50. The Settlement should also be approved in accordance with the Debtors' fiduciary obligations to creditors. It is well established that once a corporation files for Chapter 11, its management becomes a fiduciary of its creditors and, as a result, has an obligation to refrain from acting in a manner which could damage the estate or hinder a successful reorganization. Credit Lyonnais Bank Nederland N.V. v. Pathe Communications Corp., 1991 WL 277613 (Del. Ch. Dec. 30, 1991). In fact, once a corporation is insolvent, the interests of its stockholders are not as significant as those to creditors. See In re Petit, 182 B.R. 69 (Bankr. D. Me. 1995) (finding that a debtor's main duty is to protect and conserve property in its possession for the benefit of its creditors, not equityholders); In re Healthco, 208 B.R. at 300 (holding that, upon insolvency, the "rights of creditors are paramount"); Ed Peters Jewelry Co., Inc. v. C. & J. Jewelry Co., Inc., 124 F.3d 252, 276 (1st Cir. 1997) (stating that directors and officers of insolvent corporations may not pursue personal endeavors inconsistent with their duty of undivided loyalty to the corporations' stockholders and creditors); Fed. Deposit Insur. Corp. v. Sea Pines Company, 692 F.2d 973, 976-77 (4th Cir. 1982) (holding that officers and directors of an insolvent corporation no longer represent the stockholders). Indeed, in Credit Lyonnais, the court ruled that when the interests of stockholders of an insolvent corporation conflict with the interests of creditors, the creditors' interests should take precedence over the stockholders', and the corporate strategy should reflect the long-term interests of the entire corporate entity. Credit Lyonnais, 1991 WL 277613, at n. 55.

51. The Debtors' refusal to engage in a sale process — in favor of a litigation strategy that this Court has already said will not work — makes a mockery of their fiduciary duties. Since the only hope of the Debtors' solvency rests upon the complete success of all counts alleged in the Cornerstone Litigation, all of which were either rejected in California or by this

Court, the Debtors are insolvent. It is hard to imagine a clearer breach of the fiduciary duty to creditors than the Debtors' decision to pursue futile all or nothing litigation and reject an $875 million settlement. Since the Debtors will not look out for their creditors, the Court must do so, and approve the Settlement before all creditors are left with nothing.

C. The Court Has Authority to Approve the Settlement Agreement Without the Consent of The Debtor

52. There is ample authority for the Court to approve the Settlement over the Debtors' objection. Bankruptcy Rule 9019 states that "on motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement." However, in numerous different situations, courts have permitted creditors to act on behalf of the estate when the debtor has unjustifiably failed to do so. Smart World Technologies, LLC v. Juno Online Services, Inc. (In re Smart World), 2004 WL 1118328, at *3 (S.D.N.Y.) (finding settlement proposed by creditors over debtor's objection satisfied Bankruptcy Rule 9019). See also In re Pilvas, 233 B.R. 1, 3-4 (Bankr. D. Mass. 1999) (permitting an appropriately designated party to bring suit on debtor's behalf where debtor unjustifiably refused to act); Glinka v. Abraham and Rose Co. Ltd., 199 B.R. 484, 493 (D. Vt. 1996) (stating that when a debtor unjustifiably refuses to act, many courts have allowed other parties in interest to pursue the action); Glinka v. Murad (In re Housecraft Industries U.S.A., Inc.), 310 F.3d 64, 70-71 (2d Cir. 2002) (permitting secured creditor to bring claims on behalf of the estate where debtor has unjustifiably refused to do so, or upon the consent of the debtor); Commodore International, Ltd. v. Gould (In re Commodore International, Ltd.), 262 F.3d 96, 100 (2d Cir. 2001) (stating that a creditors' committee may sue on behalf of a debtor upon court approval where the debtor unreasonably fails to bring suit on its claims); Unsecured Creditors of STN Enterprises, Inc. v. Noyes (In re STN Enterprises), 779 F.2d 901,

904 (2d Cir. 1985) (holding that creditors' committee may initiate adversary proceeding in the name of the debtor if the debtor unjustifiably refuses to bring suit).

53. Indeed, creditors may propose a settlement and obtain court approval thereof without the support of the debtor where the debtor refuses to act to protect the interests of its creditors to maximize recoveries for the estate. In re Smart World, 2004 WL 1118328, at *3 (S.D.N.Y.). [10] In re Smart World, a copy of which is attached hereto as Exhibit ___ for the Court's convenience, is on all fours with the instant case. There, the debtor, an internet service provider, filed for bankruptcy to consummate a sale of its subscriber base to Juno, a competing service provider. Post-filing, the negotiations between Smart World and Juno deteriorated, with the parties engaging in litigation over the terms of their prior agreement. Recognizing that the subscriber list was a wasting asset, Smart World creditors agreed upon the terms of a settlement directly with Juno and requested that Smart World consent to the consummation thereof. Smart World refused and the creditors and Juno requested bankruptcy court authority pursuant to Bankruptcy Rule 9019 to approve the sale of Smart World's subscriber base to Juno, to terminate all existing Smart World litigation against Juno, and to grant a release to Juno of all estate claims against it.

54. The Bankruptcy Court for the Southern District of New York approved the joint creditor / Juno request and compelled Smart World to accept the settlement pursuant to Bankruptcy Rule 9019. In doing so, the Smart World court held that a debtor has a fiduciary duty to protect the interests of its creditors and maximize recovery for the estate and that when it fails to do so, others may act in the best interest of the estate. Id. at *3. The court further noted

[10] If need be, the Creditors can intervene in the Cornerstone Litigation pursuant to Section 1109(b) of the Bankruptcy Code and Bankruptcy Rule 7024(a) to promote a settlement thereof. See Term Loan Holder Committee v. Ozer Group, L.L.C. (In re Caldor Co.), 303 F.3d 161, 167-76 (2d Cir. 2002) (Section 1109(b) of the Bankruptcy Code gives a party in interest the absolute right to intervene in an adversary proceeding). See also In re Neuman, 124 B.R. 155, 159-60 (S.D.N.Y. 1991) (same).

that, by opposing the settlement, the debtor put at risk the "concrete opportunity for its creditors to obtain some recovery" and that its actions "must be characterized as an unrealistic hope that continued litigation would be so wildly successful that it might yield some recovery to its equity holders." Id. The facts of Smart World could just as well describe the situation here.

55. The Debtors are wagering the Creditors' ability to recover anything on a long shot litigation strategy that has virtually no hope of success. The Debtors apparently have no interest in protecting creditors and appear to be focused solely on trying to obtain a recovery for shareholders. Like the situation in Smart World, the Creditors' and DIRECTV's proposal of the Settlement here should not be an impediment to its approval by this Court. **[Concurrent with the approval of the Settlement, the creditors seek the appointment of a limited purpose trustee for the sole purpose of effectuating the Settlement and Subscriber Sale as discussed herein in Section III. – TO DISCUSS WITH DTV AND COMMITTEE]**

II. The Court Has Authority to Compel the Debtors to Sell Their Subscribers to DIRECTV Pursuant to Sections 363 and 105 of the Bankruptcy Code.

56. To consummate the Settlement in as expeditious a manner as possible to preserve the subscriber base and the value of the Settlement, the Debtors' subscribers must be transferred to DIRECTV pursuant to Section 363 of the Bankruptcy Code. Indeed, were there ever a paradigm for a rapid sale of assets free and clear of all liens and encumbrances pursuant to Section 363(b) of the Bankruptcy Code, this is it, as the assets at the heart of the Settlement are a perishable commodity whose expiration date is less than [fifty-five] days away.

57. In relevant part, Section 363(b) of the Bankruptcy Code provides that, "the trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). Again, as Smart World instructs, the ability to sell assets of a debtor is not limited to the trustee / debtor-in-possession. Indeed, just as

this Court has authority to approve the Settlement pursuant to Bankruptcy Rule 9019, it also has ample authority to compel the Subscriber Sale pursuant to Sections 105 and 363 of the Bankruptcy Code.

58. It is well established that pre-confirmation sales of the majority of a debtor's assets are permissible when a "sound business purpose" dictates such action. Stephens Indus., Inc. v. McClung, 789 F.2d 386, 390 (6th Cir. 1986) (finding a sound business purpose to sell an asset where asset was unprofitable and the debtor *faced the prospect of ceasing operations and losing necessary licenses without the sale*)(emphasis added). See also Committee of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.), 722 F.2d 1063, 1071 (2d Cir. 1983) (requiring evidence to justify finding of good business reason to sell assets outside plan); In re Naron & Wagner, Chartered, 88 B.R. 85, 90 (Bankr. D. Md. 1988) (determining that an emergency is a good business reason for Chapter 11 debtor to sell all or substantially all of its assets prior to confirmation of plan of reorganization or even prior to filing of plan); In re Mesta Machine Co., 30 B.R. 178 (Bankr. W.D. Pa. 1983) (holding that the sale of all or substantially all assets prior to submission of plan of reorganization is permissible *where there is imminent danger that assets will be lost if a sale is not promptly completed*)(emphasis added); Stern v. Massachusetts Alcohol Beverage Control Comm'n (In re J.F.D. Enters.), 183 B.R. 342 (Bankr. D. Mass. 1995) (finding exigent circumstances existed to proceed with non-ordinary course sale); In re Coastal Industries, Inc., 63 B.R. 361 (Bankr. N.D. Ohio 1986) (same).

59. The sound business purpose test has four elements: (1) a sound business reason or emergency justifies a pre-confirmation sale; (2) the sale has been proposed in good faith; (3) adequate and reasonable notice of the sale has been provided to interested parties; and (4) the purchase price is fair and reasonable. In re Delaware & Hudson Ry. Co., 124 B.R. 169, 176 (D.

Del. 1991); see also In re Country Manor of Kenton, Inc., 172 B.R. 217, 220 (Bankr. N.D. Ohio 1994); Titusville Country Club v. Pennbank (In re Titusville Country Club), 128 B.R. 396, 399 (Bankr. W.D. Pa. 1991).

60. The Subscriber Sale easily satisfies this test. On August 31, 2004, the Debtors will lose the right to provide DBS service to their customers and their business will be worthless. It is virtually impossible between now and August 31 to formulate, solicit, confirm and consummate a plan of reorganization or liquidation. Due to these facts, the Creditors and DIRECTV have engaged in arms' length negotiations and proceeded in good faith to reach an agreement on the Settlement and its core Subscriber Sale, while there is still a subscriber base to sell. Quite simply, there can be no more sound business purpose.

61. With the Court's authority, the auction for the Subscriber Sale can be heard on reasonable notice and, as outlined above, the Purchase Price is fair and reasonable under the circumstances and will return significant value to the vast majority of the Debtors' creditors. Accordingly, the Subscriber Sale has a sound business purpose and should be authorized and approved along with the overall Settlement, especially since it is subject to higher and better offers.

A. The Proposed Auction Procedures are Reasonable and In the Best Interests of the Debtors' Estates[11]

62. Historically, bankruptcy courts approve bidding incentives under the "business judgment rule." See, e.g., The Official Committee of Subordinated Bondholders v. Integrated Resources, Inc., 147 B.R. 650, 658 (S.D.N.Y. 1992) (stating that a court should "assess the merits or fairness of business decisions only 'when a transaction is one involving a

[11] For purposes of this section only, unless otherwise defined in this section, all capitalized terms not defined in this section, shall have the meaning ascribed to such terms in the Asset Purchase Agreement.

predominantly interested board with financial interests in the transaction adverse to the corporation'") (citing AC Acquisitions Corp. v. Anderson, Clayton & Co., 519 A.2d 103, 111 (Del. Ch. 1986)), *appeal dismissed*, 3 F.3d 49 (2d Cir. 1993). The Auction Procedures agreed to by the Creditors and DIRECTV in connection with the Asset Purchase Agreement are designed to enhance the bidding, and the Creditors and DIRECTV seek approval hereof. In reality, EchoStar is the only party other than DIRECTV who has the financial ability, and, more importantly, the business "model" to submit a bid. Accordingly, the bid procedures need not be so evolved as to handle the context of multiple bids. Accordingly, this discussion is limited.[12]

63. Qualified Bidders. Under the proposed Auction Procedures, in order for a bid to be considered, it must be submitted by a Qualified Bidder. [The Debtors, in consultation with] The Committee and the Secured Lenders, in their sole discretion, will determine whether a bidder is a Qualified Bidder and shall consider the following:

> [(i) whether the bid meets all of the conditions set forth by the Auction Procedures, (ii) whether the bidder possesses the financial ability to close the sale, (iii) whether the bid is on terms not less favorable to Pegasus than the terms of DIRECTV's Bid, (iv) any additional liabilities created by or proposed to be assumed in the bid, (v) cure payments proposed to be paid by the bidder, and (vi) other additional components of the bid. If any party in interest objects to the determination with respect to a Qualified Bidder, the Bankruptcy Court shall determine whether or not a bidder is a Qualified Bidder.]

64. Qualified Bids. As set forth in the Auction Procedures, a bid must be a "Qualified Bid." A Qualified Bid is a bid that:

> [(a) is received no later than July [ ], 2004 at 4:00 p.m. (prevailing Eastern time) (the "Bid Deadline") by [(i) Pegasus and its advisors;] (ii) counsel to the Committee;

[12] This summary is qualified in its entirety by reference to the provisions of the Auction Procedures and the Asset Purchase Agreement.

(iii) counsel to the Senior Secured Lenders; (iv) counsel to the Junior Secured Lenders; and (v) counsel to DIRECTV.

(b) is a binding offer to purchase the Purchased Assets (excluding the Patronage Certificates) and assume the Assumed Liabilities in the following manner: (i) on terms and conditions which are at least as favorable to the Pegasus estates (including, but not limited to, conditions to closing) as the terms and conditions contained in the Asset Purchase Agreement, (ii) within a time frame substantially similar to the timetable for closing established in the Asset Purchase Agreement, (iii) for a Purchase Price that exceeds DIRECTV's Purchase Price, as defined in the Asset Purchase Agreement, as it may be adjusted, by the minimum amount of $50 million (the "Overbid") and (iv) without being subject to or contingent upon obtaining financing.

(c) is submitted with a letter of credit (the "Bid LOC"), in the principal amount of [DIRECTV'S BID], plus $50 million. The Bid LOC shall be identical to DIRECTV's Letter of Credit (except for the name of the issuing bank and amount). If such bid is not accepted as the highest or best offer, the Bid LOC shall be returned to such bidder.]

65. Auction. On the date scheduled by the Court, the parties will proceed with an Auction on the following terms:

[(a) The Asset Purchase Agreement executed by DIRECTV shall constitute a Qualified Bid for all purposes. If the Debtors receive a Qualified Bid, other than the bid submitted by the DIRECTV, the Debtors will conduct an auction (the "Auction") at [ ] before the Honorable James B. Haines, Jr., United States Bankruptcy Judge, at the United States Bankruptcy Court for the District of Maine, 537 Congress Street, Second Floor, Portland, Maine 04101, to consider all higher and better bids. All Qualified Bidders who wish to participate in the Auction must appear at such location, or such other designated location, at the specified date. Only DIRECTV and other Qualified Bidders who have timely submitted their Qualified Bids shall be entitled to make any subsequent Qualified Bids at the Auction. The Auction shall be open and shall continue until only one Qualified Bidder remains and it is determined by [Pegasus, in

consultation with] the Committee and the Secured Lenders and their respective advisors, that such bid represents the highest and best bid.

(b) The highest opening bid (which shall be at least the sum of the Purchase Price set forth in the Asset Purchase Agreement plus the Overbid) shall be announced at the commencement of the Auction. Bidding at the Auction shall be limited to increasing the bids submitted by Qualified Bidders and DIRECTV prior to the Bid Deadline. To the extent that any such modification takes the form of increasing the Purchase Price, such modification must exceed the immediately preceding bid by at least $_____ in immediately available funds. [Pegasus in consultation with] The Committee and the Secured Lenders and their respective advisors, shall determine which bid is the highest and best bid (the "Successful Bid").

(c) Acceptance of the Successful Bid shall not occur, or be deemed to have occurred, until approved by entry of an order by the Bankruptcy Court which has become final and non-appealable (unless such finality and non-appealability has been waived by the Successful Bidder) and, among other things, authorizes the Asset Sale to the Successful Bidder.

(d) Immediately after the conclusion of the Auction (if one is held as provided herein), the Bankruptcy Court will hold a hearing on the approval of the Asset Sale to the Successful Bidder.]

66. In the event that no Qualified Bids are received, the parties will proceed with the execution of the Asset Purchase Agreement with DIRECTV and will not hold an Auction.

67. The Creditors submit that the proposed Auction Procedures are appropriate, in the best interests of the Debtors' estates, and reasonable under the circumstances. The Creditors believe that the Auction Procedures and related provisions will promote active bidding that will result in the highest and best offer currently available in the marketplace. At the same time, the bidding procedures will allow [the Debtors and] Creditors to conduct the Auction in a controlled but fair and open fashion that promotes participation by financially capable bidders who are

likely to close a transaction, while simultaneously discouraging non-serious offers and offers from bidders that [Pegasus and] the Creditors do not believe are sufficiently capable or likely to consummate a transaction. The Creditors further believe that the sale procedures and protections proposed herein will encourage, rather than hamper, bidding for the assets and that they are therefore appropriate under the standards governing bidding procedures in bankruptcy proceedings. See Integrated Resources, Inc., 147 B.R. at 669; In re Bjolmes Realty Trust, 134 B.R. 1000, 1011 (Bankr. D. Mass. 1999).

III. The Appointment of a Limited Purpose Trustee Is Required in This Case

68. As with the other alternative forms of relief sought herein, in the event that the Court does not grant the motions of the Creditors [and DIRECTV] for approval of the Settlement, the parties request that the Court appoint a trustee for the purpose of assessing and (hopefully) implementing the Settlement prior to August 31, 2004. [ALTERNATIVES: In conjunction with approving the Settlement and the Subscriber Sale, the Court must appoint a limited purpose trustee to consummate such transaction or this Court must appoint a trustee to evaluate the Settlement and Subscriber Sale and operate the remainder of the Debtors' businesses.]

69. Section 1104(a) of the Bankruptcy Code provides that, at any time after the commencement of the bankruptcy case, but before the confirmation of a plan, on request of a party-in-interest, the bankruptcy court shall appoint a trustee "(1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case ... or ... (2) if such appointment is in the interest of creditors, any equity holders, and other interests of the estate...." Section 1104(a)(1)-(2) of the Bankruptcy Code.

A. Cause is Present to Appoint a Trustee

70. Determinations made pursuant to Section 1104(a) of the Bankruptcy Code are fact-intensive and must be made on a case-by-case basis. See In re Bellevue Place Assocs., 171 B.R. 615, 622 (Bankr. N.D. Ill. 1994); see also In re Madison Mgmt. Group, 137 B.R. 275, 281 (Bankr. N.D. Ill. 1992). A court may examine both pre-petition and post-petition conduct in deciding whether cause exists and whether appointment of a trustee is in the best interests of creditors. See In re Oklahoma Ref. Co., 838 F.2d 1133, 1136 (10th Cir. 1988).

71. The standards for the appointment of a trustee under both prongs of Section 1104 of the Bankruptcy Code are based upon the proposition that the debtor is a fiduciary to all of its creditors. As such, a debtor owes a duty of care and loyalty to creditors to protect and conserve the estate's assets for their benefit. See, e.g., Bellevue Place, 171 B.R. at 623-24; In re Microwave Prods. of America, Inc., 102 B.R. 666, 671 (Bankr. W.D. Tenn. 1989); In re Ionosphere Clubs, Inc., 113 B.R. 164, 169 (Bankr. S.D.N.Y. 1990). In addition, a debtor's "fiduciary obligation includes refraining from acting in a manner which could damage the estate, or hinder a successful reorganization of the business." Microwave Prods., 102 B.R. at 671.

72. While there is a strong presumption that a debtor should be permitted to remain in control of the estate, that presumption will be overcome when the debtor is not carrying out its fiduciary responsibilities. See Ionosphere Clubs, Inc., 113 B.R. at 169 ("A debtor-in-possession must act as a 'fiduciary of his creditors' to 'protect and to conserve property in his possession for the benefit of creditors,' and to 'refrain[ ] from acting in a manner which could damage the estate' ") (citing In re Sharon Steel Corp., 86 B.R. 455, 457 (Bankr. W.D. Pa. 1988)). When, as here, a debtor-in-possession is unwilling or unable to fulfill its fiduciary responsibilities to its creditors, "the stewardship of the reorganization effort must be turned over to an independent

trustee." In re V. Savino Oil & Heating Co., Inc., 99 B.R. 518, 526 (Bankr. E.D.N.Y. 1989).

73. If this Court determines that "cause" exists under Section 1104(a)(1) of the Bankruptcy Code, then the appointment of a trustee is mandatory. See In re Bellevue Place, 171 B.R. at 622; In re Sharon Steel Corp., 871 F.2d at 1226. Section 1104(a)(1) of the Bankruptcy Code contains a list of causes mandating the appointment of a trustee, including gross mismanagement, fraud and dishonesty. However, such list is not exhaustive and courts have considerable discretion to decide whether cause exists based on the specific facts and circumstance of each case. Indeed, a debtor's management need not commit a "bad act" to warrant appointment of a trustee. Rather, the complete lack of concern for creditor interests present here also constitutes the cause necessary to appoint a trustee. See In re Marvel Entm't Group, Inc., 140 F.3d at 473-74 (appointing trustee without findings of wrongdoing, due to intense acrimony between debtor-in-possession and creditors, which prevented negotiations and cast doubt on possibility of an effective reorganization); In re Sharon Steel Corp., 871 F.2d at 1228; Comm. of Dalkon Shield Claimants v. A.H. Robins Co., Inc., 828 F.2d 239, 242 (4th Cir. 1987) (holding that court has considerable discretionary authority to determine whether debtor's conduct rises to the level of "cause"); Petit v. New England Mortgage Serv., Inc., 182 B.R. 64, 69 (D. Me. 1995) (using court's "broad discretion" to appoint trustee); In re Intercat, 247 B.R. 911, 921 (Bankr. S.D. Ga. 2000) (appointing a trustee is "vested in the discretion of the bankruptcy court" and inquiry into whether cause exists for such an appointment is "not limited to the enumerated list of fraud, dishonesty, incompetency or gross mismanagement, but extends to "similar cause.")(internal citations omitted); see also Sharon Steel Corp., 871 F.2d at 1228 (finding that "the totality of circumstances signaled the need for a trustee"); In re Cajun Elec. Power Coop., Inc., 74 F.3d 599, 600 (5th Cir. 1996) (upholding trustee appointment because

debtor-in-possession's interests conflicted with those of its creditors to such an extent that "the appointment of a trustee [may] be the only effective way to pursue reorganization."). Clearly, the Debtors' decision to gamble the entirety of creditor recoveries on litigation that has failed in two courts represents "cause" to appoint a trustee.

74. At this stage in the case, there are no allegations that the Debtors are improperly operating their broadcast television stations and the Creditors do not seek the appointment of a trustee with respect to that portion of the Debtors' business. Rather, the parties seek the appointment of a trustee with the limited role of assessing and implementing the Settlement. If, however, a trustee cannot be appointed for such limited purpose, then the Creditors request a fully empowered trustee. Given that the Debtors' business will be sold in a few weeks, the appointment of a trustee will not be overly disruptive; any such disruption will be outweighed by the fact that, absent a trustee, there will be no business to reorganize at all.

75. The Debtors' conduct demonstrates a total lack of concern for the interests of creditors and an absence of sound and rational decision making. The Debtors have "flatly" rejected an initial $675 million offer and have now summarily dismissed an enhanced offer of approximately $875 million, which is supported by **all** of the creditor constituencies. Instead, the Debtors have chosen to pursue a discredited litigation strategy in the hope that it will yield an equity recovery. When this litigation strategy fails again, the Creditors will have lost approximately $875 million. It is difficult to fathom a more total abandonment of fiduciary duties to creditors than what is occurring here. The Debtors' actions constitute "cause" to appoint a trustee pursuant to Section 1104(a)(1) of the Bankruptcy Code.

B. The Best Interests of Creditors Also Mandate Appointment of a Trustee

76. Similarly, terminating the Debtors' costly litigation strategy is in the best interest of the vast majority of creditors of the Debtors' estates and satisfies the standards for

appointment of a trustee under Section 1104(a)(2) of the Bankruptcy Code. Section 1104(a)(2) of the Bankruptcy Code "creates a flexible standard" for the appointment of a trustee. See Petit v. New England Mortgage Serv., Inc., 182 B.R. at 69; In re Sharon Steel Corp., 871 F.3d at 1226; In re Ionosphere Clubs, Inc., 113 B.R. at 168. Thus, Section 1104(a)(2) "reflects the practical reality that a trustee is needed." V. Savino Oil, 99 B.R. at 527 (internal citations omitted). This discretionary standard does not require a showing of wrongful behavior on the part of management, as long as a meaningful benefit from the appointment of a trustee is shown and the benefit outweighs the burdens and expenses. See, e.g., In re Cardinal Indus., Inc., 109 B.R. at 765; Microwave Prods., 102 B.R. at 675; In re the Bible Speaks, 74 B.R. 511, 514 (Bankr. D. Mass. 1987).

77. In determining whether the appointment of a trustee is in the best interest of creditors, a bankruptcy court must utilize its broad equity powers. In re Hotel Assoc., Inc., 3 B.R. 343, 345 (Bankr. E.D. Pa. 1980). "In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests." Id. (citing Lemon v. Kurtzman, 411 U.S. 192, 200-01 (1973)). In addition, when a debtor-in-possession is incapable of preserving assets for its creditors, a trustee is properly appointed under Section 1104(a)(2) of the Bankruptcy Code. See In re McCorhill Publishing, Inc., 73 B.R. 1013, 1017 (Bankr. S.D.N.Y. 1987); In re William H. Vaughan & Co., Inc., 40 B.R. 524, 526 (Bankr. E.D. Pa. 1984); In re Ford, 36 B.R. 501, 504 (Bankr. W.D. Ky. 1983); Petit v. New England Mortgage Serv., Inc., 182 B.R. 64, 69 (finding that a debtor "cannot be properly entrusted with the fiduciary duties of a trustee").

78. Rather than requiring the "roving commission to do equity" **[TRANSCRIPT CITE]** that the Debtors seek in connection with the Cornerstone Litigation, the appointment of a

trustee to implement the Settlement falls squarely within a reasonable exercise of equity since it is the *only realistic alternative to a complete loss for all creditors*. See In re Crescent Beach Inn, Inc., 22 B.R. 155, 160-61 (Bankr. D. Me. 1982) (allowing termination of debtor's exclusivity to prevent loss of substantial value of the estate through delay). The "benefits" of a trustee are manifest here (an $875 million recovery versus a $0 recovery) and the burdens are *de minimis* given the limited duration of the Debtors' business.

79. Accordingly, supplanting management with a trustee with respect to decisions pertaining to the Cornerstone Litigation and the Settlement is warranted and must be implemented immediately if there is any hope of a creditor recovery in this case.

80. The Court should not be troubled by the prospect of appointing a trustee with limited powers at such an early stage in these cases. In fact, ample authority exists with respect to motions to appoint both limited purpose trustees and trustees at early stages of a case.[13]

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[13] With respect to the appointment of a limited purpose trustee, in In re Intercat, Inc., 247 B.R. at 924, the court found such authority pursuant to Sections 1107 and 1108 of the Bankruptcy Code. The Intercat court determined that Section 1107 of the Bankruptcy Code gives the debtor-in-possession certain rights and powers "subject to ... such limitations or conditions as the court prescribes ..." and Section 1108 of the Bankruptcy Code similarly provides that "unless the court ... orders otherwise, the trustee [or debtor-in-possession] may operate the debtor's business." Intercat, 247 B.R. at 924. Accordingly, the court held that together both sections grant broad authority to tailor and define the rights of the debtor-in-possession or a trustee if one is appointed to operate debtor's business. See Id. Several other courts have also permitted the appointment of a limited purpose trustee. See In re Madison Mgmt. Group, Inc., 137 B.R. 275 (Bankr. N.D. Ill. 1992); In re North American Communications, Inc., 138 B.R. 175, 180 (Bankr. W.D. Pa. 1992); In re G & G Transport, Inc., 1998 WL 898835 at *4 (Bankr. E.D. Pa. 1998).

With respect to appointing a trustee at the early stages of a case, where there is sufficient evidence of cause or if such appointment is in the best interests of creditors, courts do not hesitate to appoint a trustee on an expedited basis. See, e.g., In re PRS Ins. Group, Inc., 274 B.R. 381 (Bankr. D. Del. 2001) (appointing a trustee within a month after an order for relief was entered); In re Bellevue Place Assoc., 171 B.R. at 622-24 (same); In re Madison Mgmt. Group, Inc., 137 B.R. 275 (Bankr. N.D. Ill. 1992) (appointing a trustee on a motion filed less than three months after the petition date); In re Colorado-Ute Electric Ass'n, Inc., 120 B.R. 164, 175 (Bankr. D. Colo. 1990) ("... if the facts and circumstances warrant the appointment of a trustee, it is not appropriate to wait to file the motion until the termination of the exclusive period. Such a deferral will only further delay the process toward the effective rehabilitation and reorganization of the debtor."); In re Prof'l Accountants Referral Services, Inc., 142 B.R. 424, 429 (Bankr. D. Colo. 1992) (appointing a trustee prior to entry for relief in an involuntary proceeding because "there could be serious and irreparable injury without the forthwith appointment of an independent, disinterested, competent trustee.").

IV. Cause Exists to Lift the Automatic Stay On the Pledged Equity

81. Should this Court deny the Creditors' prior requests herein, the Secured Lenders alternatively seek relief from the automatic stay to proceed against their pledged collateral (the "Pledged Equity") in order to exercise their voting rights on the equity interests of PM&C under the Secured Lenders' respective security agreements to replace management and propose a motion or plan to consummate the Settlement or to alternatively physically foreclose on the Pledged Equity through a sale to DIRECTV.

82. Pursuant to the Secured Lenders' respective security agreements, the Senior Secured Lenders have a first priority lien on substantially all the assets of the Debtors, including the capital stock of PM&C, the immediate parent of the operating subsidiaries, and the Junior Secured Lenders have a second priority lien on all the capital stock of PM&C. [cite to pledge agreements]

83. Upon the filing of a petition for bankruptcy, an automatic stay arises by operation of law. The stay prevents creditors of a debtor from seeking to enforce any lien on the property of the estate and affords the debtor "breathing room," allowing all parties protection from the effects of a race to the courthouse. See Hunt v. Bakers Trust Co., 799 F.2d 1060, 1069 (5th Cir. 1986) (citing H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1977)). However, the Bankruptcy Code also provides a means of lifting that stay for "cause" including "the lack of adequate protection of an interest in property." See, Section 362(d) of the Bankruptcy Code.

84. The burden of proof on a motion to lift or modify the automatic stay is a shifting one. A moving party bears the initial burden of showing "cause," but once that burden has been met, the burden of proof shifts to the debtor to show that cause does not exist to grant relief from the stay. Sonnax Indust. Inc. v. Tri Component Products Corp. (In re Sonnax Indust. Inc.), 907 F.2d 1280, 1285 (2d Cir. 1990); In re Elmira Litho, Inc., 174 B.R. 892, 902 (Bankr. S.D.N.Y.

1994); Montague Pipeline Techs. Corp. v. Grace/Lansing (In re Montague Pipeline Techs. Corp.), 209 B.R. 295, 305 (Bankr. E.D.N.Y. 1997). Should the Court not approve the Settlement and Subscriber Sale under Bankruptcy Rule 9019 and Section 363 of the Bankruptcy Code, the Secured Lenders submit that "cause" exists to lift the automatic stay because the value of the bulk of the collateral will plummet to zero on August 31, 2004. Accordingly, the Secured Lenders submit that the burden is on the Debtors to show why cause does not exist.

A. The Debtors Can Not Adequately Protect the Value of the Pledged Equity

85. A decline in value of a secured creditor's interest is "decisive in determining the need for adequate protection." In re Elmira Litho, Inc., 174 B.R. at 902 (quoting In re Saypol, 31 B.R. 796, 800 (Bankr. S.D.N.Y. 1983)). Relief from the automatic stay must be granted if the debtor is unable to demonstrate an ability to protect a secured creditor from a decline in the value of its interest in the property of the estate. See United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 370 (1988) (finding secured creditors' interest not adequately protected if the collateral is depreciating in value during the term of the stay). It is virtually impossible for the Debtors to claim that the Secured Lenders' collateral is being adequately protected and that the Secured Lenders should be forced to sit idly by and watch their collateral literally disappear over the next [fifty-five] days.

86. Decline in value of collateral may be proven either quantitatively or qualitatively. Quantitative proof, based on appraisal or similar evidence that the collateral was worth more at an earlier date, is generally more persuasive. In re Elmira Litho, Inc., 174 B.R. at 903. In the case at hand, there is undisputed quantitative proof of a decline in the value of the Secured Lenders' collateral, which is evidenced by the rapid and continual decline of the Debtors' subscriber base since 2002, made more urgent when coupled with the August 31st deadline. The Debtors themselves have stated that the business — and hence the Secured Lenders' collateral —

is being irreparably harmed each day. Thus, the Pledged Equity is steadily losing all but a tiny fraction of its value. There is no method of adequate protection that the Debtors can provide to protect the Secured Lenders in the face of the potential loss of nearly the entire value of the estates. Only relief from the automatic stay to allow the Secured Lenders to dispose of the collateral before it evaporates on August 31, 2004 will protect the Secured Lenders' property interests.

87. The sharp decline in value of the Debtors' estates — which is decimating the value of the Pledged Equity — provides ample "cause" for stay relief. The case law is replete with precedent granting stay relief under such circumstances.

88. In a similar case involving securities pledged as collateral, the rapidly deteriorating financial condition of the debtor corporation, and the resulting decline in the value of its stock, were persuasive in the court's finding that the creditor's interest in securities was not adequately protected. In re Domestic Fuel Corp., 70 B.R. 455 (Bankr. S.D.N.Y. 1987). In Domestic Fuel, the debtor failed to show that the creditor could be compensated for the decline in value of its collateral. The court looked at the lower receivables and billings for the two-month period after the filing, as well as radical changes in the business of the debtor, and held that the automatic stay should be lifted to allow the creditor to recover its stock.

89. This is precisely analogous to the current situation, where the Debtors' revenues are declining, their financial situation is critical, and almost all value will be stripped from the estates in less than two months. Every day the automatic stay is prolonged further increases the risk to the Pledged Equity. Accordingly, the automatic stay must be lifted immediately to protect the Secured Lenders from further diminution in the value of the Pledged Equity.

90. Another compelling precedent is In re Gilece, 7 B.R. 469 (Bankr. E.D. Pa. 1980). In that case, the creditors were faced with a situation where, upon the occurrence of a date certain, the estate would radically plummet in value. The Gilece court granted immediate permission to a secured creditor to foreclose on pledged shares of stock so that full advantage could be taken of a net operating loss of the corporation, thereby adding to or at least maintaining the value of the creditor's collateral. In granting this relief, the court noted that the secured party presented sufficient evidence through expert testimony of the weak financial condition of the corporation and of the fact that, upon the occurrence of the end of the calendar year, the corporation would lose the benefit of a substantial portion of a net operating loss carry-forward for income tax purposes. If the loss of tax benefits at a date certain justifies stay relief, then surely the loss of a debtor's principal business must as well.

91. Accordingly, the Secured Lenders submit that they have met their burden in demonstrating "cause" and that the Debtors simply cannot overcome the Secured Lenders' showing.

B. Upon Lifting the Automatic Stay, Creditors Can Elect a New Board of Directors

92. This Court has two alternative forms of stay relief which it can grant the Secured Lenders. First, due to the Secured Lenders valid security interest in the stock of PM&C, the Secured Lenders seek limited relief from the automatic stay to allow creditors to use their voting rights to call a special meeting of PM&C to elect a new board of directors. Case law in this area is well settled that corporate governance rights continue during a reorganization, including the ability of stockholders to elect new board members. See In re Marvel Entm't Group, Inc., 209 B.R. 832 (D. Del. 1997); In re Johns-Manville Corporation, et al., 801 F.2d 60 (2d Cir. 1986) (reversed on remand); Saxon Industries, Inc. v. NKFW Partners, 488 A.2d 1298 (Del. 1984); In

re J.P. Linahan, Inc., 111 F.2d 590 (2d Cir. 1940); In re Lionel Corporation, 30 B.R. 327 (S.D.N.Y. 1983); and In re Bush Terminal Co., 78 F.2d 662 (2d Cir. 1935).[14]

93. Here, there would be no abuse in calling a special meeting of PM&C and electing a new board. The Creditors' intentions are clearly in good faith and are necessitated by the refusal of the Debtors' current board to act to maximize recovery to all creditors. In no way would the Creditors use this as an opportunity to favor their interests over the interests of other creditor constituencies. Rather, a new and independent board could properly fulfill its fiduciary duties to all parties-in-interest and renounce the Cornerstone Litigation, accept the Settlement and enter into the Subscriber Sale.

94. In the event that simply exercising their voting rights on the Pledged Equity does not adequately protect the Creditors, the Secured Lenders alternatively seek relief from the automatic stay to physically foreclose on the Pledged Equity and other pledged assets of the Debtors through a sale to DIRECTV.

V. [The Debtors' Exclusive Period to File and Solicit a Plan of Reorganization Must Be Terminated

95. If this Court declines to grant the other relief requested herein, the Creditors alternatively seek to immediately terminate the Debtors' exclusive periods to file and solicit a plan of reorganization (the "Exclusive Periods") pursuant to Section 1121(d) of the Bankruptcy Code in order to propose a plan that, among other things, provides for the terms of the

[14] These fundamental rights are so well-established that most courts do not consider the exercise of corporate governance rights to come within the ambit of the automatic stay provisions. In re Marvel Entm't Group, Inc., 209 B.R. at 838. The right to call a stockholders' meeting may be impaired only if there is "clear abuse" in attempting to call one. In re Johns-Manville Corp., 801 F.2d at 64. In Marvel, the district court held that the automatic stay did not prevent bondholders of a debtor's parent holding company from voting pledged shares in the debtor corporation to elect a new board of directors. Id. The debtor argued that the bondholders were trying to exercise rights accruing to them as creditors rather than as stockholders because the shares were pledged as security for the payment of the bonds issued by the debtor's holding companies. Id. However, the court emphasized that the bondholders did not acquire shareholder rights in the debtor as creditors of the debtor, but rather as creditors of the debtor's holding companies. Id.

Settlement. In order to consummate a plan prior to August 31, 2004, the Creditors also require the Court to significantly shorten the notice period for approval of a disclosure statement and approve a very brief solicitation period. The Creditors do not believe that the plan process is a realistic method for implementing the Settlement, but are prepared to pursue it as a last resort in the event that the Court determines that it is inappropriate to grant the relief pursuant to Bankruptcy Rule 9019 or the other relief sought herein.

96. For all of the reasons noted above, "cause" exists to terminate the Exclusive Periods immediately. Needless to say, continuing to permit the Debtors to enjoy the exclusive privilege to file and solicit a plan of reorganization will only permit the Debtors more time to pursue the fruitless Cornerstone Litigation and bring certain harm to all parties-in-interest.

A. "Cause" Exists to Terminate the Debtors' Exclusive Period to File and Solicit a Plan of Reorganization Pursuant to Section 1121(d) of the Bankruptcy Code

97. Section 1121(d) of the Bankruptcy Code permits the Court, on request of a party-in-interest, to reduce or terminate "for cause" the exclusive period during which the Debtors may file a plan of reorganization and solicit acceptances thereof. See In re Murray, 116 B.R. 6, 7 (Bankr. D. Me. 1990).[15]

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[15] The determination of whether "cause" exists to reduce or terminate the Exclusive Periods is based upon the facts and circumstances of each particular case. See Texas Extrusion Corp. v. Lockheed Corp (In re Texas Extrusion Corp.), 844 F.2d 1142, 1160-61 (5th Cir. 1988) (finding no error in bankruptcy court's decision to terminate the initial exclusive periods); In re Crescent Beach, 22 B.R. at 160 (terminating the initial exclusive periods); see also In re Situation Mgmt. Sys., 252 B.R. at 866 (granting committee's motion to terminate the exclusive periods); In re Davis, 262 B.R. 791, 799 (Bankr. Ariz. 2001) (denying debtor's motion to extend the exclusive periods); In re Curry Corp., 148 B.R. 754, 756 (Bankr. S.D.N.Y. 1992) (same); In re All Seasons Indus., Inc., 121 B.R. 1002, 1006 (Bankr. N.D. Ind. 1990) (same).

In determining whether to reduce a debtor's exclusive periods to file and solicit acceptances of a plan, courts have enumerated various factors that should be examined including: (1) the existence of good faith progress toward reorganization; (2) whether the debtor has demonstrated reasonable prospects for filing a viable plan of reorganization; (3) whether the debtor has made progress in negotiating with creditors; and (4) whether the debtor is seeking the extension to pressure creditors. See In re Express One Int'l Inc., 194 B.R. 98, 100 (Bankr. E.D. Tex. 1996); In re Situation Mgmt. Sys., 252 B.R. at 863; In re Texaco Inc., 81 B.R. 806, 812 (Bankr. S.D.N.Y. 1988); In re Dow Corning Corp., 208 B.R. 661, 670 (Bankr. E.D. Mich. 1997) ("[w]hen the Court is determining whether to terminate a debtor's exclusivity, the primary consideration should be whether or not doing so would facilitate moving the case forward. And that is a practical call that can override a mere toting up of the factors.")

98. This Motion has made clear that this is not an ordinary case where the Debtors should receive the benefit of the initial 120-day exclusive period to file a plan. Rather, time is of the essence. On August 31, 2004 (only ninety days into the exclusive period), the Debtors' primary business ends and so does the ability of creditors to recognize any recovery on their claims. Remarkably, despite the gravity of the situation, the Debtors have rejected all offers to salvage a recovery and have not engaged in any discussions with DIRECTV or the Creditors regarding an exit strategy.

99. As the Crescent Beach court implicitly recognized, when time is of the essence and the 120-day exclusivity period is too long, the court has a duty to act swiftly in the best interests of all creditors. In that case, the court terminated the debtor's exclusivity due to the seasonal nature of the debtor's business. In re Crescent Beach Inn, Inc., 22 B.R. 155, 160 (Bankr. D. Me. 1982). Specifically, since the 120-day exclusivity period would not expire until after the end of the debtor's busy season, the court recognized that it was in the best interests of all creditors to terminate exclusivity so that a plan could be promptly filed which would help the debtor operate efficiently through its busy season.

100. Just as the Crescent Beach court did, this Court must act swiftly and decisively in the best interests of all creditors and salvage some value before the Debtors squander what remains. Likewise, the Debtors' business is seasonal to the extent it disappears at the end of the summer. Indeed, an underlying principle of Chapter 11 is to maximize the value of a debtor's estate for the benefit of its creditors. See Toibb v. Radloff (In re Toibb), 501 U.S. 157, 163 (1991); see also Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 351-54 (1985). Chapter 11 should not be used as a shield behind which a debtor may continue to

frustrate its creditors' recoveries and allow a debtor to continue to act in a manner that totally ignores its creditors' interests. See id.

B. The Termination of Exclusivity is Appropriate at this Early Stage of the Debtors' Reorganization Process

101. As the Court might expect, there are not many cases in which exclusivity has been terminated during a debtor's initial exclusive period. However, the fact that this request comes at the early stages of this case should not be determinative of the outcome, especially given the unique facts of this case. The cases in which a court has declined to terminate a debtor's exclusivity during the initial period are readily distinguishable from the case at hand. In those cases, the courts have generally determined that it is too early to conclude that the debtor is unable to file a plan. See, e.g., In re Fisher 70 B.R. 7, 9 (Bankr. S.D. Ohio 1986).

102. However, here it is obvious within only weeks of the petition date, that the Debtors will be unable to propose a viable plan that the Creditors will support. There is no chance that, even if successful, the Cornerstone Litigation will be completed by August 31. And by that time, the Debtors' main asset will be worthless, leaving almost nothing to reorganize. Only by allowing the Creditors to propose a plan now can this Court ensure that the Debtors' estates retain some value. The exigent circumstances of this case clearly favor this request.]

CONCLUSION

For the reasons stated herein, the Creditors respectfully request that this Court enter an Order granting the Motion and such other and further relief as this Court deems appropriate and just.

Dated: July ___, 2004

Respectfully Submitted,

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