IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
FLUID MARKET, INC., *et al.*,[1]	)	Case No. 24-12363 (CTG)
	)	
Debtors.	)	(Jointly Administered)
	)	
	)	**Re: Docket No. 216**
	)	

OPPOSITION TO EMERGENCY MOTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS FOR AN ORDER EXTENDING THE CHALLENGE PERIOD

This opposition is filed jointly by the Lenders[2] to the *Emergency Motion of the Official Committee of Unsecured Creditors for an Order Extending the Challenge Period* [ECF No. 216] (the "Motion") filed by the creditors committee (the "Committee").

PRELIMINARY STATEMENT

1. The Court should not extend the challenge period because the Kingbee production – the only production the Committee asserts is untimely – is largely immaterial under the circumstances as Kingbee had only minimal prepetition involvement with the Debtors, consisting solely of providing a small portion of the emergency financing extended to the Debtors shortly before the bankruptcy filing to avoid liquidation. All Lenders other than Kingbee made timely and fulsome productions, and these Lenders' productions significantly overlap the Kingbee production.

2. Notwithstanding these substantial productions from the Lenders, the only claims the Committee has identified are simply not colorable and the Committee's unsupported statement

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Fluid Market, Inc. (1365) and Fluid Fleet Services, LLC (5994). The Debtors' service address is 3827 Lafayette Street, Suite 149, Denver, Colorado 80205.

[2] The "Lenders" are Bison Capital Partners V, L.P., Bison Capital Partners V-A, L.P. Ingka Investments Ventures US BV, Kingbee Rentals, LLC and Goldman Sachs Bank USA (as the Carbon Fleet Lender Representative).

that it "believes" a *Caremark* claim exists falls far short of justifying an extension of the challenge period that would threaten the only sale transaction available to the Debtors. Indeed, the requested extension of the challenge period to January 7, 2025 would create an additional need for funding that the Debtors do not currently have and this Court has not approved – the Committee's Motion ignores this fundamental reality entirely. The Motion should be denied.

DISCUSSION

3. Kingbee's most important role in this case is as the proposed (and only known) purchaser of substantially all of Fluid's assets, and post-transition servicer for participating vehicle owners (FVIPs and Carbon Fleet). Absent a sale to Kingbee the outcome for all creditors is beyond bleak: these cases will convert to chapter 7 and Debtors' fleets will be liquidated piecemeal at a cost that could exceed recoveries. There is no alternative purchaser for the business, and no alternative servicer for trucks currently on the Fluid platform. The Committee makes no suggestion and offers no evidence to the contrary. And, a significant number of FVIPs have signed new agreements with Kingbee that would be effective if the sale were approved, and therefore are supportive of the sale. This makes it all the more puzzling that the Committee's focus is on Kingbee's production of documents. That focus causes the Committee to completely gloss over the fulsome, timely and complete production by Bison and Ingka (together, "Bison") and Goldman Sachs ("GS"), the primary pre-petition lenders to the Debtors. Notwithstanding all that is available to it, the Committee fails to identify what it has seen to date that justifies an extension of the challenge period on account of Kingbee's production lagging that of the other Lenders. Consider the following:

- Kingbee's involvement with the Debtors, in connection with the transaction, as confirmed via their documents, began shortly before the petition date, and merely as an emergency lender right before the bankruptcy filing confirming the window of time is narrow;

- Kingbee was not at all involved in the ownership or management of the Debtors pre-petition; Kingbee's involvement consisted of being one of the prepetition lenders under the prepetition bridge loan made two weeks before the bankruptcy filing. Its production is not likely to lead to probative evidence of any affirmative estate claims;
- Kingbee's production consisted almost entirely of emails, many of which were duplicative of emails *timely* produced by Bison;
- Kingbee holds only a sliver of the pre-petition loan (7.5%) and the DIP loan (9.4%). Its key role here is as a buyer and post-transition servicer more than anything else; and

4. Nowhere does the Motion discuss what the Committee does have available to it, or whether the Committee has reviewed and analyzed it. Bison, for example, immediately met and conferred with the Committee regarding the nearly 50 document requests served with less than one week's response time, promptly agreed on discovery parameters, and made a comprehensive production to the Committee on the morning of November 27 in line with those parameters. Bison later offered to make witnesses available for deposition – an offer the Committee never took them up on. Indeed, the Committee failed to notice a single deposition.

5. Similarly, GS immediately cooperated with the Committee to satisfy the discovery requests. GS made an initial production consisting of 179 documents from the Fluid "deal file" on November 25. GS followed with a comprehensive second production of 1,476 emails and documents, including 6,182 pages and 116 native files, in accordance with the discovery parameters on November 27. In an abundance of caution to ensure it fully met each discovery request, GS also made a third production – a single, one page loan statement — on December 2.

6. Putting Kingbee aside, the Committee does not explain why the challenge period should be extended for Bison and GS. As to Bison, the Committee suggests that (a) *Caremark* claims might exist, and (b) Bison's role in the Kingbee transaction was improper. Aside from

being completely unsupported with any evidence notwithstanding the substantial productions provided by Bison and GS, the Committee overlooks two important points regarding this hypothetical claim.

7. First, courts have recognized *Caremark* liability for a director's failure to exercise proper supervisory authority as "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment." *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 967 (Del. Ch. 1996). Indeed, Delaware courts have made clear that "[w]hether a judge, or jury considering the matter after the fact, believes a decision substantively wrong, or degrees of wrong extending through 'stupid' to 'egregious' or 'irrational', provides no grounds for director liability[.]" *Id.*

8. Instead, to state a *Caremark* claim, the plaintiff must allege that (a) the Board utterly failed to implement any controls to prevent the alleged wrongdoing, or (b) the Board's response to the wrongdoing was one of "conscious inaction" and not a rational attempt to advance the company's interests. Having been provided the benefit of tens of thousands of pages of discovery, based on agreed custodians, timeline, and search terms, and the opportunity to depose any individual they wished, all the Committee musters in their Motion is the conclusory statement that colorable *Caremark* claims exist. Even if the bar were set low (which it is not), the Committee fails to clear it. The Committee does not show they can even come close to meeting Delaware law's exacting standard to state this claim, which they obviously would need to satisfy to obtain standing. *See, Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004). *See also, In re Decurtis Holdings LLC*, No. 23-10548 (JKS), 2023 WL 5274925, at *4 (Bankr. D. Del. Aug. 14, 2023) (holding that "[d]erivative standing requires the moving party to demonstrate that . . . the moving party has alleged a colorable claim or cause of action . . . ." and denying standing for failure to demonstrate a colorable claim).

9. If *Caremark* means anything, it is that the Committee must come up with something, even at this early stage, suggesting liability. Here, the Committee has not disclosed

anything, yet seeks to completely derail these chapter 11 cases based entirely on its unjustified speculation.

10. Second, the claims of breach of fiduciary duty related to the Kingbee transaction fail as a matter of basic corporate governance. It was the independent director and the CRO who oversaw the sale process and handled decision-making regarding the Kingbee transaction. Bison only stepped forward when it became clear that Kingbee would need additional financial support to consummate a transaction. No one is arguing that Bison failed to disclose its involvement or acted simultaneously on behalf of Kingbee and the Debtors in connection with the sale. To the contrary, the fact of Bison's involvement with Kingbee was disclosed and known prior to the petition date, was front and center at the first day hearings, and has been discussed in open court in connection with the second day hearings.

11. Separately, the Committee's alleged claim challenging the perfection of the Lenders' liens on the Debtors' bank accounts fall flat and is a mere distraction. Even assuming the Lenders' liens in such accounts were not perfected prepetition, such liens are perfected pursuant to the terms of the DIP orders (to the extent the funds in such accounts are estate property). Because the amount of the new money DIP loan is more than four times the prepetition loan ($5.73 million and $1.26 million, respectively), and any recovery from a potential successful challenge may be available only if the DIP loan is paid in full, such accounts as perfected collateral of the DIP loan would be used to satisfy the DIP loan and would not be available for unsecured creditors.

12. Finally, the Committee's request to extend the challenge period to January 7, 2025 entirely ignores the fact that such an extension would delay the sale closing and thus create an additional need for funding in the interim, which the Debtors do not have and this Court has not approved.

In sum, because the Committee fails to (a) identify any colorable claims notwithstanding the significant discovery already received, or (b) any true inability to investigate Bison, GS, or Kingbee in light of the productions the Committee received, the Motion should be denied.

Dated: December 13, 2024
Wilmington, Delaware

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