WILLIAM K. HARRINGTON
United States Trustee for Region 2
One Bowling Green
New York, New York 10004
Telephone: (212) 510-0500
By: Shara Cornell
Trial Attorney

HEARING DATE: July 1, 2024
HEARING TIME: 2:00 p.m.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Case No. 20-11422 (MG) 20-11423 (MG)
RM BAKERY LLC & BKD GROUP LLC	:	(Chapter 11)
Debtor.	:	

PLEASE TAKE NOTICE that upon this Notice of Motion and the accompanying memorandum of law and the declaration of Victor Abriano, William K. Harrington, the United States Trustee for Region 2 (the "United States Trustee"), will move this Court before the Honorable Martin Glenn, Chief Bankruptcy Judge, in the United States Bankruptcy Court, One Bowling Green, New York, New York 10004 on **July 1, 2024 at 2:00 p.m.**, or as soon thereafter as counsel can be heard, for an order dismissing this bankruptcy, or in the alternative, converting to chapter 7 of the Bankruptcy Code, and for such other and further relief as this Court may deem just and proper. The original application is on file with the Clerk of the Bankruptcy Court.

PLEASE TAKE FURTHER NOTICE that any responsive papers should be filed with the Court and personally served on the United States Trustee, to the attention of Shara Cornell, Esq., via e-mail at shara.cornell@usdoj.gov no later than three (3) days prior to the return date set forth above. Such papers shall conform to the Federal Rules of Civil Procedure and identify the party on whose behalf the papers are submitted, the nature of the response, and the basis for such response.

PLEASE TAKE FURTHER NOTICE that the Hearing shall take place via Zoom for Government. Those wishing to appear before the Court at the Hearing must register for appearance utilizing the Electronic Appearance portal located at the Court's website: https://ecf.nysb.uscourts.gov/cgi-bin/nysbAppearances.pl. Appearances must be by 4:00 p.m. (Prevailing Eastern Time) one business day before the Hearing.

Dated: New York, New York
May 31, 2024

WILLIAM K. HARRINGTON
UNITED STATES TRUSTEE

By: /s/ *Shara C. Cornell*

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Case No. 20-11422 (MG) 20-11423 (MG)
RM BAKERY LLC & BKD GROUP LLC,	:	(Chapter 11)
Debtor.	:	

MEMORANDUM OF LAW OF THE UNITED STATES TRUSTEE IN SUPPORT OF MOTION FOR AN ORDER DISMISSING THIS CASE, OR, IN THE ALTERNATIVE, CONVERTING TO CHAPTER 7

**TO THE HONORABLE MARTIN GLENN,
CHIEF UNITED STATES BANKRUPTCY JUDGE:**

This memorandum of law is in support of the motion (the "Motion") of William K. Harrington, the United States Trustee for Region 2 (the "United States Trustee"), for an order dismissing the case of RM Bakery LLC ("RM Bakery") and BKD Group LLC ("BKD") (together, the "Debtor") or converting to one under Chapter 7 of the Bankruptcy Code. In support thereof, the United States Trustee respectfully alleges the following:

INTRODUCTION

"Cause" exists under 11 U.S.C. § 1112(b) to dismiss or convert this Chapter 11 case to Chapter 7. The Debtor has taken advantage of the automatic stay and breathing room this bankruptcy has provided for nearly four years, yet has failed to perform its most basic debtor-in-possession obligations: (1) file timely monthly operating reports, (2) pay its United States Trustee fees, and (3) file a confirmable chapter 11 plan of reorganization. Specifically, the Debtor has failed to pay its statutorily required quarterly fees ("Fees") and currently owes an estimated $48,884.24 ($46,608.38 for RM Bakery and $2,275.85 for BKD) through the first quarter of 2024. The last payment was received over four months ago on January 24, 2024 for $10,000 for only

RM Bakery. Additionally, despite languishing in bankruptcy for four years, no plan or disclosure statement has been filed.

Accordingly, cause exists to dismiss or convert this case pursuant to 11 U.S.C. § 1112(b). The United States Trustee recommends dismissal for the reasons set forth below.

FACTS

A. General Background

1. On June 15, 2020, (the "Petition Date"), the Debtor filed a voluntary petition (the "Petition") for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. § 101 *et seq.* (the "Bankruptcy Code"). *See* Declaration of Victor Abriano (the "Abriano Decl.") at ¶ 2.

2. As of the date hereof, no plan or disclosure statement has been filed. Abriano Decl. at ¶ 3.

3. As of the date of this Motion, RM Bakery owes an estimated $46,608.38 in Fees. Abriano Decl. at ¶ 5. The Fee payment received from RM Bakery was on January 24, 2024 for $10,000. *Id*.

4. As of the date of this Motion BKD owes an estimated $2,275.85 in Fees. *Id*. The last Fee payment received from BKD was on March 29, 2022. *Id*.

B. The Monthly Operating Reports

5. The Debtor has routinely been delinquent in filing monthly operating reports and instead batch files multiple delinquent reports. Abriano Decl. at ¶ 6.

6. The Debtor batch filed delinquent monthly operating reports for April 2023, May 2023, and June 2023 on November 27, 2023. ECF Dkt. Nos. 339, 340, and 341.

7. The Debtor batch filed delinquent monthly operating reports for October 2023,

November 2023, and December 2023. ECF Dkt. Nos. 352, 353, and 354.

8. The Debtor batch filed delinquent monthly operating reports for July 2023 August 2023, September 2023 on February 12, 2024. ECF Dkt Nos. 355, 356, and 357.

9. The Debtor batch filed delinquent monthly operating reports for October and November 2023 on February 20, 2024. ECF Dkt. Nos. 361 and 362.

10. The Debtor batch filed delinquent monthly operating reports for December 2023, January 2024, February 2023, and March 2024 on May 7, 2024. ECF Dkt. Nos. 373, 374, 375, and 376. The Debtor batch filed monthly operating reports again for January, February, and March 2024 on May 19, 2024. ECF Dkt. Nos. 380, 381, and 382.

11. The April 2024 monthly operating report which was due on or before May 21, 2024 is delinquent and the May 2024 monthly operating report will become due in two weeks.[1] Abriano Decl. at ¶ 7.

C. The Case Status Reports

12. On April 3, 2024, the Debtor filed a status report with the Court (the "April Status Report"). ECF Dkt. No. 365. The April Status Report stated that the proposed sale of certain assets of the Debtor's Principal, Mr. Mark Rimer, to Featherstone Distribution, LLC closed on April 3, 2024. *Id*. The Status Report failed to state when the delinquent monthly operating reports would be filed or when the outstanding United States Trustee fees would be paid.

13. On May 3, 2024, the Debtor filed a status report (the "May Status Report"). ECF Dkt. No. 371. The May Status Report stated again that the sale of certain assets of the Debtor's

1 The UST Operating Guidelines and Reporting Requirements ("OGRR") indicate a timely filing date for monthly operating reports to be the 21st day following the close of the month.

Principal closed but also stated that the Debtor had certain administrative creditors, including taxing authorities, that the Debtor still needed to finalize treatment with in order to propose a viable plan. The Status Report failed to state when the delinquent monthly operating reports would be filed or when the outstanding United States Trustee fees would be paid.

ARGUMENT

A. Dismissal or Conversion is Appropriate Under 11 U.S.C. § 1112(b)

Section 1112(b) of the Bankruptcy Code provides that on 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 [it] …, whichever is in the best interests of creditors and the estate, if the movant establishes cause." 11 U.S.C. § 1112(b)(1) (emphasis added).

Section 1112(b)(4) contains sixteen examples of events that constitute cause for conversion or dismissal. *In re FRGR Managing Member, LLC*, 419 B.R. 576, 580 (Bankr. S.D.N.Y. 2009). The list of events under subsection (b)(4) is not exhaustive and courts may consider other factors. *Id*.; *see also In re Gucci*, 174 B.R. 401, 409 (Bankr. S.D.N.Y. 1994) (noting that bankruptcy court was "not limited to the ten, non-exhaustive, enumerated grounds in 11 U.S.C. §1112(b)(1)-(10) for finding cause."). The burden of demonstrating cause rests with the movant. *In re BHS & B Holdings, LLC*, 439 B.R. 342, 346 (Bankr. S.D.N.Y. 2010); *In re Ameribuild Const. Mgmt., Inc*., 399 B.R. 120, 132 (Bankr. S.D.N.Y. 2009).

"Cause," as used in Section 1112(b) is defined in pertinent part by Section 1112(b) as follows:

> For purposes of this subsection, the term 'cause' includes—
>
> > (A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation;

> * * *
>
> (F) [the] unexcused failure to satisfy timely any filing or reporting requirement established by this title or by any rule applicable to a case under this chapter;
>
> * * *
>
> (K) failure to pay any fees or charges required under chapter 123 of title 28;
>
> * * *

11 U.S.C. § 1112(b)(4)(A), (F), and (K).

B. The Debtor Has Failed to File a Confirmable Plan and Disclosure Statement

The Debtor has been in bankruptcy for over four years. No confirmable plan or approvable disclosure statement has been filed. Indeed, the alleged impediments to filing a plan – first finding a buyer for the Debtor's Principal's assets and then closing the deal, have concluded for several months, but still no plan or disclosure statement has been filed. The sale itself did not even include the Debtor or the Debtor's assets, but the Court, creditors, and the United States Trustee patiently provided the Debtor additional time to formulate a sale that would potentially fund a plan. But, the sale has closed and no plan has been filed.

Most recently, the Debtor alleges it has issues with administrative creditors, including tax claimants, that must be finalized before a plan or disclosure statement can be filed. However, what the issues are or why they have not been finalized in the past four years remains a mystery. While it is unclear form the May Status Letter if there are other outstanding administrative creditors, the proofs of claim filing by taxing authorities were timely filed years ago. The NYS Department of Labor filed a proof of claim on July 9, 2020. POC No. 6. The National Labor Relations Board filed its first proof of claim on August 24, 2020 [POC No. 14] and second on November 8, 2021 [POC

No. 41]. The Internal Revenue Service filed its first proof of claim on September 25, 2020 [POC No. 18] and second proof of claim on February 6, 2024 [POC No. 43]. The Debtor has had ample time to discuss treatment with creditors or to file a plan that would detail proposed treatment to those creditors. Moreover, the Debtor has failed to explain why such treatment cannot be dealt with in a plan. After four years, the Debtor should have a confirmable plan on file that clearly identifies the path towards reorganization.

C. The Debtor Has Failed to Pay its Fees

The Debtor is delinquent in the payment of Fees pursuant to title 28, United States Code, section 1930(a)(6). The payment of Fees is a statutory requirement. *See, e.g., Schwartz v. Aquatic Development Group, Inc. (In re Aquatic Development Group, Inc.)*, 352 F.3d 671, 674 (2d Cir. 2003) (section 1930(a)(6) requires debtors to pay fees to the United States Trustee until the case is converted or dismissed). This Court has regularly found that the non-payment of mandatory Fees constitutes cause to convert or dismiss Chapter 11 cases. *See In re Tornheim*, 181 B.R. 161, 164 (Bankr. S.D.N.Y. 1995) (failure to pay quarterly fees, without more, provides cause to dismiss or convert case); *see also In re Hi-Toc Development Corp.*, 159 B.R. 691, 693 (Bankr. S.D.N.Y. 1993). Accordingly, cause to convert or dismiss exists in light of the non-payment of Fees.

D. The Debtor Had Failed to File its Monthly Operating Reports

The Debtor has routinely failed to file timely monthly operating reports. *See* 11 U.S.C. § 1106(a)(1) (an operating debtor-in-possession is required to file monthly operating reports).

The Debtor's delay in filing itself constitutes cause to convert or dismiss this case under Section 1112(b). Cause, as defined in Section 1112(b), includes the "unexcused failure to satisfy *timely* any filing or reporting requirement." 11 U.S.C. § 1112(b)(4)(F) (emphasis added);

In re Babayoff, 445 B.R. 64, 81 (Bankr. E.D.N.Y. 2011) (finding cause to convert or dismiss under Section 1112(b) where debtor filed multiple monthly operating reports "in a single batch, weeks or months late"). Monthly operating reports serve an important function in a bankruptcy case. They allow for all parties in interest, including the Court, United States Trustee, and creditors, to evaluate debtors and their ongoing financial condition in exchange for certain bankruptcy protections. *See, e.g., In re Visicon S'holders Tr.*, 478 B.R. 292, 315 (Bankr. S.D. Ohio 2012) ("The purpose of the operating reports is to provide the parties in interest, the UST and the court with meaningful financial information with which to gauge the debtor's performance."). The Debtor has routinely filed monthly operating reports late. For example, the most recent reports were filed on February 20, 2024 for October 2023 and November 2023.

In this case, the failure to file monthly operating reports as they become due, not only violates the statutes but makes it difficult (if not impossible) for interested parties, the United States Trustee, or the Court to monitor the Bankruptcy Case. Accordingly, cause exists to dismiss.

E. There are No Unusual Circumstances Establishing that Dismissal is Not in the Best Interests of Creditors and the Estate

Under section 1112(b)(2) of the Bankruptcy Code, after the movant shows cause, the burden shifts to the debtor and other parties in interest to show that there are "unusual circumstances establishing that conversion or dismissal is not in the best interests of creditors and the estate." 11 U.S.C. § 1112(b)(2).

As set forth above, the Debtor has failed to perform its obligations and has been provided four years of bankruptcy protections. There does not appear to be outstanding causes of action that could be prosecuted by a chapter 7 trustee considering the age of the case. Moreover, it appears that the Debtor's principal source of funding is from the Debtor's Principal and not the Debtor, so

it is unclear what would be further administered by a chapter 7 trustee.

Accordingly, the United States Trustee recommends the dismissal of this case, rather than conversion.

CONCLUSION

WHEREFORE, the United States Trustee respectfully requests that the Court enter an order dismissing this Chapter 11 case pursuant to 11 U.S.C. § 1112(b), and granting such other and further relief as may be deemed just and proper.

Dated: New York, New York
May 31, 2024

Respectfully submitted,

WILLIAM K. HARRINGTON
UNITED STATES TRUSTEE

By: /s/ Shara C. Cornell
Shara C. Cornell
Trial Attorney
One Bowling Green
New York, New York 10004
Tel. No. (212) 510-0500

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Case No. 20-11422 (MG) 20-11423 (MG)
RM BAKERY LLC & BKD GROUP LLC	:	(Chapter 11)
Debtor.	:	

DECLARATION OF VICTOR ABRIANO IN SUPPORT OF THE UNITED STATES TRUSTEE'S MOTION TO DISMISS THE CASE

Pursuant to 28 U.S.C. § 1746, Victor Abriano, declares as follows:

1. I am an auditor in the Office of the United States Trustee for Region 2 (the "United States Trustee"). I am assigned to this matter by my office and as such, I have knowledge and information about this Chapter 11 bankruptcy case. I submit this Declaration in support of the motion of the United States Trustee for an order dismissing the cases of RM Bakery LLC ("RM Bakery") and BKD Group LLC ("BKD") (together, the "Debtor").

2. On June 15, 2020, the Debtor filed a voluntary petition (the "Petition") for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. § 101 *et seq.* I have reviewed the Petition, Schedules, Statements of Financial Affairs, and the ECF Docket.

3. As of the date hereof, no plan or disclosure statement has been filed in this case.

4. I have reviewed the Chapter 11 Quarterly Fee Information and Collection System ("FICS") for RM Bakery and BKD Group. FICS reports for each are attached as **Exhibit A**.

5. As of the date of this Motion, RM Bakery owes an estimated $46,608.38 in United States Trustee Quarterly Fees ("Fees"). *See* Exhibit A. The last United States Trustee payment received from RM Bakery was on January 24, 2024 for $10,000. *Id*. As of the date of this Motion

BKD owes an estimated $2,275.85 in Fees. *Id*. The last United States Trustee payment received from BKD was on March 29, 2022. *Id*.

6. The Debtor has routinely been delinquent in filing monthly operating reports and instead batch files multiple delinquent reports. *See* ECF. Examples include:

a. The Debtor batch filed delinquent monthly operating reports for April 2023, May 2023, and June 2023 on November 27, 2023. ECF Dkt. Nos. 339, 340, and 341.

b. The Debtor batch filed delinquent monthly operating reports for October 2023, November 2023, and December 2023. ECF Dkt. Nos. 352, 353, and 354.

c. The Debtor batch filed delinquent monthly operating reports for July 2023 August 2023, September 2023 on February 12, 2024. ECF Dkt Nos. 355, 356, and 357.

d. The Debtor batch filed delinquent monthly operating reports for October and November 2023 on February 20, 2024. ECF Dkt. Nos. 361 and 362.

e. The Debtor batch filed delinquent monthly operating reports for December 2023, January 2024, February 2023, and March 2024 on May 7, 2024. ECF Dkt. Nos. 373, 374, 375, and 376.

7. The April 2024 monthly operating report which was due on May 21, 2024 is delinquent and the May 2024 monthly operating report will become due on or before June 21, 2024.

I declare under penalty of perjury that the information contained in this Declaration is true and correct.

Dated: May 30, 2024
New York, New York

By: */s/ Victor Abriano*

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Case No. 20-11422 (MG) 20-11423 (MG)
RM BAKERY LLC & BKD GROUP LLC,	:	(Chapter 11)
Debtor.	:	

ORDER DISMISSING CHAPTER 11 CASE

Upon the motion (the "UST Motion") [ECF No.] of William K. Harrington, the United States Trustee for Region 2 (the "United States Trustee"), for the entry of an order dismissing this Chapter 11 case; and for such other and further relief as this Court may deem just and proper of the above-captioned debtor and debtor in possession, RM Bakery LLC and BKD Group LLC (together, the "Debtor"); and the Court having held a hearing (the "Hearing"); and upon the record of the Hearing; and after due deliberation and sufficient cause appearing therefore, it is

ORDERED, that the UST Motion is granted as set forth herein;

ORDERED, that Debtor's case commenced under Chapter 11 of the Bankruptcy Code be and hereby is dismissed pursuant to 11 U.S.C. § 1112(b); and is further

ORDERED that the Debtor pay to the United States Trustee the appropriate sum required pursuant to 28 U.S.C. § 1930(a)(6) and 31 U.S.C. § 3717 within ten days of the entry of this order and simultaneously provide to the United States Trustee an appropriate affidavit indicating the cash disbursements for the relevant period.

Dated: New York, New York
June , 2024

THE HONORABLE MARTIN GLENN CHIEF
UNITED STATES BANKRUPTCY JUDGE