IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
NEWBURY COMMONS ASSOCIATES, LLC, *et al.*,	Case No. 15-12507 (LSS)
	Jointly Administered
Debtors[1]	Objection Deadline: To be Determined Hearing Date: To be Determined

MOTION OF SECURED CREDITOR PEOPLE'S UNITED BANK TO DISMISS THE BANKRUPTCY CASE OF THE JOINTLY ADMINISTERED DEBTOR 220 ELM STREET I, LLC (CASE NO. 16-10327)

1. People's United Bank (hereinafter "People's") the sole secured creditor of the single-asset debtor 220 Elm Street I, LLC ("220 Elm I" or "Debtor"), hereby moves to dismiss 220 Elm I's bankruptcy case (Case No. 16-10327) for cause pursuant to 11 U.S.C § 1112(b). In support of its motion, People's states as follows.

PRELIMINARY STATEMENT

2. 220 Elm I is a 50% tenant in common with respect to a solvent, financially healthy single asset real estate entity with few creditors, limited debt, and no genuine need of

[1] 220 Elm Street I, LLC's bankruptcy case, denominated Case No. 16-10327, is being jointly administered with the following Chapter 11 cases: Newbury Commons Associates, LLC (Case No. 15-12507); Seaboard Realty, LLC (Case No. 15-12508); 600 Summer St., Stamford Associates, LLC (Case No. 15-12509); Seaboard Hotel Member Associates, LLC (Case No. 15-12510); Seaboard Hotel LTS Member Associates, LLC (Case No. 15-12511); Park Square West Member Associates, LLC (Case No. 15-12512); Seaboard Residential, LLC (Case No. 15-12513); One Atlantic Member Associates, LLC (Case No. 15-12514); 88 Hamilton Ave. Member Associates, LLC (Case No. 15-12515); 316 Courtland Ave. Associates, LLC (Case No. 15-12516); 300 Main Management, Inc. (Case No. 15-12517); 300 Main St. Member Associates, LLC (Case No. 15-12518); PSWMA I, LLC (Case No. 15-12519); PSWMA II, LLC (Case No. 15-12520); Tag Forest, LLC (Case No. 15-12528); Newbury Common Member Associates, LLC (Case No. 16-10320); Century Plaza Investor Associates, LLC (Case No. 16-10321); Seaboard Hotel Associates, LLC (Case No. 16-10322); Seaboard Hotel LTS Associates, LLC (Case No. 16-10323); Park Square West Associates LLC (Case No. 16-10324); Clocktower Close Associates, LLC (Case No. 16-10325); One Atlantic Investor Associates, LLC (Case No. 16-10326); and 300 Main St., Associates, LLC (Case No. 16-10328); and 88 Hamilton Ave., Associates, LLC (Case No. 16-10330).

restructuring or rehabilitation. 220 Elm I's bankruptcy filing does not appear to be motivated by a genuine bankruptcy purpose relating to its bankruptcy estate (*e.g.*, maximization of the value of the debtor's estate for its creditors, or preservation of debtor's going concern value). Rather, 220 Elm I's presence as a Title 11 debtor among some twenty five jointly administered, related Title 11 debtors is plainly calculated to provide restructuring capital and administrative expense funding for those other entities, to the clear detriment of 220 Elm I's creditors, interest holders, and co-tenant in common. As such, 220 Elm I's bankruptcy filing should be dismissed for lack of good faith pursuant to 11 U.S.C. § 1112(b).

3. Beyond that, 220 Elm I cannot legally bind its non-debtor co-tenant in common, 220 Elm Street II LLC, to 220 Elm I's proposed use of the estate's property, or to any proposed restructuring, without the consent of that co-tenant in common. There is no evidence that 220 Elm II, which did not even participate in filing the bankruptcy case purporting to affect its co-owned primary asset, consents to any of Debtor's proposals for use of their co-owned property. This constitutes a separate and legally independent grounds for dismissal of this case for cause under 11 U.S.C. § 1112(b).

STATEMENT OF FACTS

The Debtor, and its Fractional Ownership of its Single Asset.

4. 220 Elm I is the debtor in this Chapter 11 case. Its sole asset is a single commercial office building that generates substantially all of the income of the Debtor and on which no substantial business of the Debtor is conducted other than operation of the property. [2] See, Declaration of Jon J. Gasior dated March 3, 2016 (the "Gasior Dec."), attached as **Exhibit 1** hereto, at ¶ 9. Beyond secured debt of some $7,000,000 owed to People's (see below), Debtor

[2] It is therefore a "single asset debtor" within the meaning of 11 U.S.C. § 101 (51 B).

appears to have relatively minimal additional debt.[3]

5. Pursuant to a certain Tenancy In Common Agreement dated October 14, 2005 (the "TIC Agreement") 220 Elm I owns, as a tenant in common, a 50% interest in a certain ground lease from the Town of New Canaan, and subleases relating thereto, for property located at 220 Elm Street, New Canaan, Connecticut and upon which is situated a commercial office building (the "Property"). Gasior Dec. at ¶¶ 7-8 and Exhibits D and E thereto. Debtor's 50% interest in the Property is Debtor's sole asset, and 220 Elm II, a non-Title 11 debtor, owns the remaining 50% interest in the Property and its rents as a tenant in common with 220 Elm I. *Id.* The TIC Agreement states expressly that 220 Elm I and 220 Elm II hold their respective interests as tenants in common, and that they "are not partners, and neither Owner shall represent to any such relationship other than co–tenant with the other Owner." See, Gasior Dec., Exhibit D at ¶ 11. Moreover, extra-ordinary expenditures require the unanimous consent of the tenants in common. See, Gasior Dec., Exhibit D at para. 3.

The People's Loans.

6. On October 14, 2008 People's made a loan (the "2008 Loan") in the original principal amount of $7,000,000.00 to the LLCs, jointly and severally. See Gasior Dec. at ¶ 4 and Exhibit A thereto. The 2008 Loan was secured by a first priority Leasehold Mortgage and Security Agreement on the Property, as well as by a Collateral Assignment of Subleases, Rentals and Property Income. Gasior Dec. at ¶¶ 5-6, and Exhibits B and C thereto. At the time of Debtor's bankruptcy filing, normal monthly payments on the 2008 Loan consisted of principal of $18,926.60, interest of $18,383.43 (*i.e.*, total monthly principal and interest of $37,310.03),

[3] See, Debtor's List of Creditors who hold the largest 20 Unsecured Claims and are not Insiders on a Consolidated Basis, filed 2/25/2016, attached as **Exhibit 2** hereto, (*i.e.*, debts ranging from $152.02 to $14,134.94, and totaling $45,246.53). Debtor has yet to file its full schedules.

and escrow for taxes and insurance of $8027.27, for a total of $45,336.86 due per month. See, Gasior Dec. at ¶ 10.

7. On January 24, 2014 People's made an additional loan (the "2014 Loan", and together with the 2008 Loan, the "People's Loans") in the original principal amount of $1,200,000.00 to the LLCs, jointly and severally. Gasior Dec. at ¶ 4 and Exhibit A thereto. The 2014 Loan was secured by a second priority Leasehold Mortgage and Security Agreement on the Property, as well as by a Collateral Assignment of Subleases, Rentals and Property Income. Gasior Dec. at ¶¶ 5-6 and Exhibits B and C thereto. At the time of Debtor's bankruptcy filing, normal monthly payments on the 2014 Loan consisted of principal of $2,398.26, interest of $4,053.76 (*i.e.*, total monthly principal and interest of $6,452.02), and escrow of $3,500.00, for a total of $9,952.02 due per month. See, Gasior Dec. at ¶ 11. The People's Loans recently went into default. Gasior Dec. at ¶ 12.

Debtor's Assets and Liabilities.

8. Debtor has not yet filed its schedules. However, in other filings with this Court, Debtor concedes that the aggregate debt on the People's Loans, Debtor's only secured indebtedness, is some $7,000,000, while asserting that the Property is valued in excess of $10,000,000. See, Exhibit D to Debtors' Emergency Motion [D.I. No. 176 in Case No. 15-12507] at p. 6, attached as **Exhibit 3** hereto. Debtor has also filed a list of twenty largest unsecured non-insider creditors that reflects debts totaling just $45,246.53, ranging from $152.02 to $14,134.94). See, **Exhibit 2** hereto.

Operation of the Subject Property.

9. Debtor has submitted a forecast reflecting its anticipated operation of the Property over the 13 week period February 1, 2016 through May 1, 2016. See, **Exhibit 4** hereto.

The forecast reveals that revenues generated by the Property over that three month period are $245,403, a sum more than ample to cover the Property's normal operating expenses including insurance, utilities, repairs and capital expenses (*i.e.*, $63,378), real estate taxes (*i.e.*, $28,898), and property management expenses (*i.e.*, $10,523), leaving an available surplus of $142,604. *Id.* That surplus is sufficient to pay the normal principal and interest on People's Loans (*i.e.*, $ 131,286.15, calculated as $43,762.05 per month, times 3 months), while leaving some $11,317.85 in reserve.[4] That notwithstanding, Debtor proposes to withhold payment of debt service to People's. Instead, Debtor proposes to expend $56,210 on "restructuring disbursements" relating seemingly entirely to jointly administered affiliates of the Debtor, while also withholding the balance of $86,393, presumably also for the benefit of those other entities. There is no indication that the non-debtor co-tenant in common, 220 Elm II, consents to the use of rents generated by the Property for these obviously extra-ordinary purposes; People's does not consent to that use.

The Jointly Administered Debtors, and the Contemplated Subsidization of Some Estates by Others.

10. Debtor is one of twenty-five separate legal entities controlled directly or indirectly by William A. Merritt, Jr., Thomas L. Kelly, Jr. and/or John J. DiMenna, Jr. While some of these entities are management or holding entities, the vast majority are single asset real estate projects owned by single purpose entities and having discrete sets of secured creditors, unsecured creditors, and investors. Each of these entities filed voluntary Chapter 11 petitions in the District of Delaware, and cases are being jointly administered pursuant to orders of this Court. The cases are not substantively consolidated.

[4] The taxes and insurance escrowed with Peoples are already included as expenses in the Debtor's forecast.

11. Motions filed on behalf of the jointly administered debtors for use of cash collateral and implementation of a collective cash management system provide a revealing window to the motivating force behind these multiple filings. See, *e.g.*, *Motion of Debtors for Entry of an Order Approving (I) the Debtors Continued Maintenance of Their Existing Bank Accounts and Use of Their Cash Management System, (II) the Payment of Certain Obligations Related Thereto, (III) the Continuation of Intercompany Claims, (IV) Administrative Expense Status for Intercompany Claims, (V) the Debtors Continued Use of Existing Checks and Business Forms, and (VI) Granting the Debtors a Waiver of the Bond Requirement Contained in Section 345(b) of the Bankruptcy Code [D.I. 164 in Case No. 15-12507], at pp. 4-7.; Emergency Motion of Debtors for Entry of Interim and Final Orders (I) Authorizing the Use of Cash Collateral; (II) Granting Adequate Protection to Prepetition Secured Parties; and (III) Scheduling a Final Hearing [D.I. 176 in Case No. 15-12507], at pp 18- 23 and Exhibit C thereto.*

12. Put bluntly, the chief restructuring officer ("CRO") of the jointly administered debtors proposes to commandeer positive cash flow (invariably in the form of a lender's cash collateral) generated by 'in the money' single asset real estate debtors such as 220 Elm I in order to subsidize or otherwise fund (i) rehabilitation of unsuccessful jointly administered debtors; (ii) administrative expenses to be incurred by other estates; and/or (iii) completion of unfinished projects owned by still other jointly administered debtors. This is proposed without regard to the best interests of stakeholders in such 'in the money' entities, and without regard to significant legal impediments to such actions.

LEGAL ARGUMENT

I. 220 Elm Street I LLC's Bankruptcy Case Does Not Serve a Legitimate Bankruptcy Purpose *of the Debtor 220 Elm Street I LLC* and Should be Dismissed in the Best Interests of the Stakeholders of that Bankruptcy Estate

13. Bankruptcy Code § 1112 (b) (1) provides, in pertinent part:

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

11 U.S.C. § 1112(b)(1).

14. The list of circumstances referred to in § 1112(b)(1) constituting cause for case dismissal is not exclusive, and Chapter 11 petitions may be dismissed for lack of a good faith purpose. *In re SGL Carbon Corp.* 200 F. 3d 154, 160-162 (3d Cir. 1999) (reversing lower court and mandating dismissal of financially healthy corporation's Chapter 11 petition for lack of good faith where purpose of filing was to gain advantage in resolving pending antitrust litigation, and where there was no substantiation that litigation was harming company's business relationships or constituted serious threat to company's operational well-being). In *SGL*, the Third Circuit explained the purpose of the good faith requirement thusly:

> Review and analysis of [the bankruptcy laws and relevant cases] disclose a common theme and objective [underlying the reorganization provisions]: avoidance of the consequences of economic dismemberment and liquidation, and the preservation of ongoing values in a manner which does equity and is fair to rights and interests of the parties affected. But the perimeters of this potential mark the borderline between fulfillment and perversion; between accomplishing the objectives of rehabilitation and reorganization, and the use of these statutory provisions to destroy and undermine the legitimate rights and interests of those intended benefit in stature policy. That borderline is patrolled by courts of equity, armed with the doctrine of "good faith"…

quoting *In re Victory Construction Co., Inc.*, 9 B.R. 549, 559 (Bankr. C.D. Calif. 1981), and

continuing "[a] debtor who attempts to garner shelter under the Bankruptcy Code, therefore, must act in conformity with the Code's underlying principles." 200 F. 3d at 161. And once brought into issue, the burden falls upon the bankruptcy petitioner to establish that the petition has been filed in "good faith." 200 F. 3d at 162; see also *In Re: Integrated Telecom Express, Incorporated,* 384 F. 3d, 108, 118 (3d Cir. 2004); *In re Derma Pen, LLC*, __ B.R. __, 2014 Bankr. LEXIS 5104, *18 (Bankr. D. Del. 12/19/2014).

15. In *In Re: Integrated Telecom Express, Inc.,* 384 F. 3d 108 (3d Cir. 2004), the Third Circuit considered the situation of a financially healthy debtor that filed its petition in order to take advantage of Code § 502 (b)(6) (*i.e.,* the Code provision limiting the damages recoverable upon a debtor's rejection of an unfavorable lease) in the context of a liquidating plan. The Court focused on two inquiries that are "particularly relevant to the question of good faith: (1) whether the petition serves a valid bankruptcy purpose, *e.g.*, by preserving a going concern or maximizing the value of the debtor's estate, and (2) whether the petition is filed merely to obtain a tactical litigation advantage." 384 F. 3d 119-120. It noted, among other things, that even if the landlord's lease claim were unlimited, the debtor's estate would still contain more than sufficient cash to cover all of its liabilities. *Id.* at 123-124. The Court rejected the debtor's assertions of financial distress (arising, *e.g.,* from cash flow issues, or the magnitude of the landlord's claim, or the potential for certain securities claims) and threats to any value of Integrated that Chapter 11 seeks to preserve. *Id.* at 125. In remanding the case to the bankruptcy court with instructions to dismiss the petition for lack of good faith, the Court held that:

> ...both the District Court and the Bankruptcy Court erred as a matter of law in concluding that Integrated suffered financial distress. Although Integrated's business model had failed, the company had no significant debt apart from the Landlord's claim. Moreover, the record demonstrates that the securities class action did not present a significant threat to Integrated's finances. Because

> Integrated was not in financial distress, its Chapter 11 petition was not filed in good faith as it could not--and did not--preserve any value for Integrated's creditors that would have been lost outside of bankruptcy.

384 F. 3d at 129.

16. In *In re Derma Pen, LLC*, __ B.R. __, 2014 Bankr. LEXIS 5104, *18 (Bankr. D. Del. 12/19/2014), the Bankruptcy Court dismissed the case for lack of good faith. Derma Pen had become embroiled in a dispute over the use of a trade name. Just prior to its bankruptcy filing, motions for partial summary judgment were pending against it in federal district court in Utah, and trial was imminent. An email authored by its CEO explained the filing thusly:

> As a strategy in fighting this legal battle, the partners of Derma Pen, LLC formed a new company, Medmetics, LLC, and have transferred most of the assets of Derma Pen, LLC to this new entity, including the ownership of the trademark. But it has been their intention for some time to abandon the Dermapen trademark and develop a new, uncontested trademark. The new company and its name were part of this strategy as well as creating a new trade name, MDerma FDS, for its new generation device. *The bankruptcy filing was just another step in this strategy.*
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> 2014 Bankr. LEXIS 5104 at *3 (*emphasis supplied*).

Beyond that, debtor's bankruptcy schedules revealed assets in excess of $6,000,000, a single secured debt of some $580,000, some two dozen priority tax creditors holding less than $190,000 in claims, and three dozen unsecured creditors holding a total of less than $950,000 in claims (only nine of which were owed more than $5,000), and the Court could discern no financial exigencies (*e.g.*, unusual creditor pressure or serious delinquencies) confronting the debtor. 2014 Bankr. LEXIS at *12- *13, *20.

17. After reviewing the totality of facts and circumstances, the Court perceived no valid bankruptcy purpose for the financially healthy debtor's filing, instead finding that the debtor's bankruptcy petition had been filed as a litigation tactic rather than as a good faith attempt to reorganize or preserve value for creditors. *Id.* at *27 -*29. The case was dismissed

pursuant to § 1112.

18. Here, it is plain that cash flow generated by the Property is more than ample to satisfy normal operations and debt service, while also producing a surplus. Further, Debtor appears to have few creditors (*i.e.,* a single secured creditor holding some $7mm in debt, and perhaps two dozen or so unsecured creditors holding somewhere in the neighborhood of $50,000 in debt). Further, Debtor asserts that the value of its assets well exceeds the sum of its liabilities. In short, this Debtor is financially healthy, and not remotely in need of restructuring or rehabilitation. To the contrary, the clear purpose of this filing is to commandeer -- to the detriment of People's, Debtor's unsecured creditors, Debtor's cotenant in common, and Debtor's investors -- the surplus cash generated by this Property in order to subsidize the reorganization efforts of other jointly administered debtors.[5] Thus understood, Debtor's bankruptcy lacks a valid bankruptcy purpose. The case should be dismissed.

II. Under Applicable Law, the Debtor 220 Elm Street I LLC Cannot Lawfully Bind its Co-Tenant in Common, 220 Elm Street II LLC, to the Proposed Use of Property Funds for the Benefit of Other Debtors.

19. The Debtor faces an additional obstacle to its plan to appropriate rents generated by the Property for the benefit of bankruptcy estates other than that of 220 Elm Street I LLC, and to the detriment of creditors of and equity holders in the 220 Elm I estate. It arises from the fact that the non-debtor 220 Elm II is a tenant in common with 220 Elm I with respect to the Property and the rents it generates, and there is no indication whatsoever that 220 Elm II consents to 220

[5] A debtor cannot lawfully use one jointly administered debtor's cash collateral to pay the administrative claims of another jointly administered debtor. See, *e.g.*, *In re Las Torres Development LLC*, 413 B.R. 687, 698 (Bankr. S.D. Texas 2009)(refusing to permit use of cash collateral from one jointly administered estate to pay administrative expenses of another jointly administered estate; rule applies in jointly administered cases irrespective of whether the interest in cash collateral is adequately protected).

Elm I's proposed use of the rents for the benefit of third parties. Applicable law[6] mandates that a cotenant may not act unilaterally so as to bind the interest of its cotenant. See, *In Re PEM Thistle Landing TIC*, __ B.R. __, 2014 Bankr, LEXIS 1361, *6-*7, (Bankr. D. Del. 4/2/2014)(dismissing bankruptcy case for cause where debtor, a fractional cotenant, lacked authority to bind other cotenants to bankruptcy filing or to restructuring of debt); *Ianotti v. Ciccio*, 219 Conn. 36, 41 (1991)(finding invalid deed from one cotenant purporting to convey easement in absence of other cotenant's agreement); *Johnson v. Evans*, 2015 Conn. Super. LEXIS 401, *28 (Ct. Super. 2/24/2105)(allowing disposition of property, but only in light of existence of express agreement between cotenants to sell property).[7]

Here, the Debtor is a cotenant and nothing more. See TIC Agreement at ¶ 11. It cannot bind its cotenant, 220 Elm II, to the threshold decision to put the Property into Chapter 11, let alone the proposed extraordinary use of the Property's rents for the benefit of third parties or an eventual restructuring plan affecting the Property, without 220 Elm II's consent. That consent is lacking here, and provides a separate and independent basis for dismissal of this case for cause.

[6] Connecticut law applies here because (1) the Property is located in Connecticut, and (2) the Tenancy In Common Agreement (at ¶ 15) between 220 Elm I and 220 Elm II expressly mandates application of Connecticut law. See, *In Re PEM Thistle Landing TIC,* 2014 Bankr, LEXIS 1361 *5-*6 and fn 1.

[7] More practically, the "master plan" of the CRO for the reorganization of all of the related debtors, including 220 Elm I, is the sale of all properties, including the right of each individual secured creditor to credit bid for the property upon which it holds a lien. Given that Elm II is not under the auspices of the bankruptcy court or subject to the process of a bankruptcy proceeding, Elm I cannot deliver what any buyer would seek – a 100% interest in and to the assets. Elm I Cannot deliver more than what it owns, which is its tenancy in common interest only.

CONCLUSION

For the foregoing reasons, 220 Elm I's bankruptcy case should be dismissed.

Dated: March 8, 2016
Wilmington, Delaware

Respectfully submitted,

By: */s/ Raymond H. Lemisch*

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