Hearing Date: December 16, 2004 at 1:00 p.m. (EST)
Objection Deadline: December 13, 2004 (EST)
PORTLAND

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re:	)	Chapter 11
	)	
PEGASUS SATELLITE TELEVISION, INC., et al.,	)	Case No. 04-20878
	)	
	)	(Jointly Administered)
Debtors.	)	
	)	

OFFICIAL COMMITTEE OF UNSECURED CREDITORS' RESPONSE TO MOTION OF WILMINGTON TRUST COMPANY FOR PARTIAL SUMMARY JUDGMENT

The Official Committee of Unsecured Creditors (the "Committee") of Pegasus Satellite Television, Inc. and its affiliated debtors (collectively, the "Debtors"), by and through its undersigned counsel, hereby submits this Response (the "Response") to the Motion of Wilmington Trust Company (the "Junior Lenders") for Partial Summary Judgment (the "Motion").[1] In support of its Response, the Committee respectfully represents as follows:

PRELIMINARY STATEMENT

1. Throughout the course of these cases, the Secured Lenders have been the only parties in the enviable position of knowing that, under any circumstances, they would be paid in full. Indeed, simultaneous with DIRECTV's notification to the NRTC that it intended to terminate the Member Agreement effective August 31, 2004, DIRECTV conveyed an offer to the Debtors that would guarantee payment in full of all outstanding amounts to the Secured

[1] Terms not otherwise defined herein shall have the meanings ascribed to such terms in the Motion and the Objection. By motion dated December 10, 2004, the Senior Secured Creditors (the "Senior Lenders") joined the Motion. The Senior Lenders and Junior Lenders are referred to collectively herein as the "Secured Lenders."

Lenders. That offer was never revoked and remained open the entire time that that parties were negotiating the settlement agreement pursuant to which the Debtors ultimately sold the majority of their assets to DIRECTV. Capitalizing upon that position of strength, the Secured Lenders made it abundantly clear during the course of negotiations that if the parties did not reach a resolution that fully protected their position in a timely fashion, they would move this Court to force a sale of the Debtors' assets on terms that would ensure their full recovery.

2. Now, the Secured Lenders are seeking to benefit further from their insulated position. Their Motion is a transparent effort to avoid the fact-intensive inquiry that a Court is required to make with respect to prepayment penalties and default interest, and an attempt to preclude the Committee from conducting discovery and proving that the prepayment penalties and default interest sought by the Secured Lenders are inappropriate. The Motion, which relies primarily on irrelevant statements made by the Debtors and the Committee and seeks to misapply the legal doctrines of judicial estoppel and law of the case, fails as a matter of law and fact for a number of reasons.

3. First, as a matter of law, the Junior Lenders entirely misstate the exacting standards for the application of judicial estoppel. The doctrine is extremely rigorous and its application is only appropriate in those rare instances where a party is essentially attempting to defraud a court. The Junior Lenders have not (and cannot) come close to meeting that standard in this case.

4. Second, as a matter of fact, the Junior Lenders cannot satisfy their burden of proving that judicial estoppel is appropriate with respect to the alleged risk of loss faced by the Junior Lenders. The Junior Lenders' Motion is largely devoted to reciting a litany of statements made by various parties to show that the Debtors faced serious risks if they did not enter into the

Global Settlement Agreement. The Motion ignores the fact, however, that while the Debtors and the unsecured creditors did indeed face substantial risks in this matter, the Secured Lenders did not. No other party in this bankruptcy had a safety net that guaranteed that if the parties could not broker the highest and best offer from DIRECTV, they would nevertheless receive a full recovery of amounts due. Accordingly, statements made by the parties with respect to the risks faced by the Debtors cannot be used to preclude the Committee from showing that the Secured Lenders did not face a significant risk of loss.

5. Third, the Junior Lenders' attempt to apply the doctrine of judicial estoppel to the issue of voluntariness likewise fails. The Junior Lenders argue that the sale of the Debtors' assets was voluntary despite specific facts that, during the negotiations related to the Global Settlement, the Secured Lenders took affirmative steps to pressure the parties into an immediate asset sale.

6. Fourth, the doctrine of "law of the case" simply does not apply here. There are no prior rulings of this Court with respect to the issues of risk of loss or voluntariness of the sale that would establish a law of the case appropriate for summary judgment.

7. Finally, the Junior Lenders' argument based on "common sense" is neither legally cognizable nor sustainable in light of the ample disputed facts among the parties. In fact, common sense mandates that the Motion be denied.

I. STATEMENT OF UNDISPUTED FACTS

8. On June 2, 2004, DIRECTV conveyed to the Debtors an offer to purchase substantially all the Debtors' subscribers for approximately $675 per subscriber, or an aggregate of $750 million. This offer, which guaranteed payment of all outstanding amounts to the

Secured Lenders, was never revoked and remained open the entire time that parties were negotiating the Global Agreement. (Committee Rule 56(b) Statement at ¶¶ 2-5).

9. On June 16, 2004 and June 23, 2004, counsel for each of the Committee, the Secured Lenders, and DIRECTV met in order to begin negotiating a settlement with DIRECTV. During these negotiations, DIRECTV presented its prior offer as a starting point for the subsequent negotiations among the Debtors, the Committee, the Secured Lenders and DIRECTV regarding the sale of the Debtors' Satellite Assets. All parties in attendance were aware that the DIRECTV Offer was to serve as a "floor" for the parties' future negotiation of the sale of the Satellite Assets. (Committee Rule 56(b) Statement at ¶¶ 7-13).

10. The Secured Lenders did not participate in the subsequent negotiation sessions among the Debtors, the Committee, and DIRECTV, which led to the Global Settlement, because, since the Senior Lenders were assured of being repaid in full, their participation to the negotiations was unnecessary. As stated in an email dated July 7, 2004 from Mr. Richard Krasnow, counsel to DIRECTV, to Mr. Kristopher Hansen, counsel to the Junior Lenders: "Yes, the lenders were not included in the negotiations between DIRECTV and members of the Committee. I am sure that you agree that, so long as the purchase price that DIRECTV was prepared to pay was sufficient to cover both the senior and junior bank debt, the inclusion of the banks in the negotiation was unnecessary." (Committee Rule 56(b) Statement at ¶ 16).

11. On August 2, 2004, the Debtors issued a press release stating that the Global Settlement had been executed by all parties in interest on July 30, 2004. (Committee Rule 56(b) Statement at ¶ 17). As contemplated by all parties in interest since the inception of these cases, the Global Settlement facilitates a transaction pursuant to which the Secured Lenders were paid in full. (Committee Rule 56(b) Statement at ¶ 21).

12. After the Court entered an order approving the Settlement Motion and the Asset Sale on August 26, 2004, the Asset Sale successfully closed on August 27, 2004 and the Debtors paid all undisputed amounts due to the Junior Lenders on September 17, 2004. (Committee Rule 56(b) Statement at ¶¶ 19-22).

13. Since the inception of these cases, while the Debtors were engaged in pursuing their litigation strategy against DIRECTV and the NRTC, the Secured Lenders, acknowledging that the only way for them to be repaid in full was for the Debtors to sell their Satellite Assets, forced the parties into an immediate sale of the Satellite Assets. As set forth in an email dated June 15, 2004 written by Mr. Hansen, counsel to the Junior Lenders, to Mr. David Botter, counsel to the Committee, the Secured Lenders' goal was clear: "our strategy at this point is to get to DTV asap before the litigation gets out of hand and get them up to a subscriber purchase amount that satisfies your group." (Committee Rule 56(b) Statement at ¶ 24).

14. The Junior Lenders concede that they pressured the Debtors to sell the Satellite Assets, by taking "the lead in the preparation of a comprehensive motion to approve a sale of the Debtors' subscriber base without the Debtors' consent." (Committee Rule 56(b) Statement at ¶ 25). Indeed, the Secured Lenders repeatedly threatened the Debtors and the Committee to file such motion if the Debtors did not acquiesce to their demands to sell the Satellite Assets. On July 7, 2004, Mr. Andrew Rosenberg, counsel to the Senior Lenders, wrote to Mr. Botter: "I have a call into Nyhan [debtors' counsel]. I am planning on telling him that our patience is just about out and he should take the best deal he can and be done." On July 8, 2004, Mr. Hansen wrote to Mr. Botter: "It's obvious that we've got to do a deal ... The banks are all starting to get very nervous and, with the court's comments today, we're getting tremendous pressure to cut a

deal without you and put on the motion or foreclose and sell and force you to explain to the court why you let a good deal pass." (Committee Rule 56(b) Statement at ¶¶ 27-31).

15. Given the uncertainty of the viability of the Debtors's business after August 31, 2004, the Debtors never had a real choice between pursuing their "cornerstone litigation" strategy and agreeing to a sale of their Satellite Assets. As stated by the Committee, "the Global Settlement is the estates' best and only option for maximizing the value of the Debtors' assets and providing guaranteed returns to the unsecured creditor body." Because "Pegasus may lose its ability to distribute DIRECTV programming as of August 31, 2004 ... [it] will result in a precipitous drop in the value of the Debtors' estate." (Committee Rule 56(b) Statement at ¶¶ 33-42).

16. The Debtors also shared the view that the sale of the Satellite Assets was the only possible outcome for the Debtors in these cases. During his closing argument at the Sale Hearing, Mr. Larry Nyhan stated, "[t]he debtors and the committee have done their best to maximize value for these estates under difficult circumstances. And, your Honor, I don't say that by way of an apology. As Mr. Puntus testified unequivocally, we believe that this is an excellent deal. It is the best deal. It is the only deal." (Committee Rule 56(b) Statement at ¶ 67).

17. Finally, as fiduciary for their creditors, the Debtors had no choice but to sell the Satellite Assets to DIRECTV. As the Committee stated in its support for the Sale Motion, when "faced with the August 31st termination date, the sale of the Satellite Assets pursuant to the Global Settlement is the only hope for the distributions to be made to the unsecured creditors of these estates," such that "[t]he Debtors and the Committee have clearly acquitted their fiduciary

duties to their respective stakeholders by entering into the Global Settlement and prosecuting the Motion." (Committee Rule 56(b) Statement at ¶¶ 44-45).

II. PARTIAL SUMMARY JUDGMENT CANNOT BE GRANTED BECAUSE THERE ARE MATERIAL ISSUES OF FACT RELATING TO THE JUNIOR LENDERS' ALLEGED RISK OF LOSS AND THE VOLUNTARY NATURE OF THE SALE OF THE DEBTORS' SATELLITE ASSETS

18. Summary judgment is appropriate only when "there is no genuine issue of material fact" such that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). In determining whether a genuine issue of fact exists, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). The Court should be "mindful that respondents' version of any disputed issue of fact thus is presumed correct." Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 456 (1992). Accordingly, the Committee's burden in responding to the Motion is not to show that it is likely to succeed at trial, but rather only to show that there are genuine, disputed issues of material fact that preclude summary judgment. Under this standard, the Junior Lenders' Motion should be denied.

III. JUDICIAL ESTOPPEL DOES NOT PREVENT THE COMMITTEE FROM ARGUING THAT NO RISK OF LOSS EXISTED AND THAT THE SALE OF THE DEBTORS' SATELLITE ASSETS WAS INVOLUNTARY

(a) The Doctrine of Judicial Estoppel is Inapplicable as a Matter of Law

19. The Junior Lenders' judicial estoppel argument fails as a matter of law and fact. The Junior Lenders' casual discussion of the judicial estoppel doctrine entirely misstates the exacting standards for its application.

20. "The primary concern of the doctrine of judicial estoppel is to protect the integrity of the judicial process." United States v. Levasseur, 846 F.2d 786, 792 (1st Cir. 1988). This

doctrine is intended to prevent a litigant from "summon[ing] the authority of one court to subvert a pact made with another." Id. at 793. While the First Circuit recognizes the doctrine of judicial estoppel in certain limited circumstances,[2] its application requires truly egregious conduct by the party who would be estopped. See Payless v. Alberto Culver Inc., 989 F.2d 570, 571 (1st Cir. 1993) (applying judicial estoppel only after concluding that appellants had engaged in a "palpable fraud that the court will not tolerate, even passively"); InterGen N.V. v. Grina, 344 F.3d 134, 144 (1st Cir. 2003) ("Courts are prone to invoke [judicial estoppel] when a litigant is playing fast and loose with the courts, *and not otherwise*") (emphasis added); Brooks v. Beatty, 25 F.3d 1037 (Table), No. 93-1891, 1994 WL 224160, at *2 (1st Cir. May 27, 1994) ("judicial estoppel should be employed when ... *intentional self-contradiction* is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice") (emphasis added) (citing Patriot Cinemas, 834 F.2d at 212); Levasseur, 846 F.2d at 793 (judicial estoppel appropriate only where a party has attempted to "invoke the authority of one tribunal to override or flout a bargain made with another").

21. The Junior Lenders' attempt to isolate statements made by the Debtors and Committee counsel with respect to risks faced by the Debtors or the voluntariness of the asset sale, and claim that they are inconsistent with the Committee's current position, falls far short of establishing a basis for judicial estoppel. For example, in Payless, the First Circuit held that judicial estoppel precluded a former chapter 11 debtor from maintaining a prepetition cause of action not disclosed in its earlier chapter 11 proceeding:

> Even a cursory examination of the claims shows that defendants should have figured in both aspects of Chapter 11 proceedings, and that Payless could not have thought otherwise. ... The basic principle of bankruptcy is to obtain a discharge from one's creditors in return for all one's assets, except

[2] Some circuits and jurisdictions have never recognized the doctrine of judicial estoppel. See Patriot Cinemas, Inc. v. General Cinema Corp., 834 F.2d 208, 212 (1st Cir. 1987) (collecting cases).

> those exempt, as a result of which creditors release their own claims and the bankrupt can start fresh. Assuming there is validity in Payless' present suit, it has a better plan. Conceal your claims; get rid of your creditors on the cheap, and start over with a bundle of rights. *This is a palpable fraud that the court will not tolerate, even passively. Payless, having obtained judicial relief on the representation that no claims existed, cannot now resurrect them and obtain relief on the opposite basis.*

Payless, 989 F.2d at 571. It is this degree of flagrant misuse of the courts that judicial estoppel is intended to target.

22. It is not enough, as the Junior Lenders claim, for a party to take conflicting positions in different phases of a case. "For the invocation of the doctrine, the two positions must be diametrically opposed." Levasseur, 846 F.2d at 794 (citation omitted). A litigant "must, in effect have made a bargain with the tribunal of the first proceeding by making certain representations to the tribunal in order to obtain a particular benefit from the tribunal." Aguiar v. Interbay Funding, 311 B.R. 129, 136-37 (B.A.P. 1st Cir. 2004) (internal quotations omitted). For purposes of a motion for summary judgment, "conflicting evidentiary signals simply illustrate that the judicial estoppel issue [is] inappropriate for summary disposition under Rule 56." Brooks, 1994 WL 224160, at *3.

23. Judicial estoppel is entirely inappropriate in this matter and the Junior Lenders' Motion should be denied. In the case at hand, the Committee has never "played fast and loose" with this Court, has never used "intentional self-contradiction to obtain unfair advantage," and has never "invoked the authority of one tribunal to override or flout a bargain made with another." To the contrary, as discussed below, statements made by the Debtors and the Committee with respect to the risks facing the Debtors are neither inconsistent with nor change the fact that the Secured Lenders simply were not at risk of non-payment. Likewise, a handful of statements made by the Debtors and the Committee as to their participation in the negotiation of

the Global Settlement, and the reasonableness of that Settlement, certainly do not establish that the process was entirely voluntary. Under these circumstances, the Junior Lenders simply cannot establish that there are no material issues of fact as to whether the Committee previously adopted positions regarding risk of loss and voluntariness that are "diametrically opposed" to the Committee's arguments in its Objection.

(b) Risk of Loss

The Secured Lenders Were Not At Risk Of Non-Payment

24. The Junior Lenders' attempt to impute the Debtors' risk to themselves simply ignores the fact that at all times during the negotiations of the Global Settlement, an offer was on the table from DIRECTV that would have satisfied in whole the Debtors' outstanding obligations to the Secured Lenders. Following the Petition Date, the Junior Lenders' risk of non-payment was virtually non-existent. As described in the Committee's Objection, on or about June 2, 2004, DIRECTV conveyed to the Debtors an offer to purchase substantially all the Debtors' subscribers for approximately $675 per subscriber, or an aggregate of $750 million (the "DIRECTV Offer"). The DIRECTV Offer was conveyed to the Debtors *the same day* they were notified that the NRTC was terminating the Member Agreement effective as of August 31, 2004.

25. It is undisputed that the Junior Lenders were aware of the existence of the DIRECTV Offer, which was publicized in a press release issued by DIRECTV on June 2, 2004 (the "DIRECTV Press Release") (Exhibit A to Committee Objection, Main Case Docket No. 681).[3] It is also undisputed that the Junior Lenders had full knowledge of the subsequent negotiations among the Committee, the Debtors, and DIRECTV, during which the Committee

[3] According to the DIRECTV Press Release, "[u]nder this offer, if Pegasus agrees to transfer its subscribers to DIRECTV . . . [it] can elect to receive a lump sum cash payment of $675 per qualifying transferred subscriber . . . [B]ased on the number of Pegasus subscribers as of March 31, 2004 . . . the maximum aggregate amount payable by DIRECTV under the Pegasus Offer Agreement would be approximately $750 million."

negotiated a *higher* purchase price for the Debtors' Satellite Assets. Again, at no point did DIRECTV ever rescind this offer and the Debtors could have accepted it at any time.

26. Although the DIRECTV Offer initially was rejected by the Debtors, it was never revoked by DIRECTV and remained open throughout the course of the parties' negotiations. On or about June 16, 2004, the Debtors, the Committee, and DIRECTV met to commence their negotiations. The Junior Lenders as well as the Senior Lenders participated in this meeting.[4] During these negotiations, the initial DIRECTV Offer was again presented by DIRECTV and served as a "floor" for the parties' negotiations for the sale of the Satellite Assets. Thus, it was abundantly clear to all parties in interest, including the Junior Lenders, throughout the duration of these cases that, *in a worst case scenario*, the Debtors would receive $675 per subscriber pursuant to the DIRECTV Offer. This amount would have been more than enough to satisfy the Junior Lenders' claims in full.

27. At a hearing held before this Court on June 4, 2004 – merely two days after the Petition Date – counsel to the Junior Lenders, Mr. Kristopher Hansen, clearly acknowledged this point when he stated that "the offers made by DIRECTV for repurchase of subscribers at certain value rates, the purchase that they put out in a press release at this point in time, would repay the senior lenders, *the junior lenders*, and get into the noteholders at this point in time." June 4, 2004 Hearing Transcript, the relevant portions of which are attached hereto as Exhibit A (emphasis added).

28. On June 23, 2004, when the Debtors, the Committee, and DIRECTV met to continue their negotiations, DIRECTV presented to all parties in interest at the meeting a term sheet entitled "DIRECTV Proposed Transaction" pursuant to which DIRECTV detailed its offer to purchase the Satellite Assets for $740 million, an offer that would guaranty the Junior

[4] See Committee Rule 56(b) Statement at ¶¶ 7-8.

Lenders' repayment in full. Again, the Junior Lenders as well as the Senior Lenders participated in such meeting.[5] A copy of the DIRECTV Proposed Transaction is attached hereto as Exhibit B.

29. As the Junior Lenders were well aware, whatever efforts the Debtors and the Committee undertook between June 2, 2004 and July 30, 2004, the date the Global Settlement was executed, to obtain a higher purchase price from DIRECTV for the Satellite Assets, were for the purpose of enhancing the value of the Satellite Assets for the benefit of the *unsecured creditors* in furtherance of the Committee's fiduciary duties to such creditors, and not for the benefit of the Junior Lenders who were already *guaranteed* of being repaid from the inception of these cases.

30. The fact that the Junior Lenders knew there was no risk of non-payment is further evidenced by the fact that the Junior Lenders did not participate in the negotiation sessions among the Debtors, the Committee, and DIRECTV that led to the Global Settlement. Given the DIRECTV Offer, the Junior Lenders were ensured of being repaid the totality of their claims and, therefore, did not *need* to participate in the negotiations with DIRECTV. As stated in an email dated July 7, 2004 from Mr. Richard Krasnow, counsel to DIRECTV, to Mr. Hansen, counsel to the Junior Lenders (which the Junior Lenders attach to their Motion but conveniently truncate in the Motion itself):

> Yes, the lenders were not included in the negotiations between DIRECTV and members of the Committee. *I am sure that you agree that, so long as the purchase price that DIRECTV was prepared to pay was sufficient to cover both the senior and junior bank debt, the inclusion of the banks in the negotiation was unnecessary.*

June 7, 2004, 5:19 p.m. (Exhibit D to the Rule 56(b) Statement of the Junior Lenders) (emphasis added).

[5] See Committee Rule 56(b) Statement at ¶¶ 9-12.

31. The Junior Lenders submit in their Motion that they suffered a risk of loss until September 17, 2004, the date of the Prepayment by the Debtors. In reality, even if a risk of loss ever existed, it was eliminated long before the date of the Prepayment. In the first instance, the Global Settlement was executed by all parties in interest on July 30, 2004, as published by a press release dated August 2, 2004, a copy of which is attached hereto as Exhibit C. The Global Settlement documents a transaction pursuant to which the Secured Lenders were paid in full.

32. Moreover, on August 3, 2004, the Debtors received a letter of credit from DIRECTV that ensured payment of the totality of the purchase price for the Satellite Assets, and thus ensured full payment to the Secured Lenders, as evidenced by an email of Ms. Ellen Moring, counsel to the Debtors, a copy of which is attached hereto as Exhibit D. Finally, the Junior Lenders would have this Court believe that they suffered a risk of loss *even after this Court approved the Global Settlement on August 26, 2004 and after the transaction embodied in the Global Settlement closed on August 27, 2004.*

The Committee's Prior Statements Regarding The Debtors' Plight Are Not Inconsistent With Its Current Position

33. In their Motion, the Junior Lenders rely on comments made by Committee counsel and others to argue that the Debtors' assets in these cases could have lost all their value because of DIRECTV's termination of the Subscriber Agreement. None of these statements, however, change the fact that the DIRECTV Offer alone would have provided the Debtors with enough liquidity to *guarantee* the Junior Lenders repayment in full and that the DIRECTV Offer merely served as a *starting point* for the subsequent negotiations between the Debtors, the Committee, and DIRECTV regarding the sale of the Debtors' Satellite Assets.

34. Under the circumstances, statements related to the risk facing the Debtors' business cannot be used to preclude the Committee from demonstrating that the Secured Lenders

faced no real risk of loss. The Junior Lenders' accusation that the Committee has "espoused positions in complete conflict with the stance they now take in their Objection" is based merely on the Committee's acknowledgment in previous pleadings and during oral arguments that the Debtors' business was in serious trouble at the inception of these cases if no deal was done.

35. The lengthy recitation of statements contained in the Motion does nothing to change the fact that the Secured Lenders faced virtually no risk of non-payment. Was August 31, 2004 a hard deadline? Yes. Did the Debtors face the potential destruction of their business? Yes. Was the Global Settlement that was ultimately reached the best possible recovery for the estates and all creditors? Yes. During the entire process did DIRECTV ever rescind its offer that would have fully satisfied the outstanding obligations to the Secured Lenders? No.

36. In sum, the Junior Lenders have simply not come close to establishing that: (i) there is no genuine issue of material fact as to whether they faced a risk of loss; or (ii) judicial estoppel should apply to prevent the Committee from arguing that the Secured Lenders did not, in fact, face a risk of loss. In actuality, and contrary to the hyperbole contained in the Motion, the facts of these cases demonstrate that the Secured Lenders were *assured* of being repaid in full throughout the entire process.

(c) Voluntary Nature of the Sale

The Secured Lenders Pressured The Parties Into An Immediate Asset Sale

37. For similar reasons, the Junior Lenders cannot sustain their burden of proving that they are entitled to summary judgment with respect to whether the asset sale was voluntary. The Junior Lenders claim that the Debtors voluntarily entered into the Global Settlement, which, consequently, triggered the prepayment penalty provisions, and suggest that this complex issue is one that can and should be resolved on a motion for summary judgment.

38. In this Circuit, however, a determination of whether a liquidation under chapter 11 is voluntary or involuntary is an intensely factual analysis, to be made on a case-by-case basis.

> The question of whether a particular bankruptcy proceeding does or does not result in a "voluntary" or "involuntary" redemption, or whether prepayment premiums generally are enforceable, is not a sterile theoretical analytical activity under the case law. The courts actually engage in a fact-specific inquiry into the particular circumstances surrounding the secured creditor and the debtor in the bankruptcy proceeding involved.

In re Public Serv. Co. of N.H., 114 B.R. 813, 818 (Bankr. D.N.H. 1990). See also In re Cole, 93 B.R. 707, 709 (B.A.P. 9th Cir. 1988) (holding that where a debtor cannot pay its obligations, and ultimately proposes a liquidating chapter 11 plan to satisfy its debts, such payments are involuntary because the debtor is faithfully discharging his duties as a debtor in possession). In this case, considering that the parties have not even begun to produce documents or take depositions, summary judgment on such a highly factual issue would be grossly inappropriate.

39. Public Serv. Co. of N.H. dictates that the asset sale in this case cannot be considered voluntary, and prepayment penalties are inappropriate. In Public Serv. Co. of N.H., the court determined that the lenders, in their capacity as indenture trustee, waived their right to any prepayment penalty by making repeated demands in a company's Chapter 11 proceeding for acceleration and immediate payments. In re Public Serv. Co. of N.H., 114 B.R. 813, 818-819 (Bankr. D.N.H. 1990). While the Secured Lenders in this case may not have publicly demanded payment of the Loans, outside of the courthouse they repeatedly demanded that the Debtors abandon their litigation strategy against DIRECTV and sell the Satellite Assets. The Secured Lenders should not be rewarded for their behind-the-scenes pressure tactics, described below.

40. As this Court is aware, immediately following the Petition Date, the Debtors were engaged in pursuing their litigation strategy against DIRECTV and the NRTC and were focused

on moving their "cornerstone litigation" forward. On June 4, 2004, Mr. Larry Nyhan, counsel to the Debtors, stated that the "debtor is ... interested in moving the litigation forward." June 4, 2004 Hearing Transcript (See Exhibit A to the Response). The Junior Lenders, on the other hand, intended to force the Debtors into an immediate sale of the Satellite Assets. Although the Junior Lenders never made any demands *before this Court,* they unquestionably pressured the parties to sell the Satellite Assets.

41. As set forth in an email dated June 15, 2004 written by Mr. Hansen, counsel to the Junior Lenders, to Mr. David Botter, counsel to the Committee, the Junior Lenders' goal was clear:

> I think our strategy at this point is to get to DTV asap before the litigation gets out of hand and get them up to a subscriber purchase amount that satisfies your group.

June 15, 2004, 9:35 a.m. (See Exhibit E to the Response).

42. In their motion seeking payment of prepayment penalties and default interest, the Junior Lenders concede that they pressured the Debtors to sell the Satellite Assets, noting that "Wilmington Trust and the senior secured lenders . . . voiced their concerns to the Committee, and, with less than a month left before the August 31, 2004 termination of the Member Agreements . . . *took the lead* in the preparation of a comprehensive motion to approve a sale of the Debtors' subscriber base without the Debtors' consent."[6]

43. Significantly, the Junior Lenders were prepared to submit to this Court, without the Debtors' consent, a Joint Motion of the Secured Lenders, the Official Committee of Unsecured Creditors[7] [and DIRECTV] to: (I) Approve Settlement With DIRECTV and NRTC and Compel the Sale of the Debtors' Subscribers to DIRECTV, Subject to Higher and Better Offers; or, in the Alternative; (II) Appoint a Limited Purpose Trustee to Advance the Settlement

[6] Junior Lenders' Motion Seeking Payment of Prepayment Penalties and Default Interest, at 5 (emphasis added).
[7] The Secured Lenders were prepared to file this motion without the participation of the Committee, if necessary.

and Subscriber Sale; (III) Permit the Secured Lenders to Exercise Remedies With Respect to Their Collateral; or (IV) Terminate the Exclusive Periods Within Which Only the Debtors May File a Plan of Reorganization and Solicit Acceptances Thereto (the "Forced Sale/Trustee Motion").

44. Contrary to the Junior Lenders' claim that the Global Settlement was entirely voluntary, the Junior Lenders repeatedly threatened to file the Forced Sale/Trustee Motion if the Debtors did not acquiesce to their demands to sell the Satellite Assets.

45. As written by Mr. Hansen to Mr. Botter in an email dated July 1, 2004, if the negotiations between the Committee and the Debtors did not result in a sale of the Satellite Assets, the Junior Lenders' strategy was to file the Forced Sale/Trustee Motion:

> We expect a "NO" or "let's think about this" response from the Company [to the proposal of a sale of the Satellite Assets to DIRECTV], neither of which is acceptable as we need the train out of the station. As discussed the other day, Andy [Rosenberg, counsel to the Senior Lenders] and I would like to file papers [the Forced Sale/Trustee Motion] by the middle of next week. If you get "let's think about this" response today, *the filing just pressures them to think faster.*

July 1, 2004, 11:08 a.m. (See Exhibit F to the Response) (emphasis added).

46. On July 7, 2004, Mr. Rosenberg wrote to Mr. Botter:

> As to the Debtors, if directv says no to a chapter 11 plan, *I think they will need the pressure of pleadings and hearing date to convince them to cut the best deal they can and run.*

July 7, 2004, 6:32 p.m. (See Exhibit G to the Response) (emphasis added).

47. On July 7, 2004, Mr. Rosenberg again wrote to Mr. Botter:

> I have a call into Nyhan [debtors' counsel]. I am planning on telling him that *our patience is just about out and he should take the best deal he can and be done.*

July 7, 2004, 5:29 p.m. (See Exhibit G to the Response) (emphasis added).

48. On July 8, 2004, Mr. Rosenberg wrote to Mr. Botter:

> Game, set, match to directv. *It is time to finish with directv.* This judge will not let the debtor blow up a sale.

July 8, 2004, 11:20 a.m. (See Exhibit H to the Response) (emphasis added).

49. On July 8, 2004, Mr. Hansen stated to Mr. Botter:

> It's obvious that we've got to do a deal b/c the judge keeps dropping the value of the litigation/your primary leverage. We know that you've got the basic deal leverage of being able to deliver the subs too, but that's also eroding with time. *The banks are all starting to get very nervous and, with the court's comments today, we're getting tremendous pressure to cut a deal without you and put on the motion or foreclose and sell and force you to explain to the court why you let a good deal pass.* Ordinarily, I wouldn't think that we could get anything of such magnitude done without you, but the ice cube is getting very watery and we think that the court, at this point, will take anything that salvages something.

July 8, 2004, 6:31 p.m. (See Exhibit I to the Response) (emphasis added).

50. Given the circumstances facing the company, it should come as no surprise that the Junior Lenders' goal was to force a sale of the Debtors' Satellite Assets for an amount that would satisfy their claims. To that end, the Junior Lenders had the Forced Sale/Trustee Motion ready to be filed. As reflected by Mr. Hansen's email to Mr. Botter on June 25, 2004, the Junior Lenders had a draft of the Forced Sale/Trustee Motion ready as early as June 25, 2004.[8] The fact that the Forced Sale/Trustee Motion was never filed is irrelevant to this inquiry. The Junior Lenders made it clear that they would file the Forced Sale/Trustee Motion at any point they felt it was necessary.

51. As a consequence of the involuntary nature of the sale, the Secured Lenders are deemed to have waived their rights to the prepayment penalties. See In re Duralite Truck Body & Container Corp., 153 B.R. 708, 715 (Bankr. D. Md. 1993) ("Where the lender has exercised its option to accelerate upon default, the economic justification for prepayment premium as alternative performance of the bargained loan is negated"); see also Planvest Equity Income

[8] See email of Mr. Hansen to Mr. Botter dated June 25, 2004, 7:48 p.m. (Exhibit J to the Response) ("We've got a draft of the papers ready").

Partners IV, 94 B.R. 644, 645 (Bankr. D. Ariz. 1988) ("the argument that [the secured creditor] would be entitled to the prepayment penalty in a liquidation is not persuasive because payment of the debt resulting from liquidation would not constitute a voluntary prepayment").

The Committee's Prior Statements Regarding The Global Settlement Are Not Inconsistent With Its Present Position

52. In their Motion, the Junior Lenders once again cite a handful of prior statements made by Committee counsel in an attempt to construe the Committee's current position regarding the involuntary nature of the Global Settlement as somehow inconsistent with those prior statements. Despite the Junior Lenders' assertions, the Committee has made the same argument throughout these cases. The Committee's description of the Global Settlement at various points in time as "justified," as a "good opportunity," or as the "result of lengthy negotiations," however, is not inconsistent with the positions taken in the Objection, and does not negate the pressure tactics used by the Junior Lenders, described above. The Committee submits that the Debtors never had a real choice between pursuing their "cornerstone litigation" strategy and agreeing to a sale of their Satellite Assets. The Debtors were forced to liquidate their Satellite Assets, as fiduciaries to their creditors. As such, their agreement to the sale was not fully voluntary.

53. The prior positions taken by the Committee and the Debtors are entirely consistent with the Committee's current position. As stated in the Committee Support Motion, "[i]n light of the facts and circumstances of these cases, the pursuit of the highest and guaranteed return provided by the Global Settlement *is the most appropriate exercise of the Debtors' and Committee's fiduciary duties*. Any other action would be an abrogation of such duties." Comm. Support Motion, Main Case Docket No. 453, ¶ 2 (emphasis added).

54. The Committee stated further, "[s]ignificantly, faced with the August 31st termination date, the sale of the Satellite Assets pursuant to the Global Settlement *is the only hope for the distributions to be made to the unsecured creditors of these estates*." Id. at ¶ 68 (emphasis added). Thus, "[t]he Debtors and the Committee have clearly acquitted their fiduciary duties to their respective stakeholders by entering into the Global Settlement and prosecuting the Motion." Id. at ¶ 84.

55. The Debtors also shared the view that the sale of the Satellite Assets was the only possible outcome for the Debtors in these cases. During closing arguments at the Sale Hearing Mr. Nyhan stated, "[t]he debtors and the committee have done their best to maximize value for these estates under difficult circumstances. And, your Honor, I don't say that by way of an apology. As Mr. Puntus testified unequivocally, we believe that this is an excellent deal. *It is the best deal. It is the only deal.*" Sale Hrg. Tr., Day Two, Main Case Docket No. 655, at 79 (emphasis added).

56. This Court stated, "I think it would – it would be expecting too much and *completely unrealistic* to see how beyond August 31st in the absence of some arrangement with DIRECTV the value of the subscriber base could be preserved and marketed over time, and again, I'm satisfied that within those time constraints whether or not the signal was going to be cut off, the creditors committee and – did a real admirable job in marketing those assets and trying to *get the best deal they could*." Id. at 93 (emphasis added).

57. As established by the statements cited above, the Debtors and the Committee felt they had no choice but to accept this deal. As such, the Junior Lenders' argument that certain statements made by the parties should preclude the Committee from arguing that the sale was not wholly voluntary simply does not hold water. At a minimum, the issue of whether the sale of the

Satellite Assets and the resulting prepayment of the Loans was voluntary is a highly factual inquiry that is unsuitable for disposition on summary judgment. Given the substantial pressure applied by the Secured Lenders to ensure a sale in this case, the Junior Lenders' Motion should be denied.

IV. THE LAW OF THE CASE DOES NOT ESTABLISH THAT THERE WAS A LEGITIMATE RISK OF LOSS OR THAT THE SALE OF THE DEBTORS' SATELLITE ASSETS WAS VOLUNTARY

58. The Junior Lenders cannot establish that the law of the case doctrine should apply to the issues of risk of loss or voluntariness of the Global Settlement. The Junior Lenders distort the requirements of this narrowly-tailored doctrine, stating conclusively that it applies based on a few isolated statements made by this Court. The law of the case doctrine simply does not apply here because this Court has never made a *ruling* that the Secured Lenders faced a significant risk of loss or that the sale of the Debtors' Satellite Assets was purely voluntary.

59. As an initial matter, "the law of the case doctrine only directs [a court's] discretion; it does not limit [its] power." A.M. Capen's Co. v. America Trading and Prod. Corp., 202 F.3d 469, 472 (1st Cir. 2000). While law of the case "precludes relitigation of the legal issues presented in successive stages of a single case *once those issues have been decided*, ... [t]he doctrine does not bar litigation of *all questions which were within the issues of the case* and which, therefore, might have been decided." Field v. Mans, 157 F.3d 35, 40 (1st Cir. 1998) (emphasis added). Furthermore, "in this circuit, the law of the case doctrine has not been construed as an inflexible straitjacket that invariably requires rigid compliance with the terms of the mandate." Bethlehem Steel Export Corp. v. Redondo Constr. Corp., 140 F.3d 319, 321 (1st Cir. 1998).

60. In this instance, the law of the case doctrine does not apply because this Court has simply not ruled on the specific questions at issue. The Court's approval of the Global Settlement as "fair and reasonable" certainly does not equate to a decision that either: (i) the Secured Lenders faced a significant risk of loss; or (ii) the Secured Lenders did not forcefully steer the Debtors to sell the Satellite Assets. Even if these issues are related to the Court's approval of the Global Settlement, "the [law of the case] doctrine does not bar litigation of *all questions which were within the issues of the case.*" Field, 157 F.3d at 40 (emphasis added).

61. As such, and as set forth in full above, the Secured Lenders' risk of loss and the voluntariness of the sale of the Satellite Assets are issues that are entirely inappropriate for summary judgment.

The Junior Lenders' "Common Sense" Argument Is Neither Legally Cognizable Nor Factually Sutainable

62. The Junior Lenders' "common sense" argument does not alter the conclusion that summary judgment is inappropriate here. The Committee has yet to uncover a case in which common sense was cited as a supporting legal doctrine, nor do the Junior Lenders offer any legal authority for this argument. True common sense, as set forth by the Supreme Court, dictates that the Committee's version of any disputed issue of fact is presumed correct. See Eastman Kodak, 504 U.S. at 456. In light of the Committee's extensive factual support for their arguments that (i) the Secured Lenders did not, in fact, face a risk of loss, and (ii) the Secured Lenders steered these cases to a forced sale, the Junior Lenders' Motion must be denied.

CONCLUSION

For all of the reasons set forth herein, the Committee respectfully requests that this Court (a) deny the Motion in its entirety, and (b) grant such other relief as the Court deems just, equitable, and proper.

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