UNITED STATES BANKRUPTCY COURT – NORTHERN DISTRICT OF NEW YORK
Alexander Pirnie U.S. Courthouse and Federal Building, 10 Broad Street, Utica, NY 13501

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U.S. Bankruptcy Judge

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In re: *Folts Home and Folts Adult Home, Inc.*
Lead Chapter 11 Case No.: 17-60139

LETTER-DECISION AND ORDER

I. *Introduction*

Before the Court in these jointly administered cases is the application of Upstate Service Group, LLC ("Upstate") filed on November 28, 2017 (the "Application," ECF No. 296), for entry of an order under 11 U.S.C. § 503(b) allowing, as an administrative expense, its claim for monies

loaned to Folts Home ("Folts") and Folts Adult Home, LLC ("FAH") immediately prior to their commencement of these chapter 11 cases.[1] The Application, in part, seeks administrative expense priority status for $250,000.00 which Upstate advanced to Folts and FAH on or about February 13, 2017, as the so-called "Chapter 11 Deposit" in connection with the parties' execution of an Asset Purchase Agreement on the same date (the "Upstate APA," ECF No. 82, Ex. 5).[2] To the extent the Application seeks other types of relief, Upstate has since withdrawn these requests. Moreover, as Upstate stated in its letter brief filed on October 15, 2018 (the "Upstate Brief," ECF No. 561), it has amended and reduced its request for allowance of an administrative expense claim from $250,000.00 to $175,000.00.

Following several consensual adjournments of the first scheduled hearing date on December 12, 2017, the Court held a hearing on the Application on September 26, 2018. Neither the United States Trustee nor any party in interest filed or voiced opposition to the Application. In fact, counsel for Debtors orally supported the Application pursuant to the parties' pre-petition agreement to preserve Upstate's right to assert an administrative claim in these chapter 11 cases. However, the Court *sua sponte* raised certain issues and afforded Upstate the opportunity to file a supplemental brief to address the Court's concerns, which it did. The Court held a continued hearing and listened further to oral argument on November 14, 2018, before taking the matter under advisement. This Letter-Decision and Order constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52 and Federal Rule of Bankruptcy Procedure 7052, as made applicable here by Federal Rule of Bankruptcy Procedure 9014.

[1] Unless otherwise indicated, all chapter and section references are to the United States Bankruptcy Code, 11 U.S.C. §§ 101–1532 (the "Bankruptcy Code").

[2] During the pre-petition period, the Court will refer to the Folts and FAH entities. During the post-petition period, however, the Court will refer to Folts and FAH collectively as "Debtors."

II. *Jurisdiction*

The Court has jurisdiction over these cases and this core proceeding under 28 U.S.C. § 1334 and § 157(a), (b)(1), (2)(A) and (B).

III. *Background*

The facts detailing the parties pre and post-petition relationship are recited in the Application and in the Joint Affidavit of Anthony E. Piana, DDS and James H. Morey in Support of Chapter 11 Petitions and First Day Motions Pursuant to Local Bankruptcy Rule 2015-6 filed on February 16, 2017 ("Debtors' Joint Affidavit," ECF No. 17). As the facts are both undisputed and supported by the record in these cases, the Court need not restate them in their entirety. Rather, the Court will set forth only the facts most pertinent to its ruling.

On February 16, 2017, Folts and FAH filed voluntary petitions for chapter 11 relief and the Court immediately ordered the joint administration of their cases. The proof of claim bar date in these cases was set for and expired on August 15, 2017. Upstate was not listed on as a creditor on Debtor's schedules or statements and it did not file a formal claim against either Debtor.

As set forth in Debtors' Joint Affidavit, Folts is a New York not-for-profit corporation that, as of the petition date, owned a 163-bed residential health care and rehabilitation facility in Herkimer, New York. (*Id.* ¶ 6.) FAH is also a New York not-for-profit corporation that, as of the petition date, owned an 80-bed adult residential center located in Herkimer, New York. (*Id.* ¶ 7.)

During the period from 2004 to 2012, certain of Folts and FAH's executives engaged in irregular financial dealings and committed mismanagement with respect to the residential health and rehabilitation facility and the adult residential center (collectively, the "Facilities"). (*Id.* ¶ 23–25.) This ultimately caused Folts and FAH to voluntarily request that the New York State Department of Health ("DOH") appoint a financial receiver to operate the Facilities. Following

interviews of several prospective receivers, Folts and FAH selected Upstate primarily because Upstate expressed an interest in purchasing the Facilities and continuing the corporate mission of providing skilled nursing care in the Herkimer, New York area. (*Id.* ¶ 26.) Two affiliates of Upstate, FRNC, LLC and FCADH, LLC, began operating the Facilities as receivers on October 1, 2013, pursuant to Receivership Agreements signed by DOH, Folts, FAH, and Upstate. DOH issued Operating Certificates to Upstate for the Facilities and Folts and FAH surrendered theirs. (*Id.* ¶ 27.) During this time and as of the petition date, Folts and FAH's real property was subject to notes and mortgages insured by the Secretary of the United States Department of Housing and Urban Development ("HUD"). (*Id.* ¶ 10–16.) In furtherance of Upstate's proposal to purchase the Facilities, Upstate engaged in discussions with HUD concerning the proposed purchase price and treatment of the two HUD-insured mortgages. The parties, however, failed to reach an agreement.

In January or February 2014, Folts and FAH elected to seek a new purchaser and substitute receiver. (*Id.* ¶ 28.) By March 2014, Folts and FAH identified The HomeLife Companies, Inc. ("HomeLife") as the potential new receiver. In November 2014, Folts and FAH entered into an Asset Purchase Agreement with HomeLife, which was conditioned upon HomeLife's negotiation with HUD of acceptable terms for the treatment of the existing mortgage claims. HomeLife then ran the Facilities from February 2015 through late 2018, when they were terminated post-petition following Debtors' sale of the Facilities pursuant to §363(b).

At the conclusion of its receiverships, Upstate determined that it had a surplus of funds in the amount of $761,297.61 belonging to Folts and FAH. On July 1, 2015, Upstate commenced an interpleader action in the United States District Court for the Northern District of New York (the "District Court") against HomeLife, Folts, FAH, HUD, the Internal Revenue Service, and several of Folts and FAH's judgment creditors (the "Interpleader Action"). By orders issued in the

Interpleader Action, Upstate deposited said funds with the Clerk of Court for the District Court on or about March 2016. (*Id.* ¶ 32.)[3]

During 2016, Upstate contacted HUD regarding its renewed interest in purchasing the Facilities. Upstate negotiated a deal with HUD and HUD consented to Upstate's purchase of the Facilities for $9,500,000.00. Upstate presented a proposed purchase agreement to Folts and FAH in December 2016, and the parties entered into the Upstate APA shortly thereafter. (*Id.* ¶¶ 33–34.) In conjunction with the Upstate APA, Upstate paid Folts and FAH a deposit of $1,250,000.00. Of that amount, $1,000,000.00 represented the purchase deposit and $250,000.00 was earmarked as a "Chapter 11 Deposit" to enable Folts and FAH to commence and administer these bankruptcy cases in order to consummate the sale. Specifically, subsection 2.1 of Section 2 of the Upstate APA, titled "Purchase Price," provided as follows:

> 2.1 In exchange for the Purchased Assets, Purchaser [Upstate] agrees to pay to Sellers [Folts and FAH] the following consideration (the "Total Consideration"):
>
> . . .
>
> (b) The sum of Two Hundred and Fifty Thousand Dollars ($250,000.00) (the **"Chapter 11 Deposit"**, and, together with the Purchase Deposit, the **"Deposit"**), which Chapter 11 Deposit shall be segregated from the Purchase Deposit. The Sellers are hereby authorized to use the Chapter 11 deposit to commence the Bankruptcy Cases and to implement the sale of the Purchased Assets pursuant to sections 105(a), 363 and 365 of the Bankruptcy Code.
>
> The Purchase Deposit and the Chapter 11 Deposit will be held in escrow by Sellers' counsel in accordance with an escrow agreement in the form attached hereto as Exhibit A. Interest, if any, on the Purchase Deposit will be paid to the person receiving the Purchase Deposit if this Agreement does not close and shall be applied at any Closing under this Agreement as a credit to the Purchase Price. *Unless otherwise reimbursed in the event of an Alternate Transaction, Purchaser retains*

[3] By Memorandum-Decision and Order of the District Court issued by the Honorable Gary L. Sharpe on March 15, 2018, the Interpleader Action was referred to this Court and assigned Adversary Case Number 18-80007. (ECF Adv. Pro. No. 1.) On October 5, 2018, Debtors filed a Motion for an Order Approving Stipulation Consenting to the Release of Interpleader Funds Deposited by FCADH, LLC (the "Interpleader Settlement Motion," ECF Adv. Pro. No. 33.) Following a hearing held on October 24, 2018, the Court granted the Interpleader Settlement Motion by Order issued October 25, 2018. (ECF Adv. Pro. No. 39.)

> *the right to assert an administrative expense claim in the amount of the Chapter 11 Deposit in the Bankruptcy Cases, provided that payment of such claim does not impair the ability of HUD to collect on its claims in the Bankruptcy Cases.*

(Upstate APA 7) (first and second emphasis in original, third emphasis added). In conjunction with the Upstate APA, the parties signed an Escrow Agreement that provided for the release of the Chapter 11 Deposit to Folts and FAH, with the caveat that they "in turn shall pay the Chapter 11 Deposit to their attorneys to pay the costs and expenses, including attorneys' fees, necessary to prepare and file the Bankruptcy Cases." (Upstate APA, Ex. A.) Nearly one week after accepting the deposit, Debtors filed for bankruptcy relief and, without delay, filed a motion under §§ 105(a), 363, and 365(b) to approve the Upstate APA and Upstate as the stalking horse bidder for substantially all of Debtors' assets, including the Facilities, and to sell the assets to the highest bidder (the "Sale Motion," ECF No. 18).

The Court granted the Sale Motion by order issued March 27, 2017 (the "Sale Order," ECF No. 82), wherein Upstate was designated as the stalking-horse bidder and deemed a qualified bidder for the Facilities and corresponding assets. Decretal paragraph 4 of the Sale Order provided, "Upstate waives its right to assert an administrative expense claim in the amount of the Chapter 11 Deposit under section 2.1(b) of the Purchase Agreement." Debtors conducted the auction on June 6, 2017, at which time Upstate was outbid by Cedarcare Holdings LLC ("Cedarcare"). The Court entered a final sale order approving Cedarcare's purchase of the Facilities and corresponding assets on July 21, 2017 (the "Final Sale Order," ECF No. 182), wherein the Court approved Cedarcare's Asset Purchase Agreement and bid in the amount of $16,600,000.00, which all parties agreed greatly exceeded their original expectations. Decretal paragraph 28 of the Final Sale Order terminated the Upstate Agreement and provided, "The return of the USG Chapter 11 Deposit in the amount of $250,000.00 shall be the subject of a further order of this Court."

IV. *Discussion*

Express Waiver of Upstate's Right to Seek an Administrative Expense Claim

In the first instance, the Court cannot overlook Upstate's express waiver of its contractual right to seek § 503(b) treatment for reimbursement of the Chapter 11 Deposit, as memorialized by the Sale Order. Upstate had an opportunity to review and object to decretal paragraph 4 of the Sale Order, but it failed to do so prior to the Court's entry of the Sale Order and it never moved to reconsider or vacate the same. Even after Upstate was outbid by Cedarcare in an amount so substantial that the parties refer to it as a basis for the Court to grant the Application, Upstate did not affirmatively seek to undo paragraph 4 of the Sale Order or otherwise reinstate Section 2.1(b) of the Upstate APA. Although the Court recognizes that paragraph 28 of the Final Sale Order requires a further order with respect to the Chapter 11 Deposit, it will not read that decretal paragraph so broadly as to resurrect or preserve Upstate's right to seek an administrative expense claim in these bankruptcy cases. Even if it had, as explained below, Upstate has not shown that it would be entitled to such favorable treatment.

Application of § 503(b) to the Facts

Upstate contends that it is entitled to reimbursement of the Chapter 11 Deposit from Debtors' estates as an administrative expense claimant under either § 503(b)(1)(A) on the basis of it being an actual, necessary cost and expense of preserving the estates or under § 503(b)(3)(D) and (b)(4) as an actual, necessary expense incurred by Upstate "in making a substantial contribution" in these bankruptcy cases. 11 U.S.C. § 503(b).

Bankruptcy Code § 503 provides, in pertinent part:

> (b) after notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including–
>
> (1)(A) the actual, necessary costs and expenses of preserving the estate including–

> . . .
> (3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by–
> . . .
> (D) a creditor, . . . in making a substantial contribution in a case under chapter 9 or 11 of this title.
> . . .
> (4) reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under subparagraph (a), (B), (C), (D), or (E) of paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expense incurred by such attorney or accountant . . . .

Id. Upstate bears the burden of proving, by a preponderance of the evidence, that it is entitled to an award under § 503(b), which should only be granted in extraordinary circumstances. *In re Drexel Burnham Lambert Grp. Inc.*, 134 B.R. 482, 489 (Bankr. S.D.N.Y. 1991) (citing *In re Englewood Community Hosp. Corp.*, 117 B.R. 352, 358 (Bankr. N.D. Ill. 1990)). While the list of priorities set forth in § 503(b) is not exclusive or "designed to cover every conceivable situation," priorities are to be narrowly construed. *Id.* at 488 (citing *Trustees of the Amalgamated Ins. Fund. v. McFarlin's Inc.*, 789 F.2d 98, 101 (2d Cir. 1986)). Thus, notwithstanding Upstate's citation to § 105(a) and general principles of equity and fairness, the Court may not simply convert Upstate's pre-petition debt into an administrative claim that would be accorded priority treatment pursuant to § 507(a) over the claims of other creditors. *Id.* at 488–89 (citations omitted) ("A bankruptcy court is without discretion or authority to deviate from the Code's narrow list of priorities on purely equitable grounds.")

Under § 503(b)(1)(A), Upstate argues that relief is proper because it has a claim against Debtors that (1) arose from a transaction with Debtors or on account of consideration furnished to Debtors, and (2) the transaction or consideration directly benefitted Debtors. Thus, Upstate submits that its claim satisfies the universally accepted two-part test set forth in *In re Mammoth Mart, Inc.*,

536 F.2d 950, 950 (1st Cir. 1976), for determining whether an expense falls within the category of "actual and necessary costs and expenses of preserving the estate." As to the first prong of the test, Upstate argues that the Chapter 11 Deposit was consideration furnished by Upstate to Debtors upon the signing of the Upstate APA. (Upstate Br. at 3.) As to the second prong of the test, Upstate argues that the consideration directly benefitted Debtors because Debtors' counsel was paid $35,000.00 from the Chapter 11 Deposit as a pre-petition retainer, and the balance of $215,000.00 was retained and used to satisfy Debtors' counsel's post-petition fee awards in these bankruptcy cases. (*Id.*) Both Upstate and Debtors confirmed on the record at oral argument that these bankruptcy cases would not have been filed by Debtors' counsel if Upstate had not advanced and earmarked the Chapter 11 Deposit for this purpose.

Upstate's position, however, is fatally flawed. To satisfy the first element, it must "show that the debtor-in-possession (not the pre-petition entity) incurred the transaction on which the claim is based, or that the claimant furnished the consideration to the debtor-in-possession (not the pre-petition entity)." *In re CIS Corp.*, 142 B.R. 640, 643(S.D.N.Y. 1992). "Consideration exists generally where (1) the debtor-in-possession induces the creditor to perform postpetition, or (2) the creditor performs under an executory contract prior to rejection." (citing *In re Mid Region Petroleum, Inc.*, 1 F.3d 1130, 1133 (10th Cir. 1993) (quoting *In re Mammoth Mart, Inc.*, 536 F.2d at 954); *In re CIS Corp.*, 142 B.R. 640, 643 (S.D.N.Y. 1992)). Neither scenario applies here.

Rather, Upstate's claim arises out of a commitment made to Folts and FAH, before these entities became debtors-in-possession. Moreover, the Chapter 11 Deposit was furnished by Upstate to Folts and FAH in consideration for Upstate's proposed purchase of the Facilities and Folts and FAH's selection of Upstate as the stalking horse bidder. The mere fact that Debtors utilized the Chapter 11 Deposit in large part to pay post-petition attorneys' fees, as agreed to pre-petition by

Upstate, Folts, and FAH, does not change the Court's analysis and expose Debtors' estates to administrative liability. Accordingly, the Court finds that Upstate has not satisfied the first prong of the § 503(b)(1)(A) test. It therefore need not address the second prong of whether Upstate's provision of the Chapter 11 Deposit and Debtors' use of the funds constitutes a direct benefit to Debtors' estates.

In the alternative, under § 503(b)(3)(D), Upstate argues that it made a substantial contribution to these bankruptcy cases by providing the Chapter 11 Deposit to Folts and FAH to facilitate Debtors' chapter 11 filings. Specifically, Upstate contends that Debtors would not have been able to file for chapter 11 relief and, therefore, HUD likely would have either foreclosed its mortgages and security interests in Debtors' assets or sold the same to another investor who could have then initiated foreclosure proceedings. Instead, Debtors were able to file bankruptcy and sell the Facilities through the § 363 sale process that resulted in proceeds of $16,600,000.00, a sum which greatly exceeded Upstate's initial bid of $9,750,000.00. (Upstate Br. at 3.)

As several sister courts have noted, Congress did not define the term "substantial contribution" in the Bankruptcy Code. *See, e.g., Speights & Runyan v. Celotex Corp. (In re Celotex Corp.),* 227 F.3d 1336, 1338 (11th Cir. 2000). It included that requirement, however, as a means of "reconcil[ing] two conflicting objectives of encouraging participation in the reorganization process and preserving the value of the estate for creditors." *In re Essential Therapeutics, Inc.,* 308 B.R. 170, 174 (Bankr. D. Del. 2004) (citing *Lebron v. Mechem Fin., Inc.*, 27 F.3d 937, 944 (3d Cir. 1994)). With those objectives in mind, "[t]he substantial contribution provisions are narrowly construed," *Short Pump Entm't, L.L.C. v. Randall's Island Family Golf Ctrs., Inc. (In re Randall's Island Family Golf Ctrs., Inc.),* 300 B.R. 590, 597 (Bankr. S.D.N.Y. 2003) (citing *In re United States Lines, Inc.*, 103 B.R. 427, 429 (Bankr. S.D.N.Y. 1989); *In re Baldwin-United Corp.*, 79 B.R.

321, 336 (Bankr. S.D. Ohio 1987), "and limited to 'those rare occasions when the creditor's involvement truly fosters and enhances the administration of the estate,'" *id.* (quoting *In re Best Prods. Co.*, 173 B.R. 862, 866 (Bankr. S.D.N.Y. 1994). "Compensation is limited to . . . extraordinary actions" resulting in an actual and demonstrable benefit to the debtor's estate and creditors. *Id.* (citing *In re Best Prods. Co.*, 173 B.R. at 866; *In re Alert Holdings, Inc.*, 157 B.R. 753, 757 (Bankr. S.D.N.Y. 1993); *In re Jensen-Farley Pictures, Inc.*, 47 B.R. 557, 569 (Bankr. D. Utah 1985)).

Upstate's § 503(b)(3)(D) argument is succinctly summarized as follows: "but for Upstate's payment of the Chapter 11 Deposit, the bankruptcy petition[s] would not have been filed, and but for Upstate's involvement as the stalking horse, it is doubtful whether the Debtors would have recovered $16.6 million for their estates." (Upstate Br. at 4.) While this may be accurate, it is overly simplistic in light of the extraordinary relief requested and the applicable standard as set forth in a well-developed body of case law.

Generally, "expenses incurred by a creditor with respect to merely participating as a bidder in the purchase of a debtor's assets in a chapter 11 case are not 'incurred by a creditor in making a substantial contribution' to a chapter 11 case, even if the sale proceeds increased as a result of bids made by the creditor." *In re Kidron, Inc.*, 278 B.R. 626, 630–31 (Bankr. M.D. Fla. 2002). "However, to the extent expenses are incurred–which, although incurred in conjunction with a creditor's participation in the purchase of a debtor's assets–also directly, materially, and demonstrably contribute to the process of achieving a successful sale for the benefit of creditors generally, then such expenses should be allowed as administrative expenses . . . ." *Id.* at 631.

Viewed in this context, a court's inquiry must focus on the precise nature of the services rendered. Typical expenses incurred by any prospective purchaser of assets for "performing due

diligence, participating as a buyer in connection with a sale procedures motion and a motion to approve, obtaining financing, and participating as a bidder in the auction, will not ordinarily be entitled to administrative priority under section 503(b)(3)(D) because of the incidental benefits to the estate." *Id.* at 633. "However, where special or unusual circumstances are present and the unsuccessful bidder directly contributes to the sale process as necessitated by circumstances resulting in a demonstrable benefit to the estate, then such expenses should be allowed as administrative expenses under section 503(b)(3)(D)." *Id.*

Upstate correctly acknowledges that the focus of the court's inquiry under § 503(b)(3)(D) must be on the services provided to the debtor's bankruptcy estate. Upstate cites *In re AMR Corp.*, Chapter 11 Case No. 11-15463, 2014 Bankr. LEXIS 3298 (Bankr. S.D.N.Y. Aug. 5, 2014), for the factors to be considered in determining whether a substantial contribution has been made in this instance, including:

> (i) whether the services benefitted a creditor, the estate itself, or all interested parties;
> (ii) whether the services resulted in an actual significant and demonstrable benefit to the estate; and
> (iii) whether the services were duplicated by the efforts of others involved in the case.

Id. at *5 (citing *Trade Creditor Grp. v. L.J. Hooker Corp., Inc. (In re Hooker Invs., Inc.)*, 188 B.R. 117, 120 (S.D.N.Y. 1997), *aff'd*, 109 F.3d 349 (2d Cir. 1996); *In re Best Prods. Co.*, 173 B.R. at 862).

In *In re Kidron, Inc.*, the successful applicant's extensive post-petition actions as a potential purchaser of the debtor's assets substantially benefitted all interested parties because said actions forced the debtor to cooperate with and provide financial information to interested parties other than the stalking horse in order to ensure a fair sale process. By contrast, Upstate's involvement in Debtors' cases was limited to pre-petition financing and typical stalking horse

activities. Here, Upstate did not provide services to Debtors prior to or following the petition date, and Upstate did not make "'constructive contributions in key reorganizational aspects'" of these bankruptcy cases. *In re Kidron, Inc.*, 278 B.R. at 633 (quoting *In re U.S. Lines, Inc.*, 103 B.R. 427, 430 (Bankr. S.D.N.Y. 1989)). What Upstate did do was loan $250,000.00 to the pre-petition entities, Folts and FAH. This loan simply does not fall within the ambit of § 503(b) or, more specifically, § 503(b)(3)(D).

Request for Grant of an Informal Proof of Claim

Having denied Upstate's request for an administrative expense claim, the Court must now address Upstate's alternate, final argument that the Court to treat the Application as an informal proof of claim and Upstate be awarded a general unsecured claim for a portion of the Chapter 11 Deposit in the amount of $175,000.00.

Under Federal Rule of Bankruptcy Procedure 3003(c)(2):

> Any creditor or equity security holder whose claim or interest is not scheduled or scheduled as disputed, contingent, or unliquidated shall file a proof of claim or interest within the time prescribed by subdivision (c)(3) of this rule; any creditor who fails to do so shall not be treated as a creditor with respect to such claim for the purposes of voting and distribution.

Fed. R. Bankr. P. 3003(c)(2). As to the form and technical requirements of a proof of claim, "[c]ourts have long recognized the concept of informal proofs of claim where a creditor evidences an intent to state a claim against an estate, but where the filings fail to conform to the technical requirements of a proof of claim." *In re Dana Corp.*, Chapter 11 Case No. 06-10354 (BRL), 2008 Bankr. LEXIS 2241, at *6 (Bankr. S.D.N.Y. July 23, 2008) (citing *In re Waterman & Assocs.*, 227 F.3d 604, 608 (6th Cir. 2001); *In re Operation Open City, Inc.*, 148 B.R. 184, 189 n.5 (Bankr. S.D.N.Y. 1992)). Thus, under certain circumstances, bankruptcy courts may elect to use equity to

treat pleadings filed in a bankruptcy case as an informal proof of claim. *In re Republic Airways Holdings, Inc.*, 573 B.R. 84, 90 (Bankr. S.D.N.Y. 2017).

In order to qualify as an informal proof of claim, a filed document must: (1) have been timely filed with the bankruptcy court and have become part of the judicial record; (2) state the existence and nature of the debt; (3) state the amount of the claim against the estate; and (4) evidence the creditor's intent to hold the debtor liable for the debt. *In re Dana Corp.*, 2008 Bankr. LEXIS 2241, at *7–8 (citing *In re Enron Corp.*, 370 B.R. 90, 99 (Bankr. S.D.N.Y. 2007) (citing *Houbigant, Inc. v. ACB Mercantile, Inc. (In re Houbigant, Inc.),* 190 B.R. 185, 187 (Bankr. S.D.N.Y. 1995)).

Again, Upstate's position is subject to a fatal flaw, which Upstate seemingly acknowledges. Upstate recites the standard and, notably, quotes the requirement for a timely filing by a creditor of a writing that may be construed as a proof of claim. Rather than directly address the fact that the Application was filed after the bar date expired, Upstate requests relief "[d]espite the fact that the claims bar date in these cases expired on August 15, 2017." (Upstate Br. at 8.) Upstate's Application was not filed for another one hundred and five calendar days, which is a problem that the Court cannot simply overlook.

Upstate could have sought this Court's permission to file a late proof of claim under Federal Rule of Bankruptcy Procedure 9006(b)(1) and the "excusable neglect" standard set forth in *Pioneer Investment Services v. Brunswick Associates Limited Partnership*, 506 U.S. 380 (1993). However, presumably given its advance notice of these bankruptcy cases and its participation as a stalking horse bidder, it did not do so.

Accordingly, there is no basis for the Court to permit Upstate to receive a distribution from Debtors' estates, much less an administrative expense claim that is afforded priority treatment under the Bankruptcy Code.

V. *Conclusion*

To grant the Application on the § 503(b) grounds asserted by Upstate would both contradict the Sale Order and set a precedent which the Court believes is contrary to the proper reading of § 503(b). Further, to grant the Application on the basis of the alternate relief requested would be an improper use of this Court's discretion in light of the established facts in these bankruptcy cases. Accordingly, it is hereby

ORDERED, that the Application is denied with respect to Upstate's request for relief under § 503(b); and it is further

ORDERED, that the Application is denied with respect to Upstate's request for allowance of an informal general unsecured proof of claim.

It is SO ORDERED.

Dated: February 14, 2018
Utica, New York

/s/DIANE DAVIS
Hon. Diane Davis
United States Bankruptcy Judge