

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:)	Chapter 11
)	
COACH AM GROUP HOLDINGS CORP,)	Case No. 12-10010 (KG)
<i>et al.</i> ,)	
)	(Jointly Administered)
Debtors.)	
)	Hearing Date: April 23, 2012 at 11:00 a.m.
)	Objection Deadline: April 16, 2012 at 4:00 p.m.

**MOTION OF UNION PACIFIC RAILROAD COMPANY
FOR RELIEF FROM THE AUTOMATIC STAY**

Union Pacific Railroad Company ("Union Pacific"), by and through its undersigned counsel, hereby files this motion (the "Motion") seeking the entry of an order, substantially in the proposed form attached hereto as Exhibit A, under and 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 Rule 4001-1 of the Local Rules of Practice and Procedure for the United States Bankruptcy Court for the District of Delaware (the "Local Rules"), granting relief from automatic stay, to the extent applicable, so that Union Pacific may (i) access its insurance coverage under the Policy (as defined herein) as an "Additional Insured" for the action (the "Action") currently pending in the Superior Court of California, County of Placer (the "State Court") against Union Pacific, debtor Corporate Coach of America, Inc. ("Corporate Coach"), and certain DOES 1 through 30 and (ii) file a complaint against debtor CUSA CSS, LLC ("CUSA") in the Action, to assert a crossclaim for Union Pacific's contractual and common law rights to indemnification and to collect, if necessary, any judgment obtained from the available insurance proceeds under the Policy. In support of the Motion, Union Pacific respectfully states as follows:

JURISDICTION

1. This Court has jurisdiction over this contested matter pursuant to 28 U.S.C. §§ 1334 and 157. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A) and (G).

2. The statutory predicates for this Motion are section 362(d)(1) of the Bankruptcy Code, Bankruptcy Rule 4001 and Local Rule 4001-1.

BACKGROUND

A. The Relationship Between Union Pacific and the Debtors

3. Pursuant to that certain Long Haul, Yard, and Shuttle Transportation Services Agreement dated July 1, 2008 (the “Agreement”) between Union Pacific and debtor CUSA, CUSA, among other things, provides transportation services for Union Pacific’s train and engine crews, other personnel and materials. A true and correct copy of the Agreement is attached hereto as Exhibit B.

4. Under the Agreement, CUSA is obligated to “indemnify and hold harmless [Union Pacific] from all fines, judgments, awards, claims, demands, liability, losses, damages and expenses (including attorney fees and costs) . . . , for injury or death to all persons, including [Union Pacific]’s . . . employees . . . arising out of (i) an action or omission of [CUSA], (ii) the breach by [CUSA] of any provision of th[e] Agreement or (iii) the direct involvement of [CUSA]’s vehicle.” Agreement § 8.A. The Agreement is clear that the CUSA’s indemnification obligation applies to “any claims, suits or judgments brought against [Union Pacific] under the Federal Employer’s Liability Act “ *Id.* § 8.B (emphasis in original omitted).¹

¹ In addition to CUSA’s indemnification obligations under the Agreement, CUSA is also obligated, in instances such as the Action, to indemnify Union Pacific under California common law. *See, e.g.*, 5 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW 212 (10th ed. 2005) (explaining that equitable indemnity applies “among defendants who are jointly and severally liable to the plaintiff” and “[g]enerally, there

5. In addition to its obligation to indemnify and hold Union Pacific harmless, CUSA is obliged to procure and maintain during the life of the Agreement business automobile coverage with a combined single limit of not less than \$5 million for each automobile accident that may occur. *See* Agreement § 9.B. Moreover, Union Pacific must be included as an “Additional Insured” under such policy. *Id.* § 9.E.²

B. The Liability Insurance Policy

6. On November 7, 2008, National Union Fire Insurance Company of Pittsburgh, PA (“National Union”) issued the Business Auto Liability Policy No. CA 979-86-79 (the “Policy”) for the policy period of September 16, 2008 to September 16, 2009. A true and correct copy of the Policy is attached hereto as Exhibit C. The “Named Insured” under the Policy is debtor Coach America Holdings, Inc. *See* Policy at Business Auto Declarations. In accordance with the Agreement, Union Pacific is named as an “Additional Insured” under the Policy. *See* Policy at Endorsement 87950 (defining “additional insured” as “any person or organization for whom [Coach America Holdings, Inc. is] contractually bound to provide additional insured status”).

7. Under the Policy, National Union is obligated to “pay all sums an ‘insured’ legally must pay as damages because of ‘bodily injury’ or ‘property damage’ to which this insurance applies, caused by an ‘accident’ and resulting from the ownership, maintenance or use of a covered ‘auto’.” *See* Policy at Business Auto Coverage Form § II.A. National Union also has the “duty to defend any ‘insured’ against a ‘suit’ asking for such damages” until the

must be some basis for tort liability against the proposed indemnitor . . . usually based on a duty owed to the underlying plaintiff”).

² Importantly, the Agreement is clear that “[t]he fact that insurance is obtained by [CUSA] . . . will not be deemed to release or diminish the liability of [CUSA], including, without limitation, liability under the indemnity provisions of th[e] Agreement.” Agreement § 9.J.

Policy's limit of liability insurance coverage is reached. *Id.*

8. As an "Additional Insured" under the Policy, National Union is obligated to pay for the damages, if awarded, and the defense costs of Union Pacific related to the Action. It must also pay to Union Pacific any award Union Pacific obtains against CUSA for indemnification. *See id.* § II.B.2 (obligating National Union to pay, on behalf of the Debtors, damages and costs that CUSA "(a) [a]ssumed in a contract or agreement that is an 'insured contract' provided the 'bodily injury' . . . occurs subsequent to the execution of the contract or agreement; or (b) . . . would have in the absence of the contract or agreement."). CUSA's indemnification obligations arise under the Agreement as well as California common law. In the event that Union Pacific receives payment from National Union for its defense and any liability costs because of Union Pacific's status as an "Additional Insured" under the Policy and thereby is made whole, Union Pacific's indemnity claim against CUSA would likely be rendered moot.

9. While the Policy does not have an overall limit of liability insurance coverage, it provides that, "[r]egardless of the number of covered 'autos', 'insureds', premiums paid, claims made or vehicles involved in the 'accident', the most [National Union] will pay for the total of all damages . . . resulting from any one 'accident' is the Limit of Insurance for Liability Coverage shown in the Declarations [*i.e.* \$5 million]." *Id.* § II.C.

10. National Union's obligation to pay for Union Pacific's defense and liability costs (either arising because of Union Pacific's status as an "Additional Insured" or its right to indemnification from CUSA) arises in the first instance. In other words, no deductibles are required to be paid by the Debtors (or Union Pacific) before National Union must fulfill its obligations under the Policy. *See* Policy at Deductible Coverage Endorsement 73189 § I. Rather, the Debtors are obligated to reimburse National Union up to \$5 million per "accident"

plus certain “Allocated Loss Adjustment Expenses” *after* National Union has paid such damages and expenses. *Id.* According to the Debtors, this obligation is secured by certain letters of credit issued on behalf of the Debtors. *See* Mar 19, 2012 Hr’g Tr. at 54:1-24.³

C. The State Court Action

11. On or about July 29, 2010, Mr. Thomas Leslie (the “Plaintiff”), a former employee of Union Pacific, commenced the Action in the State Court against Corporate Coach, Union Pacific and certain DOES 1 through 30, alleging joint and several liability under the Federal Employers’ Liability Act for injuries and damages caused when the Debtors were transporting the Plaintiff and his fellow crew members to a railroad yard in Lathrop, California on or about November 3, 2008. Subsequently, the State Court issued an order allowing the Plaintiff to file an amended complaint. The amended complaint asserts claims against both Corporate Coach and Union Pacific arising from the November 3, 2008 incident and asserts joint and several liability as between Corporate Coach and Union Pacific. A true and correct copy of the First Amended Complaint is annexed hereto as Exhibit E.

12. Following the commencement of the Action, National Union exercised its duty under the Policy and defended the Action on behalf of Corporate Coach and Union Pacific. The Action was set for trial in December 2011.

13. In early December, based upon testimony given by the Plaintiff’s treating physician, it was determined that a potential conflict existed between Corporate Coach and Union Pacific as to the cause of the Plaintiff’s alleged injury. The nature of the potential conflict is the possibility that, in addition to injuries alleged to have been caused in the November, 2008

³ Relevant portions of the March 19, 2012 hearing transcript are attached hereto as Exhibit D.

incident, the Plaintiff also has injuries attributable to long term occupational exposures. Upon learning of the possible conflict, Union Pacific obtained its own counsel separate from the counsel once provided by National Union for Corporate Coach and the Union Pacific.

14. On March 29, 2012, counsel for Union Pacific tendered to National Union its request for reimbursement of its defense costs. It is anticipated that National Union will refuse to reimburse Union Pacific and comply with its obligations under the Policy - as it has done with respect to BNSF Railway Company, a co-defendant with one or more of the Debtors in other unrelated pending state court actions that is similarly situated to Union Pacific - on the grounds that the automatic stay applies to prevent National Union from continuing to honor its obligations under the Policy.

RELIEF REQUESTED

15. Union Pacific seeks limited relief from the automatic stay so that it may access its right to insurance coverage under the Policy for the Action. Namely, it seeks to obtain payment of its defense costs and, if necessary, any liability costs. Moreover, Union Pacific seeks relief from the stay to file a complaint against CUSA in the Action, to assert a crossclaim for contractual and common law indemnification and to collect, if necessary,⁴ any judgment for indemnity against CUSA from the available insurance proceeds under the Policy. Finally, Union Pacific seeks a waiver of Bankruptcy Rule 4001(a)(3) such that an order granting Union Pacific's request would permit Union Pacific to proceed immediately.

⁴ Union Pacific seeks to assert a crossclaim against CUSA for indemnification in the Action out of an abundance of caution. Should Union Pacific receive payment from National Union for its defense and any liability costs because of Union Pacific's status as an "Additional Insured" under the Policy and thereby is made whole, Union Pacific's indemnity claim against CUSA would likely be rendered moot.

BASIS FOR THE RELIEF REQUESTED

A. The Standard for Seeking Relief from the Automatic Stay Under 11 U.S.C. 362(d)(1)

16. Section 362(d)(1) of the Bankruptcy Code provides that the Court can grant relief from the automatic stay, including terminating, annulling, modifying or conditioning the stay, for “cause.” 11 U.S.C. § 362(d)(1).

17. Once the movant meets its initial burden to establish a prima facie case of “cause”, the burden is shifted to the party opposing relief to rebut the movant’s entitlement to such relief. *Izzarelli v. Rexene Prods. Co. (In re Rexene Prods. Co.)*, 141 B.R. 574, 576-77 (Bankr. D. Del. 1992).

18. Because “cause” is undefined in the Bankruptcy Code, courts generally consider three factors in determining whether it exists:

1. Whether any great prejudice to either the bankrupt estate or the debtor will result from a lifting of the stay;
2. Whether the hardship to the non-bankrupt party by maintenance of the stay considerably outweighs the hardship to the debtor; and
3. The probability of the creditor prevailing on the merits.

In re Downey Fin. Corp., 428 B.R. 595, 609 (Bankr. D. Del. 2010). As discussed herein, Union Pacific submits that consideration of these factors in light of the facts and circumstances present warrant the limited relief Union Pacific seeks by this Motion.

B. Sufficient Cause Exists to Grant Union Pacific Relief from the Automatic Stay

1. The Debtors and the Estates Will Not Face Any Prejudice

19. If Union Pacific is granted limited relief from the stay, the Debtors will not suffer any “great” prejudice. Indeed, Union Pacific asserts that the Debtors will suffer no prejudice.

20. More specifically, allowing Union Pacific to access its insurance coverage for

defense and liability costs and to assert a crossclaim, and collect against the Policy if necessary, for indemnification will neither affect nor drain the estates of their assets. The Policy obligates National Union *in the first instance* to defend Union Pacific in the Action and pay for any liability that may arise. It also obligates National Union to provide indemnification coverage to CUSA should National Union fail to defend Union Pacific and pay in the first instance for any liability.⁵ It is only after National Union makes a payment under the Policy under either of these avenues of Policy coverage, and tenders a reimbursement request to the Debtors, that the Debtors may become obligated to reimburse National Union. No immediate payment by the Debtors or their estates is necessary.

21. If, following a tender for reimbursement from National Union, the Debtors fail to reimburse, the Debtors assert that National Union has the right to draw down on certain letters of credit that have been issued to secure the Debtors' obligations under the Policy. *See* Mar. 19, 2012 Hr'g Tr. at 54:1-24. According to the Debtors, the *possible* loss of value of these letters of credit at some *unknown point in the future* will cause them harm. *Id.* at 56:14-24. This scenario is hypothetical, speculative and remote.

22. Regardless of the foregoing, however, CUSA is obligated to Union Pacific under the Agreement and California common law to indemnify it for its costs and damages related to the Action. Accordingly, because these costs are an obligation to be borne ultimately by CUSA and its estate, they would not be harmed by the advance payment of such costs by National Union. Rather, payment would be beneficial to the Debtors because it would remove any claim, under common law, the Agreement or otherwise, Union Pacific has against CUSA related to the

⁵ Should this situation arise and National Union refuses to provide indemnification coverage, Union Pacific is permitted to enforce the indemnity provisions directly against National Union. *See* CAL. INS. CODE § 11580(b)(2).

Action for indemnification. *See, e.g., In re Allied Digital Techs. Corp.*, 306 B.R. 505, 514 (Bankr. D. Del. 2004) (opining that debtor would not be harmed by allowing directors and officers to access payment of their defense costs under an insurance policy where the debtor was obligated to indemnify the directors and officers under its bylaws); *Downey Fin.*, 428 B.R. at 610 (same).

23. Finally, allowing Union Pacific to access the insurance proceeds will not deplete the insurance coverage otherwise available under the Policy for the Debtors. Although there is a \$5 million per accident liability limit, defense costs are not limited. Moreover, the Plaintiff seeks to hold CUSA and Union Pacific joint and severally liable for his damages and injuries suffered. Accordingly, there is no chance the payment of a judgment on behalf of Union Pacific could exhaust the coverage at the expense of the Debtors. Indeed, the payment by National Union of any judgment obtained by the Plaintiff would extinguish the claim that the Plaintiff would assert against the Debtors' estates related to the Action.

2. Union Pacific will Suffer Real and Identifiable Harm

24. While the Debtors would suffer no harm should the Court grant Union Pacific relief from the stay to access its insurance coverage, by contrast, Union Pacific would suffer real and identifiable harm should the stay be allowed to continue. Here, Union Pacific negotiated and obtained from the Debtors direct insurance coverage for liability and defense costs as well as indemnification. Now, Union Pacific is in need of its right to payment under the Policy.

25. Without the narrow lifting of the stay it seeks, Union Pacific will be left to defend itself without the benefit of its additional insured status under the Policy and will suffer real and identifiable harm. To date, Union Pacific has incurred approximately \$17,800 in defense costs for which they are entitled to coverage but have not yet been reimbursed. Union Pacific

bargained for this coverage, and should be entitled to the benefit of its bargain. *See, e.g., Allied Digital*, 306 B.R. at 514 (“Without funding, the [movants] will be prevented from conducting a meaningful defense to the Trustee’s claims and may suffer substantial and irreparable harm. The [movants] bargained for this coverage.”). Failure to obtain reimbursement of these costs is a real and identifiable harm to Union Pacific. *See, e.g., Downey Fin.*, 428 B.R. at 610 (identifying real harm where the movants would be forced to pay \$880,000 in defense costs “out of their own pockets.”).

26. Given the facts and circumstances, Union Pacific submits that the hardship it will experience from the continuance of the stay outweighs the hardship to the Debtors if they stay is modified. Accordingly, Union Pacific respectfully requests that the stay be lifted for the limited purpose of allowing Union Pacific to access its right to insurance coverage under the Policy for defense and liability costs and to assert a crossclaim against CUSA, and collect against the Policy if necessary, for indemnification.

RELIEF FROM BANKRUPTCY RULE 4001(a)(3)

27. Federal Rule of Bankruptcy Procedure 4001(a)(3) provides for a fourteen (14) day stay on all orders granting relief from the automatic stay unless the Court grants otherwise. Fed. R. Bankr. P. 4001(a)(3). Given the facts and circumstances previously discussed herein, Union Pacific respectfully submits that waiver of the fourteen (14) day period under Bankruptcy Rule 4001(a)(3) is appropriate in this instance to permit Union Pacific to access immediately its insurance coverage under the Policy.

NOTICE

28. Union Pacific has provided notice of the relief requested in this Motion to counsel for the Debtors, counsel to the Office of the United States Trustee, counsel to the Official

Committee of Unsecured Creditors, counsel to the Plaintiff in the Action, and those parties entitled to notice pursuant to Bankruptcy Rule 2002, in accordance with Local Rule 2002-1(b). In light of the nature of the relief requested herein, Union Pacific submits that no other or further notice is necessary.

NO PRIOR REQUEST

29. No previous motion for the relief sought herein has been made to this or any other court.

WHEREFORE, Union Pacific respectfully requests that the Court enter an order, substantially in the proposed form attached hereto as Exhibit A, (i) modifying the automatic stay to permit Union Pacific (a) to access its right to insurance coverage under the Policy for the Action and (b) to file a complaint against CUSA in the Action, to assert a crossclaim for indemnification and to collect, if necessary, any judgment obtained against CUSA from the available insurance proceeds under the Policy, and (ii) granting such other and further relief as the Court deems necessary and appropriate.

Dated: April 2, 2012
Wilmington, Delaware

ASHBY & GEDDES, P.A.



Gregory A. Taylor (I.D. #4008)
Karen B. Skomorucha Owens (I.D. #4759)
500 Delaware Avenue, 8th Floor
P.O. Box 1150
Wilmington, DE 19899-1150
Telephone: (302) 654-1888
Facsimile: (302) 654-2067
Email: gtaylor@ashby-geddes.com
kowens@ashby-geddes.com

Counsel to Union Pacific Railroad Company