

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

In re

HELIOS AND MATHESON ANALYTICS, INC.,  
*et al.*,

Debtors.

Case No. 20-10242-dsj  
Chapter 7

**REPLY BY SILVER CINEMAS ACQUISITION COMPANY D/B/A LANDMARK  
THEATRES IN FURTHER SUPPORT OF ITS PROOF OF CLAIM**

Silver Cinemas Acquisition Company, doing business as Landmark Theatres (“Landmark” or “Exhibitor”), by its undersigned counsel, respectfully submits this Reply in further support of its Proof of Claim and in opposition to the Trustee’s Objection thereto. Landmark’s facts are set forth below, in the accompanying Affidavit of Steven M. Cherniak (the “Cherniak Aff.”),<sup>1</sup> and in its Proof of Claim (Cherniak Aff. Ex. “A”), and Landmark hereby states as follows:

1. As conceded by the Trustee, Landmark admittedly is entitled to allowance of the sum of \$1,317,677.35 pursuant to Paragraph “3.2” of the MoviePass Exhibitor Agreement, dated as of March 21, 2018 (the “Agreement”; Cherniak Aff. Ex. “B”) for tickets purchased by MoviePass and/or its customers for movies shown in Landmark theaters, in connection with Landmark’s Proof of Claim (Cherniak Aff. Ex. “A”).

2. The scope of the Trustee’s Objection is limited to Landmark’s additional claim for \$15,585,212.00 under Paragraph “3.4” of the Agreement, representing the “Renewal Term Minimum Sales” due under that provision. The Trustee does not dispute the computation of the

---

<sup>1</sup> All capitalized terms used herein shall have the meaning ascribed to them in the accompanying Cherniak Affidavit.



Renewal Term Minimum Sales amount, as set forth in Landmark's Proof of Claim (Cherniak Aff. Ex. "A"), and instead contends that allowing Landmark's claim under Paragraph "3.4" of the Agreement would amount to an "exorbitant" penalty.

3. However, Paragraph "3.4" of the Agreement is a proper liquidated damages clause, *not* an unenforceable penalty provision. MoviePass negotiated for, and obtained, the benefit of using Landmark's intellectual property, branding, and goodwill to promote its own subscription sales to movie theater customers. Landmark further agreed to grant MoviePass the *exclusive* right to provide paid subscription services to Landmark's customers, who in turn could buy movie tickets at Landmark theaters at a significant discount. In exchange, MoviePass was obligated to reimburse Landmark for the purchased tickets, albeit at a 20% reduction (with certain adjustments not relevant here), and MoviePass also agreed to purchase a minimum number of tickets during each renewal term of the Agreement.

4. In short, Paragraph "3.4" simply ensured that if the minimum number of tickets was not sold during any particular renewal term, then MoviePass would make up the shortfall. And the computation of the "Renewal Term Minimum Sales", in turn, was based upon an annualized average of the four months of sales prior to the renewal term, and thus was a reasonable estimate of the *minimum* value of the Agreement, as renewed, to Landmark.

5. Moreover, at the time of entering into the Agreement, it would have been all but impossible to estimate the actual damages to Landmark in the event of a breach by MoviePass, given the difficulty in calculating how many tickets should have been purchased by MoviePass subscribers in any given period of time, and therefore, it was reasonable for the parties to negotiate the Renewal Term Minimum Sales provision in Paragraph "3.4" to fix what those damages would be if MoviePass failed to perform (as it subsequently did).

6. Accordingly, Landmark's Proof of Claim should be allowed in its entirety.

### FACTUAL BACKGROUND

7. Landmark and MoviePass are parties to a MoviePass Exhibitor Agreement, dated as of March 21, 2018 (the "Agreement"; Cherniak Aff. Ex. "B"), between Silver Cinemas Acquisition Company d/b/a Landmark Theatres ("Landmark" or "Exhibitor") as exhibitor, and MoviePass, Inc. ("MoviePass"). Cherniak Aff. ¶ 8.

8. As set forth in the recitals to the Agreement, MoviePass was "a theatrical movie subscription service which allows subscribers to attend a movie a day in theaters nationwide for a fixed fee and enables theatrical movie exhibitors to increase movie attendance and concession revenue[.]" Agreement (Cherniak Aff. Ex. "B") at p. 1. Under the Agreement, Landmark agreed to "permit MoviePass and/or its Customers to purchase tickets from Exhibitor via the MoviePass Service for movies playing at any of Exhibitor's Theaters at the price of the ticket's face value minus twenty (20%) percent...", *id.* at ¶ 3.1, subject to theater-level or day-specific discounts, but such that the overall average discount would always equal 20% (*id.*).

9. Pursuant to Paragraph "3.2" of the Agreement, "MoviePass shall pay Exhibitor for all tickets purchased by MoviePass and/or its Customers via the MoviePass Service for movies shown in Exhibitor's Theaters during each fourteen (14) day period during the Term..." *Id.*

10. The initial term of the Agreement was for an eight (8) month period. *Id.* at ¶ 7.1. Under Paragraph "7.2" of the Agreement, "[t]his Agreement shall automatically renew for successive one (1) year terms from the last day of the then in-effect term (each a '**Renewal Term**') unless Exhibitor provides notice to MoviePass at least thirty (30) days before the

expiration of the then in-effect term that it does not wish to renew the Agreement, or as otherwise terminated consistent with this Agreement.”

11. Under Paragraph “6.1”, Landmark agreed to “use commercially reasonable efforts to promote the MoviePass Service to customers of Exhibitor’s Theaters at its own expense.”

Under Paragraph “8”, Landmark agreed that it “shall not, and shall not authorize any third parties to, without limitation, develop, market, distribute, sell or otherwise commercialize or use a service that competes directly with the MoviePass Service, namely, a theatrical movie subscription service.”

12. Landmark agreed to these provisions, and agreed to renew the Agreement, because MoviePass, in turn, agreed to purchase a fixed minimum value of tickets during each term of the Agreement, thus providing Landmark with what it believed would be some measure of financial stability. Cherniak Aff. ¶ 13.

13. Specifically, during the Initial Term, the parties agreed that MoviePass would purchase at least \$1.6 million worth of Landmark tickets (the “Minimum Sales”), failing which MoviePass would pay Landmark “the difference between the actual sales and the Minimum Sales within ninety (90) days of the end of the Initial Term. Notwithstanding the foregoing, if Exhibitor terminates this Agreement prior to the expiration of the Initial Term, then MoviePass shall not be obligated to meet the Minimum Sales requirement in this Section.” Agreement (Cherniak Aff. Ex. “B”), at ¶ 3.3. The parties further agreed that the Minimum Sales guaranty would be adjusted on a pro rata basis if Landmark opened or closed theaters, thus increasing or decreasing overall attendance at its theaters. *Id.*

14. Paragraph “3.4” of the Agreement—the subject of the Trustee’s dispute—states in pertinent part as follows:

Should this Agreement renew for one-year periods following the Initial Term, according to the terms of this Agreement, MoviePass will endeavor to purchase, or have its Customers purchase, a minimum amount of dollars (\$) worth of tickets through the MoviePass Service for movies shown in Exhibitor's Theaters (**'Renewal Term Minimum Sales'**) for each such year-long Renewal Term following the Initial Term, calculated as follows: Each Renewal Term Minimum Sales amount shall equal the annualized amount of the monthly average of actual sales for the final four months of the prior Term period (i.e., the last four months of the Initial Term, and subsequently, the last four months of any subsequent year-long Renewal Terms). ***In the event that such Minimum Sales are not met, then MoviePass shall pay Exhibitor the difference between the actual sales and the Renewal Term Minimum Sales within ninety (90) days of the end of each such year-long Renewal Term.*** Notwithstanding the foregoing, if Exhibitor terminates this Agreement prior to the expiration of any such Renewal Term, then MoviePass shall only be obligated to meet a pro-rate, per-month Renewal Term Minimum Sales requirement....

Agreement (Cherniak Aff. Ex. "B"), at ¶ 3.4 (emphasis added).

15. It is undisputed that the final Renewal Term of the subject Agreement began in or around December 1, 2018 and expired in or around November 30, 2019. Cherniak Aff. ¶ 16.

16. As set forth in the Proof of Claim and in the schedule annexed to the Trustee's Objection, MoviePass defaulted in payment under the Agreement during the Renewal Term by failing to reimburse Landmark for tickets purchased by customers through the MoviePass service. Cherniak Aff. ¶ 17 & Ex. "A" thereto. MoviePass ceased all business operations in or around September 2019, *see* Trustee's Objection at ¶ 10, and MoviePass filed a chapter 7 bankruptcy petition on January 28, 2020.

17. Landmark timely filed its Proof of Claim (Cherniak Aff. Ex. “A”) as a general unsecured claim for \$16,902,889.35.

18. As set forth in the Proof of Claim, Landmark’s damages consist of two components. *First*, MoviePass failed to pay Landmark the sum of \$1,317,677.35 for tickets purchased by MoviePass and/or its customers for movies shown in Landmark’s theaters during the Renewal Term, as required under Paragraph “3.2” of the Agreement. Cherniak Aff. ¶ 19; *see* Proof of Claim (Cherniak Aff. Ex. “A”) at ¶ 3(a). *Second*, MoviePass owed Landmark liquidated damages in the amount of \$15,585,212.00 under Paragraph “3.4” of the Agreement. Cherniak Aff. ¶ 19; *see* Proof of Claim (Cherniak Aff. Ex. “A”) at ¶ 3(b).

19. Specifically, and as stated in the Proof of Claim:

Under Article 3.4 of the parties’ Agreement, there is currently due and owing from MoviePass to Exhibitor the sum of \$15,858,212.00, representing the Renewal Term Minimum Sales amount. The annualized amount of the monthly average of actual sales for the final four months of the initial term was \$1,921,568.00 for August 2018, \$1,376,249.00 for September 2018, \$1,116,499.00 for October 2018, and \$965,999.00 for November 2018, for a total of \$5,380,316.00, or, a monthly average of \$1,345,079.00, and an annualized minimum amount of \$16,140,947.00. Under Paragraph 3.4, MoviePass is obligated to pay Exhibitor the difference between the actual sales, which totaled \$555,735.00, and the Renewal Term Minimum [Sales] [a]mount of \$16,140,947.00, or \$15,585,212.00 (i.e., \$16,140,947.00 minus \$555,735.00), the shortfall from the minimum guarantee.

*Id.* (Cherniak Aff. Ex. “A”) at ¶ 3(b).

20. The Trustee’s Objection concedes the validity of Landmark’s claim under Paragraph “3.2”, and with respect to the claim under Paragraph “3.4”, the Trustee’s Objection does not dispute that the claim amount is properly computed under the terms of the Agreement.

Instead, the Trustee's Objection contends that Paragraph "3.4" should not be enforced and/or that Landmark's claim should be subordinated below claims of other general unsecured creditors because the damages under that Paragraph supposedly are in the nature of a "penalty".

**PARAGRAPH "3.4" IS A PROPER LIQUIDATED DAMAGES PROVISION, NOT AN UNENFORCEABLE PENALTY**

21. "Liquidated damages are 'an estimate, made by the parties at the time they enter into their agreement, of the extent of the injury that would be sustained as a result of breach of the agreement....A contractual provision fixing damages in the event of breach will be sustained if the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation.'" *Honeywell Int'l Inc. v. Northshore Power Systems, LLC*, 32 Misc.3d 1223(A), \*6 (N.Y. Sup. Ct., N.Y. Co. 2011) (quoting *Truck Rent-A-Center, Inc. v. Puritan Farms 2<sup>nd</sup>, Inc.*, 41 N.Y.2d 420, 424-25 (1977)), *aff'd*, 96 A.D.3d 581 (1<sup>st</sup> Dep't 2012). "As a general matter, 'parties are free to agree to a liquidated damages clause provided that the clause is neither unconscionable nor contrary to public policy[.]'" *Trustees of Columbia University in City of New York v. D'Agostino Supermarkets, Inc.*, 36 N.Y.3d 69, 71 (2020), quoting *172 Van Duzer Realty Corp. v. Globe Alumni Student Assistance Association, Inc.*, 24 N.Y.3d 528, 536 (2014) (internal quotation marks and citations omitted).

22. Whether a provision "represents an enforceable liquidation of damages or an unenforceable penalty is a question of law, giving due consideration to the nature of the contract and the circumstances....The burden is on the party seeking to avoid liquidated damages...to show that the stated liquidated damages are, in fact, a penalty[.]" *JMD Holding Corp. v. Congress Financial Corp.*, 4 N.Y.3d 373, 379-80 (2005) (citations omitted). "Absent some element of fraud, exploitive over-reaching or unconscionable conduct...to exploit a technical breach, there is no warrant, either in law or in equity, for a court to refuse enforcement of the

agreement of the parties[.]” *Fifty States Mgt. Corp. v. Pioneer Auto Parks*, 46 N.Y.2d 573, 577 (1979).

23. As noted above, Paragraph “3.4” is a classic liquidated damages provision for two reasons.

24. *First*, at the time of negotiating the Agreement, it would have been all but impossible to ascertain Landmark’s damages in the event of default by MoviePass. Such damages would require Landmark to show what its sales actually were, as opposed to what they would have been had MoviePass performed. It was entirely appropriate for the sophisticated parties to the Agreement to negotiate, instead, that if MoviePass failed to sell the agreed-upon minimum number of tickets during any given one-year term, Landmark’s fixed damages in such a one-year term would equal the difference between actual annual sales, on the one hand, and annualized average sales during the last four months of the prior one-year term.

25. *Second*, the negotiated sum of liquidated damages under Paragraph “3.4” is plainly proportionate to what Landmark’s foreseeable losses were. Landmark and MoviePass were well within their rights to assume that, for any given year, the MoviePass sales would be no *worse* than the annualized average of the four (4) months of the prior year. In fact, the deal was far more favorable to MoviePass than a mere average of the prior year’s sales. Because each one-year renewal term of the Agreement commenced in or around December, the four-month period from the prior term to be annualized under Paragraph “3.4” in computing the Renewal Term Minimum Sales always ran from August through November—in other words, computation of the four-month average would always include sales figures from August and September, two months known in the industry to be lower-performing months on average. Thus, the Renewal Term Minimum Sales represented a *low* estimate of what the annual sales would have been had

MoviePass performed its obligations under the Agreement, and certainly is not grossly disproportionate to the losses that Landmark suffered as a result of not receiving the ticket sales it anticipated when contracting with MoviePass.

26. Thus, the Trustee's contention that the liquidated damages provision under Paragraph "3.4" constitutes an unenforceable "penalty" completely ignores the fact that *both* parties had anticipated that sales would be *higher* than the Renewal Term Minimum Sales, and further ignores the fact that the difference between the actual sales, on the one hand, and the Renewal Term Minimum Sales amount, on the other, only would entitle Landmark to an amount that is on the *low* end of what *both* parties had anticipated would be Landmark's benefit from the Agreement.

27. Hence, the Trustee's contention that Paragraph "3.4" constitutes an unenforceable "penalty" and not a valid liquidated damages provision is without merit.

28. Equally without merit is the Trustee's contention that "the Exhibitor Agreement was structured such that Landmark was able to ignore MoviePass's breach and continue to apply the Minimum Sales Shortfall provision without providing MoviePass with a single movie ticket or anything else of value." Objection, at ¶ 20. To the contrary, if Landmark had failed to sell discounted tickets to MoviePass customers when requested, *Landmark* would have been in breach, and MoviePass would have had the right to terminate the Agreement for a material breach pursuant to Paragraph "11(i)". While the Trustee contends that in such a scenario, Landmark nonetheless could have claimed entitlement to the "Minimum Sales Shortfall" anyway, that hypothetical situation is doubtful under the Agreement's plain language and, in any event, is far from reality and need not be resolved by the Court. In the real world, MoviePass is the one that breached the Agreement by eventually failing to sell *any* tickets, due to no fault

whatsoever by Landmark, and by failing to reimburse Landmark for the tickets that its customers duly purchased at discount through MoviePass. Landmark only stopped providing discounted tickets when customers were *unable* to purchase them through MoviePass, due solely to *MoviePass's* default. It is absurd to blame Landmark for MoviePass's own failure.

29. Likewise meritless is the Trustee's contention that the Agreement is "unconscionably one-sided" (Objection at ¶ 22). The Agreement plainly was negotiated by sophisticated parties at arms' length. Indeed, Paragraph "3.4" also protected MoviePass by fixing and capping its damages in case of its breach.

30. For the same reasons indicated above, Landmark's Paragraph "3.4" damages are *not* in the nature of a "fine, penalty, or forfeiture" pursuant to Bankruptcy Code § 726(a)(4), and to the contrary, such damages clearly are "compensation for actual pecuniary loss suffered by" Landmark (*id.*). Thus, there is no basis for lowering the priority of Landmark's claim to the extent it arises under Paragraph "3.4" of the parties' Agreement. There certainly is no basis at all for subordinating Landmark's claim for "inequitable conduct", or simply because allowing Landmark's claim will necessarily reduce the amount that other similarly situated general unsecured creditors can recover.

*[Remainder Of Page Intentionally Left Blank]*

**CONCLUSION**

31. For the reasons stated, Landmark's Proof of Claim should be allowed in its entirety.

Dated: New York, New York  
July 20, 2021

**HARWOOD REIFF LLC**

By: /s/ Simon W. Reiff  
Simon W. Reiff  
370 Lexington Avenue, Suite 505  
New York, New York 10017  
(212) 661-0750 (office)  
(646) 365-3332 (fax)  
(347) 674-9797 (cell)  
[sreiff@harwoodreiff.com](mailto:sreiff@harwoodreiff.com)

*Attorneys for Silver Cinemas Acquisition  
Company d/b/a Landmark Theatres*