No. 19-____

IN THE

Supreme Court of the United States

NEXTERA ENERGY, INC.,

Petitioner,

v.

ELLIOTT ASSOCIATES, L.P.,
ELLIOTT INTERNATIONAL, L.P.,
ENERGY FUTURE HOLDINGS CORP., AND
LIVERPOOL LIMITED PARTNERSHIP,

Respondents.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a debtor's decision to agree to a negotiated breakup fee as part of a sale transaction should be reviewed by the bankruptcy court under the deferential "business judgment rule" of 11 U.S.C. § 363, as the Fifth Circuit has held, or under the heightened standard of 11 U.S.C. § 503, which requires the bankruptcy court to decide on the debtor's behalf whether the fee is necessary, as the Third Circuit held below.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is NextEra Energy, Inc., appellant below. NextEra Energy, Inc. has no parent company and no publicly held company owns 10% or more of its stock.

Respondents are Elliott Associates, L.P., Elliott International, L.P., Energy Future Holdings Corp., and Liverpool Limited Partnership, appellees below.

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NextEra Energy, Inc. ("NextEra") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The decision of the Third Circuit is reported at 904 F.3d 298 and reproduced at page 1a of the Appendix to this petition ("App."). The order denying NextEra's petition for rehearing en banc is unreported and reproduced at App. 103a. The opinion of the United States Bankruptcy Court for the District of Delaware is unreported and reproduced at App. 48a.

JURISDICTION

The judgment of the Third Circuit was entered on September 13, 2018. App. 1a. The Third Circuit denied NextEra's petition for rehearing en banc on October 24, 2018. App. 103a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The pertinent text of the relevant statutory provisions, 11 U.S.C. § 363 and 11 U.S.C. § 503, is set forth in the Appendix at App. 105a and 113a.

INTRODUCTION

This case presents an opportunity for this Court to resolve "a clear circuit split" on a recurring and important question of bankruptcy law. Kevin M. Baum, *It's Not About Breaking Up: A Contract-Consideration Based 'Dowry' As An Alternative To Breakup Fees In Bankruptcy*, 2012 Ann. Survey of Bankr. Law 11 (2012). That split, long acknowledged by courts and leading bankruptcy commentators, concerns the appropriate standard of review to apply to a debtor's acceptance of a breakup-fee provision as part of a sale transaction.

Breakup fees (also called termination fees) are routinely offered to potential bidders in asset sales "as an inducement to make a bid or to hold a bid open." 1 *Collier on Bankruptcy* ¶ 15.04 (16th ed. 2018). They are a "common feature of bankruptcy cases as more and more [debtors] rely on * * * sales as an alternative to traditional reorganizations." *Id.* The question of court approval is often enormously consequential. Here, for instance, NextEra's $18.7

billion offer to purchase a debtor's interest in another company was expressly conditioned on the bankruptcy court's approval of a $275 million breakup fee (the "Termination Fee") payable if the seller backed out and pursued another opportunity.

The Fifth Circuit, recognizing that breakup fees can unlock value by inducing bids that would otherwise never be made, has long deferred to a debtor's business judgment that a fee is appropriate. That court applies the standards of 11 U.S.C. § 363 ("Section 363"), which specifically governs a debtor's sales of assets, and will uphold a breakup fee if supported by "an articulated business justification, good business judgment, or sound business reasons." *In re ASARCO, L.L.C.*, 650 F.3d 593, 601 (5th Cir. 2011) (quoting *In re Moore*, 608 F.3d 253, 263 (5th Cir. 2010)). Many other courts, including the United States District Court for the Southern District of New York, employ the same standard. *See*, *e.g.*, *In re Genco Shipping & Trading Ltd.*, 509 B.R. 455 (Bankr. S.D.N.Y. 2014). The leading bankruptcy treatise, recognizing the circuit split presented here, has endorsed the Fifth Circuit's approach as the "better and more widely held view." 3 *Collier*, *supra*, ¶ 363.02.

The Third Circuit disagrees. In the decision below, applying its own precedents, that court squarely "rejected application of a business judgment rule." App. 28a. Instead, it held that termination fees are subject to 11 U.S.C. § 503 ("Section 503"), which governs administrative fees charged to the debtor's estate. *Id.* Under that provision, approval is prohibited unless, in the bankruptcy court's own *de novo* view, the fee is an "'actual, necessary cost[] [or] expense[] of preserving the estate.'" *Id.* (quoting 11

U.S.C. § 503(b)(1)(A)). Under that rule, it is for the bankruptcy court to decide in the first instance, based on "what is ultimately a judgment call" made without deference to the debtor, whether "the proposed fee's potential benefits to the estate outweigh any potential harms." App. 30a (quoting 11 U.S.C. § 503(b)(1)(A)). Applying Section 503 in this case, the Third Circuit upheld the bankruptcy court's retroactive disapproval of the Termination Fee, even while acknowledging the reasonableness of the debtor's conclusion that it was justified. It reached that holding even though the bankruptcy court had initially approved the fee, only to reconsider the "potential benefits" and "potential harms" to the estate a year later, after the conditions triggering payment had occurred.

Both the Third and Fifth Circuits have acknowledged that their standards squarely conflict.[1] That division is exceedingly important. Breakup fees are often the only way to attract value-maximizing bids for a debtor's assets. The skittishness of some lower courts to approve them (or, worse still, the willingness to employ Section 503 to retroactively rescind approval) inevitably chills potential bidders, thus costing estates millions or billions of dollars. Accordingly, the conflict means that a debtor's ability to obtain maximum value in an asset sale depends on the venue for its bankruptcy. And because the question presented

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[1] *Compare* App. 28a ("[W]e [have] rejected application of a business judgment rule, under which a requested termination fee would be approved if the debtor had a good faith belief that the fee would benefit the estate.") *with ASARCO*, 650 F.3d at 601-02 (endorsing business judgment rule and rejecting application of "narrower standard in section 503").

divides not only two circuits, but also the two jurisdictions (the District of Delaware and the Southern District of New York) that handle the overwhelming majority of large-business bankruptcies, it will inevitably lead sophisticated entities to forum shop in search of the most favorable version of federal law.

This case provides an ideal vehicle for resolving the conflict. The lower courts recognized that the Termination Fee presented a calculated but justified risk for the debtors: even though there was some possibility of payment if the deal fell apart, the fee was necessary to induce NextEra's market-clearing bid and therefore had "the potential of providing a large benefit to the estates." App. 32a. It was only ***after*** the downside risk materialized that the bankruptcy court retroactively rescinded the approval it had given a year earlier, thus permitting the debtors to avoid payment. In affirming that bait-and-switch, the Third Circuit conceded there was "no question that the Termination Fee conferred some benefit" on the estate from an *ex ante* perspective, App. 31a, but nevertheless deferred to the bankruptcy court's hindsight-based conclusion that the fee was undesirable in the circumstances that had come to pass. By crediting that judicial conclusion over the debtor's *ex ante* business judgment that the fee's potential upside outweighed its potential downside, App. 27a-35a, the Third Circuit engaged in precisely the sort of hindsight-based, judicial second-guessing that the Fifth Circuit's business judgment rule exists to avoid.

The disagreement over the proper standard of review for termination fees in bankruptcy is clear, longstanding, and widely acknowledged. This case presents an excellent vehicle for resolving it. The Court should grant certiorari.

STATEMENT OF THE CASE

A. Proceedings In The Bankruptcy Court.

Prior to their bankruptcy, Energy Future Holdings Corp., Energy Future Intermediate Holding Company LLC, and certain other affiliated companies (collectively, the "Debtors") owned an 80 percent stake in Oncor, Texas's largest electric power transmission and distribution company. After going bankrupt and marketing that interest for more than two years, the Debtors struck a deal with NextEra that valued Oncor at approximately $18.7 billion. JA17.[2] The transaction was to be implemented through a merger agreement (the "Merger Agreement") and a Chapter 11 reorganization plan.

A critical element of the deal was the Debtors' agreement to pay NextEra the $275 million Termination Fee if the Debtors terminated the Merger Agreement and consummated an alternative transaction involving Oncor. JA182. The Debtors sought bankruptcy court approval of the fee, explaining that it was necessary to induce the "massive value" offered by NextEra's bid. JA436-38. After carefully scrutinizing the Merger Agreement and the Termination Fee, the court approved them, finding that "the evidence overwhelmingly indicates that a breakup fee was necessary to induce NextEra to make a bid, and to move forward with a merger agreement." JA578. The court also acknowledged that the conditions on which the fee would be triggered were heavily negotiated, and that the fee—

[2] "JA" refers to the Joint Appendix filed in the Third Circuit.

which amounted to 1.47% of the transaction's value—was "on the low end of utility-type transactions" and "an appropriate number for a case of this size." *Id.*

The parties then worked for months to obtain approval of the plan, which the bankruptcy court confirmed. The last hurdle was regulatory approval from the Public Utility Commission of Texas (the "PUCT"). Despite NextEra's best efforts, *see* JA1076-79, the PUCT denied approval, JA780. Continuing its quest to close the deal (and as the Merger Agreement required), NextEra sought rehearing of the PUCT denial while simultaneously pursuing potential settlements to allow the deal to close. JA1080. Because they wanted the massive value NextEra was offering, the Debtors supported those efforts. JA1080-81.

But when a lucrative alternative proposal for Oncor emerged, the Debtors abandoned NextEra, setting the stage for payment of the Termination Fee under its terms. JA1082-86. At that time, respondents Elliott Associates, L.P., Elliott International, L.P., and Liverpool Limited Partnership (collectively "Elliott"), which are creditors of the estates, moved the bankruptcy court to reconsider and retroactively revoke the Termination Fee. Elliott, which would have benefited greatly if the NextEra deal had succeeded, never objected when the fee was initially considered. Instead, Elliott waited to raise its objections until more than ten months after the Termination Fee was approved, after NextEra spent huge sums attempting to close in reliance on the fee's protection, and after the Debtors had walked away in favor of another transaction.

The bankruptcy court decided to reconsider its earlier approval, finding that when it had initially ruled, it had not appreciated that there was no date by which the Merger Agreement would automatically terminate if PUCT approval was not obtained. Without such a date, the court said, the Debtors were economically motivated to terminate the deal, thereby triggering the Termination Fee, while NextEra sought to overturn the PUCT denial before the agency and the courts. Because it had not understood that incentive at the time of initial approval, the court asserted, it had underestimated the likelihood the Debtors would have to pay the fee. App. 76a-79a.

The record of the initial approval, though, contained no evidence of the court's supposed misunderstanding. An automatic termination date would have been a highly unusual provision, and nothing in the record had ever suggested that the Merger Agreement had one. The court asked no questions about an automatic termination date during the approval process and never gave any indication that it desired additional information on that point. Nor did the record provide any other reason to believe that the concept had been relevant to (much less dispositive of) anyone's analysis of the Termination Fee's desirability. To the contrary, even after the fee became payable, the Debtors emphasized that they had completely understood the point the court said it had missed and had deemed the fee desirable anyway. JA1203:1-13 ("Your Honor, we think * * * that this was a calculated risk worth taking * * * . We think everyone went into this with their eyes wide open.").

The court's reliance on hindsight continued when it turned to the merits. Applying the Third Circuit's test under Section 503, the court set forth a black-letter principle that "[p]ayment of a termination or break-up fee when a court (or regulatory body) declines to approve the related transaction" is never permissible. App. 81a. That rule was desirable, the court said, because a fee cannot "provide an actual benefit to the debtor's estate" sufficient to satisfy Section 503 if, in hindsight, the bid that the fee attracted has failed to garner approval. *Id.*[3] Thus, even though the court agreed that the fee, as negotiated, was necessary to induce NextEra's massive, market-clearing bid, the court held that it provided no benefit because, in the wake of PUCT's disapproval and the Debtors' decision to pursue an alternative transaction, it had ultimately become payable according to its terms.

On the basis of that judgment, the bankruptcy court took a scalpel to its original order, providing that the Termination Fee was "approved in part," but rewriting the fee provision so that payment would be "disallowed" in the specific circumstances that had transpired. App. 44a-45a ("The Termination Fee is disallowed in the event that the PUCT declines to approve the transaction contemplated in the Merger Agreement and, as a result, the Merger Agreement is terminated * * * . The Termination Fee is otherwise approved.").

[3] The bankruptcy court disclaimed the use of hindsight, but contended that "even if the Court is acting on hindsight, it may do so." App. 82a n.87.

B. Proceedings In The Court Of Appeals.

NextEra appealed directly to the Third Circuit under 28 U.S.C. § 158(d)(2), arguing, *inter alia*, that the breakup fee should have been approved because it "was necessary to induce NextEra to bid and to cause NextEra to adhere to [its] bid—which was the highest and best bid received." NextEra Reply Br. at 19, *In re Energy Future Holdings Corp.* No. 18-1109 (3d Cir. filed Feb. 12, 2018).[4] A divided panel affirmed. The majority, noting that the court had previously "rejected application of a business judgment rule," ruled that inducing NextEra's market-clearing bid was not enough to justify the Termination Fee. App. 28a. Instead, applying Section 503, the court rejected the Debtors' business judgment in favor of the bankruptcy court's hindsight-based "judgment call" that the fee's "potential harms" outweighed its "potential benefits." App. 27a-35a. The majority reached that conclusion even while acknowledging that the fee's "potential benefits" at the time it was agreed to were enormous, since there was "no question that the Termination Fee * * * induc[ed] NextEra to make the highest bid that Debtors received." App. 31a.[5]

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[4] *See also* NextEra Opening Br. at 52, *In re Energy Future Holdings Corp.*, No. 18-1109 (filed Feb. 12, 2018) (arguing that to approve the Fee "only two questions needed to be answered in the affirmative. First, was the Termination Fee material in inducing NextEra's bid? Second, was NextEra's bid more likely to unlock Oncor's 'true value' than the available alternatives?") (footnote omitted).

[5] NextEra also argued that Elliott's motion to reconsider was barred by laches, since Elliott had sat silently while NextEra pursued a transaction that would have greatly benefited all creditors, objecting only once the deal was terminated and payment came due. The Third Circuit rejected that argument,

That decision prompted a strong dissent from Judge Rendell, a former Chair of the Judicial Conference's Bankruptcy Committee. She called the panel's opinion "a troubling—if not dangerous—precedent." App. 40a. Invoking Fifth Circuit case law, she observed that because "[t]he Fee had been properly approved as part of the" transaction, the bankruptcy court's after-the-fact reconsideration of whether it was a "necessary" administrative expense was inappropriate. *Id.* Instead, after the Debtors terminated the NextEra deal, "[a]ll that remained" was to allocate the fee among the different estates "and pay the previously approved Fee." *Id.* She therefore would have held, consistent with the Fifth Circuit's decision in *ASARCO*, that where a breakup fee is necessary to induce a market-clearing bid, a bankruptcy court cannot later invalidate it simply because, in hindsight, payment appears undesirable. App. 37a-38a (noting that, from a business perspective at the time of the deal, the Termination Fee's "many benefits to the estates were apparent").

NextEra sought rehearing, arguing, *inter alia*, that the panel's ruling "exacerbate[d] the split with other jurisdictions that approve bidder protections under a business judgment standard." Pet. for Rehearing at 16 n.3, *In re Energy Future Holdings Corp.*, No. 18-1109 (filed Sept. 27, 2018). Rehearing was denied. App. 103a.

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resting on an outside-the-record hypothesis that Elliott, the largest activist hedge fund in the world, *see* Emily Stewart, *Elliott Management: What Is It, and Who is Behind It?*, ABC News Australia (June 20, 2017) (https://tinyurl.com/y9hvh6po), represented here by sophisticated counsel, had been flummoxed by the Merger Agreement's "complicated" terms. App. 21a-22a.

REASONS FOR GRANTING THE PETITION

I. THE THIRD CIRCUIT'S DECISION CONFLICTS WITH THE FIFTH CIRCUIT AND DEEPENS THE WIDESPREAD DIVISION AMONG THE NATION'S MOST IMPORTANT BANKRUPTCY COURTS.

As has long been observed, there is a "clear circuit split over the appropriate standard for reviewing breakup fees." Baum, *supra*; *see also* 1 *Collier*, *supra*, ¶ 15.04.[6] That intractable conflict, which involves two circuits, the Nation's two most important bankruptcy courts, and many other courts around the country, warrants this Court's review.

A. The Fifth Circuit Applies Section 363's Business Judgment Rule To Breakup-Fee Transactions.

In *ASARCO*, the Fifth Circuit rejected application of Section 503's heightened standard, instead adopting the business judgment rule of Section 363 to review breakup fees. In that case, the debtor's

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[6] *See also, e.g.*, *In re O'Brien Envtl. Energy, Inc.*, 181 F.3d 527, 533 (3d Cir. 1999) ("[C]ourts that have addressed the standard for break-up fees and expenses in bankruptcy proceedings have adopted very different approaches."); *In re JW Res., Inc.*, 536 B.R. 193, 195 (Bankr. E.D. Ky. 2015) (noting that "there are many standards used to evaluate break-up fees"); *In re Tama Beef Packing, Inc.*, 290 B.R. 90, 96-97 (B.A.P. 8th Cir. 2003) (describing "all of the tests established by various courts to determine whether break-up fees should be permitted"); Zachary R. Frimet, Note, *Reward The Stalking Horse Or Preserve the Estate: Determining the Appropriate Standard of Review For Awarding Break-Up Fees In § 363 Sales*, 20 Fordham J. of Corp. & Fin. L. 461, 465 (2015) (noting that "[t]he lack of a uniform break-up fee standard is detrimental" to bankruptcy law and "leaves debtors and stalking horse bidders in a precarious position").

"most substantial asset" was a judgment against its parent companies. 650 F.3d at 597. The debtor's proposed plan involved a sale of that asset through a bid-solicitation process and an auction, which the debtor believed "would maximize the value of the * * * [j]udgment." *Id.* The parent companies that owed the judgment proposed an alternative plan, under which they would assume control of the debtor and the judgment would be forgiven. *Id.* at 597-98.

The solicitation process proceeded while the bankruptcy court considered those competing plans. At the process's outset, the debtor requested court authorization to "reimburse certain expenses incurred by bidders selected to proceed to the second phase." *ASARCO*, 650 F.3d at 598. The debtor told the court that, during the second phase, "the bidders would have the opportunity to conduct additional due diligence" entailing "highly sophisticated legal analysis—and thus substantial legal costs." *Id.* Thus, the debtors, "believ[ing] it necessary to provide bidders with an incentive to undertake that investment," requested approval to reimburse those costs. *Id.* The parent companies, hoping that their own, no-sale plan would be approved (thus rendering the due diligence valueless), opposed the request. *See id.*

The bankruptcy court sided with the debtors, but when the parent companies appealed to the district court, that ruling was stayed. *ASARCO*, 650 F.3d at 598. In the meantime, the bankruptcy court and district court adopted the parents' plan, and the debtor, now in the parents' control, forgave the judgment. *Id.* The question then became what to do about reimbursement of due-diligence costs that, in hindsight, were unnecessary. After the district court affirmed the bankruptcy court's order approving reimbursement, the debtor appealed, arguing, *inter alia*, that the reimbursement request (which it had previously supported) should have been evaluated under Section 503 and rejected. *Id.* at 598, 600.

The Fifth Circuit affirmed. In doing so, it explained why Section 363, not Section 503, should apply to the review of a debtor's agreement to bidder protections. *ASARCO*, 650 F.3d at 603. Under Section 363, a debtor is entitled to use, sell, or lease estate property in the ordinary course of business without court approval, 11 U.S.C. § 363(c)(1), and may do so outside the ordinary course of business after notice and a hearing, *id.* § 363(b)(1). In either case, however, the Bankruptcy Code places the debtor, not the court, in charge of deciding how best to dispose of estate property. *ASARCO*, 650 F.3d at 601. Thus, even where reviewable, the court explained, the debtor's decisions are subject only to a "flexible" "business judgment standard" that "encourages" the debtor's "discretion." *Id.* at 601.

By contrast, Section 503 sets forth the standard for permitting a ***third party***'s claim to reimbursement for administrative expenditures made purportedly for the debtor's benefit. *ASARCO*, 650 F.3d at 601-02. In that context, the interests of the third party (which, through the expenditures, has become a creditor) are not necessarily aligned with those of the estate and the creditors generally. As a result, the court applies a "narrower," less permissive standard than under Section 363. *Id.* at 601. Under that standard, the burden is on the fee creditor to demonstrate that the expenses it incurred were in fact necessary to provide a benefit to the estate. *Id.* at 601-02 (after-the-fact reimbursement appropriate only where expenses are the "result of actions * * * that benefitted the estate") (quoting *In re Jack/Wade Drilling, Inc.*, 258 F.3d 385, 387 (5th Cir. 2001)).

After explaining that distinction, the Fifth Circuit concluded that, with respect to the reimbursement motion, "the business judgment standard" of Section 363 was the "better fit." *ASARCO*, 650 F.3d at 602-03. That was because the motion had sought "authorization to make discretionary use of the estate's funds," rather than approval to reimburse third-party expenses already incurred. *Id.* In so holding, the Fifth Circuit sought to distinguish two Third Circuit cases, *O'Brien*, *supra*, and *In re Reliant Energy Channelview LP*, 594 F.3d 200 (3d Cir. 2010), that had instead applied Section 503, observing that in those cases, an "unsuccessful bidder[] * * * sought payment for expenses incurred without the court's pre-approval for reimbursement." *ASARCO*, 650 F.3d at 602; *see infra* at 19-21 (discussing distinctions).

Proceeding to apply the Section 363 standard, the Fifth Circuit approved the debtor's initial business judgment, reasoning that "there was no evidence in the record of self-dealing or manipulation among the parties who negotiated the reimbursement procedures; the [reimbursement] facilitated, not hindered, the auction process; and the approved maximum available size of the reimbursement fee was reasonable in comparison to the size of the [asset]." *ASARCO*, 650 F.3d at 603. In those circumstances, the court held, the decision to offer bidder protections had been the debtor's to make. *Id.*

B. The Third Circuit Has Squarely Rejected The Fifth Circuit's Rule.

Courts and commentators quickly recognized that *ASARCO* opened a circuit split. *See*, *e.g.*, Baum, *supra* ("The *ASARCO* decision create[s] a clear circuit split over the appropriate standard for reviewing breakup fees."); *JW Res.*, 536 B.R. at 195. The decision below, which holds that Section 503 "applies to ***all*** requests for termination[] fees" regardless of pre-approval, App. 28a n.4 (emphasis added), deepens that split, rejects the Fifth Circuit's effort at achieving harmony, and eliminates any possibility of consistency among the circuits.

1. The Third Circuit's rejection of the business judgment rule dates to *O'Brien*. There, the debtor and a potential purchaser, Calpine, sought advance approval for a breakup fee to be paid to Calpine in the event its stalking-horse bid did not prevail. 181 F.3d at 529.[7] The bankruptcy court refused to approve the fee in advance, but agreed to permit Calpine to seek payment at the end of the process. *O'Brien*, 181 F.3d at 529. Despite having told the bankruptcy court it would not proceed without advance protection, Calpine nevertheless placed a bid, which was ultimately unsuccessful. *Id.* at 529-30. Thereafter, it sought payment of the fee and reimbursement of its expenses, which both the

[7] A stalking-horse bid is an initial bid on the assets of a bankrupt company, which sets the floor price that other bidders must exceed. *See, e.g.*, *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 642 (2012). Stalking-horse bidders often seek breakup fees to compensate them for their "time and effort, and for the lost opportunity costs incurred by * * * forgoing other acquisitions" while holding their bid open. Baum, *supra*.

bankruptcy court and the district court denied. *Id.* at 530.

In the Third Circuit, Calpine argued that the bankruptcy court had erred by refusing to permit payment of the fee after the fact.[8] As to that question, the court noted that, despite a well-developed body of bankruptcy- and district-court case law, it was the "first court of appeals * * * to consider the standards that should govern an award of break-up fees and related expenses in the bankruptcy context." *O'Brien*, 181 F.3d at 528-29. After explaining the various rules lower courts had applied, the court asserted that the "objective[] of federal bankruptcy law" is to "usurp[] from the debtor his power to control the distribution of his assets," *id.* at 532 (quotation omitted), and concluded that "the business judgment rule should not be applied," *id.* at 535. Instead, it ruled, the determination "must be made in reference to general administrative expense jurisprudence" under Section 503. *Id.* And, applying that section, the court concluded that the bankruptcy court's application of an "at least nine factor[]" balancing test, which had turned largely on a hindsight analysis of the effects of Calpine's bid on the auction, was not an abuse of discretion. *Id.* at 536-38. It therefore affirmed the bankruptcy court's refusal to approve the fee. *Id.* at 538.

The Third Circuit later reinforced that holding in *Reliant*. There, the debtor and a stalking-horse

[8] Calpine also argued that the bankruptcy court had erred by denying pre-approval. But the Third Circuit, anticipating later developments that would make it very difficult to appeal rulings regarding breakup fees, held that prospective buyers lack appellate standing to challenge denials of pre-approval. *Id.* at 530-31; *see infra* at 27-29.

bidder, Kelson, entered into an agreement that included, but was not contingent on approval of, a termination fee. 594 F.3d at 202-03. The bankruptcy court rejected the termination fee, and the bidder appealed. *Id.* at 204-05. Applying *O'Brien*, the Third Circuit affirmed, reasoning that the bankruptcy court had not "abuse[d] its discretion" in determining that the fee "was not necessary to preserve the value of the estate." *Id.* at 210. That conclusion rested on a single point: Self-evidently, the fee was neither necessary to induce Kelson's bid nor necessary to prevent it from walking away, since Kelson had not conditioned its bid on approval of the fee. *Id.* at 207-08.[9]

2. In the decision below, the Third Circuit expanded *O'Brien* and *Reliant* by applying them to reject a termination fee that ***was*** indisputably both reasonable and necessary to induce the bid. All agree (and the bankruptcy court itself observed) that the breakup-fee provision was necessary to induce NextEra to make its $18.7 billion bid, which was by far the highest bid for Oncor. Nor was the breakup fee unreasonable: as the bankruptcy court also recognized, the $275 million fee was "an appropriate number" falling "on the low end of utility-type transactions." App. 100a. Moreover, both when the Termination Fee was initially approved and when Elliott lodged its belated challenge, the Debtors supported approval, precisely because the fee was a necessary precondition of NextEra's offer. Indeed, in

[9] Kelson also argued that, because neither the debtor nor any creditor had objected to the termination fee *ex ante*, *O'Brien* did not apply, and the court should apply the business judgment rule. *Id.* at 208-09. The court held that *O'Brien* foreclosed that argument. *Id.* at 209.

the face of Elliot's challenge, the Debtors made clear to the bankruptcy court that the fee had been "a calculated risk worth taking" to encourage NextEra's bid. "[E]veryone," the Debtors told the court, "went into this with their eyes wide open." JA1203:1-13.

Under *ASARCO*, the Fifth Circuit would defer to that untainted exercise of business judgment. But in the Third Circuit, a bankruptcy court must make its own "judgment call," divorced from the debtor's expertise, "about whether the proposed fee's potential benefits to the estate outweigh any potential harms." *Id.* at 30a (citing *O'Brien*, 181 F.3d at 535). Accordingly, the Third Circuit affirmed the bankruptcy court's decision even though it depended not on the desirability of the Termination Fee *ex ante*, but on an after-the-fact assessment of whether the fee—inherently a calculated risk—paid off for the estate in the end. *See* App. 36a-37a & n.2 (Rendell, J., dissenting) (attributing bankruptcy court's disapproval of the Termination Fee to a hindsight desire not to "deplet[e] the estates" once the fee became payable).[10]

That holding creates a stark conflict with the Fifth Circuit. In the Fifth Circuit, the Termination Fee would be approved as a valid exercise of the debtor's business judgment, but in the Third Circuit it was disapproved notwithstanding that judgment.

3. In deferring to the bankruptcy court on the facts of this case, the Third Circuit extinguished any

[10] Although purporting to withhold judgment on the propriety of employing after-the-fact reasoning to analyze a breakup fee, *see* App. 32a n.5, the court of appeals affirmed the bankruptcy court's exercise of discretion despite acknowledging that it was tainted by hindsight. App. 33a n.7.

possibility of harmony with *ASARCO*. The *ASARCO* court had advanced the timing of the request as a potential distinction with the Third Circuit, pointing out that in *O'Brien* and *Reliant*, the bankruptcy court had "refused to approve the break-up fee" in advance, so "[t]he unsuccessful bidders * * * sought payment for expenses incurred without the court's pre-approval." *ASARCO*, 650 F.3d at 602. But in this case, the Debtors sought—and obtained—pre-approval of the Fee. *See* App. 40a (Rendell, J., dissenting). Under *ASARCO*, that pre-approval would have put the request squarely within Section 363's business judgment rule. *Id.* Yet the opinion below rejects that result, holding that pre-approval is "immaterial," because Section 503 governs "***all*** requests for termination[] fees" in bankruptcy. App. 28a n.4 (emphasis added).

ASARCO also sought to explain prior Third Circuit cases as being rooted in a fact-specific concern about the anti-competitiveness of the specific fees at issue. *ASARCO*, 650 F.3d at 602. But in this case, the Third Circuit acknowledged that the Termination Fee was an indispensable condition attached to NextEra's market-clearing offer. *See*, *e.g.*, App. 31a. The fee therefore greatly aided the bidding process—and the court of appeals acknowledged as much. App. 32a ("[B]y inducing NextEra's bid, the Termination Fee might eventually maximize the value of the estates—assuming the deal closed.") (emphasis omitted).[11] By nevertheless applying Section 503, the Third Circuit left no doubt that the fact-specific

[11] As the bankruptcy court found, the Termination Fee also created value by obviating the need for a different provision—the "match right"—that the Debtors had contended "would have a chilling effect" on other bidders. JA437; JA579:13-15.

distinctions *ASARCO* hypothesized are irrelevant. In the Third Circuit, Section 503 applies to "all" breakup fees as a blanket rule. App. 28a & n.4.

Finally, in *ASARCO*, the Fifth Circuit suggested a possible distinction between formal breakup fees and the "due diligence reimbursement fees" that were at issue there. 650 F.3d at 602. But that is a distinction without a difference. Both forms of bidder protection offer something of value (either reimbursement for expenses or insurance against deal failure) to compensate bidders for the risks associated with partaking in an asset sale. That is why courts and commentators across the country, including Judge Rendell in the dissent below, have recognized that *ASARCO*'s rule applies equally to breakup fees. *See*, *e.g.*, App. 40a (Rendell, J., dissenting); *JW Res.,* 536 B.R. at 195 ("The Fifth Circuit recently rejected the Third Circuit's reliance on administrative expense treatment as the only appropriate standard and affirmed the bankruptcy court's approval of break-up fees in advance of an auction based on a 'compelling and sound business justification' pursuant to § 363(b)."); 1 *Collier*, *supra*, ¶ 15.04 (describing *ASARCO* as applying "test for the approval of breakup fees in bankruptcy"); Baum, *supra* (*ASARCO* pertains to "appropriate standard for reviewing breakup fees").

C. The Nation's Two Leading Bankruptcy Courts Stand On Opposite Sides Of The Circuit Split, And Confusion Reigns In Other Courts Across The Country.

Exacerbating the clear split of authority described above, other lower courts—including the two most important bankruptcy courts in the Nation—have long applied starkly divergent standards to the approval of breakup fees.

1. Most importantly, the District Court for the Southern District of New York has sided with Fifth Circuit—and against the Third Circuit—in concluding that breakup fees are subject only to Section 363's business judgment rule. Under the Southern District's rule, the only questions a court asks before approving a breakup fee are: (i) whether the fee was negotiated at arms'-length; (ii) whether the fee encourages bidding; and (iii) whether the amount of the fee is facially unreasonable. *In re Integrated Res., Inc.*, 147 B.R. 650, 657 (S.D.N.Y. 1992).[12] That rule is, in substance, the same one the Fifth Circuit applies. *See ASARCO*, 650 F.3d at 601-03; 1 *Collier*, *supra*, ¶ 15.04 (S.D.N.Y. applies "the same analysis" as *ASARCO* and "permit[s] the payment of breakup fees * * * under the business judgment rule").

The resulting disagreement between the Southern District of New York and the District of Delaware (in the Third Circuit) has profound consequences for the Nation's most significant bankruptcies. "When large firms file for bankruptcy, they tend to do so in" those two jurisdictions. Jared A. Ellias, *What Drives Bankruptcy Forum Shopping? Evidence From Market Data*, 47 J. Legal Stud. 119, 119 (2018). Indeed, the two courts serve as "de facto national bankruptcy courts," since, between them, they have "overseen more than 60 percent of all large bankruptcy cases in the past 25 years." *Id.* at 119-20. The "massive forum shopping" that statistic reflects is a "well-

[12] *See also Genco*, 509 B.R. at 454; *In re Metaldyne Corp.*, 409 B.R. 661, 670 (Bankr. S.D.N.Y. 2009).

entrenched feature of American bankruptcy law," and is likely explained, at least in part, by sophisticated entities' attraction to the stability and predictability attributed to those two courts. *Id.* at 120 (citing sources), 122.

The disagreement this case presents is therefore highly consequential. To begin with, it gives rise to disparate application of federal law on a critical issue in the Nation's most important bankruptcies. An entity that files for bankruptcy in New York knows that it can likely structure an asset sale according to its business needs, while an entity that files in Delaware now knows that its decision to offer a breakup fee is less likely to be approved in advance and, even if it is, will be subject to significant second-guessing in the event the fee becomes payable. Nor will the distinction be lost on bidders, who are naturally averse to having their bargained-for protections invalidated after the fact simply because they have turned out to be necessary. *See* Mark F. Hebbeln, *The Economic Case for Judicial Deference to Break-Up Fee Agreements in Bankruptcy*, 13 Bankr. Dev. J. 475, 507-08 (1997) (noting that "courts' practice of invalidating break-up fee agreements * * * serves to provide a disincentive to the initial bidder, a result that all would agree is not desirable"). The predictable result is that putative asset buyers in Delaware bankruptcies will decrease their bids—or decline to bid at all. *Id.* at 503 (bidders will "lower [their] bid[s] to compensate for the possibility that [a breakup fee] might be invalidated"). The uncertainty such "second-guessing" engenders is precisely what the Fifth Circuit's "business judgment rule is meant to avoid." *Id.* at 502. And because the Second Circuit is unlikely ever to pass on this issue, *see infra* at 27-29, only this Court's intervention can resolve the conflict.

2. Given the disagreement among the circuits and the Nation's most important bankruptcy courts, it is no surprise that confusion reigns among other federal courts as well. Some have sided with the Fifth Circuit and the Southern District of New York. *See*, *e.g.*, *JW Res.,* 536 B.R. at 194-95 (business judgment rule applies to request for pre-approval). Others have staked out a middle ground, pursuant to which the bankruptcy court does not defer to the debtor's business judgment but does not apply the high, "necess[ity]" standard endorsed in the decision below. *See, e.g.*, *In re Tiara Motorcoach Corp.*, 212 B.R. 133, 137 (Bankr. N.D. Ind. 1997) ("A sale [of assets] is not in the ordinary course of business, and the business judgment of the debtor should not be solely relied upon."); *In re Am. W. Airlines, Inc.*, 166 B.R. 908, 912 (Bankr. D. Ariz. 1994) ("[T]he standard is not whether a break-up fee is in within the business judgment of the debtor, but whether the transaction will 'further the diverse interests of the debtor, creditors, and equity holders, alike.'").[13] And some jurisdictions have sided with the Third Circuit and applied Section 503. *See*, *e.g.*, *In re President Casinos, Inc.*, 314 B.R. 786, 789 (Bankr. E.D. Mo. 2004); *In re S.N.A. Nut Co.*, 186 B.R. 98, 105 (Bankr. N.D. Ill. 1995) (noting disagreement among courts, but holding that "absent compelling circumstances which clearly indicate that payment of the fee would

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[13] *See also In re Sea Island Co.*, 2010 WL 4393269, at *3 (Bankr. S.D. Ga. Sept. 15, 2010). Before *ASARCO*, one bankruptcy court within the Fifth Circuit had adopted a similar rule. *See In re Redwine Res., Inc.*, 2010 WL 5209287 (Bankr. N.D. Tex. 2010).

be in the best interests of the estate, breakup fees should not be awarded in bankruptcy auction sales”).

Even courts that appear to agree with one another cannot quite bring their rules into accord. For example, in *Tama Beef*, 290 B.R. at 90, the Eighth Circuit’s Bankruptcy Appellate Panel acknowledged that various courts had adopted different tests, including “[t]he business judgment test,” the Third Circuit’s “administrative claim” test, and a “best interests of the estate test,” under which the court should itself determine “whether the break-up fee provided net value to the estate.” *Id.* at 96-97. The court, siding with the Third Circuit, applied Section 503. *Id.* at 97-98. But it adopted a nine-factor test—not the one the Third Circuit applied in this case—and, employing hindsight, found that test satisfied because the highest bid would not have been made without a breakup fee. *Id.* at 98-100. In so openly embracing hindsight, the *Tama Beef* court deviated from the analysis of the Third Circuit (with which it thought it was siding), which has refused to openly endorse the use of hindsight. *See* App. 32a n.5.

II. THIS CASE PRESENTS AN IDEAL VEHICLE FOR RESOLVING AN IMPORTANT QUESTION OF BANKRUPTCY LAW.

The question presented is profoundly consequential and, as the sheer volume of lower-court cases reveals, regularly recurring. It is also squarely implicated in this case, even though it often escapes appellate review in other cases. The time has come to resolve the lower courts’ longstanding conflict.

A. The Question Presented Is Recurring And Important, And It Often Eludes Appellate Review.

The availability of breakup fees is an issue of substantial importance to potential asset purchasers. "The problem facing the parties to a major sale of assets is that the development of a bid often requires a substantial investment of time and effort[,] * * * particularly * * * for the initial bidder." 1 *Collier*, *supra*, ¶ 15.04. Developing a bid on a complex asset can be spectacularly expensive, and "bidders understand that the [debtor], perhaps at the insistence of the bankruptcy court, may shop the bid to other potential bidders," thereby effectively "appropriat[ing] the time and money" the initial bidder "invested in developing the bid." *Id.*

By "serv[ing] as compensation for th[e] initial bidder's investment" or otherwise compensating a bidder for costs and risks associated with an offer, breakup fees serve as a form of insurance, enabling bidders to offer—and debtors to attract—value that would otherwise never be available. 1 *Collier*, *supra*, ¶ 1504; *see, e.g.*, App. 38a (Rendell, J., dissenting) ("Clearly, the fee was a necessary and integral aspect of the deal. Indeed, NextEra would have 'walked' without it."). The Third Circuit's rule, which disfavors breakup fees (both by imposing a strict test for their approval and by introducing the possibility of after-the-fact invalidation), thus imposes unwarranted costs on bidders, debtors, and creditors alike. The question presented therefore directly affects the ability of debtors and purchasers to structure multibillion-dollar transactions in an economically efficient manner and, as such, bears heavily on the ability of Chapter 11 to achieve its core purposes. *Cf. Fla. Dep't of Revenue* v. *Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 51 (2008) (observing that Chapter 11 seeks to further "a debtor's interest in reorganizing and restructuring its debts and the creditors' interest in maximizing the value of the bankruptcy estate").

Moreover, as the large number of cases opining on the validity of breakup fees in bankruptcy suggests, the question presented arises frequently in the lower courts. Breakup fees and other bidder protections are "a common feature of bankruptcy cases." 1 *Collier*, *supra*, ¶ 15.04. And, because breakup fees exist in part to incentivize bidders to undertake difficult valuations for transactions or hedge complex risks, *see*, *e.g.*, *ASARCO*, 650 F.3d at 602 (payments were structured to provide bidders incentive to undertake "costly but necessary due diligence"), the question is particularly apt to arise in important cases, such as this one, stemming from large-scale or complex restructurings.

But even though the issue recurs frequently in the lower courts, there are significant obstacles to appellate review. The lack of additional appellate decisions addressing the question has nothing to do with the regularity with which the issue arises. *Cf. O'Brien*, 181 F.3d at 528-29, 532-35 (noting that, as of 1999, the question had not reached a court of appeals even though it was the subject of a widespread disagreement in lower courts). Rather, it is largely attributable to the fact that appellate courts have generally refused to hear appeals regarding breakup fees. For instance, the Third Circuit has imposed a Catch-22 that effectively renders almost all bankruptcy-court refusals to approve a breakup fee non-appealable, since a bidder cannot appeal a denial on an interlocutory basis, *O'Brien*, 181 F.3d at 530-31, and a bidder that proceeds without approval will likely have its fee denied as unnecessary to induce the bid, *Reliant*, 594 F.3d at 206-08. Other circuits, including the Second Circuit, have held that orders regarding breakup fees are interlocutory,[14] or, alternatively, that appeals from them are statutorily moot.[15] That is why, even though the business judgment rule is black-letter law in the Southern District of New York, the Second Circuit has not had (and may never have) an opportunity to opine on it. *See Integrated Res.*, 3 F.3d at 51-54 (declining to address standard of review because order was interlocutory). The split between the Nation's two most important bankruptcy courts is therefore likely to persist until this Court intervenes.

Practical considerations also contribute to the scarcity of suitable vehicles for this Court to answer the question presented. The potential beneficiary of a breakup fee often ends up purchasing the asset (thus mooting the issue of the fee), so there is often no need to litigate the question of payment after final judgment. And many bidders will react to the

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[14] *See In re Integrated Res., Inc.*, 3 F.3d 49, 51-54 (2d Cir. 1993) (order regarding "validity of an agreement for a breakup fee" was interlocutory).

[15] *See In re WestPoint Stevens, Inc.*, 600 F.3d 231, 247 (2d Cir. 2010) (noting that 11 U.S.C. § 363(m) creates a rule of "statutory mootness" that generally "bars appellate review" of sales approved under Section 363); *see also* 11 U.S.C. § 363(m); *Cinicola* v. *Scharffenberger*, 248 F.3d 110, 121-22 (3d Cir. 2001) ("To promote certainty and finality in bankruptcy sales, § 363(m) prohibits the reversal of a sale * * * of bankruptcy estate property if a party failed to obtain a stay of the sale.").

uncertainty engendered by the potential application of Section 503 by simply declining to bid in the first place. The result is that, although the question presented has profound implications for bankruptcy auctions, lower-court rulings on it are routinely shielded from appellate review. This Court is therefore likely to have few opportunities to address the question presented, even though its resolution would likely create billions of dollars of value for creditors in bankruptcy cases involving asset sales. Thus, although further percolation of this issue would be unnecessary in any event, *see*, *e.g.*, *Harris* v. *Viegelahn*, 135 S. Ct. 1829, 1836 (2015) (certiorari granted to resolve bankruptcy-related conflict between Third and Fifth circuits), it is particularly unwarranted here, where lower courts have considered the issue fully and there are obstacles to appellate review in other cases.

B. This Case Is An Excellent Vehicle.

Certiorari is also warranted because the Court's resolution of the standard-of-review issue promises to be dispositive in this case. The bankruptcy court found that "the evidence overwhelmingly indicate[d] that a breakup fee was necessary to induce NextEra to make a bid, and to move forward with a merger agreement." JA578; *cf. ASARCO*, 650 F.3d at 603 (approving reimbursement where bidder protection "facilitated, not hindered, the auction process").[16] It acknowledged that the amount of the fee was appropriate and bargained-for, and that the Debtors obtained valuable concessions from NextEra in

[16] As Elliott conceded below, the best offers not involving breakup fees were worth "materially less" than NextEra's. Br. of Appellees Elliott Assoc's, L.P., *et al.* at 19, *In re Energy Future Holdings Corp.*, No. 18-1109 (3d Cir. filed Mar. 5, 2018).

exchange.[17] Even once the Termination Fee became payable, the Debtors agreed that it was a "calculated risk worth taking," and had been undertaken with "eyes wide open." JA1203:1-13. And there has been no suggestion of fraud, self-dealing, or any other inappropriate motivation on the Debtors' part. *Cf., e.g.*, *ASARCO*, 650 F.3d at 603 (approving reimbursement under business judgment rule where "there was no evidence in the record of self-dealing or manipulation"). Under *ASARCO*, that "calculated risk" is precisely the sort of business decision to which a court must defer. It was only by "reject[ing]" the "business judgment standard," App. 28a, that the court of appeals could approve the bankruptcy court's decision to do otherwise. This case therefore squarely implicates the longstanding circuit split over the appropriate standard of review.

III. BREAKUP-FEE AGREEMENTS SHOULD BE REVIEWED UNDER THE BUSINESS JUDGMENT STANDARD OF SECTION 363.

Courts have long recognized that business decisions are the province of businesspeople, not judges. *See*, *e.g.*, *Dodge* v. *Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) ("[J]udges are not business experts."); *see also, e.g.*, *Corwin* v. *KKR Fin. Holdings LLC*, 125 A.3d 304, 313-14 (Del. 2015) (Strine, C.J.)

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[17] App. 101a ("[T]he termination fee went up at the end of the process but it went up primarily, I believe, because [NextEra] walked away from the match right, and the combination of match right, lower breakup fee was replaced with no match right and a higher breakup fee."); App. 100a (fee was "an appropriate number for a case of this size," and was "on the low end" compared to similar transactions); *cf. ASARCO*, 650 F.3d at 603 (approving reimbursement where it was "reasonable in comparison to the size of the [asset]").

(the "core rationale of the business judgment rule" is "that judges are poorly positioned to evaluate the wisdom of business decisions and there is little utility to having them second-guess the determination of impartial decision-makers with more information"). The breakup-fee context provides no reason to deviate from that well-accepted rule. Hebbeln, *supra*, at 507-08.

In *ASARCO*, the Fifth Circuit correctly held that approval of a breakup fee should take place under Section 363, in the same manner as other aspects of asset sales and other decisions the debtor makes. As noted, Section 363(b) allows a debtor to sell its property outside the ordinary course of business after obtaining bankruptcy court approval. 11 U.S.C. § 363(b). Every lower court, including the Third Circuit, holds that a business judgment standard applies to court approval under Section 363(b).[18] As the Fifth Circuit has held, because the employment of a breakup fee is no less a "discretionary use of the estate's funds" than any other business decision a debtor would make in an asset sale, there is no reason to carve out a breakup-fee exception to that general rule. *ASARCO*, 650 F.3d at 602-03. It is therefore not surprising that no other circuit has adopted the Third Circuit's anomalous conclusion that the standards of Section 363 will apply to only some, but not all, aspects of a debtor's sale of assets.

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[18] *See*, *e.g.*, *Moore*, 608 F.3d at 263; *Stephens Indus., Inc.* v. *McClung*, 789 F.2d 386, 390 (6th Cir. 1986); *In re Lionel Corp.*, 722 F.2d 1063, 1070 (2nd Cir. 1983); *see also In re Scimeca Found., Inc.*, 497 B.R. 753, 771 (Bankr. E.D. Pa. 2013) (sale permissible when price is "reasonable" and "the sale process has been conducted in good faith") (*citing In re Abbotts Dairies of Pa., Inc.*, 788 F.2d 143, 149–50 (3d Cir. 1986)).

Section 503 does nothing to undermine that view. As its plain text reveals, Section 503(b) operates not to prohibit otherwise-permissible transactions, but to allow payment of certain "administrative expenses" for which the Bankruptcy Code makes no provision elsewhere. *Compare* 11 U.S.C. § 503(b) (providing that "there shall be allowed" certain expenses "[a]fter notice and hearing") *with* 11 U.S.C. § 503(c) (providing that, "[n]otwithstanding subsection (b)," certain other expenses are impermissible). Because a debtor's sale of assets is authorized under Section 363, there is no need for additional authorization under Section 503.

To the contrary, the same justification that led Congress to place the debtor in charge of asset sales applies equally to breakup fees—especially where those fees are non-severable components of a bid package. The debtor, not the bankruptcy court, conducts "discussions with * * * potential bidder[s] and knows what it will take to induce" them to bid. Hebbeln, *supra*, at 505. It is therefore the debtor that "is in the best position to know the size of the break-up fee that will be required," and to assess whether "other potential bidders are likely to enter the bidding without the due diligence of the bidder seeking a break-up fee agreement." *Id.* And, "absent a finding that the board breached its duty of loyalty, courts can safely assume that the [debtor's] main objective is maximization of the value of the [asset]." *Id.* That is why the leading bankruptcy treatise has unambiguously endorsed the Fifth Circuit's rule as the "better" one. 3 *Collier*, *supra*, ¶ 363.02.[19]

[19] *See also* Nicholas M. McGrath, *Breaking Down Breakup Fees: The Appropriate Standard*, 2011 Ann. Surv. of Bankr. Law 14 (2011) (asserting that "the stringent standards of the

The Third Circuit's contrary view is not merely bad policy, but also devoid of statutory support. *O'Brien* rested its decision on the assertion that courts have no authority to "create a right to recover from [a] bankruptcy estate where no such right exists under the Bankruptcy Code." App. 28a (quoting *O'Brien*, 181 F.3d at 532). But that view fails to account for Section 363, which straightforwardly provides that, with court approval under the well-settled business judgment standard, a debtor ***can*** arrange and undertake a sale of estate assets. Moreover, as the Fifth Circuit explained in *ASARCO*, whereas "Section 363 addresses the debtor's use of the estate property * * * , Section 503, in contrast, generally applies to third parties that have already incurred expenses in connection to the debtor's estate." 650 F.3d at 602. Accordingly, any need there may be to more closely scrutinize third-party claims for after-the-fact reimbursement is absent where the court is asked to pre-approve a breakup fee negotiated by the debtor at arms'-length, particularly where the fee was indisputably necessary to induce a value-maximizing bid. *See id.* at 602-03.

The Third Circuit's rule, moreover, inevitably devolves into improper hindsight. Each of the Third Circuit's three decisions on the question viewed the utility of a breakup fee from a hindsight perspective after payment had come due, rather than from the perspective of a bidder seeking to maximize value *ex ante*. App. 27a-35a; *O'Brien*, 181 F.3d at 528; *Reliant*, 594 F.3d at 204-05. From that *post hoc*

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section 503(b) test will have a chilling effect on inducing stalking horse bidders to take the crucial first steps in an asset sale," whereas a "business judgment standard better achieves both the original and current goals of break-up fees").

perspective, a fee can appear to be an "expense" for which the estate "received nothing of direct value." 3 *Collier*, *supra*, ¶ 363.02. But the relevant question for achieving the aims of bankruptcy law, *see Piccadilly Cafeterias*, 554 U.S. at 51-52, is what legal rule will maximize the estate's value *ex ante*, when a breakup fee may be necessary to induce a bid and it is unknown whether the fee will ever need to be paid.

Viewed in that light, a rule of debtor primacy is unquestionably preferable, particularly in the context of assessing the desirability of a complex, heavily negotiated merger agreement such as the one at issue here. *See supra* at 6. Indeed, contrary to *O'Brien*'s assertion that "the objective[] of federal bankruptcy law" is to "usurp[] from the debtor his power to control the distribution of his assets," 181 F.3d at 532 (quotation marks omitted), Section 363 entrusts the debtor to make the complex business decisions necessary to carry out "the general Code policy of maximizing the value of the bankruptcy estate." *Toibb* v. *Radloff*, 501 U.S. 157, 163 (1991). The Third Circuit's decision to strip debtors of that role has no support in the statute, conflicts with a century-old consensus in the law, and cannot be reconciled with the Fifth Circuit's holding in *ASARCO*.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari and reverse the judgment.

Respectfully submitted,

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January 2019

APPENDIX

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APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-1109

In re: ENERGY FUTURE HOLDINGS CORP.,
et al,
Debtors

NEXTERA ENERGY, INC.,
Appellant

On Appeal from the United States Bankruptcy Court for the District of Delaware
(Bankruptcy Case No. 14-10979)
Bankruptcy Judge: Honorable Christopher S. Sontchi

Argued
April 19, 2018

Before: GREENAWAY, JR., RENDELL, and FUENTES, *Circuit Judges*.

(Opinion Filed: September 13, 2018)

OPINION

GREENAWAY, JR., Circuit Judge.

About a year after approving a merger agreement that called for the payment of a $275 million termination fee under certain conditions, the Bankruptcy Court in this Chapter 11 case admitted that it had made a mistake, granted a motion for reconsideration, and narrowed the circumstances under which the termination fee would be triggered. Were it not for the order granting reconsideration, Appellant NextEra Energy, Inc. would now be entitled to payment of the $275 million fee out of the bankruptcy estates. In pursuit of the payment, NextEra argues in this appeal that the Bankruptcy Court had it right the first time and should have never granted the motion for reconsideration. NextEra contends first that the motion was untimely, before arguing alternatively that the motion should have been denied on the merits because the termination fee provision, as originally drafted, was an allowable administrative expense under 11 U.S.C. § 503(b). We, however, conclude that the Bankruptcy Court did not err in either respect. The motion for reconsideration was timely, and the Bankruptcy Court did not abuse its discretion in granting it. We will therefore affirm.

I. BACKGROUND

A. The Approval of the Merger Agreement and Termination Fee

Shortly after initiating Chapter 11 bankruptcy proceedings, Debtors Energy Future Holdings Corp. ("EFH") and Energy Future Intermediate Holding Company LLC ("EFIH") began marketing their approximately eighty-percent economic interest in the rate-regulated business of Oncor Electric Delivery Co. LLC, the largest electricity transmission and distribution system in Texas.[1] On July 29, 2016, Debtors entered into an Agreement and Plan of Merger with NextEra, under which NextEra would acquire Debtors' interest in Oncor. The Merger Agreement, which reflected an approximately $18.7 billion implied total enterprise value for Oncor, stated that NextEra would provide approximately $9.5 billion in consideration to Debtors' estates.

The Agreement also included a Termination Fee provision, which obligated Debtors to pay NextEra $275 million if the agreement was terminated under certain circumstances. As Debtors' counsel later acknowledged before the Bankruptcy Court, this provision was "incredibly detailed." App. 547. It began by providing that Debtors would be required to pay the Termination Fee—sometimes referred to as a break-up fee—

> [i]f this Agreement is terminated . . . and any alternative transaction is consummated (including any transaction or proceeding that permits the [Debtors] to emerge from the Chapter 11 Cases) pursuant to which neither [NextEra] nor any of its Affiliates will obtain direct or indirect ownership of . . . approximately 80% equity interest in Oncor.

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[1] To be precise, Debtors in the underlying consolidated Chapter 11 proceeding are EFH and fourteen of its subsidiaries, including EFIH.

App. 182. In other words, payment would be triggered if NextEra did not ultimately acquire Debtors' interest in Oncor and Debtors either sold Oncor to someone else or otherwise emerged from the bankruptcy proceedings. But the provision then proceeded to list a number of exceptions to this default rule. It provided, for instance, that the Fee would not be payable if the parties mutually consented to terminate the Merger Agreement prior to closing, or if Debtors terminated because NextEra was in breach of the Agreement.

Most importantly for purposes of this appeal, the Fee provision also included an exception that was to govern if the Public Utility Commission of Texas ("PUCT") did not approve the merger. That part of the provision stated that payment would not be triggered if the Agreement was "terminated . . . *by [NextEra]* . . . and the receipt of PUCT Approval (without the imposition of a Burdensome Condition) [wa]s the only condition . . . not satisfied or waived in accordance with this Agreement." App. 182 (emphasis added). The Fee provision said nothing, however, about whether the $275 million would be owed if, due to the PUCT's declining to approve the Agreement, *Debtors* took the initiative to terminate rather than NextEra. Thus, under those circumstances, the default rule applied: If the PUCT rejected the merger and Debtors consequently terminated the Agreement, they would owe NextEra $275 million upon the consummation of an alternative deal, regardless of whether that alternative was better for the estates.

Before the Merger Agreement could take effect, Debtors were required to obtain approval from the

Bankruptcy Court, so, within days of finalizing the Agreement with NextEra, they filed an appropriate motion with the court. In that Approval Motion, Debtors explained the Termination Fee provision as follows:

> Upon Court approval of the Merger Agreement, EFH Corp. and EFIH are liable for the Termination Fee, in the amount of $275 million, as an allowed administrative expense claim, in the event of certain termination events in accordance with the Merger Agreement. The Termination Fee is not payable in the event of, among other things, certain terminations resulting from breaches by NextEra or Merger Subsidiary or following a termination by NextEra at the Termination Date (as defined in the Merger Agreement) where PUCT approval is the only closing condition not satisfied. . . .
>
> The Merger Agreement includes provisions that allow for any higher or otherwise better bids to emerge. From the execution of the Merger Agreement until entry of the Approval Order, the Debtors may solicit, initiate, and facilitate higher or otherwise better offers without paying the Termination Fee. . . . If the Debtors terminate the Merger Agreement following entry of the Approval Order to accept another proposal, and the transaction contemplated by such other proposal is consummated, the Debtors would owe the $275 million Termination Fee.

App. 397–98 (citation omitted).

On September 19, 2016, after several creditors objected to the proposed merger, the Bankruptcy

Court held a hearing regarding the Approval Motion. During that hearing, William Hiltz, a member of Debtors' financial advisory team testified about whether the Termination Fee would be triggered upon failure to achieve approval from the PUCT:

> THE COURT: [I]f the Court confirms the . . . NextEra deal, and that plan does not consummate because of a failure to achieve regulatory approval, is the break-up fee payable?
>
> MR. HILTZ: If the Debtor enters into another transaction, the answer is yes.
>
> THE COURT: But if this transaction simply falls apart because you don't get regulatory approval from the Public Utility Commission?
>
> MR. HILTZ: Well, again, I think if the Debtor enters into another transaction including a reorganization involving its own creditors . . . it would be payable.
>
> THE COURT: . . . [B]ecause if this plan gets confirmed for Debtors—not anything the Debtors do wrong, they don't get the regulatory approval they need—this falls apart and a year and a half from now they confirm a different plan that's not even a sale plan, say it's a standalone plan, that break-up fee would be payable?
>
> MR. HILTZ: I believe so.

App. 535. Although Hiltz's testimony did not address the critical distinction between whether it was Debtors or NextEra that initiated the termination upon PUCT disapproval, it was otherwise accurate: payment of the Fee did not necessarily hinge on whether either party was at fault for the PUCT's failure to approve, and the "alternative transaction" that would trigger payment did not need to be a sale plan. Rather, as Hiltz acknowledged to the Bankruptcy Court, the alternative could be a standalone plan—meaning a resolution without the involvement of a third party, under which at least some creditors would have to agree to accept less than one hundred percent payment and instead take debt and/or equity issued by a reorganized company.

Later on at the hearing, however, Debtors' counsel contradicted Hiltz's testimony. Initially, counsel informed the court that the Fee would not be payable if the PUCT rejected the plan and "NextEra walk[ed]." App. 541. But minutes later, counsel added:

> Suffice to say there's no break-up fee if the PUC[T] just denies—outright denies approval. But if the PUC[T] imposes the burdensome condition which is a significant hurdle, . . . a break-up fee is triggered.

App. 547. This statement was inaccurate in that the triggering of the Fee did not turn on whether the PUCT outright rejected the merger or instead imposed a "burdensome condition," which a different provision of the Merger Agreement defined with specificity. Rather, as we have said, whether the Fee became payable upon PUCT disapproval hinged on whom it was that took the initiative to terminate the agreement—Debtors or NextEra. Thus, it was incorrect to state "there's no break-up fee if the PUCT . . . outright denies approval." In reality, if the PUCT flat-out rejected the merger, the Fee would be payable, so long as it was the Debtors who terminated.

Debtors' counsel's misstatement was never corrected during the September 19 hearing, though, and at the conclusion of the hearing, the Bankruptcy Court entered an order approving the Merger Plan and Agreement. The Approval Order authorized Debtors to enter into the merger, approved the Termination Fee on the terms provided for in the Agreement, and authorized Debtors to pay the Termination Fee to NextEra as an allowable administrative expense to the extent it became due and payable under the Agreement. The Order further provided that, in the event the Fee became payable, EFH and EFIH would agree on the allocation of the payment between their respective estates, and then seek the Bankruptcy Court's approval of such allocation. If EFH and EFIH were ultimately unable to agree on how to divide the payment, the Order stated that the Bankruptcy Court "would determine the appropriate allocation of the Termination Fee" between the estates. App. 455. Indeed, the Bankruptcy Court, was to "retain jurisdiction over any matter or disputes arising from or relating to the interpretation, implementation or enforcement of th[e] Order." App. 456.

Later reflecting on Debtors' Approval motion, the objections raised by the various creditors, and the September 19 hearing, the Bankruptcy Court would state that no one "focused the Court on a critical fact: the Merger Agreement did not set a date by which approval by the [PUCT] had to be obtained." App. 19. "Consequently," the court wrote, no party made it aware "that if the PUCT did not approve the NextEra Transaction, the Debtors could eventually be required to terminate the Merger Agreement and trigger the Termination Fee unless NextEra terminated first of its own volition." App. 19–20 (emphasis omitted). And, according to the court, "under no foreseeable circumstances would NextEra terminate the Merger Agreement . . . [b]ecause NextEra had the ability to hold out . . . until the Debtors were forced by economic circumstances to terminate." App. 26 (emphasis omitted). Put differently, because there was no date by which PUCT approval had to be obtained before the merger dissolved automatically, in the face of regulatory rejection, NextEra could simply be patient, pursue all possible appeals, and wait for Debtors to terminate first, which would allow NextEra to collect the $275 million Termination Fee.

B. The Bankruptcy Court's Reconsideration of the Approval Order

On September 22, 2016, three days after the Bankruptcy Court entered the Approval Order, the PUCT held a hearing at which one of its Commissioners expressed concerns over the Fee. Perhaps due to Debtors' counsel's misstatement at the September 19 hearing before the Bankruptcy Court, the Commissioner appeared to be under the false impression that the Fee would be payable if the PUCT imposed burdensome conditions, but not if it outright rejected the merger. And perhaps partly based on that impression, he stated that the Termination Fee "appear[ed] to be an effort to really tie the [PUCT's] hands" and force it to approve the merger without any burdensome conditions. App. 690. In the Commissioner's eyes, if the PUCT imposed certain conditions on its approval, then NextEra would just hold out for payment of the

Termination Fee, which the Commissioner feared might come from Debtors' "only asset," Oncor—to the detriment of Oncor's customers. App. 694. NextEra's purported hope, then, according to the Commissioner, was that the PUCT would be reluctant to trigger payment of the Fee, and would therefore approve the merger as proposed in order to prevent such payment.

In the aftermath of the Commissioner's statement, Debtors and NextEra submitted a letter to the Bankruptcy Court on September 25, seeking to clarify the terms of the Termination Fee provision. The letter began by stating the parties' joint view was that "NextEra Energy is not entitled to a termination fee under the merger agreement if NextEra Energy terminates the merger agreement because the [PUCT] either approves the merger agreement transaction with 'burdensome conditions' (as defined in the merger agreement) or does not approve the merger agreement transaction." App. 702. This statement corrected part of Debtors' counsel's misstatement from the September 19 hearing, but it did not address the critical related issue: what would happen if the PUCT rejected the merger or approved it with burdensome conditions *and NextEra did not terminate*.

That issue the letter waited until the penultimate paragraph to discuss:

> In other words, the $275 million termination fee is triggered if EFH and/or EFIH terminate the merger agreement as a consequence of the Commission either not approving the merger agreement transaction or approving the merger transaction with the imposition of imposing of a

> burdensome condition. In order for EFH and/or EFH to pursue an alternative transaction, EFH and EFIH believe that they would only terminate in such a situation if they had an alternative proposal to pursue. The termination fee is not triggered if, under the same circumstances NextEra Energy terminates the merger agreement instead of EFH and/or EFIH.

App. 702. Importantly, like the Approval Motion and the testimony at the September 19 hearing, the letter neglected to explain that the Merger Agreement did not set a date by which approval by the PUCT had to be obtained before the merger dissolved on its own.

The next day, at a previously scheduled hearing, the Bankruptcy Court detoured from the agenda to address the comments of the PUCT Commissioner and the parties' subsequent letter. The court acknowledged that it was "sympathetic" to the Commissioner's concerns, but it appeared to be put at ease by the parties' letters. App. 715. According to the court, in the letter, "the parties clarified that . . . NextEra will not seek to collect any portion of the termination fee contemplated by the merger agreement in the event NextEra terminates" because of PUCT rejection or PUCT approval with burdensome conditions. App. 716. Again, though, it never came up that that the Merger Agreement did not provide a date by which PUCT approval had to be achieved. Instead, the court proceeded to briefly address the Commissioner's concern that Oncor would be on the hook for the Termination Fee if it became payable. It spelled out that the fee was "an issue for the Bankruptcy Court and the creditors of

EFH and EFIH, and not for the PUCT, Oncor, and the rate payers," because if the fee was triggered it would "constitute an administrative expense claim payable by EFH and EFIH." App. 717. Consequently, the court "encourage[d] the [PUCT] to review the proposed merger . . . with an unblinking eye and in no way to be influenced by the possible triggering of the termination fee." App. 718. The court then moved on to the previously scheduled agenda. It made no changes to the September 19 Approval Order.

The next month, NextEra and Oncor submitted their Joint Application for change of control of Oncor to the PUCT. The Application asked for the PUCT to drop two central features of a "ring-fence" the PUCT had previously imposed on Oncor when it was owned by Debtors: (1) the requirement that Oncor maintain an independent board of directors, and (2) the ability of certain minority shareholders to veto dividends. NextEra would not negotiate with regard to either feature, leading members of the PUCT to refer to them as "deal killers." *E.g.*, App. 765, 772. In April 2017, the PUCT formally denied the Joint Application, concluding that the merger was not in the public interest under the Texas Public Utility Regulatory Act. The parties subsequently filed two requests for reconsideration, but NextEra continued to hold firm on the deal-killer terms. The PUCT denied both requests for the same reasons provided in its original decision.

According to the Bankruptcy Court, at this point, the merger was "clearly dead." But NextEra showed no indications of terminating the agreement. Instead, it filed an appeal in Texas state court. In the words of the Bankruptcy Court, NextEra made it "clear that [it] would appeal the PUCT's decision to all levels of review, leaving the Debtors no choice but to terminate the Merger Agreement and risk triggering the Termination Fee or else incur months or years of continued interest and fee obligations." App. 28.

On July 7, 2017, Debtors formally terminated the Merger Agreement based on the failure to obtain regulatory approval and NextEra's alleged breach of the Agreement. The same day, Debtors entered into a different merger agreement with another party.

A few weeks later, on July 29, 2017, Appellees Elliott Associates, L.P., Elliott International, L.P., and The Liverpool Limited Partnership (collectively, "Elliott"), who are creditors of Debtors, filed the motion to reconsider at issue in this appeal. In its motion, Elliott sought reconsideration of the Approval Order to the extent that the Approval Order authorized Debtors to pay the Termination Fee under circumstances where the parties failed to obtain PUCT approval and Debtors were resultantly forced to terminate the Agreement in order to pursue an alternative transaction. Within days, NextEra filed a competing application with the Bankruptcy Court seeking allowance and payment of the Termination Fee upon Debtors' consummation of the alternative transaction, to which Elliott objected based on the same grounds as in its motion to reconsider.

The Bankruptcy Court ultimately granted Elliott's motion, explaining that it had "fundamentally misapprehended the facts as to whether the Termination Fee would be payable if the PUCT failed to approve the NextEra Transaction." App. 45.

The court rejected NextEra's argument that the motion was untimely, concluding instead that the Approval Order was interlocutory because it "d[id] not resolve all issues relating to the Termination Fee," such as the allocation of the Fee between the Debtors' estates. App. 36. In the alternative, the court ruled that it was appropriate to grant the motion even if the Approval Order was a final order, because "the interest of justice outweigh[ed] the interest of finality." App. 45.

On the merits, the court concluded that, had it possessed complete knowledge of the facts at the time the Approval Motion was filed, it could not have approved the Termination Fee. Specifically, the court held that the Fee was not an "actual, necessary cost[] and expense[] of preserving the estate" under 11 U.S.C. § 503(b)(1)(A), because "[p]ayment of a termination or break-up fee when a court (or regulatory body) declines to approve the related transaction cannot provide an actual benefit to a debtor's estate sufficient to satisfy" the statutory requirement. App. 43.

Accordingly, the Bankruptcy Court amended the Approval Order to provide that:

> The Termination Fee, upon the terms and conditions of the Merger Agreement, is approved in part and disallowed in part. The Termination Fee is disallowed in the event that the PUCT declines to approve the transaction contemplated in the Merger Agreement and, as a result, the Merger Agreement is terminated, regardless of whether the Debtors or NextEra subsequently terminates the Merger Agreement. In those circumstances, the EFH/EFIH Debtors are not

> authorized to pay the Termination Fee as a qualified administrative expense or otherwise. The Termination Fee is otherwise approved.

App. 12. NextEra then filed a timely appeal of the Bankruptcy Court's decision, and this Court agreed to hear the appeal directly and on an expedited basis pursuant to 28 U.S.C. § 158(d)(2).

II. JURISDICTION

The Bankruptcy Court had jurisdiction under 28 U.S.C. §§ 157 and 1334(b). We have jurisdiction under 28 U.S.C. § 158(d)(2).

III. DISCUSSION

On appeal, NextEra argues that the Bankruptcy Court erred in granting Elliot's motion to reconsider for two independent reasons. First, NextEra contends that the motion should have been denied because it was untimely. Second, NextEra argues that, even if the motion was timely, it should have been denied on the merits because, regardless of any misapprehension of the facts, the Bankruptcy Court was right in its initial determination that the Termination Fee, as originally drafted, was an allowable administrative expense under 11 U.S.C. § 503(b); thus, in NextEra's view, there was no error of law requiring correction.

A. The Timeliness of Elliott's Motion for Reconsideration

As the Bankruptcy Court correctly recognized, the timeliness of Elliott's motion depends in part on whether the September 19, 2016 Approval Order was an interlocutory or a final order. The Federal Rules of Bankruptcy Procedure do not expressly authorize motions for reconsideration. But bankruptcy courts, like any other federal court, possess inherent authority, see *Law v. Siegel*, 571 U.S. 415, 420–21 (2014), and such authority permits courts to reconsider prior interlocutory orders "at any point during which the litigation continue[s]," as long as the court retains jurisdiction over the case, *State Nat'l Ins. Co. v. Cty. of Camden*, 824 F.3d 399, 406 (3d Cir. 2016). Thus, if the Approval Order was interlocutory, no strict time limit applied to Elliott's motion for reconsideration.

If, on the other hand, the Approval Order was final, Elliot's motion would be subject to the time restrictions of Federal Rule of Civil Procedure 60. *See* Fed. R. Bankr. P. 9024 (providing that, with limited exceptions, Rule 60 applies in cases under the Bankruptcy Code); Fed. R. Civ. P. 60(b) ("On motion and just terms, the court may relieve a party . . . from a final judgment, order or proceeding."). When based on mistake, newly discovered evidence, or fraud, a motion brought under Rule 60(b) must be brought within one year of the entry of the underlying order, and under all circumstances, such a motion "must be made within a reasonable time." Fed. R. Civ. P. 60(c). Here, Elliott's motion was filed less than a year after the Approval Order was filed, but NextEra argues that the motion was not made within a reasonable time because, according to NextEra, Elliott could have raised its arguments at the time the merger was initially approved.

We generally review timeliness determinations for an abuse of discretion. See *Bailey v. United Airlines*, 279 F.3d 194, 202–03 (3d Cir. 2002) (reviewing for abuse of discretion determination that motion for summary judgment was timely); see also *In re Fine*

Paper Antitrust Litig., 685 F.2d 810, 817 (3d Cir. 1982) ("[M]atters of docket control . . . are committed to the sound discretion of the District Court."). But the threshold question of whether the Approval Order is interlocutory or final is a legal issue that turns on the interpretation of Rule 60—that is, whether the Approval Order constitutes a "final . . . order" under the Rule. We exercise plenary review over such questions involving the interpretation of the Federal Rules of Civil Procedure. *Garza v. Citigroup, Inc.*, 881 F.3d 277, 280 (3d Cir. 2018). Accordingly, here, we first exercise plenary review over the Bankruptcy Court's conclusion that the Approval Order was interlocutory. Once we have answered that initial question, we review any remaining aspects of the Bankruptcy Court's timeliness determination for an abuse of discretion. *See Bailey*, 279 F.3d at 202–03.

Turning to the initial question, we begin by noting that the rules of finality and appealability are different in the bankruptcy context than in ordinary civil litigation. Because "[a] bankruptcy case involves 'an aggregation of individual controversies,'" *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686, 1692 (2015) (quoting 1 Alan N. Resnick & Henry J. Sommer, Collier on Bankruptcy ¶ 5.08[1][b] (16th ed. 2014)), "Congress has long provided that orders in bankruptcy cases may be immediately appealed if they finally dispose of discrete disputes within the larger case," *id.* (quoting *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 657 n.3 (2006)). Indeed, the bankruptcy appeals statute "authorizes appeals of right not only from final judgments in cases but from 'final judgments, orders, and decrees .

. . in cases and proceedings.'" *Id.* (omission in original) (quoting 28 U.S.C. § 158(a)).

In light of these general principles, we have adopted a flexible, pragmatic approach to finality in the bankruptcy context. *Century Glove, Inc. v. First Am. Bank of N.Y.*, 860 F.2d 94, 97 (3d Cir. 1988). Among the factors relevant to this approach are "(1) 'the impact of the matter on the assets of the bankruptcy estate,' (2) 'the preclusive effect of a decision on the merits,' and (3) 'whether the interests of judicial economy will be furthered'" by an immediate appeal. *In re Marcal Paper Mills, Inc.*, 650 F.3d 311, 314 (3d Cir. 2011) (quoting *F/S Airlease II, Inc. v. Simon*, 844 F.2d 99, 104 (3d Cir. 1988)). The ultimate question, however, is whether the order "fully and finally resolved a discrete set of issues, leaving no related issues for later determination." *In re Taylor*, 913 F.2d 102, 104 (3d Cir. 1990); *see also Bullard*, 135 S. Ct. at 1692.

Applying a flexible, pragmatic approach here, we agree with the Bankruptcy Court that the Approval Order was interlocutory. Assuming the "discrete set of issues" for purposes of finality was those related to the Termination Fee provision, the Order still reserved questions for later determination. For one, the Order did not resolve how the Fee would be allocated between EFH's and EFIH's respective estates in the event it became payable. Rather, at a minimum, the Order required the Bankruptcy Court to approve an allocation proposed by EFH and EFIH at a later date. Thus, the Fee could not be paid without further court action. If EFH and EFIH were unable to agree on such an allocation, the Order provided that the Bankruptcy Court would have to determine an appropriate allotment. That the Approval Order left this allocation question unanswered is critical to the finality analysis, because it means that the impact of the Order itself on the assets of the respective estates was both uncertain and far-off. The later allocation determination very well might have had significant effects on the rights of other interested parties, too, as we can assume that EFH and EFIH do not share all of the same creditors. Even in the flexible, pragmatic world of bankruptcy, "[f]inal does not describe th[e] state of affairs" when "parties' rights and obligations remain unsettled." *Bullard*, 135 S. Ct. at 1692.

It was not only the allocation issue that remained up in the air either. Although the Approval Order authorized Debtors to enter into the Merger Agreement and pay the Termination Fee "to the extent it bec[a]me[] due and payable pursuant to the terms and conditions of the Merger Agreement," the Order also expressly provided that the Bankruptcy Court was "retain[ing] jurisdiction over any matter or disputes arising from or relating to the interpretation, implementation or enforcement of th[e] Order." App. 455–56. As it turns out, such a dispute has arisen: in a separate adversary complaint that is not at issue in this appeal, Debtors have alleged that, even if the Termination Fee provision were enforced as originally drafted and approved, NextEra still would not be entitled to the Fee, because, according to Debtors, NextEra breached the Merger Agreement.[2] It is exactly this

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[2] Debtors' adversary complaint, which seeks a declaratory judgment, was filed in the Bankruptcy Court before Elliott's

kind of dispute over which the Bankruptcy Court retained jurisdiction in the Approval Order. Because the Approval Order left open the possibility that the Bankruptcy Court would need to decide when the Fee was payable, it was uncertain that the Order itself would have any impact on the estates without further court action.

Nonetheless, according to NextEra, the discrete question for purposes of finality here was whether the Termination Fee provision satisfied the legal standard applicable to administrative expenses under 11 U.S.C. § 503(b). In NextEra's view, the Approval Order was final because, by its own terms, it provided that the Termination Fee was approved "without any further proceedings before, or order of, the Court." App. 455. But this argument overlooks the fact that the Order's very next sentence provided the significant caveat that the Bankruptcy Court would have to approve the allocation of the Fee between the estates. Thus, as we have said, in reality, the Fee could not have been paid until further court action took place.

Also, the Supreme Court recently rejected a conception of finality that "slic[ed] the case too thin." *Bullard*, 135 S. Ct. at 1692 (dismissing Debtor's argument that "each time the bankruptcy court

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motion for reconsideration was granted. *See* Adversary Complaint, *Energy Future Holdings Corp. v. NextEra Energy, Inc.*, *(In re Energy Future Holdings Corp.)*, Ch. 11 Case No. 1:14-bk-10979, Adv. No. 17-50942 (Bankr. D. Del. Aug. 3, 2017). At oral argument before this Court, counsel for NextEra represented that the adversary proceeding has been put on "hiatus" pending our resolution of this appeal. Tr. of Oral Arg. at 11.

reviews a proposed plan . . . it conducts a separate proceeding" for purposes of the bankruptcy appeals statute). NextEra's proposed conception here, in our view, would do just that: single out a particular question about a particular provision of a merger agreement, chop it off of the broader case, and deem it its own separate issue. This conception takes our flexible, pragmatic approach to finality too far.

Because we conclude that the Approval Order was interlocutory, Elliott's motion to reconsider was subject to no explicit time restriction. Instead, the only timeliness argument that NextEra might have is the doctrine of laches. To assert a laches defense, NextEra would have to show that Elliott inexcusably delayed its motion and that NextEra was prejudiced as a result of such a delay. *Tracinda Corp. v. DaimlerChrysler AG*, 502 F.3d 212, 226 (3d Cir. 2007). Laches is an equitable doctrine, however, and the decision of whether to recognize it as a defense in a particular case is left to the discretion of the lower courts. *Id.* Here, we cannot say that the Bankruptcy Court abused its discretion in refusing to bar Elliott's motion because of laches. The motion was filed less than a year after the Approval Order was issued, within weeks of Debtors terminating the Merger Agreement, and actually before NextEra had even filed its application seeking payment of the Termination Fee. The Fee provision in the Merger Agreement was also complicated, and the record was muddled at the time the Bankruptcy Court was making its approval decision. Under these circumstances, we are unable to conclude that Elliott *inexcusably* delayed the filing of its motion.[3] The Bankruptcy Court therefore did not abuse its discretion in determining that the motion was timely.

B. The Merits of Elliott's Motion for Reconsideration

1. The Applicable Legal Standard

Turning to the merits of Elliott's motion, we must first identify the applicable legal standard. We have, on occasion, stated that lower courts "possess[] inherent power over interlocutory orders, and can reconsider them when it is consonant with justice do so." *State Nat'l Ins. Co.*, 824 F.3d at 417 (quoting *United States v. Jerry*, 487 F.2d 600, 605 (3d Cir. 1973)); *see also Roberts v. Ferman*, 826 F.3d 117, 126 (3d Cir. 2016) ("'[T]he law of the case doctrine does not limit the power of trial judges to reconsider their prior decisions,' but . . . when a court does so, it must explain on the record why it is doing so and 'take appropriate steps so that the parties are not prejudiced by reliance on the prior ruling.'" (quoting *Williams v. Runyon*, 130 F.3d 568, 573 (3d Cir. 1997))). The Bankruptcy Court here, however, thought that its task required a little more. In part

[3] NextEra argues that we should bar Elliott's motion as untimely because "the alleged infirmities forming the basis" of the motion "all occurred (or failed to occur) before the Bankruptcy Court entered the Approval Order." Appellant's Br. at 28–29. And yet, according to NextEra, "Elliott sat on its hands for nearly a year, waiting to see if it would reap the benefits of a successful transaction induced by approval of the Termination Fee." *Id.* at 33. The Bankruptcy Court was better equipped than we are to evaluate this contention, however, and there simply is no evidence in the record before us that Elliott acted with the motive NextEra alleges.

because bankruptcy proceedings "involve[] the routine entry of interlocutory orders," the Bankruptcy Court concluded that parties in bankruptcy cases should not be permitted to relitigate previously decided issues "without good cause." App. 30. The court therefore subjected Elliott's motion to the same standard that governs motions to alter or amend a judgment under Federal Rule of Civil Procedure 59(e). See Fed. R. Bankr. P. 9023 (incorporating Rule 59). According to that standard, such a motion should be granted only where the moving party shows that at least one of the following grounds is present: "(1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court [made its initial decision]; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." *United States ex rel. Schumann v. Astrazeneca Pharm. L.P.*, 769 F.3d 837, 848–89 (3d Cir. 2014) (quoting *Max's Seafood Café ex rel. Lou-Ann, Inc. v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999)).

In our view, the Bankruptcy Court's approach makes sense, at least in the context of an order approving a merger agreement and accompanying termination fee provision. If courts could freely amend any interlocutory bankruptcy order, the larger proceedings would be fraught with uncertainty, and parties could never rely on prior decisions. Accordingly, we will assess the merits of Elliott's motion using the same standard employed by the Bankruptcy Court.

In seeking reconsideration, Elliott has not alleged an intervening change in the law or the availability of new evidence. Its motion is instead based entirely on the third basis for reconsideration provided above: the need to correct a clear error of law or fact or prevent manifest injustice. In granting the motion, the Bankruptcy Court concluded that it "had a fundamental misunderstanding of the critical facts when it [initially] approved the Termination Fee" because it was unaware that the Merger Agreement did not set a date by which PUCT approval had to be obtained. App. 38. This factual error, the court said, led it to incorrectly apply the law governing the permissibility of termination fees in bankruptcy cases. According to the court, had it "properly apprehended the facts at the time" it was considering Debtors' Approval Motion, "it could not have approved" the Termination Fee provision as it was originally drafted. App. 44. In other words, the Bankruptcy Court had committed "manifest errors" of both fact and law, which required the court to amend the September 19 Approval Order so that payment would not be triggered when the Merger Agreement was terminated—by either party—as a result of the PUCT's failure to approve the transaction. App. 47.

To affirm, we need only conclude that the Bankruptcy Court committed a clear error of fact *or* law, as the relevant standard is disjunctive. *See, e.g., Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.*, 602 F.3d 237, 251 (3d Cir. 2010) (citing *Max's Seafood*, 176 F.3d at 677). We have never adopted strict or precise definitions for "clear error of law or fact" and "manifest injustice" in the context of a motion for reconsideration, and we do not endeavor to do so here. We have, however, suggested that there is substantial, if not complete, overlap between the two concepts. *See, e.g., id.* ("The purpose of a motion for reconsideration . . . is to correct manifest errors of law or fact . . . ." (first alteration in original) (quoting *Max's Seafood*, 176 F.3d at 677)). To state what may be obvious, the focus is on the gravity and overtness of the error. *See, e.g., Burritt v. Ditlefsen*, 807 F.3d 239, 253 (7th Cir. 2015) ("A 'manifest error' occurs when the district court commits a 'wholesale disregard, misapplication or failure to recognize controlling precedent." (quoting *Oto v. Metro Life. Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000))); *Venegas-Hernandez v. Sonolux Records*, 370 F.3d 183, 195 (1st Cir. 2004) ("[A] manifest error is '[a]n error that is plain and indisputable, and that amounts to a complete disregard of the controlling law.'" (second alteration in original) (quoting Black's Law Dictionary 563 (7th ed. 1999))). Thus, Elliott must show more than mere disagreement with the earlier ruling; it must show that the Bankruptcy Court committed a "direct, obvious, [or] observable error," *Manifest Injustice*, Black's Law Dictionary (10th ed. 2014), and one that is of at least some importance to the larger proceedings.

Despite this heightened standard, we review a lower court's determination regarding a motion to reconsider for an abuse of discretion. *See, e.g., Howard Hess*, 602 F.3d at 246. To the extent the Bankruptcy Court's determination was based on factual findings, we review such findings for clear error. *Id.* To the extent its determination was "predicated on an issue of law, such an issue is reviewed de novo." *Max's Seafood*, 176 F.3d at 673 (italics omitted). Here, however, we are presented with no such legal issue, because the decision to allow or deny a termination fee is itself reviewed for only an abuse of discretion. See *In re Reliant Energy Channelview LP*, 594 F.3d 200, 205 (3d Cir. 2010).

2. The Bankruptcy Court's Claimed Error of Fact

Review of the Bankruptcy Court's purported factual error is relatively straightforward. The parties agree that the Merger Agreement did not set a date by which PUCT approval had to be achieved. Although the Bankruptcy Court made no express finding on the subject before it issued the Approval Order, it later said that it was unaware that the Agreement failed to provide such a date. As a starting point, we think the best source for information about the Bankruptcy Court's subjective understanding is the court itself. Indeed, we must accept the Bankruptcy Court's factual conclusions regarding its own subjective understanding unless they are clearly erroneous. *See Max's Seafood*, 176 F.3d at 673; *cf. Monsanto Co. v. E.I. Du Pont de Nemours & Co.*, 748 F.3d 1189, 1198 (Fed. Cir. 2014) (reviewing for clear error district court's findings that a party "had made factual misrepresentations of its subjective understanding"). We see no reason to second-guess the Bankruptcy Court's admission that it initially failed to recognize the absence of a deadline for PUCT approval, because there was no mention of any such deadline in Debtors' Approval Motion, the September 19 hearing testimony, or the September 25 letter submitted by Debtors and NextEra.

NextEra contends that it would have been unusual for the Agreement to include a deadline for regulatory approval and that "[a]ccordingly, there was no need for the parties to call attention to the fact that the transaction followed standard market practice." Appellant's Br. at 18. But even assuming NextEra is correct in its description of standard market practices, its argument addresses a different issue than the one before us. NextEra's contention is essentially that the Bankruptcy Court *should have* developed an accurate understanding of the facts in the first instance based on the record that was developed. Our inquiry is more limited, though. The relevant question for our purposes is whether the Bankruptcy Court—justified or not—misapprehended the facts at the time it issued the Approval Order. Absent any indication in the record that the Bankruptcy Court knew that the Merger Agreement did not include a deadline for PUCT approval, we cannot say that the court's findings with regard to its own subjective understanding were clearly erroneous.

3. The Bankruptcy Court's Claimed Error of Law and Decision to Reconsider the Approval Order

Of course, the significance of the Bankruptcy Court's error of fact depends on how the error impacts the underlying legal determination—that is, the permissibility of the Termination Fee under the original terms of the Fee provision. If the factual error was central to the relevant legal calculus, we think it appropriate to deem it a *clear* or *manifest* error warranting reconsideration. If, on the other hand, the factual error had only a tangential impact on the legal determination, the Bankruptcy Court would have abused its discretion in concluding that it was a manifest error. The question then would be whether, setting aside the factual error, the Bankruptcy Court had committed a legal error so indisputable and fundamental that it rose to the level of a manifest error of law.

The legal calculus begins with our decision in *Calpine Corp. v. O'Brien Environmental Energy, Inc. (In re O'Brien Environmental Energy, Inc.) (O'Brien)*, 181 F.3d 527, 532 (3d Cir. 1999), where we held that courts do not have the authority to "create a right to recover from [a] bankruptcy estate where no such right exists under the Bankruptcy Code." As a result, termination fees are subject to the same general standard used for all administrative expenses under 11 U.S.C. § 503, which, in relevant part, permits the payment of post-petition administrative expenses only to the extent that they constitute "the actual, necessary costs and expenses of preserving the estate," 11 U.S.C. § 503(b)(1)(A) (2012). *See O'Brien*, 181 F.3d at 535. In light of this statutory requirement, we rejected application of a business judgment rule, under which a requested termination fee would be approved if the debtor had a good faith belief that the fee would benefit the estate. *O'Brien*, 181 F.3d at 535. "[T]he allowability of break-up fees," we said, instead "depends upon the requesting party's ability to show that the fees [a]re actually necessary to preserve the value of the estate."[4] *Id.*

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[4] We explained that this standard applies to all requests for terminations fees, as long as the claimed right to recover "arose after [the debtor] filed for bankruptcy protection and began marketing its assets for sale." *O'Brien*, 181 F.3d at 532; *see also id.* at 535 (reasoning that there existed no "compelling justification for treating an application for break-up fees and expenses under § 503(b) differently from other applications for

How can a termination fee provide such a benefit to a debtor's estate? In *O'Brien*, we recognized two possible ways. First, we said that "such a benefit could be found if assurance of a break-up fee promoted more competitive bidding, such as by inducing a bid that otherwise would not have been made and without which bidding would have been limited." *Id.* at 537. Second, "if the availability of break-up fees and expenses were to induce a bidder to research the value of the debtor and convert the value to a dollar figure on which other bidders can rely, the bidder may . . . provide[] a benefit to the estate by increasing the likelihood that the price at which the debtor is sold will reflect its true worth." *Id.* A decade after *O'Brien*, we identified a third way a termination fee could preserve the value of an estate: by assuring that a bidder "adhered to its bid rather than abandoning its attempt to purchase . . . in the event that the Bankruptcy Court required an auction for [the] sale" of the relevant asset. *In re Reliant Energy*, 594 F.3d at 207.

It bears emphasis, however, that we have always said these are ways a termination fee *might* confer a benefit on an estate. *See, e.g., O'Brien*, 181 F.3d at 537 (explaining that these were instances "where a benefit could be found" or "may" be found). We have never held that bankruptcy courts must allow fees whenever they find that one of the above features is

administrative expenses"). Thus, it is immaterial that *O'Brien* differed from this case in that the bankruptcy court there "had specifically denied breakup fees as part of the sale process." Dissenting Op. at 4. Here, like in *O'Brien*, NextEra's right to recover the Termination Fee arose after Debtors had initiated the bankruptcy proceedings. *O'Brien* therefore applies.

present. Rather, it is ultimately within a bankruptcy court's discretion to approve or deny a termination fee based on the totality of the circumstances of the particular case. *See In re Reliant Energy*, 594 F.3d at 205. Exercising that discretion and taking into account all of the relevant circumstances, the bankruptcy court must make what is ultimately a judgment call about whether the proposed fee's potential benefits to the estate outweigh any potential harms, such that the fee is "actually necessary to preserve the value of the estate," *O'Brien*, 181 F.3d at 535. *See In re Reliant Energy*, 594 F.3d at 208 (holding that the bankruptcy court did not abuse its discretion in denying a proposed fee when the "potential harm to the estate the break-up fee would cause by deterring other bidders from entering the bid process outweighed" the benefit the fee might have conferred by securing a bidder's adherence to its bid).

Here, the Bankruptcy Court's error of fact means that the Bankruptcy Court had overlooked a significant potential harm when it initially approved the Termination Fee as drafted by the parties. The Bankruptcy Court failed to initially recognize that Debtors had essentially gambled on PUCT approval. If the PUCT declined to approve the merger, Debtors would owe the $275 million Termination Fee unless NextEra took the initiative to terminate the Agreement first. But the Bankruptcy Court did not appreciate that, since the Merger Agreement included no deadline by which PUCT approval had to be obtained before the deal would dissolve on its own, NextEra had little incentive to terminate the agreement first on its own volition. Instead, NextEra could simply wait for Debtors to terminate, which would trigger payment of the $275 million Fee. Under those circumstances, the Termination Fee would provide no benefit to estates. It would in fact be detrimental: not only would the estates be out $275 million, but Debtors would be back to square one and, with the passage of time, in a worse off position—desperate to accept an alternative transaction.

Due to its factual error, the Bankruptcy Court failed to weigh this potential harm to the estates against the potential benefits. There is no question that the Termination Fee conferred some benefit by inducing NextEra to make the highest bid that Debtors received. *See O'Brien*, 181 F.3d at 537. But we cannot look at that benefit in a vacuum. Unlike the circumstances contemplated in *O'Brien*, NextEra's bid was not designed to provide a competitive benefit. And although the Termination Fee was intended to induce NextEra to adhere to its bid, *see In re Reliant Energy*, 594 F.3d at 207, this benefit was potentially negated by the perverse incentive that could result. Indeed, the Fee provision would potentially induce NextEra to adhere to its bid in a particular way. It would allow NextEra to hold firm against any burdensome conditions. Rather than negotiate on its "deal killer" conditions, NextEra could remain uncompromising and pursue appeals until Debtors were forced to terminate the Agreement out of financial necessity.

Looking at the totality of the circumstances, we do not think the Bankruptcy Court abused its discretion in concluding that a scenario where "Debtors were forced to terminate the Merger Agreement . . .

because NextEra had the Debtors in a corner . . . would have been predictable" had the court possessed a complete understanding when it initially approved the Termination Fee.[5] With an accurate view of the facts, one would have seen that, by inducing NextEra's bid, the Termination Fee *might eventually* maximize the value of the estates—assuming the deal closed. This the Bankruptcy Court recognized at the outset. But the Fee also created substantial financial risk if the PUCT did not approve the transaction and, as a result, closing did not take place. When it initially approved the Fee, the Bankruptcy Court did not fully appreciate this risk. A court also could have, in exercising its discretion, determined that the Fee provision would itself make closing less likely to occur, because if the PUCT imposed conditions that NextEra did not like, NextEra would have less reason to compromise and could instead simply wait for the Debtors to terminate and trigger payment of the $275 million Fee. This problem the Bankruptcy Court, by its own admission, completely missed when it approved the Fee.

In sum, the Termination Fee provision had the potential of providing a large benefit to the estates, but it also had the possibility to be disastrous. Once

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[5] Contrary to the Dissent's suggestions, *see* Dissenting Op. at 2, the Bankruptcy Court, in its opinion, stated explicitly that it was not using hindsight when reconsidering the issue of whether the Termination Fee was allowable, and we see nothing in the record or the Bankruptcy Court's reasoning that contradicts this disclaimer. We therefore need not reach the question of whether it is permissible for a court to act based on hindsight when considering a proposed termination fee's compliance with *O'Brien*.

it had a complete understanding, the Bankruptcy Court properly weighed the various considerations and determined that the potential benefit was outweighed by the harm that would result under predictable circumstances. In other words, the risk was so great that the Fee was not necessary to preserve the value of Debtors' estates. Having made such a determination, the Bankruptcy Court did not abuse its discretion in denying the Fee in part.[6]

The Bankruptcy Court also did not abuse its discretion in concluding that its previous factual error was a *clear* or *manifest* one that justified the partial denial of the Fee on a motion for reconsideration.[7] As we have already explained, the error of fact was obvious and indisputable. Indeed, NextEra concedes that the Merger Agreement did not include a date by which PUCT approval had to be obtained. The factual error also had a substantial

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[6] According to the Dissent, it was error for the Bankruptcy Court to "engage[] in an after-the-fact assessment of benefit to the estates as if no initial approval had been granted." Dissenting Op. at 4. But an "after-the-fact assessment" is inevitable in the context of a motion for reconsideration, and the court did not act "as if no initial approval had been granted." Rather, as we have said, it subjected itself to the heightened Rule 59(e) standard.

[7] We therefore need not reach the question of whether the court also committed a manifest error of law and do not hold, as the Bankruptcy Court did, that "[p]ayment of a termination or break-up fee when a court (or regulatory body) declines to approve the related transaction can[] [never] provide an actual benefit to a debtor's estate sufficient to satisfy the *O'Brien* standard," App. 43. We hold only that the Bankruptcy Court did not abuse its discretion in concluding that, in this particular case, the risk of harm was so great that the Termination Fee was not necessary to preserve the value of Debtors' estates.

impact on the Bankruptcy Court's *O'Brien* analysis, as the above discussion illustrates. The error led the court to fundamentally misjudge the likelihood that the Termination Fee would be harmful to the estates.

To be sure, we have said that when a court reconsiders a prior decision, it must "take appropriate steps so that the parties are not prejudiced by reliance on the prior ruling." *Roberts*, 826 F.3d at 126 (quoting *Williams*, 130 F.3d at 573). Here, NextEra purportedly spent a significant amount of money in its attempt to obtain PUCT approval. As NextEra acknowledges, however, it has an alternative way to seek reimbursement for those expenses: its Application for Allowance and Payment of Administrative Expenses in the amount of nearly $60 million is currently pending before the Bankruptcy Court. We are also mindful of the fact that NextEra believed for roughly a year that it would be entitled to payment of the Termination Fee if Debtors terminated the Agreement due to the PUCT's declining to approve the merger, and that NextEra formed expectations accordingly. But we think general principles of reliance were adequately protected in this case by the heightened Rule 59(e) standard that the Bankruptcy Court employed.

That the heightened standard was satisfied here is in and of itself proof that this case is anomalous. Reconsideration was warranted only because the Bankruptcy Court failed to discern a critical fact that profoundly altered the underlying legal determination. If we were presented with anything less, our conclusion may very well have been different. Reconsideration remains a form of relief generally reserved for "extraordinary circumstances."

In re Pharmacy Benefit Managers Antitrust Litig., 582 F.3d 432, 439 (3d Cir. 2009) (quoting *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988)). And yet, it is also a form of relief generally left to the discretion of lower courts. That, of course, is no accident. It is a product of our recognition that some "fact-bound issues . . . are ill-suited for appellate rule-making," *United States v. Tomko*, 562 F.3d 558, 565 (3d Cir. 2009) (en banc), and that the matters under our review have often been "decided by someone who is thought to have a better vantage point than we on the Court of Appeals," *id.* (quoting *United States v. Mitchell*, 365 F.3d 215, 234 (3d Cir. 2004)). *See generally id.* at 564–66 (discussing principles underlying the abuse of discretion standard in both civil and criminal cases). In this case, we have little doubt that the Bankruptcy Court was "better positioned . . . to decide the issue[s] in question." *McLane Co., Inc. v. EEOC*, 137 S. Ct. 1159, 1166–67 (2017) (quoting *Pierce v. Underwood*, 487 U.S. 552, 560 (1988)). Having examined the record and the Bankruptcy Court's reasoning closely, we cannot say that it abused its discretion in taking the unusual step of reconsidering its prior decision.

IV. CONCLUSION

For the foregoing reasons, we will affirm the Bankruptcy Court's Order granting Elliott's motion for reconsideration.

In re: ENERGY FUTURE HOLDINGS CORP.

No. 18-1109

RENDELL, Circuit Judge, dissenting:

While I am reluctant to dissent because I have no doubt that the Bankruptcy Court carefully considered its decision to reverse course and disallow the previously approved Termination Fee, two significant aspects of this case concern me: first, the grant of a delayed reconsideration motion when there had been no clear error of fact or law, and, second, the flawed analysis of the benefit to the estates as though there had been no pre-approval of the Fee as part of the Merger Agreement. I conclude that the Bankruptcy Court abused its discretion in granting reconsideration, and, therefore, I disagree with the Majority's affirmance of the Bankruptcy Court's order.

Admittedly, the facts of the case presented a difficult situation for the Bankruptcy Court. The Next Era deal would have brought $9.5 billion to the estates. When that deal failed to obtain regulatory approval, the Debtors were forced to terminate and seek a new deal, which would bring "materially less" to the estates.[1] The Bankruptcy Court was thus faced with the prospect of further depleting the estates by payment of the $275 million Termination Fee.[2]

[1] Elliott Br. at 19.

[2] I submit that the fact that the Debtors were left to accept a less favorable deal is the real culprit. Had the Debtors terminated to pursue a higher and better offer after regulatory approval of the Next Era deal was denied, there would have been no reconsideration of the initial approval of the fee.

Nonetheless, the reconsideration of the previously approved Fee was uncalled for. The Bankruptcy Court may have "misapprehended" that the Fee would be payable in the situation that developed, but this was no legal or factual error. It was simply a failure to appreciate a particular set of potential consequences which became apparent in the light of day. But hindsight cannot justify nullifying a material term of the deal that was struck with all of the facts on the table. Here, the parties fully appreciated the potential scenarios at the time the Fee was initially approved. Indeed, when Elliott filed the reconsideration motion, the Debtors—who had every incentive to cry foul as to the initial deal and avoid paying the Fee—opposed Elliott's motion, calling the motion "Machiavellian."[3]

The Bankruptcy Court seems to say that had it appreciated this eventuality, it would not have approved the Fee, but this defies logic and common sense. The Court had considered the Fee and its importance to the deal extensively in its initial approval of it as part of the Merger Agreement. The many benefits to the estates were apparent to the Bankruptcy Court. In particular, the Court stated, "I think the evidence overwhelmingly indicates that a breakup fee was necessary to induce NextEra to make a bid, and to move forward with a merger agreement,"[4] and "[i]t's clear that the termination fee

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Indeed, that would have been a common scenario that the Fee guarded against. Thus, the issue of the denial of regulatory approval or an end date for approval is a red herring.

[3] A. 1206.

[4] A. 578.

went up at the end of the process but it went up primarily, I believe, because they walked away from the match right, and the combination of match right, lower breakup fee was replaced with no match right and a higher breakup fee."[5] With regard to the size of the Fee, the Court concluded, "[1.47%] is an appropriate number for a case of this size"—that is, $18.7 billion—and "[t]he evidence is clear that this is on the low end of utility-type transactions [and] on the low end of this Court's experience with regard to breakup fees that I have approved numerous times."[6] Clearly, the Fee was a necessary and integral aspect of the deal. Indeed, NextEra would have "walked" without it.[7] The Debtors urged the Court to approve the Fee as part of the deal, lest they have to go "back to the drawing board." [8] The Bankruptcy Court engaged in a thoughtful assessment of the Fee's value to the deal.[9] Thus, there was no legal flaw in the original approval, let alone a clear error. Therefore, reconsideration was unwarranted.

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[5] A. 579.

[6] A. 578.

[7] A. 483-85.

[8] A. 549.

[9] Although, as explained below, the controlling precedent, *O'Brien* and *Reliant*, involved consideration of the fee when presented later as a cost of administration, rather than when pre-approved as part of a sale agreement, the "benefit" or "value" of the fee is the standard for both. *See, e.g.*, *In re Philadelphia Newspapers, LLC*, No. 09-11204, 2009 WL 3242292 (Bankr. E.D. Pa. Oct. 8, 2009), *rev'd in part on other grounds*, 418 B.R. 548 (E.D. Pa. 2009) (using *O'Brien* to analyze whether to authorize a breakup fee pre-auction).

But the Bankruptcy Court's reasoning suffers from another infirmity. It engaged in an after-the-fact assessment of benefit to the estates as if no initial approval had been granted, citing to *O'Brien* and *Reliant*. The Court reasoned that the Fee was not an allowable administrative expense under 11 U.S.C. § 503(b)(1)(A) because "[p]ayment of a termination or break-up fee when a court (or regulatory body) declines to approve the related transaction cannot provide an actual benefit to a debtor's estate sufficient to satisfy the *O'Brien* standard."[10] The Court considered what *did* happen and conducted an *O'Brien* analysis anew. But this after-the-fact assessment of benefit was improper because the Fee had initially been approved as part of the Merger Agreement.

O'Brien and *Reliant* are distinguishable because, in those cases, the court had specifically denied breakup fees as part of the sale process. The issue before us involved the denial of the later, post-sale requests for the fee by the unsuccessful bidders as an administrative expense under § 503.[11] As the Majority notes here, in the Approval Order the Bankruptcy Court had already authorized the

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[10] A. 43.

[11] It is interesting to note that in both *O'Brien* and *Reliant*, the bankruptcy courts did not dismiss the unsuccessful bidders' later requests out-of-hand but seriously considered the role their bids had played in moving the sale process forward when assessing the value to the estates. The Bankruptcy Court's reasoning here, however, focused on later events, namely the denial of regulatory approval, as depriving the bid of value. I suggest this was off target, even if it had not been an abuse of discretion to entertain a motion for reconsideration.

Debtors to pay the Fee as an allowable administrative expense that preserved value for the estates to the extent it became due and payable under the Merger Agreement.[12]

The United States Court of Appeals for the Fifth Circuit has noted this tension in *In re ASARCO, L.L.C.*, 650 F.3d 593 (5th Cir. 2011). There, the Court observed that "[t]he unsuccessful bidders in *O'Brien* and *Reliant Energy* sought payment for expenses incurred without the court's pre-approval for reimbursement, and thus section 503 was the proper channel for requesting payment." *Id.* at 602. Here, due to the previous approval, the Bankruptcy Court's analysis of the after-the-fact benefit to the estates—or lack thereof—was misplaced. The Fee had been properly approved as part of the Merger Agreement, and there was no issue of allowance after the fact of an administrative expense. All that remained was to allocate and pay the previously approved Fee. There is no place in our precedent for a "double" § 503 analysis, where a party could seek approval of a fee as a term of a deal and then get another bite at the *O'Brien* apple, urging there was no value, if the deal sours. And yet that is what the Bankruptcy Court did here.

The reconsideration of a previously approved term of a deal, based on a bankruptcy court's failure to appreciate all of the potential ramifications of the term, sets a troubling—if not dangerous—precedent. Parties to commercial transactions present the terms of the deal to the court for approval and, once approved, are entitled to rely on the court's order,

[12] Majority Op. at 10.

which is based on a thoughtful, well-reasoned analysis. Here, that should have been the guiding principle, and the grant of reconsideration so as to nullify the previously approved Fee when there was no clear error of fact or law was an abuse of discretion.

APPENDIX B

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	§	Chapter 11
ENERGY FUTURE HOLDINGS CORP., ET AL	§	Case No.: 14-10979 (CSS)
Debtors.	§	Jointly Administered
	§	Re: D.I. 9584, 11636, 11649, 11666, 11668, 11669, 11708, 11712, 11716, 11879, 11905, 11998
ENERGY FUTURE HOLDINGS CORP., ET AL.,	§	Adv. Pro. No. 17-50942 (CSS)
Plaintiffs and Intervenors	§	Re: Adv. Pro. D.I. 1, 2, 11, 12, 21, 41, 50, 79
v.	§	
NEXTERA ENERGY, INC.,	§	
Defendant.	§	

ORDER

Upon the motion (the "Motion to Reconsider") of the Elliott Associates, L.P., Elliott International, L.P., and The Liverpool Limited Partnership to reconsider, in part, the *Order (A) Authorizing Entry Into Merger Agreement, (B) Approving Termination Fee, and (C) Authorizing Entry Into and Performance Under Plan Support Agreement* [D.I. 9584] (the "Termination Fee Order"); and the Court having found that it has jurisdiction to consider the Motion to Reconsider and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; and the

Court having found that consideration of the Motion to Reconsider and the relief requested therein is a core proceeding pursuant to 28 U.S.C. § 157(b); and the Court having found that venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and the Court having found that the due and proper notice of the Motion to Reconsider was provided and that such notice was adequate and appropriate under the particular circumstances; and the Court having found that it has the judicial power to enter a final order; and the Court having held a hearing to consider the relief requested in the Motion (the "Hearing"); and upon consideration of the stipulated record[1] and all proceedings had before the Court at the Hearing; and the Court having found that the relief requested in the Motion to Reconsider is in the best interests of the Debtors' estates, their creditors and other parties in interest; and the Court having determined, for the reasons set forth in the Opinion, dated October 3, 2017 [D.I. 11998] (the "Opinion"), that the legal and factual bases set forth in the Motion to Reconsider establish just cause for the relief granted herein; and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED THAT:

1. The Motion to Reconsider is GRANTED for the reasons set forth in the Opinion.

2. All objections to the Motion to Reconsider that have not been withdrawn, waived, settled or specifically addressed in the Opinion or this Order,

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[1] Pursuant to the Stipulation and Order Regarding Elliott's Motion to Reconsider, the parties have stipulated to the record with regard to the Motion to Reconsider. [D.I. 11716, ¶7(a)-(z)].

and all reservations of rights included in such objections, are specifically overruled in all respects on the merits.

3. The Termination Fee Order shall be modified to correct clear errors of law and fact and to prevent manifest injustice, which would have resulted from the Court's misapprehension of facts and erroneous application of law set forth in *In re O'Brien Environmental Energy, Inc.*, 181 F.3d 527 (3d Cir. 1999) and section 503(b) of the Bankruptcy Code.

4. The Termination Fee Order must be modified because it approved a provision in the Merger Agreement [2] that authorized the Debtors to pay NextEra the Termination Fee in circumstances in which the payment was not a necessary expense and the Debtors' estates would not receive an actual benefit, which is a manifest error of law.

5. The Termination Fee Order is hereby amended to delete in its entirety the language at paragraph 4 of such order and to replace it with the following:

> The Termination Fee, upon the terms and conditions of the Merger Agreement, is approved in part and disallowed in part. The Termination Fee is disallowed in the event that the PUCT declines to approve the transaction contemplated in the Merger Agreement and, as a result, the Merger Agreement is terminated, regardless of whether the Debtors or NextEra subsequently terminates the Merger Agreement. In those circumstances, the EFH/EFIH Debtors are not authorized to pay the Termination Fee as a

[2] Undefined terms used herein have the meaning set forth in the Opinion.

qualified administrative expense or otherwise. The Termination Fee is otherwise approved. Subject to the forgoing ruling, the EFH/EFIH Debtors are authorized and directed to pay the Termination Fee as an allowed administrative expense to the extent it becomes due and payable pursuant to those terms and conditions of the Merger Agreement that are approved in this Order, at the time and in the manner provided for in the Merger Agreement and this Order, without any further proceedings before, or order of, the Court; provided, however, that in the event that the Termination Fee becomes payable in accordance with section 8.5(b) of the Merger Agreement and with this Order, the EFH Debtors, on the one hand, and the EFIH Debtors, on the other hand, either will agree on the allocation of the Termination Fee between their respective estates (and seek Bankruptcy Court approval of such allocation) or each estate reserves the right to request that the Bankruptcy Court determine the appropriate allocation of the Termination Fee between the EFH Debtors and the EFIH Debtors; provided, further, however that the Termination Fee shall be payable as provided in the Merger Agreement and this Order and that both the EFH Debtors and the EFIH Debtors agree that any such payment of the Termination Fee, by either or both estates, shall be without prejudice to the rights of each estate to seek a subsequent Bankruptcy Court ruling regarding the appropriate allocation of the paid Termination Fee between the EFH Debtors and the EFIH Debtors.

6. The *Application of NextEra Energy, Inc.for Payment of Administrative Claim* [D.I. 11649] is **DENIED**.

7. All further discovery, briefing, proceedings, and other actions regarding the Debtors' *First Amended Adversary Complaint* [Adv. No. 17-50942, D.I. 41] are stayed pending further order of the Court.

8. Nothing in this Order shall preclude NextEra from filing a request for allowance of an administrative claim (on a ground other than the grounds on which the Termination Fee was denied in the Opinion and this Order) and any person's right to object to any such request.

9. No further proceedings with respect to the Termination Fee are contemplated or required and the Termination Fee Order and this Order are final orders, effective as of the date hereof, for purposes of 28 U.S.C. § 158. In the event that an appellate court determines that the Termination Fee Order and/or this Order are interlocutory, NextEra is hereby granted leave to appeal the Termination Fee Order and/or this Order pursuant to Federal Rule of Bankruptcy Procedure 8004.

10. Notwithstanding the possible applicability of Bankruptcy Rules 6004(a), 6004(h), 7062, 9014, or otherwise, the terms and condition of this Order shall be effective and enforceable immediately upon entry.

11. The Court shall retain jurisdiction over any matter or disputes arising from or relating to the interpretation, implementation or enforcement of this Order.

/s/Christopher S. Sontchi
Christopher S. Sontchi
United States Bankruptcy Judge

Date: October 18, 2017

APPENDIX C

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	§	Chapter 11
ENERGY FUTURE HOLDINGS CORP., ET AL.,	§	Case No.: 14-10979 (CSS)
Debtors.	§	(Jointly Administered)
	§	Docket Nos.: 9584, 11636
	§	

OPINION

Dated: October 3, 2017

Sontchi, J. *<u>/s/Christopher J. Sontchi</u>*

INTRODUCTION

Before the Court is a motion for reconsideration of an order approving, among other things, a Termination Fee[1] in the amount of $275 million. The Court is taking the extraordinary step of reconsidering its order entered over one year ago because its approval of the Termination Fee was based upon a fundamental misapprehension of critical facts. The Court's misunderstanding was based upon imprecise and incorrect testimony by the Debtors' witness, incomplete responses by Debtors' counsel to questions by the Court and conspicuous and unhelpful silence by the beneficiary of the Termination Fee, NextEra. However, the ultimate

[1] Undefined terms used in the Introduction have the meaning set forth below.

responsibility for the Court's mistake lies with the Court itself. The Court simply missed the critical nuance between when the Termination Fee would be payable and when it would not be.

In any event, had the Court properly understood the facts it would not have approved the payment of the Termination Fee under the present circumstances nor could it. Viewed at the time the Termination Fee was approved, the fee did not satisfy the *O'Brien* standard for payment of such fees because there could not be any actual benefit to the Debtors' estate by payment of the fee. That has been borne out by the actual circumstances at present. Indeed, payment of the Termination Fee at this time would be extremely harmful to the Debtors' estates.

The Court's misapprehension of the facts led to an incorrect application of the legal standard. In short, the Court made a manifest error of fact and law. As such, the Court must take the extraordinary step, which it does not do lightly, of reconsidering an order it entered over a year ago and upon which parties have relied.

JURISDICTION

The Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334. Venue in the United States Bankruptcy Court for the District of Delaware is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 11 U.S.C. § 157(b)(2)(A), (B), (N), and (O). The Court has the judicial power to enter a final order.

STATEMENT OF FACTS[2]

Even a concise history of this 3½ year old Chapter 11 case would take hundreds of pages. Thankfully, the issue before the Court is quite narrow and the relevant facts can be set forth with some brevity.

In April 2016, after an extensive and strategic marketing process and various other efforts, the Debtors engaged in discussions with NextEra Energy, Inc. ("NextEra") for the sale of the Debtors' economic interest in Oncor Electric Delivery Company LLC ("Oncor").

On July 29, 2016, certain of the Debtors, NextEra, and EFH Merger Co., LLC ("Merger Sub")—a newly formed subsidiary of NextEra—executed definitive documentation to govern this transaction, including an Agreement and Plan of Merger among Energy Future Holdings Corp. ("EFH"), Energy Future Intermediate Holding Company LLC ("EFIH"), NextEra, and Merger Sub, dated July 29, 2016 (the "Merger Agreement"). The Merger Agreement, as amended, contemplated a merger of EFH with and into Merger Sub, whereby EFH would have become a wholly-owned subsidiary of NextEra with an approximately $18.7 billion implied Oncor total enterprise value. Included in the Merger Agreement was a "Termination Fee" in the amount of $275 million in favor of NextEra (the "Termination Fee").

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[2] Pursuant to the Stipulation and Order Regarding Elliott's Motion to Reconsider, the parties have stipulated to the record with regard to the Motion to Reconsider. [D.I. 11716, ¶7(a)-(z)]. All statements of fact contained herein are drawn from the stipulated record.

Also on July 29, 2016, EFH, EFIH, EFIH Finance Inc., certain direct and indirect subsidiaries of EFH, and NextEra entered into a Plan Support Agreement (as modified, amended or supplemented from time to time, the "Plan Support Agreement") in support of the Amended Joint Plan of Reorganization of Energy Future Holdings Corp. et al., pursuant to Chapter 11 of the Bankruptcy Code, as modified and filed with the Bankruptcy Court on August 5, 2016 [D.I. 9199] (as modified, amended or supplemented from time to time, the "E-Side Plan"). By motion dated August 3, 2016 (the "Approval Motion"), the Debtors sought approval of their entry into the Plan Support Agreement and the Merger Agreement (collectively, the "NextEra Transaction").[3]

Through the Approval Motion, the Debtors sought approval of the Merger Agreement, including the Termination Fee. The Debtors supported the Approval Motion with declarations by two members of the Debtors' advisory team, William Hiltz and David Ying.[4] The supporting declarations included

[3] *See Motion Of The EFH/EFIH Debtors For Order (A) Authorizing Entry Into Merger Agreement, (B) Approving Termination Fee, And (C) Authorizing Entry Into And Performance Under Plan Support Agreement* [D.I. 9190].

[4] *See Declaration of William O. Hiltz in Support of the Motion of the EFH/EFIH Debtors for Order (A) Authorizing Entry into Merger Agreement, (B) Approving Termination Fee, and (C) Authorizing Entry into and Performance Under Plan Support Agreement* [D.I. 9191] ("Hiltz Declaration"); *Declaration of David Ying in Support of the Motion of the EFH/EFIH Debtors for Order (A) Authorizing Entry into Merger Agreement, (B) Approving Termination Fee, and (C) Authorizing Entry into and Performance Under Plan Support Agreement* [D.I. 9192] ("Ying Declaration").

one identical statement as to when Termination Fee would be payable—"Upon Court approval of the Merger Agreement, EFH Corp. and EFIH are liable for the Termination Fee, in the amount of $275 million, as an allowed administrative expense claim, in the event of termination of the Merger Agreement." [5] The Approval Motion repeated the above statement contained in the declarations and included two additional sentences:

> The Termination Fee is not payable in the event of, among other things, certain terminations resulting from breaches by NextEra or Merger Subsidiary or following a termination by NextEra at the Termination Date (as defined in the Merger Agreement) where PUCT approval is the only closing condition not satisfied.
>
> ***
>
> If the Debtors terminate the Merger Agreement following entry of the Approval Order to accept another proposal, and the transaction contemplated by such other proposal is consummated, the Debtors would owe the $275 million Termination Fee.[6]

Several creditors objected to the Approval Motion, including Fidelity Management & Research Company; the Estate of George Fenicle, David William Fahy, and John H. Jones (the "Asbestos Objectors"); American Stock Transfer & Trust Company, LLC, as successor trustee to The Bank of New York Mellon Trust Company, N.A. (in such

[5] Hiltz Declaration at ¶19; Ying Declaration at ¶10.

[6] Hiltz Decl. ¶ 19; Ying Decl. ¶ 10.

capacity, the "EFH Indenture Trustee"); and Contrarian Capital Management, LLC, which joined in the briefs of the EFH Indenture Trustee.[7] None of these objections nor the Debtors' reply[8] focused the Court on a critical fact: the Merger Agreement did not set a date by which approval by the Public Utility Commission of Texas ("PUCT") had to be obtained. Consequently, no party alerted the Court to what is now alleged by movants: that *if* the PUCT did not approve the NextEra Transaction, the Debtors could eventually be required to terminate the Merger Agreement and trigger the Termination Fee unless NextEra terminated first of its own volition.

By the time of the hearing on September 19, 2016, all of the objecting creditors, except the Asbestos Objectors, had withdrawn their objections. Although the Asbestos Objectors pressed their objection to the Termination Fee, they focused primarily on the argument that the Termination Fee violated due process.[9] The Asbestos Objectors also objected to the Termination Fee under the Third Circuit's holding in *O'Brien*[10] but did not argue that the fee was impermissible because it could be payable when the Debtors had received no actual benefit.[11]

The testimony at the September 19 hearing focused on the reasonableness of the Termination Fee,

[7] D.I. 9397-99 and 9402.

[8] D.I. 9536-37.

[9] 9/19/16 Hr'g Tr. at 111:7–13, 114:4–116:4.

[10] *In re O'Brien Envtl. Energy, Inc.*, 181 F.3d 527 (3d Cir. 1999).

[11] 9/19/16 Hr'g Tr. at 111:21–114:3.

stating that the size of the fee was "market" in the witnesses' view. The witnesses described generally the circumstances in which the Termination Fee would be triggered, with the Debtors' investment banker emphasizing that any fee would be paid upon EFH entering into "another transaction." [12] No mention was made of any instance when the Termination Fee could be triggered in the absence of a higher or better alternative transaction.

Mr. Hiltz testified that if the PUCT were not to approve the transaction and the Debtors subsequently confirmed a different plan, the Termination Fee would be payable.

> THE COURT: [I]f the Court confirms the plan, and by that I mean the one on the table here, or the NextEra deal, and that plan does not consummate because of a failure to achieve regulatory approval, is the break-up fee payable?
>
> MR. HILTZ: If the Debtor enters into another transaction, the answer is yes.
>
> The COURT: But if this transaction simply falls apart because you don't get regulatory approval from the Public Utility Commission?
>
> MR. HILTZ: Well, again, I think if the Debtor enters into another transaction including a

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[12] *See id.* at 76:12–17 (affirmation by Debtors' banker that the termination fee will be paid "in the unlikely event that the deal isn't consummated and EFH enters into another transaction"); *see also id.* at 28:9–11 (proffer of EFH Treasurer Anthony Horton expressing his "confiden[ce] that the proposed transaction with NextEra will close and belie[f that] there's a low possibility that the termination fee will be triggered").

reorganization involving its own creditors … it would be payable.

THE COURT: [B]ecause if this plan gets confirmed for Debtors—[and] not [because of] anything the Debtors do wrong, they don't get the regulatory approval they need—this falls apart and a year and a half from now, they confirm a different plan that's not even a sale plan, say it's a standalone plan, that break-up fee would be payable?

MR. HILTZ: I believe so.[13]

However, when the Court inquired directly of Debtors' counsel, Debtors' counsel was unclear on the issue.

THE COURT: I actually have a question. . . . And this goes to when the break-up fee is payable in the event there is a regulatory problem.

. . .

THE COURT: So, I read [Sections 8.5(b) and 8.2(a)] to be is—and maybe—is this your understanding that the plan gets confirmed, they go to the PUCT, the PUCT shuts it down, and NextEra—or it sets terms on it that NextEra doesn't like, and NextEra terminates, that the break-up fee is not payable?

. . .

MR. HUSNICK: . . . [Y]ou're 100 percent right about if the PUCT denies approval.

. . .

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[13] *Id.* at 78:3-23.

THE COURT: So if they simply disapprove and the parent—and NextEra walks, no break-up fee?

MR. HUSNICK: Correct.[14]

The initial response stated there would be no break-up fee if "NextEra walks"—but did not specify that if NextEra did not walk after a PUCT denial, the Termination Fee could be payable when the Debtors were forced to terminate. Shortly after that exchange, counsel for the Debtors then made the following statement to the Court to clarify the earlier statements:

MR. HUSNICK: Your Honor, the second thing I wanted to clarify was just the break fee. I think we are on the same page now about when that gets paid, but just to cover it one more time, it's an incredibly detailed provision. Suffice to say there's no break-up fee if the PUC [sic] just denies—outright denies approval.[15]

After hearing closing statements, the Court overruled the remaining objection and approved the Merger Agreement, including the Termination Fee.[16] While noting that the Termination Fee was "large," the Court found it "an appropriate number for a case of this size."[17] It also found that the amount was "supported by the market" and that the evidence

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[14] 9/19/16 Hr'g Tr. at 82:6–84:10.

[15] *Id*. at 90:10–15.

[16] *Id*. at 119-24.

[17] *Id*. at 121:4–19.

indicated that the fee was "necessary to induce NextEra to make a bid."[18]

Following the hearing, the Court entered the Order granting the Approval Motion, including approval of the Termination Fee (the "Termination Fee Order").[19] The Termination Fee Order did not include a finding regarding the actual benefit to the Debtors' estates from the imposition of a $275 million Termination Fee. The Court did not limit or preclude assertion of the Termination Fee by NextEra if the PUCT denied the change-in-control application submitted by NextEra.

On September 22, 2016, three days after the record on the Approval Motion was closed and the Termination Fee Order was entered, the PUCT held a hearing at which the Commissioners expressed concerns regarding the Debtors' potential liability for the Termination Fee and the position in which it placed the Commissioners:

> COMM: [T]his merger agreement does something much more, and that is it appears to be an effort to really tie the Commission's hands in the proceeding.
>
> What they propose is that . . . if I read [the Merger Agreement] correctly, if the Commission rejects the transaction in its entirety, is not in the public interest subject to some caveats, there's no termination fee.
>
> If, on the other hand, the Commission purports to approve it but with what they call "burdens of

[18] *Id.*

[19] D.I. 9584.

> condition" (sic) . . . they can walk and get paid $275 million. Now that's an extraordinary requirement.[20]

To Commissioner Anderson, the Termination Fee would be paid if the PUCT imposed "burdensome conditions," not if the PUCT rejected the application. So, it really was an "improper attempt" to constrain the PUCT in the exercise of its statutory duties under Texas law,[21] a view seemingly shared by Commissioner Nelson.[22]

Following Commissioner Anderson's remarks, on September 25, counsel for the Debtors and NextEra submitted a joint letter to the Court seeking to clarify when the Termination Fee would be paid (the "September 25 Letter").[23] Since this letter was submitted after the Termination Fee Order, it was not part of the record supporting the Termination Fee Order's entry. The September 25 Letter starts by stating that NextEra would not receive the Termination Fee if NextEra terminated the Merger Agreement because "the Commission either approves the merger agreement with 'burdensome conditions' (as defined in the merger agreement) or does not approve the merger agreement transaction."[24]

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[20] Sept. 22, 2016 PUCT Hr'g Tr. at 88–89 (comments of Commissioner Anderson).

[21] *Id.* at 89:22–25.

[22] *Id.* at 94:23–95:4.

[23] D.I. 9655.

[24] *Id.*

After adding a paragraph to clarify that representation, the September 25 Letter then stated:

> In other words, the $275 million termination fee *is triggered* if EFH and/or EFIH terminate the merger agreement as a consequence of the Commission either not approving the merger agreement transaction or approving the merger transaction with the imposition of a burdensome condition.[25]

And the next two sentences seek to assure the Court that the payment of the Termination Fee is unlikely because:

> In order for EFH and/or EFIH to pursue an alternative transaction, EFH and EFIH believe they would only terminate in such a situation if they had an alternative proposal to pursue. The termination fee is not triggered if, under the same circumstances, NextEra Energy terminates the merger agreement instead of EFH and/or EFIH.[26]

The September 25 Letter suggests that the Termination Fee would be triggered only if the Debtors opted to "pursue" an "alternative proposal." There is, however, no definition of "alternative proposal" in the Merger Agreement. Nor is there a fixed definition for "alternative transaction," which the Merger Agreement simply describes as any transaction "(including any transaction or proceeding that permits the E-Side Debtors that are the direct or indirect owners of Oncor Holdings to emerge from the Chapter 11 Cases) pursuant to which neither

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[25] *Id.*

[26] *Id.*

[NextEra] nor any of its Affiliates will obtain direct or indirect ownership of 100% of Oncor Holdings and Oncor Holdings' approximately 80% equity interest in Oncor."[27] But the payment of the Termination Fee did not stop with transactions that the Debtors would "pursue" to emerge from their Chapter 11 cases because the Termination Fee was also payable in a Chapter 7 liquidation or a liquidating Chapter 11 plan for EFIH.[28]

At a previously scheduled September 26, 2016 hearing, the Court departed from the agenda and made a statement relating to the comments of Commissioner Anderson. The Court recognized the "unusual and troubling" pressure that the Termination Fee placed on both the PUCT and the Court.[29] But the Court noted the clarification provided by the September 25 Letter with regard to whether NextEra would seek payment of the Termination Fee in the event NextEra Terminated the Merger Agreement.

> Late last evening, however, EFH and NextEra sent a joint letter to the Court regarding the termination fee. In that letter the parties clarified their position with regard to the termination fee. More specifically, the parties state that it is their view that NextEra is not entitled to a termination fee under the merger agreement if NextEra terminates the merger agreement because the PUCT either approves the merger agreement

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[27] *See* Merger Agreement, § 8.5(b).

[28] *See id.* §§ 8.3(d), 8.4(g), 8.5(b).

[29] 9/26/16 Hr'g Tr. at 12:20-13:8.

> transaction with burdensome conditions or does not approve the merger agreement transaction.
>
> In addition, the parties clarified that in any event, NextEra will not seek to collect any portion of the termination fee contemplated by the merger agreement in the event NextEra terminates the merger agreement and the circumstances just described by the Court and more specifically detailed in the letter.[30]

Again, however, no one brought to the Court's attention that NextEra would never be required to terminate and could simply wait for mounting financial pressures to force the Debtors to do so instead.[31]

On October 31, 2016, NextEra and Oncor submitted their joint change of control application for the PUCT's approval ("Joint Application"). The Joint Application asked that the PUCT drop two key features of a "ring-fence" the regulator had erected around Oncor in connection with the 2007 leveraged buyout: first, the requirement that Oncor maintain an independent Board of Directors; and second, certain minority shareholders' ability to veto dividends. NextEra was unwilling to concede the governance terms, going so far as to call them "deal killers."

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[30] *Id*. at 13:9–24.

[31] It is important to note as well that the bulk of the Court's comments were focused on alleviating pressure on the PUCT by noting that the risk associated with payment of the Termination Fee was borne by the Debtors' creditors and not Oncor's rate payers. *Id*. at 14:2-16:1.

On March 30, 2017, the PUCT held an open meeting on the NextEra Transaction. During the meeting, the Commissioners expressed significant concerns about the transaction's terms and its impact on the public interest. As Commissioner Anderson explained in a memorandum he filed the same day,

> From the earliest contacts, well before the sale merger transfer application was filed, NextEra's representatives have been very clear and consistent about the conditions that they could not accept and the reasons why those conditions were unacceptable. As the Chairman noted perceptively toward the end of the Hearing on the Merits, among the core issues in this case is whether "our deal[-]killers are [NextEra's] deal-killers." At least for this Commissioner, I fear that they do indeed correlate negatively.[32]

On April 13, 2017, the PUCT denied the Joint Application, citing, among other things, the impasse between the PUCT and NextEra over the critical "deal-killer" terms, as well as a number of other fundamental defects in the Joint Application.[33] On May 8, 2017, NextEra filed a rehearing request, without Oncor joining, simply rearguing the same contentions the PUCT had rejected after months of debate.[34] The deadline for a decision was set at June

[32] *See* Mem. from Commissioner Kenneth W. Anderson, Jr. on Open Meeting of Mar. 30, 2017 (PUCT D.I. 46238).

[33] Notice of Order Entered by the Pub. Util. Comm'n of Tex. Related to the Change of Control Appl. of Oncor [D.I. 11152].

[34] NextEra Energy, Inc.'s Mot. for Reh'g Filed Before the Pub. Util. Comm'n of Tex., Adv. Pro. No. 17-50479-CSS [D.I.6-7].

7, 2017, but NextEra sought to prolong the process, requesting an extension to "the maximum extent allowed by law"—effectively July 22, 2017. The PUCT denied that request and again rejected the Joint Application on June 7, 2017 for the same reasons cited in its April 13 decision.[35] NextEra promptly filed a second rehearing request, again refusing to budge on the "deal-killer" conditions. The PUCT again rejected NextEra's rehearing request, issuing a terse, one-sentence order on June 29, 2017.[36]

With the deal now clearly dead, NextEra still took no action to terminate the Merger Agreement. Indeed, it was clear that NextEra would appeal the PUCT's decision to all levels of review, leaving the Debtors no choice but to terminate the Merger Agreement and risk triggering the Termination Fee or else incur months or years of continued interest and fee obligations.

On July 7, 2017, the Debtors terminated the Merger Agreement and entered into a merger agreement with another party. The Debtors terminated the NextEra Merger Agreement based on both NextEra's failure to obtain regulatory approval and breach of the Merger Agreement, while

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[35] Notice of Order Entered by the Pub. Util. Comm'n of Tex. in the Admin. Proceeding Related to the Change of Control Appl. of Oncor [D.I. 11325].

[36] Notice of Order Entered by the Pub. Util. Comm'n of Tex. in the Admin. Proceeding Related to Change of Control Appl. of Oncor Elec. Delivery Co. [D.I. 11398].

reserving their rights to assert other grounds for terminating.[37]

On July 29, 2017, Elliott Associates, L.P., Elliott International, L.P., and The Liverpool Limited Partnership (collectively, "Elliott") filed The Elliott Funds' Motion to Reconsider in Part the September 19, 2016 Order [D.I. 9584] Approving the NextEra Termination Fee (the "Motion to Reconsider").[38] The Debtors and NextEra objected to the Motion to Reconsider.[39] On September 19, 2017 (one year to the day from entry of the Termination Fee Order), the Court held a hearing on the Motion to Reconsider on a stipulated record.[40] At the conclusion of the hearing, the Court provided a tentative ruling granting the Motion to Reconsider subject to issuance of a formal opinion and entry of an order. This is the Court's Opinion in support of granting the Motion to Reconsider.

LEGAL ANALYSIS

1. The Standard of Review

The applicable standard of review depends upon whether the Termination Fee Order is an interlocutory or a final order. As set forth below, if the order is interlocutory in nature the standard under Rule 9023 is applicable and if the order is final the standard under Rule 9024 applies.

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[37] *See* Notice of Filing of Termination Ltrs. [D.I. 11424].

[38] D.I. 11636.

[39] D.I. 11879 and 11876, respectively.

[40] *See* D.I. 11716.

The Federal Rules of Civil and Bankruptcy Procedure do not recognize a motion for reconsideration.[41] A party seeking reconsideration in bankruptcy court must file a motion to alter or amend judgment under Fed. R. Bankr. 9023 or a motion for relief from judgment under Fed. R. Bankr. P. 9024.[42] On their face neither Rule 9023 nor Rule 9024 apply to interlocutory orders. As such, some courts have held that the court is free to apply whatever standard it deems appropriate to a motion to reconsider an interlocutory order.[43] Nonetheless, in Calyon New York Branch v. American Home Mortg. Corp., this Court held that the standard under Rule 59(e) (made applicable by Fed. R. Bankr. P. 9023) should apply to motions to reconsider or to amend interlocutory orders.

> The policy underlying the standards governing a motion to alter or amend a final order under Rule 59(e) is equally applicable to a motion to alter or amend an interlocutory order under Rule 54(b) - "where litigants have once battled for the court's

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[41] 12 *Moore's Federal Practice*, §59.30[7] (Matthew Bender 3d ed.).

[42] *See Williams v. Akers*, 837 F.3d 1075, 1077 n. 1 (10th Cir. 2016).

[43] *Anderson Living Trust v. WPX Energy Production, LLC*, 308 F.R.D. 410, 433 (D. N.M. 2015) ("In short, a district court can use whatever standard it wants to review a motion to reconsider an interlocutory order. It can review the earlier ruling de novo and essentially reanalyze the earlier motion from scratch, it can review the ruling de novo but limit its review, it can require parties to establish on of the law-of-the-case grounds, or it can refuse to entertain motions to reconsider altogether.").

> decision, they should neither be required, nor without good reason permitted, to battle for it again." This is especially true in the bankruptcy context where the very nature of the practice involves the routine entry of interlocutory orders.[44]

A motion for reconsideration under Rule 9023 may not be used as a vehicle to "relitigate issues the Court has already decided,"[45] nor should Rule 9023 "… be used to advance arguments that a party could have made before judgment, but neglected to do so." [46] However, a prior decision should be reconsidered "where it appears [the Court] has overlooked or misapprehended some factual matter that might reasonably have altered the result reached by the Court."[47] As this Court has previously stated, "[w]hile it is true that a motion for reconsideration should not be used to reargue the

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[44] *Calyon New York Branch v. American Home Mortg. Corp.*, 383 B.R. 585, 589 (Bankr. D. Del. 2008) (citing *Official Comm. Of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 167 (2d Cir. 2003)).

[45] *In re W.R. Grace & Co.*, 556 B.R. 113, 118 (Bankr. D. Del. 2016) *(citing Max's Seafood Cafe ex rel. Lou–Ann, Inc. v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999)).

[46] *Skretvedt v. E.I. DuPont de Nemours & Co.*, No. CIV.A. 98-61-MPT, 2009 WL 1649495, at *2 (D. Del. June 12, 2009).

[47] *Official Comm. of Unsecured Creditors v. Catholic Diocese of Wilmington, Inc. (In re Catholic Diocese of Wilmington, Inc.),* 437 B.R. 488, 490 (Bankr. D. Del. 2010) (citing *Karr v. Castle,* 768 F. Supp. 1087, 1093 (D. Del. 1991), *aff'd* 22 F.3d 303 (3d Cir. 1994)).

facts or applicable law, it is appropriate when the facts were presented but overlooked by the Court."[48]

A motion for reconsideration under Rule 9023 may be granted where (i) there has been an intervening change in controlling law; (ii) new evidence has become available; or (iii) there is a need to prevent manifest injustice or to correct a clear error of fact or law.[49] The issue here is whether the Termination Fee Order should be amended to prevent manifest injustice and to correct a clear error of fact and law.

The exact meanings of the terms "manifest injustice" and "clear error of law or fact" remain unsettled, and there fails to be uniform application of an agreed upon definition by courts.[50] With respect to "manifest injustice," various courts have observed the following:

> There is no judicial consensus … but several courts have applied the Black's Law Dictionary definition, which states that "manifest injustice" is an error in the trial court that is direct, obvious, and observable, such as a defendant's guilty plea that is involuntary or that is based on a plea agreement that the prosecution rescinds. A party may only be granted reconsideration based

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[48] *Id.* (citing *In re Chama, Inc.,* 2000 WL 33712473, at *1 (Bankr. D. Del. Sept. 21, 2000)).

[49] *Stanziale v. Southern Steel & Supply, L.L.C. (In re Conex Holdings, LLC)*, 524 B.R. 55, 58 (Bankr. D. Del. 2015); *In re W.R. Grace & Co.*, 398 B.R. 368, 372 (D. Del. 2008) (citations omitted).

[50] *New Jersey Dept. of Environ. Protection v. Occidental Chemical Corp. (In re Maxus Energy Corp.),* No. 16-11501 (CSS), 2017 WL 3278830, at *3 (Bankr. D. Del. Aug. 2, 2017)

> on manifest injustice if the error is apparent to the point of being indisputable. In order for a court to reconsider a decision due to "manifest injustice," the record presented must be so patently unfair and tainted that the error is manifestly clear to all who view it.[51]

Similarly, courts have held that a "clear error of law or fact" requires a finding that the error is "plain and indisputable … amount[ing] to a complete disregard of the controlling law or the credible evidence in the record."[52]

If the order approving the Termination Fee is a final order, however, Fed.R.Civ.P. 60(b), incorporated by Fed. R. Bankr. P. 9024, allows a party to seek relief from a judgment, order, or proceeding for the following reasons:

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[51] *In re Titus*, 479 B.R. 362, 367-68 (Bankr. W.D. Pa. 2012) (quoting *In re Roemmele,* 466 B.R. 706, 712 (Bankr. E.D. Pa. 2012)); *accord Teri Woods Pub., L.L.C. v. Williams*, No. CIV.A. 12-04854, 2013 WL 6388560, at *2 (E.D. Pa. Dec. 6, 2013).

[52] *Titus*, 479 B.R. at 368 ("Other courts have expressed much the same view, though in somewhat different words.") (citations omitted)). *See, e.g.*, *In re Telfair,* 745 F.Supp.2d 536, 561 (D.N.J. 2010) (the term manifest injustice is an overlap of the term manifest error of law or fact, and it means that the court overlooked some dispositive factual or legal matter that was presented to it, or alternatively that there was an error in the trial court that was direct, obvious, and observable); *Oto v. Metro. Life Ins. Co.,* 224 F.3d 601 (7th Cir. 2000), (manifest error is not demonstrated by disappointment of losing party, rather it is the wholesale disregard, misapplication, or failure to recognize controlling precedent) *reh'g denied, cert. denied* as *Beverley v. Oto,* 531 U.S. 1152, 121 S.Ct. 1097, 148 L.Ed.2d 970 (2001); *In re Parikh,* 397 B.R. 518 (Bankr. E.D.N.Y. 2008) (same)).

> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud ..., misrepresentation, or other misconduct of an adverse party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
>
> (6) any other reason justifying relief from the operation of the judgment.[53]

The purpose of Rule 60(b) is "to strike a proper balance between the conflicting principles that litigation must be brought to an end and that justice must be done."[54] As with motions made pursuant to Rules 52 and 59, the decision to grant or deny relief pursuant to Rule 60(b) is committed to the discretion of the trial court.[55]

A threshold issue to determining whether a Rule 60 motion can prevail is whether the motion is filed timely. Motions filed pursuant to Rule 60(b) must be

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[53] Fed.R.Civ.P. 60(b).

[54] *Moss v. Potter*, 2007 WL 1726519, at *1 (W.D.Pa.2007) (*quoting Boughner v. Secretary of Health, Education, and Welfare*, 572 F.2d 976, 977 (3d Cir.1978)).

[55] *Id. See also In re Reading Broad., Inc.*, 386 B.R. 562, 567 (Bankr. E.D. Pa. 2008).

made within a "reasonable time."[56] Additionally, claims made under Rule 60(b)(1)-(3) are untimely per se if made more than one year from the entry of judgment.[57] Here the Motion for Reconsideration was filed less than a year after the Court's entry of the Termination Fee Order.[58] Furthermore, the Motion for Reconsideration was not ripe until the Debtors terminated the Merger Agreement with NextEra (purportedly triggering payment of the Termination Fee), which was not done until July 7, 2017,[59] mere weeks before the Motion for Reconsideration was filed. Based on the facts and circumstances in these cases, the Motion for Reconsideration was timely filed.

As the motion for reconsideration is timely, the Court must look to the burden placed on movant. "'The framers of Rule 60(b) set a higher value on the

[56] Fed.R.Civ.P. 60(c).

[57] *Id.; see also In re G-I Holdings, Inc.*, 472 B.R. 263, 279 (Bankr. D.N.J. 2012). *See, e.g., In re USN Communications, Inc.*, 288 B.R. 391, 396 (Bankr.D.Del.2003) ("A motion filed under Civil Procedure Rule 60(b) is not considered timely just because it is filed within the one-year time limit"); *Defeo v. Allstate Ins. Co.*, No. CIV. A. 95-244, 1998 WL 328195, at *5 (E.D. Pa. June 19, 1998) ("The one year period, applicable to subsections (1)—(3) [of Rule 60(b)], is an outer limit and any Rule 60(b) motion is subject to denial if it is not also made within a reasonable time after the basis for relief is known"); *In re J.B. Winchells, Inc.*, 106 B.R. 384, 389 (Bankr.E.D.Pa.1989) (same).

[58] *Compare* D.I. 9655 (entered Sept. 19, 2016) and D.I. 11636 (filed July 29, 2017).

[59] *See* D.I. 11424 (filed July 7, 2017).

social interest in the finality of litigation.'"[60] A movant "bears a heavy burden" in showing that relief is appropriate under Rule 60.[61]

The Third Circuit has stated that "[t]he power of a court to invoke Rule 60(b) to vacate its own earlier judgment is unquestioned."[62] However, when a court is considering its own judgment, "extraordinary circumstances" must be present to justify the use of Rule 60(b) to vacate the judgment.[63] Furthermore, "Rule 60(b) seeks to strike a delicate balance between two countervailing impulses: the desire to preserve the finality of judgments and the 'incessant command of the court's conscience that justice be done in light of all the facts."[64]

Regardless of whether the order approving the Termination Fee is interlocutory or final, the Court's analysis as to whether it misapprehended the facts and, thus, made a manifest error of fact and law will

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[60] *In re Syntax-Brillian Corp.*, 551 B.R. 156, 160 (Bankr. D. Del. 2016) (*quoting Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 682 (7th Cir.1983)).

[61] *Bohus v. Beloff*, 950 F.2d 919, 930 (3d Cir.1991) (citation omitted).

[62] *Budget Blinds, Inc. v. White*, 536 F.3d 244, 251 (3d Cir.2008).

[63] *Id.* at 251, 255 ("We have explained that a showing of extraordinary circumstances involves a showing that without relief from the judgment, an 'extreme' and 'unexpected' hardship will result.") (citation omitted).

[64] *In re New Century TRS Holdings, Inc.*, No. 07-10416 KJC, 2012 WL 38974, at *2 (Bankr. D. Del. Jan. 9, 2012), *aff'd*, No. ADV 09-52251 KJC, 2013 WL 1196605 (D. Del. Mar. 25, 2013) (citations and internal quotation marks omitted).

be the same. If the Termination Fee is interlocutory then consideration of the importance of the finality of the Court's order is of no moment. If the order is final, however, the Court must weigh the importance of the finality of its order in determining whether to grant the motion to reconsider. In other words, it is the absence of finality and reliance on a final order that differentiates motions under Rule 9023 from Rule 9024.[65] As to the "substance" the review under both Rule 9023 and Rule 9024 boils down to this - "'[t]he purpose of a motion for reconsideration . . . is to correct manifest errors of law or fact or to present newly discovered evidence.'"[66]

2. The Order Approving the Termination Fee Is Interlocutory

The problem of applying the final judgment rule to bankruptcy litigation with its numerous parties in interest and its adversary proceedings and contested matters makes "[t]he question of finality in bankruptcy appeals a thorny one," although most courts agree that the concept of finality in bankruptcy is broader and more flexible than in ordinary civil litigation, and that determinations of finality in the context of bankruptcy are dealt with "in a more pragmatic and less technical sense than in other settings." As the U.S. Supreme Court put it, succinctly, "[t]he rules are different in bankruptcy."[67]

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[65] *See, e.g., In re Reading Broad., Inc.*, 386 B.R. at 570.

[66] *Max's Seafood Cafe*, 176 F.3d at 677 (*quoting Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985)).

[67] COLLIER ON BANKRUPTCY ¶ 5.08[1][b] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.).

For an order to be final it "need not resolve all the issues raised by the bankruptcy; but it must completely resolve all of the issues pertaining to a discrete claim, including issues as to proper relief."[68] In making its determination, the court is required to take a flexible, pragmatic approach.[69]

Even though the order approving the Termination Fee was entered on September 19, 2016, over one year ago, it remains interlocutory. The order approving the Termination Fee does not resolve all issues relating to the Termination Fee. The order expressly requires this Court to (i) approve an agreed-upon allocation of the Termination Fee between the estates, (ii) determine how the Termination Fee will be allocated, and/or (iii) rule on the appropriate allocation of the Termination Fee should the parties request it.[70] Additionally, the Termination Fee is only to be paid when it becomes "due and payable pursuant to the terms and conditions of the Merger Agreement."[71] There is an issue being litigated between the Debtors, Elliott, NextEra and others as to whether NextEra breached the Merger Agreement and, thus, whether it is

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[68] *Official Comm. Of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.)*, 3 F.3d 49, 53 (2d Cir. 1993) (emphasis omitted).

[69] *Century Glove, Inc. v. First Am. Bank of N.Y.*, 860 F.2d 94, 97 (3d Cir. 1988); *In re Reliant Energy Channelview LP*, 397 B.R. 697, 699 (D. Del. 2008) (citing *In re Armstrong World Indus., Inc.*, 432 F.3d 507 (3d Cir. 2005).

[70] *See* Termination Fee Order ¶ 4.

[71] *Id.*

entitled to the Termination Fee at all.[72] The Court expressly retained jurisdiction for exactly this dispute.[73]

The Debtors argue that the Termination Fee Order is final, even though they argued in a previous appeal that the same order is interlocutory. Their previous argument makes a succinct case in favor of deeming the order interlocutory.

> This case illustrates why *Reliant*'s "wait-and-see" approach is sensible. The Termination Fee has not been triggered. Even if it were triggered, the Authorization Order expressly defers, rather than allocates, any such fee between EFIH (of which Appellants are not creditors) and the EFH Debtors (of which Appellants purport to be creditors). Accordingly, the parties' rights and obligations with respect to the Termination Fee remain unsettled and are subject to later determination.[74]

Moreover, NextEra's policy arguments in favor of finding the order to be final overlook the countervailing policy issues that weigh strongly in favor of revisiting the Termination Fee Order. NextEra cannot reasonably have relied on the Termination Fee Order when it knew the order was premised on an incomplete and confusing record. And it does not make for sound policy to award

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[72] *See generally* Adv. Pro. 17-50942.

[73] Termination Fee Order ¶ 10.

[74] Appellee's Motion to Dismiss Appeal, *Fenicle v. Energy Future Holdings Corp.*, Civ. Act. No. 16-cv-888-RGA, D. Del. [D.I. 18] ¶ 21.

NextEra a windfall of $275 million due to the passage of time or because NextEra claims to have relied on the order in spending tens of millions on legal fees. Whatever interests NextEra may have in the Termination Fee must give way to the interest in ensuring that the Court's decisions are based on a complete record and a proper application of controlling precedent. Likewise, granting reconsideration here does not impugn all termination fees. Parties that accurately and properly negotiate, structure, and disclose termination fees to a court can still rely on orders approving such fees.

In short, as the Supreme Court held in *Bullard v. Blue Hills Bank*,[75] an order remains interlocutory where "[t]he parties' rights and obligations remain unsettled" because "'[i]t ain't over till it's over.'"[76] Applying a flexible and pragmatic approach, the Court finds that the order approving the Termination Fee is an interlocutory order because it left considerable "additional work to be done" by the Court.[77]

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[75] 135 S. Ct. 1686 (2015).

[76] *Id.* at 1693.

[77] *See Reliant*, 397 B.R. at 699-700 & n.1. There are at least two additional arguments as to why the order approving the Termination Fee is interlocutory. First, while the Termination Fee clearly has a negative impact on the assets of the Debtors' estates, the Termination Fee—calculated by the Debtors at 1.47 percent of TEV—is not so large a proportion of the estate as to make the Termination Fee Order final under relevant precedent. *See Reliant*, 397 B.R. at 700 (concluding that when the termination fee amounted to less than 3% of the debtors' estate, the order approving the fee was not final). Second, judicial economy and the avoidance of piecemeal litigation favor finding that the order approving the Termination Fee Order is

3. The Court Misapprehended The Facts As To When The Termination Fee Would Be Payable

The Court had a fundamental misunderstanding of the critical facts when it approved the Termination Fee. Despite the Court's direct question as to whether the Termination Fee would be payable if the PUCT declined to approve the NextEra Transaction, the record is incomplete and confusing on that fundamental point. The Court simply did not understand that if the PUCT declined to approve the NextEra Transaction and the Debtors (as opposed to NextEra) terminated the Merger Agreement the Termination Fee would be payable to NextEra. Despite the obvious confusion on this point neither the Debtors nor NextEra sought to clarify the record and affirmatively state that NextEra would receive the Termination Fee if the Debtors terminated the Merger Agreement. Instead they repeatedly stated that NextEra would not receive the Termination Fee if it terminated the Merger Agreement. It bears noting that at the time the PUCT had already evaluated one transaction approved by this Court and the PUCT approval process and its potential adverse effect on the Debtors' estate was at the forefront of the Court's mind, and still is.

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interlocutory. *See, e.g.*, *In re New Century TRS Holdings, Inc.*, 407 B.R. 558, 571 (Bankr. D. Del. 2009) (citing "the need to protect creditors and reorganizing debtors from piecemeal litigation" and supporting case law). Significant litigation regarding allocation will follow if the Termination Fee is determined to be payable. Allocation litigation would greatly impact plan confirmation proceedings by affecting the Debtors' ability to demonstrate that administrative expenses will be paid and that the "best interests test" is satisfied.

The confusing record was critical because in combination with another fact that was not mentioned, i.e., the Merger Agreement had no time limit, the reality was that ***under no foreseeable circumstances would NextEra terminate the Merger Agreement if the PUCT declined to approve the NextEra Transaction***. Why? Because NextEra had the ability to hold out and to pursue numerous motions for reconsideration and a fruitless appeal until the Debtors were forced by economic circumstances to terminate the Merger Agreement, which is exactly what occurred. If the Court had understood these critical facts it would not have approved this provision of the Termination Fee.[78]

The Debtors and NextEra point to the September 25 Letter and September 26 hearing as providing clarification on these points. This is insufficient for a number of reasons. Most importantly, the Court approved the Termination Fee by order dated September 19, 2016 following a hearing that same day. The record on the Termination Fee was closed on September 19th. Second, the point of the status conference on September 26th was for the Court to respond to certain comments by Commissioner Anderson with regard to the Termination Fee. No relief was sought from the Court. In addition, the Court understood Commissioner Anderson to be concerned that the Termination Fee was designed to put pressure upon the PUCT. The Court sought to alleviate those concerns by stating that the

[78] Importantly, the Court is only reconsidering a narrow but highly significant provision of the Termination Fee. Nothing herein affects any other provision of the Termination Fee or the Termination Fee Order.

Termination Fee, if payable, would be borne by the Debtors' creditors not by Oncor's rate payers. At no time did the Court understand the parties' submissions to be an attempt to clarify to this Court that the Termination Fee would be payable if the PUCT declined to approve the NextEra Transaction and the Debtors terminated the Merger Agreement. Third, the key nuance—that NextEra had no economic incentive to terminate the Merger Agreement if the PUCT declined to approve the NextEra Transaction and indeed its incentive was just the opposite—was not disclosed in the September 25 Letter and not discussed at the September 26 hearing.

The critical issue is whether the Court misapprehended the facts, not whether the record may have been complete. In any event, the record was, at the very least, confusing. In one instance a witness clearly stated that the Debtors would be liable for the Termination Fee if the PUCT declined to approve the NextEra Transaction and the Debtors terminated the Merger Agreement. But that testimony is countered with a contrary statement by counsel on the issue. Moreover, at no point did anyone bring forward the critical fact that NextEra had no economic incentive to terminate the Merger Agreement. Indeed, no facts were sufficiently drawn to the Court's attention such that the Court might have realized the point on its own accord. More was required by the Debtors and NextEra in order for them to rely on the record to refute the Court's own misunderstanding - whether justified or not.[79]

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[79] The Court does not believe the Debtors acted improperly or with malice. The reality is that the NextEra Transaction was

4. The Termination Fee Cannot Not Satisfy The *O'Brien* Standard

The Third Circuit permits the payment of termination fees out of an estate only in certain narrow circumstances prescribed by Bankruptcy Code Section 503(b). [80] To be allowed as an administrative expense, the Termination Fee must be one of the "actual, necessary costs and expenses of preserving the estate."[81] In general, administrative expenses are narrow in scope and allowed only to the extent that the expense "provided an actual benefit to the estate" and was "necessary to preserve the value of the estate assets."[82]

Under *O'Brien*, the standard is no different, but the timing and circumstances make the Court's approval far more challenging. The Court is required to determine whether the movant has carried the

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extraordinarily complicated and the Debtors focused their attention on whether the Termination Fee was market not on when the Termination Fee might be payable in what the Debtors viewed was the unlikely event the PUCT declined to approve the NextEra Transaction. As for NextEra, the record indicates it was happy to remain silent. Whether NextEra realized the Court misapprehended the facts to NextEra's benefit is unknown but, if it did, it certainly made no effort to clarify the record.

[80] *O'Brien*, 181 F.3d at 532.

[81] 11 U.S.C. § 503(b)(1)(A).

[82] *In re Bernard Techs., Inc.*, 342 B.R. 174, 177 (Bankr. D. Del. 2006); *see In re Reliant Energy Channelview, LP*, 403 B.R. 308, 311 (Bankr. D. Del. 2009) (emphasizing that it is not enough that a termination fee provide "some benefit" to the estate; it must be "actually necessary to preserve the value of the estate").

"heavy burden" of demonstrating that a post-petition transaction "provided an actual benefit" to the debtor's estate, justifying the future payment of a termination fee as one of the necessary costs or expenses of the estate.[83] For this reason, bankruptcy courts considering approval of termination fees focus not only on whether the expense is necessary to induce a transaction, but also on the conditions that must be met to consummate the transaction (*e.g.*, financing, due diligence, regulatory approvals, etc.). The lack of conditions or the certainty of meeting them ensures that the termination fee, as distinct from mere expense reimbursement, provides a debtor's estate with an actual benefit.

The regular situation in which a termination fee provides an actual benefit consistent with *O'Brien* is when the fee induces a bid that results in higher competitive bidding for the debtor's asset.[84] Moreover, even if an auction does not occur, a termination fee may be justified when it "increase[es] the likelihood that the price at which the debtor is sold will reflect its true worth."[85]

In this instance, the Debtors (with the support of NextEra) sought approval of a termination or break-up fee that was not designed to induce competitive bidding for Oncor. Rather, they sought a fee designed

[83] *O'Brien*, 181 F.3d at 533 (quoting district court opinion).

[84] *See O'Brien*, 181 F.3d at 537; *In re Reliant Energy Channelview LP*, 594 F.3d 200, 206 (3d Cir. 2010) (explaining that a termination fee is permissible where it "induce[s] an initial bid"); *In re Women First Healthcare, Inc.*, 332 B.R. 115, 121 (Bankr. D. Del. 2005) (similar).

[85] *O'Brien*, 181 F.3d at 537.

to induce NextEra to pursue approval of the NextEra Transaction before this Court through confirmation and before the PUCT through its regulatory process and to protect NextEra if the Debtors decided to pursue a superior, alternative transaction. Approval of a termination or break-up fee under those circumstances might be appropriate. However, there are critical elements of the Termination Fee in this case that would provide for payment of the fee even if there was no actual benefit to the Debtors' estate that were discernable at the time the Termination Fee was approved (had the Court properly understood the facts).

Here, the Termination Fee was payable to NextEra *even if* the PUCT declined to approve the NextEra Transaction and the Debtors (as opposed to NextEra) terminated the Merger Agreement. As discussed above, this was a critical point. Payment of a termination or break-up fee when a court (or regulatory body) declines to approve the related transaction cannot provide an actual benefit to a debtor's estate sufficient to satisfy the *O'Brien* standard.[86] Consider the more common circumstance of a request for a break-up fee in favor of a stalking horse bidder in an asset sale. Could a court approve payment of a break-up fee under *O'Brien* in the event that the court declines to approve the actual sale (regardless of whether the stalking horse is the winning bidder)? How would serving as a stalking horse in a sale that fails to garner court approval possibly provide an actual benefit to the debtor's

86 *See, e.g., In re Hupp Industries, Inc.*, 140 B.R. 191, 195 (Bankr. N.D. Ohio 1992) (Court declining to approve break-up fee where fee is payable even if court declines to approve sale).

estate? The Court posits that it could not. Indeed, this was the point of the Court's inquiry at the hearing on the Termination Fee as to whether the fee would be payable if the PUCT did not approve the NextEra Transaction.

This issue was exacerbated in this case by the fact that the Merger Agreement did not have a time limit for approval and the Termination Fee was payable if the Debtors terminated the Merger Agreement. This incentivized NextEra to pursue multiple motions for reconsideration and a fruitless appeal strategy to force the Debtors to terminate the Merger Agreement to pursue an alternative transaction. Allowance of a termination or break-up fee when a debtor chooses to pursue a higher and better offer is appropriate. In this case, the Debtors were forced to terminate the Merger Agreement to pursue a lower offer because NextEra had the Debtors in a corner. Payment of a termination fee under those circumstances, which would have been predictable had the Court properly understood the facts, could not provide an actual benefit to a debtor's estate sufficient to satisfy the *O'Brien* standard.[87]

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[87] It is important to note that the Court is not judging whether the Termination Fee is payable based on hindsight. Rather, the point is that had the facts been properly understood at the time the Court approved the Termination Fee it would not have done so because the *O'Brien* standard was not satisfied. However, even if the Court is acting on hindsight, it may do so. *See In re Mammoth Mart, Inc.*, 536 F.2d 950, 954 (1st Cir. 1976) (A creditor "will not be entitled to [administrative expense] priority if the bankrupt estate was not benefitted ***in fact***" from the creditor's contract performance during the reorganization period.) (emphasis added).

In short, had the Court properly apprehended the facts at the time of its approval of the Termination Fee it could not have approved the Termination Fee under *O'Brien*. To do so constituted legal error.

5. The Interests Of Justice Outweigh The Interests Of Finality In This Instance

As discussed earlier, the order approving the Termination Fee is an interlocutory order. As such, the applicable legal standard is Federal Rule of Civil Procedure 59 (incorporated by Bankruptcy Rule 9023) and the Court need not balance "two countervailing impulses: the desire to preserve the finality of judgments and the 'incessant command of the court's conscience that justice be done in light of all the facts.'"[88] However, even if the order approving the Termination Fee is a final order and, thus, the motion for reconsideration is reviewable under Federal Rule of Civil Procedure Rule 60 (made applicable by Bankruptcy Rule 9024), the interest of justice outweigh the interest of finality in this instance.

As discussed at length above, the Court fundamentally misapprehended the facts as to whether the Termination Fee would be payable if the PUCT failed to approve the NextEra Transaction. This misapprehension of the facts was due in part to the confusing record presented by the Debtors and NextEra. Had the Court understood there was a scenario in which NextEra would receive the Termination Fee even if the PUCT declined to

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[88] *In re New Century TRS Holdings, Inc.*, No. 07-10416 KJC, 2012 WL 38974 at *2 (citations and internal quotation marks omitted).

approve the NextEra Transaction, it would not have approved the payment of the Termination Fee in those circumstances. Indeed, it could not have done so under the Third Circuit's ruling in *O'Brien*. The interests of justice—ensuring that the approval of a payment of $275 million to NextEra is based on a complete record and the proper application of the law—clearly outweighs the interest of finality of the Termination Fee Order. In making this determination the Court is cognizant that NextEra acted in reliance upon the Termination Fee Order and spent tens of millions of dollars in pursuing the NextEra Transaction.[89] But NextEra was conspicuously silent in response to the Court's questions regarding whether the Termination Fee would be payable if the PUCT declined to approve the merger and was content to allow the Court to rely on an incomplete and confusing record.

Notwithstanding the passage of time and the reliance of the parties on the Termination Fee Order, the interests of justice, which include, among other things, requiring parties seeking relief from the Court to be accurate in their representations, outweigh the interest of finality in this instance.

6. The Entry Of The Termination Fee Was A Manifest Error Of Fact And Law That Must Be Reversed

At the end of the day, "'[t]he purpose of a motion for reconsideration . . . is to correct manifest errors of

[89] At oral argument counsel for NextEra stated that NextEra incurred expenses of $300 million in connection with the Oncor merger. That figure is unsupported by the stipulated record before the Court.

law or fact or to present newly discovered evidence.'"[90] The Court entered the Termination Fee Order based on a misapprehension of the facts as to whether the Termination Fee would be payable if the PUCT declined to approve the NextEra Transaction and the Debtors terminated the Merger Agreement. This misapprehension of the facts was based, in part, on the presentation of an incomplete and confusing record by the Debtors and NextEra. It was also based, in part, on the misunderstanding of the Court as to the record presented. The Court's misapprehension of the facts constituted a manifest error of fact justifying reconsideration.

Based upon the Court's misapprehension of the facts it approved the Termination Fee under the Third Circuit's ruling in *O'Brien*. Payment of the Termination Fee in the event that the PUCT were to decline to approve the NextEra Transaction, regardless of whether the Debtors or NextEra actually terminated the Merger Agreement, cannot constitute an actual necessary cost and expense of preserving the Debtors' estates. The Court's approval of the Termination Fee was a manifest error of law justifying reconsideration.

The Court's manifest errors of fact and law requires the Court to take the extraordinary step of reconsidering its order entered on September 19, 2016, approving the Termination Fee.

CONCLUSION

For the reasons set forth above, the Court will grant the Motion for Reconsideration. The parties

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[90] *Max's Seafood Cafe*, 176 F.3d at 677 (*quoting Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985)).

are directed to submit proposed forms of order under certification of counsel by no later than October 10, 2017.

APPENDIX D

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:	§	Chapter 11
ENERGY FUTURE HOLDINGS CORP., ET AL	§ §	Case No.: 14-10979 (CSS)
	§	(Jointly Administered)
Debtors.	§	
	§	
ENERGY FUTURE HOLDINGS CORP.	§ §	Adv. Pro No. 17-50942 (CSS)
-and-	§	
ENERGY FUTURE INTERMEDIATE HOLDING COMPANY, LLC.,	§ § § §	
Plaintiffs,	§	
v.	§	
NEXTERA ENERGY, INC.,	§ §	
Defendant.	§	

United States Bankruptcy Court
824 North Market Street
Wilmington, Delaware

September 19, 2017
10:03 PM

Before:

HON CHRISTOPHER S. SONTCHI
U.S. Bankruptcy Judge

HEARING re Motion of the EFH/EFIH Debtors for Order Authorizing the EFH/EFIH Debtors to Consent to Oncor's Entry into the Sharyland Merger Agreement [D.I. 11837; filed August 29, 2017]

HEARING re Application of Energy Future Holdings Corp., et al., for Entry of an Order Authorizing the Debtors to Retain and Employ Shaw Fishman Glantz & Towbin LLC as Special Delaware Counsel Effective Nunc Pro Tunc to August 14, 2017 [D.I. 11838; filed August 29, 2017]

HEARING re The Elliott Funds' Motion to Reconsider in Part the September 19, 2016 Order [Dkt. No. 9584] Approving the NextEra Termination Fee [D.I. 11636; filed July 29, 2017]

HEARING re Motion of Shirley Fenicle, William Fahy, John H. Jones, and David Heinzmann to Intervene Pursuant to Rule 24 of the Federal Rules of Civil Procedure and Rule 7024 of the Federal Rules of Bankruptcy Procedure [Adv. D.I. 27; filed August 25, 2017]

HEARING re Elliott's Motion to Intervene and for Derivative Standing [Adv. D.I. 28; filed August 25, 2017]

Transcribed by: Dawn South, Jamie Gallagher, and Tracey Williams

* * *

THE COURT: Please be seated. Okay. I hate to be read to, so I'm going to read to you. It will be brief.

All right, before the Court is a timely motion for reconsideration of an order entered one year ago today, approving among other things a termination fee in favor of NextEra in the amount of $275 million. I am going to issue an opinion and enter an order at a later date. But given the impact my ruling may have on the pending litigation over the termination fee, I'm going to state my conclusion now, which is subject in all respects to the opinion and order that will be issued at a future date.

This oral, tentative ruling is by its very nature brief and incomplete. More detail and analysis will be offered in the forthcoming opinion.

I do not take this motion lightly. The finality of judgments and orders is very important and, thus, the movant has a very high burden. But nonetheless, I'm going to grant the motion for reconsideration.

Regardless of whether the order approving the termination fee is interlocutory or final, the Court's decision was based on the serious misapprehension of the facts that constitutes manifest error. At the time of the approval of the termination fee, until NextEra sought payment of the termination fee, I do not understand that the termination fee would be payable under the present circumstances. I would not have approved the termination fee if I had understood that it would be due if the PUC denied the merger application and two motions for reconsideration, while NextEra bided its time, pursuing a fruitless appeal, thus forcing the debtors to terminate the merger agreement.

While perhaps unartfully worded, this was the issue I was concerned with when I inquired at the hearing on September 19 if the termination fee would be payable if the PUCT did not approve the transaction. The responses I received at the hearing were only partially responsive. I missed the critical nuance that the termination fee would not be payable if the PUCT failed to approve the merger and NextEra terminated the deal, but would be payable if the PUCT failed to approve the merger and the debtors terminated the deal. Shame on me.

At the end of the day, approval of payment of the termination fee under these circumstances could not satisfy the O'Brien standard. And had I properly understood the issue at the time the termination fee was considered in September 2016, I would have so ruled. And to do otherwise was a manifest error of fact and law.

The Court will find that under the extraordinary circumstances here, and due to the Court's misapprehension of the facts on a critical issue that if properly understood would have fundamentally changed the Court's conclusion, it is appropriate to reconsider the Court's order approving the termination fee such that the termination fee will not be payable under the present circumstances.

As I said, an opinion and order will follow and I don't—I stopped predicting how long it takes to draft opinions a long time ago. So that will happen when it happens. So that's my tentative ruling. I don't know how that affects the other orders or motion that are in front of the Court, or the other proceedings, but I'm perfectly willing to go forward with those today. I assume that when I do issue an order, it will be appealed and it may make sense to continue the litigation in any event. But we can certainly proceed today, unless the parties would like a recess to discuss it.

APPENDIX E

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	§	Chapter 11
ENERGY FUTURE HOLDINGS CORP., ET AL[1]	§	Case No.: 14-10979 (CSS)
	§	(Jointly Administered)
Debtors.	§	
	§	
	§	

ORDER (A) AUTHORIZING ENTRY INTO MERGER AGREEMENT, (B) APPROVING TERMINATION FEE, AND (C) AUTHORIZING ENTRY INTO AND PERFORMANCE UNDER PLAN SUPPORT AGREEMENT

Upon the motion (the "Motion")[2] of the EFH/EFIH Debtors for entry of an order (this "Order"): (a) (i) authorizing entry into the Merger Agreement, attached hereto as **Exhibit 1**, and (ii) approving the Termination Fee as an allowed administrative

[1] The last four digits of Energy Future Holdings Corp.'s tax identification number are 8810. The location of the debtors' service address is 1601 Bryan Street, Dallas, Texas 75201. Due to the large number of debtors in these chapter 11 cases, for which joint administration has been granted, a complete list of the debtors and the last four digits of their federal tax identification numbers is not provided herein. A complete list of such information may be obtained on the website of the debtors' claims and noticing agent at http://www.efhcaseinfo.com.

[2] All capitalized terms used but not otherwise defined in this Order shall have the meanings ascribed to them in the Motion.

expense claim payable when due without further order of the Court, and (b) approving and authorizing the EFH/EFIH Debtors to enter into and perform under the PSA, attached hereto as **Exhibit 2**, all as more fully set forth in the Motion; and the Court having found that it has jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; and the Court having found that consideration of the Motion and the relief requested therein is a core proceeding pursuant to 28 U.S.C. § 157(b); and the Court having found that venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and the Court having found that the Debtors provided due and proper notice of the Motion and such notice was adequate and appropriate under the particular circumstances; and the Court having held a hearing to consider the relief requested in the Motion (the "Hearing"); and upon consideration of the record of the Hearing and all proceedings had before the Court; and the Court having found and determined that the relief sought in the Motion is in the best interests of the EFH/EFIH Debtors' estates, their creditors and other parties in interest; and that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and after due deliberation and sufficient cause appearing therefor, it is hereby **ORDERED**:

1. The Motion is hereby granted as set forth herein.

2. All objections, if any, to the Motion that have not been withdrawn, waived, settled, or specifically addressed in this Order, and all reservations of rights included in such objections, are specifically overruled in all respects on the merits.

3. The EFH/EFIH Debtors' entry into the Merger Agreement is authorized, and the Merger Agreement is approved in its entirety without modification.

4. The Termination Fee, upon the terms and conditions of the Merger Agreement, is approved, and the EFH/EFIH Debtors are authorized and directed to pay the Termination Fee as an allowed administrative expense to the extent it becomes due and payable pursuant to the terms and conditions of the Merger Agreement, at the time and in the manner provided for therein, without any further proceedings before, or order of, the Court; *provided, however*, that in the event that the Termination Fee becomes payable in accordance with section 8.5(b) of the Merger Agreement, the EFH Debtors, on the one hand, and the EFIH Debtors, on the other hand, either will agree on the allocation of the Termination Fee between their respective estates (and seek Bankruptcy Court approval of such allocation) or each estate reserves the right to request that the Bankruptcy Court determine the appropriate allocation of the Termination Fee between the EFH Debtors and the EFIH Debtors; *provided, further, however* that the Termination Fee shall be payable as provided in the Merger Agreement and both the EFH Debtors and the EFIH Debtors agree that any such payment of the Termination Fee, by either or both estates, shall be without prejudice to the rights of each estate to seek a subsequent Bankruptcy Court ruling regarding the appropriate allocation of the paid Termination Fee between the EFH Debtors and the EFIH Debtors.

5. The EFH/EFIH Debtors' entry into the PSA is authorized under section 363(b) of the Bankruptcy Code.

6. The PSA shall be binding and enforceable against the parties thereto in accordance with its terms.

7. The EFH/EFIH Debtors are authorized to enter into amendments to the Merger Agreement or PSA in accordance with the terms and conditions set forth therein without further order of the Court; *provided, however*, that the EFH/EFIH Debtors shall file with the Court a notice attaching a copy of any such amendments within five (5) business days of execution.

8. Notwithstanding the possible applicability of Bankruptcy Rules 6004(a), 6004(h), 7062, 9014, or otherwise, the terms and conditions of this Order shall be effective and enforceable immediately upon entry.

9. The EFH/EFIH Debtors are hereby authorized and empowered to take all actions necessary to implement the relief granted in this Order.

10. The Court shall retain jurisdiction over any matter or disputes arising from or relating to the interpretation, implementation or enforcement of this Order.

11. Notice of the Motion as provided therein is good and sufficient and the requirements of the Local Rules are satisfied by such notice.

/s/ Christopher S. Sontchi

The Honorable Christopher S. Sontchi

United States Bankruptcy Judge

Dated: September 19, 2016

Wilmington, Delaware

APPENDIX F

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:	§	Chapter 11
ENERGY FUTURE HOLDINGS CORP., ET AL	§	Case No.: 14-10979 (CSS)
	§	(Jointly Administered)
Debtors.	§	
	§	
	§	

United States Bankruptcy Court
824 North Market Street
Wilmington, Delaware

September 19, 2016
10:11 a.m. – 1:09 p.m.

Before:
HON CHRISTOPHER J. SONTCHI
U.S. Bankruptcy Judge
ECRO OPERATOR: Leslie Murin

HEARING re Motion of the EFH/EFIH Debtors for Order (A) Authorizing Entry into Merger Agreement, (B) Approving Termination Fee, and (C) Authorizing Entry into and Performance Under Plan Support Agreement [D.I. 9190; filed August 3, 2016]

HEARING re Disclosure Statement for the Third Amended Joint Plan of Reorganization of Energy Future Holdings Corp., et al., Pursuant to Chapter 11 of the Bankruptcy Code as it Applies to the EFH

Debtors and EFIH Debtors [D.I. 9493; filed September 7, 2016]

HEARING re Motion of the EFH/EFIH Debtors for Entry of an Order (A) Scheduling Certain Hearing Dates and Deadlines and Establishing Certain Protocols in Connection with Confirmation of the Debtors' Joint Plan of Reorganization as it Relates to the EFH/EFIH Debtors, (B) Approving the EFH/EFIH Disclosure Statement, (C) Establishing the EFH/EFIH Voting Record Date, EFH/EFIH Voting Deadline, and Other Dates, (D) Approving Procedures for Soliciting, Receiving, and Tabulating Votes on the Plan, and (E) Approving the Manner and Forms of Notice and Other Related Documents [D.I. 9201; filed August 5, 2016]

HEARING re Letter to the Honorable Christopher S. Sontchi Regarding Discovery Disputes (SEALED) [D.I. 9483; filed September 6, 2016]

Transcribed by: Sonya Ledanski Hyde

* * *

THE COURT: All right. I'm going to—based on evidence that was submitted to the Court today, I'm going to overrule the objection and approve the merger agreement and the PSA. We feel, again, with the due process argument, the Court has ruled on this numerous times and I'm not going to go through my previous lengthy rulings again. Suffice it to say that I reject the due process argument that the bar date that applied to unmanifested asbestos claims and the seeking of discharge of those unmanifested asbestos claims violates due process. The rights, the post hoc—ex post, excuse me, rights, of those types of claimants to come in and object to that discharge at a later date are fully preserved. I was very careful when I made that ruling initially, and I've been careful throughout to make it clear that those rights are reserved. I believe that the Court's previous rulings are in compliance with the law and consistent with the law.

I find—well, there is no stay pending appeal of the previous confirmation order. I personally think that appeal is moot because that order is null and void. It has not yet been dismissed by the District Court, but I believe that the District Court will ultimately either dismiss that or affirm this Court's previous ruling, and there's no likelihood of success on the merits of that appeal. As a result, the idea that there is execution risk based on being reversed on a now defunct, void order, that is, in my mind, nonetheless, was proper, is not sufficient to, sort of, lock in a result here. In other words, if it were certain or certainly probably that the Court would be reversed and that that would either require either an amendment that NextEra would have to agree to or the ability for NextEra to walk away and trigger the breakup fee, that might be one thing to have the Court have pause about approving the breakup fee in this instance. But there is no such risk, or the risk is so de minimis as to not be worth noting. As a result, there's no impediment based on the pending appeal or the argument that this plan being put before the Court is not consistent with due process so as to give the Court any concern that it's locking in a breakup fee based on that argument either being successful on appeal or a confirmation of the plan.

The breakup fee amount is large but, like everything in this case including the state of Texas, this is a big case and everything in here big numbers, and you have to look at it appropriately from a percentage basis, that's at, I believe, approximately 1.47 percent of TEV as we sit here today based on the most recent changes to the deal. That's an appropriate number for a case of this size. Generally, those fee percentages drop as cases get bigger, they go up as cases get smaller. The evidence is clear that this is on the low end of utility-type transactions. It's also on the low end of this Court's experience with regard to breakup fees that I have approved numerous times, so I believe the amount is supported by the market, I think the evidence overwhelmingly indicates that a breakup fee was necessary to induce NextEra to make a bid, and to move forward with a merger agreement.

Now, it cannot be denied that NextEra has been anxious, willing to buy this asset for quite some time. They participated through, I guess it's now three rounds of negotiation—the negotiations in late 2014, the approved negotiations in 2015 and now the 2016 negotiation. They also attempted to insert themselves into the last confirmation trial, much to my displeasure, and I don't think, frankly, appropriately, but that is what it is. So, there's no question that they are anxious to buy this asset, but it's also clear from the evidence that they're not anxious to buy this asset at any price, and in fact, they walked away in 2015 when they lowered their purchase price which led, of course, to the Hunt deal that was ultimately confirmed but not consummated. And it's clear that all provisions of the APA have been subject to vigorous negotiation and on some points they have given and on other points they haven't given, and the termination fee has been a piece of this deal from day one.

It's clear that the termination fee went up at the end of the process but it went up primarily, I believe, because they walked away from the match right, and the combination of match right, lower breakup fee was replaced with no match right and a higher breakup fee. So, I don't think there was any lack of negotiation or give without consideration in the negotiation for the breakup fee in late July when it increased in value.

I think importantly, with regard to the breakup fee, it's really not an asbestos claimant issue because the value that arises—excuse me, the value that is potentially taken away from creditors, if the breakup fee is triggered, that value is not taken away from the asbestos creditors. That value is taken away from the EFH creditors or EFH equity. That never—that money never works its way to the asbestos claimants. So, were there to be no breakup fee and were there to be someone else coming in and bidding another, say, $300 million, that full $300 million would work its way through the waterfall up, but it wouldn't in any way inure to the benefit of the asbestos claimants.

The asbestos claimants, perhaps, are more interested in, and perhaps with reason, at least at first blush, with regard to the change in the reduction of the reserve from $250 million to $100 million, but that is, I believe, the evidence indicates and supports a—that $250- million-dollar reserve that's now been reduced to $100- million-dollar reserve doesn't exist for the benefit of the asbestos plaintiffs, it exists for the benefit of the purchaser, NextEra. Whether it's an accounting incident or a mechanism or simply a hold back mechanism to make sure there are funds available, in any event, it doesn't affect the ultimate liability under the proposed plan, that liability flowing to the pre-organized entity that is going to be a functioning business which has always been profitable, by the way, and a full—a business that's been funded by over $4 billion dollars of equity infusion. So, there's no negative effect on the asbestos claimants by the change in reduction from the reserve price. The effect, if any, would be on NextEra, but NextEra is in a much better position than the Court to make its own judgment about what it needs or doesn't need in connection with a reserve for those liabilities.

So, I think that the argument based on due process, I think the argument based on the amount of the breakup fee, I think the argument based on the PSA, et cetera, they're all refuted by the law and the facts in the case, and I will overrule the objection.

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 18-1109

In re: ENERGY FUTURE HOLDINGS CORP., et al,

Debtors

NEXTERA ENERGY, INC.,

Appellant

Present: SMITH, *Chief Judge*, McKEE, AMBRO, JORDAN, GREENAWAY, JR., VANASKIE, SHWARTZ, KRAUSE, RESTREPO, BIBAS, RENDELL,[*] and FUENTES,[**] *Circuit Judges*.

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

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[*] Judge Rendell's vote is limited to panel rehearing only.

[**] Judge Fuentes's vote is limited to panel rehearing only.

BY THE COURT,

s/ Joseph A. Greenaway, Jr.

Circuit Judge

Dated: October 24, 2018

JK/cc: All Counsel of Record

APPENDIX H

11 U.S.C. § 363

§ 363. Use, sale, or lease of property

(a) In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title.

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless—

(A) such sale or such lease is consistent with such policy; or

(B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease—

(i) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and

(ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

(2) If notification is required under subsection (a) of section 7A of the Clayton Act in the case of a transaction under this subsection, then—

(A) notwithstanding subsection (a) of such section, the notification required by such subsection to be given by the debtor shall be given by the trustee; and

(B) notwithstanding subsection (b) of such section, the required waiting period shall end on the 15th day after the date of the receipt, by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, of the notification required under such subsection (a), unless such waiting period is extended—

(i) pursuant to subsection (e)(2) of such section, in the same manner as such subsection (e)(2) applies to a cash tender offer;

(ii) pursuant to subsection (g)(2) of such section; or

(iii) by the court after notice and a hearing.

(c)(1) If the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or

1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless—

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

(3) Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (e) of this section, but shall be scheduled in accordance with the needs of the debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or lease only if there is a reasonable likelihood that the trustee will prevail at the final hearing under subsection (e) of this section. The court shall act promptly on any request for authorization under paragraph (2)(B) of this subsection.

(4) Except as provided in paragraph (2) of this subsection, the trustee shall segregate and account for any cash collateral in the trustee's possession, custody, or control.

(d) The trustee may use, sell, or lease property under subsection (b) or (c) of this section—

(1) in the case of a debtor that is a corporation or trust that is not a moneyed business, commercial corporation, or trust, only in accordance with nonbankruptcy law applicable to the transfer of property by a debtor that is such a corporation or trust; and

(2) only to the extent not inconsistent with any relief granted under subsection (c), (d), (e), or (f) of section 362.

(e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362).

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if—

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

(g) Notwithstanding subsection (f) of this section, the trustee may sell property under subsection (b) or (c) of this section free and clear of any vested or contingent right in the nature of dower or curtesy.

(h) Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if—

(1) partition in kind of such property among the estate and such co-owners is impracticable;

(2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and

(4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

(i) Before the consummation of a sale of property to which subsection (g) or (h) of this section applies, or of property of the estate that was community property of the debtor and the debtor's spouse immediately before the commencement of the case, the debtor's spouse, or a co-owner of such property, as the case may be, may purchase such property at the price at which such sale is to be consummated.

(j) After a sale of property to which subsection (g) or (h) of this section applies, the trustee shall distribute to the debtor's spouse or the co-owners of such property, as the case may be, and to the estate, the proceeds of such sale, less the costs and expenses, not including any compensation of the trustee, of such sale, according to the interests of such spouse or co-owners, and of the estate.

(k) At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

(l) Subject to the provisions of section 365, the trustee may use, sell, or lease property under subsection (b) or (c) of this section, or a plan under chapter 11, 12, or 13 of this title may provide for the use, sale, or lease of property, notwithstanding any provision in a contract, a lease, or applicable law that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title concerning the debtor, or on the appointment of or the taking possession by a trustee in a case under this title or a custodian, and that effects, or gives an option to effect, a forfeiture, modification, or termination of the debtor's interest in such property.

(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

(n) The trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees, or expenses incurred in avoiding such sale or recovering such amount. In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against any such party that entered into such an agreement in willful disregard of this subsection.

(o) Notwithstanding subsection (f), if a person purchases any interest in a consumer credit transaction that is subject to the Truth in Lending Act or any interest in a consumer credit contract (as defined in section 433.1 of title 16 of the Code of Federal Regulations (January 1, 2004), as amended from time to time), and if such interest is purchased through a sale under this section, then such person shall remain subject to all claims and defenses that are related to such consumer credit transaction or such consumer credit contract, to the same extent as such person would be subject to such claims and defenses of the consumer had such interest been purchased at a sale not under this section.

(p) In any hearing under this section—

(1) the trustee has the burden of proof on the issue of adequate protection; and

(2) the entity asserting an interest in property has the burden of proof on the issue of the validity, priority, or extent of such interest.

APPENDIX I

11 U.S.C. § 503

§ 503. Allowance of administrative expenses

(a) An entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause.

(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—

(i) wages, salaries, and commissions for services rendered after the commencement of the case; and

(ii) wages and benefits awarded pursuant to a judicial proceeding or a proceeding of the National Labor Relations Board as back pay attributable to any period of time occurring after commencement of the case under this title, as a result of a violation of Federal or State law by the debtor, without regard to the time of the occurrence of unlawful conduct on which such award is based or to whether any services were rendered, if the court determines that payment of wages and benefits by reason of the operation of this clause will not substantially increase the probability of layoff or termination of current employees, or of nonpayment of domestic support obligations, during the case under this title;

(B) any tax—

(i) incurred by the estate, whether secured or unsecured, including property taxes for which liability is in rem, in personam, or both, except a tax of a kind specified in section 507(a)(8) of this title; or

(ii) attributable to an excessive allowance of a tentative carryback adjustment that the estate received, whether the taxable year to which such adjustment relates ended before or after the commencement of the case;

(C) any fine, penalty, or reduction in credit relating to a tax of a kind specified in subparagraph (B) of this paragraph; and

(D) notwithstanding the requirements of subsection (a), a governmental unit shall not be required to file a request for the payment of an expense described in subparagraph (B) or (C), as a condition of its being an allowed administrative expense;

(2) compensation and reimbursement awarded under section 330(a) of this title;

(3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by—

(A) a creditor that files a petition under section 303 of this title;

(B) a creditor that recovers, after the court's approval, for the benefit of the estate any property transferred or concealed by the debtor;

(C) a creditor in connection with the prosecution of a criminal offense relating to the case or to the business or property of the debtor;

(D) a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a substantial contribution in a case under chapter 9 or 11 of this title;

(E) a custodian superseded under section 543 of this title, and compensation for the services of such custodian; or

(F) a member of a committee appointed under section 1102 of this title, if such expenses are incurred in the performance of the duties of such committee;

(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 expenses incurred by such attorney or accountant;

(5) reasonable compensation for services rendered by an indenture trustee in making a substantial contribution in a case under chapter 9 or 11 of this title, 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;

(6) the fees and mileage payable under chapter 119 of title 28;

(7) with respect to a nonresidential real property lease previously assumed under section 365, and

subsequently rejected, a sum equal to all monetary obligations due, excluding those arising from or relating to a failure to operate or a penalty provision, for the period of 2 years following the later of the rejection date or the date of actual turnover of the premises, without reduction or setoff for any reason whatsoever except for sums actually received or to be received from an entity other than the debtor, and the claim for remaining sums due for the balance of the term of the lease shall be a claim under section 502(b)(6);

(8) the actual, necessary costs and expenses of closing a health care business incurred by a trustee or by a Federal agency (as defined in section 551(1) of title 5) or a department or agency of a State or political subdivision thereof, including any cost or expense incurred—

(A) in disposing of patient records in accordance with section 351; or

(B) in connection with transferring patients from the health care business that is in the process of being closed to another health care business; and

(9) the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business.

(c) Notwithstanding subsection (b), there shall neither be allowed, nor paid—

(1) a transfer made to, or an obligation incurred for the benefit of, an insider of the debtor for the purpose of inducing such person to remain with the

debtor's business, absent a finding by the court based on evidence in the record that—

(A) the transfer or obligation is essential to retention of the person because the individual has a bona fide job offer from another business at the same or greater rate of compensation;

(B) the services provided by the person are essential to the survival of the business; and

(C) either—

(i) the amount of the transfer made to, or obligation incurred for the benefit of, the person is not greater than an amount equal to 10 times the amount of the mean transfer or obligation of a similar kind given to nonmanagement employees for any purpose during the calendar year in which the transfer is made or the obligation is incurred; or

(ii) if no such similar transfers were made to, or obligations were incurred for the benefit of, such nonmanagement employees during such calendar year, the amount of the transfer or obligation is not greater than an amount equal to 25 percent of the amount of any similar transfer or obligation made to or incurred for the benefit of such insider for any purpose during the calendar year before the year in which such transfer is made or obligation is incurred;

(2) a severance payment to an insider of the debtor, unless—

(A) the payment is part of a program that is generally applicable to all full-time employees; and

(B) the amount of the payment is not greater than 10 times the amount of the mean severance pay given to nonmanagement employees during the calendar year in which the payment is made; or

(3) other transfers or obligations that are outside the ordinary course of business and not justified by the facts and circumstances of the case, including transfers made to, or obligations incurred for the benefit of, officers, managers, or consultants hired after the date of the filing of the petition.