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

In re:	)	Chapter 11
Bouchard Transportation Co., Inc., *et al.*	)	Case No. 20-34682 (DRJ)
Debtors.	)	(Jointly Administered)
BOUCHARD TRANSPORTATION CO., INC.	)	
Plaintiff.	)	Adv. Proc. No. 20-03501
v.	)	
AMERICAN BUREAU OF SHIPPING and UNITED STATES COAST GUARD	)	
Defendants.	)	

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF THE COMPLAINT AND APPLICATION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY AND PERMANENT INJUNCTION AGAINST THE U.S. COAST GUARD AND THE AMERICAN BUREAU OF SHIPPING

Bouchard Transportation Co., Inc., debtor in the above-captioned chapter 11 cases ("Plaintiff," and together with its debtor-affiliates the "Debtors"), through its undersigned counsel, hereby files this *Memorandum of Law in Support of Its Application for Temporary Restraining Order and Preliminary and Permanent Injunction against the U.S. Coast Guard and the American Bureau of Shipping.* In support thereof, Plaintiff respectfully states as follows.[1]

[1] Terms used but not defined herein shall have the meaning ascribed to them in that certain *Complaint and Application for Temporary Restraining Order and Preliminary and Permanent Injunction* filed contemporaneously herewith (the "Complaint").

Preliminary Statement & Relevant Background

1. The Debtors commenced these chapter 11 cases to implement a renaissance of their 100-year-old family business, an operational turnaround made possible by the automatic stay, DIP financing, and other tools Congress availed to distressed companies seeking to rehabilitate. A document of compliance ("DOC"),[2] issued by the U.S. Coast Guard, is effectively the Debtors' only path to a successful reorganization. The crew, customers, lenders, and insurers can rely on the DOC as certification that the vessels are operated and maintained pursuant to a safety management system ("SMS") that satisfies the ISM Code standards for shipping companies. Without a DOC, Plaintiff cannot operate as an independent going concern as it has for the past century. Its lenders, customers, and insurers, which form the lifeblood of its operational viability, require a DOC, and because of the Defendants' failure to comply with statutory requirements, Plaintiff currently does not have one.

2. Filing these chapter 11 cases provided the Debtors the necessary "breathing space" to stabilize the business and access $29 million of DIP financing on an interim basis. Since the Petition Date, the Debtors have hired and re-hired key employees; undertaken key repairs of and corrective actions with respect to their vessels; were invited to, and agreed to sit on, the safety committee of American Waterways Operators (national trade association for the U.S. tugboat and barge industry); and have otherwise sought to best position themselves for these pivotal crossroads—earning back a DOC and related safety management certifications. Obtaining a DOC

[2] A DOC constitutes evidence that the responsible party has completed a thorough safety management audit administered by a classification society delegated such authority from the Coast Guard and verifies that the responsible party is operating in accordance with the ISM Code. The International Safety Management Code, or the "ISM Code," was created by the International Maritime Organization to provide an international standard for the safe management and operation of ships and for pollution prevention as part of the Convention for Safety of Life at Sea.

is the linchpin to the Debtors' operational turnaround and the trajectory of these chapter 11 cases going forward.

3. Throughout its 100-year history, the Debtors have strived to maintain a culture of excellence and safety in accordance with the U.S. Coast Guard's regulations and guidelines. In particular, for many years the Debtors have applied for, and have obtained, a DOC. In the past, the Debtors maintained a long-standing relationship with the American Bureau of Shipping ("ABS") to secure their DOC. ABS is a United States-based Recognized Organization ("RO") empowered by the U.S. Coast Guard to conduct the applicable safety inspections and audits necessary for the issuance of a DOC.

4. Before Plaintiff is eligible for DOC consideration, however, it must first have the U.S. Coast Guard, or its authorized delegate (*e.g.*, ABS), review and approve the safety management plan—*i.e.*, conduct a safety audit—to ensure such plan is consistent with and will assist in implementing applicable safety requirements under the Shipping Code. Section 3204(b) of the Shipping Code provides that the U.S. Coast Guard "***shall review***" any such plan presented.[3] Accordingly, Congress has provided that such review is mandatory. Here, the U.S. Coast Guard has delegated, in part, such mandatory reviewing authority to ABS, although the U.S. Coast Guard is also able to conduct audits itself.

5. In January 2020, ABS decided to terminate its relationship with the Plaintiff. Recognizing the critical need for a new classification society, the Plaintiff was forced to rely on a foreign RO with very limited knowledge of the Plaintiff's operations and vessels. As a result, on August 31, 2020, the U.S. Coast Guard revoked Plaintiff's DOC and all related safety management

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[3] "Upon receipt of a safety management plan submitted under subsection (a), the Secretary ***shall review*** the plan and approve it if the Secretary determines that it is consistent with and will assist in implementing the safety management system established under section 3203." 46 U.S.C. § 3204(b) (emphasis added).

certifications following the recommendation by such foreign RO. That foreign RO (and others) has since indicated it will not do business with Bouchard on a go-forward basis.

6. Prepetition, the Debtors appealed the U.S. Coast Guard's decision to revoke the DOC. However, these attempts proved unsuccessful. In tandem, the Debtors have since taken a number of steps to regain DOC certification, including making significant updates to their safety management plan, repairing the fleet, hiring and re-hiring key personnel, raising necessary working capital, and resolving various maritime lienholder claims—all to ensure that another safety audit will prove successful.[4]

7. In connection with these efforts, on December 7, 2020, Plaintiff requested that ABS conduct the safety audit as contemplated by section 3204(b) of the Shipping Code,[5] thereby triggering the "***shall review***" standard under the statute. That same day, ABS notified Plaintiff that it would not re-engage with Plaintiff or its affiliates in any respect, requesting that "repeated inquiries and futile requests of ABS immediately cease" while noting that "[ABS does not] intend to participate in further communications on this subject."[6]

8. On December 8, 2020, the Debtors requested that the U.S. Coast Guard instruct ABS to fulfill its statutory obligations delegated to them by the U.S. Coast Guard as an RO and perform the safety audit in a timely and professional manner.[7] Since then, the U.S. Coast Guard

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4 The Debtors have also undertaken a host of initiatives to achieve Subchapter M compliance. Under Subchapter M, towing vessels greater than 26 feet require an inspection by either the U.S. Coast Guard or an approved third party organization. In connection with the inspection, towing vessel owners must submit an application for a certification of inspection ("COI") for compliance with structural integrity, navigation equipment, life boats, fire extinguishers, and other safety devices. Following a successful inspection, the U.S. Coast Guard will issue the corresponding COI. Subchapter M compliance is a key component to a safety audit as the U.S. Coast Guard has made it a sine qua non to the DOC issuance.

5 *See* **Exhibit 1** to Minogue Declaration.

6 *See* **Exhibit 2** to Minogue Declaration.

7 *See* **Exhibit 3** to Minogue Declaration.

has not taken any action in furtherance of conducing a safety audit or directing ABS to conduct a safety audit.[8] Best efforts to persuade the U.S. Coast Guard otherwise—both before and after the foregoing communications—have proven unsuccessful.

9. If neither the U.S. Coast Guard nor ABS will review the Debtors' proposed safety management plan—as they are statutorily required to do—Debtors cannot obtain a DOC and will thus suffer irreparable harm absent injunctive relief. Likewise, there is no viable alternative to the U.S. Coast Guard or ABS under the circumstances. Indeed, following the August 2020 inspection, the foreign RO that conducted the inspection ultimately recommended that the Plaintiff find a new RO.[9] Of the few other foreign RO's that have been delegated authority by the U.S. Coast Guard to conduct such audits, these RO's have either indicated that they are unable to take on new business or otherwise lack the necessary resources to inspect the 50 vessels that comprise the Debtors' vast fleet within the timing requirements imposed by these chapter 11 cases and the demands of third parties.[10]

10. ABS is best positioned to conduct the inspection because of ABS's longstanding history and familiarity with the Debtors' fleet and operations. As the only ***U.S.-based*** RO, ABS is most familiar with Plaintiff's equipment and compliance policies, procedures, and protocols and thus most able to effectively and timely conduct the safety audit.[11] Time is of the essence because the Debtors' insurance carriers and available liquidity sources have indicated that, in the absence of a DOC, necessary coverage and/or funding will be unavailable as soon as early-to-mid January

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8 *See* Minogue Declaration, ¶ 15.

9 *See* Minogue Declaration, ¶ 17.

10 *See* Minogue Declaration, ¶¶ 18.

11 *See* Minogue Declaration, ¶ 16.

2021.[12] Key customers have likewise indicated they are unwilling to transact with the Debtors unless and until they re-gain a DOC.[13] As a result, the Debtors find themselves at a crossroads.

11. Plaintiff cannot sustain its business and/or advance its ongoing restructuring efforts absent the relief requested in the Complaint.

Argument

12. "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). "[A]s to the relationship between the likelihood of success and irreparable harm . . . the movant must show that there is both a likelihood of success on the merits and of suffering irreparable harm, but if the movant should demonstrate that one factor has a strong likelihood, then the opposite factor may be subject to a lower standard." *Villarreal v. N.Y. Marine & Gen. Ins. Co. (in re OGA Charters, LLC)*, 554 B.R. 415, 425 (Bankr. S.D. Tex. 2016). Each element for preliminary injunctive relief is met here.

I. The Plaintiff Is Likely to Succeed on the Merits of its Claims.

A. The Plaintiff Is Likely to Prevail on the Relief Requested with Respect to the Automatic Stay.

13. Section 362(a)(3) of the Bankruptcy Code protects estate assets by automatically staying "***any act*** to obtain possession of . . . or to ***exercise control over property of the estate***." (emphasis added). The injunction created by section 362 is a critical protection for debtors, providing them with a "breathing spell" that is essential to their ability to reorganize successfully. *Browning v. Navarro*, 743 F.2d 1069, 1083 (5th Cir. 1984) (citations omitted). Courts broadly

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[12] *See* Ray Declaration, ¶¶ 7, 9.

[13] *See* Minogue Declaration, ¶ 8.

construe the Bankruptcy Code's automatic stay in light of its fundamental importance to a debtor's reorganization. *See In re Padilla*, 379 B.R. 643, 662 (Bankr. S.D. Tex. 2007) (explaining the automatic stay's "broad application" as a means of "providing a debtor with breathing room"). Here, the U.S. Coast Guard's and ABS's refusal to perform a timely and fair safety audit violates section 362(a)(3) of the Bankruptcy Code.

i. Plaintiff's Right to a Review of the Safety Management Plan, Customer Relationships, Insurance Policies, DIP Facility, and Economic Opportunities Are Each Estate Property.

14. Section 541(a) of the Bankruptcy Code provides that property of the estate includes all "legal or equitable interests of the debtor in property" as of, or acquired after, the Petition Date. *See also Highland Capital Mgmt. LP v. Chesapeake Energy Corp.* (*In re Seven Seas Petroleum, Inc.*), 522 F.3d 575, 584 (5th Cir. 2008). Property of the estate includes tangible property, intangible property, and causes of action. *See In re CTLI LLC*, 528 B.R. 359, 366 (Bankr. S.D. Tex. 2015) (*citing In re Equinox Oil Co., Inc.*, 300 F.3d 614, 618 (5th Cir. 2002)). The continued refusal by the U.S. Coast Guard and/or ABS to review the Debtors' safety management plan and conduct a safety audit implicates at least four categories of § 541 property rights, including the Debtors': (a) statutory right to have its safety management plan reviewed by the U.S. Coast Guard and/or ABS pursuant to section 3204 of the Shipping Code; (b) customer relationships and related operating cash flows; (c) insurance policies, including with respect to hull and machinery and P&I coverage; (d) postpetition financing facility; and (e) opportunity to receive economic benefits in the future as a result of obtaining a DOC in accordance with the Shipping Code.

15. The DOC, and the right to a review, inspection, and audit in connection with obtaining a DOC, is estate property. "A right, privilege, or license to operate or do business, granted or issued under state or federal law, is generally held to be property of the estate." *In re Draughon Training Inst., Inc.*, 119 B.R. 927, 931 (Bankr. W.D. La. 1990) (certification granted

by the United States Department of Education was considered property of the estate). Further, courts have determined that a government certification that provides value to the estate constitutes property of the estate. *See id*.

16. The U.S. Coast Guard is the agency with authority to prescribe regulations governing safety management systems for responsible persons and vessels. 46 U.S.C. § 3201, *et seq*. This includes the authority to issue a DOC if a safety management system is satisfactory. 46 U.S.C. § 3205. The statutes, in relevant part, create two mandatory obligations for the U.S. Coast Guard:

a. Under 46 U.S.C. § 3204(b), upon the U.S. Coast Guard's receipt of a safety management plan from an applicant, the U.S. Coast Guard "**shall review** the plan and approve it if the Coast Guard determines that it is consistent with and will assist in implementing the Safety Management Systems." (emphasis added).

b. Under 46 U.S.C. § 3205, once the U.S. Coast Guard has verified that the responsible person and vessel comply with the applicable requirements under the Act, the "Coast Guard **shall issue** for the vessel on request other responsible person a safety management certificate and document of compliance." (emphasis added).

17. Based on the express language of 46 U.S.C. § 3204(b), the U.S. Coast Guard's review of a proposed safety management plan[14] is not discretionary—*i.e.*, the code makes it a mandatory standard in light of its statement that the U.S. Coast Guard "***shall review***" the plan—and Plaintiff has triggered that "***shall review***" standard by requesting the safety audit. That statutory right to a safety audit is property of the estate. Moreover, the Debtors' opportunity to contract with customers, maintain necessary insurance coverage, access DIP financing, and receive a future economic benefit as a result of obtaining a DOC—*i.e.*, their ability to survive as a

[14] To fulfill its obligations under these statutes, the U.S. Coast Guard implemented various regulations, under 33 CFR § 96, subpart D, *et seq*. Through its regulations, the U.S. Coast Guard approves of "recognized organizations" such as ABS to audit and inspect applicants' vessels and SMS on its behalf. 33 CFR § 96, *et seq*.

going-concern—are also estate property. *See In re THG Holdings LLC*, 604 B.R. 154, 160 (Bankr. D. Del. 2019) ("[M]ere opportunity to receive an economic benefit in the future is property with value under the Bankruptcy Code.") (quoting *In re Majestic Star Casino, LLC*, 716 F.3d 736, 750 (3d Cir. 2013)).

ii. The U.S. Coast Guard and ABS Exercised, and Continue to Exercise, Control Over Estate Property Through Their Refusal to Conduct a Safety Review That Is Required Under the Shipping Code.

18. The U.S. Coast Guard and ABS have exercised, and continue to exercise, control over the Debtors' property discussed above and as a result have violated, and continue to violate, the automatic stay. When considering whether a non-debtor has attempted to exercise control over property of the estate, "courts have defined 'control' quite broadly." *Lex Claims, LLC v. Fin. Oversight & Mgmt. Bd.*, 853 F.3d 548, 552 (1st Cir. 2017) (citing *Thompson v. Gen. Motors Acceptance Corp., LLC*, 566 F.3d 699, 702 (7th Cir. 2009)). Although either "depleting" or "dismembering" property of the estate are sufficient to violate the automatic stay, it does not follow that actions so severe are necessary to violate the stay; rather, terms "obtain possession" and "exercise control" in the relevant section of the Bankruptcy Code indicate that a wide spectrum of acts are stayed. *In re Montgomery*, 525 B.R. 682, 696 (Bankr. W.D. Tenn. 2015) (citing *In re Allentown Ambassadors, Inc.*, 361 B.R. 422, 437 (Bankr. E.D. Pa. 2007) ("The term [exercise control] has been described as 'elusive' and one which can be defined only in a 'case by case' manner").

19. Here, the Debtors' ability to operate their vessels in the service of their customers is a bona fide property right and of fundamental importance to their reorganization. Given their dependence on obtaining a DOC to re-launch their operations, the Debtors are entirely reliant on the U.S. Coast Guard and/or ABS honoring the Debtors' statutory right to review the Debtors' safety management plan and conduct a safety audit and inspection.

20. Since the filing of the Debtors' chapter 11 cases, the Debtors have been working hard to address known deficiencies and improve their safety systems.[15] On December 7, 2020, Plaintiff requested that Defendant ABS conduct a safety audit, triggering the statutory obligation to honor the Debtors' property right to a safety audit.

21. In connection with these efforts, the Debtors made numerous requests to ABS to reestablish their relationship and schedule the applicable reviews, audits, and inspections for the Debtors. Despite numerous pleas to the ABS management team, the only message received by the Debtors was, without explanation, "ABS will not re-engage with Bouchard" and a request to the Debtors that the "repeated inquires and futile requests of ABS immediately cease."[16] When it became clear that ABS was not willing to support the Debtors' efforts, the Debtors appealed to the U.S. Coast Guard directly[17] to request them to conduct the applicable review or direct ABS to do so. Unfortunately, the Debtors were met with the same result.

22. The U.S. Coast Guard and ABS have not fulfilled their statutory duties to the Debtors, despite repeated outreach from the Debtors, and their inaction effectively brings the Debtors' restructuring progress to a grinding halt. Despite repeated efforts by the Debtors to reopen discussions with ABS or the U.S. Coast Guard on the DOC process, both have declined to engage with the Debtors. Providing the required review, audits, and inspections is a statutory obligation of the U.S. Coast Guard and ABS and the Debtors' fundamental property right. The Debtors' ability to engage customers, maintain insurance, generate revenue, and continue as a going concern requires DOC certification but the actions of the U.S. Coast Guard and ABS have

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15 *See* Minogue Declaration, ¶ 20.

16 *See* **Exhibit 2** to the Minogue Declaration.

17 *See* **Exhibit 3** to the Minogue Declaration.

stranded the Debtors, depleted their assets, and left them unable to exercise their economic rights in violation of the automatic stay.

B. The Plaintiff Is Likely to Prevail on the Relief Requested with Respect to Section 525 of the Bankruptcy Code.

23. Section 525(a) of the Bankruptcy Code prohibits governmental units[18] from discriminating against companies who are or have been debtors under the Bankruptcy Code on the basis of, among other things, the chapter 11 filing, insolvency, or the nonpayment of a dischargeable debt. "The common qualities of the property interests protected under section 525(a) … are that these property interests are unobtainable from the private sector and ***essential to a debtor's fresh start***." *In re Stoltz*, 315 F.3d 80, 90 (2d Cir. 2002) (emphasis added). In his concurring opinion, Justice Stevens also observed how section 525(a) "endorses a general rule that gives priority to the debtor's interest in preserving control of an important asset of the estate pending the completion of the bankruptcy proceedings." *FCC v. NextWave Personal Communications, Inc.*, 537 U.S. 293, 309 (2003).

24. Courts have thus found a violation of section 525 where the government action frustrates a debtor's ability to reorganize. *See, e.g.*, *Matter of Anderson*, 15 B.R. 399, 400 (Bankr.

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[18] While section 525 clearly prohibits discrimination against the Debtors by the U.S. Coast Guard, it has also been applied to prohibit discrimination by quasi-governmental units, such as ABS, that perform licensing-functions, such as medical societies, state bar associations, and unions, given their ability to impact a debtor's livelihood or fresh start. 4 Collier on Bankruptcy ¶ 525.02[3] (Richard Levin & Henry J. Sommer eds., 16th ed. 2020). Here, the U.S. Coast Guard explicitly empowers ROs like ABS to "act on behalf of the U.S." and "perform safety management audits and certification functions delegated by the Coast Guard" in applicable regulations. 33 C.F.R. § 96.400. ABS's failure to proceed with a safety audit would impact—indeed, fundamentally jeopardize—the Debtors' ability to make a fresh start after chapter 11. Moreover, ABS is pervasively entwined with the U.S. Coast Guard such that it is functionally a "governmental unit" subject to section 525. *See New Baltimore Towers v. Oksentowicz* (*In re Oksentowicz*), Nos. 04-73913, 04-74260, 2005 WL 7466596, at *3 (E.D. Mich. Sept. 16, 2005) (significant entwinement with HUD rendered public housing owner a "governmental unit" subject to section 525); *In re Marcano*, 388 B.R. 324, 335 (S.D.N.Y 324, 2003) (tenants association in New York City public housing development was a "governmental unit" due to "such pervasive entwinement of the City" in the association's workings and composition). Here, the federal government expressly recognizes ABS "as its agent" in classification matters, has the power to name representatives to the executive committee of ABS, and codifies conditions for the ABS's operations in order for it to maintain its status. *See* 46 U.S.C. § 3316(a).

S.D. Miss. 1981) (finding that non-renewal of a liquor license would be prohibited government action under section 525 because it would force them to close their retail store, lose their means of earning a living, and ultimately preclude the reorganization of the debtors). For example, section 525(a) has been applied to prevent governmental units from frustrating a debtor's ability to engage in a trade or business. *See, e.g.*, *In re Walker*, 927 F.2d 1138 (10th Cir. 1991); *In re Exquisito Services, Inc.*, 823 F.2d 151, 155 (5th Cir. 1987) (affirming lower court's holding that Air Force violated section 525(a) by refusing to exercise an option to renew food services contract while also directing Air Force to exercise such renewal under section 105(a) of the Bankruptcy Code). In addition, the Supreme Court has held that the Federal Communications Commission could not revoke a chapter 11 debtor's license for failure to make certain payments in relation to dischargeable debts. *See NextWave*, 537 U.S. at 301.

25. Importantly, in *NextWave* the Supreme Court construed section 525(a)'s "solely because" language to mean the statutory prohibition against discriminatory behavior remains applicable even where a "valid regulatory motive" underlies a governmental actor's conduct. *See id*. at 301 (finding a governmental unit's motive for the discriminatory behavior "irrelevant" to section 525(a)); *see also, In re Envtl. Source Corp.*, 431 B.R. 315, 323 (Bankr. D. Mass. 2010) (finding that because the debtor's financial incapacity was the proximate cause of the debarment, the other motives of the Commonwealth in enacting the debarment statute were irrelevant); *In re Valentin*, 309 B.R. 715, 720-22 (Bankr. E.D. Pa. 2004) (finding that a debtor's failure to pay prepetition rent was the proximate cause of the housing authority's decision to evict in violation of section 525). The government entity's motives do not have to be obvious for a court to find that the entity discriminated against a debtor. *See In re McKibben*, 233 B.R. 378, 381 (Bankr. E.D. Tex. 1999).

26. On December 7, 2020, the Debtors requested that a safety audit be conducted, thereby triggering the U.S. Coast Guard's obligation to review the safety management plan in connection with the audit and determine if it was satisfactory. On December 8, 2020, the Debtors reiterated prior requests that the U.S. Coast Guard intervene and direct ABS to perform a safety audit. The U.S. Coast Guard again declined. Neither the U.S. Coast Guard nor ABS has proceeded with the Debtors' request for a safety audit in connection with regaining a DOC. Indeed, the Debtors are not aware of any other non-debtor party that has ever been refused a safety inspection by the U.S. Coast Guard or its recognized organization. A DOC—together with the corresponding right to a safety audit under section 3204(b) of the Shipping Code—is essential to the Debtors' fresh start and ongoing restructuring efforts for the reasons set forth herein. The Debtors cannot obtain a DOC from the private sector. The U.S. Coast Guard's and ABS's steadfast refusal to perform a safety audit materially and adversely impacts the Debtors' ability to successfully reorganize and is exactly the type of discrimination section 525(a) of the Bankruptcy is designed to prohibit.

C. The Plaintiff Is Likely to Prevail on the Relief Requested with Respect to Section 706 of the Administrative Procedures Act.

i. The Court May Compel the Defendants to Conduct the Statutorily-Required Safety Audit.

27. Section 706(1) of the Administrative Procedures Act ("APA") allows courts to "compel agency action unlawfully withheld and unreasonably delayed."[19] Courts generally

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[19] Section 706 is subject to section 704, which provides for judicial review of "final agency action" for which there is no other adequate remedy. *See* 5 U.S.C. § 704. In this case, the Defendants' failure and/or refusal to conduct a safety audit constitutes final agency action for purposes of the APA because this failure "mark[s] the 'consummation of the agency's decision making process," and affects the rights and obligations of the Debtors. *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997); *Sierra Club v. Peterson*, 185 F.3d 349, 364 (5th Cir. 1999), *on reh'g*, 228 F.3d 559 (5th Cir. 2000) (reviewing agency action where "the action of failing to comply with the [agency's own regulations] ha[d] occurred"); *Patterson v. Defense POW/MIA Accounting Agency*, 343 F. Supp. 3d 637, 651 (W.D. Tex. 2018) (plaintiffs sufficiently alleged APA violation by showing that the government

require an agency to act pursuant to section 706(1) where it is shown that the agency has some sort of "clear" or "nondiscretionary" duty to act. *See, e.g., San Francisco Baykeeper v. Whitman*, 297 F.3d 877, 885-86 (9th Cir. 2002); *In re Bluewater Network*, 234 F.3d 1305, 1315 (D.C. Cir. 2000). Additionally, Section 706(2) of the APA requires federal courts to set aside federal agency action that is "not in accordance with the law," which means, of course, *any* law, and not merely those laws that the agency itself is charged with administering. *See, e.g., Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413–414 (1971) ("In all cases agency action must be set aside

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violated directives to recover, identify, and return remains); *see also* 5 U.S.C. § 551(13) (defining "agency action" to include denial of relief and "failure to act").

Even if the Court finds that Plaintiff has not exhausted its administrative remedies, cause exists to permit this action. 33 C.F.R. § 96.495 outlines the process by which the Debtors could appeal ABS's failure to conduct a safety audit. Specifically, § 96.495 permits the Debtors to send a written request for reconsideration to ABS, who would then have thirty days to respond. *See* 33 C.F.R. § 96.495(a). § 96.495 further provides that the Debtors could appeal an unfavorable response from ABS to the Commandant of the US. Coast Guard but does not otherwise require Commandant to rule within a specified timeframe. *Id*. § 96.495(b)-(c). The Commandant's decision constitutes the Coast Guard's final agency action. *Id.* Importantly, and with respect to this appeals process, § 96.495 also does not require that the Debtors exhaust their administrative remedies before seeking judicial relief.

In the absence of any such requirement, the jurisprudential doctrine of exhaustion controls. *McKart v. United States*, 395 U.S. 185, 193-94 (1969) (discussing "judicial application of the exhaustion doctrine in cases where the statutory requirement of exclusivity [of an agency's jurisdiction] is not so explicit"). But there are several exceptions to this doctrine. One such exception provides that exhaustion is not required "when the prescribed administrative remedy is plainly inadequate because either no remedy is available, the available remedy will not give relief commensurate with the claim, or the remedy would be so unreasonably delayed as to create a serious risk of irreparable injury." *Patsy v. Florida Intern. University*, 634 F.2d 900, 903 (5th Cir. 1981), *rev'd and remanded on other grounds sub nom., Patsy v. Board of Regents*, 457 U.S. 496 (1982) (collecting cases). Another exception provides that exhaustion is not required "if it would be futile to comply with the administrative procedures because it is clear that the claim will be rejected." *Id*.

Both of these exceptions apply here. As set forth in more detail herein, Debtors will suffer irreparable injury if they are unable to obtain a DOC by January 2021. Among other things, the Debtors' P&I insurance (without which they cannot operate) will expire on February 20, 2021 unless the Debtors have obtained a DOC by January 15, 2021. The Debtors will not be able to do this if they have to follow the lengthy and indeterminate appeals process set forth in 33 C.F.R. § 96.495.

That appeals process would also be futile. Though Debtors have made multiple attempts to work with Defendants, the latter have indicated a clear unwillingness to perform their statutory duties. Indeed, after the Debtors requested a safety audit to review its safety management plan in accordance with 46 U.S.C. § 3204(b), ABS notified the Debtors that it would not re-engage with them in any respect, requesting that "repeated inquiries and futile requests of ABS immediately cease" while noting that "[ABS does not] intend to participate in further communications on this subject." Based on these and similar communications with Defendants, any further efforts to appeal the Defendants' decision would clearly be futile. In light of such futility and the risk of irreparable harm, the Court should not require Debtors to exhaust their administrative remedies.

if the action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' or if the action failed to meet statutory, procedural, or constitutional requirements").

28. Here, ABS and the U.S. Coast Guard had a clear and nondiscretionary duty[20] to act pursuant to section 3204(b) of the Shipping Code when Plaintiff requested a safety audit. Each of ABS and the U.S. Coast Guard has unreasonably delayed in performing this clear duty and the time of such delay is not within any "rule of reason." *See Telecommunications Research & Action Ctr. v. F.C.C.*, 750 F.2d 70, 80 (D.C. Cir. 1984) (setting forth a balancing test to determine whether an agency has unreasonably delayed in acting, which, among other factors, considers a "rule of reason" in the time it takes agencies to make decisions). ABS has, by its own words, unreasonably delayed performing its statutory obligation when it informed the Debtors that any repeated requests would be an exercise in futility. There can be no rule of reason when such a delay of a clear duty effectively becomes a permanent delay.

29. The nature and extent of the Debtors' interests that are prejudiced by the U.S. Coast Guard's and ABS's inaction cannot be overstated. The Debtors' primary interest is getting their business back up and running again in full compliance with applicable health, safety, and environmental rules and regulation. Such compliance, evidenced by a DOC, is a necessary step to maintaining key insurance coverage, accessing critical liquidity, transacting with customers, and otherwise realizing economic opportunities and the restructuring initiatives well underway. But Defendants have arbitrarily decided to disregard their statutory obligations to conduct an audit and review Plaintiff's safety management plan. Their express refusal to review and audit the Debtors'

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[20] ABS has a nondiscretionary duty to act when audits are requested pursuant to 33 C.F.R. § 96.320, which requires that requests for safety management audits *must* be communicated to an RO authorized by the U.S. Coast Guard.

safety systems, despite their obligations under the Shipping Code, is a direct violation of section 706(1) and (2).[21]

D. The Plaintiff Is Likely to Prevail on the Relief Requested with Respect to Section 105(a) of the Bankruptcy Code.

30. Given the flagrant nature of the U.S. Coast Guard and ABS's refusal to engage, the Bankruptcy Code empowers the Court to grant the relief requested as it is necessary and appropriate to effectuate the purposes of the Bankruptcy Code. Specifically, section 105(a) of the Bankruptcy Code authorizes the Court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title" or precluding the Court "from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement [C]ourt orders or rules, or to prevent an abuse of process." Thus, the Court may "tak[e] any action or mak[e] any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process." *In re Schemelia*, 607 B.R. 455, 462 (Bankr. D.N.J. 2019) (citation omitted). Here, the U.S. Coast Guard's and ABS's refusal to conduct the applicable safety audits has impeded and will continue to adversely impact the Debtors' ability to use estate property to resume operations. These actions are inimical to important policies served by U.S. bankruptcy law: enhancing estate value for the benefit of creditors and speedy and centralized proceedings and should be enjoined by the Court.

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[21] Other courts have reviewed and ordered the U.S. Coast Guard or its designees to perform their administrative duties of licensing when they declined to do so. *See e.g. District 2, Marine Eng'rs Beneficial Ass'n*, 447 F. Supp. 72, 81 (N.D. Ohio 1977) (holding that a federal statute affording Coast Guard discretion in determining and enforcing manning requirements for vessels did not imply the inverse authority to waive requirements altogether).

E. The Plaintiff Is Likely to Prevail on the Relief Requested with Respect to a Writ of Mandamus.

31. 28 U.S.C. § 1361 provides district courts[22] with original jurisdiction over mandamus relief to compel a U.S. agency "to perform a duty owed to the plaintiff." *See, e.g.*, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 18 (1983); *Dresser v. Ohio Hempery Inc.*, 122 F. App'x 749, 755 (5th Cir. 2004).

32. To merit mandamus relief, a party must show that (a) no other adequate means to attain the relief sought exists and (b) the right to the issuance of the writ is clear and indisputable. Even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances. *See Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380–81 (2004) (citations and internal quotation marks omitted); *see also In re 2920 ER, L.L.C.*, 607 F. App'x 349, 352 (5th Cir. 2015). "These hurdles, however demanding, are not insuperable." *Id.*

33. Although mandamus relief is an exceptional form of relief, when an agency refuses to act or perform its statutory duties, courts will compel them to do so. *See, e.g., Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130, 134 (5th Cir. 1994) (finding that the director of Department of Labor's Office of Workers' Compensation Programs had a "clear ministerial and nondiscretionary duty" and that "mandamus was the proper remedy to redress the director's failure to carry out this duty"); *Marine Eng'rs Beneficial Assoc. (AFL-CIO) v. Adams*, 447 F. Supp. 72 (N.D. Ohio 1977) (holding that plaintiff made a sufficient showing of the U.S.

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[22] Bankruptcy courts may also consider actions in the nature of mandamus relief because, as units of the district courts under 28 U.S.C. § 151, it falls within their subject matter jurisdiction. *See, e.g., In re Kline*, 2004 WL 2649712, n. 2 (Bankr. N.D.N.Y. Oct. 4, 2004); *In re Vance*, 120 B.R. 181, 190 (Bankr. N.D. Okla. 1990) ("to the extent that any petition for mandamus arises under title 11 of the Bankruptcy Code or arises in or is related to a bankruptcy case, it is within bankruptcy subject matter jurisdiction").

Coast Guard's statutory duty to permit § 1361 jurisdiction and requiring the U.S. Coast Guard to enforce such statutory duty).

34. As an RO, ABS is charged with agency authority to issue DOCs and perform other statutory certification services on behalf of the U.S. Coast Guard, including with respect to section 3204(b) of the Shipping Code. Therefore, to the extent ABS's actions are contrary to any statutory or regulatory obligations, their wrongful conduct is attributable to the U.S. Coast Guard and is subject to mandamus relief to compel performance of "a duty owed to the plaintiff" pursuant to 28 U.S.C. § 1361.

35. For the reasons set forth herein with respect to section 3204(b) of the Shipping Code, the U.S. Coast Guard and its regulatory agent ABS have disregarded their statutory duties to conduct a safety review on the Debtors, precisely the kind of clear and indisputable situation that warrants the Court ordering both parties to comply with their obligations to the Debtors.

II. The Plaintiff Is Likely to Suffer Irreparable Injury Absent Injunctive Relief.

36. The Debtors are likely to suffer irreparable harm if neither the U.S. Coast Guard nor ABS will review the Debtors' proposed safety management plan—as they are statutorily required to do. Plaintiff cannot obtain a DOC otherwise since there is no viable alternative to the U.S. Coast Guard or ABS under the circumstances. And if Plaintiff cannot obtain a DOC, it will suffer immediate and irreparable harm. For example:[23]

- the Debtors' P&I insurance (without which it cannot operate) expires on February 20, 2021 and the P & I insurance club refuses to renew the insurance ***unless the Debtors have obtained a DOC by January 15, 2021***;
- the Debtors' hull and machinery insurance provider has indicated a willingness to withdraw its lift stay motion [Docket No. 265] ***provided the Debtors have obtained a DOC in advance of the January 5, 2021 hearing***;

[23] Plaintiff's need for immediate relief is further necessitated by the upcoming holiday season which will likely limit Defendants' availability to conduct the required safety review and audit.

- the DIP lenders have conditioned their willingness to lend the full $60 million facility on a final basis, or authorize an additional DIP draw, on the Debtors' ability to obtain a DOC;

- customers are unwilling to transact with the Debtors if they do not have a DOC; and

- without incremental liquidity from DIP financing or customer revenues, the Debtors are projected to exhaust all currently available liquidity by January 2021.

37. The U.S. Coast Guard and ABS have proven unwilling to perform a review of the Debtors' safety management plan. The Debtors will be irreparably injured if they cannot seek an inspection because such review of the Plaintiff's safety protocols is a first, critical step for the Debtors to obtain a DOC. Absent a DOC, the Debtors will be unable to restart their operations, stabilize their business, and return to profitability, and their ability to reorganize as a going-concern will be severely impaired. Because the Debtors' business and ongoing restructuring efforts depend on restoring the DOC, and with the impending deadlines imposed by insurers and lenders, the Debtors' liquidity profile, and the costs of administering these chapter 11 cases, each day that goes by without a safety audit impairs the value of the Debtors' business.

38. Indeed, this court has held that an unreasonable harassment and interference with a debtor's assets and operations, contrary to the purposes of the reorganization provisions of the Bankruptcy Code, constitutes immediate and irreparable harm. *See, e.g., In re Continental Airlines, Corp.*, 43 B.R. 127, 128–30 (Bankr. S.D. Tex. 1984) (enjoining defendant from convening disciplinary hearings involving a large number of pilots employed by debtor-airline because the absence of the debtor's pilots, which would result in, among other things, the cancellation of a significant number of flights and an inability to generate revenues, constituted irreparable harm to the debtor in its operations and reorganization efforts); *In re PTI Holding Corp.*, 346 B.R. 820, 834 (Bankr. D. Nev. 2006) (enjoining creditors' prosecution of actions to

enforce guarantees against debtor's key executives on the grounds that such actions would divert the executives from furthering the debtor's business and overseeing its reorganization efforts, thereby causing irreparable harm to the debtor's business and prospects for rehabilitation).

III. The Balance of the Equities Weighs Strongly in the Plaintiff's Favor and an Injunction Is In the Public Interest.

39. The U.S. Coast Guard and ABS will not suffer any prejudice from the entry of the Debtors' requested injunction. Rather, the injunctive relief requested hereby only requires Defendants to fulfill their statutory obligations—nothing more than the crux of their job. Moreover, the Plaintiff believes that a safety audit will not take more than one to two days to complete. On the other hand, Plaintiff's ability to continue its 100 year-long operation and legacy and to successfully reorganize as a going-concern is jeopardized by Defendant's failure to act.

40. Finally, the public interest would be served by entering a judgment against the U.S. Coast Guard and ABS to ensure that the integrity of the bankruptcy process is respected. In bankruptcy, public policy favors "an orderly administration of the debtor's assets via their bankruptcy estate, such that the debtor may be able to gain a fresh start, by satisfying valid claims against that estate." *In re OGA Charters, LLC,* 554 B.R. 415, 426 (Bankr. S.D. Tex. 2016) (citing *In re T–H New Orleans Ltd. P'ship,* 188 B.R. 799, 807 (E.D. La. 1995), *aff'd,* 116 F.3d 790 (5th Cir. 1997)); *see also In re PTI Holding Corp.,* 346 B.R. 820, 832 (Bankr. D. Nev. 2006) ("The public interest in successful reorganizations is significant."). Enjoining Defendants from continuously violating the automatic stay would serve to facilitate the orderly administration of Plaintiff's bankruptcy estate, expedite Plaintiff's efforts to reorganize as a going-concern, and benefit all parties in interest. Public interest strongly favors that parties follow the Bankruptcy Code and abide the automatic stay provision that bankruptcy affords debtors.

41. Additionally, public interest favors agency decision-making that is transparent, not arbitrary and capricious, and in accordance with the applicable statute granting an agency such decision-making authority. *See, e.g., Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 413–414 (1971) ("In all cases agency action must be set aside if the action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' or if the action failed to meet statutory, procedural, or constitutional requirements").

WHEREFORE, the Debtors respectfully request the Court enter the proposed form of temporary restraining order, attached to the Complaint as **Exhibit A**, and preliminary and permanent injunction enjoining the U.S. Coast Guard and ABS from, among other things, (1) continuing to violate the automatic stay of section 362 of the Bankruptcy Code, (2) discriminating against the Plaintiff pursuant to section 525 of the Bankruptcy Code, (3) neglecting to fulfill its statutory duty to conduct a safety audit in violation of § 706, and (4) requiring Defendants to expeditiously conduct a fair and impartial safety audit.

Houston, Texas
December 17, 2020

/s/ *Matthew D. Cavenaugh*

JACKSON WALKER L.L.P.
Matthew D. Cavenaugh (TX Bar No. 24062656)
Genevieve M. Graham (TX Bar No. 24085340)
1401 McKinney Street, Suite 1900
Houston, Texas 77010
Telephone: (713) 752-4200
Facsimile: (713) 752-4221
Email: mcavenaugh@jw.com
ggraham@jw.com

Co-Counsel to the Debtors
and Debtors in Possession

KIRKLAND & ELLIS LLP
KIRKLAND & ELLIS INTERNATIONAL LLP
Ryan Blaine Bennett, P.C. (admitted *pro hac* vice)
W. Benjamin Winger (admitted *pro hac* vice)
300 North LaSalle Street
Chicago, Illinois 60654
Telephone: (312) 862-2000
Facsimile: (312) 862-2200
Email: ryan.bennett@kirkland.com
benjamin.winger@kirkland.com

Co-Counsel to the Debtors
and Debtors in Possession

Certificate of Service

I certify that on December 17, 2020, I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas.

/s/ Matthew D. Cavenaugh
Matthew D. Cavenaugh