UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

In re:	
VANTAGE TRAVEL SERVICE, INC.,	
Debtor	Chapter 11 Case No. 23-11060-JEB

UNITED STATES TRUSTEE'S MOTION TO APPOINT A CHAPTER 11 TRUSTEE OR, ALTERNATIVELY, TO CONVERT THE DEBTOR'S CHAPTER 11 CASE TO CHAPTER 7 (WITH CERTIFICATES OF SERVICE AND CONFERENCE) (EMERGENCY HEARING REQUESTED)

William K. Harrington, the United States Trustee for Region 1, moves this Court to appoint a chapter 11 trustee for Vantage Travel Service, Inc. ("Debtor") or, alternatively, to convert the Debtor's case to chapter 7 under 11 U.S.C. §§ 1104(a) and 11112(b) for "cause."[1]

PRELIMINARY STATEMENT

Under emergency procedures approved by this Court on two business days' notice, the Debtor will sell substantially all of its assets (including its customer list, which it recently valued at $7,000,000, $2,119,139.81 in cash

[1] Except as defined here, all capitalized terms have the same meaning given them in the United States Trustee's omnibus objection to the Debtor's first day motions (DE38) and objection to entry of the final financing order (DE128).

"Customer Trust Funds " and $1,537665 in pre-paid expenses) to United Travel Pte. Ltd. ("United") under 11 U.S.C. § 363(b). In exchange, and subject to higher bids, United will pay the Debtor $1,000,000, consisting of a $750,000 credit bid for funds advanced under a DIP facility and $250,000 in cash, plus a percentage of possible future sales derived from the Debtor's customers.

The sale must close by August 11, 2021. After the sale closes, the Debtor will dismiss its case.

The Debtor maintains that the Customer Trust Funds are not estate property. But it does not explain how the funds are held in trust - and are therefore excluded from the estate under 11 U.S.C. § 541(d) – and proposes to transfer them under section 363(b) anyway. If they are property of the estate, then the Debtor's statement that it had cash totaling only $4,702 as of the petition date, requiring it to request post-petition financing to cover payroll and sale costs, was incorrect.

United will refund Customer Trust Funds to the customers who paid them only after it contacts them and inquires whether they would like to book a trip using the deposit as a downpayment. According to its schedule "E/F," the Debtor owes customers $108,714,003.19 for deposits made on pre-petition trips that the Debtor did not provide. The Debtor says that its "accumulated deficit"

(losses passed through its profit and loss statement since inception) totaled $127,951,923 through December 31, 2022.

The DIP facility, which is funded in part by the Debtor's sole stockholder and largest secured creditor, Mr. Henry R. Lewis, provides just enough cash to pay the attorneys' fees necessary to effectuate the sale. In exchange for authorizing the Debtor to use cash collateral, the Debtor stipulates that it owes Mr. Lewis $35,811,861 under pre-petition loan taken out in 2022 and to the validity and priority of the all asset lien securing it.

The Debtor also waives all defenses against Mr. Lewis and releases him from all causes of action, whether for equitable subordination or avoidance, subject to the very limited challenge rights of a creditors' committee, whose attorneys' fees will be paid by the estate. The committee must move this Court for standing before bringing challenge actions.

The Debtor has provided no information on Mr. Lewis's pre-petition financial transactions with the Debtor and the welter of affiliated entities and trusts that he controls, however. And if this Court approves the facility as proposed by Mr. Lewis, no subsequently appointed trustee can investigate or challenge them.

As noted by this Court at the July 25, 2023 hearing on final approval of the post-petition financing facility, Mr. Lewis is the sole beneficiary of the sale, because he is the Debtor's single largest secured lender. According to his attorney, Mr. Lewis resigned as the Debtor's CEO days before that hearing.

Section 1104(a)(1) of the Bankruptcy Code requires this Court to appoint a chapter 11 trustee "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 . . . ."

Section 1112(b)(4) requires the Court to convert a debtor's chapter 11 case to chapter 7 for "cause," including "gross mismanagement of the estate . . ." (subsection (B)).

The facts and circumstances of this case clearly indicate that cause to appoint a chapter 11 trustee or to convert exists. Appointment of a trustee or conversion is necessary, because the Debtor and its management have irreconcilable conflicts in seeking this Court's approval of an all asset sale and post-petition financing that exclusively benefit Mr. Lewis, on unreasonably short notice, without relevant and necessary disclosures of his pre-petition transactions with the Debtor, affiliates and related trusts that he controls.

In support, the united States Trustee states:

EMERGENCY HEARING REQUESTED

1. The United States Trustee requests that this Court schedule an emergency hearing on this motion. MLBR 9013-1(g).

2. As set forth above, and in the United States Trustee's two previous objections, the sale process initiated by the Debtor is proceeding very rapidly, with insufficient disclosure of Mr. Lewis's pre-petition financial transactions with the Debtor and multiple affiliates and trusts. There is similarly no disclosure about what happened to the $108,714,003.19 in pre-petition customer deposit claims.

3. The sale will benefit only Mr. Lewis, because he alone will be entitled to receive the net proceeds under his pre-petition all asset lien. Prepetition creditors will receive nothing. And if this Court approves the final financing order as presented by the Debtor, Mr. Lewis will be released, outside of a plan, from all pre-petition claims, subject to limited challenge by a committee that must request and obtain standing, but not a subsequently appointed trustee.

4. The consideration to be paid by United appears to be worth far less than the assets it is purchasing from the Debtor.

5. Lastly, according to his attorney, Mr. Lewis resigned as CEO shortly before the Court conducted the July 25, 2023 hearing. This leaves

questions about the Debtor's management's capacity to fulfill the Debtor's fiduciary responsibilities.

6. In short, this case needs the immediate intervention of a bonded fiduciary – a chapter 11 or 7 trustee – to resolve the conflicts of interest presented by the Debtor and its management.

7. For these reasons, this Court should schedule this motion for an emergency hearing on this motion.

JURISDICTION, VENUE AND BASIS FOR RELIEF

8. This Court has jurisdiction over this matter under 28 U.S.C. §§ 157 and 1334.

9. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A).

10. Venue is proper in this Court under 28 U.S.C. §§ 1408 and 1409.

11. The statutory basis for relief includes 28 U.S.C. § 586(a)(3), 11 U.S.C. §§ 307, 1104 and 1112 and Fed. R. Bankr. P. 1017 and 2007.1.

FACTS

A. The Debtor is on a fast track to sell assets scheduled at $10,656,805.08 to a United for $1,000,000.

12. The Debtor filed its voluntary chapter 11 petition on June 29, 2023 on the eve of a payroll. According to its first day pleadings and the budget

attached to the financing motion (DE7), the Debtor had only $4,207 in cash. DE1.

13. By order dated July 7, 2023, on only two business days' notice and over the United States Trustee's objection (DE38), this Court approved procedures under which the Debtor must close a sale of substantially all of its assets to United or another bidder by August 11, 2023. DE64 (order). DE3-1 (asset purchase agreement "APA").

14. According to the APA, the Debtor's most valuable asset is its customer list. DE3.

15. In its recently filed schedules, the Debtor valued the customer list at $7,000,000. DE109 at 8.

16. United's stalking horse bid is $1,000,000, consisting of a DIP loan of up to $750,000, which it will credit bid at auction, plus $250,000 in cash. DE3-1 at 7 (APA).

17. In addition to its customer list, the Debtor will transfer to United under the APA:

a. "Vendor Credits," defined to include pre-payments, totaling at least $1,537,665. *Compare* APA at with DE109 at 4-5; and

b. "Customer Trust Funds" totaling $2,119,139.81 to United, notwithstanding that it claims that these funds are not

> property of the estate and, therefore, cannot be included in a section 363(b) sale. *Compare* DE3 at 13 (APA) *with* DE109 at 9 (schedule "A/B," question 77) ("NOT PROPERTY OF THE ESTATE") and 140 (SOFA 21) *and with* 11 U.S.C. § 363(b) (authorizing the debtor to sell only "property of the estate").

18. United does not have to refund any Customer Trust Funds until it contacts the customers who paid them and inquires whether they would like to book a trip using the money DE14 at 9 (DelGreco affidavit).[2] *See* DE3-1 at 26-27 (section 9.3).

19. No document filed in the case to date describes under what law or trust agreement the Customer Trust Funds are held in trust.

20. To submit a qualified bid, any counterbidder, in addition to presenting a certified check for $150,000, must pay very high, additional threshold breakup and topping fees - intended to preserve United's inside track - totaling $500,000, or 50% of United's bid, and then close quickly in all cash, with no credit allowed. DE64 at 7; 13.

21. As of July 25, 2023, when this Court conducted a hearing on the

[2] "The Customer Trust Funds will be transferred to the Purchaser at closing and, if the Purchaser cannot, or elects not to, provide the trip with respect to which the Customer Trust Funds were remitted by a customer to the Debtor, the Purchaser shall refund the cash received from each such customer from the Customer Trust Funds . . . ." DE14 at 9.

Debtor's proposed final financing order (DE118), it was unclear whether any counterbidders, including Pacific Travel Partners, Inc., who had appeared at the first day hearings through counsel and offered to provide DIP financing, would submit bids by the tight August 3, 2023 deadline.

22. The United States Trustee submits that the unreasonably rushed sale process and the high barriers to entry approved by this Court may be the reason.

B. Mr. Henry R. Lewis, the Debtor's sole stockholder, resigns post-petition.

23. Mr. Lewis signed the corporate vote authorizing the Debtor to file the petition. DE2.

24. In its SOFA, the Debtor listed Mr. Lewis as President, Treasurer and Clerk. DE109 at 143. It said that Mr. Lewis and the two trusts through which he owns 100% of the Debtor's stock, the Henry R. Lewis Trust and the HRL Trust, are control persons, along with Mr. DelGreco, the Debtor's current COO/CFO. *See* DE14 at 3 (affidavit of Mr. Gregory DelGreco) and DE15 (affidavit of Mr. David L. Herman).

25. According to his attorney, Mr. Lewis served as the Debtor's CEO until just prior to the July 25, 2023 hearing, when he abruptly resigned.

C. Mr. Lewis is the Debtor's single largest alleged secured creditor.

26. As of the petition date, the Debtor owed Mr. Lewis $35,811,861 under a pre-petition facility that he had assigned to himself and the HRL Trust from another of his entities, Paul Gauguin Shipping Limited. DE14 at 4. DE7 at 2 (financing motion). DE109 at 16 (schedule "D").

27. The facility is allegedly secured by an all-asset lien. *Id.*

D. For now, this Court has denied Mr. Lewis's request to be released from all liability under the financing motion.

28. Under the financing motion (DE7), the Debtor seeks authorization to borrow up to $1,000,000 from United, Mr. Lewis and the HRL Trust to finance the section 363 sale of the Debtor's assets under the APA. The DIP advances will be secured by a priming liens on all of the estate's assets, except avoidance actions, and will have superpriority over the Pre-petition lender's pre-petition liens and administrative expenses. *See* DE118 at 15-17 (proposed final order).

29. As adequate protection to use cash collateral, the Debtor's proposed final order:

a. requires the Debtor to stipulate to the amount of Mr. Lewis and the HRL Trust's pre-petition claim and the validity and priority of their liens. DE7 at 12-13; DE118 at 24-26;

b. requires the Debtor to waive all claims and defenses against them. DE118 at 14-15; 24-26;

c. requires a committee to commence any challenge action against them within the lesser of 60 days following the entry of an order approving the employment of its counsel or September 27, 2023. *Id.*;

d. requires a trustee to commence a challenge action against them no later than September 12, 2023, regardless of whether a trustee has been appointed. *Id.*; and

e. requires a party in interest other than the Debtor – possibly including a trustee - to obtain prior Court authorization to bring a challenge action. *Id.*

30. The United States Trustee objected to interim (DE38) and final (DE128) approval of the financing motion and insisted that Mr. Lewis's pre-petition lien should not attach to the Customer Trust Funds (DE128 at n.4). *See also* DE119 (limited objection of Airlines Reporting Corporation).

31. This Court sustained the objections to final approval for now, finding that such provisions were inappropriate for pre-petition cash collateral lenders, such as Mr. Lewis and the HRL Trust, who will exclusively benefit from the asset sale as senior secured creditors, particularly where, as here, there remain too many unanswered questions concerning the Debtor's pre-petition transactions with them and other entities controlled by Mr. Lewis.

32. On July 26, 2023, this Court instead entered a second interim cash

collateral order (DE145) and scheduled (DE144) a final hearing on the financing motion for August 9, 2023, the date of the auction sale (DE65). *See* DE145 at 10 (exempting the Customer Deposit Funds from Mr. Lewis's pre-petition lien).

E. As this Court has acknowledged, because Mr. Lewis's pre-petition secured claim far exceeds the value the Debtor's assets, only he will benefit from the sale.

33. In its schedules, the Debtor listed :

a. assets of $14,382,009.42, including receivables owed by affiliated entities controlled by Mr. Lewis totaling $1,864,011.90, deposits and pre-paid expenses of $3,518,770.27, its creditor list, which it valued at $7,000,000 but excluding the Customer Trust Funds; and

b. liabilities of $171,520,097.71, including unsecured consumer deposit claims totaling $108,714,003.19, unsecured claims owed to affiliates totaling $4,338,378.30 and Mr. Lewis's secured claim of $35,811,861.

DE109 at 2; 8; 9; 16; 124.

34. As this Court acknowledged on the record at the July 25, 2023 hearing on the final financing order (DE118), however, even if a sale were to close for the $7,000,000,000 value estimated by the Debtor, the only creditors who will benefit would benefit are Mr. Lewis and the HRL Trust. *Compare* DE7 *with* DE109.

F. The Debtor says it will dismiss the case after closing the sale, because creditors will get nothing and there are no estate causes of action.

35. According to the sale motion:

> It is extremely unlikely that there will be assets available to pay even a fraction of . . . priority [customer] claims . . . The Debtor currently anticipates that there will be insufficient proceeds from the sale of the Assets to pay all secured claims in full, let alone to fund a distribution on account of non-administrative priority claims or general unsecured claims . . . [and] The absence of colorable preference [or fraudulent transfer] claims would support a determination to seek dismissal of the Chapter 11 case after the closing of the Proposed Sale, rather than maintain a bankruptcy case with minimal or no assets to administer . . . .

DE3 at 22-25.

36. It is unclear how extensive the Debtor's avoidance action review was. But because it was conducted by the Debtor's management, who are conflicted from evaluating Mr. Lewis's pre-petition transactions with the Debtor, affiliates and related trusts (*see infra*), it is reasonable to believe that such a review was neither objective nor thorough.

37. The sale motion (DE3) does not contain sufficient information about the Debtor and its pre-petition transactions with insiders and affiliates and does not constitute the functional equivalent of a disclosure statement under local rule 6004-1.

G. The Debtor's pre-petition financial position and performance.

38. The Debtor's pre-petition financial statements ("Statements") for the years 2019-2022 rebut the claims at the July 5, 2023 first day hearings that it was successful before Covid.

39. Among other things, the Statements show that the Debtor:

a. had net income of ($15,194,172) in 2019 ($29,521,843) in 2020, ($18,986,807) in 2021 and ($3,455,133) in 2022;[3]

b. had an "accumulated deficit" (cumulative accrual basis losses reported through the profit and loss statement) on its balance sheet of ($64,249,100) in 2019, ($79,443,273) in 2020, ($108,965,116) in 2021 and ($127,951,923) in 2022;

c. realized net cash from operating activities of ($13,798,537) in 2019, ($15,131,531) in 2020, ($294,427) in 2021 and ($20,192,067) in 2022;

d. carried customer deposit liabilities claims year to year that exceeding its total assets, including its cash and pre-paid expenses by multiples ranting from 3.6 to 8.5; and

e. had "non-controlling interests" (presumably in other entities) of ($15,194,172) in 2019, ($29,521,843) in 2020, ($18,986,807) in 2021 and ($3,455,133) in 2022.

DE128-1.

[3] The Debtor claimed ordinary business income in its Federal tax returns of had net income of ($12,538,497) for 2019 ($33,106,136) in 2020, ($21,915,046) in 2021. The Debtor reported that it has not filed its 2022 return.

40. Of particular concern, neither the schedules nor the SOFA nor the unaudited financial statements indicate what happened to the $108,714,003.19 in consumer deposits. Based on Mr. Herman's affidavit, however, it is likely that the Debtor used them to fund its operations without providing the requested trips. DE15 at 3 (stating that the Debtor used customer deposits during the Pandemic "to fund its working capital needs . . .")

41. From January 1, 2020 through December 31, 2023, coinciding with Mr. DelGreco's tenure as COO/CFO, the Debtor's customer deposit liability increased from $73,418,093 to $108,600,007 or 48%. DE128-1.

H. The schedules and SOFA provide no financial information about the Debtor's affiliates, the insider trusts that own them or their pre-petition transactions with the Debtor.

42. According to an organization chart provided in connection with the Debtor's initial debtor interview, the Debtor and 11 affiliates are owned through trusts (collectively the "HRL Trusts") that are, in turn, controlled by the Debtor's sole director, Mr. Henry R. Lewis.[4]

43. Several of these affiliates hold controlling interests in other affiliates that, in turn, own river vessels. DE15 at 2. Ten affiliates or related entities, but

[4] The United States Trustee has not attached the chart, which the Debtor's affiliates' investment banker has labeled "Strictly Confidential – Not for Distribution."

not the Debtor, retained Gordian Group, LLC as their investment banker. *Id.*

44. In response to SOFA question 13, which asks the Debtor to "List any transfers of money or other property by sale, trade, or any other means made by the debtor or a person acting on behalf of the debtor within 2 years before the filing of this case to another person, other than property transferred in the ordinary course of business or financial affairs . . . ," the Debtor filled in the box marked "None." *Id.* at 136.

45. Like the first day pleadings, the Debtor's schedules and SOFA provide no information about the HRL Trusts, the Debtor's affiliates, including the ship-owning affiliates (DE7 at 3, n.1), their financial position or financial performance.

STATUTORY FRAMEWORK

A. Case commencement and property of the estate.

46. The filing of a petition under the Bankruptcy Code commences a bankruptcy case. *See* 11 U.S.C. § 301(a). The commencement of the case creates an estate comprised of all the debtor's legal or equitable interests in property, wherever located. 11 U.S.C. § 541(a). *See United States v. Whiting Pools, Inc.*, 462 U.S. 198 (1983) (noting the broad scope of estate property). The filing of a petition operates as a stay of creditor actions to collect a claim against the debtor

or to realize on estate property. 11 U.S.C. §§ 362(a)(3) and (6).

47. Section 541(d) includes in property of the estate any equitable interest in property owned by someone else and held in trust by the debtor. 11 U.S.C. § 541(d).

> When property in the possession of a debtor is alleged to be held in trust by the debtor for a nondebtor, and therefore not estate property under section 541(a)(1) or (2), the burden rests upon the entity seeking to exclude the property from the estate to establish the existence of the claimed fiduciary relationship. That entity must prove title and identify the trust fund or property and, where the fund or property has been commingled with the general property of the debtor, must sufficiently trace the property. However, if it cannot first be shown that a trust has been created, there is no necessity for inquiry as to whether the property can be identified or traced . . . .

5 COLLIER ON BANKRUPTCY, ¶ 541.28 (Alan N. Resnick & Henry J. Sommer, eds., 16th ed. rev. 2023).

48. Property held under an express, constructive, resulting or statutory trust is excluded from the estate. *Id.* at [1], [2], [3] and [5]. State law determines whether a constructive trust exists. *Id.* at 2. *See Meskell v. Meskell*, 243 N.E. 2d 804 (1969).

49. Under Massachusetts law, to impose a constructive trust, a claimant must establish that legal title to his property was obtained by fraud or in violation of a fiduciary or confidential relationship. *Meskell v. Meskell*, 243 N.E. 2d at 807.

B. Debtors in possession owe a fiduciary duty to the estate and its constituents.

50. Debtors in possession assume the rights and powers of a trustee under 11 U.S.C. §§ 323(a) and 1107(a). "Without question, the Chapter 11 debtor and its management occupy a fiduciary role vis-a-vis the estate and its constituents . . . That role requires them to refrain from activities aimed to benefit only themselves . . . ."[5] *In re DN Associates*, 144 B.R. 195, 198-199 (Bankr. D. Me. 1992), *aff'd sub nom Casco Northern Bank, N.A. v. DN Associates (In re DN Associates)*, 3 F.3d 512, 514-515 (1st Cir. 1993).

C. Directors and officers of a debtor in possession are bound by a duty of loyalty and must avoid self-dealing.

51. In operating the debtor in possession, directors and officers owe a duty of loyalty to the debtor and cannot put their personal interests ahead of the interests of creditors. 11 U.S.C. § 1108 ("Authorization to operate business").

> Chapter 11 trustees and the directors and officers of debtors in possession are also bound by a duty of loyalty. Their duty of loyalty

[5] "But so long as the Debtor remains in possession, it is clear that the corporation bears essentially the same fiduciary obligation to the creditors as does the trustee for the Debtor out of possession . . . It is equally apparent that in practice these fiduciary responsibilities fall not upon the inanimate corporation, but upon the officers and managing employees who must conduct the Debtor's affairs under the surveillance of the court . . . ." *Wolf v. Weinstein*, 372 U.S. 633, 649-650 (1963). *See Commodity Futures Trading Com'n v. Weintraub*, 471 U.S. 343, 354 (1985). *See also Bezanson v. Thomas (In re R & R Assocs. of Hampton)*, 402 F.3d 257, 266 (1st Cir. 2005) (stating that debtor in possession duties "include the maximization of the value of the debtor's assets, and the recovery of property for the benefit of the estate . . . ").

> encompasses an obligation to refrain from self-dealing, to avoid conflicts of interests and the appearance of impropriety and to treat all parties to the case fairly.

7 COLLIER ON BANKRUPTCY at ¶ 1108.09.

D. Appointment of a chapter 11 trustee under 11 U.S.C. § 1104(a)(1) and (2).

52. Section 1104(a) of the Bankruptcy Code states that the bankruptcy court shall order the appointment of a trustee, at any time after the commencement of the case but prior to confirmation of a plan, on request of a party in interest or the UST, and after notice and a hearing:

> (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 liabilities 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).

53. Subsection (1) of Section 1104(a) addresses management's pre- and post-petition misdeeds or mismanagement, while subsection (2) provides the court with "particularly wide discretion" to appoint a trustee even absent wrongdoing or mismanagement. *See In re Bellevue Place Assocs.*, 171 B.R. 615, 623

(N.D. Ill. 1994). Where the court finds either that cause exists or that appointment is in the interest of the parties, an order for the appointment of a trustee is mandatory. *See Official Comm. Of Asbestos Pers. Injury Claimants v. Sealed Air Corp. (In re W.R. Grace & Co.)*, 285 B.R. 148, 158 (Bankr. D. Del. 2002).

54. The categories enumerated in 11 U.S.C. § 1104(a)(1) "cover a wide range of conduct" and, thus, are best described as illustrative, rather than exclusive. *See In re Marvel Entertainment Corp.*, 140 F.3d 463, 472 (3d Cir. 1998) (quoting *Committee of Dalkon Shield Claimants v. A.H. Robbins Co.*, 828 F.2d at 242).

55. Fraud, dishonesty, incompetence, and gross mismanagement of a debtor's business affairs are all grounds for appointment of a chapter 11 trustee under 11 U.S.C. § 1104(a)(1). *See, e.g., In re Sharon Steel Corp.*, 871 F.2d 1217 (3d Cir. 1989); *In re Colby Construction Corp.*, 51 B.R. 113, 116-118 (Bankr. S.D.N.Y. 1985).

56. The determination of whether cause exists must be taken on a case by case basis, taking into account all relevant factors. *Sharon Steel*, 871 F.2d at 1225. Pre-petition conduct alone may provide the basis for a court to appoint a trustee. *See In re Rivermeadows Assocs., Ltd.*, 185 B.R. 615, 619 (Bankr. D. Wyo. 1995).

57. In the First Circuit:

> The inquiry into whether cause exists for the appointment of a chapter 11 trustee is not limited to the enumerated list but extends to "similar cause." *See* 11 U.S.C. § 1104(a)(1). In determining whether a particular set of circumstances establishes cause under this prong of § 1104(a), courts have considered a variety of factors, including: (1) Materiality of the misconduct; (2) Evenhandedness or lack of such in dealings with insiders or affiliated entities vis-a-vis other creditors or customers; (3) The existence of pre-petition voidable preferences or fraudulent transfers; (4) Unwillingness or inability of management to pursue estate causes of action; (5) Conflicts of interest on the part of management interfering with its ability to fulfill fiduciary duties owed to the debtor; [and] (6) Self-dealings by management or waste or squandering of corporate assets . . . While any one factor may not warrant appointment of a trustee, the court must consider the cumulative or collective impact of the alleged problems or issues in making its decision . . . That is, the court must determine whether the totality of the circumstances warrant appointment of a trustee . . .

United Surety & Indemnity Co. v. Lopez-Munoz (In re Lopez-Munoz), 553 B.R. 179, 190 (B.A.P. 1st Cir. 2016) (denying request for the appointment of a chapter 11 trustee under 11 U.S.C. § 1104(a)(1)), *affirmed*, *United Surety & Indemnity Co. v. Lopez-Munoz (In re Lopez-Munoz)*, 866 F.3d 487 (1st Cir. 2017) (citations and internal punctuation omitted).

58. While "[t]he default position is that current management will retain control of the company . . . § 1104 represents a potentially important protection that courts should not lightly disregard or encumber with overly protective attitudes towards debtors-in possession . . . ." *Tradex v. Morse*, 339 B.R. 823, 826 (D. Mass. 2006) (holding that "cause" to appoint a trustee must be established

under a preponderance of the evidence standard) (internal citations omitted).

59. "If the creditors and equity holders would be better off with a trustee than with current management, a trustee arguably should be appointed. The debtor's management has no vested right to maintain control . . . ." Charles Jordan Tabb, LAW OF BANKRUPTCY, §11.7 (West, 5th Ed. 2020).

E. Conversion under 11 U.S.C. § 1112(b)

60. Under 11 U.S.C. § 1112(b)(1), "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."

61. Section 1112(b)(4) contains a nonexclusive list of 16 examples of "cause," including gross mismanagement of the estate (subsection (B)). *See* 7 COLLIER ON BANKRUPTCY, ¶ 1112.04[6][a] (Alan N. Resnick & Henry J. Sommer, eds., 16th ed. rev. 2022).

62. "In addition, the court may convert or dismiss a case for reasons that are not specifically enumerated in the section, provided that these reasons are sufficient to demonstrate the existence of cause." *La Trinidad Elderly LP SE v. Loiza Ponce Holdings LLC (In re La Trinidad Elderly LP SE)*, 627 B.R. 779, 798

(BAP 1st Cir. 2021) (citation omitted).

63. Such additional cause includes breach of the debtor's fiduciary duties by its management (*In re Hampton Hotel Investors, L.P.*, 270 B.R. 346, 361-362 (Bankr. S.D.N.Y 2001) (finding that self-dealing by the debtor's general partner, and the corresponding need to protect creditors, constituted cause to convert)) and lack of a reorganizational purpose (*see Fields Station LLC v. Capitol Food Corp. of Fields Corner (In re Capitol Foods Corp. of Fields Corner)*, 490 F.3d 21 (1st Cir. 2007)). "One ground, however, is sufficient, standing alone, to establish cause under the statute . . . ." *In re Andover Covered Bridge, LLC*, 553 B.R. 162, 172 (BAP 1st Cir. 2016) (citations and internal punctuation omitted). *Hoover v. Harrington (In re Hoover)*, 828 F.3d 5, 9 (1st Cir. 2016).

64. "Once cause is found, the burden shifts to the opposing party to demonstrate 'unusual circumstances' that establish conversion or dismissal is not in the best interests of the creditors and the estate. The bankruptcy court retains discretion in determining whether unusual circumstances exist and whether conversion or dismissal is in the best interest of creditors and the estate." *Efron v. Canelario (In re Efron)*, 529 B.R. 396, 411 (B.A.P. 1st Cir. 2015). *Accord, In re Andover Covered Bridge, LLC*, 553 B.R. at 171-172.

ARGUMENT

I. This Court should either appoint a chapter 11 trustee or convert the Debtor's chapter 11 case to chapter 7 for "cause" under 11 U.S.C. §§ 1104(a) and 1112(b)(4).

65. The facts and circumstances of this case demonstrate that "cause" exists to appoint a chapter 11 trustee or to convert the Debtor's chapter 11 case to chapter 7, including for fraud, dishonesty, incompetence or gross mismanagement of the affairs of the Debtor by current management, either before or after the petition date, for gross mismanagement of the estate, for violation of the Debtor and management's fiduciary duties or similar cause. 11 U.S.C. §§ 1104(a)(1) and 1112(b)(4)(B).

66. The Debtor filed its chapter 11 case on the eve of a payroll. Representing to this Court that it had cash of only $4,702, it obtained authorization to conduct an all asset sale cum financing on two business days' notice after the July 4 weekend.

67. The Debtor has not disclosed the legal basis for claiming that the Customer Trust Funds are held in trust. *Compare* 11 U.S.C. § 541(a) (*with* subsection (d) *and with* 5 COLLIER ON BANKRUPTCY at ¶ 541.28.

68. The Debtor cannot claim that it is holding those funds under an express trust, because it has identified no trust instrument. And its practices,

according to Mr. Herman, were to use them to fund its operations.

69. The Debtor cannot claim that that it is holding the Customer Trust Funds under a statutory trust, because it has identified no state or Federal law that would require it to do so. *Compare* 26 U.S.C. § 7501 (providing that whenever a person is required to collect or withhold any IRS taxes from another person and pay them over to the IRS, the amount of the tax shall be held in a special trust fund for the United States).

70. If the Debtor claims that it is holding the Customer Trust Funds for the benefit the customers who gave them beginning May 11, 2023 under a constructive trust, then it has essentially admitted that it defrauded them. *Meskell v. Meskell*, 243 N.E. 2d at 807 (finding that, under Massachusetts law, a claimant must establish that legal title to his property was obtained by fraud or in violation of a fiduciary or confidential relationship).

71. Absent the existence of an express, constructive, resulting or statutory trust, the Customer Funds constitute property of the estate that the Debtor could have used to fund its post-petition operations. It appears that the Debtor's cash crisis was therefore self-invented and a pretext for selling the Debtor's assets quickly, without full disclosure as required by local rule 4002-1(c).

72. If the Debtor is correct, and the Customer Deposits are not property of the estate, then it cannot sell them under section 363(b), which authorizes the Debtor to sell only estate property. 11 U.S.C. § 363(b).

73. If this Court finds that the Customer Deposits are property of the estate that can be sold, then the Debtor is selling them, the Vendor Creditors and its customer list for far less than their fair value.

74. The sale procedures insisted upon by the Debtor and United raise very substantial capital barriers to entry for potential counterbidders, who must, in addition to satisfying them, conduct due diligence under the gun. That no counterbidders, including Pacific Travel Partners, Inc., have formally declared themselves is likely the result of the $500,000 combined cost of the overbid and breakup fees.

75. Most importantly, as this Court pointed out at the July 25, 2023 hearing, the only person who will benefit from the sale of the Debtor's assets is Mr. Lewis. He (and the HRL Trust, which he controls) will receive the net sale proceeds. According to the Debtor's budget (DE7-1) and Court-ordered reconciliation (DE120), estate and committee professionals will be paid in full.

76. But, by the Debtor's own admission, holders of general unsecured claims, including approximately $27,000,000 owed to vendors and $108,000,000

owed to customer deposit creditors, will get nothing.

77. The entire sale and financing process has been rushed and arranged by the Debtor in a way that exclusively benefits Mr. Lewis. Rather than seeking to maximize creditors' recoveries consistent with the fiduciary duties imposed upon the Debtor and its officers, Mr. Lewis, in addition to receiving the proceeds of the Debtor's assets in partial satisfaction of his alleged $35,000,000 secured claim, will be discharged of all liability for any pre-petition transactions involving the Debtor and the affiliates, without disclosure or independent investigation of them. *Compare* 11 U.S.C. § 524(e).

78. Questions about what happened to the $108,714,003.19 in consumer deposits, where the Debtor got the cash to continue operating in light of its miserable financial performance before and after Covid and the timing and circumstances of Mr. Lewis' pre-petition loan facility will go unanswered.

79. The rights of a subsequently appointed trustee to investigate or to bring a challenge action are not preserved in the final order. Even if they were, it will not matter, because, according to the sale motion, the Debtor will dismiss the case after the sale, most likely with a structured waterfall paying selected claims.

80. Appointment of a trustee or conversion is necessary, because the

Debtor and its management have irreconcilable conflicts in seeking this Court's approval of an all asset sale and post-petition financing that exclusively benefit the Debtor's sole stockholder, control person and single largest secured creditor, Mr. Lewis, on unreasonably short notice, without relevant and necessary disclosures of his pre-petition transactions with the Debtor, affiliates, including the ship-owning affiliates, and related trusts that he controls.

81. The Debtor's reorganization purpose, if it has one, is to liquidate its assets.

82. Liquidation is best handled by a bonded, independent fiduciary – a chapter 7 trustee – who will be subject to supervision by this Court and audit by the United States Trustee.

83. The facts and circumstances of this case demonstrate "cause" under 11 U.S.C. §§ 1104(a) and 1112(b)(4).

84. Accordingly, this Court should either appoint a chapter 11 trustee or convert the Debtor's chapter 11 case to chapter 7.

REQUESTED RELIEF

For these reasons, the United States Trustee requests that the Court enter orders: 1) scheduling an emergency hearing on this motion; 2) appointing a chapter 11 trustee or converting the Debtor's chapter 11 case to chapter 7; and

3) granting him all such other and further legal and equitable relief to which he may be entitled.

Respectfully submitted,

WILLIAM K. HARRINGTON
UNITED STATES TRUSTEE,
REGION 1

By: */s/ Eric K. Bradford*

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Dated: July 31, 2023.

CERTIFICATE OF SERVICE

I certify that on July 31, 2023, true and correct copies of the foregoing motion were served by CM/ECF only upon the individuals who filed notices of appearance in the Court's CM/ECF database, including counsel for the Debtor, who are identified below.

Respectfully submitted,

WILLIAM K. HARRINGTON
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REGION 1

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BY CM/ECF:

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CERTIFICATE OF CONFERENCE

Pursuant to MLBR 9013-1(g)(C), I certify that on July 31, 2023, I spoke by Zoom with counsel for the Debtor, Michael Goldberg, Esq., regarding the substance of the foregoing motion and the United States Trustee's request that it be heard on an emergency basis. Attorney Goldberg disagreed with the United States Trustee's position.

Respectfully submitted,

WILLIAM K. HARRINGTON
UNITED STATES TRUSTEE,
REGION 1

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