Hearing Date and Time: August 12, 2021 at 10:00 a.m.
Objections Deadline: August 9, 2021 at 5:00 p.m.

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re HELIOS AND MATHESON ANALYTICS, INC., *et al.*,[1] Debtors.	Chapter 7 Case No. 20-10242-dsj (Jointly Administered)

TRUSTEE'S REPLY BRIEF IN FURTHER SUPPORT OF HIS OBJECTION TO CLAIM NO. 55 FILED AGAINST MOVIEPASS, INC. BY COHEN BROTHERS REALTY CORPORATION, SUCCESSOR-IN-INTEREST TO SILVER CINEMAS ACQUISITION COMPANY d/b/a LANDMARK THEATRES, PURSUANT TO 11 U.S.C. §§ 502(b) AND 726(a) AND FEDERAL RULE OF BANKRUPTCY PROCEDURE 3007

TO THE HONORABLE DAVID S. JONES,
UNITED STATES BANKRUPTCY JUDGE:

Alan Nisselson ("***Trustee***"), trustee for above-captioned Chapter 7 Debtors ("***Debtors***"), including Helios and Matheson Analytics, Inc. ("***HMNY***") and MoviePass, Inc., Case No. 20-10244-dsj ("***MoviePass***"), by his undersigned attorneys, Windels Marx Lane & Mittendorf, LLP, for, respectfully provides the following response to Landmark's Reply brief filed July 20, 2021 (Doc. 192) in opposition to his objection to Claim 55 ("***Claim 55***") (Doc. 160) filed as a general unsecured claim against MoviePass by Cohen Brothers Realty Corporation, successor-in-interest

[1]The Debtors in the jointly administered Chapter 7 cases, together with the last four digits of each Debtor's federal tax identification number, are as follows: Helios and Matheson Analytics, Inc., a/k/a MovieFone (9913), Zone Technologies, Inc., a/k/a Red Zone, a/k/a Zone Intelligence, (5124), and MoviePass, Inc. (9893).

to Silver Cinemas Acquisition Company, d/b/a Landmark Theatres ("***Landmark***").

DISCUSSION

A. Landmark Has Not Demonstrated any Foreseeable or Actual Loss

1. Landmark concedes that its Section 3.4 Claim is based on a liquidated damages clause, Opp. 2, 7, and is subject to New York law. *Id.* 7. Such a clause is enforceable only if it "specifies a liquidated amount which is reasonable in light of the anticipated probable harm, and actual damages must be difficult to ascertain at the time the parties entered into the contract." *Nisselson v. Empyrean Inv. Fund, L.P.*, 376 B.R. 390, 416 (Bankr. S.D.N.Y. Oct. 12, 2007) (citations omitted). Furthermore, the clause should not be enforced if it results in damages that are "plainly or grossly disproportionate to the probable loss." *Truck Rent-A-Center, Inc. v. Puritan Farms 2nd Inc.*, 41 N.Y.2d 420, 424 (N.Y. 1977). The reasonableness of the liquidated damages provision is examined in light of the circumstances at the time of its creation. *United Merchants and Manufacturers, Inc. v. Equitable Life Assur. Soc.*, 674 F.2d 134, 142 (2nd Cir. 1982).

2. Landmark fails to explain how it faced any foreseeable loss in the event that MoviePass failed to satisfy the Minimum Sales Shortfall. Nothing in the Exhibitor Agreement compelled Landmark to forgo direct ticket sales to non-MoviePass customers, to make any investments in anticipation of increased ticket sales, or otherwise incur any risk in reliance on MoviePass's obligation to satisfy the Minimum Sales Shortfall. Rather, the "loss" that Landmark describes is merely the disappointment of not selling additional tickets to MoviePass's subscribers, or successfully invoking Clause 3.4 against a solvent MoviePass.

3. A party in Landmark's position might have incurred actual, foreseeable losses that would support a defensible liquidated damages provision. But Landmark does not claim, nor

could it, that it made any investment in the expectation that MoviePass would buy millions of dollars' worth of tickets during the Renewal Term. The Exhibitor Agreement did not require Landmark, for example, to block off a certain number of tickets for MoviePass subscribers which it was then unable to sell. Landmark does not claim that it planned to expand its theaters, or that it planned to increase its staffing, to accommodate the expected wave of MoviePass subscribers. Nor does it claim that it invested or planned to invest in advertising or other marketing efforts to draw MoviePass subscribers to its theaters. Without some such investment, there was no foreseeable harm to Landmark that would form the basis of its liquidated damages clause. While Landmark may be disappointed that its windfall of ticket sales did not materialize, it has not demonstrated that the liquidated damages clause is designed to compensate it for a *foreseeable loss*, as required by New York law.

4. Nor has Landmark made any showing that it incurred any *actual* losses as a result of MoviePass's failure to satisfy the Minimum Sales Shortfall. Landmark could very well have sold a quantity of tickets equivalent to the Minimum Sales Shortfall to MoviePass's former subscribers at its ticket windows or through other channels. There is simply no basis to assume that the Minimum Sales Shortfall is an accurate proxy for Landmark's foreseeable or actual losses upon MoviePass's breach of the Exhibitor Agreement.

5. The authorities cited by Landmark do not support enforcement of Section 3.4—on the contrary, they illustrate why it serves no purpose other than to penalize MoviePass. In *JMD Holding Corp. v. Congress Fin. Corp.*, 4 N.Y.3d 373 (2005), the New York Court of Appeals enforced a $600,000 prepayment penalty in connection with a $40 million revolving loan as liquidated damages. The borrower there argued that, since it was not obligated to borrow any particular amount under the revolving loan facility, the lender's prospective damages were zero,

and the lender was not entitled to any liquidated damages in lieu of the lost interest occasioned by the prepayment. *Id*. 508. The Court of Appeals explained that the lender had incurred costs to make the $40 million in funding available under the agreement, and that the agreement "diminished its capacity to make profitable loans to other entities." *Id*. 508. See also *Walter E. Heller & Co., Inc. v. American Flyers Airline Corp*., 459 F. 2d. 896, 899 (2nd Cir. 1972)(conducting a similar analysis in enforcing $250,000 in liquidated damages for breach of an agreement to borrow $8.9 million). Here, by contrast, Landmark does not maintain that it incurred any costs in making its theater tickets available to MoviePass subscribers during the Renewal Term, much less that those costs amounted to the full ticket price for the projected number of tickets. Nor does it argue that Paragraph 3.4 diminished its capacity to sell tickets to other moviegoers, by analogy to a prepayment penalty on a loan agreement. The logic of *JMD Holding* simply does not apply here.

6. The liquidated damages provisions enforced in *JMD Holding* and similar cases also reflect a tiny fraction of the deal amounts at issue, in stark contrast to Landmark's demand for the full ticket price across a full year of anticipated ticket sales, as contemplated by Section 3.4. As examples, the liquidated damages clauses enforced in *JMD Holding Corp*. and *Walter E. Heller* represented 1.5% and 2.8%, respectively, of the loans in question. *JMD Holding* at 504 ($600,000 of $40,000,000); *Walter E. Heller* at 899 ($250,000 of $8,900,00). Each court found that the liquidated damages amount before it was not "plainly disproportionate to the possible loss." *Id*. Landmark, by contrast, seeks liquidated damages equal to one hundred percent of the anticipated ticket sales contemplated by Renewal Term Minimum Sales provision—an opportunistic ploy out of any proportion to Landmark's foreseeable losses at the time of contracting, *In re United Merchants and Mfrs.*, 674 F. 2d at 142, or to its actual losses. *See also*

Rochester v. E & L Piping, Inc., 196 Misc.2d 572, 576, 764 N.Y.S.2d 514, 518 (Sup. Ct. Monroe County 2003) (charging 125% of the contract for noncompliance with minority hiring standards unreasonable); *Automotive Fin. Corp. v. Ridge Chrysler Plymouth L.L.C.*, 219 F.Supp.2d 945 (N.D. Ill. 2002) (striking down a 15% penalty for prepayment during first year of the loan as an arbitrary and unenforceable penalty based on Illinois law); *Nisselson v. Empyrean Inv. Fund, L.P.*, 376 B.R. at 417 (prepayment penalty of 76% unreasonable and unenforceable).

7. Landmark argues that the RTMS represents "a reasonable estimate of the *minimum value of the Agreement, as renewed, to Landmark*." Opp. 2, ¶ 4 (emphasis added). In light of the above authorities, Landmark's view of what makes a liquidated damages clause enforceable is misguided. It is not the gross amount of the parties' contract—what Landmark calls the "minimum value of the Agreement"—that determines the permissible amount of a liquidated damages clause, but the foreseeable or probable amount of loss in the event of a breach. *Truck Rent-A-Center, Inc.*, 41 N.Y.2d at 424. Landmark has not demonstrated any such loss—only disappointment that its attempt to reap an exorbitant windfall in the event of MoviePass's failure was unsuccessful.

8. Landmark also cites *Fifty States Management Corp. v. Pioneer Auto Parks, Inc.*, 46 N.Y. 2d 573 (1979), a New York Court of Appeals case enforcing an accelerated rent provision upon a tenant's default in its monthly rent payment. While enforcing the provision before it, the Court noted that "equity abhors forfeitures" and that it must "examine the sum reserved under an instrument as liquidated damages to insure that it is not disproportionate to the damages actually arising from the breach or designed to coerce the performance of a party." *Id.* at 577. The accelerated rent provision was enforceable because a promise to pay rent on time "is an essential part of the bargain as it represents the consideration to be received for permitting the

tenant to remain in possession of the property of the landlord," *id*. 578, and "often the landlord relies on timely payment of rent to meet its own outstanding obligations, such as a mortgage on the demised premise." *Id.* Such clauses are "so common in other commercial transactions," *id*., and their enforcement "works no forfeiture." *Id*. Landmark does not explain how the RTMS clause functions to guarantee the proper functioning of the Exhibitor Agreement, as an acceleration clause in a lease promotes the timely payment of rent, *see id*. 577-578, or otherwise explain how the Exhibitor Agreement would have been unviable in the absence of this clause. As such, its reliance on *Fifty States* is misplaced.

9. There is another key difference between the acceleration clause in *Fifty States* and the liquidation clause at issue here. The rent acceleration clause, when invoked, merely allowed the landlord to receive the rental payments contemplated in the lease "as a condition of defendant's continued occupancy." *Id.* Unlike the landlord in *Fifty States*, Landmark does not point to any meaningful consideration provided in exchange for its exorbitant liquidated damages clause. While the tenant in *Fifty States* remained in possession of the leased premises, MoviePass subscribers did not continue to get movie tickets during the Renewal Term—certainly not $15.6 million worth of movie tickets.

10. Landmark appears to suggest that its agreement "to grant MoviePass the exclusive right to provide paid subscription services to Landmark's customers" was the needed consideration to support MoviePass's promise to satisfy the RTMS. Opp. ¶¶ 3, 11. But it does not allege that there was any other viable subscription service which could have served as an alternative. More importantly, Landmark's unilateral right to terminate the Exhibitor Agreement upon a breach by MoviePass (Opp. ¶10)—which it failed to exercise—meant that it could have terminated its agreement with MoviePass and cast its lot with another subscription service, if

there indeed was one. This means that Landmark was not bound to give up its right to deal with other potential subscription services for the entirety of the Renewal Term.

11. Likewise, MoviePass's use of Landmark's "intellectual property, branding, and goodwill to promote its own subscription sales to movie theater customers" (Opp. 2, ¶ 3) may have constituted consideration for MoviePass's commitment to pay for Landmark tickets while MoviePass was in operation, but it was not valid consideration for an obligation to buy one year's worth of movie tickets after the service collapsed.

B. Granting the Section 3.4 Claim would Prejudice Innocent Unsecured Creditors.

12. At this advanced stage of the administration of the consolidated cases, the Trustee can represent that there will likely be several million dollars in assets available for distribution to general unsecured creditors of MoviePass. In the event that the disputed part of Claim No. 55 is allowed in the amount of approximately $15.6 million, the dividend rate for all general unsecured creditors will be reduced by approximately two-thirds. Thus, it will be the innocent general unsecured creditors of MoviePass—the accountants, software developers, attorneys, former employees, and others who provided goods, services, and labor to MoviePass—who will bear the burden of the Minimum Sales Shortfall. The Court should not countenance this unfair result. *See In re Virtual Network Services Corp.*, 98 B.R. 343, 351-352, 1989 U.S. Dist. LEXIS 7215, *28-*29 (N.D. Ill. Apr. 28, 1989). "Equity abhors forfeitures," *Fifty States Management Corp. v. Pioneer Auto Parks, Inc*., 46 N.Y. 2d 573 (1979), and this Court should exercise its equitable powers to ensure that innocent parties are not harmed by the enforcement of Landmark's exorbitant and unreasonable liquidated damages provision.

CONCLUSION

13. Because the Section 3.4 Claim is based on an unenforceable liquidated damages clause under New York law, the claim is "unenforceable against the debtor and property of the debtor, under . . . applicable law" and Bankruptcy Code § 502(b)(1) mandates that it be disallowed. Alternatively, this Court should subordinate the Section 3.4 Claim to fourth priority as one for a "fine, penalty, or forfeiture," because it is "not compensation for actual pecuniary loss suffered by the holder of such claim." Bankruptcy Code § 726(a)(4).

Dated: New York, New York
August 9, 2021

Respectfully submitted,

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	
	:	Chapter 7
	:	
HELIOS AND MATHESON ANALYTICS INC., *et al.*,[1]	:	Case No. 20-10242-dsj
	:	(Jointly Administered)
Debtors.	:	

AFFIDAVIT OF SERVICE BY FIRST CLASS MAIL AND CM/ECF NOTIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MATTHEW CORWIN, being duly sworn, deposes and says that deponent is not a party to the case, is over 18 years of age, is employed at Windels Marx Lane & Mittendorf, LLP, 156 West 56th Street, New York, New York 10019, and that on August 9, 2021, I served the:

> *Trustee's Reply Brief in Further Support of His Objection to Claim No. 55 Filed Against MoviePass, Inc. by Cohen Brothers Realty Corporation, Successor-In-Interest to Silver Cinemas Acquisition Company d/b/a Landmark Theatres, Pursuant to 11 U.S.C. §§ 502(b) and 726(a) and Federal Rule of Bankruptcy Procedure 3007*, upon:

[1] The Debtors in the jointly administered Chapter 7 cases, together with the last four digits of each Debtor's federal tax identification number, are as follows: Helios and Matheson Analytics, Inc., a/k/a MovieFone (9913), Zone Technologies, Inc., a/k/a Red Zone, a/k/a Zone Intelligence, (5124), and MoviePass, Inc. (9893).

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at the last known address given by or obtained for each party for that purpose, by delivering a true copy of same securely enclosed in a first class postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York. In addition, by filing the above Reply on the docket for this case through the Case Management/Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of New York (the "CM/ECF System"), registered users of the CM/ECF System designated to receive electronic notice of events in this case through the CM/ECF System received notice of the filing hereof in accordance with General Order No. 559 of the United States Bankruptcy Court for the Southern District of New York and Federal Rule of Bankruptcy Procedure 9036.

Sworn to before me this 9th day of August 2021 */s/ Maritza Segarra* Maritza Segarra Notary Public, State of New York No. 01SE4652865 Qualified in Westchester County Commission Expires December 31, 2021	*/s/ Matthew Corwin* MATTHEW CORWIN