

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

In re:)	
)	Chapter 11
VERTEX ENERGY, INC., <i>et al.</i> , ¹)	Case No. 24-90507 (CML)
Debtors.)	(Jointly Administered)
)	

**OBJECTION AND RESERVATION OF RIGHTS OF KIRBY INLAND MARINE, LP TO
THE DEBTORS' NOTICE OF CURE COSTS AND POTENTIAL ASSUMPTION AND
ASSIGNMENT OF EXECUTORY CONTRACTS
AND UNEXPIRED LEASES IN CONNECTION WITH SALE**

[Relates to Dkt. No. 158]

Kirby Inland Marine, LP ("Kirby"), by and through its undersigned counsel, hereby submits this objection and reservation of rights (the "Objection") in response to the *Notice of Cure Costs and Potential Assumption and Assignment of Executory Contracts and Unexpired Leases in Connection with Sale* (the "Cure Notice") [Dkt. No. 158] filed by the debtors in the above-captioned chapter 11 cases (the "Debtors") on October 9, 2024.

BACKGROUND

1. Kirby and Debtor Vertex Refining Alabama LLC ("Vertex Refining Alabama") are parties to that certain Master Transportation Services Contract dated as of January 11, 2023 (as amended and restated from time to time, the "MTS Contract"). Kirby also provides fleeting services from time to time to Vertex Refining Alabama and Debtor Vertex Energy, Inc. pursuant to those certain Terms and Conditions available at <https://kirbycorp.com/wp-content/>

¹ A complete list of each of the Debtors in these chapter 11 cases may be obtained on the website of the Debtors' proposed claims and noticing agent at <https://www.veritaglobal.net/vertex>. The location of Debtor Vertex Energy, Inc.'s corporate headquarters and the Debtors' service address in these chapter 11 cases is 1331 Gemini Street Suite 250, Houston, Texas 77058.



uploads/2021/03/Fleeting-Terms-and-Conditions-FINAL.pdf. Kirby has also provided certain other services to the Debtors on spot terms, including to Vertex Energy, Inc.

2. Pursuant to the MTS Contract, Kirby and Vertex Refining Alabama entered into that certain Charter Order dated March 27, 2023 (as amended and restated from time to time, including by that certain Amendment One to the Charter Order dated January 3, 2024, the “Charter Order”), which is incorporated into the MTS Contract and together constitute a charter party (the “Charter Party”).

3. Under the Charter Party, Kirby agreed, among other things, to provide certain transportation services to Vertex Refining Alabama with respect to bulk liquid cargo (the “Transportation Services”) for a period commencing on January 8, 2024 and terminating on January 7, 2025 (the “Contract Period”). Vertex Refining Alabama agreed to pay to Kirby a charter hire rate of \$10,250.00 per day (the “Day Rate”), plus any fuel, lube oil, and applicable taxes and any other costs for Vertex Refining Alabama’s account per the Charter Party terms (the “Ancillary Costs”) during the Contract Period. Additionally, in the event that the towing vessel is removed from the Tow (as defined by the Charter Party), Vertex Refining Alabama agreed to pay Kirby a barge-only charter hire rate of \$2,200.00 per barge, per day, plus fleeting costs and applicable taxes and any other costs for Vertex Refining Alabama’s account per the Charter Party terms (the “Barge-Only Costs”).

4. On September 24, 2024 (the “Petition Date”), the Debtors filed voluntary petitions for bankruptcy relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) in the United States Bankruptcy Court for the Southern District of Texas, Houston Division (the “Bankruptcy Court”).

5. On September 24, 2024, the Debtors filed their *Emergency Motion for Entry of an Order (I) Approving the Bidding Procedures and Auction, (II) Scheduling Bid Deadlines, an Auction, Objection Deadlines, and a Sale Hearing, (III) Approving the Assumption and Assignment Procedures, (IV) Approving the Form and Manner of Notice of a Sale Transaction, the Auction, the Sale Hearings, and Assumption and Assignment Procedures, and (V) Granting Related Relief* (the “Bidding Procedure Motion”) [Dkt. No. 5].

6. Pursuant to the Bidding Procedures Motion, the Debtors sought entry of an order approving, inter alia, (a) the Bidding Procedures, (b) certain notices, including the notice of Cure Costs, (c) the Assumption and Assignment Procedures in connection with Sale Transactions, and (d) the scheduling of certain sale milestones.²

7. The Bidding Procedures Motion contemplated (a) a sale of all, or any portion of, the Debtors’ assets through one or more Sale Transactions, including through a potential credit bid submitted by the DIP Lenders and / or the Term Loan Lenders, or alternatively, (b) a standalone recapitalization of the Company’s balance sheet. The Bidding Procedures Motion did not identify any proposed bidder or include any proposed form of an asset purchase agreement.

8. On September 25, 2024, the Court entered an Order approving the Bidding Procedures Motion (the “Bidding Procedures Order”) [Dkt. No. 55].

9. On October 9, 2024, the Debtors filed the Cure Notice, identifying certain contracts and leases that the Debtors may seek to assume and assign in connection with a Sale Transaction. The Cure Notice lists the MTS Contract in the Proposed Cure Schedule with a proposed cure amount of \$1,302,240.33 (the “Proposed Cure Amount”).

² Capitalized terms not defined herein shall have the meanings ascribed to them in the Bidding Procedures Motion.

10. In fact, however, Vertex Refining Alabama owes Kirby, as of October 21, 2024, no less than \$1,580,652.21 for Transportation Services provided pursuant to the MTS Contract:

	Invoice Number	Invoice Date	Amount
1.	2171002	08/21/24	\$261,238.78
2.	2187362	09/06/24	\$278,675.06
3.	2204162	10/01/24	\$199,111.87
4.	2211743	10/01/24	\$325,454.90
5.	2211806	10/01/24	\$89,343.53
6.	2224543	10/22/2024	\$426,828.07
Total			\$1,580,652.21

11. Moreover, as of the date of this Objection, Kirby continues to provide the Transportation Services to Vertex Refining Alabama. As such, Kirby is now, and will become, entitled to other amounts that have, or will become, due and payable under the terms of the MTS Contract, including but not limited to Day Rates, Ancillary Costs, and, potentially, Barge-Only Costs, for the duration of the Contract Period.

OBJECTION³

A. All Defaults Under the Contracts Must be Cured.

12. Section 365(b)(1) of the Bankruptcy Code provides that:

If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default . . .

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

³ The Debtors agreed to an extension of Kirby's deadline to object to the Cure Notice through and including October 23, 2024 as the parties continue to discuss a consensual resolution.

13. Therefore, as a condition to a debtor's assumption of an executory contract, the contractual counterparty is entitled to be paid all amounts due and owing in full. This requirement ensures that the contract is restored to pre-default conditions and brought back in compliance with its terms. *See* 11 U.S.C. § 365(b); *see also In re Escarent Entities, L.P.*, 423 F. App'x 462, 465 (5th Cir. 2011) (quoting *In re Ionosphere Clubs, Inc.*, 85 F.3d 992, 999 (2d Cir.1996) ("If the debtor has defaulted under the contract . . . the debtor may not assume the contract unless the debtor, *inter alia*, cures the default or provides adequate assurance that it will do so . . . to insure that the contracting parties receive the full benefit of their bargain if they are forced to continue performance.") (citations omitted)).

14. In light of the above, Kirby objects to the Proposed Cure Amount because it (a) does not reflect the amount owed by Vertex Refining Alabama to Kirby under the MTS Contract as of October 21, 2024; and (b) does not reflect the increasing amount owed to Kirby from and after that date as a result of additional unpaid post-petition amounts that have accrued or will accrue under the MTS Contract, to the earlier of the effective date of any assumption and assignment of the MTS Contract or the expiry of the Contract Period, including, without limitation, additionally accruing Day Rate charges, Ancillary Costs, and, potentially, the Barge-Only Costs.

15. Kirby understands that the Debtors intend, shortly, to file a Supplemental Cure Notice.

16. With the aim of resolving this Objection consensually and expeditiously, Kirby requests that (a) the Supplemental Cure Notice reflect the MTS Contract cure amount as of October 21, 2024 as \$1,580,652.21 or such other amount as of another date as may be agreed between Kirby and the Debtors; and (b) the Supplemental Cure Notice and any order permitting the

assignment and assumption of the MTS Contract, or otherwise filed in connection to the cure amount for the MTS Contract, state the following:

Notwithstanding anything in any other Cure Notice or order to the contrary, the Cure Cost with respect to the MTS Contract shall be equal to (i) the Cure Cost reflected in the Supplemental Cure Notice filed [] with respect to the MTS Contract (the “Initial Cure Cost”), plus (ii) any additional amounts required to cure monetary defaults under the MTS Contract accruing from the date the Initial Cure Cost was calculated through and including the effective date of any assumption and assignment of the MTS Contract (the “Effective Date”). Nothing herein shall impair the right of Kirby Inland Marine, LP to assert that any obligations accruing under or in respect of the MTS Contract from now until the Effective Date are entitled to priority as an administrative expense claim.

17. Kirby will continue to work with the Debtors and the Debtors’ professionals in an effort to resolve the matters set out in this Objection.

RESERVATION OF RIGHTS

18. Kirby reserves all rights and remedies with respect to the Cure Notice, the MTS Contract and all other agreements between Kirby and the Debtors, and all amounts necessary to cure the defaults under the MTS Contract and any other agreements between Kirby and the Debtors, including but not limited to Kirby’s right to (a) assert any additional amounts that may be due and owing under the MTS Contract, (b) make any and all such other or further objections as may be appropriate, and (c) to require and receive adequate assurance of future performance by any assignee of the MTS Contract or any other agreements between or among Kirby and the Debtors.

CONCLUSION

19. Wherefore, Kirby respectfully requests that an order be entered conditioning the assumption and assignment of the MTS Contract on payment of all amounts owed in respect of

the MTS Contract through and including the Effective Date, and providing Kirby such other and further relief as is just and proper.

Date: October 23, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2024, I caused a copy of this Objection and Reservation of Rights to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas.

/s/ Julie Harrison
Julie Harrison