UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
COACH AM GROUP HOLDINGS CORP., et al.,	)	Case No. 12-10010 (KG)
	)	(Jointly Administered)
Debtors.	)	
	)	**Hearing Date: April 23, 2012 at 11:00 a.m.**
	)	**Objections due by: April 16, 2012**

JOINT MOTION OF ROSEMARY AND DAVID DIONNE AND BERNADINE WILLIAMSEN FOR RELIEF FROM STAY TO ALLOW STATE COURT ACTIONS TO PROCEED

Rosemary and David Dionne and Bernadine Williamsen (the "Dionnes" and "Williamsen", respectively or together the "Movants"), jointly move, pursuant to section 362(d) of Title 11 of the United States Code (the "Bankruptcy Code"), Rule 4001 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and Local Rule 4001-1, for relief from the automatic stay to allow Movants to continue to prosecute their respective state court actions, liquidate their claims against the debtors and to proceed to collect any judgments in the first instance against any available insurance proceeds under any applicable policies (the "Motion"). In support of the Motion, the Movants state as follows:

Background

1. On January 3, 2012 (the "Petition Date"), the above-captioned debtors (the "Debtors") each filed voluntary petitions for relief under Chapter 11 of title 11 of the Bankruptcy Code in this Court.

2. On January 5, 2102, an Order directing procedural consolidation and joint administration of the Debtors' cases was entered by the Court [D.I. 44].

3. The Debtors continue to operate their businesses as debtors-in-possession pursuant to section 1107(a) and 1108 of the Bankruptcy Code, however, a sale of all or

substantially all of the Debtors' assets is intended. To date, no trustee or examiner has been appointed in the Debtors' cases.

4. On January 13, 2012, an official committee of unsecured creditors was appointed in these cases by the Office of the United States Trustee.

5. Prior to the Petition Date, the Movants each initiated state court actions in the Circuit Court of the State of Oregon for the County of Washington (the "Circuit Court") against numerous parties, including three of the Debtors (the "Oregon Actions").

a. The Dionnes initiated their Oregon Action, case no. C11-5366CV, on September 22, 2011 against CUSA, LLC dba Coach America; CUSA Raz, LLC dba Coach America and/or RAZ Transportation Company; CUSA ASL, LLC dba Coach America (the "Debtor Defendants") and certain other non-debtor entities. A copy of the Second Amended Complaint is attached hereto as Exhibit A (the "Dionne Complaint").

b. Williamsen initiated her Oregon Action, case no. C11-6176CV, on October 25, 2011 against the Debtor Defendants and certain other non-debtor entities. A copy of the Complaint is attached hereto as Exhibit B (the "Williamsen Complaint").

6. The Oregon Actions arise out of injuries the Movants sustained as a result of a bus fire occurring near Tillamook, Oregon. The Movants were members of a senior citizen tour group. The group was scheduled to tour the Pacific Northwest from September 11 - 20, 2010 on a bus owned by Debtor Defendant CUSA Raz, LLC and operated by Debtor Defendant CUSA, LLC. Upon information and belief, the driver of the bus was an employee of one of the Debtor Defendants.

7. On the first full day of the tour, September 12, 2010, a fire erupted on the bus forward of the dashboard of the driver, which forced an emergency evacuation. See Exhibit C.

Several of the passengers were able to escape through the front door of the bus. Smoke and flames prevented other passengers, including the Movants, from reaching the front door and, there being no other doors on the bus, they had to escape through windows which, on the outside of the bus, were over seven feet from the ground.

8. As a result of the bus fire, Rosemary Dionne suffered from smoke inhalation and severe burns on her back, buttocks, arms, wrists, fingers and head. She was hospitalized for 40 consecutive days, nearly three weeks of which she was heavily sedated to permit her to endure the pain and treatments. Of the 40 days, she was intubated on a ventilator for 18 days because her trachea was too swollen to allow her to breathe. She also underwent skin graft surgeries. At the time of the filing of the Dionne Complaint, Mrs. Dionne's health care expenses were $430,246.07 and growing. David Dionne suffered a fracture of his knee after climbing over and exiting out of an emergency window. He also suffered burns on his head, left ear, fingers, and the left side of his neck, as well as smoke inhalation. Mr. Dionne's health care expenses were $5,066.80 and growing at the time of the filing of the Dionne Complaint.

9. Additionally as a result of the bus fire, Williamsen suffered smoke inhalation, bilateral pelvic fracture, a right calcaneous fracture, fracture to her second lumbar vertebra, a wound breakdown of the calcaneal incisions, burns and other injuries and has had to endure several surgeries and ongoing pain. At the time of the filing of the Williamsen Complaint, Williamsen's health care expenses were $179,679.51 and growing.

10. Two insurance policies of the Debtor Defendants' appear to provide coverage for the bus fire and resulting injuries. One is a primary policy with coverage of $5 million, and the other is an excess policy with coverage of an additional $5 million. The primary liability insurance policy is policy number CA 979-86-79, coverage is provided by National Union Fire

Insurance Company of Pittsburgh, PA, and the policy period is September 16, 2009 to September 16, 2010 (the "Primary Policy"). The excess liability insurance policy is policy number 027666060, the insurer is Lexington Insurance Company, and the policy period is September 16, 2009 to September 16, 2010 (the "Excess Policy" together with the Primary Policy hereinafter referred to as the "Insurance Policies").

The primary policy is required by federal law governing Motor Carrier Safety, which provides:

> (a) No motor carrier shall operate a motor vehicle transporting passengers until the motor carrier has obtained and has in effect the minimum levels of financial responsibility as set forth in §387.33 of this subpart.
> (b) Policies of insurance, surety bonds, and endorsements required under this section shall remain in effect continuously until terminated. . . .

(49 C.F.R. §387.31.) Further, 49 C.F.R. § 387.33 provides that "[f]or-hire motor carriers of passengers operating in interstate or foreign commerce" must have a minimum level of financial responsibility of $5,000,000 for "any vehicle with a seating capacity of 16 passengers or more." Copies of these regulations are attached hereto as Exhibit D.

Recognizing this, Endorsements of the primary policy entitled "Endorsement for Motor Carrier Policies of Insurance for Public Liability Under Section 18 of the Bus Regulatory Reform Act of 1982" state:

> The insurance policy to which this endorsement is attached provides automobile liability insurance and is amended to assure compliance by the insured, within the limits stated herein, as a for-hire motor carrier of passengers, with Section 18 of the Bus Regulatory Reform Act of 1982 and the rules and regulations of the Federal Highway Administration (FHWA) and the Interstate Commerce Commission (ICC).
>
> In consideration of the premium stated in the policy to which this endorsement is attached, the Insurer (the company) agrees to pay, within the limits of liability described herein, any final judgment recovered against the insured for public liability resulting from negligence in operation, maintenance or use of motor vehicles subject to the financial responsibility requirements of Section

> 18 of the Bus Regulatory and Reform Act of 1982 regardless of whether or not each motor vehicle is specifically described in the policy and whether or not such negligence occurs on any route or in any territory authorized to be served by the Insured or elsewhere. . . .

The same Endorsements also provide:

> It is understood and agreed that no condition, provision, stipulation, or limitation contained in the policy, this endorsement, or any other endorsement thereon or violation thereof, shall relieve the [insurer] from liability or from the payment of any final judgment, within the limits of liability herein described, irrespective of the financial condition, insolvency or bankruptcy of the insured. However, all terms, conditions, and limitations in the policy to which the endorsement is attached shall remain in full force and effect as binding between the insured and the [insurer]. The insured agrees to reimburse the [insurer] for any payment made by the [insurer] on account of any accident, claim, or suit involving a breach of the terms of the policy, and for any payment that the [insurer] would not have been obligated to make under the provision of the policy except for the agreement contained in this endorsement.
>
> It is further understood and agreed that, upon failure of the [insurer] to pay any final judgment recovered against the insured as provided herein, the judgment creditor may maintain an action in any court of competent jurisdiction against the [insurer] to compel such payment.

The policy further provides as a general condition that "[b]ankruptcy or insolvency of the 'insured' or the 'insured's' estate will not relieve us of any obligations under this Coverage form." Excerpts from the Primary Policy are attached hereto as Exhibit E.

Oregon law, which applies because this bus fire occurred in Oregon and the bus was apparently maintained in Oregon, similarly provides:

> A policy of insurance against loss or damage resulting from accident to or injury suffered by an employee or other person and for which the person insured is liable, or against loss or damage to property caused by horses or by any vehicle drawn, propelled or operated by any motive power, and for which loss or damage the person insured is liable, shall contain within such policy a provision substantially as follows: "Bankruptcy or insolvency of the insured shall not relieve the insurer of any of its obligations hereunder. If any person or legal representative of the person shall obtain final judgment against the insured because of any such injuries, and execution thereon is returned unsatisfied by reason of bankruptcy, insolvency or any other cause, or if such judgment is not satisfied within 30 days after it is rendered, then such person or

> legal representatives of the person may proceed against the insurer to recover the amount of such judgment, either at law or in equity, but not exceeding the limit of this policy applicable thereto."

ORS 742.031 (2009). A copy of this statute is attached hereto as Exhibit F.

The Excess Policy provides that "[i]t is agreed that this policy, except as herein stated, is subject to all conditions, agreements and limitations of and shall follow the underlying policy/ies in all respects, including changes by endorsement, and the Insured shall furnish the Company with copies of such changes." The excess policy also provides that "[i]n the event of the Insured's bankruptcy or insolvency or any entity comprising the Insured, we shall not be relieved thereby of the payment of any claims hereunder because of such bankruptcy or insolvency." Excerpts from the Excess Policy are attached hereto as Exhibit G.

11. The Oregon Actions were stayed upon the Debtors, including the Debtor Defendants, initiating the instant bankruptcy cases. As of the Petition Date the exchange of discovery in the Oregon Actions was underway, however, trial dates had not yet been set.

Requested Relief

12. The Movants request that an Order be entered lifting the automatic stay under Section 362 (d) of the Bankruptcy Code so that the Movants may move forward with litigating the Oregon Actions against the Debtor Defendants, liquidating their claims against the Debtors, and, if successful, satisfy, in the first instance, any judgment or other resolution obtained against the Debtor Defendants from proceeds of the applicable insurance policies.

Argument

13. The Oregon Actions have been stayed as a result of the filing of the Debtor Defendants' bankruptcy cases. As such, the Movants are entitled to request relief from the automatic stay pursuant to §362(d) of the Bankruptcy Code.

14. Congress enumerated that under Section 362 of the Bankruptcy Code relief from the automatic stay may be granted "for cause." 11 U.S.C. § 362(d)(1). Cause is not defined in the Code; it must be "determined on a case-by-case basis." *In re Rexene Products Co.*, 141 B.R. 574, 576 (Bankr.D.Del. 1992) (citing *Matter of Fernstorm Storage and Van Co.*, 938 F.2d 731, 735 (7th Cir. 1991)). "The legislative history indicates that cause may be established by a single factor such as 'a desire to permit an action to proceed...in another tribunal', or 'lack of any connection with or interference with the pending bankruptcy case'". *In re Rexene*, 141 B.R. at 576 (citing H.R. Rep. 95-595, 95th Cong., 1st Sess., 343-44 (1977) (emphasis added)).

15. This Court has also found, from the legislative history of Section 362 of the Bankruptcy Code, that Congress recognized that the stay should be lifted in appropriate circumstances:

> "It will often be more appropriate to permit proceedings to continue in their place of origin, when no great prejudice to the Bankruptcy Estate would result, in order to leave the parties to their chosen forum and to relieve the Bankruptcy Court from any duties that may be handled elsewhere."

Id. at 576 (Citing H. R. Rep. No. 595, 95th Cong., 1st Sess. 341 (1977).

16. The term "cause" as used in §362(d) has no obvious definition, and is determined on a case-by-case basis. A three-factor test has been adopted for determining whether "cause" exists, applying the following criteria:

(a) Whether any great prejudice to either the bankrupt estate or the Debtor will result from the continuation of the civil suit;

(b) Whether the hardship to the non-bankrupt party by maintenance of the stay considerably outweighs the hardship of the Debtor; and

(c) The creditor has a probability of prevailing on the merits.

(citations omitted). *Id.* at 576.

17. In applying the first prong of the *Rexene* factors, there is no prejudice to the Debtors or their estates that will result from permitting the parties to proceed with the Oregon Actions. The primary purpose of the automatic stay is to "prevent certain creditors from gaining a preference for their claims against the debtor; to forestall the depletion of the debtor's assets due to legal costs in defending proceedings against it; and, in general, to avoid interference with the orderly liquidation or rehabilitation of the debtor." *Id.* at 576.

18. In the Oregon Actions, the Debtor Defendants had already retained local defense counsel, who, as of the Petition Date, were actively defending the Oregon Actions. As far as is known, the employees of the Debtors who might be called as witnesses in deposition or at trial are mechanics and maintenance personnel regarding electrical wiring and the maintenance history of the bus, training personnel regarding training of what bus drivers should do in the event of a fire on a bus, and a custodian of records who can describe the purchase and ownership history of the bus. Any involvement of the Debtors' estate, its bankruptcy counsel or any employees who are pertinent to the Debtors' cases in the Bankruptcy Court would be merely ministerial. In addition, Section II – Liability Coverage, paragraph A of the primary policy reserves to the insurer the right and duty to defend the lawsuits and the right to settle the lawsuits as the insurer considers appropriate. Notably, the Debtors are liquidating their assets, so even if defending the Oregon Actions required more than ministerial involvement, it would not impede an effort to reorganize.

Moreover, the Movants' claims against the Debtor Defendants must be liquidated at some time in order for the Movants to participate in any future distribution from the Debtors' estates and to close the estates. That is, permitting the personal injury cases to move forward does not prejudice the Debtors or the Debtors' estates since, at some time, these claims must be resolved.

In addition, because the Movants' claims arise from personal injury, the Bankruptcy Court does not have jurisdiction to liquidate them. *Hays and Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149 (3d Cir. 1989).

19. Further, if the Movants either settle their lawsuits or proceed to trial in the Oregon Actions and obtain judgments against the Debtor Defendants, payment of those settlements or judgments will come from the proceeds of the Insurance Policies, policies that are required to pay out under federal and Oregon law, as well as by the express terms of the policies. Indeed, Oregon law requires that the pertinent liability policies must include a bankruptcy clause that provides that in the event a final judgment is entered against the insured and execution on the judgment is returned unsatisfied because of the insured bankruptcy, insolvency or other cause, then the judgment holder may proceed against the insurer directly to recover the amount of the judgment. ORS §742.031 (2009). See Exhibit F.

20. The Primary Policy contains a reimbursement provision, which provides in part:

> A. We will pay all sums that we become obligated to pay up to our Limit of Insurance under the policy . . .
> B. You must reimburse us up to the Deductible Limit(s) shown in the Schedule [$5,000,000] for any amounts we have so paid as damages, benefits or Medical Payments. The Deductible will apply to each "occurrence", "accident", offense, claim or other basis as shown in the Schedule, regardless of the number of persons or organizations who sustain damages because of an "occurrence" or "accident" or offense or other basis shown in the Schedule.
> C. In addition, you must reimburse us for all "Allocated Loss Adjustment Expense" we pay as Supplementary Payments . . . .

See Exhibit E. The Debtors, then, do not have a traditional "deductible" but rather the insurer must first satisfy any covered judgment and then the Debtors have an obligation to reimburse the insurer for those amounts paid. Indeed, if the Primary Policy had a true deductible, it would not

be compliant under federal or Oregon state law, which would subject the Debtors to revocation of their authority to operate for-hire buses by the applicable federal and state authorities.

Further, the insurers are obligated by law and by the insurance policies to defend the Debtors. That is, relief from the stay will not prejudice Debtors because their insurers will defend them in the Oregon Actions.

21. In sum, the Debtors will not be prejudiced by relief from the stay because the day to day involvement as witnesses at deposition or trial of employees of Debtors in the litigation are expected to be mechanics, trainers, and custodians of records and not persons believed to be part of reorganization or sale of assets of the Debtors, because their insurers are obligated to pay the claims or judgments, which is an independent obligation of the insurers to the Movants, because the Movants' claims must be liquidated at some time, and because the insurers are legally and contractually required to defend the rights and property of the Debtors.

22. Even in the event the proceeds from the Insurance Policies do not cover all or a portion of any judgments obtained in the Oregon Actions, the Movants would be seeking to liquidate their claims as to the Debtor Defendants as opposed to attempting to collect on them through the Oregon Actions. Once liquidated, any portion of the Movants' claims not paid from the proceeds from the Insurance Policies would be treated as an allowed non-priority unsecured claims entitled to receive a pro rata distribution, if any, with all other general unsecured creditors. Accordingly, this prong clearly weighs in favor of the Movants.

23. The second prong of the *Rexene* factors likewise weighs in favor of lifting the stay. The hardship the Movants will endure, should the automatic stay continue, far outweighs any hardship, if any, to the Debtors in lifting the stay. The Movants are 73, 72, and 73 years old. They suffered tremendous physical and emotional injuries and, at this stage of their lives,

deserve to be able to obtain some closure on this horrific event and should not be compelled to wait for Debtors to work out the Debtors' own financial problems. Further, delay of a trial of the personal injury cases unfairly benefits Debtors. Witnesses from the bus are largely senior citizens. Memories fade and, inevitably, senior citizen witnesses may become unavailable by ill health or death. In addition, and as a practical matter, setting a trial date in the Oregon cases is a necessary step to either force settlement or bring the litigation to an end. The automatic stay makes that impossible.

24. Furthermore, the Circuit Court is the proper forum for the Oregon Actions. The bus fire occurred in Oregon and many if not all of the pertinent mechanics, maintenance personnel, trainers, and custodians of records of Debtors are believed to be in Oregon. Since the Oregon Actions were actively being litigated at the time of the Debtor Defendants' bankruptcy filings, the parties to the Oregon Actions, including the Debtor Defendants, had already retained counsel who are in Oregon. The parties would incur substantial expense and inconvenience if the Oregon Actions were moved to Delaware, not the least of which is that the Movants would have to retain Delaware counsel and perpetuate testimony of Oregon witnesses for presentation in Delaware. In fact, the Movants have no connection with Delaware. The Debtors would not face such expense and inconvenience if the Oregon Actions proceeds in the Circuit Court as they already have a presence therein and, upon information and belief, the Debtors routinely operate in Oregon as well.

25. In addition, the Circuit Court is the appropriate court to hear an action involving claims arising out of Oregon law. The Oregon Actions were already pending as of the Petition Date, so the Circuit Court likely has some familiarity with the case. Further, there are non-debtor defendants in the Oregon Actions who may not be subject to jurisdiction in Delaware,

forcing the Movants to bear the costs of prosecuting lawsuits in Oregon and Delaware. Litigating two cases would not only greatly increase the expense and burden on the Movants but could result in conflicting judgments in the two courts. Clearly the hardship imposed upon the Movants by maintaining the automatic stay far outweighs the possible harm, if any, to the Debtors.

26. Likewise, the third prong of the *Rexene* factors weighs in favor of the Movants. This Court has held that the required showing of a "probability of success on the merits" is very slight. *Id.* at 578. Further, this Court has also previously held that this prong "merely requires a showing that their claim is not frivolous". *In re Levitz Furniture Incorporated, et al.*, 267 B.R. 516, 523 (Bankr. D. Del. 2000). Here, the Movants' probability of success is high. The bus was owned, operated and maintained by the Debtor Defendants. A fire started forward of the driver's dashboard, an area of the bus exclusively the responsibility of the Debtor Defendants. Additionally, the Debtor Defendants, or at least one of them, were acting as a common carrier, meaning that they must conform with the highest duty of care, and were responsible for the condition of the bus, even if that condition is traceable back to the manufacturer. *Simpson v. Gray Line Co.*, 226 Or. 71, 358 P.2d 516 (1961) ("a common carrier owes its passengers the highest degree of care and skill practicable for it to exercise"). Indeed, even if Debtor Defendants hired independent contractors to maintain the bus and the work of those independent contractors caused the fire, common carriers are responsible for the work of their independent contractors. *Id.* Accordingly, this prong weighs in favor of the Movants as well.

27. In sum, continuation of the Oregon Actions will not hinder, burden or delay the administration of the Debtors' cases or be at all inconsistent with the policies of section 362 of the Bankruptcy Code and appears to be the most appropriate option under the circumstances.

Conclusion

WHEREFORE, the Movants respectfully request the Court to enter an order, substantially in the form attached hereto, which modifies the automatic stay to permit the Movants to continue to prosecute their respective state court actions to judgment or other resolutions; to proceed to collect upon any judgments or other resolutions obtained against the Debtor Defendants, in the first instance, against any available insurance proceeds under the applicable policies; and to liquidate the Movants' claims against the Debtor Defendants.

Dated: March 28, 2012

FERRY, JOSEPH & PEARCE, P.A.

/s/ Lisa L. Coggins

Lisa L. Coggins, Esq. (DE # 4234)
824 Market Street, Suite 1000
Wilmington, DE 10801
Tel: (302) 575-1555
Fax: (302) 575-1714
lcoggins@ferryjoseph.com
Counsel to the Movants