TransAmerican Natural Gas Corp. (In re TransAmerican Natural Gas Corp.), 978 F.2d 1409, 1416 (5th Cir. 1992), reh'g denied, 983 F.2d 1060 (5th Cir. 1993), cert. dismissed, TransAmerican Natural Gas. Corp. v. Toma Steel Supply, Inc., 507 U.S. 1048 (1993) (emphasis added; internal citations and quotations omitted); see also NL Indus., Inc. v. GHR Energy Corp., 940 F.2d 957, 966 (5th Cir. 1991), cert. denied, 502 U.S. 1032 (1992) (same); In re SGS Studio, Inc., 256 B.R. 580, 582 (Bankr. N.D. Tex. 2000) (same).

Significantly, the record remains completely devoid of ***any testimony by an estate fiduciary*** that, in the debtor's business judgment, the Break-Up Fee was necessary. In fact, Mr. Cofsky, testifying on behalf of the Debtor, expressed an opinion that he did ***not*** think the Break-Up Fee was necessary to get the Greenberg Group to bid. Accordingly, the Debtor clearly has failed to meet its burden of demonstrating that the award of the Break-Up Fee is supported by its sound business judgment. See GBL

Holding Co. v. Blackburn/Travis/Cole, Ltd., 331 B.R. 251, 254 (N.D. Tex. 2005) (stating that debtor "must satisfy [its] fiduciary duty to the debtor, creditors and equity holders, [by articulating some] business justification for using, selling, or leasing the property outside the ordinary course of business"). Simply put, the Court has received no evidence whatsoever to suggest that the Break-Up Fee was needed to get an auction started.

Furthermore, even Mr. Greenberg himself did not testify that the Break-Up Fee was necessary for the Greenberg Group to bid or that the Greenberg Group would be any less committed to the deal without it. As the Third Circuit recently noted, "a break-up fee is not necessary to preserve the value of the estate when the bidder would have bid even without the break-up fee" and a break-up fee should not "give an advantage to a favored purchaser over other bidders by increasing the cost of acquisition." In re Reliant Energy Channelview LP, 594 F.2d 200, 206 (3d Cir. 2010) (internal citations omitted).

Here it is clear that not only would the Greenberg Group have bid without the Break-Up Fee (and in fact did so bid prepetition), but also that the Break-Up Fee would increase the cost of acquiring the Texas Rangers for any other bidder by at least $10 million and would therefore chill bidding. There has been no evidence that the Break-Up Fee will provide ***any*** benefit to the estate, much less that the Break-Up Fee is necessary to preserve its value. As such, the Break-Up Fee should not be approved.[6]

[6] If the Greenberg Group is not the Successful Bidder, it would be free to assert a claim against the estate for rejection damages (or even assert a substantial contribution claim under Section 503(b)(3)(D) of the Bankruptcy Code), which claim could be adjudicated in due course pursuant to applicable law.

**WHEREFORE**, for all of the foregoing reasons and the reasons set forth in the Motion for Reconsideration and on the record at the Hearing, the Lender Parties respectfully request that the Court reconsider and vacate the Bidding Procedures Order and not approve the Break-Up Fee.

Dated: July 23, 2010

Respectfully submitted,

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