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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

In re:	Chapter 11
Cloudeeva, Inc.,[1]	Case No. 14-24874 (KCF)
Debtors.	(Jointly Administered)

DEBTORS' MEMORANDUM OF LAW IN OPPOSITION TO MOTION OF BARTRONICS ASIA PTE LTD. FOR ENTRY OF AN ORDER (I) DIRECTING THE APPOINTMENT OF A CHAPTER 11 TRUSTEE OR, (II) IN THE ALTERNATIVE, DISMISSING THE CHAPTER 11 CASES

[1] The Debtors in these chapter 11 cases (the "Chapter 11 Cases"), along with the last four digits of each Debtor's tax identification number, are: Cloudeeva, Inc., a Delaware Corporation (5326) and Cloudeeva, Inc., a Florida Corporation (2227) (collectively, "Cloudeeva").

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PRELIMINARY STATEMENT

Just two weeks into the Debtors' chapter 11 cases, Bartronics Asia Pte. Ltd ("BAPL") filed its motion for the appointment of a chapter 11 trustee or, in the alternative, dismissing the Chapter 11 Cases (the "Motion"). BAPL seeks the appointment of a chapter 11 trustee or dismissal of the Chapter 11 Cases based on allegations of fraud, dishonesty and mismanagement, none of which are supported by competent evidence and all of which are unrelated to the operation of the Debtors' business. More importantly though, the allegations are not true.

The Debtors recognize that the disputes between BAPL and the Debtor concerning the Stock Exchange Agreement dated as of December 12, 2012 (the "SEA") have given rise to an unhealthy amount of litigation. The Debtors filed the Chapter 11 Cases in order to protect the business of Cloudeeva as well as its creditors, customers and its many employees from the reckless accusations and relentless litigation of BAPL. Herein, the Debtors will respond to the baseless allegations of wrongdoing in the Motion; they do not seek to avoid the adjudication of BAPL's claims on the merits. They do, however, seek to prevent BAPL from causing further harm to an otherwise viable business with tremendous potential. Chapter 11 provides the Debtors with the transparency that all creditors, employees and other parties in interest deserve. It also provides the stability that the Debtors need. The claims of BAPL can be sorted out in the appropriate court, arbitration process or in mediation. Better yet, these disputes can be resolved in the context of negotiation of a chapter 11 plan of reorganization, a much more economical and efficient means.

But, the Debtors' current management team must remain in place. The appointment of a chapter 11 trustee will be very disruptive to the current business operations, and could result in loss of customers, key consultants, vendors and financing opportunities. Even worse, the appointment of a chapter 11 trustee may bring the operations of the Debtors to at least a

temporary standstill, leaving liquidation as the only alternative. Because of these potential consequences, the Debtors urge the Court to reject this drastic remedy. Indeed, courts in both New Jersey and California have refused to displace current management despite requests of BAPL to do so.

The courts *and BAPL* have acknowledged that Adesh Tyagi is, and has been, the sole director and officer of Cloudeeva and that he is authorized to manage the affairs of the Debtors' business. He has done so honestly and competently in the face of BAPL's baseless allegations, its misappropriation of assets, its illegal efforts to gain access to confidential information from Cloudeeva's employees and its direct competition with the Debtors. The decisions of Mr. Tyagi and his management team on a business level and on the litigation front have been made with the best interests of creditors, employees and customers, and the financial health of Cloudeeva, in mind.

The Motion fails to satisfy the substantial burden of proof required by the Bankruptcy Code -- clear and convincing evidence (i) from which the Court can determine that cause exists to appoint a chapter 11 trustee or (ii) that the appointment of a trustee is in the interests of creditors, equity security holders and other interests in the estate. In support of the Motion, BAPL knowingly attempts to introduce inadmissible evidence from which it argues that Mr. Tyagi is a "convicted felon" and then hopes that the Court will be so shocked that it will accept the rest of their unsubstantiated and baseless contentions. The reality is that BAPL's allegations against Mr. Tyagi are no more than misstatements, embellishments and red herrings designed to draw attention from their own wrongdoing.

Not only are the allegations in the Motion untrue, they also relate to conduct that occurred pre-petition, some of which had nothing to do with Cloudeeva. The Debtors are now

subject to the strict reporting and operating guidelines of both this Court and the Office of the United States Trustee. When faced with a motion to appoint a chapter 11 trustee, the controlling and better view is that courts should focus on management's post-petition conduct and whether that conduct is so egregious that the court can determine that cause exists under section 1104(a)(1) of the Bankruptcy Code or that the "interests of creditors, any equity security holders *and* other interests of the estate" are served as required under section 1104(a)(2) of the Bankruptcy Code (emphasis added). In that regard, the Court must consider the interests of all constituent groups, not only the interests of BAPL (if it even has an interest, which the Debtors dispute). The use of the conjunctive ("and") in section 1104(a)(2) requires that the interests of *all* creditors and any equity security holder, as well as other estate interests (which include the Debtors), be taken into account. Here, no other party whose interests would be affected by the appointment of a trustee has expressed any concern with the pre- or post-petition management of the Debtors or the need for a chapter 11 trustee. In fact, there is absolutely no evidence that any of the alleged pre-petition conduct relied upon by BAPL in support of the Motion has affected any other party. Indeed, not even the U.S. Trustee has moved for such relief despite the requirement under section 1104(e) of the Bankruptcy Code that "the United States Trustee *shall* move for the appointment of a trustee under subsection (a) if there are reasonable grounds to suspect that current [management] participated in actual fraud, dishonesty, or criminal conduct in the management of the debtor." 11 U.S.C. § 1104(e) (emphasis added).

As will be demonstrated, BAPL has not met its burden for the appointment of a chapter 11 trustee and the Motion must be denied. Likewise, there is no basis to dismiss the Chapter 11 Cases.

STATEMENT OF FACTS

On July 21, 2014, the Debtors commenced the Chapter 11 Cases by filing voluntary petitions for relief under chapter 11 of the Bankruptcy Code. The Debtors are operating their businesses and managing their properties as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. No examiner or creditors committee has been appointed herein. Additional background facts surrounding the commencement of the Chapter 11 Cases are set forth in the *Declaration of Adesh Tyagi in Support of Chapter 11 Petitions and First Day Pleadings* [Doc. No. 8]. Facts most relevant to the Motion are summarized below.

A. Cloudeeva History and Background

Cloudeeva Florida is a public company which owns one hundred percent (100%) of the equity of Cloudeeva Delaware. Cloudeeva Delaware was originally known as Systems America, Inc., a Delaware corporation incorporated in 1994 ("SA Delaware"). On December 7, 2012 Cloudeeva Florida's predecessor, "SA Florida", entered into the SEA with BAPL. Under the SEA, SA Florida transferred sixty-two percent (62%) of its stock to BAPL and BAPL transferred one hundred percent (100%) ownership in a company called Bartronics America, Inc. to SA Florida. As part of this transaction, SA Delaware and Bartronics America, Inc. were merged and in late 2012, SA Delaware changed its name to Cloudeeva, Inc., a Delaware corporation, and SA Florida changed its name to Cloudeeva, Inc., a Florida corporation. Following the SEA transaction, the former employees and executive management of Bartronics America, Inc. became employees and managers of Cloudeeva Delaware. *See Declaration of Adesh Tyagi in Support of Chapter 11 Petitions and First Day Pleadings* [Doc. No. 8], ¶ 6-9.

Cloudeeva Delaware has been, at all relevant times, a global cloud services and technology solutions company specializing in cloud, big data and mobility solutions and services. The Debtor provides information technology staffing services to major clients and

third-party vendors in the United States and India. Cloudeeva employs three hundred eighteen (318) W-2 employees and twenty-seven (27) independent contractors in the United States. In 2013, the Debtor generated revenues of over $34.4 million and projects revenues of $31 million for the financial year from January to December 2014. *Id.*, ¶ 11-13.

B. Post-Merger Management and Operations

Immediately following the SEA, the business operations of Cloudeeva were run by former management of BAPL. The role of Mr. Tyagi was intended to be "company leader" having an oversight role with respect to the day-to-day affairs of the business and a major focus on growth and merger and acquisition activity which has always been part of the long term business plan for Cloudeeva. *See, Putta Decl.*, Ex. 18-19. Under the SEA, Mr. Tyagi was named as a member of the board of directors, BAPL was authorized to appoint a member of the board and three (3) additional members were authorized. Without explanation, and despite requests by Mr. Tyagi for it to do so, BAPL did not designate its representative to the board for months after the SEA transaction.

Although Mr. Tyagi understood that his role was not to run the day to day operations of Cloudeeva Delaware, he insisted on a "hands on" approach with respect to the affairs of Cloudeeva Delaware. (*See* Putta decl., Ex. 19.) Following the merger, he became concerned about resistance from former Bartronics management to his requests for access to the books and records of Cloudeeva Delaware. By May 2013, Mr. Tyagi was so frustrated with his lack of access to the books and records, he made a formal demand. *See, Declaration of Adesh Tyagi* in opposition to the Motion submitted herewith (the "Tyagi Decl."), ¶ 14. As he became more familiar with the practices of Bartronics' management and the financial affairs of Bartronics America, Inc., BAPL and other affiliated entities, Mr. Tyagi's level of concern grew.

C. Mr. Tyagi Discovers Mismanagement and Self-Dealing at Bartronics

Concerns about the financial affairs of Cloudeeva Delaware ultimately caused Mr. Tyagi to conduct an investigation with the assistance of attorneys and a forensic accountant, Karen Balmer, CPA. In the course of the investigation, approximately $2 million of questionable transfers outside the ordinary course of business were identified between December 7, 2012 (the date of the SEA) and August 9, 2013 under the management of former Bartronics personnel, including Sudir Rao, Chetan Kunchala and Venkata Putta. (*See* Declaration of Karen Balmer, dated September 29, 2013, ("Balmer Decl.") ¶¶ 10-12, attached to the declaration of Mark Vitcov (the "Vitcov Decl."), as Ex. E.) When Mr. Tyagi and Ms. Balmer sought explanations for these transfers, none were provided. Also, the forensic investigation revealed that BAPL had seriously misstated the value of Cloudeeva Delaware's receivables, goodwill, liabilities and equity. For example, the investigation revealed that the receivable accounts for BAPL affiliates Exxova Worldwide and Veneta Holdings, $11.7 and 14.9 million respectively, were uncollectible – this was a major omission considering that these receivables represented 80% of Cloudeeva Delaware's current assets and are specifically referred to in the SEA at section 3.8(d). *Id.* at ¶¶ 14-15. The forensic investigation further revealed: a set of bogus financial statements prepared by Chetan Kunchala, a Bartronics financial analyst at Cloudeeva Delaware, which deliberately overstated asset values for the purpose of borrowing from Wells Fargo Bank (*id.* at ¶ 16); a suspect transfer in January 2013 of $152,936 to HCM Logic, a company owned by the former Bartronics president's wife and other suspect transfers to "ZZ Corp" which was Bartronics' code for transfers out of Cloudeeva Delaware that did not relate to the business of Cloudeeva Delaware; and a gross overstatement (without any justification) of goodwill value at $33.2 million. (*Id.* at ¶¶ 18 and 25).

The misstatements also infected the liability/equity portions of the balance sheet. The Cloudeeva books reflected a preferred equity position held by Bartronics India in the amount of $50 million which was created by converting alleged liabilities of Cloudeeva Delaware to Bartronics India to equity. According to Ms. Balmer's analysis, the reflection of the Bartronics India preferred equity stake in Cloudeeva India was inaccurate. (*Id.* at ¶ 21.)

As the September 29, 2013 Balmer Declaration reflects, there is more. The main point, however, is that within the seven months following the SEA, Mr. Tyagi had discovered that Bartronics America had been making improper transfers to related entities and had made material misstatements in its books and records. He was not prepared to tolerate the continuation of these practices in Cloudeeva Delaware.

D. Mr. Tyagi Takes Action to Address BAPL's Misrepresentations and Self-Dealing

Once Mr. Tyagi learned of the above transgressions by Bartronics personnel at Cloudeeva Delaware, he had no choice but to remedy the situation. In July 2013, Mr. Tyagi took steps to remove Venkat Maram as a director of Cloudeeva Delaware. (*See* Putta Decl., Ex. 22.) For the reasons stated above, he certainly had ample reason to do so. He also had the legal authority.

Mr. Tyagi had authority from a properly constituted Board of Directors. First (and easiest), on July 31, 2013, the New Jersey Superior Court entered an order, consented to by BAPL, confirming that Adesh Tyagi was the Chairman and CEO of Cloudeeva Delaware (*see* Pappy Decl., Ex. A). Second, although the SEA and Stockholders' Agreement specify how Cloudeeva Florida's board was to be constituted, apparently BAPL was not concerned enough to nominate its board representative for more than seven months after the SEA transaction closed. (*See Putta Decl.*, Ex. 21.) During that time, Mr. Tyagi requested that BAPL appoint its director

but BAPL failed to do so. Moreover, the corporate governance documents of Cloudeeva Florida require that certain formalities be followed in the appointment of directors – BAPL ignores these formalities. The Bylaws of Cloudeeva Florida were never amended to appoint directors as called for the in SEA. According to these Bylaws, the annual shareholder's meeting is noticed for the 30th of June of each year. (*See* Bylaws, Article I, Section 1, attached to the Declaration of Stephen Moses (the "Moses Decl.") as Ex. M). Article I, section 1 of the Bylaws further states that the business transacted at the annual shareholders' meeting ***shall include the election of directors***. A shareholder meeting may be conducted without a noticed meeting, "if a consent in writing, setting forth the action taken, shall be signed by the holders of outstanding stock ***having not less than the minimum number of votes that would be necessary to authorize or take such action*** at a meeting at which all shares entitled to vote thereon were present and voted." (*Id.* at Art. I, sec. 9 [emphasis added].) Such a consent was never executed.

In addition, Article II of the Bylaws addresses the directors. According to Article II, section 5, the minimum number of directors is one (1). (*Id.*) Therefore, because BAPL neglected to appoint a director at the closing of the SEA (or for months thereafter) and the formalities set forth in the Bylaws and Shareholders' Agreement were never carried out, Mr. Tyagi remains the sole director of Cloudeeva Florida. (*See* Moses, Decl., ¶ 16.)

E. Bartronics Commences Litigation

By exercising his corporate governance rights as set forth above, Mr. Tyagi made it clear that he was not going to tolerate any further misuse of corporate funds and misrepresentations in financial statements. He removed Bartronics' representatives from management of Cloudeeva Delaware. BAPL's response was to go on the offensive. It filed a Verified Complaint and Order to Show Cause in the New Jersey Superior Court which was heard by Judge Innes of the Mercer County Chancery Court in July 2013. After a full hearing and consideration of the evidence, the

court denied BAPL's request for emergent relief. Contrary to BAPL's assertions, Judge Innes did not deny the TRO only because Bartronics Asia failed to name Cloudeeva Delaware as a nominal party. Indeed, the court considered evidence showing that Cloudeeva Delaware's President, Venkat Maram, had taken over $500,000 from the company after the SEA transaction without authorization from the board or Mr. Tyagi. This evidence concerned the court greatly and was a major reason why Judge Innes ruled the way he did. It is no surprise, therefore, that BAPL decided to dismiss the New Jersey action and try its luck in another court with a new lawyer.

Thus, in September 2013, the California Action was filed and thereafter a TRO and various preliminary injunctions have been entered. The history of the proceedings before the California State Court is extensive and the pleadings that have been filed are voluminous. There is no doubt that Cloudeeva suffered some setbacks before the California State Court and has disagreed with certain rulings which are on appeal and presently stayed. In the Motion, BAPL cherry picks certain history from California and speculates that Cloudeeva's legal strategy was to hide information. While it is true that Cloudeeva was concerned about the unrestricted sharing of certain information with BAPL, the reason for this concern was obvious -- BAPL had misappropriated substantial assets from Cloudeeva Delaware; it made material misrepresentations about assets and liabilities; it had established a company to compete with Cloudeeva; and it had reason to believe that BAPL was seeking to destroy the business.

As stated by the California State Court, the intent behind the Preliminary Injunction was to allow the company to continue to operate in the ordinary course of business and that the court should only be brought in to review transactions that "appear to lead to irreversible financial detriment or obvious self-dealing." (Moses Decl., Ex. B.) Instead, BAPL and its attorneys used

the Preliminary Injunction to question every single transaction undertaken by Cloudeeva Delaware, causing the company to incur needless and excessive legal costs. In terms of requests for production of documents, Cloudeeva produced the documents required by the court in the Preliminary Injunction and in some cases disputes arose over BAPL's requests for further documentation, which were usually only brought to the attention of Cloudeeva at the time that BAPL made an *ex parte* application with the California State Court. BAPL did not engage in any effort to meet and confer in good faith with counsel for Cloudeeva for the production of further documents it might request, which is a requirement in California law and civil practice. (Moses Decl., ¶¶ 7, 12.)

Although BAPL was an active competitor with Cloudeeva Delaware, it repeatedly requested confidential and proprietary information from Cloudeeva Delaware, claiming such production was required under the Preliminary Injunction despite the fact that there were no specific terms addressing some of the information requested. When Cloudeeva Delaware specifically requested that BAPL enter into a stipulated protective order with respect to confidential and proprietary information, BAPL's counsel refused to do so. As a result, Cloudeeva filed two motions, one with the arbitrator and one with the California State Court, in order to obtain a protective order that covered all of the confidential and proprietary information produced by Cloudeeva Delaware pursuant to the Preliminary Injunction and in the arbitration. Despite BAPL's vehement opposition, the arbitrator and the court both granted the protective orders. Cloudeeva Delaware began producing weekly and monthly documents required under the Preliminary Injunction, but redacted personally identifiable information concerning its employees, vendors and clients because BAPL's attorneys refused to stipulate to a protective order. (*See* Moses Decl., ¶ 8.) Cloudeeva Delaware had a legitimate interest in preserving and

protecting Cloudeeva Delaware's proprietary and confidential information from misuse by BAPL and asserted its rights. The California State Court later entered a protective order and then an order requiring Cloudeeva Delaware to produce the same information unredacted, which Cloudeeva Delaware did on May 29, 2014. (*See* letter dated May 29, 2014, attached to the Moses Decl., Ex. I.)

Cloudeeva's cautious approach was reasonable. During discovery proceedings in the JAMS arbitration between BAPL and Cloudeeva, in June 2014, Cloudeeva took the depositions of BAPL's representatives, Venkata Putta and Chetan Kunchala. Through their testimony, Cloudeeva confirmed that Mr. Putta and Mr. Kunchala had improperly obtained certain confidential financial information of Cloudeeva from a Cloudeeva Delaware employee, Vijaya Yarramaneni, in flagrant breach of her duty of loyalty and the terms of her employment with Cloudeeva Delaware. Knowing that they had received this confidential information improperly (and in breach of their own prior employment relationships with Cloudeeva), Mr. Putta and Mr. Kunchala provided this information to BAPL and its attorneys, who then used that information in motions filed against Cloudeeva in the California Action. The California court described this conduct as "repugnant and probably illegal." *See* Declaration of Scott Hammel (the "Hammel Decl."), p. 5.

F. Bartronics Accuses Mr. Tyagi of Fraud and Mismanagement (Without Proof)

Bartronics' Motion is full of baseless accusations that Mr. Tyagi took funds from the Debtors to fund personal or familial enterprises and that he has mismanaged the business affairs of Cloudeeva. BAPL has been on this crusade for some time. Unfortunately, no matter how many times Mr. Tyagi provides explanations, the accusations keep coming. Rather than devoting pages of responses herein, the Debtors refer to the Vitcov and Tyagi Declarations

which respond to virtually all (if not all) of BAPL's contentions of fraud and mismanagement. Also, as with most of BAPL's arguments, they are not supported by competent evidence to get over the clear and convincing burden of proof threshold to warrant the appointment of a chapter trustee.

G. The Debtor's Business is Viable and Might be Harmed if a Trustee is Appointed

The Debtor operates a business that relies heavily on the relationships between its management and its customers, and in particular upon the relationships Mr. Tyagi has built over the last two decades. The Debtor is the current iteration of a company that was founded in 1994 by Mr. Tyagi and built by him from the ground up in the intervening years. (Tyagi Decl., ¶ 4.) Mr. Tyagi has negotiated numerous key contracts to aid the company's growth over two decades. (*Id.*, ¶ 6.) In the two years leading up to the 2012 merger, Mr. Tyagi oversaw rapid growth at Cloudeeva Delaware, growing its market share of revenues by 100% and increasing its profit margin by 25%. (*Id.*, ¶ 6.) Indeed, it was Mr. Tyagi's success running Cloudeeva Delaware, and his ability to raise capital, that caused BAPL to reach out to Mr. Tyagi to discuss a merger agreement. (*Id.*, ¶ 8)

Mr. Tyagi's leadership has grown Cloudeeva Delaware from having a single financial industry client, to having clients throughout the energy, financial, government, health care, retail, and travel industries. As a result of Mr. Tyagi's efforts, Cloudeeva Delaware now supports operations in nearly 20 countries. This growth in the Debtor's customer base has continued following the SEA. In fact, following the SEA, Mr. Tyagi has, through his efforts, landed various blue chip customers for Cloudeeva. Mr. Tyagi has also personally negotiated several essential financing arrangements, both before and after the SEA, to finance the acquisition of additional companies and to provide working capital. It was Mr. Tyagi who,

following the SEA, implemented and continues to implement a new branding and marketing approach for the Debtor, focused on better positioning the company in the field of cloud computing and better integrating all of the company's recent acquisitions. (Id., ¶ 12.)

Bartronics America's legacy, and the constant interference and litigiousness of BAPL as described above, have resulted in real financial challenges for the Debtor. Nonetheless, the current management team put in place by Mr. Tyagi has begun to right the ship, having implemented more than $1.2 million in annual cost saving measures, which is beginning to result in steadily increasing revenues. (Vitcov Decl., at p. 10.) While BAPL's actions have jeopardized the financial health of the Debtors, the business is profitable and will benefit from the additional stabilization this Chapter 11 reorganization can provide. (*Id.*)

Although the Debtor's business is profitable and has begun to increase its revenue, it remains fragile and dependent on the relationships Mr. Tyagi has built. Both the litigation pursued by BAPL and the Debtor's Chapter 11 filing have contributed to a sense of unease communicated by certain vendors and customers. (*Id.*, ¶ 13.) The appointment of a Chapter 11 trustee would not only terminate the direct relationships between the Debtor's customers and the CEO and founder of the company, but it will also contribute to the overall sense of uncertainty with which the Debtor is already contending as it reorganizes. Because the business is so heavily relationship-dependent, and because the business is in the midst of a fragile recovery, the loss of customers that would occur upon the appointment of a trustee would devastate the debtor, ultimately harming all of the stakeholders involved in this case.

ARGUMENT

I. A CHAPTER 11 TRUSTEE IS NOT WARRANTED AND THE MOTION MUST BE DENIED.

Pursuant to the Bankruptcy Code, a Chapter 11 trustee shall be appointed upon a showing of cause or in the interests of creditors, any equity security holders and other interests of the estate. Section 1104(a) of the Bankruptcy Code provides:

> At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest or the United States Trustee, and after notice and a hearing, the court shall order the appointment of a trustee –
>
> (1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case . . .; or
>
> (2) if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate . . .

11 U.S.C. § 1104(a)(1) and (2).

The burden of proof is the same under either section 1104(a)(1) or 1104(a)(2): the party seeking the appointment of a chapter 11 trustee has the burden of proving the need for a trustee by clear and convincing evidence. *In re Sharon Steel Corp.*, 871 F.2d 1217, 1226 (3d Cir. 1989); *In re Marvel Entertainment Group, Inc.*, 140 F.3d 463, 471 (3d Cir. 1998); *see also Official Committee of Asbestos Claimants v. G-I Holdings, Inc. (In re G-I Holdings, Inc.)*, 385 F.3d 313, 315-18 (3d Cir. 2004). This is a substantial burden which BAPL cannot and has not met under either section of the statute. The appointment of a chapter 11 trustee is extraordinary relief and is the "'exception, rather than the rule,'" *Marvel*, at 471, quoting *Sharon Steel*, at 1225, because "current management is generally best suited to orchestrate the process of rehabilitation for the benefit of creditors and other interests of the estate." *In re Savino Oil & Heating Co.*, 99 B.R. 518, 524 (Bankr. E.D.N.Y. 1989); *Marvel*, 140 F.3d at 471; *Taub v. Taub (In re Taub)*, 427 B.R. 208, 225 (Bankr. E.D.N.Y. 2010) (finding that appointment of a trustee is an unusual remedy with a "very high" standard of proof). Because the debtor in possession is a fiduciary of all

creditors and has an obligation to avoid conduct that would "damage the estate or hinder a successful reorganization," *Petit v. New England Mort. Servs.*, 182 B.R. 64, 69 (D. Me. 1995), there is a "strong presumption against appointing an outside trustee." *Marvel*, 140 F.3d at 471; *In re Sundale, Ltd.*, 400 B.R. 890, 899 (Bankr. S.D. Fla. 2009); *In re The 1031 Tax Group, LLC*, 374 B.R. 78, 85 (Bankr. S.D.N.Y. 2007). The debtor in possession's familiarity with the operations and business of the debtor "often [makes] it the *best* party to conduct operations" during the chapter 11 process. *Marvel*, 140 F.3d at 471(emphasis added); *Sharon Steel*, 871 F.2d at 1226 (noting the House Report's conclusion that "very often creditors will be benefitted by continuation of the debtor in possession" because of the debtor's familiarity with the business and the avoidance of the expense of a trustee). "The appointment of a trustee imposes a substantial financial burden on a debtor's estate which can preclude the possibility of reorganization." *In the Matter of Century Glove, Inc.*, 73 B.R. 528, 537 (Bankr. D. Del. 1987), *citing In re Crescent Beach Inn, Inc.*, 22 B.R. 155, 160 (Bankr. D. Me. 1982) (denied the motion, noting that the administration expense of a trustee should be considered).

A. BAPL fails to establish sufficient cause to warrant mandatory appointment of a chapter 11 trustee.

Under section 1104(a)(1), once the court determines that cause exists, the appointment of a chapter 11 trustee is mandatory. *Sharon Steel*, 871 F.2d at 1226. The determination of cause, however, is within the discretion of the court. *Committee of Dalkon Shield Claimants v. A.H. Robins Co., Inc.*, 828 F.2d 239, 242 (4th Cir. 1987); *1031 Tax Group*, 374 B.R. at 86. This discretion is subject to "the various interests involved in the bankruptcy proceeding," including the protection of creditors. The level of mismanagement, dishonesty or fraud is relative and must be properly considered so as to not "frustrate" the policies of the Bankruptcy Code. The consequences of the alleged conduct must also be considered such that the appointment of a chapter 11 trustee is "harmonious with the [Code] in its entirety" thereby entrusting Bankruptcy Courts with discretionary authority to determine if cause exists under section 1104(a)(1). *A.H. Robins*, 838 F.2d at 242.

The determination of whether cause exists under section 1104(a)(1) must be made on a case by case basis. *Marvel*, 140 F.3d at 472; *Sharon Steel*, 871 F.2d at 1226, 1228 (decisions under both provisions of section 1104(a) are made on a case by case basis and the court should consider the "totality of the circumstances"); *Sundale,* 400 B.R. at 900 ("the decision to appoint a trustee is fact intensive and the determination must be made on a case by case basis"). Here, the facts offered by BAPL are insufficient to justify the extraordinary relief of appointing a chapter 11 trustee. Cause cannot be established by clear and convincing evidence.

BAPL's argument is based entirely upon alleged pre-petition conduct of management. Although section 1104(a)(1) calls for consideration of both pre- and post-petition conduct of management, "the general 'focus is on the debtor's *current management*, not the misdeeds of past management.'" *In re Denis Berjeron*, 2013 Bankr LEXIS 4556, *23 (Bankr. E.D.N.C. Oct. 31, 2013) (emphasis added), quoting *1031 Tax Group*, 374 B.R. at 86; *Taub*, 427 B.R. at 225 (noting that the U.S. Trustee's request for the appointment of a trustee was based on the debtor's failure to meet post-petition obligations); *In re James Philip Sletteland*, 260 B.R. 657, 672 (Bankr. S.D.N.Y. 2001)(finding that the "focus is on the debtor's *current activities*, not past misconduct" (emphasis added)); *In re Eagle Creek Subdivision, LLC*, 2009 Bankr. LEXIS 632, *2 (Bankr. E.D.N.C. Mar. 9, 2009)(holding that a court determining cause to appoint a trustee "must narrow its focus to the actions of *current management*" (emphasis added)). "Speculation that a debtor may do something in the future does not overcome the strong presumption that the debtor should be permitted to remain in possession in a chapter 11 case or justify the additional cost of a trustee." *Sletteland*, 260 B.R. at 672. There is always some degree of mismanagement or incompetence in every chapter 11 case. *In re General Oil Distributors, Inc.*, 42 B.R. 402, 409 (Bankr. E.D.N.Y. 1984); *Sletteland*, 260 B.R. at 672. Chapter 11 is intended to give a debtor a 'second chance' permitting current management to correct past mistakes. *General Oil*, at 409. Indeed, to do otherwise would require the appointment of a chapter 11 trustee even where former management was involved in a single act of fraud, mismanagement or dishonesty. *Id.* Even where pre-petition conduct may be highly questionable, a debtor's history of errors in judgment

are not uncommon and should not be grounds for finding cause to appoint a trustee. *In re Cardinal Indus., Inc.*, 109 B.R. 755, 759 (Bankr. S.D. Ohio 1990). Furthermore, where a debtor maintains a business relationship with a related non-debtor business entity, it "does not *de jure* establish" cause to appoint a trustee. *In re Clinton Centrifuge, Inc.*, 85 B.R. 980, 985 (Bankr. E.D. Pa. 1988). These cases demonstrate that the standard of proof is not easily met when an entity seeks the extraordinary relief of having a chapter 11 trustee appointed. BAPL must provide more than embellishments and unproven allegations of pre-petition conduct. The evidence falls woefully short of clear and convincing and the Motion should be denied.

Berjeron, supra, cited to several decisions, which although unreported, are relevant and provide guidance with respect to the weight to be given pre-petition conduct, especially when there is no evidence of similar post-petition conduct. In *Gomez v. U.S. Trustee*, 2010 U.S. Dist. LEXIS 14403, *2 (W.D. Va. Feb. 18, 2010), the court recognized that "the mere existence of a *prior felony conviction* will not justify the appointment of a trustee in every Chapter 11 case." (Emphasis added.) In *In re Tanglewood Farms, Inc.*, 2011 Bankr. LEXIS 624, *2 (Bankr. E.D.N.C. Feb. 10, 2011), despite evidence of a fraudulent pre-petition scheme to divert the proceeds of the sale of grain, there was no evidence of any post-petition conduct and the motion for the appointment of a trustee was denied. Although a chapter 11 trustee was appointed in *In re Piedmont Center Invs., LLC*, 2011 Bankr. LEXIS 4659, *4 (Bankr. E.D.N.C. Sept. 8, 2011), the court noted the partial owner/manager's pre-petition indictment for serious crimes of bank fraud, false statements and identity theft was not alone sufficient to appoint a chapter 11 trustee. Those particular deeds, however, were supported by the manager's letter detailing his fraudulent scheme, thereby providing the additional conduct justifying a trustee in that case. In *Berjeron*, although management was twice incarcerated for civil contempt for failing to comply with court orders, the court did not appoint a chapter 11 trustee. *Berjeron*, at *28-29; *see also A.H. Robins*, 585 F.2d at 240 (where the debtor having been held in civil contempt of a consent order prohibiting the payment of pre-petition claims was not enough to appoint a chapter 11 trustee). Based upon the foregoing, the allegations of pre-petition criminal complaints and a *nolo*

contendere plea against Tyagi (which is not admissible (*see generally* Federal Rule of Evid. 410) and therefore is not competent evidence) should not even be considered by the Court.

Throughout the Motion, BAPL provides only unproven allegations of mismanagement that occurred pre-petition and fall far short of clear and convincing. As to evidence of any post-petition fraud, dishonesty, incompetence or gross mismanagement, BAPL offers none, because there is none. Granted these cases are in their infancy, but if the mismanagement was as pervasive as BAPL would have this Court believe, then certainly BAPL would have been able to identify some post-petition conduct. As stated above, there has been no such conduct. In fact, since the Petition Date, the Debtors have continued to comply with orders of the Court, requests of the U.S. Trustee and even requests for reports from BAPL. BAPL cannot point to one post-petition instance where the Debtors have not complied with their obligations. Indeed, even to the extent courts look at the acrimony between the debtor and a creditor or other party in interest to justify the appointment of a trustee, *see G-I Holdings*, 385 F.3d at 321; *Marvel*, 140 F.3d at 472-73, the acrimony that existed here has diminished since the Petition Date, at least in the context of operational issues and production of documents.

Furthermore, disputed or contested, allegations of fraud, dishonesty, mismanagement or similar conduct are just that—allegations—and are not sufficient to yield a determination of cause under section 1104(a)(1). *Berjeron*, at *25-26 (Citations omitted). The allegations must be proven. *In re Concord Coal Corp.*, 11 B.R. 552, 553 (Bankr. S.D.W.Va. 1981). The allegations in the California Action are all disputed. None have been proven. To the extent the California State Court made any findings, none are relevant to the Motion *sub judice*. Further, despite any alleged pre-petition errors in judgment or mismanagement, there is absolutely no evidence that such conduct will continue post-petition. Indeed, under the scrutiny of the United States Trustee, who has taken an active role in the Chapter 11 Cases thus far, and this Court, and even BAPL, the Debtors will be unable to engage in any conduct that would give rise to cause under section 1104(a)(1). *See In re Royster Co.*, 145 B.R. 88, 91 (Bankr. M.D. Fla. 1992) (finding that despite "pervasive" pre-petition conduct by the debtors, the debtors were operating

post-petition under the "watchful eye" of a creditors committee, the U.S. Trustee and a secured creditor, and therefore a trustee was not warranted);[2] *Clinton Centrifuge*, 85 B.R. at 987 (acknowledging that "in most bankruptcy cases there will be some display of mismanagement," but under the "watchful eye" of creditors, the debtors' post-petition conduct will be "sufficiently monitored" to obviate the need for a trustee).

None of the cases cited in support of BAPL's application under section 1104(a)(1) is applicable to the facts of this case – even the one-sided and inaccurate facts alleged by BAPL. For instance, BAPL argues that cause exists for the appointment of a trustee based on BAPL's inaccurate factual statement that Mr. Tyagi "is a convicted felon who pled guilty to a $4.8 million fraud in 2012." (BAPL Br. at 22.) Aside from the fact that this allegation is untrue, the cases cited by BAPL to support its argument presented situations that BAPL does not even allege here. In *Gomez v. U.S. Trustee*, *supra*, at *1-*2, the debtor filed a Chapter 11 petition one week prior to his sentencing on charges involving fraud "based on acts committed by [the debtor] during the course of managing his medical practice or his personal financial affairs." In *In re Jayo*, the debtor pled guilty, two days after filing a bankruptcy petition, to a federal charge of converting cattle she had pledged to a federal agency as collateral, and the debtor made "knowingly false sworn statements on her schedules and statements of financial affairs." 2006 Bankr. LEXIS 1946, at *1, *3, *8 (Bankr. D. Idaho July 28, 2006). Thus, both cases involved ongoing criminal proceedings that directly implicated the bankrupt estates, a situation that is not even alleged by BAPL.

Throughout the Motion, BAPL relies on cases involving easily distinguishable, and far more egregious, conduct in which BAPL even alleges Tyagi has engaged. BAPL cites several cases in which trustees were appointed where owners or managers of a debtor were involved in self-dealing of a variety not alleged, and certainly not proven by clear and convincing evidence, here. *See, e.g.*, *Sharon Steel*, 871 F.2d at 1228 (debtor's management engaged in "systematic

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[2] The absence of a creditors committee is not sufficient to appoint a trustee, especially where the U.S. Trustee and BAPL are so actively engaged in the Chapter 11 Cases.

syphoning of [debtor's] assets to other companies under" control of debtor's chairman and CEO on eve of bankruptcy filing); *In re PRS Ins. Grp., Inc.*, 274 B.R. 381, 385-86 (Bankr. D. Del. 2001) (debtor's principal diverted millions of dollars to, *inter alia*, purchase homes and pay for daughter's wedding, and he refused to answer questions about alleged diversions at hearing on trustee motion on advice of counsel); *In re Intercat, Inc.*, 247 B.R. 911, 922 (Bankr. S.D. Ga. 2000) (appointing trustee for closely held debtor where founder and CEO floated loans to himself that were not paid back, personally collected royalties belonging to company, and wasted corporate assets by diverting intellectual property to another company he owned); *Petit, supra,* 182 B.R. 64 (upholding appointment of trustee where debtor was obstructive and evasive during bankruptcy proceedings, hid details of disposition of funds received in a settlement during bankruptcy proceedings, and where evidence suggested debtor planned to make preferential transfers to inside creditors); *In re McCorhill Publ'g, Inc.*, 73 B.R. 1013, 1017 (Bankr. S.D.N.Y. 1987) (appointing trustee where debtor's directors had conflicting interests with entities sharing office suite with debtor, financial affairs of debtor were intertwined with related entities, debtor made undocumented loans to principals that were not repaid, and debtor made unauthorized post-petition payments on prepetition obligations).

BAPL further wrongfully alleges that Tyagi has disregarded certain court orders entered in the California action and asks this Court to appoint a trustee based on that untrue allegation. Once again, however, BAPL resorts to citing cases involving far more egregious conduct than it wrongfully alleges here in attempting to make its point. In arguing that violations of orders entered by courts other than the bankruptcy court constitutes cause for appointing a trustee, BAPL cites to *In re Biolitec, Inc.*, 2013 Bankr. LEXIS 1377 (Bankr. D.N.J. April 3, 2013), a case that bears no resemblance to the instant one. In *Biolitec*, the debtor was one of a number of related entities under common control. *Id.* at *2. During the bankruptcy, a related entity under common management effectuated a merger in direct violation of an injunction that had been issued by the Federal District Court in Massachusetts. *Id.* at *3. The injunction had been imposed to prevent the fraudulent transfer of assets in an attempt to become judgment proof. *Id.*

at *2-*3. The *Biolitec* Court explained that the merger "weigh[ed] heavily" because it was undertaken and authorized by the Supervisory Board of [the related non-debtor entity], an entity which is the target of fraudulent transfer actions and under common control and ownership with the Debtor." *Id.* at *12. Thus, the court found, because the management of the debtor was not sufficiently independent of the common owner, it could not act as a fiduciary to the creditors in light of the common owner's actions in transferring assets despite the injunction. *Id.*

Here, BAPL does not allege that Cloudeeva fraudulently transferred assets in contravention of a court order to frustrate creditors – not even close. Nor does it allege that Cloudeeva has failed to adhere to any disclosure requirements during the pendency of these actions, as was the case in the other inapplicable cases cited by BAPL. *See, e.g., Tradex Corp. v. Morse*, 339 B.R. 823 (D. Mass. 2006) (debtor did not make "straightforward and accurate" disclosures in bankruptcy, comingled affairs with other entities owned by principal, and principal was under grand jury investigation for fraud); *Savino Oil, supra*, 99 B.R. 518 (following adverse judgment, debtor formed new entity on eve of bankruptcy, transferred customer list and accounts to new entity, and failed to disclose that it did so in its Chapter 11 petition). BAPL's cases cited for the proposition that prepetition failure to adhere to court orders should result in the appointment of a trustee absent such post-petition conduct also, like the rest of the authority it relies on, bear no resemblance to this case. *See, e.g., In re Rivermeadows Assoc., Ltd.*, 185 B.R. 615 (Bankr. D. Wyo. 1995) (appointing a trustee where debtor's principal could not appear in bankruptcy court for fear of arrest because bench warrant had been issued for his disobeying court orders in separate state litigation related to the debtor); *In re Colorado-Ute Elec. Ass'n, Inc.*, 120 B.R. 164 (Bankr. D. Colo. 1990) (trustee appointed not because of prepetition failure to follow orders but because of conflicts and lack of business savvy on rural utility co-op board).

As demonstrated by the Declarations of Adesh Tyagi, Mark Vitcov, Scott Hammel and Stephen Moses, submitted herewith, BAPL has failed to meet its burden of persuasion by clear and convincing evidence on which the Court could determine that cause exists under section 1104(a)(1) for the appointment of a trustee. The Debtors' Declarations sufficiently rebut

BAPL's baseless arguments asserted in support of the Motion, thereby destroying any weight that they may have. The Motion seeking the appointment of a chapter 11 trustee must be denied.

B. BAPL fails to prove that the appointment of a trustee is in the interests of creditors, any equity security holders and other interests of the estate.

Unlike section 1104(a)(1) which mandates the appointment of a chapter 11 trustee once the Bankruptcy Court determines that cause exists, section 1104(a)(2) of the Bankruptcy Code "'envisions a flexible standard'[whereby the court] has discretion to appoint a trustee 'when to do so would serve the parties' and the estates' interests.'" *Marvel*, 140 F.3d at 474, quoting *Sharon Steel*, 871 F.2d at 1226; *1031 Tax Group*, 374 B.R. at 90-91. The flexible, discretionary standard is premised upon the Court's consideration of certain factors which give rise to a cost/benefit analysis. *Sundale*, 400 B.R. at 909.

The factors were developed in light of Congress' intent, when formulating section 1104(a)(2), to protect the public interest and the interests of creditors and to facilitate "a reorganization that will benefit both the creditors *and* the debtors." *1031 Tax Group*, 374 B.R. at 91, quoting from the House Report, 124 Cong. Rec. H11, 11 (daily ed. Sep. 28 1978) (emphasis added). The factors to be considered are:

(i) the debtor's trustworthiness;
(ii) the debtor's past and present performance and prospects of rehabilitation
(iii) the confidence in the debtor's current management; and
(iv) the benefits derived from, as compared to, the cost incurred by the appointment.

1031 Tax Group, at 91; the factors are "amorphous, diverse, and necessarily involve a great deal of judicial discretion." *Savino Oil*, 99 B.R. at 527 n.11.

Each of the foregoing factors weighs against the Motion. BAPL cannot demonstrate by clear and convincing evidence that the Debtors are untrustworthy. No competent evidence has been offered. Indeed, the fact that the Debtors are producing documents and information in response to the various and numerous requests by the U.S. Trustee and BAPL is evidence of their trustworthiness. In support of the second factor, the Debtors' current performance is

unblemished and should be the focus of the Court's consideration. See, Sec. I-A, *supra.* The presumption in favor of a debtor remaining in possession also facilitates the Debtors' prospects of rehabilitation. The Debtors understand the need to adhere to the strict reporting and operating guidelines under chapter 11 and will continue to do so.

As to the confidence in the Debtors' current management, there can be no doubt that the Debtors' customers and creditors have confidence in current management. *See* Moses Decl., ¶ 14; Vitcov Decl., at p. 10. Creditors will certainly have little or no confidence in an outside industry-inexperienced trustee. Furthermore, other than by BAPL, the issue of confidence in the Debtors' current management has not been raised by any party in interest. Indeed, if an outside trustee is appointed to manage the business, vendors and customers may refuse to continue to do business with the Debtors (which may be what BAPL, as a competitor, wants). Finally, balancing the benefits derived from the appointment of a trustee against the administrative expenses that will be incurred by the appointment of a trustee weighs against the appointment. The added administrative expense will only unnecessarily erode the value to unsecured creditors. Thus, to the extent the factors are considered by the Court, and in the absence of clear and convincing proof, the appointment of a trustee is not in the interest of all creditors, any equity holders and the other interests of the estate as referenced under section 1104(a)(2).

Moreover, the plain language of section 1104(a)(2) does not support the appointment of a trustee. Section 1104(a)(2) requires that the appointment of a trustee be "in the interests of creditors, any equity security holders, *and* other interests of the estate." (Emphasis added.) The statute is written in the conjunctive thereby requiring that the Court find that a chapter 11 trustee is in the interests of all of the Debtors' constituent groups, including the Debtors' creditors, equity security holders and other estate interests. *In re St. Louis Globe Democrat, Inc.*, 63 B.R. 131, 138 n.9 (Bankr. E.D. Mo. 1985) (finding that although the appointment of a trustee is in the interests of creditors and other interests of the estate, it was not in the interest of any equity security holder). "[A] creditor group, *no matter how dominant*, cannot justify the appointment of a trustee simply by alleging it would be in its interest. It must show that the appointment is in

the interests of all those with a stake in the estate, which [like here] . . . would include the debtors." *Sletteland*, 260 B.R. at 672 (emphasis added); *see also Berjeron*, at 36. Here, other than its own interests, BAPL has not shown that any other party's interest is served by the appointment of a trustee. But BAPL's interest alone is not sufficient to satisfy section 1104(a)(2). To grant BAPL's Motion for its own purposes disenfranchises other creditors and the Debtors. *See* 7 Collier, *Bankruptcy*, ¶ 1104.02[3][d][i] (Resnick and Sommer eds, 16th ed.). This cannot be permitted.

The mere fact that one particular party is unhappy with current management is thus clearly insufficient cause to appoint a trustee under section 1104(a)(2). *See, e.g., In re Stein and Day, Inc.*, 87 B.R. 290, 295 (Bankr. S.D.N.Y. 1988) (refusing to appoint trustee on motion of single aggrieved creditor where other creditors felt management was competent). Attempting to convert its own irrational dislike of Cloudeeva's management into cause for appointment of a trustee, BAPL again cites to a string of cases involving far more egregious facts than are alleged here. *See, e.g., U.S. Mineral Prods. Co. v. Cmte. of Asbestos Bodily Injury & Prop. Damage Claimants (In re U.S. Mineral Prods. Co.)*, 2004 U.S. Dist. LEXIS 673 (D. Del. Jan. 16, 2004) (upholding bankruptcy court's *sua sponte* appointment of trustee where, after two years of attempts, debtor and asbestos claimants could not agree on a plan); *Cardinal Indus., supra*, 109 B.R. 755 (appointing trustee where there was "crisis of confidence" in management following good faith efforts to allow debtors to direct reorganizations where management failed to respond to data requests, failed to keep accurate financial records and continued to lose cash); *In re Microwave Prods. Of Am.*, 102 B.R. 666 (Bankr. W.D. Tenn. 1989) (appointing trustee where, *inter alia*, debtor appeared to be acting in principal's interests, disclosure statements failed to identify material information, and primary lender had no confidence in management).

Based on the foregoing, the Court should conclude that the appointment of a trustee is not warranted under section 1104(a)(2). BAPL fails to demonstrate by clear and convincing evidence that the appointment of a chapter 11 trustee is necessary or justified here. BAPL fails to present any competent evidence to establish that the appointment of a trustee would be in the

interests of any party other than BAPL. *St. Louis Globe*, 63 B.R. at 138, n.9. BAPL fails to prove that the benefits of a trustee outweigh the harm to the Debtors' estates and to their other creditors or equity security holders. There is no evidence that current management is not competent to operate under chapter 11 proceeding. The chapter 11 process is "sufficient to protect the interests of the Debtors, the estates and all creditors [including BAPL (to the extent it is ultimately determined to be a creditor or equity holder)] and a chapter 11 trustee is not necessary." *Berjeron*, at *38.

In sum, BAPL has failed to show by clear and convincing evidence that a chapter 11 trustee should be appointed in these cases under either section 1104(a)(1) or (a)(2).

II. BAPL'S ALTERNATIVE RELIEF FOR DISMISSAL OF THE CHAPTER 11 CASES SHOULD BE DENIED.

Alternatively, BAPL seeks dismissal of the Chapter 11 Cases for lack of good faith or because the filing of the Chapter 11 Cases was not duly authorized. BAPL argues that the Chapter 11 Cases were filed as a litigation tactic and had no legitimate bankruptcy purpose, and therefore were not filed in good faith. BAPL's second argument is that Adesh Tyagi was not authorized to file the Chapter 11 Cases on behalf of Cloudeeva Delaware and Cloudeeva Florida. Each of these arguments fails and the alternative relief must be denied. Indeed, BAPL completely ignores the principal purposes of chapter 11 – to provide financially troubled businesses "with breathing space in which to return to a viable state," *In re Winshall Settlor's Trust*, 758 F.2d 1136, 1137 (6th Cir. 1985), and to maximize the value of the estates. *In re 15375 Memorial Corp.*, 589 F.3d 605, 619 (3d Cir. 2009). This was the Debtors' interest when they filed the Chapter 11 Cases. BAPL's attempt to characterize the Chapter 11 Cases as being in bad faith or a litigation tactic is indicative of BAPL's own litigation tactics to destroy the Debtors' operations at any cost.

A. The Bankruptcy Petitions were filed in good faith.

Debtors do not dispute that in the absence of good faith, a court may find cause to dismiss under section 1112(b) of the Bankruptcy Code. *NMSBPCSLDHB, L.P. v. Integrated Telecom*

Express, Inc. (In re Integrated Telecom Express, Inc.), 384 F.3d 108, 118 (3d Cir. 2004). However, good faith is a factual issue that also must be analyzed on a case by case basis. The determination of good faith for purposes of section 1112(b) is a "'fact intensive inquiry' in which the court must examine 'the totality of the circumstances' and determine where 'a petition falls along the spectrum ranging from the clearly acceptable to the patently abusive.'" *15375 Memorial*, 589 F.3d at 618, quoting *Integrated Telecom*, 384 F.3d at 118 and *SGL Carbon Corp.*, 200 F.3d 154, 162 (3d Cir. 1999). Good faith "encompasses several, distinct equitable limitations . . . that deter filings that seek to achieve objectives outside the legitimate scope of the bankruptcy laws." *SGL Carbon*, 200 F.3d at 165 (citations omitted). However, because the analysis is based on "the totality of facts and circumstances," courts should also consider the debtor's subjective intent as relevant to the determination of good faith. *15375 Memorial*, 589 F.3d at 618; *SGL Carbon*, 200 F.3d at 165.

Whether or not there was a valid bankruptcy purpose for filing the Chapter 11 Cases and whether or not the filing was a litigation tactic should be considered together. There can be no question that the Debtors have a valid bankruptcy purpose for filing the Chapter 11 Cases. The Debtors were suffering from a "huge financial drain" as a result of the California Action and the California State Court's severe restrictions on the Debtors' ability to factor receivables in order to generate cash to enable the Debtors to operate. *See Declaration of Adesh Tyagi in Support of Chapter 11 Petitions and First Day Pleadings*, ¶ 21 [Doc. No. 8]. By filing the Chapter 11 Cases, the Debtors sought to preserve their business and maximize the value of their estates, which is a valid bankruptcy purpose. *15375 Memorial*, 589 F.3d at 619. The filing of the Chapter 11 Cases was clearly not a litigation tactic to stop the pending California Action, the receiver motion or the related arbitration proceeding and avoid any judgment in any other proceedings. Indeed, immediately upon commencing the Chapter 11 Cases, the Debtors removed the California Action to the United States Bankruptcy Court for the Northern District of California (Case No. 14-0575(Bankr. N.D. Cal.)) pursuant to Fed. R. Bankr. P. 9027, and shortly thereafter filed a motion to transfer venue of the removed action to the United States Bankruptcy

Court for the District of New Jersey. The motion to transfer venue is scheduled for hearing on September 8, 2014. If the venue motion is granted, the California Action will be heard and resolved by this Court in the context of the Chapter 11 Cases. The Debtors filed a Notice of Removal of a similar action currently that was pending in the New Jersey Superior Court. Were the filing of the Chapter 11 Cases a litigation tactic to avoid or stay the California Action, the Debtors could very simply have done nothing more than file the Chapter 11 Cases and relied upon the automatic stay. The Debtors were not, by the filing of the Chapter 11 Cases, attempting to avoid litigating the issues in the California Action. BAPL's attempt to color this as a litigation tactic is no more than a red herring and this argument should not be considered by the Court.

As is the pattern in its moving papers, BAPL cites to several clearly distinguishable cases in arguing that the Debtor's Chapter 11 filing was merely a litigation tactic. For instance, BAPL relies on two cases involving single-asset entities with few employees. *See, e.g., In re Ravick Corp.*, 106 B.R. 834, 850 (Bankr. D.N.J. 1989) (comparing case to the "new debtor syndrome," as described by the Fifth Circuit, "'in which a one-asset entity has been created or revitalized on the eve of foreclosure to isolate the insolvent property and its creditors,'") (quoting *In re Little Creek Devpm'nt Co.*, 779 F.2d 1068, 1073 (5th Cir. 1986)); *Argus Grp. 1700, Inc. v. Steinman (In re Argus Grp. 1700, Inc.)*, 206 B.R. 757 (E.D. Pa. 1997) (involving partnership dispute over single-asset entity that was financially sound at time of filing). Further, the cases cited by BAPL for the proposition that "courts are inclined to dismiss Chapter 11 cases where the issues at the heart of the bankruptcy proceedings are more appropriately decided through arbitration" do not support the proposition and bear no resemblance to the facts of this case. (BAPL Br. at 35.) *See, e.g., Mintze v. Am. Gen. Fin. Servs., Inc., (In re Mintze)*, 434 F.3d 222 (3d Cir. 2006) (ordering parties in Chapter 13 case to arbitrate statutory lender-liability claims but not ordering dismissal of Chapter 13 case); *In re Stingfree Techs., Inc.*, 2009 Bankr. LEXIS 3023, at *44-*45 (Bankr. E.D. Pa. 2010) (dismissing where debtor had no active business and "[i]t [was] clear from the evidence that this chapter 11 case was not filed to preserve any going-concern value of [the debtor]"). Here, however, the Debtors are actively engaged in and continue to provide global

cloud services and technology solutions worldwide, as well as contracting with clients and third party vendors in the United States and India by furnishing consultants. The Debtors currently employ over 300 employees and consultants. These employees are focused on continuing the growth of the business. *See* Moses Decl., ¶ 14.

BAPL's argument that the Chapter 11 Cases do not serve a valid or legitimate bankruptcy purpose must also be rejected. It is well-settled that in order to establish that a chapter 11 filing serves a valid bankruptcy purpose, the debtor must show that the petition "preserv[es] a going concern or maximiz[es] the value of the debtor's estate." *Integrated Telecom*, 384 F.3d at 120, citing *SGL Carbon*, 200 F.3d at 165; *see also 15375 Memorial*, 589 F.3d at 619 (other citations omitted). The Chapter 11 Cases were filed to preserve the Debtors' assets and to ensure the continued viability of the Debtors. Tyagi First Day Decl., ¶ 22. Debtors believe that there is a viable going concern to be salvaged and whose value can be maximized through the chapter 11 process.

Any reliance by *15375 Memorial, supra*, and *SGL Carbon, supra*, is misplaced. The debtors in those cases were not candidates for chapter 11. They had either no real assets other than insurance policies (*Memorial*, at 625) or were so "financially healthy," (*SGL Carbon*, at 163), that the courts found their respective filings served no valid bankruptcy purpose and dismissed those chapter 11 cases. Unlike those debtors, the Debtors here have real assets to preserve and were in financial distress when the cases were commenced, especially because of the California Court's restrictions on the Debtors' rights to factor their receivables. Tyagi First Day Decl., ¶ 21. Now, in chapter 11, the Debtors' financial situation is improving. Indeed, despite BAPL's efforts to terminate receivables financing in the California Action, BAPL consented to the same receivables factoring in this Court. *See Interim Order Approving Factoring Agreement and Authorizing Debtor to Obtain Financing from Prestige Capital Corporation* [Doc. No. 79].

As the Third Circuit noted in *SGL Carbon*, 200 F.3d at 164, the fact that litigation is pending on the commencement of a chapter 11 case does not automatically deem the filing a

litigation tactic Debtors have been permitted to file for bankruptcy protection where pending litigation threatened its long term viability. *Baker v. Latham Sparrowbush Assocs. (In re Cohoes Indus. Terminal Inc.)*, 931 F.2d 222, 228 (2d Cir. 1991) (finding that the debtor was encountering financial stress when it filed its petition); *In re Bible Speaks*, 65 B.R. 415, 426 (Bankr. D. Mass. 1986)(noting the adverse effect of pending litigation which created a cash flow problem preventing the debtor from meeting its current obligations); *In re Johns-Manville*, 36 B.R. 727, 729-30 (Bankr. S.D.N.Y. 1984)(acknowledging the large number of asbestos-related claims and that the anticipated large volume of claims in the future created substantial financial difficulties). The courts recognized "the need for early access to bankruptcy relief to allow a debtor to rehabilitate its business before it is faced with a hopeless situation." *SGL Carbon*, 200 F.3d at 163 (cautioning that that situation "does not open the door to premature filing nor does it allow for the filing . . . that lacks a valid reorganizational purpose").

The Debtors here are no different than the debtors in *Cohoes, Bible Speaks* and *Johns-Manville*. The Debtors were faced with a serious financial crisis. BAPL was causing financial stress to the Debtors' operations (withdrawing funds, opposing the debtors' efforts to obtain factoring), *see* Tyagi First Day Decl., ¶ 20, and something needed to preserve the Debtors' assets for the benefit of creditors and the estate. The provisions of the Bankruptcy Code are "intended to benefit those in genuine financial distress." *Furness v. Lillienfield*, 35 B.R. 1006, 1013 (D. Md. 1983). The Debtors were experiencing more than the "mere possibility of a future need to file" chapter 11. There was "'such financial difficulty that if [they] did not file [on July 21, 2014]'" the need to file would be "'anticipated in the future.'" *SGL Carbon*, 200 F.3d at 164, quoting *Cohoes*, 931 F.2d at 228. If the Debtors were not in such financial stress at that time, they certainly were anticipating it.

Based upon the foregoing, the Debtors have demonstrated that the Chapter 11 Cases had a valid bankruptcy purpose and were not filed as a litigation tactic to obstruct the California Action (which should proceed in this Court).

B. The Petitions were Duly Authorized.

As another roadblock to an orderly rehabilitative process, BAPL argues that Mr. Tyagi, the CEO and sole director of the Debtors, was not authorized to file the petitions. That is simply not true. With respect to Cloudeeva Delaware, on July 31, 2013, BAPL stipulated to the entry of an order by the Superior Court of New Jersey, Case No, C-92-13, recognizing that Tyagi is the Chairman and CEO of Cloudeeva Delaware. (*See* Pappy Decl., Ex. A.) Until such time as the directorship is changed in accordance with the terms of corporate Bylaws, Mr. Tyagi remains the sole director.

Pursuant to the Cloudeeva Florida Bylaws, appointing directors according to the terms of paragraph 2 of the Stockholders Agreement requires a shareholders' meeting. (Moses Decl., Ex. M, Art. I, Sec. 1.) Furthermore, the Bylaws recognize that the board can consist of only one director. (*Id.*, Art. II, Sec. 5.) BAPL did not even attempt to appoint its director until July 2013, and has never called for a shareholders meeting; in fact, BAPL elected not to appoint a director to Cloudeeva Florida if doing so required following any corporate formalities.

There is no doubt that Mr. Yella was never formally installed as a director. The issue of his appointment as a "provisional" director is currently on appeal in the Court of Appeals for the State of California, 6th District, Case No. H040598, filed on January 6, 2014. Even the California Superior Court acknowledged in its order that it did not have authority to confirm the appointment. (*See* December 27, 2013 Order (the "December 27 Order") appointing Mr. Yella as an interim director; Moses Decl., Ex. E.) The December 27 Order expressly states that the court does not have the authority to confirm the appointment of Mr. Yella, which can only be done by following the proper corporate formalities. (*Id.*) BAPL refused to follow the proper corporate formalities, which required calling a shareholders meeting. (*See* Corporate Bylaws; Moses Decl., Ex. M.) In a hearing before the Superior Court on February 21, 2014, counsel for Cloudeeva Florida and BAPL argued the issue at length. At that hearing, BAPL's counsel conceded that it had *not* followed the proper corporate formalities to confirm Mr. Yella as a director, because BAPL did not want to call a shareholders meeting, stating ". . . the reason is

because we want rescission, we don't want to exercise shareholder rights. We don't want to be a shareholder with them." (Moses Decl., Ex. F.) In an order dated March 4, 2014, following the February 21, 2014 hearing, the court agreed with Cloudeeva Florida that the appeal of the December 27 Order stayed the mandatory terms of the court's order, specifically including ". . . the obligation of Cloudeeva to provide certain financial information and to confirm Srinivas Yella as a director of Cloudeeva." (Moses Decl., Ex. G.) As Cloudeeva's only lawfully recognized director, Mr. Tyagi was duly authorized to file the Chapter 11 Cases.

In light of (i) the Debtors' legitimate bankruptcy purpose for commencing the Chapter 11 Cases, (ii) the absence of any litigation tactic and (iii) the duly authorized officer having filed the Chapter 11 Cases, there is no basis to dismiss the Chapter 11 Cases under section 1112(b) of the Bankruptcy Code.

CONCLUSION

Based upon the foregoing, the Debtors respectfully request that the Court enter an Order denying the Motion in its entirety and granting such other and further relief as the Court deems just and proper.

Dated: August 15, 2014

Respectfully submitted,

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

In re:	Chapter 11
Cloudeeva, Inc.,	Case No. 14-24874 (KCF)
Debtors.	(Jointly Administered)

DECLARATION OF ADESH TYAGI IN OPPOSITION TO MOTION OF BARTRONICS ASIA PTE. LTD. FOR ENTRY OF AN ORDER (I) DIRECTING THE APPOINTMENT OF A CHAPTER 11 TRUSTEE OR, IN THE ALTERNATIVE, (II) DISMISSING THE CHAPTER 11 CASES

(FILED UNDER SEAL)

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Cloudeeva, Inc.,	Case No. 14-24874 (KCF)
Debtors.	(Jointly Administered)

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Debtors.	(Jointly Administered)

DECLARATION OF STEPHEN MOSES IN OPPOSITION TO MOTION OF BARTRONICS ASIA PTE. LTD. FOR ENTRY OF AN ORDER (I) DIRECTING THE APPOINTMENT OF A CHAPTER 11 TRUSTEE OR, IN THE ALTERNATIVE, (II) DISMISSING THE CHAPTER 11 CASES

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Debtors.	(Jointly Administered)

DECLARATION OF MARK VITCOV IN OPPOSITION TO MOTION OF BARTRONICS ASIA PTE. LTD. FOR ENTRY OF AN ORDER (I) DIRECTING THE APPOINTMENT OF A CHAPTER 11 TRUSTEE OR, IN THE ALTERNATIVE, (II) DISMISSING THE CHAPTER 11 CASES

(FILED UNDER DEAL)