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

In re:	§	**Case No. 17-31646**
	§	
MONTCO OFFSHORE, INC., *et al.*,[1]	§	**Chapter 11**
	§	
Debtors.	§	**(Jointly Administered)**
	§	

JOINT RESPONSE OF THE DEBTORS AND BLACKHILL PARTNERS, LLC TO THE BLACK ELK TRUSTEE'S OBJECTION TO DEBTORS' APPLICATION FOR ENTRY OF AN ORDER (I) AUTHORIZING THE RETENTION AND EMPLOYMENT OF BLACKHILL PARTNERS, LLC AS FINANCIAL ADVISOR AND INVESTMENT BANKER FOR THE DEBTORS AND DEBTORS IN POSSESSION PURSUANT TO 11 U.S.C. §§ 327(a) AND 328(a), *NUNC PRO TUNC* TO THE PETITION DATE, (II) WAIVING CERTAIN TIME-KEEPING REQUIREMENTS AND (III) GRANTING RELATED RELIEF
[Relates to ECF # 107 and 220]

TO THE HONORABLE MARVIN ISGUR, UNITED STATES BANKRUPTCY JUDGE:

Montco Offshore, Inc. ("Montco Offshore") and Montco Oilfield Contractors, LLC ("MOC") as debtors and debtors in possession in the above-captioned chapter 11 cases (collectively, the "Debtors"), together with Blackhill Partners, LLC ("Blackhill"), submit this joint response (the "Response") to the objection (the "Objection") of Richard Schmidt (the "Black Elk Trustee" or the "Trustee"), Trustee for the Black Elk Liquidation Trust (the "Trust") [Doc. Nos. 219; 220], to the *Debtors' Application for Entry of an Order (I) Authorizing the Retention and Employment of Blackhill Partners, LLC as Financial Advisor and Investment Banker for the Debtors and Debtors in Possession Pursuant to 11 U.S.C. §§ 327(a) and 328(a) Nunc Pro Tunc to the Petition Date, (II) Waiving Certain Time Keeping Requirements and (III)*

[1] The Debtors in these chapter 11 cases, together with the last four (4) digits of each Debtor's federal tax identification number, are Montco Offshore, Inc. (1448) and Montco Oilfield Contractors, LLC (9886). The mailing address for the Debtors, solely for the purposes of notices and communications, is 17751 Hwy 3235, Galliano, Louisiana 70354.

Granting Related Relief [Doc. No. 107] (the "Application").[2] In support of the Application, the Debtors and Blackhill respectfully state as follows:

PRELIMINARY STATEMENT

1. The Debtors commenced these cases in order to avail themselves of the breathing room provided by the automatic stay and to avail themselves of the opportunity for negotiation inherent in chapter 11. They have accordingly commenced restructuring negotiations with their various creditor constituencies and are attempting to craft value-maximizing plans that will provide the highest and best recoveries possible for all stakeholders. Blackhill, as the investment banker and financial advisor for the Debtors, has been and continues to be critical to these restructuring efforts, these cases and their successful implementation. As set forth below, Blackhill has been retained since January 2017 and has played an integral role in the Debtors' restructuring efforts both in the months leading up to the commencement of these cases and since the commencement of these cases (including, specifically, leading discussions with multiple potential counterparties about a range of strategic alternatives).

2. The Black Elk Trustee does not dispute that the Debtors require Blackhill's services. Nor does the Trustee dispute the expertise or qualifications of Blackhill or the proposed terms and conditions of Blackhill's engagement. Rather, the Trustee alleges that Blackhill is not disinterested as a result of Blackhill's prior engagement by Black Elk Energy Offshore Operations, LLC ("Black Elk") and therefore holds an "adverse interest" and may not

[2] Capitalized terms not defined herein shall have the meaning ascribed to them in the Application.

be retained under § 327(a) of the Bankruptcy Code. The Trustee's position, however, is baseless and without any legal or factual support. [3]

3. As set forth below, Blackhill is disinterested. Blackhill is neither a creditor, equity security holder nor insider of the Debtors and does not hold or represent any "interest adverse to the estate." Blackhill's prior work for Black Elk, moreover, does not give Blackhill any sort of adverse interest. Courts have described "adverse interest" as possessing an economic interest that would render a professional *biased against the estate* and/or *impair its judgment* in advising a debtor. Here, Blackhill neither holds nor represents any economic or other interest in either the affairs of the Trust or the outcome of any dispute between the Debtors and the Trustee. Indeed, Blackhill's prior engagement by Black Elk ended almost a year ago. Blackhill, furthermore, is not advising the Debtors on any issues relating to Black Elk or the Trust. Blackhill thus does not possess any economic (or other) interest by virtue of its prior work for Black Elk that would render it "biased" against the Debtors. Put another way, nothing about Blackhill's now-terminated engagement by Black Elk impairs its ability to advise and assist the Debtors in their efforts to rehabilitate and successfully emerge from these chapter 11 cases.

4. As shown below, the Black Elk Trustee's Objection relies solely on conclusory and hyperbolic statements about alleged "conflicts of interest," bad faith and adverse interests without showing how Blackhill's prior work for Black Elk gives it any bias against the Debtors

[3] The Official Commitee of Unsecured Creditors (the "Committee") filed a reservation of rights [Doc. No. 221] in the event an apparent or actual conflict of interest arises during the pendency of these cases as a result Blackhill's prior work for Black Elk. For the reasons set forth in this Response, the Debtors and Blackhill dispute that any such conflict will arise under any circumstances, but nevertheless agree that the Committee's rights in such an event are preserved. The U.S. Trustee also filed a limited objection [Doc. No. 231]. The Debtors and Blackhill believe that this Response addresses the concerns raised by and makes the necessary showing as requested by the U.S. Trustee, but will reach out to the U.S. Trustee to discuss and address any further issues or questions. Further, the Debtors and Blackhill will agree to make changes to the indemnity language in the proposed order in response to the comments of the U.S. Trustee in the limited objection.

or would impair its judgment. Indeed, the Trustee bases his position entirely on a handful of facts and statements which are either incorrect or irrelevant. None of these allegations could support any finding that Blackhill holds or represents any interest adverse the estates.

5. Finally, notwithstanding the Trustee's allegations, the Debtors were well aware of Blackhill's prior work for Black Elk when they selected Blackhill as their restructuring advisor. The Debtors did not then, and do not now, believe that Blackhill holds any interest that is adverse to the estates. Accordingly, for the reasons set forth in the Application and this Response, the Debtors and Blackhill respectfully request that the Court overrule the Objection and permit the Debtors to exercise their right to employ and retain the investment banker and financial advisor of their choosing to assist them efficiently move through and successfully emerge from these chapter 11 cases.

BACKGROUND

6. The Debtors first engaged Blackhill in January 2017. The initial focus of the engagement was on certain out-of-court restructuring options for Montco Offshore. Blackhill's engagement was subsequently expanded in March 2017 to address the potential restructuring of the Debtors through these chapter 11 cases.

7. The Debtors chose to retain Blackhill over other advisory and investment banking firms due to Blackhill's considerable knowledge of the market for the Debtors' services. The Debtors believe that Blackhill's qualifications, relationships and credibility in the offshore exploration and production services market provide Montco Offshore, and in turn all of the Debtors' parties in interest, with the best position to realize the highest and best path forward.

8. Since its initial engagement in January, Blackhill has served a critical and integral role in advising the Debtors on their restructuring options and preparing for the commencement

of these cases. Blackhill's role has become even more important since the commencement of these cases as Blackhill has played a leading role in negotiations with the Official Committee of Unsecured Creditors and the Debtors' other constituencies. Blackhill, moreover, has led negotiations for DIP financing after running a process to determine DIP financing alternatives. In addition, Blackhill is currently running a process to find a plan sponsor and/or buyer and are in discussions now with multiple potential counterparties about a range of strategic alternatives.

9. On April 6, 2017, the Debtors filed the Application to employ Blackhill as their investment banker and financial advisor. As noted in the Application, the Debtors anticipate that Blackhill's services will focus primarily on advising and assisting Montco Offshore in analyzing, negotiating and implementing a restructuring transaction for Montco Offshore. The Debtors also advised Blackhill that its services were not needed in connection with any Black Elk matter and/or the Black Elk Contract. Accordingly, the scope of Blackhill's services does not include work on any such matters absent further Court approval.

10. As the Court may recall (and as described in the Application and the declaration of Joe Stone in support of the Application), Blackhill was previously retained as restructuring and financial advisors to Black Elk in the Black Elk bankruptcy case and Managing Director Jeffery Jones was designated as CRO of Black Elk. In that role, Blackhill provided general financial and restructuring advice to Black Elk, including, without limitation, seeking a contract counter-party for decommissioning and P&A work. MOC was ultimately selected by substantially all of the parties-in-interest in the Black Elk case as the contract counter-party, and subsequently, the parties negotiated and entered into the Black Elk Contract. As described in the Application, Blackhill's engagement in the Black Elk case ended in July 2016 and Blackhill has had no further involvement with Black Elk or its estates in almost a year.

11. The Black Elk Trustee filed its Objection to the Application on May 19, 2017. As noted above, the Trustee's sole objection relates to whether Blackhill holds an adverse interest and thus is not disinterested by virtue of Blackhill's prior engagement by Black Elk.

ARGUMENT

12. As set forth below, Blackhill is disinterested. It is neither a creditor, equity security holder nor insider of the Debtors and does not hold or represent an interest adverse to the estates—whether as a result of its prior engagement by Black Elk or otherwise. The Trustee's Objection relies solely on conclusory statements that are not supported by the law or the facts cited in the Objection. Indeed, the Trustee never explains, let alone demonstrates, how Blackhill, by virtue of its now-terminated engagement by Black Elk, holds or represents an adverse interest that would render it biased against the estates or impair its judgment in rendering restructuring advice and services to the Debtors as set forth in the Application.

A. Blackhill Does not Hold or Represent any Interest Adverse to the Estates.

13. Section 327(a) of the Bankruptcy Code provides that a debtor in possession may employ one or more professional persons that (1) "do not hold or represent an interest adverse to the estate" and (2) that "are disinterested persons." 11 U.S.C. § 327(a). A disinterested person, moreover, is defined as a person who (a) is not a creditor, equity security holder or insider of the debtor, (b) is not, and was not within two years prior to the commencement of the case, a director, officer or employee of the debtor, and (c) does not have a materially adverse interest to the interests of the estate or any class of creditors or equity holders by reason of any direct or indirect relationship to, connection with or interest in, the debtor or for any other reason. 11 U.S.C. § 101(14).

14. Blackhill, without question, is not a creditor, equity security holder or insider of the Debtors and is not, and has not, been a director, officer or employee of the Debtors in the two years prior to the petition date. Indeed, the Black Elk Trustee only alleges that Blackhill holds an interest adverse to the Debtors' estates as a result of Blackhill's prior work for Black Elk.

15. Courts have described what constitutes an adverse interest in a number of ways.[4] Although the language varies, the inquiry generally boils down to whether the professional is motivated to act in a manner that is adverse to the debtor or its estate. As an example, courts have stated an adverse interest exists if a professional: (a) has or asserts an economic interest that tends to lessen the value of the estate or creates an actual or potential dispute with the estate, In re West Delta Oil Co., 432 F.3d 347, 356 (5th Cir. 2005); (b) possesses a predisposition that renders a bias against the estate, id.; or (c) has a personal interest which might impair the professional's judgment when advising the Debtor, In re Am. Int'l Refinery, Inc., 676 F.3d at 461-62. Under each of these various articulations, the primary focus is whether the professional possesses a meaningful incentive to act contrary to the best interests of the estate. In re Contractor Tech., Ltd., 2006 WL 1492250, at *6 (S.D. Tex. May 30, 2006).

16. Examples of cases where a court has found a professional to possess an adverse interest include where debtor's counsel sought to finance a bidder proposing to acquire the debtor's assets because it, *inter alia*, gave counsel a personal interest in reducing the value of the assets of the estate, In re West Delta Oil Co., 432 F.3d at 356, or where counsel was actually acting on behalf of a major equity holder and attempting to benefit such holder at the expense of the estate, In re Kendavis Industries, Int'l Inc., 91 B.R. 742, 752 (Bankr. N.D. Tex. 1988).

[4] The term "adverse interest" as used in both sections 327(a) and 101(14) of the Bankruptcy Code "is generally considered to have the same meaning." Waldron v. Adams & Reese, L.L.P. (In re Am. Int'l Refinery, Inc.), 676 F.3d 455, 461 n. 7 (5th Cir. 2012) (citing cases).

Another example is where counsel holds a prepetition claim against the estate. See In re Gallegos, 68 B.R. 584, 586-87 (Bankr. D.N.M. 1986). In each of these cases, the professionals possessed a tangible personal interest that impaired their ability to act in the best interest of the debtors' estates.

17. Unlike the professionals described above, Blackhill neither holds nor represents any economic or other interest that would interfere with its ability to act in the best interests of the Debtors' and their estates. Specifically, Blackhill has no economic or other interest in either (a) the affairs of the Trust or (b) the outcome of any dispute between the Debtors and the Trust. Indeed, Blackhill's prior engagement by Black Elk ended almost a year ago (and Blackhill has never represented the Trust). Since then, Blackhill has had no further involvement in connection with Black Elk or its estates. Importantly, section 327(a) is written in the present tense, requiring that retained professionals "do not *hold* or *represent* an interest adverse to the estate." 11 U.S.C. § 327(a) (emphasis added). The Supreme Court has recognized that "Congress' use of a verb tense is significant in construing statutes." United States v. Wilson, 503 U.S. 329, 333 (1992). Accordingly, Blackhill does not hold or represent an interest adverse to the estate where its representation of Black Elk has terminated.[5]

18. Further, the Debtors do not even require Blackhill's services for any matter relating to Black Elk or the Black Elk Contract. As noted in the Application, the Debtors anticipate that Blackhill's services will focus primarily on advising and assisting Montco

[5] Notably, the Committee moved to retain Alvarez & Marsal, LLC ("A&M") as their financial advisors in these chapter 11 cases on May 4, 2017 [Doc. No. 194] (the "A&M Retention Application"). A&M was also previously engaged as a financial advisor to Black Elk beginning in December 2012, and Managing Director Gary Barton, who has been working on the engagement on behalf of the Committee in the Debtors' cases, was first the Interim CFO of Black Elk (between January and April 2013) and the CRO of Black Elk (between April and September 2013). Greenberg Declaration in Support of A&M Retention Application ¶ 3(a) [Doc. No. 194, Ex. B].

Offshore in analyzing, negotiating and implementing a restructuring transaction for Montco Offshore.[6] See In re Age Ref., Inc., 447 B.R. 786, 802 (Bankr. W.D. Tex. 2011) (holding, under section 327(a) "the relevant inquiry here is whether [special counsel] holds or represents an interest adverse to that of the estate *with respect to the specific causes of action for which the Trustee seeks to hire the firm*" (emphasis added)).

19. Accordingly, for all of the foregoing reasons, Blackhill possesses no motivation, by virtue of its now-terminated engagement by Black Elk, to act in a manner adverse to the Debtors or their estates as it is free of any economic interest, bias, or other personal interest that would incentivize it to act in a manner contrary to the Debtors' best interests. And nothing about Blackhill's prior retention by Black Elk impairs Blackhill's judgment and ability to provide the Debtors with the restructuring services set forth in the Application. Indeed, tellingly, at the time the Debtors engaged Blackhill in January 2017, the Debtors were fully informed of Blackhill's prior work for Black Elk and had no concerns regarding Blackhill's prior retention by Black Elk. The Debtors, moreover, continue to affirmatively support the retention of Blackhill and believe it is in the best interests of the Debtors, their estates and all stakeholders.

B. The Black Elk Trustee's Conclusory Allegations that Blackhill Holds or Represents an Adverse Interest Lack Legal and Factual Support.

20. The Black Elk Trustee correctly notes the various articulations of what it means to hold or represent an adverse interest. See Objection at ¶¶ 11-12. But the Trustee fails to provide any explanation as to how Blackhill's now-terminated engagement by Black Elk constitutes an adverse interest. The Trustee simply notes the standard and then summarily concludes that

[6] In addition, there are no senior advisors staffed on the Debtors' cases who also worked on the Black Elk matter (there is in fact only one junior team member who will have involvement in both matters, otherwise the teams are completely separate).

Blackhill has an adverse interest because Blackhill was formerly engaged by Black Elk and worked on, and provided testimony in connection with, the Black Elk Contract.

21. None of the cases cited in the Objection, moreover, support the Trustee's conclusory position. Indeed, the Trustee fails to cite to a single case where a court disqualified a professional based solely on that professional's prior representation of a potential creditor of the estate. Instead, the Trustee cites to cases where the court either did not find an adverse interest or that are otherwise clearly distinguishable. See In re Am. Int'l Refinery, Inc., 676 F.3d at 464-65 (holding that debtors' counsel did not have a disqualifying adverse interest based on a creditor's payment of counsel's retainer or counsel's prior relationship to the debtors); In re West Delta Oil Co., 432 F.3d at 356 (holding that counsel who attempted to finance a bidder's acquisition of the Debtor's assets while employed by the Debtor held an adverse interest); In re LTHM Houston-Operations, LLC, 2014 WL 5449737, at *2-4 (Bankr. S.D. Tex. Oct. 24, 2014) (holding that a trustee's proposed financial advisory firm did not hold an adverse interest to the estate even though the trustee was a member of the financial advisory firm).

22. The Trustee's reference to the three examples of "adversity" described in the In re LTHM Houston–Operations, LLC case is equally unavailing. See Objection ¶ 12. Each of these examples are distinguishable: one involved an attorney who was a prepetition secured creditor of the Debtor's estate, In re Gallegos, 68 B.R. at 586-87; another involved attorneys who had previously served as officers and/or directors of the Debtor, In re Wells Benrus Corp., 48 B.R. at 198-99; and the third involved the proposed employment of an attorney who was simultaneously representing principals of the Debtor and a key issue could involve the pursuit of estate claims against such principals, In re Red Lion, Inc., 166 B.R. 296, 297-98 (Bankr. S.D. Tex. 1994). (Of course, attorneys and investment bankers are held to different ethical standards.)

23. The only purported support for the Trustee's allegation that Blackhill holds an adverse interest are various inaccurate and/or irrelevant statements describing both the current dispute between the Debtors and the Trust with respect to the Black Elk Contract and Blackhill's prior work for Black Elk. None of these statements, however, demonstrate that Blackhill has any bias against the Debtors or that its judgment is somehow impaired by virtue of its prior retention by Black Elk.

24. First, the Trustee references the adversary complaint that MOC recently filed against the Trust, alleging that MOC is "essentially accusing Mr. Jones and/or Mr. Gurley of Blackhill of fraud" in the complaint. Objection at ¶ 13. This is absolutely inaccurate and a distortion of what the Black Elk Trustee knows about the true nature and basis of the dispute between MOC and the Trust. ***Nevertheless, to be clear, MOC has not alleged, and does not believe, that there are any claims for fraud against Blackhill or any of its professionals.*** Further, MOC's claims regarding misrepresentation arise from issues with the accuracy and contents of Black Elk's books and records (as well as the books and records of BSEE/BOEM) and how Black Elk's books and records were maintained by Black Elk and its now-indicted sponsor, Platinum Partners, which in no way implicates Blackhill's conduct. The Black Elk Trustee knows this and any allegation that MOC believes Blackhill engaged in any sort of fraudulent conduct is baseless and disingenuous.

25. The Black Elk Trustee also places great importance on statements made by Lance Gurley in a declaration submitted in the Black Elk bankruptcy case. In the declaration, Mr. Gurley stated that the Black Elk Contract "provides for the P&A on a turnkey basis of substantially all of [Black Elk's] operated P&A liabilities . . . ." Objection, Ex. A at ¶ 27. The Trustee asserts that the Debtors "now appear to contest" that the contract was a turnkey contract.

Objection ¶ 14. The Trustee's assertion, again, is disingenuous. While MOC has never contested whether the Black Elk Contract is "turnkey" – it simply does not agree with the Trustee's interpretation of the implications therefrom – the allegations set forth in the adversary complaint are clear and speak for themselves.

26. Finally, the Trustee wrongly mischaracterizes the Black Elk Contract as being a contract negotiated solely between Blackhill and MOC. As the Trustee and his counsel are aware, the Black Elk Contract was the product of a collective process and intense arms'-length negotiations among as many as twenty parties.[7] In any event, Blackhill's prior involvement in the Black Elk bankruptcy case and connection with the Black Elk Contract does not give Blackhill any "personal interest" in the current dispute between the Debtors and the Trust that "might impair the high degree of impartiality and detached judgment" required by the Bankruptcy Code.[8] See Am. Int'l Refinery, Inc., 676 F. 3d at 461-62 (quoting In re West Delta Oil Co., 432 F.3d at 355).

27. In sum, the Trustee has failed to make any affirmative case whatsoever as to why Blackhill holds or represents an interest adverse to the estates or otherwise is not disinterested under the law or the facts of these cases. As a result, the Objection should be overruled. See In re Aircraft Instrument & Dev., Inc., 151 B.R. 939, 944 (Bankr. D. Kan. 1993) (overruling an objection to an accountant's retention under section 327(a) where the objector "presented no

[7] Some of the parties materially involved in the contract negotiations (in addition to Black Elk and MOC), included: W&T Offshore, Merit Energy, McMoRan Oil and Gas, Fieldwood Energy, JX Nippon Oil Exploration, Energy XXI, Maritech Resources, Argonaut Insurance, Westchester Fire Insurance, Liberty Insurance, the Ad Hoc Group of Bondholders, the unsecured creditors' committee (represented by Trustee's counsel) and the Department of Justice.

[8] The Trustee also inaccurately states that MOC "unlike any other contractor . . . was granted, by Blackhill, complete access to the competing bids." Objection ¶ 14, n. 7. Each party was given access to the gross bid amounts but no party was aware of the components of any particular bid.

other basis than [the accountant's] audit work" for a Debtor's competitors and other manufacturers as a basis for disqualification and presented "no analysis of the statutory language or of the facts in support of its motion").

WHEREFORE, the Debtors and Blackhill respectfully request that the Court overrule the Black Elk Trustee's Objection and enter the Proposed Order, substantially in the form of Exhibit A to the Application, and grant such other relief as is just and proper.

[*Remainder of Page Intentionally Left Blank.*]

Dated: May 23, 2017
Houston, Texas

DLA PIPER LLP (US)

By: */s/ Vincent P Slusher*

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CERTIFICATE OF SERVICE

I certify that on May 23, 2017, 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/ Vincent P. Slusher
Vincent P. Slusher