

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF MARYLAND  
(Baltimore Division)**

**In re:**

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**COUNCIL OF UNIT OWNERS OF  
THE 100 HARBORVIEW DRIVE  
CONDOMINIUM,**

\*

**Case No. 16-13049-MMH**

\*

**(Chapter 11)**

**Debtor.**

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**PENTHOUSE 4C, LLC’S MOTION TO CONVERT,  
DISMISS OR APPOINT A CHAPTER 11 TRUSTEE**

Penthouse 4C, LLC (“Penthouse 4C”), a creditor and member of the Council of Unit Owners of the 100 Harborview Drive Condominium (the “Debtor”), pursuant to 11 U.S.C. §§ 1104(a) and 1112(b), hereby moves for the entry of an order dismissing this case, converting this case to a case under chapter 7 of the Bankruptcy Code, or appointing a chapter 11 trustee. In support of the Motion, Penthouse 4C states as follows:

**I. JURISDICTION AND VENUE**

1. The Court has jurisdiction over this Motion under 28 U.S.C. §§ 157 and 1334.

Venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409.

2. This Motion is a core proceeding under 28 U.S.C. § 157(b). The statutory bases

for the relief requested herein are 11 U.S.C. §§ 1104(a) and 1112(b).

**II. BACKGROUND**

3. The Debtor is an unincorporated condominium association comprised of all

persons, firms, corporations, trusts or other legal entities holding title to a condominium unit in

the 29-story luxury residential high-rise building known as The Harborview Towers in

Baltimore, Maryland.

4. On March 9, 2016 (the “Petition Date”), the Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code.

5. On October 28, 2016, the Debtor filed a *Chapter 11 Plan of Reorganization* [Dkt. 189]. On December 21, 2016, the Debtor filed an *Amended Chapter 11 Plan* [Dkt. 229]. On February 23, 2017, the Debtor filed a *Second Amended Chapter 11 Plan* [Dkt. 319] (the “Plan”). The Plan was the subject of a five-day contested confirmation hearing. Penthouse 4C objected to the Plan, arguing that the Plan was not confirmable for a number of reasons, including without limitation:

- a. The Plan was not “fair and equitable” as required by section 1129(b)(2) of the Bankruptcy Code;
- b. The Plan unfairly discriminated against Penthouse 4C in violation of section 1129(b)(2) of the Bankruptcy Code because it effectively subordinated Penthouse 4C’s claim to those of all other unsecured creditors.
- c. The Plan did not satisfy the best interest of creditors test under section 1129(a)(7) of the Bankruptcy Code because, based on the Maryland Condominium Act’s requirement that unit owners fund the Debtor’s operating deficiency according to their percentage interests, Penthouse 4C and all other creditors would be paid in full in a chapter 7 liquidation.
- d. The Plan separately classified similar claims without a legitimate business reason for doing so in violation of section 1122 of the Bankruptcy Code.
- e. The Plan was not feasible because it failed to provide for repairs mandated by orders of the Circuit Court for Baltimore City and the Court of Special Appeals of Maryland.
- f. The Plan failed to provide for all of Penthouse 4C’s claims in violation of section 1123(a)(1) of the Bankruptcy Code.
- g. The Plan was not proposed in good faith, as required by section 1129(a)(3) of the Bankruptcy Code, because the Plan put equity interests ahead of Penthouse 4C’s interests by violating the absolute priority rule, building up reserves for future repairs for the

benefit of unit owners, and failing to assess unit owners to pay claims.

- h. The Plan contained third party releases in violation of applicable law.

6. On June 9, 2017, the Court entered an Order [Dkt. 404] and Memorandum Opinion [Dkt. 403] denying confirmation of the Plan. The Court rejected the Plan due to the inclusion of impermissible third-party releases without addressing several of Penthouse 4C's other confirmation objections, including objections that the Plan was not fair and equitable and unfairly discriminated against Penthouse 4C in violation of section 1129(b) of the Bankruptcy Code.

7. This proceeding has been pending for nearly 20 months, and in the five months since the Plan was denied, the Debtor has not proposed another plan.

8. Meanwhile, the Debtor has incurred legal fees of over \$1.25 million since the Petition Date between its bankruptcy counsel and special condominium counsel, all while general unsecured claimants like Penthouse 4C have received nothing.

9. The Debtor has refused to exercise its statutory right under section 11-110(b) of the Maryland Condominium Act to levy a special assessment on individual unit owners, which would allow the Debtor to pay all its creditors in full.

### **III. RELIEF REQUESTED**

10. By this Motion, pursuant to sections 1104(a) and 1112(b) of the Bankruptcy Code, Penthouse 4C respectfully requests the entry of an order dismissing this case, converting this case to a case under chapter 7 of the Bankruptcy Code, or appointing a chapter 11 trustee to operate and administer the Debtor's estate.

**IV. BASIS FOR RELIEF REQUESTED**

11. Section 1112(b)(1) of the Bankruptcy Code provides that:

[O]n request of a party in interest, and after notice and a hearing, the court shall convert a case under [chapter 11] to a case under chapter 7 or dismiss a case under [chapter 11], whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

11 U.S.C. § 1112(b)(1).

12. Section 1112(b)(4) of the Bankruptcy Code sets forth a nonexhaustive list of circumstances that constitute “cause” for the purpose of section 1112(b) including, *inter alia*, substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation and failure to confirm a plan within the time fixed by the Bankruptcy Code. *See* 11 U.S.C. § 1112(b)(4)(A) and (J); *see also In re Skeen Goldman, LLP*, 2007 WL 4556683 at \*4 (Bankr. D. Md. Dec. 20, 2007) (noting that section 1112(b)’s list is not exhaustive).

13. Once the moving party establishes “cause,” the debtor (or other opponent to the motion) can avoid conversion, dismissal, or the appointment of a trustee only by showing:

- a. “unusual circumstances” establishing that converting or dismissing the case is not in the best interests of creditors and the estate;
- b. a “reasonable likelihood” that a plan will be confirmed within the timeframes established in sections 1121(e) and 1129(e), or if such sections do not apply, within a reasonable period of time; and
- c. the grounds for converting or dismissing the case include an act or omission of the debtor (i) for which there exists a “reasonable justification” for the act or omission, and (ii) that will be cured within a reasonable period of time fixed by the court.

11 U.S.C. 1112(b)(2). Where the “cause” shown is the “substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation,” conversion,

dismissal or appointment of a trustee is required and the foregoing exceptions do not apply. *See* 11 U.S.C. § 1112(b)(2)(B).

14. Once “cause” is established under section 1112(b), courts must take one of three actions: (i) dismiss the chapter 11 case; (ii) convert the case to chapter 7; or (iii) appoint a chapter 11 trustee. 11 U.S.C. § 1112(b); *In re Landmark Atlantic Hess Farm, LLC*, 448 B.R. 707, 712 (Bankr. D. Md. 2011). Of the three possible remedies, the court must effectuate whichever is in the interest of creditors and the estate. *Landmark-Atlantic*, 448 B.R. at 712. In making this determination, the interest of the debtor is not a factor to be considered. *Lakefront Investors, LLC v. Clarkson*, 484 B.R. 72, 84-86 (D. Md. 2012).

15. Section 1104(a) of the Bankruptcy Code provides for the appointment of a chapter 11 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 similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liability of the debtor; or
- (2) if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor.

11 U.S.C. § 1104(a). “The Bankruptcy Court has discretion in finding whether cause exists to appoint a Chapter 11 Trustee because ‘... a policy of flexibility pervades the bankruptcy code with the ultimate aim of protecting creditors.’” *In re Byrd*, 2007 WL 4287548, at \*13 (Bankr. D. Md. Dec. 5, 2007) (quoting *Comm. Of Dalkon Shield Claimants v. A.H. Robins Co.*, 828 F.2d 239, 242 (4th Cir. 1987)).

16. Courts have found “cause” to appoint a chapter 11 trustee where the debtor in possession has a conflict of interest or refuses to take action adverse to equity holders where

doing so is in the best interest of creditors and the estate. *See, e.g., In re Eurospark Industries, Inc.*, 424 B.R. 621, 632-33 (Bankr. E.D.N.Y. 2010) (collecting cases).

17. In this case, cause exists to convert this case to chapter 7, dismiss this case, or appoint a chapter 11 trustee. Nearly 20 months into this case, the Debtor is no closer to confirming a chapter 11 plan than it was on the Petition Date. Even worse, it has been nearly five months since the rejection of the Plan, yet the Debtor has not proposed a new plan. Meanwhile, since the Petition Date, the Debtor's estate has incurred over \$1.25 million in attorneys' fees between the Debtor's bankruptcy counsel and special condominium counsel, with no progress toward reorganization to show for such a tremendous drain on the estate. Continuing to allow the expenditure of estate assets on such an unjustifiable scale, while at the same time enforcing the automatic stay and precluding creditors from enforcing their rights, is unfair and prejudicial to creditors.

18. Moreover, as Penthouse 4C argued at length while objecting to the Plan, the Debtor has an affirmative duty, under the Maryland Condominium Act to levy special assessments on individual unit owners to fund its obligations and expenses and pay creditors in full. *See* Md. Real Prop. Stat. § 11-110(b)(1) ("Funds for the payment of current common expenses and for the creation of reserves for the payment of future common expenses *shall* be obtained by assessments against the unit owners in proportion to their percentage interests in common expenses and common profits.") (emphasis added). As issuing a special assessment would enable the Debtor to pay all its creditors in full, doing so is unequivocally in the best interest of creditors and the estate. Moreover, the Debtor's fiduciary duty to its creditors as a debtor in possession mandates a special assessment to pay creditors in full. *See, e.g., In re Ralph C. Tyler, P.E., P.S., Inc.*, 156 B.R. 995, 997 (Bankr. N.D. Ohio 1993) ("The [debtor in

possession] is clothed with the rights and duties of a trustee and as such is obligated to collect property of the estate in order to maximize the estate's value. ... Thus, actions against corporate officers, directors and shareholders that yield a benefit to the estate must be pursued.”) (internal citations omitted).

19. The Debtor's fiduciary duty to act in the best interest of creditors became effective the minute this case was filed. *See* 11 U.S.C. § 1107(a) (mandating that debtor perform its obligations and duties). Now, nearly 20 months into the case, the Debtor's refusal to levy a special assessment to fully fund its obligations is indefensible. Allowing the Debtor to continue floundering along as debtor in possession flies in the face of the Bankruptcy Code's principal purpose of securing “the prompt and effectual administration and settlement of the debtor's estate.” *Katchen v. Landy*, 382 U.S. 323, 328 (1966); *Bosiger v. U.S. Airways*, 510 F.3d 442, 449 (4th Cir. 2007).

20. For these reasons, cause exists to dismiss this case, convert this case to chapter 7, or appoint a chapter 11 trustee pursuant to 11 U.S.C. §§ 1104(a) and 1112(b).<sup>1</sup>

WHEREFORE, Penthouse 4C, LLC, pursuant to 11 U.S.C. §§ 1104(a) and 1112(b), respectfully requests the entry of an order:

- A. Granting this Motion;
- B. Dismissing this case, converting this case to a proceeding under chapter 7, or appointing a chapter 11 trustee; and

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<sup>1</sup> Penthouse 4C reserves the right to argue at the hearing on this Motion that one of the three remedies provided by sections 1104(a) and 1112(b) may be more appropriate under the circumstances.

C. Granting such other relief as the Court deems just and appropriate.

Dated: October 30, 2017

/s/ Maria Ellena Chavez-Ruark  
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