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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

In re:	:	
	:	Chapter 11
METRO FUEL OIL CORP., *et al.*,	:	
	:	Case Nos.
	:	12-46913 (ESS)
	:	12-46914 (ESS)
	:	12-46915 (ESS)
Debtors.	:	12-46917 (ESS)
	:	12-46918 (ESS)
	:	12-46919 (ESS)
	:	12-46920 (ESS)
	:	12-46921 (ESS)
	:	12-46922 (ESS)
	:	
	:	Jointly Administered

OBJECTION OF NEW YORK COMMERCIAL BANK TO MOTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF METRO FUEL OIL CORP., *ET AL.*, FOR AN ORDER MODIFYING THE DEBTORS' EXCLUSIVITY RIGHTS TO GRANT CO-EXCLUSIVE RIGHTS TO THE COMMITTEE

New York Commercial Bank ("NYCB"), by and through its counsel, Loeb & Loeb LLP, hereby submits this objection to the motion (the "Motion") of the Official Committee of Unsecured Creditors (the "Committee") of Metro Fuel Oil Corp., *et al.* (the "Debtors"), for an order modifying the Debtors' exclusivity rights to grant co-exclusive rights to the Committee. In support of this Objection, NYCB respectfully states as follows:

PRELIMINARY STATEMENT

1. It is well-settled that termination of a debtor's exclusivity should be reserved for those situations where termination "would move the case forward materially, to a degree that wouldn't otherwise be the case." *In re Adelphia Commc'ns. Corp.*, 352 B.R. 578, 590 (Bankr. S.D.N.Y. 2006) (citation omitted). That is indisputably *not* the case here. Instead, granting co-exclusivity to the Committee would mire these cases in litigation over a patently unconfirmable plan (any plan that the Committee would propose would be unconfirmable) while holding the estates' creditors' hostage to the chapter 11 process indefinitely. That result would completely undermine the creditor protections of the Bankruptcy Code[1] and contravene well-established precedent. *See* Argument, p. 13, below.

2. The Committee argues that co-exclusivity is appropriate because its yet unseen plan would (i) be "confirmable," (ii) avoid "protracted and costly litigation over the numerous unresolved issues in these cases," (iii) offer a better alternative than the sure resolution that conversion to chapter 7 would afford, and (iv) resolve the Pullos' pending involuntary bankruptcy cases and avoid a supposed "windfall" to NYCB that the Committee baselessly asserts would otherwise result. Motion, ¶¶ 8 and 29. Each of these statements is patently false.

3. ***First,*** no Committee plan is confirmable. The Committee has not even deigned to describe the supposed "plan" it would propose and seek to confirm if this Court were to grant co-exclusivity, much less provided any explanation of how such a plan could be confirmed under the statutory requirements for such relief. No such explanation is possible, because no plan is confirmable in these cases:

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[1] "Bankruptcy Code" refers to title 11, United States Code.

a. **The estates are administratively insolvent.** NYCB holds a superpriority administrative expense claim of at least $8 million on account of the failed adequate protection for its allowed secured claim in the chapter 11 cases. In addition, other administrative claims against the Debtors exceed $8 million. For a plan to be confirmed, all of those claims must be paid in cash on the effective date except to the extent a particular administrative expense claimant agrees to a different treatment. However, the estates have no available unencumbered assets with which to pay these claims. Other than encumbered cash, the estates' only assets are highly speculative causes of action, which would be hotly contested and would take months or years of litigation to resolve. The case law is clear that the mere hope of recovering money in litigation (the most the Committee can allege) is an insufficient basis to confirm a plan or avoid conversion to chapter 7. *See Taub v. Taub (In re Taub)*, 427 B.R. 208, 231 (Bankr. E.D.N.Y. 2010) (Stong, J.), *aff'd*, *Taub v. Adams*, Nos. 10-CV-02600 (CBA), 10-CV-02611 (CBA), 2010 U.S. Dist. LEXIS 104805, at *37-*38 (E.D.N.Y. Aug. 30, 2010). *See also generally* Argument, § A(i), below.

b. **No contribution from the Pullos to these estates would be appropriate.** The Committee reveals only one detail about its purported plan: it would rely on "approximately $18 million to $24 million that the Pullos [principals of the Debtor companies] are expected to contribute under the Committee's plan." Motion, ¶ 2. However, the Committee provides no evidence that any such contribution will ever occur. It is just sheer hope. Moreover, the Pullos have been petitioned into involuntary bankruptcy. *See* Case Nos. 13-43603-ess and 13-43602 (Bankr. E.D.N.Y.). Thus, any payment of significant assets from the Pullos to these estates (which do not even have

liquidated claims against the Pullos) would cause a windfall for these estates to the detriment of the Pullos' legitimate creditors. That outcome would run diametrically contrary to the policy of appropriate, ratable distribution underlying the Bankruptcy Code. This policy should govern in the Pullos' bankruptcies. Ironically, it was the Committee that orchestrated the Pullos' involuntary bankruptcy, purportedly in order to ensure that the Pullos' assets *are* distributed fairly to the *Pullos'* creditors. Now, the Committee angles for just the opposite. *See* Argument, § A(ii), below.

c. **Nonconsensual releases in favor of the Pullos could not be approved.** The Pullos presumably would require releases from their own creditors in exchange for any contribution to these estates. NYCB will not consent to any such release because it holds valid claims of more than $26 million directly against the Pullos, which remain unpaid,[2] are supported by personal guaranties and a judgment, and are nondischargeable. Any nonconsensual third party release would be illegal under controlling Second Circuit authority and would render any Committee plan unconfirmable. *See* Argument, § A(iii), below.

4. ***Second,*** a Committee plan would not avoid "protracted and costly litigation over the numerous unresolved issues in these cases," as alleged by the Committee. On the contrary, co-exclusivity would *assure* additional litigation, as the Committee seeks to confirm a plan that is facially unconfirmable over creditor objection. This litigation would necessarily implicate all or virtually all of the potentially disputed issues in these cases, in addition to more typical

[2] NYCB does not concede that its claims in the Pullos' bankruptcy cases are limited only to the amounts currently remaining unpaid and reserves all rights with respect to the allowable amount of its claims against the Pullos in the Pullos' bankruptcy cases.

confirmation issues like releases, feasibility and good faith (among many others). Although the outcome is clear in advance – the plan would not be confirmed – this litigation would likely take several months and cost the estates and the creditors hundreds of thousands or millions of dollars, thereby adding to the already significant administrative insolvency that plagues the Debtors' cases. *See* Argument, § B.

5. ***Third,*** the Committee's assertion that a quest for confirmation of an unconfirmable plan in chapter 11 is better than straight-forward conversion to chapter 7 is absurd. If the Court were to grant the Motion, the Committee's professionals would incur many more fees and expenses in a doomed attempt to confirm a plan, thereby deepening the estates' insolvency. Moreover, upon the inevitable failure of the Committee's plan, conversion to chapter 7 would *still be required* to liquidate the estates, except that the estates would then have wasted significant time and resources. On the other hand, if these cases were converted now, the chapter 7 trustee would proceed immediately with the liquidation process at considerably less expense than the numerous professionals currently incurring fees chargeable to the estates, and would be empowered to prosecute estate claims. Accordingly, there would be no prejudice to creditors and liquidation could occur at a fraction of the cost. *See* Argument, § B.

6. ***Finally,*** the Committee is wrong that its plan could resolve the Pullos' involuntary cases and that conversion of the these cases would somehow lead to the dismissal of the Pullos' involuntary cases (and thus a purported windfall to NYCB). The Committee cannot and does not provide any support for these naked assertions. There is no evidence that any of the other involuntary petitioning creditors, or the Pullos themselves, are prepared to support the Committee's (still undisclosed) plan. Moreover, the possible conversion of the Metro cases has nothing to do with whether the Pullos' involuntary cases are dismissed. The Committee signed

the Pullos petitions derivatively on behalf of the Metro estates. A chapter 7 trustee would step into the shoes of the Committee as the petitioning creditor. Even if that were not the case, the estates have no liquidated claim against the Pullos anyway and, thus, are an invalid petitioning creditor. Consequently, failure of these estates to remain a petitioning creditor against the Pullos would have no impact on those cases. *See* Argument, § C.

7. For all of these reasons, and as discussed in greater detail below, the Motion should be denied.

BACKGROUND

8. NYCB incorporates by reference all of the facts contained in the Statement of Disputed Facts Proposed by NYCB and the Statement of the Material Facts Not in Dispute sections of the Pre-Hearing Statement dated October 16, 2013 [Docket No. 661] (the "Pre-Hearing Statement").[3]

A. The Debtors' Indebtedness To NYCB.

9. Pursuant to the terms and conditions of Paragraph 5 of the Final Order Pursuant to 11 U.S.C. §§ 105, 361, 362, 363, 364 and 507(A) Authorizing Post-Petition Financing, (B) Authorizing Use of Cash Collateral, (C) Granting Adequate Protection, and (D) Granting Related Relief dated November 20, 2012 [Docket No. 187] (the "Final DIP Order"), NYCB is a pre-petition secured creditor of the Debtors in the aggregate principal amount of $41,245,933.29 (as of the Petition Date), with such indebtedness in the form of a revolving credit facility and two

[3] Capitalized terms used but not defined herein shall have the meanings ascribed to such terms in the Pre-Hearing Statement.

terms loans. The Debtor borrowers and guarantors are identified in Paragraph 5(a) of the Final DIP Order.[4] Pre-Hearing Statement, ¶ 42.

10. NYCB's Revolver Indebtedness (as defined in the Final DIP Order) was secured as of the Petition Date by non-real property assets of the Borrowers, Apollo Transport and Metro Energy (collectively, the "Pledging Debtors"). Final DIP Order, ¶ 5. The Debtors admit that this collateral was principally comprised of the Pledging Debtors' cash, accounts receivable, inventory and intangible assets. Declaration of David Johnston, Chief Restructuring Officer of the Debtors, in Support of Debtors' Motion . . . dated September 27, 2012 [Docket No. 8] ("Johnston DIP Financing Declaration"), ¶ 10; *see also* Final DIP Order, ¶ 5. The Debtors further admit that NYCB's Term Indebtedness (as defined in the Final DIP Order) is secured by mortgage liens on a parcel of real property then owned by Metro Terminals known as "Lot 14" and the proceeds thereof. Johnston DIP Financing Declaration, ¶¶ 11-13; s*ee also* Final DIP Order, ¶ 5. All of the collateral securing the Indebtedness, as more fully described in paragraph 5 of the Final DIP Order, is hereinafter referred to as the "Prepetition NYCB Collateral".[5]

B. The DIP Facility.

11. The Debtors borrowed $10 million in principal under the DIP loan facility (the "DIP Facility") approved by this Court, subject to the terms of the Final DIP Order, a series of orders approving the DIP Facility on an interim basis [Docket Nos. 27, 114, 150 and 176] and two extension orders by which the maturity date of the DIP Facility was extended [Docket Nos.

[4] Valley National Bank ("Valley") also asserts a pre-petition lien on Metro Terminals' real property in an amount of approximately $7.3 million. *See* Final DIP Order, ¶ 5.

[5] Paragraph 5 of the Final DIP Order contains specific, binding findings and acknowledgements regarding the validity, extent and priority of the Indebtedness and of NYCB's security interests in and liens on the Prepetition NYCB Collateral. That paragraph is incorporated herein by reference.

360 and 373] (the "DIP Orders"). Pre-Hearing Statement, ¶ 10. The DIP Orders also provided for the Debtors' use of NYCB's cash collateral – *i.e.*, all of the Debtors' cash – pursuant to a series of approved budgets. *See*, *e.g.*, Final DIP Order, ¶16; Pre-Hearing Statement, ¶ 51. The DIP Facility was secured by liens on substantially all of the Debtors' assets. Final DIP Order at ¶ 13; Pre-Hearing Statement, ¶ 49. Those liens primed the liens of NYCB in respect of the Prepetition NYCB Collateral. *Id.*

12. In seeking approval of this priming DIP Facility, the Debtors represented to the Court that the Prepetition NYCB Collateral had value far in excess of what the Debtors actually realized on account those assets in connection with their disappointing sale process. Pre-Hearing Statement, ¶ 2. Specifically, the Debtors alleged that the property known as Lot 14 had a value in excess of $39 million, such that, as of the Petition Date, they retained "approximately $23 million of equity value above the $16.4 million aggregate" of the Term Loan Indebtedness and the term loan indebtedness of Valley. *See*, *e.g.*, *id.;* Johnston DIP Financing Declaration, ¶¶ 14-15.

13. NYCB objected to the authorization of the DIP Facility on the grounds that, among other things, NYCB would not be adequately protected. However, in reliance on, among other things, the Debtors' representations regarding value and the purported equity cushion that NYCB would enjoy, the Court approved $3 million of initial, interim borrowing under the priming DIP Facility and cash collateral usage at the first day hearing in the Chapter 11 Cases. *See* First Interim DIP Order [Docket No. 27]. Unfortunately for NYCB, as discussed in greater detail below, the Debtors' assertions of value proved to be wildly inflated, and NYCB was badly harmed by the DIP Facility and the Debtors' cash usage.

C. NYCB's Failed Adequate Protection.

14. Pursuant to the Final DIP Order, NYCB received replacement liens on its pre-petition collateral and a lien on substantially all other real and personal property of the Debtors (the "Adequate Protection Liens") to "adequately protect" NYCB against, among other things, the use of its cash collateral and the imposition of the priming DIP Facility described above. Final DIP Order, ¶ 17(a). The Final DIP Order provides that the Adequate Protection Liens are subordinate only to the liens securing the DIP Facility and to the professional fee carve-out (the "Carve-Out"), subject to the terms of the Final DIP Order. *Id.* The Adequate Protection Liens are also subordinate to the IDA and Trufund debt, but only to the extent of any recovery against the prepetition collateral securing the indebtedness of those parties. *Id.* The Final DIP Order further granted to NYCB "allowed super-priority administrative claims" (any such claim, a "Superpriority Claim") pursuant to Section 507(b) of the Bankruptcy Code, having priority over all other administrative expense claims other than the Carve-Out and the claims of the DIP Facility lender. *Id.* at ¶ 17(b).

15. On or about March 6, 2013, substantially simultaneously with the closing of the sale of the Debtors' assets, the Debtors repaid the DIP Facility, which had ballooned from $10 million of principal to $11,680,791.16, inclusive of all interest, fees and expenses. Pre-Hearing Statement, ¶ 52. That payment was made from the sale proceeds of the Debtors' assets. *Id.* While the precise allocation of the sale proceeds has not yet been finalized, it is clear that the full payment amount was made from assets constituting the Prepetition NYCB Collateral or that were subject to the Adequate Protection Liens, thus harming NYCB. *Id.* ("The Debtors paid the DIP Facility . . . from the Sale proceeds, other than the proceeds of the collateral securing the Indenture Noteholder and Trufund indebtedness.").

16. The payment of the DIP Facility from NYCB's cash collateral, together with the use of NYCB's cash collateral to fund the Carve-Out and the diminution in value of the Debtors' customer list, accounts receivable and other items of Prepetition NYCB Collateral during these chapter 11 cases has deprived NYCB of millions of dollars of collateral value. Pre-Hearing Statement, ¶ 8. As a result, NYCB is entitled to a multi-million dollar Superpriority Claim in the amount of that diminution (not less than $8 million), secured by the Adequate Protection Liens on all of the Debtors' unencumbered assets, including all causes of action. Final DIP Order, ¶¶ 17(a) (granting Adequate Protection Liens on all "Collateral"); 13 (defining "Collateral" to include essentially all of the Debtors' assets, including, "all real and personal property . . . claims and causes of action, and any proceeds thereof").[6] *See also* Pre-Hearing Statement, ¶ 5.

17. The estates have no unencumbered funds with which to pay this Superpriority Claim, and any funds that come into the estates, including through litigation, would be subject to NYCB's Adequate Protection Liens. *Id.* at ¶¶ 6, 8, 26 (liens and security interests of secured parties encumber all cash), ¶ 42 (describing collateral coverage of NYCB), ¶ 43 (no challenges to lien other than Challenge Collateral), ¶ 45-48 (describing claims and collateral coverage of the Indenture Noteholders and Trufund (as defined in the Pre-Hearing Statement)).

D. <u>The Asset Sales</u>.

18. After numerous adjournments, the Debtors held an auction for the sale of their assets on February 4 and 5, 2013. Declaration of Christopher K. Wu in Support of Debtors' Motion for Entry of an Order Authorizing and Approving (A) the Sale of All or Any Portion of the Debtors' Assets and (B) Assumption and Assignment of Executory Contracts and Unexpired

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[6] NYCB reserves all of its rights with respect to the validity and quantification of its Superpriority Claims and the value of the Adequate Protection Liens.

Leases ("Wu Declaration"), ¶ 9 [Docket No. 379]; Pre-Hearing Statement, ¶ ¶ 7, 9, 55. After two days of bidding, United Refining Energy Corp. ("United Refining") was declared the successful bidder for substantially all of the Debtors' operating assets (other than accounts receivable) with a bid of $27 million in cash, plus assumption of any cure costs in connection with assumed contracts and certain additional amounts based on the value of the Debtors' inventory on hand at the time of closing. Wu Declaration, ¶ 12; Pre-Hearing Statement, ¶ 55.

19. The Debtors also selected back-up bidders for the Debtors' assets, including those assets that were not subject to the NYCB's prepetition security interests and liens or that constitute "Challenge Collateral" as defined in paragraph 5(d) of the Final DIP Order (all such assets, the "Previously Unencumbered Assets").[7] Wu Declaration, ¶ 10; Pre-Hearing Statement, ¶ 9. Specifically, United Refining was the backup bidder for the property known as "Calverton" with a $2.9 million bid; affiliates of Hackman Capital were the backup bidder for certain vehicle assets with a bid of $500,000; and NYCB was the backup bidder for the property known as "Kingsland" with a $750,000 credit bid of its Adequate Protection Liens. *Id.* In total, the auction resulted in specific backup bids for Previously Unencumbered Assets of $4.15 million.

20. The sale to United Refining was approved by order entered on February 15, 2013 [Docket No. 381] and closed on or about March 6, 2013. Pre-Hearing Statement, ¶ 52.

21. Subsequently, an affiliate of United Refining agreed to acquire a substantial portion of the Debtors' accounts receivable for approximately $10.17 million, plus certain other

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[7] For purposes of argument only, NYCB will concede that all of the "Challenge Collateral," as defined in paragraph 5(d) of the Final DIP Order, in fact constituted Previously Unencumbered Assets, such that they were not encumbered by NYCB's prepetition security interests and liens. NYCB reserves and does not waive the right to defend against any challenge to its security interests in and liens on the Challenge Collateral. In any event, whether NYCB's prepetition security interests and liens extended to the Challenge Collateral makes no difference, since those assets and their proceeds are fully encumbered by the Adequate Protection Liens.

amounts dependent on verification and collection of the Debtors' accounts receivable. That sale was approved by the Order entered on March 7, 2013 [Docket No. 417] (the "AR Sale Order") and closed on or about March 8, 2013. Pre-Hearing Statement, ¶ 56. NYCB received the proceeds of that sale directly in a partial paydown of the Revolver Indebtedness, together with certain other sums, including, among other less significant items, (i) the Debtors' pre-sale cash collateral and (ii) a portion of the proceeds attributable to the sale of the Debtors' inventory. *See* AR Sale Order, ¶ 25; Pre-Hearing Statement, ¶ 57-58.

22. In total, the Debtors realized approximately the same amount for *all* of their assets – including their accounts receivable[8] – as they told the Court the property known as "Lot 14" would be worth *on its own* in connection with the priming DIP Facility. Johnston DIP Financing Declaration, ¶¶ 14-15. Worse yet, they incurred more than $7.5 million in professional fees before achieving this poor result. Operating Report for March 2013 [Docket No. 505] (statement of operations). The sale process was a failure, generated huge losses and drained the Debtors' cash (*i.e.*, NYCB's cash collateral).

23. The Debtors' estates conveyed *no* benefit on NYCB by funding and facilitating the sale process and closing the sales. Instead, the sale process was to NYCB's detriment because it was expensive and slow and realized far less than the Debtors had represented as the assets' value.

E. The Estates Are Administratively Insolvent.

24. The Debtors owe approximately $4.5 million in administrative claims under Section 503(b)(9) of the Bankruptcy Code for goods sold to the Debtors in the twenty-day period

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[8] The accounts receivable alone had a Petition Date face value of more than $17.5 million. Operating Report for September-October 2012 [Docket No. 189] (balance sheet).

before the Petition Date. Pre-Hearing Statement, ¶ 34. The Debtors also have at least $3.87 million in unpaid, post-petition liabilities.[9] Operating Report for August 2013 [Docket No. 648] (balance sheet); Pre-Hearing Statement ¶ 22.

25. In addition to these administrative claims, NYCB holds a Superpriority Claim against the Metro estates for not less than $8 million. Pre-Hearing Statement, ¶ 23. This liability results from the damage caused to NYCB's collateral position by the DIP Facility priming and the lack of sufficient "adequate protection" from the sale proceeds of unencumbered assets.

26. After payment to NYCB of the proceeds of the accounts receivable and inventory as described above, the estates are now left with only approximately $16.1 million in cash. *See* Operating Report for August 2013 [Docket No. 648]; Pre-Hearing Statement, ¶ 61. All of that cash is subject to the NYCB's prepetition security interests and liens, the Adequate Protection Liens and, according to others, the liens of the Debtors' other secured creditors. Pre-Hearing Statement, ¶ 26. As such, not a penny of that cash can be used to satisfy administrative expense claims or any other creditors' claim. The estates are thus deeply administratively insolvent.

ARGUMENT

27. Pursuant to Section 1121 of the Bankruptcy Code, a debtor has the exclusive right to file a plan of reorganization for up to 18 months from entry of the order of relief. 11 U.S.C. §§ 1121(b) and (d)(2). Any party seeking to terminate debtor exclusivity bears the heavy burden of proving that "cause" exists to do so. 11 U.S.C. § 1121(d); *In re Dow Corning Corp.*, 208 B.R.

[9] This amount is net of all payments previously made from the Carve Out, the proceeds of the Debtors' asset sales, and the other post-petition cash use by the Debtors through the end of August, 2013. The Carve Out account now holds no more than $1.39 million. Operations Report for August 2013; Pre-Hearing Statement, ¶ 61. Thus, even if applied against the Debtors' admitted, outstanding post-petition liabilities, those administrative claims alone still exceed $2.47 million.

661, 663 (Bankr. E.D. Mich. 1997)); *In re Excel Mar. Carriers, Ltd.*, No. 13-23060-rdd, 2013 Bankr. LEXIS 3920, at *12 (Bankr. E.D.N.Y. Sept. 13, 2013). In determining whether such cause exists, the court's "primary consideration" must be whether termination "would move the case forward materially, to a degree that wouldn't otherwise be the case." *In re Adelphia Commc'ns. Corp.*, 352 B.R. at 590 (citing *In re Dow*, 208 B.R. at 670 (Whether termination would so advance the case is "a practical call that can override a mere toting up of [any specific] factors.")); *see also In re Excel Mar. Carriers*, 2013 Bankr. LEXIS 3920, at *6.

28. Where, as here, the Committee could not propose a confirmable plan, terminating exclusivity would by definition *not* "move the cases forward" in the slightest. To the contrary, permitting the Committee to file an unconfirmable plan would instead embroil the parties in costly and futile litigation that will ultimately return them to this same point after the plan inevitably fails – only having wasted substantial additional time and money to get there.

29. *In re Dow* is on point. 208 B.R. at 669-70. There, the bankruptcy court acknowledged the futility of terminating exclusivity merely "so that the Committees can attempt to cram down their [unconfirmable] plan on the Debtor." *Id.* The *Dow* court saw that the committees' plan would ultimately not be confirmable, and therefore concluded that it would be foolish to cause "parties [to] spend thousands of hours and millions of dollars in filing competing plans, obtaining approvals of disclosure statements, mailing out the plans to hundreds of thousands of claimants, only to have the whole thing crash in flames when the Court perhaps denies confirmation of both plans[.]" *Id.* This Court should reach the same conclusion on the present facts and reject the Motion.

30. The Committee's other stated bases for granting co-exclusivity also fail. As discussed below, chapter 7 is a far superior alternative than the certain protracted litigation on an

unconfirmable plan that the Committee proposes. Chapter 7 is cheaper, and any valuable estate causes of action will be preserved and can be asserted by the chapter 7 trustee, so the estates will be benefitted. Finally, the Committee has stated no reason to believe that granting the Motion will resolve the Pullos' involuntary cases, and it is a simply a non-sequitur to say that granting the Motion will prevent the Pullos' cases from being dismissed.

A. <u>The Committee cannot confirm a chapter 11 plan in these cases</u>.

i. ***<u>The Debtors' cases are deeply administratively insolvent</u>.***

31. There are approximately $8.4 million of administrative expense claims pending against the estates – without including NYCB's $8 million plus Superpriority Claim. Specifically, the Debtors and the Committee admit to approximately $4.5 million of asserted claims under Section 503(b)(9) (Pre-Hearing Statement, ¶ 34), plus an additional approximately $3.87 million in unpaid postpetition accrued administrative liabilities. Pre-Hearing Statement, ¶ 22. NYCB further has a Superpriority Claim of at least $8 million under Section 507(b) of the Bankruptcy Code, resulting from the diminution of its collateral as a result of the sale process and the priming DIP Facility imposed on NYCB at the outset of these cases. Pre-Hearing Statement, ¶ 23. That Superpriority Claim is secured by all of the sale proceeds and all of the recoveries that might be obtained from prosecuting estate causes of action, including any recovery by these estates from the Pullos. Final DIP Order, ¶ 17.

32. It is black letter law that "except to the extent that the holder of a particular claim has agreed to a different treatment of such claim," a chapter 11 plan must provide for payment of all administrative expense claims in full, in cash, on the effective date. 11 U.S.C. § 1129(a)(9)(A). Unfortunately, after liquidating the estates, the Debtors' assets essentially consist of approximately $16.1 million in *fully-encumbered* cash and certain potential causes of action. Pre-Hearing Statement, ¶ 61. Indeed, all of that remaining cash and the causes of action

are encumbered by the liens of NYCB and the Debtors' other secured creditors. Even the Debtors' previously unencumbered property and the proceeds thereof are now NYCB's collateral by virtue of NYCB's adequate protection liens. As a result, none of those assets can be used to pay administrative expenses.

33. Accordingly, only if the Committee obtains the agreement of NYCB and each and every other holder of all administrative expense claims to take less than payment in full, in cash, on the effective date, could such a plan be confirmed. Since the administrative claims other than NYCB's claims total more than $8 million and are held by multiple creditors, it is prohibitively unlikely that every administrative creditor will so consent. Certainly, NYCB would not grant that consent. The Committee has no evidence to the contrary.[10]

a. The Committee could not surcharge NYCB's collateral to bring in funds to pay administrative claims, and thus could not satisfy 11 U.S.C. § 1129(a)(9).

34. The Committee may argue that Section 506(c) of the Bankruptcy Code would permit surcharge of NYCB's collateral as a means to bring in funds to pay administrative expenses. The Committee is wrong.[11]

35. Section 506(c) permits a trustee to surcharge collateral for the "reasonable, necessary costs and expenses of preserving, or disposing of, such [collateral] to the extent of any

[10] Beyond being the holder of a multi-million dollar Superpriority Claim, NYCB is also by far the Debtors' largest unsecured creditor. Thus, NYCB would hold a "blocking position" in the Debtors' unsecured creditor class under any plan voting process. That position, too, would make it difficult (and extremely expensive) to confirm a plan over NYCB's dissenting vote and objection. 11 U.S.C. § 1126(c).

[11] To date, the Committee has not obtained standing to assert any claims or causes of action against NYCB, including claims for surcharge of NYCB's collateral under Section 506(c). NYCB has objected and continues to object to the Court granting standing to the Committee for this purpose. *See* Docket Nos. 318, 361, 369.

benefit to the [secured creditor]." 11 U.S.C. § 506(c). The Committee cannot establish the requisite elements here.

36. First, the costs for which the Committee would seek to surcharge NYCB's collateral were not "necessary," as the statute requires. Specifically, selling NYCB's collateral under a "§ 363 sale in a chapter 11 case was not a necessary action to preserve or dispose of the property securing [NYCB's] debts because other remedies existed. Debtors sought chapter 11 protections for voluntary and elective reasons of disposing of [NYCB's collateral] in a self-beneficial manner rather than out of necessity." *In re TIC Memphis RI 13, LLC*, No. 12-29322, 2013 Bankr. LEXIS 2943, at *13-*14 (Bankr. W.D. Tenn. Jan. 10, 2013). Like in *TIC Memphis*, the Debtors here had other options. They could have elected to permit NYCB to foreclose on its collateral either before the Petition Date or after, based on NYCB's stay relief motion, filed just a week into the Debtors' cases. *See* Docket No. 47. Instead, the Debtors plowed ahead with a sale process in their own self-interest. No surcharge is thus available.

37. Moreover, the Committee cannot establish any benefit to NYCB. Even if actions are reasonable and necessary, no surcharge is appropriate if those actions do not give rise to any benefit to the secured creditor whose collateral was sold. *In re TIC Memphis RI 13, LLC*, 2013 Bankr. LEXIS 2943, at *15-*16. The benefit "must be direct and not speculative, hypothetical, or unascertainable." *Id.* at *16. Here, there was *no* benefit to NYCB of the sale process. At the outset of these cases, the Debtors persuaded the Court that NYCB's "Lot 14" collateral was worth more than $39 million. As a result, the Debtors were permitted to borrow under the priming DIP Facility. Ultimately, after completing the sale process, the Debtors received *far less* than that amount for virtually all assets. *And* the Debtors caused NYCB to incur significant legal fees in the bankruptcy cases in order to ensure that its rights were protected. Thus, the

bankruptcy process was a "detriment and not a benefit" to NYCB, so no surcharge is appropriate. *Id.* at *18. Certainly no surcharge would be equitable, given that NYCB has borne the costs of these cases through the Carve-Out and the loss of value of its collateral under the Court-authorized sale process. *Id.*

38. Likewise, even if there were some potential "benefit" to NYCB, that amount is far too "speculative, hypothetical, or unascertainable" to justify a Section 506(c) surcharge in any case. *Id.* at *17 ("Surcharging the [creditor's] cash collateral for and with the Debtor's professional fees and expenses at this point and under these circumstances would only be a hypothetical balancing act between the § 363 sale price, a hypothetical foreclosure sales price, the fees and expenses incurred by [creditor] in this bankruptcy case, the hypothetical fees and expenses that would have been incurred in a hypothetical foreclosure, and fees and expenses incurred by the Debtor's professionals. The court believes such a tenuous and speculative balancing act was not the intended purpose of a § 506(c) analysis.").

39. Even if the Committee could establish the elements of Section 506(c) – which it cannot – the Committee could not surcharge NYCB's collateral because the estates have already used NYCB's cash collateral to pay all of the fees and expenses of the sale. Specifically, all of the expenses incurred by the estates to preserve, maintain and sell NYCB's collateral have been paid from NYCB's collateral through the Carve-Out, which covered all professional fees relating to the sale process.

40. Where, as here, the fees and expenses incurred in the preservation, maintenance and sale of NYCB's collateral did not exceed the amount of the Carve-Out, the Carve-Out subsumes the Section 506(c) surcharge. *See, e.g.*, *Gowan v. Gardi (In re Gardi)*, 273 B.R. 4, 11, (Bankr. E.D.N.Y. 2002) (parties' agreement to pay first $110,000 of net proceeds of sale to the

estate "could be viewed as either a consensual surcharge or a carve-out to the estate under 11 U.S.C. Section 506(c)"); *In re Reese*, No. 06-50133-RLJ-11, 2007 Bankr. LEXIS 4093, at *10-*11 (Bankr. N.D. Tex. Dec. 12, 2007) (where the total fees and expenses incurred do not exceed the amount of the carve-out, the carve-out "constitutes the maximum amount of a Section 506(c) surcharge claim" and "subsume[s] the surcharge consent for real estate sales").

41. Moreover, even if NYCB's collateral had not already been effectively surcharged, the Committee could not use a Section 506(c) surcharge to satisfy unpaid administrative claims in any event. It is axiomatic that the surcharge amount must go "to the administrative claimant that conferred the benefit on the secured creditor." *In re Reese*, 2007 Bankr. LEXIS 4093, at *13-*14 (adopting the holding of *In re Debbie Reynolds Hotel & Casino, Inc.*, 255 F.3d 1061 (9th Cir. 2001), where the court "construed the [surcharge] payment as one made directly from the secured creditor to the claimant as opposed to a payment from the bankruptcy estate"). Yet here the Committee's plan would improperly use a Section 506(c) surcharge to fund administrative claims generally, because the professionals directly involved with the sale process will have already received payment from the Carve Out. As *Reese* explains, such a tactic is prohibited.

42. Thus, because the Committee would be unable to surcharge NYCB's collateral for payment of, among other things, currently unpaid administrative expense claims, which payments would have to be made in full on the effective date, a plan could not be confirmed. 11 U.S.C. §1129(a)(9).

b. The Committee could not confirm a plan that is dependent on bringing in funds through speculative litigation.

43. Because all of the cash in the estates is subject to the liens and security interests of the Debtors' secured creditors, the Committee can only look to the proceeds of litigation

recoveries to satisfy administrative expenses (and only after payment in full of NYCB's Superpriority Claim).[12] However, the Committee cannot obtain confirmation of a plan to be funded by potential recoveries from future, speculative litigation because "there is no way to establish the feasibility of a plan [as required by Bankruptcy Code Section 1129(a)(9)(A)] which is to be funded solely from the possibility of a law suit." *See Moody v. Sec. Pac. Bus. Credit, Inc.*, 85 B.R. 319, 345 (W.D. Pa. 1988).

44. In fact, bankruptcy courts – including this Court – have routinely held that the "prospect that a potentially meritorious litigation will bring funds into the estate" is not a reasonable basis to maintain a chapter 11 case. *See In re Taub*, 427 B.R. at 231 (finding administratively insolvent debtor "cannot confirm a plan of reorganization in a timely fashion based solely upon its litigation claims against [its lender], whatever the ultimate merits of its claims[,]" and granting motion to convert case to chapter 7); *see also In re BH S&B Holdings,* 439 B.R. at 350 (granting conversion on grounds of, among other things, administrative insolvency despite debtors' claims that a litigation victory could render the estate solvent); *In re FRGR Managing Member LLC*, 419 B.R. 576, 582 (Bankr. S.D.N.Y. 2009) ("[M]ost cases reject the need to evaluate the merits of a debtor's litigation claims in deciding whether to dismiss or convert a chapter 11 case.").

ii. ***Any Pullo contribution to the Debtors' estates would be inappropriate.***

45. The Committee discloses that they apparently intend to fund administrative expenses using "approximately $18 million to $24 million that the Pullos are expected to

[12] Notably, NYCB has both prepetition and replacement liens on litigation recoveries and the proceeds of insurance policies, including the Debtors' D&O insurance policy. Accordingly, those recoveries and proceeds could not be used to satisfy administrative expense claims.

contribute under the Committee's plan." Motion, ¶ 2. As noted above, the Committee has not provided any evidence to suggest, let alone any assurance, that such a payment is forthcoming. On the contrary, it appears to be another hope of the Committee. It is not worth proceeding to confirmation (or even to a disclosure hearing) on a plan predicated on a non-existent contribution from Metro's insiders.

46. Moreover, even if such a payment somehow were contemplated, it would constitute a large portion of the net value of the Pullos' real estate holdings, as far as NYCB can ascertain. Providing such a large percentage of the Pullos' assets to the Debtors' estates (and to the exclusion of the Pullos' legitimate creditors who hold liquidated claims against them) would be entirely inappropriate. Such a result would fly in the face of the very purpose of the Bankruptcy Code – appropriate, ratable distributions of a debtor's assets. *See Young v. Higbee Co.*, 324 U.S. 204, 210 (1945) ("But, historically one of the prime purposes of the bankruptcy law has been to bring about a ratable distribution among creditors of a bankrupt's assets; to protect the creditors from one another.").

47. As noted above, the Metro estates do not even have a liquidated claim against the Pullos. Accordingly, the existence, extent and validity of such a purported claim cannot be assumed, let alone assured, at this time. To the extent there is no Metro claim against either or both of the Pullos, then the transfer of a significant amount of assets to these estates would be tantamount to an unlawful fraudulent transfer. And if the estates' claims against the Pullos are valid, then the proposed transfer of Pullo assets to the estates (but not in equal proportion to the Pullos' other creditors) is no different from an avoidable preference. Ironically, it was the Committee that spearheaded the involuntary petitions against the Pullos, supposedly with the goal of ensuring ratable distribution of the Pullos' assets. Pre-Hearing Statement, ¶ 67. Yet now

the Committee argues that it will use the Pullos' involuntary cases to assure non-ratable distribution, all to NYCB's detriment. The Court should not put itself in the position of having to countenance such a result.

48. Finally, any contribution that the Pullos make to the estates would apparently be used to pay many administrative creditors of Metro, which do not have any direct claims against the Pullos – ahead of NYCB's legitimate claims based on direct Pullo guarantees. *See* 11 U.S.C. § 507(a)(2). Specifically, after NYCB's Superpriority Claim is paid in full, any additional funds would be used to pay not less than $8 million owed by these estates on account of other administrative claims – again, before payment in full of NYCB's and other legitimate creditors' direct claims against the Pullos. *Id.* Thus, any contribution by the Pullos to the estates would *circumvent* the Bankruptcy Code's priority scheme, unfairly prejudicing the Pullos' legitimate creditors, which would otherwise obtain a fair distribution of the Pullos' assets in bankruptcy.

iii. ***No plan can give the Pullos a nonconsensual third-party release*****.**

49. It is virtually impossible to imagine that the Pullos would agree to contribute between $18-24 million to the Metro estates without demanding third party releases from all of Metro's creditors (many of which, including NYCB, are creditors of the Pullos). Such releases are not available in the Second Circuit absent "truly unusual circumstances" – which are simply not present here.

50. In this Circuit, releases of claims that could be asserted by creditors against non-debtor third parties are governed by the standard set forth in *Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 141 (2d Cir. 2005). In that case, the Second Circuit held that a nonconsensual third-party release is proper "only in rare cases," because there is no explicit Bankruptcy Code authorization for such releases (outside of asbestos cases) and because such non-debtor releases lend themselves to abuse. *Id.* at 141-42.

51. Accordingly, "[a] nondebtor release in a plan of reorganization should not be approved absent the finding that *truly unusual circumstances* render the release terms important to the success of the plan" and that consideration was received by the estates. *Id.* at 143 (emphasis added). Indeed, the Second Circuit in *Metromedia* noted that "[n]o case has tolerated nondebtor releases absent the finding of circumstances that may be characterized as unique." *Id.* at 142; *see also In re Adelphia Commc'ns. Corp.*, 368 B.R. 140, 267 (Bankr. S.D.N.Y. 2007) (noting that "[t]he tenor of the *Metromedia* decision, as much as its plain language, cannot be ignored. It requires the bankruptcy community in this Circuit to be much more circumspect in providing for third-party releases than it used to be"). Following the *Metromedia* decision, "third-party releases or injunctions to prevent a creditor from suing a third party now are permissible . . . if, but only if, there are unusual circumstances to justify enjoining a creditor from suing a non-debtor party." *In re Adelphia Commc'ns. Corp.*, 368 B.R. at 267.

52. Here, the only unique circumstance is how uniquely unfair it would be to NYCB and the Pullos' other legitimate creditors to give a release to the Pullos from the Debtors' creditors in exchange for a payment of cash from the Pullos to the Metro Debtors. These cases simply do not meet the stringent *Metromedia* standard. NYCB holds tens of millions of dollars of claims against the Pullos, a portion of which have been reduced to a judgment and all of which are nondischargeable. As noted above, the bulk of any Pullo payment to the Metro estates would wind up in the hands of creditors of Metro, who have no claims against the Pullos. In the meantime, NYCB's rights to continue to pursue the Pullos to collect on its large claims directly against the Pullos would be extinguished, as would (presumably) the claims of other creditors having claims directly against the Pullos. Such an absurd result should be rejected. Indeed, by seeking such releases, the Committee plan would violate the discharge provisions of Section 524

of the Bankruptcy Code, and therefore would not satisfy the requirement of Section 1129(a)(1) that the plan comply with the applicable provisions of the Bankruptcy Code. *See In re Sun Valley Newspapers, Inc.*, 171 B.R. 71, 77 (B.A.P. 9th Cir. 1994) (plan with improper release of non-debtors violated Section 524 and was unconfirmable); *In re Elsinore Shore Assocs.*, 91 B.R. 238 (Bankr. D.N.J. 1988) (confirmation denied of chapter 11 plan providing for release of creditors' claims against third-party nondebtors).

B. The substantial cost of a plan confirmation fight and undue delay in concluding these cases weighs heavily in favor of denying the Committee's motion and granting NYCB's conversion motion.

53. A Committee plan would sink this case into months of extremely expensive litigation, for nothing. The Committee cannot confirm a plan over the objection of NYCB or any other administrative creditor, and the estates cannot afford to pay NYCB or the other administrative creditors in full. Accordingly, the plan is doomed to fail, and all that would result is massive expense and delay and deeper administrative insolvency on the part of the Debtors. For these reasons alone, the Court should deny the Committee's Motion. *See, e.g., In re Excel Mar. Carriers,* 2013 Bankr. LEXIS 3920, at *12 (denying committee's motion to terminate exclusivity where the "additional cost of terminating exclusivity and having a plan confirmation fight" would be significant). Worse yet, a Committee plan will inevitably fail – after great waste of time and money – and the cases will be left in the same position as they are in today, with conversion as the only viable option to conclude these cases.

54. For this Court to permit such a clear waste of money and inordinate delay would be particularly imprudent where, as here, the Court has before it NYCB's motion to convert these cases to chapter 7. *See* Amended Motion of New York Commercial Bank for Conversion of the Debtors' Cases to Chapter 7 Pursuant to 11 U.S.C. § 1112(B), dated May 10, 2013

[Docket No. 525]. Chapter 7 would facilitate moving the cases forward to a *final* conclusion in a much more cost effective and efficient manner.

55. Chapter 7 is a significantly cheaper alternative than continuing in chapter 11. The Committee and the Debtors are represented by several highly competent but very expensive attorneys and financial advisors. The continued accrual of expensive professional fees (more than $6 million in fees and expenses in these cases through just August, 2013) would be greatly reduced. Pre-Hearing Statement, ¶ 19. Specifically, upon conversion, a single trustee would be appointed, eliminating the expensive redundancy of having both Debtors in possession *and* a Committee (and their respective professionals charging fees and costs to the Debtors' estates). The trustee in chapter 7 would likely retain counsel that would be far less expensive than the three international law firms currently representing the estates, and would rid the estates of the continuing costs of the estates' two financial advisors by hiring a local, hourly-rate accounting firm.

56. Moreover, there would be no degradation in value to the estates from conversion to chapter 7 as the trustee would (i) have a duty to investigate and prosecute all causes of action it believes will maximize value for the stakeholders of the estate (11 U.S.C. § 704(a)(4)), and (ii) owe a fiduciary duty to the estates and will satisfy that duty by seeking to maximize recoveries. No valid, surviving causes of action will be lost. Moreover, chapter 7 trustees are uniquely qualified to commence litigation. *In re Ameribuild Const. Mgmt., Inc.*, 399 B.R. 129, 134 (Bankr. S.D.N.Y. 2009) (declining to consider merits of litigation commenced by debtor where debtor's business was shuttered and chapter 7 trustee "would be able to prosecute" those claims). In short, conversion assures a successful wind-down; granting the Committee's Motion simply dooms the estates to further litigation and losses.

C. The Committee plan would not resolve the Pullos' bankruptcy cases, and conversion would not cause the Pullos' cases to be dismissed.

57. The Committee baldly asserts that (i) the Committee plan will resolve the Pullos' involuntary cases and (ii) conversion will cause the Pullos' involuntary cases to be dismissed, thus providing a supposed windfall to NYCB. The Committee does not and cannot support either of those assertions with any explanation or a shred of evidence.

58. With respect to the plan resolving the involuntary cases of the Pullos, the Committee has not stated that the Pullos are in agreement with this plan or that or any of the other petitioning creditors support the Committee's plan. In the absence of the support of all of those parties, the Committee's plan would have no impact at all on the Pullos' involuntary cases.

59. Further, there is simply no logical connection between conversion of the Metro cases and the dismissal of the involuntary petitions against the Pullos. The three non-estate petitioning creditors of the Pullos would have no less incentive to press the involuntary petitions if the Metro cases were to convert, and the chapter 7 trustee could step into the shoes of the Committee as a petitioning creditor (although the estates are not a valid petitioning creditor because they do not have a liquidated, *bona fide* claim). 11 U.S.C. §303(b). Simply stated, the rights of the Metro estates would not be prejudiced in connection with the Pullos' involuntary bankruptcy if the Metro cases were to convert, because a Metro trustee could assert and prosecute claims against the Pullos.

RESERVATION OF RIGHTS

60. NYCB expressly reserves and does not waive its rights to raise any arguments or objections in the Debtors' or its insiders' bankruptcy cases, including, but not limited to, in connection with any plan confirmation proceedings.

CONCLUSION

WHEREFORE, for the foregoing reasons, NYCB respectfully requests that the Court deny the Motion and reject any co-exclusivity for the Committee, together with such other and further relief as the Court may deem just and proper.

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