William M. Hawkins (WH-1865)
Daniel B. Besikof (DB-6872)
Loeb & Loeb LLP
345 Park Avenue
New York, New York 10154
Telephone: (212) 407-4000
Fax: (212) 937-3326

Attorneys for New York Commercial Bank

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

MOTION OF NEW YORK COMMERCIAL BANK FOR (A) CONVERSION OF THE DEBTORS' CASES TO CHAPTER 7 PURSUANT TO 11 U.S.C. § 1112(B), (B) STAY RELIEF PURSUANT TO 11 U.S.C. §§ 362(D)(1) AND (D)(2) TO ENFORCE RIGHTS AGAINST PROPERTY OF DEBTORS AND COLLECT INDEBTEDNESS OWED BY DEBTORS, AND (C) FOR PROHIBITION OF THE FURTHER USE OF ANY CASH COLLATERAL

New York Commercial Bank ("NYCB"), by and through its counsel, Loeb & Loeb LLP, hereby files this Motion for (a) conversion of the above captioned debtors' (the "Debtors") Chapter 11 cases (the "Chapter 11 Cases") to cases under Chapter 7 of title 11, United States Code (the "Bankruptcy Code") pursuant to 11 U.S.C. § 1112, (b) relief from the automatic stay pursuant to 11 U.S.C. §§ 362(d)(1) and (d)(2) to enforce rights against property of the Debtors

and collect indebtedness owed by the Debtors, and (c) a prohibition on the use of NYCB's cash collateral (*i.e.*, all Debtors' cash) pursuant to 11 U.S.C. §§ 361 and 363 (this "Motion").

The declaration of Richard Szekelyi dated January 29, 2013 is submitted in support of this Motion, and is filed herewith (the "Szekelyi Declaration"). In further support of this Motion, NYCB respectfully states as follows:

JURISDICTION, VENUE AND STATUTORY BASIS

1. The bases for jurisdiction of this Motion are 28 U.S.C. §§ 1334 and 157. Venue is appropriate under 28 U.S.C. § 1408. This contested matter is "core." The statutory bases for the relief requested are (a) Section 1112 of the Bankruptcy Code to convert the case to Chapter 7, (b) with respect to NYCB's requested stay relief, Sections 362(d)(1) and (d)(2) of the Bankruptcy Code, and (c) Sections 361 and 363 of the Bankruptcy Code, concerning the request for an order prohibiting the Debtors' further use of cash. No prior request to convert the cases to Chapter 7 or to terminate the Debtors' use of cash collateral has been made. NYCB previously requested that the Court lift the automatic stay due to the Debtors' lack of progress at the Chapter 11 Cases' outset, but subsequently withdrew that motion to permit the Debtors to attempt their sale process in bankruptcy.

INTRODUCTION

2. The Debtors filed these cases more than four months ago, on September 27, 2012 (the "Petition Date"), with the stated purpose of selling all or a substantial portion of their assets to one or more third parties, to obtain cash and pay creditors. In the meantime, the Debtors have only burdened the estates with approximately $12 million of priming post-petition debt, loaded the estates with other administrative expenses, and racked up more than $5 million in post-petition losses.

3. Now, as the Debtors' *fourth* adjourned auction sale date looms on February 4, they still have no stalking horse bidder to buy any of their assets. Thus, it appears that the Debtors will – again, for the *fourth* time – fail to make any asset sale, despite their extremely expensive sale process. In fact, NYCB believes that the Debtors will fail to sell any significant portion of their assets, either because the Debtors will prove unable to propose a sale transaction, or because any proposed sale will not be approved by this Court due to objection.[1]

4. Whether February 4 results in a sale or not, these cases simply cannot afford to continue in Chapter 11. Sale or not, the Debtors have and will have little or no unencumbered, available cash. Indeed, even if the Debtors have sold assets, the Debtors will not obtain enough proceeds to pay in full their secured creditors, including NYCB and their debtor-in-possession lender, unless the sale is extremely successful (which NYCB hopes, but does not expect, will be the case). Accordingly, the sale closing would yield no available cash for the Debtors, because the proceeds of NYCB's collateral would not be available for the Debtors' use: NYCB objects to any such use and adequately protecting NYCB for use of its cash collateral would be impossible. Instead, such cash should be immediately paid over to NYCB as collateral proceeds. Further, if the accounts receivable of the Debtors are not sold on February 4, then this Court should also grant stay relief to NYCB so that NYCB can enforce its rights as a secured creditor to collect on the receivables.

[1] Prospects for the February 4th auction are bleak. For example, the Debtors have failed to identify any proposed "stalking horse" bidder for the sale. Had they done so, they would have filed a proposed asset purchase agreement representing the "stalking horse" bid with the Court. Order (A) Approving Bidding … dated October 24, 2012 [Docket No. 136], ¶ B (contemplating the filing of any stalking horse bid agreement with five days for objection by parties-in-interest). The Debtors have made no such filing.

5. After a sale, the Debtors would most likely lack sufficient physical assets to continue operating, because any successful transaction would likely divest the Debtors of substantially all operating assets. Without these assets, the Debtors business could not operate, whether they held useable cash or not. Thus, following stay relief granted to NYCB in cash proceeds and any remaining accounts receivable, this Court should convert the case to Chapter 7 after any sale or, in the alternative, simply provide stay relief for NYCB in all of its collateral.

6. On the other hand, if no sale occurs on February 4, these Chapter 11 Cases should be converted to Chapter 7 all the same. With such a complete failure of the sale process, the Debtors will be virtually out of money, even as the DIP lender's February 9 loan maturity date soon requires repayment of nearly $12 million. Further, the Debtors' authority to use cash collateral also ends no later than February 9. As noted above, NYCB will not consent to any further cash use, and adequately protecting NYCB for such usage would be impossible. Thus, the Debtors would not have the right to use even the minimal cash that might be available. With a dire cash shortage and a due DIP loan that the Debtors would not have funds to repay, the Court should promptly convert the cases or, in the alternative, provide NYCB stay relief, if the February 4 auction date is (another) failure and no sale occurs.

BACKGROUND

A. The Debtors' Indebtedness to NYCB and its Collateral.

7. NYCB is a pre-petition secured creditor of the Debtors, owed not less than $41.3 million as of the Petition Date. This indebtedness includes a pre-Petition Date revolving line of credit facility provided by NYCB to borrowers Metro Fuel Oil Corp. ("Metro Fuel"), Metro Terminals Corp. ("Metro Terminals") and Metro Terminals of Long Island, LLC ("Metro Long Island") (collectively, the "Borrowers") of approximately $31.8 million ("Revolver

Indebtedness") and two term loans of approximately $4.2 and $5.3 million ("Term Indebtedness" and, together with the Revolver Indebtedness, the "Indebtedness") provided to Metro Terminals. Szekelyi Declaration, ¶ 4. *See also* Declaration of David Johnston, Chief Restructuring Officer of the Debtors, in Support of First Day Pleadings dated September 27, 2012 [Docket No. 11], ¶ 20 ("Johnston First Day Declaration").[2] *See also* Final DIP Order (defined below), ¶ 5.

8. Each of the Borrowers and Debtors Apollo Petroleum Transport, LLC ("Apollo Transport"), Kings Land Realty, Inc. ("Kings Land"), Metro Biofuels, LLC, Metro Energy Group LLC ("Metro Energy") and Metro Plumbing Services Corp. provided pre-petition guaranties of the Indebtedness to NYCB. Szekelyi Declaration, ¶ 5. *See also* Johnston First Day Declaration and the Final DIP Order, ¶ 5.

9. The Revolver Indebtedness was secured as of the Petition Date by non-real property assets of the Borrowers, Apollo Transport and Metro Energy (collectively, the "Pledging Debtors"). The Debtors admit that this collateral is 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.

10. The Debtors admit that the Term Indebtedness is secured by mortgage liens on a parcel of real property owned by Metro Terminals known as "Lot 14." Johnston DIP Financing Declaration, ¶¶ 11-13. *See also* Final DIP Order, ¶ 5.

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[2] Upon information and belief, Valley National Bank also asserts a pre-petition lien on Metro Terminals' real property in an amount of approximately $7.3 million. *See* paragraph 16, below.

B. The Debtors' Operations and Assets.

11. **The Businesses.** Each Debtor operated a distinct line of business as of the Petition Date. For example, Metro Fuel markets and distributes "home heating oil, ULSD and biofuels for residential and commercial use and provides installation and repair services in connection with oil burners and other HVAC-related equipment." Johnston First Day Declaration, ¶ 13.

12. **The Personal Property Assets and Cash of the Debtors.** According to the Debtors, the accounts receivable of all Debtors as of December 31, 2012 totaled $21,125,750, and the inventory value asserted by the Debtors was $2,434,560. Szekelyi Declaration, ¶ 7. The Debtors also assert that they collectively owned as of the Petition Date equipment with a balance sheet value of no greater than $6.589 million, but the value of which is certainly much less. Johnston First Day Declaration, Schedule 4.[3] The cumulative value as of the Petition Date of Debtor "goodwill" and "other assets" is not greater than $1.846 million, according to the Debtors. *Id.* Currently, the Debtors have approximately $1.8 million in cash. Szekelyi Declaration, ¶ 8.

13. **The Real Property Assets.** Some of the Debtors own real property. For example, Metro Terminals owns Lot 14, which the Debtors assert has a value of $39.1 million. Johnston DIP Financing Declaration, ¶¶ 14 and 15.[4]

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[3] Mr. Johnston's disclosure of equipment value includes an unamortized financing cost of $835,000, which – of course – has no value.

[4] Metro Terminals also owns a real property parcel known as Lot 150 on which sits an incomplete, non-functioning biofuel production plant. Johnston First Day Declaration, ¶ 17. The Debtors also assert that Metro Terminals owns a real property parcel on Kingsland Avenue in Brooklyn, where an office building sits. Transcript of Hearing of September 27, 2012, p. 23. Additionally, the

(continue…)

14. **The Failed Sale Process Calls Valuation Into Doubt.** Of course, assuming the Debtors achieve no sale on February 4, that failure clearly calls into substantial doubt the Debtors' asserted valuation of Lot 14. In fact, since the Debtors could not sell their real and personal property through a program that they established and administered, this Court should not give credence to any value the Debtors seek to ascribe to any assets. Clearly, the market (as apparently tested by the Debtors' sales efforts) disagrees with what the Debtors think their assets are worth. Otherwise, the Debtors' attempts to sell would not have been such a dismal failure. Given this failure, however, this Court should not permit the Debtors to continue these Chapter 11 Cases and prolong the ineffective sale process.

15. Simply put, and as detailed below, the Debtors' sale process has cost a fortune, generated huge losses and drained the Debtors' cash, yet failed to provide acceptable results. A conversion to Chapter 7 would halt this hemorrhage of money, and represents the mostly likely avenue to value preservation now available.

C. <u>The Debtors' Debts</u>.

16. **Petition Date Debt**. The Debtors admit as follows regarding the extent of the Debtors' overall debts as of the Petition Date:

- **Long-term Secured Debt**. As of the Petition Date, the "outstanding long-term secured debt obligations aggregated approximately $58.8 million, consisting of $48.3 million of bank debt [*i.e.*, approximately $31.8 million of

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Debtors further admit that Metro Long Island owns a storage facility site in Calverton, Long Island. Johnston First Day Declaration, ¶ 16.

Revolver Indebtedness to NYCB, approximately $9.5 million of Term Indebtedness to NYCB, and approximately $7 million for Valley National Bank's term debt secured by Lot 14] and $10.5 million of project financing [*i.e.*, the IDA and SeedCo debt, which is secured by Lot 150]." Johnston First Day Declaration, ¶ 18 and Schedule 3.

- **Trade Creditor Debt.** As of the Petition Date, "trade creditors have outstanding prepetition claims of approximately $10 million." *Id.*
- **Insider Debt.** The Debtors assert that equity holder insiders Paul and Gene Pullo have unsecured claims against Metro Fuel and Metro Terminals of $1.195 million and $5.455 million, respectively. *Id.* at ¶ 22.

17. **DIP Loan Borrowing**. The Debtors have borrowed $10 million in principal under the DIP loan facility approved by this Court, subject to the terms 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 (the "Final DIP Order") [Docket No. 187]. The Debtors have fully drawn the DIP facility, which matures on February 9, 2013. The lender on the DIP facility asserts that not less than $11.6 million will be due and owing upon the maturity of its loan.[5]

18. Pursuant to the Final DIP Order, NYCB received replacement liens in its pre-petition collateral and a lien in substantially all other real and personal property of the Debtors for purported adequate protection (the "Purported Adequate Protection Liens"). The Final DIP

[5] NYCB waives no rights hereby regarding the Final DIP Order, nor any rights with regard to the DIP facility, all of which are reserved by NYCB.

Order provides that the Purported Adequate Protection Liens are subordinate only to the liens of the DIP lender and to the professional fee carve-out (subject to the terms of the Final DIP Order). The Purported Adequate Protection Liens are also subordinate to the IDA and SeedCo debt, but only to the extent of any recovery against Lot 150.

D. The Debtors Have Lost Money Since the Petition Date and Have Nearly No Cash; the Estates are Administratively Insolvent.

19. February 4 will reveal the extent of the Debtors' failure to execute their long-promised asset sale. Worse yet, this failure comes against the backdrop of extensive losses and a choking cash shortage.

20. Beyond approximately $12 million of DIP financing debt incurred since the Petition Date through January 19, 2013, the Debtors have accumulated more than $3.7 million of professional expense obligations in the same period. Szekelyi Declaration, ¶ 9. Further, the Debtors have tax obligations of over $2.8 million that they had budgeted to pay since the Petition Date, but have not. Szekelyi Declaration, ¶ 9.

21. Over the course of these bankruptcy cases, the Debtors have used approximately $574,000 per week, on average, of which approximately $400,000 per week represents working capital invested in accounts receivable and inventory (with at best disappointing results, in light of the Debtors' inability to successfully sell assets). Szekelyi Declaration, ¶ 10. In fact, the Debtors' management of the cases has resulted in a shocking $9.2 million of negative net book cash flow between the Petition Date and January 19, 2013. *Id.*

22. The Debtors also reported a cumulative net loss exceeding $3.5 million through December 31, 2012. Szekelyi Declaration, ¶ 11. Worse yet, when considering the total amount of professional fees incurred through December 29, 2012, as reported by the Debtors, and the

increase in past-due receivables since the Petition Date, this reported loss is likely understated by at least $2.0 million. Accordingly, the Debtors' actual net loss since the Petition Date likely exceeds $5.5 million. Szekelyi Declaration, ¶¶ 11 – 12.

23. An increase to the default interest rate of 11% per annum under the DIP loan on February 9, 2013, would only add to the Debtors' wasteful administrative costs and expenses. Szekelyi Declaration, ¶ 13. Further, NYCB understands that the payment-in-kind treatment of accruing interest on the DIP loan ends at any time on or after February 9, 2013, at the DIP lender's discretion. *Id.* This change would expose the Debtors' estates not just to even higher costs, but to more debilitating demands on cash as well – cash which is NYCB's collateral. Such an increased liquidity drain would further erode NYCB's collateral position.

24. Even now, the Debtors' management has already pushed the estates into a very serious cash crisis, triggering apparent administrative insolvency.[6] As of January 19, 2013, the Debtors report a cash balance of approximately $1.8 million (net of the professionals' carve out account). Szekelyi Declaration, ¶ 8. However, this cash exists only because the Debtors failed to pay tax amounts exceeding $2.8 million, which the Debtors themselves had previously budgeted for payment. Szekelyi Declaration, ¶ 9. Had these tax obligations been paid, the Debtors would have no cash today. *Id.*

25. Even beyond the obvious inability to repay the DIP loan with their limited funds, the Debtors still appear administratively insolvent: even excluding the DIP loan obligation, since the Debtors admit that they owe approximately $860,000 of unpaid post-petition debt (other than

[6] Administrative insolvency in bankruptcy occurs when the estate has insufficient funds to pay administrative claims in full. *See, e.g., In re Pan Am Corp.*, No. 98 CIV 838 (RCC) (RLE) 2000 WL 254010, *2 (S.D.N.Y March 7, 2000).

the DIP loan) and have also estimated that administrative claims under Section 503(b)(9) of the Bankruptcy Code total more than $4 million, there is simply no way the Debtors can pay their administrative creditors, unless there is an extremely successful (though, unfortunately, unlikely) sale which yields well beyond the amounts owed to the Debtors' secured claimants. Szekelyi Declaration, ¶ 15. Given the failure of NYCB's "adequate protection" in these cases from its Purported Adequate Protection Liens, the resulting super-priority claims in favor of NYCB needed to compensate NYCB under the Final DIP Order further assure that these estates cannot satisfy their accrued administrative obligations. Final DIP Order, ¶ 17(b). *See* below herein.

26. While very expensive, the bankruptcy has been a failure. The marketing process has achieved no or unsatisfactory results, and the Debtors' near total lack of cash means they cannot operate much longer, with or without their operating assets. Further, the Debtors' heavy losses have occurred in the winter heating season, the very period in which the Debtors' cyclical businesses should achieve significant profits in order to affront the other periods of the year. Szekelyi Declaration, ¶ 16. Instead, the Debtors' cases have witnessed excessive spending and substantial losses, which leave no ability for any continued operations as the Debtors' business further slows in the seasonal low that begins with the spring months, particularly if the exorbitant cost of these cases continues. *Id.* The time has come to end the Debtors' money-wasting Chapter 11 Cases, and convert to Chapter 7, and / or provide stay relief to NYCB, so that a deliberate, effective liquidation can now occur.[7]

[7] Should the Debtors sell any of NYCB's collateral, NYCB requests that the sale proceeds be transferred to NYCB immediately after the sale. If the Debtors' sale of assets leaves the accounts receivable unsold, NYCB further requests that this Court provide stay relief to permit NYCB to enforce its rights as secured creditor to collect the accounts of the Debtors. *See* below.

E. NYCB Has Sustained Devastating Erosion of Its Collateral and Adequate Protection Has Failed.

27. The Debtors' post-petition operations have devastated NYCB's collateral position by eroding the value of significant personal property, which is collateral for NYCB's Indebtedness. First, of course, the greatest single erosion to NYCB's position has been the over-sized, priming DIP loan. Moreover, the Debtors have also significantly eroded the value of their customer list and accounts receivable by intentionally failing to service customers. Szekelyi Declaration, ¶ 18. The resulting loss of vendees not only compromises the value of their customer list, but also undermines collections on accounts receivable.

28. Not surprisingly, the quality of the accounts receivable is being significantly diminished. First, the Debtors are damaging NYCB's collateral position by consuming A/R proceeds, having already consumed the entirety of the DIP loan proceeds. Second, the Debtors have failed and continue failing to create sufficient new receivables. Thus, the amount of past-due accounts over 60 days has increased since the Petition Date from $4 million to over $5.6 million as of January 19, 2013, or from 22% of the accounts receivable at the Petition Date to 32% of this balance, based on the Debtors' own reporting. Szekelyi Declaration, ¶ 18. This precipitous erosion of receivables shows that the Debtors' post-petition operations have and continue to harm NYCB's position, by seriously degrading the realizable value on (what should be) a relatively liquid asset of the Debtors. Clearly, the value of the Debtors' receivables is less than their face amount, and is declining overall.

29. Beyond the erosion of NYCB's personal property collateral, the bank's purported adequate protection from the Debtors' real property has clearly failed, too. The anticipated poor results of the Debtors' February 4 auction (if it happens at all) makes it impossible for the Debtors to argue that the Debtor-alleged $39 million value on just Lot 14 has any basis in reality.

Szekelyi Declaration, ¶ 19. Where these Debtors have argued that there is a protective equity cushion even after the over-sized DIP loan, it has become clear that the Debtors' Lot 14 provides no protection for NYCB. Szekelyi Declaration, ¶ 19.

ARGUMENT

A. THE COURT SHOULD CONVERT THE CHAPTER 11 CASES TO CHAPTER 7

30. Section 1112(b)(1) of the Bankruptcy Code provides that "the court shall convert a case under [chapter 11] to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate," upon the motion of a party in interest, "if the movant establishes cause." 11 U.S.C. §§ 1112(b)(1) and (c). "Cause" can arise upon "substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation [of the debtor's business]." 11 U.S.C. § 1112(b)(4)(A). When the Bankruptcy Court establishes that conversion or dismissal is in the "best interests of the creditors and the estate," it must decide between these two choices – conversion or dismissal – based on the same criteria. 11 U.S.C. § 1112(b)(1).

31. There has been a substantial and continuing diminution of the Debtors' estates in these Chapter 11 Cases, establishing abundant cause under Section 1112 for conversion. Through January 19, 2013, the Debtors have suffered approximately $9.2 million of negative net book cash flow during the first sixteen weeks of these cases. Szekelyi Declaration, ¶ 10. Of this, only approximately $6.3 million funded working capital growth (which includes (a) an approximately $5.6 million increase in accounts receivable resulting from a seasonal increase in sales volume, and (b) an approximate $750,000 increase in inventory). *Id.*

32. The Debtors' relentless losses during the cases further call for conversion. The net loss of the Debtors' estates in bankruptcy exceeds $5 million. Szekelyi Declaration, ¶ 11.

Further, this loss will only pejorate as the post-maturity interest rate on the DIP loan increases, the Debtors cannot purchase product, and the upcoming spring months bring on the Debtors slow season. Szekelyi Declaration, ¶ 16.

33. Beyond these dismal financial results, the Debtors are eroding the value of both the customer list and the accounts receivable by failing to service clients of the business. Szekelyi Declaration, ¶ 17. The accounts receivable have become less valuable as a result, with the over-120 days accounts having increased by $700,000 in the sixteen weeks since the Petition Date through January 19, 2013. Szekelyi Declaration, ¶ 18.

34. The value crash of the Debtors' real estate is also starkly evident, providing additional "cause" for conversion. From more than $39 million in asserted real property value for just Lot 14, the Debtors will have failed by February 4 to sell at any price, much less one that even approaches this amount. In short, the Debtors have decimated the value of both the real and personal property of their estates.

35. Beyond these grounds, however, the Debtors' cash crisis and administrative insolvency also call for conversion now, and provide compelling, independent grounds for pushing these cases into Chapter 7. *See, e.g. U.S. v. Hernandez,* 160 F.3d 661, 664 (11th Cir. 1998) ("These Chapter 11 cases were … converted to Chapter 7 cases because the debtors were insolvent."); *In re Ionosphere Clubs, Inc.,* 134 B.R. 515, 525 (Bankr. S.D.N.Y. 1991) ("Administrative insolvency is but one of the bases for conversion to Chapter 7 under § 1112 (b).") Even if the Debtors manage to effect a sale on February 4, no unencumbered cash would become available to the Debtors, and the Debtors would not possess their operating assets. Thus, beyond a lack of cash, there likely would be no facilities with which to operate anyway, calling for immediate conversion, even if a sale occurs.

36. The cash burn and the decline in accounts receivable and inventory, which are the collateral of NYCB, constitute a direct incremental loss in value to NYCB and other pre-petition creditors. Moreover, the erosion of the customer base occurring under the Debtors' destructive strategy will further degrade the enterprise value of the Debtors to the detriment of the creditor body. As such, the Debtors management has caused, and is projected by the Debtors to continue causing, great diminution to the Debtors' estates. 11 U.S.C. § 1112(b)(4)(A).

37. "Cause" based on substantial losses or substantial diminution of the estate is also supported here by an "absence of a reasonable likelihood of rehabilitation" of the Debtors. *Id.* These Debtors have always intended to liquidate their assets (rather than rehabilitate). So, there is no likelihood of rehabilitation, and thus the second prong of the Section 1112(b)(4)(A) is satisfied. *Loop Corp. v. U.S. Trustee*, 379 F.3d 511, 516 (8th Cir. 2004) ("[b]ecause the debtors here intended to liquidate their assets rather than restore their business operations, they had no reasonable likelihood of rehabilitation"); *In re BH S & B Holdings, LLC* , 439 B.R. 342, 347 (Bankr. S.D.N.Y 2010) (same). In fact, even if the Debtors purported to have a change of heart now and decided to seek reorganization, it would be impossible anyway. The Debtors clearly lack the funds to do so, at least because they are unable to pay their administrative claims. Szekelyi Declaration, ¶¶ 8 and 15. Rehabilitation is impossible.

38. Of course, given the failure of the sale process, the Debtors may still attempt an 11th-hour strategy to reorganize or recapitalize their businesses in Chapter 11.

39. Any such attempt would be doomed to failure, however, because it would only cause further losses to NYCB and other creditors and exacerbate the estates' administrative insolvency.

40. The Court need only consider that the Debtors now have very limited available cash. What's more, any restructuring would take time, leading the Debtors into their low season, which will accelerate and deepen the significant losses that the estates have already experienced. Of course, any such strategy would cost more; both professional fees and the DIP loan's increased interest rate would load an even greater debt burden on the Debtors' estates.

41. In short, the Court should convert these cases even if the Debtors announce a hoped-for reorganization. Time and money have simply run out. This Court should convert the cases because any further operations will generate even greater losses, whether or not a sale has occurred on February 4. *Any* ongoing operations would simply permit management to rack up additional expenses that the Debtors have no cash to pay (other than the professionals, however, who enjoy the protection of a carve out and virtually assure continued cash depletion).

42. The Debtors clearly have no strategy to benefit their creditors. The Debtors should not be allowed to drain the estates' remaining assets and enterprise value, and continue to pay excessive professional fees, to pursue a strategy at odds with the best interests of their creditors.

B. NYCB IS ENTITLED TO STAY RELIEF UNDER SECTION 362(d)(1) FOR "CAUSE" AND UNDER SECTION 362(d)(2), BECAUSE THE DEBTORS HAVE NO EQUITY IN NYCB'S COLLATERAL AND NO REORGANIZATION CAN OCCUR

43. To the extent the Court is not prepared to convert the cases to Chapter 7, the Court should lift the automatic stay to allow NYCB to foreclose on all its collateral. Moreover, even if the Court coverts the cases to Chapter 7, if the Debtor has achieved a sale of any NYCB collateral, the Court should grant stay relief and require turnover to NYCB of the sale proceeds and – if not already sold by the Debtors – the Court should further grant stay relief so that NYCB can enforce its rights to collect on the Debtors' receivables. Under both Sections 362(d)(1) and

(2) of the Bankruptcy Code, NYCB merits this relief, because abundant "cause" exists for the Court to lift the stay in NYCB's favor (*i.e.,* Section 362(d)(1)), and because the Debtors would have no equity in sale proceeds (assuming they are insufficient to repay all NYCB debt) or in the accounts receivable, nor is any reorganization possible in these cases (Section 362(d)(2)).

44. **Stay Relief for "Cause."** Under Section 362(d)(1) of the Bankruptcy Code, the Court "shall grant stay relief" "for cause" which is a broad and flexible concept that must be determined on a case-by-case basis. *In re MF Global Holdings Ltd.*, 469 B.R. 177, 191 (Bankr. S.D.N.Y. 2012). While Section 1112(b)(4)(A) explicitly states that cause exists for conversion when there is a "substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation," this same standard evidences cause in the context of stay relief under Section 362(d)(1) as well. *In re 51-53 West 129th Street HDFC, Inc.*, 475 B.R. 391, 399 (Bankr. S.D.N.Y. 2012), *citing In re Inwood Heights Hous. Dev. Fund Corp*., 2011 WL 3793324 (Bankr. S.D.N.Y. Aug. 25, 2011). Further, Section 362(d)(1) expressly recognizes that "cause" also exists, requiring stay relief, when a secured creditor suffers from a "lack of adequate protection" of its interests in collateral. 11 U.S.C. § 362(d)(1).

45. Clearly, abundant "cause" exists here, mandating stay relief for NYCB against these Debtors. These estates have experienced significant losses during the bankruptcy cases, have little or no cash to operate, and are administratively insolvent. Worse yet, the Debtors' management has further diminished the estates by precipitating a cash crisis and eroding both the customer list and the accounts receivables, which comprise NYCB's collateral. Szekelyi Declaration, ¶¶ 7, 8, 15 and 17.

46. "Cause" under Section 362(d)(1) also arises because NYCB's adequate protection has failed. This Court previously provided NYCB with protection against the priming of nearly

$12 million in DIP debt and the so-called "carve out" by relying on the Debtors' representation that Lot 14 alone was worth approximately $39 million. Szekelyi Declaration, ¶ 19. However, given the failure of the Debtors' sale process, the Debtors cannot credibly assert that this value holds. Instead, at least based on the disappointing results of the Debtors' marketing process, the Debtors' real estate appears to be worth far less and has therefore failed to provide "adequate protection" for NYCB against the DIP loan's priming, the significant carve out, and the erosion caused by the Debtors' use of NYCB's cash collateral. The Purported Adequate Protection Liens are far from adequate.

47. **Stay Relief for Lack of Equity and No Reorganization.** Section 362(d)(2) also compels stay relief for NYCB. Under this provision of the Bankruptcy Code, the Court must award stay relief of a movant's interest in estate property when there is no possibility of an effective reorganization and the estate has no equity in the property in question. 11 U.S.C. § 362(d)(2).

48. First, as set forth above (paragraphs 37-42), no reorganization is possible in these cases. 11 U.S.C. § 362(d)(2)(B). Thus, only one other requirement for stay relief under Section 362(d)(2) remains: the Debtors' lack of equity. 11 U.S.C. § 362(d)(2)(A). This requirement is also readily fulfilled in these cases. First, the face amount of the accounts receivable is less than the NYCB Revolver Indebtedness as secured thereby, whether taken alone or considered with all the other personal property collateral securing this debt. Szekelyi Declaration, ¶¶ 4, 7 and 8. Of course, the receivables are worth less than their face amount in any case. Accordingly, NYCB clearly merits stay relief in receivables.

49. Second, to the extent there are any sale proceeds derived from NYCB's collateral, this Court should order stay relief and direct turnover of the money to NYCB. Only in

the (apparently) unlikely circumstance that the Debtors sell NYCB's collateral for more than the amount of debt owed to NYCB would the Debtors have any possible discretion to use some of that cash. However, since NYCB fully expects that any sale will achieve far less than the full amount of NYCB Indebtedness, this Court should order stay relief so that all proceeds are directly surrendered to NYCB. By definition, the Debtors would have no equity in such funds and, so, together with the complete impossibility of reorganization here, undeniable grounds exist for stay relief under Section 362(d)(2), requiring that the sale proceeds be paid immediately to NYCB.

50. Indeed, abundant grounds for stay relief under Section 362(d)(2) exist for all of NYCB's collateral. Accordingly, should the Debtors fail to effect a sale on February 4, the Debtors' unsuccessful marketing will have demonstrated that NYCB's collateral has a lesser value than the amounts owed to NYCB. This lack of equity fulfills Section 362(d)(2)(A) of the Bankruptcy Code and requires stay relief in favor of NYCB in these cases, should the Court not convert the cases to Chapter 7 of the Bankruptcy Code.

C. NYCB DOES NOT CONSENT TO FURTHER USE OF ITS CASH COLLATERAL, AND THIS COURT SHOULD PROHIBIT ANY FURTHER USE OF CASH

51. The Bankruptcy Code prohibits a debtor-in-possession's use of a secured creditor's cash collateral unless, among other requirements, the debtor provides "adequate protection" for the secured creditor's interest in the funds. 11 U.S.C. §§ 361 and 363(c)(2). All of the Debtors' cash constitutes NYCB's cash collateral, since it exclusively derives from the Debtors' collections on receivables. Szekelyi Declaration, ¶ 8. This Court sought to provide "adequate protection" to NYCB for the use of its cash collateral in the Final DIP Order, including by the Purported Adequate Protection Liens. Currently, the Debtors have only limited authority to use cash under the Final DIP Order, and all such authority ends as of February 9,

2013. *See* Notice of (A) Extended DIP Maturity and Related Budget and (B) Extended Sale Process Timeline dated December 7, 2012 [Docket No. 215], 2.

52. While only at most a few days of authorized cash use remain, NYCB now objects to any further spending by the Debtors, because – as detailed above – the "adequate protection" provided to NYCB has so clearly failed. Accordingly, the Court should halt all cash use by the Debtors immediately, since the Debtors have not and cannot provide the required "adequate protection" to NYCB. Szekelyi Declaration, ¶¶ 8 and 17-19. Absent this immediate relief, the Debtors' management would continue paying expenses which have to date provided no benefit to the Debtors' pre-petition creditors (and have even put post-petition creditors at risk). Especially in light of the failed sale process, the Debtors' excessive losses, the severe cash crisis and the apparent administrative insolvency, an immediate cessation of any further cash use by the Debtors is imperative to the preservation of any value in these cases.

53. In particular, since all Debtor funds represent the proceeds of NYCB's collateral, and especially since the supposed "adequate protection" provided to NYCB in these cases has failed so miserably, Section 361 and 363 of the Bankruptcy Code prohibit any further cash use. Even one more day of Debtor spending would only work to further damage NYCB's position.

MEMORANDUM OF LAW

54. NYCB respectfully submits that no separate memorandum of law is necessary, since the legal arguments are set forth herein.

CONCLUSION

WHEREFORE, for all these reasons, NYCB respectfully requests that the Court (a) convert the Debtors' Chapter 11 Cases to cases under Chapter 7 of the Bankruptcy Code, or, in the alternative, (b) lift the automatic stay of Bankruptcy Code Section 362(a) with regard to NYCB's rights in and to all estate property of all Pledging Debtors, securing the Indebtedness or any part thereof,[8] and (c) prohibit any further use of cash by the Debtors, along with such other and further relief as to this Court shall appear just.

Dated: January 29, 2013

LOEB & LOEB LLP

/s/ William M. Hawkins
William M. Hawkins, Esq.
Daniel B. Besikof, Esq.
345 Park Avenue
New York, New York 10154-0037

Attorneys for New York Commercial Bank

[8] As set forth above, NYCB further requests that the Court provide stay relief, even if the Court converts the cases to Chapter 7, so that NYCB can immediately obtain any cash proceeds of its collateral following a sale. Moreover, if the Debtors' receivables have not been sold, NYCB also requests stay relief, even if conversion occurs, so that NYCB can collect from the Debtors' account debtors against the receivables in reduction of the Indebtedness.

William M. Hawkins (WH 1865)
Daniel B. Besikof
Loeb & Loeb LLP
345 Park Avenue
New York, New York 10154
Telephone: (212) 407-4000
Fax: (212) 937-3326

Attorneys for New York Commercial Bank

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

DECLARATION OF RICHARD SZEKELYI IN SUPPORT OF MOTIONS OF NEW YORK COMMERCIAL BANK (I) FOR (A) CONVERSION OF THE DEBTORS' CASES TO CHAPTER 7 PURSUANT TO 11 U.S.C. § 1112(B), (B) STAY RELIEF PURSUANT TO 11 U.S.C. §§ 362(D)(1) AND (D)(2) TO ENFORCE RIGHTS AGAINST PROPERTY OF DEBTORS AND COLLECT INDEBTEDNESS OWED BY DEBTORS, AND (C) PROHIBITION OF THE FURTHER USE OF ANY CASH COLLATERAL, AND (II) FOR AN EXPEDITED HEARING AND A SHORTENED NOTICE PERIOD WITH RESPECT TO THE CONVERSION MOTION

I, Richard Szekelyi, hereby declare under penalty of perjury as follows:

1. I am a managing director of Phoenix Management Services, LLC. We have been engaged to provide financial consulting and advice to Loeb & Loeb LLP regarding its representation of New York Commercial Bank ("NYCB"), concerning the obligations of Metro

Fuel Oil Corp. ("Metro Fuel"), Metro Terminals Corp. ("Metro Terminals"), Metro Terminals of Long Island, LLC ("Metro Long Island"), Apollo Petroleum Transport, LLC ("Apollo Transport"), Kings Land Realty, Inc. ("Kings Land"), Metro Energy Group LLC ("Metro Energy"), Metro Plumbing Services Corp. ("Metro Plumbing"), and Metro Biofuels, LLC ("Metro Biofuels" and, collectively with Metro Fuel, Metro Terminals, Metro Long Island, Apollo Transport, Kings Land, Metro Energy and Metro Plumbing, the "Debtors") to NYCB.

2. I submit this declaration in support of the motions of NYCB (I) for (a) conversion of the Debtors' cases (the "Chapter 11 Cases") to cases under Chapter 7 of the Bankruptcy Code pursuant to 11 U.S.C. § 1112, or, in the alternative, (b) automatic stay relief pursuant to 11 U.S.C. §§ 362(d)(1) and 362(d)(2) to enforce rights against property of the Debtors and collect indebtedness owed by the Debtors, and (c) prohibition on any further use of cash by the Debtors (the "Conversion Motion"); and (II) for an expedited hearing on and shortened notice of the Conversion Motion (together with the Conversion Motion, the "Motions").* The Motions are dated and being filed together herewith on the date hereof.

3. I have reviewed records and information concerning the Debtors and their operations, communicated with their principals and consultants, and gained other, personal knowledge regarding the Debtors' affairs, assets and liabilities since September 27, 2012 (the "Petition Date"). The matters set forth herein are therefore based on personal knowledge derived from the Debtors' statements, records and information, unless otherwise indicated.

4. **The Debtors' Pre-Petition Debt to NYCB and Security Therefor.** NYCB is a pre-petition secured creditor of the Debtors, owed not less than $41.3 million as of

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* Capitalized terms used by not otherwise defined herein shall have the meaning assigned thereto in the Conversion Motion.

the Petition Date. This indebtedness includes a pre-Petition Date revolving line of credit facility provided by NYCB to borrowers Metro Fuel, Metro Terminals and Metro Long Island (collectively, the "Borrowers") of approximately $31.8 million ("Revolver Indebtedness") and two pre-petition term loans of approximately $4.2 and $5.3 million ("Term Indebtedness" and, together with the Revolver Indebtedness, the "Indebtedness") provided to Metro Terminals.

5. Each of the Borrowers and Debtors Apollo Transport, Kings Land, Metro Biofuels, Metro Energy and Metro Plumbing provided pre-petition guaranties of the Indebtedness to NYCB.

6. The Revolver Indebtedness was secured as of the Petition Date by non-real property assets of the Borrowers, Apollo Transport and Metro Energy (collectively, the "Pledging Debtors"). The Debtors admit that this collateral is principally comprised of the Pledging Debtors' cash, accounts receivable, inventory and intangible assets.

7. **Accounts Receivable and Inventory of the Debtors.** Based on the Monthly Operating Report of the Debtors, filed on January 22, 2013 [Docket No. 310] (the "December MOR"), the accounts receivable of all Debtors as of December 31, 2012 totaled $21,125,750, and the inventory value for all Debtors was $2,434,560. All accounts receivable and inventory are owned by Pledging Debtors. Accordingly, they are collateral for the NYCB Indebtedness, as described in paragraphs 5 and 17 of the Final DIP Order.

8. **The Debtors' Cash.** Currently, the Debtors have approximately $1.8 million of cash. This amounts is net of the carve-out established by the Final DIP Order for professionals' fees in these cases. The Debtors have already spent all of the funds advanced under their DIP financing facility. Therefore, all Debtor cash now represents proceeds of receivables, which are all collateral securing the NYCB Indebtedness.

9. **The Debtors' Post-Petition Obligations.** Beyond approximately $12 million of DIP financing debt incurred since the Petition Date through January 19, 2013, the Debtors have accumulated more than $3.7 million of professional expense obligations in the same period. Further, the Debtors have tax obligations of over $2.8 million that they had budgeted to pay since the Petition Date, but have not. These tax obligations appear on the pro forma submitted by the Debtors to the Court on December 7, 2012. *See* Notice of (A) Extended DIP Maturity and Related Budget and (B) Extended Sale Process Timeline dated December 7, 2012, Exhibit A [Docket No. 215]. Had the Debtors paid these tax obligations as budgeted, the Debtors' cash balance would have been eliminated.

10. **The Debtors' Post-Petition Spending.** Over the course of these bankruptcy cases, the Debtors have used approximately $574,000 per week, on average, of which approximately $400,000 per week represents working capital invested in accounts receivable and inventory. The Debtors' management of the cases has resulted in $9.2 million of negative net book cash flow since the Petition Date through January 19, 2013. Of this, only approximately $6.3 million funded working capital growth (which includes (a) an approximate $5.6 million increase in accounts receivable resulting from a seasonal increase in sales volume, and (b) an approximate $750,000 increase in inventory).

11. **The Debtors' Significant Post-Petition Losses.** The Debtors reported a cumulative net loss exceeding $3.5 million through December 31, 2012. December MOR. When considering the total amount of professional fees incurred through December 29, 2012, as reported by the Debtors, and the increase in past-due receivables since the Petition Date, however, this reported loss is likely understated by at least $2.0 million. Accordingly, the Debtors' actual net loss since the Petition Date likely exceeds $5.5 million.

12. Attached hereto is a chart that I prepared which sets forth the performance of the Debtors from the Petition Date through December 31, 2012.

13. **The DIP Loan Indebtedness.** The DIP lender asserts that its loan to the Debtors matures on February 9, 2013, when approximately $11.6 million will become due and payable by the Debtors. *See* Final DIP Order, ¶ 24. If the Debtors fail to pay on time, it is my understanding that the DIP lender may raise the interest rate on the loan to the default rate of 11% per annum and can insist on cash payment of interest (rather than only payment-in-kind). *See* Final DIP Order, Exhibit A, 6. I also understand that, upon maturity, the DIP lender asserts that it can begin to "exercise all rights and remedies under the DIP Documents," upon seven days' prior notice. Final DIP Order, ¶ 32.

14. Even if the DIP lender simply raised the interest rate to 11% and required cash payments, this increase would expose the Debtors' estates to both higher costs and a further debilitating demand on cash.

15. **The Debtors Are Administratively Insolvent.** Beyond an inability to repay the DIP loan with current cash or cash equivalents, the Debtors still suffer from significant amounts of administrative claims which they cannot pay. For example, the December MOR shows the Debtors owe approximately $860,000 of post-petition debt other than the DIP loan. Moreover, the Debtors believe that valid claims under Section 503(b)(9) of the Bankruptcy Code exceed $4 million. Thus, with more than $4,860,000 in administrative claims excluding the DIP loan obligations, there is no way the Debtors can pay administrative creditors in full without an extremely successful (though, at this point, not anticipated) sale.

16. **The Winter Season Should Have Been the Most Profitable for the Debtors.** The Debtors' losses in these cases (which are reported by the Debtors as a loss of

EBITDA of $356,744, and a net loss exceeding $700,000 *before* the costs of bankruptcy) have occurred in the winter heating season, the period in which the Debtors' cyclical businesses should have achieved significant profits in order to affront the other periods of the year. The Debtors' records show that, once the spring months come, the Debtors' businesses enter a significant "low" period, in which the Debtors net losses always increased historically, even prior to these Chapter 11 Cases or any related financial difficulties.

17. **The Debtors Have Eroded NYCB's Collateral.** Beyond incurring the priming DIP debt, the Debtors' post-petition operations have otherwise devastated NYCB's collateral position by eroding the value of significant personal property, which is collateral for NYCB's Indebtedness. The Debtors have significantly eroded the value of their customer list and accounts receivable by intentionally failing to service customers. The resulting loss of vendees not only compromises the value of their customer list, but also undermines collections on accounts receivable.

18. Not surprisingly, the quality of the accounts receivable is being significantly diminished. First, the Debtors are damaging NYCB's collateral position by consuming A/R proceeds, having already consumed the entirety of the DIP loan proceeds. Second, the Debtors are failing to create sufficient new receivables. Thus, the amount of past-due accounts over 60 days has increased since the Petition Date from $4 million to over $5.6 million as of January 19, 2013, or from 22% of the accounts receivable at the Petition Date to 32% of this balance, based on the Debtors' own reporting. Further, over-120 days accounts have increased by $700,000 in the sixteen weeks since the Petition Date through January 19, 2013. This precipitous erosion of receivables shows that the Debtors' post-petition operations have and continue to harm NYCB's position, by seriously degrading the realizable value on receivables.

19. The so-called "adequate protection" provided to NYCB has also failed. Beyond the degradation of receivables and the customer list, the Debtors' bankruptcy has revealed that the Debtors' asserted value of the Lot 14 real property at $39.1 million cannot be supported. *See* Debtors' Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to Obtain Postpetition Financing ... dated September 27, 2012 [Docket No. 7], ¶ 25. Since the Debtors and their retained professionals have sought to sell this and other assets of the estates for approximately three months, but have not been able to do so, it appears this real estate value simply does not reflect reality and is simply too high.

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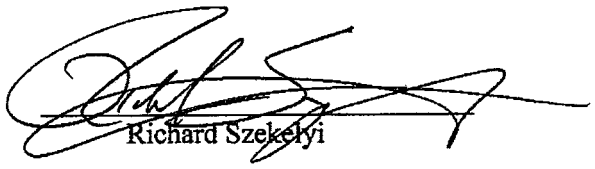
Dated: January 29, 2013



Richard Szekelyi

Attachment to Richard Szekelyi Declaration

Metro Financial Performance
From Inception through December 31, 2012
Adjusted

	MOR As Reported		Adjustments		Adjusted Performance	
Revenue:						
Sale of Petroleum	44,927,124	99.4%	(700,000)	(1)	44,227,125	99.4%
Throughput	260,700	0.6%			260,700	0.6%
Total Revenue	45,187,824	100.0%			44,487,825	100.0%
Cost of Goods Sold:						
Petroleum Products	41,423,873	91.7%			41,423,874	93.1%
Cost of Service	150,252	0.3%			150,252	0.3%
Cost of Trucking	822,320	1.8%			822,320	1.8%
Total Cost of Goods Sold	42,396,445	93.8%			42,396,446	95.3%
Gross Profit	2,791,379	6.2%			2,091,379	4.7%
Operating Expenses:						
Payroll & Benefits	1,640,826	3.6%			1,640,826	3.7%
Insurance	746,892	1.7%			746,892	1.7%
Professional Fees (ordinary course)	299,549	0.7%			299,549	0.7%
Repairs & Maintenance	79,737	0.2%			79,737	0.2%
Auto & Truck	98,324	0.2%			98,324	0.2%
Utilities	61,551	0.1%			61,551	0.1%
Dues & Subscriptions	17,511	0.0%			17,511	0.0%
Licenses & Permits	22,778	0.1%			22,778	0.1%
Other G&A	180,956	0.4%			180,956	0.4%
Total Operating Expenses	3,148,124	7.0%			3,148,124	7.1%
EBITDA	(356,745)	-0.8%			(1,056,745)	-2.4%
Other Operating Expenses:						
Depreciation	(319,222)	-0.7%			(319,222)	-0.7%
Bad Debts	(3,584)	0.0%			(3,584)	0.0%
Interest Expense - net	(122,356)	-0.3%			(122,356)	-0.3%
Finance Charges	21,595	0.0%			21,595	0.0%
Miscellaneous Income	85,223	0.2%			85,223	0.2%
Realized Gain or Loss	(10,340)	0.0%			(10,340)	0.0%
Net Income (Loss) from Operations	(705,429)	-1.6%			(1,405,429)	-3.2%
Professional Expense - Restructuring	(1,676,263)	-3.7%	(1,449,514)	(2)	(3,125,777)	-7.0%
Interest Expense - DIP Financing	(1,094,101)	-2.4%			(1,094,101)	-2.5%
Net Income (Loss) after BK Costs	(3,475,793)	-7.7%			(5,625,307)	-12.6%

(1) - Increase in past-due accounts over 120 of $732,320 since the inception of the case may reflect lost bid contracts and/or impact of limiting service to customers due to liquidity constraints. Treated as a reduction in Revenue to reflect impact on earnings at the Gross Margin and EBITDA levels.

(2) - Professional fees as reported by Alix on the Weekly Actual vs. DIP Budget Analysis as of December 29, 2012 totaled $3,125,777, as opposed to only $1,676,263 as report on the MOR