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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

In re:	Chapter 11
Duro Dyne National Corp., *et al.*[1]	Case No. 18 –27963 (MBK)
Debtors.	(Jointly Administered)

DEBTORS' MEMORANDUM OF LAW IN OPPOSITION TO MOTION OF CERTAIN INSURERS FOR RELIEF FROM AUTOMATIC STAY

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's tax identification number, are: Duro Dyne National Corp. (4664); Duro Dyne Machinery Corp. (9699); Duro Dyne Corporation (3616); Duro Dyne West Corp. (5943); and Duro Dyne Midwest Corp. (4662).

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Debtors Duro Dyne National Corp., et al. (the "Debtors" or the "Company") submit this Memorandum of Law in Opposition to the Motion (the "Motion") of Certain Insurers (the "Moving Insurers") for Relief from the Stay.

PRELIMINARY STATEMENT

The Moving Insurers wrongly claim lifting the stay would benefit the Debtors and creditors more than swiftly achieving confirmation of the Debtors' plan of reorganization (the "Plan"). Nothing could be further from the truth. Only the Moving Insurers would benefit from pursuing the New York State Supreme Court declaratory judgment lawsuit (the "New York Litigation"). Their Motion is a transparent attempt to obtain negotiating leverage. Self-serving and disingenuous arguments do not constitute "cause" for relief from the automatic stay.

There is absolutely no need at this time to pursue the New York Litigation. The Moving Insurers admit that the New York Litigation will only decide certain limited "rights and obligations" under the policies, including the appropriate allocation scheme that should apply under applicable law and the policy language at issue. Indeed, the Moving Insurers' motions pending in the New York Litigation may simply impact *when* they will be required to pay out those limits, i.e., how much and how soon based on the applicable allocation scheme. None of the motions pending in the New York Litigation – or anything else in that lawsuit – will have any impact on the feasibility of the Debtors' Plan. This is why during negotiations the Ad Hoc Committee and Pre-Petition Legal Representative for Future Claimants secured a plan for their constituents that assign the insurance to a trust for asbestos personal injury claimants "as is, where is" (the "Asbestos Personal Injury Trust").

The Moving Insurers' true intentions and self-serving purposes are evidenced by the Motion's misleading contradictory statements concerning the New York Litigation. For

example, while the Moving Insurers claim that "the parties have filed (or renewed) summary judgment motions that will resolve many, if not all, of the remaining coverage disputes …" (*see*, Motion, pp. 14-15), the Motion reiterates several times that there is at least one material issue in the New York Litigation that will require discovery and trial, which could take months or even years to fully resolve. These contradictions emphasize what the Motion really is: a transparent attempt to create negotiating leverage by disrupting the plan confirmation process.

Against this background the Motion clearly must be denied. First, the Moving Insurers have failed to demonstrate sufficient "cause" to warrant a modification of the stay respecting the New York Litigation. Second, the Debtors would suffer material prejudice were the stay modified and the New York Litigation allowed to advance. Third, the balance of equities favors allowing the chapter 11 cases to proceed to confirmation. Finally, at this time, there is no manifest need for the New York Litigation to proceed.

The automatic stay is a fundamental protection of the Bankruptcy Code from which the Moving Insurers have failed to demonstrate a right to relief. This is not a bankruptcy case in which the feasibility of a plan is dependent upon either the immediate progress or the eventual outcome of the New York Litigation. The Debtors urge the Court to deny the Moving Insurers' Motion and instead, appropriately, allow this chapter 11 case to unfold without the unnecessary and wasteful distraction of a parallel insurance coverage action which will impede the orderly progress towards confirmation of the Plan.

STATEMENT OF RELEVANT FACTS

A. Overview and Nature of the Debtors' Business

In 1952 Milton Hinden founded the Company that did business under the name Duro-Dyne Corporation. Over the span of 60 years, the Company has evolved into the leading manufacturer of sheet metal accessories and equipment for the heating, ventilating, and air

conditioning (HVAC) industry. The Company's operations are conducted though Duro Dyne, Duro Dyne Machinery, Duro Dyne Corp., Duro Dyne Midwest, and Duro Dyne West.

Duro Dyne is a holding company whose primary asset is all of the issued and outstanding capital stock of the other Debtors. Duro Dyne is owned by members of the Hinden family and various trusts for the benefit of Hinden family members.

B. Asbestos Litigation

The primary reason for the filing of the Debtors' chapter 11 cases is the need to address the Debtors' asbestos liability. As of the date the chapter 11 cases were filed (the "Petition Date"), the Debtors are named as defendants in approximately 956 pending personal injury cases stemming from alleged asbestos exposure (the "Asbestos Personal Injury Claims"). Prior to the Petition Date, the Debtors settled more than 650 asbestos claims that had been filed against them. There were also over 8,100 asbestos claims dismissed. These claims have been asserted in various jurisdictions, including Michigan, Illinois, Massachusetts, Missouri, and West Virginia.

The alleged asbestos liability arose as a result of the Debtors having sold products that allegedly contained asbestos beginning in approximately 1952 until about 1978. Since the first asbestos claims were filed against the Debtors in 1988, the Debtors have worked with their insurance companies to seek dismissal of a large portion of the Asbestos Personal Injury Claims and to settle the remaining Asbestos Personal Injury Claims in advance of trial.

At the rate the Asbestos Personal Injury Claims were being filed and settled by the Debtors and their insurance companies, it originally appeared that the Debtors would be able to address all of the claims through proceeds of insurance and cash flow from operations. In recent years, however, the Debtors have been forced to bear an increasing share of settlements and defense costs due to the insolvency of one of the Debtors' insurance companies, the exhaustion

of the Debtors' primary insurance coverage, and disputes with insurance companies providing excess level coverage.

C. Insurance Coverage

Beginning at least as early as 1968, the Company maintained comprehensive general liability insurance coverage applicable to asbestos personal injury claims. The Company purchased primary general liability policies from North River Insurance Company ("North River"), Hartford Accident & Indemnity Company ("Hartford"), Federal Insurance Company ("Federal"), Aetna Insurance Company of Connecticut ("Aetna"), and Insurance Company of North America ("INA") covering the policy periods from August 1, 1968 through June 23, 1991. Additionally, Duro Dyne purchased umbrella or excess insurance policies from Hartford, North River, Federal, MidStates Reinsurance Corporation ("MidStates"), Munich Reinsurance America, Inc., ("Munich") and Great Atlantic Insurance Company of Delaware ("GAIC") covering the policy periods from May 15, 1972 through June 23, 1989.

The comprehensive general liability insurance policies described above are "occurrence-based" policies which, subject to other policy terms, generally insure against liability arising from bodily injury or property damage during the policy period, even if the injury or damage does not manifest itself until after the policy period. The Company's pre-1991 "occurrence" policies provide insurance coverage for asbestos and other "long tail" claims, which are commonly asserted years or decades after the underling injuries are alleged to have occurred. After 1991, the policies purchased by the Company contain various exclusions for asbestos and asbestos-related claims.

In total, from 1968 through 1991, the Company purchased comprehensive general liability policies with combined limits of liability of approximately $82.5 million. All of the policies impose a duty on the insurance company to indemnify the Company for settlements or

judgments. The primary and umbrella policies also require the insurance company to pay to defend the Company in connection with potentially covered claims. Although there are limits of liability that apply to indemnity payments in all of the policies, some of the Company's primary and umbrella policies provide for the payment of an unlimited amount of defense costs in the event a potentially covered claim is asserted against the Company. As a general matter, primary policies respond to claims first, followed by umbrella and excess policies.

D. The Insurance Coverage Litigation

On September 19, 2013, North River commenced the New York Litigation against the Company and the Company's other primary and umbrella/excess insurance companies seeking to limit its coverage obligations to the Company in connection with the Asbestos Personal Injury Claims. Although the New York Litigation remains pending, the parties have not undertaken any discovery. They have, however, filed motions for summary judgment on a variety of presently known legal issues. Critical issues in the coverage case include the insurance companies' argument, contested by the Company, that the Company is obligated to contribute a share of its defense costs in the Asbestos Personal Injury Claims (and should reimburse the Moving Insurers for more than $1 million in past defense costs), and an argument by North River that one of its remaining primary policies contains an exclusion for asbestos liability.

Debtors' other insurance companies in the New York Litigation have raised a host of additional arguments that they contend limit or eliminate their coverage obligations. Those arguments include, but are not limited to, assertions that: (1) certain insurance companies' obligations to pay defense costs are limited or non-existent; (2) the Company has not properly exhausted the primary policies; and (3) insurance companies who issued policies in multiple years are obligated only to provide coverage up to the limits of a single year's policy. The Company disputes these arguments and believes that they lack merit.

E. Prepetition Settlement Negotiations

As detailed above, the cost of defending and resolving Asbestos Personal Injury Claims asserted against the Company has been and continues to be substantial. In addition, the amount of insurance coverage remaining to the Company has continued to decline.

In light of these circumstances, the Company determined that it was necessary to commence a case under chapter 11 of the Bankruptcy Code to preserve its remaining assets and to confirm a plan of reorganization that would allow the Company to satisfy its Asbestos Personal Injury Claims in accordance with the requirements of section 524(g) of the Bankruptcy Code. In July 2015, the Company began discussions with counsel for the holders of Asbestos Personal Injury Claims in order to explore the feasibility of, and the potential for, a prenegotiated chapter 11 plan of reorganization that would include the Asbestos Personal Injury Trust for present and future asbestos personal injury claimants and a channeling injunction pursuant to section 524(g) of the Bankruptcy Code. At that time, counsel for holders of Asbestos Personal Injury Claims formed an *ad hoc* committee of asbestos plaintiffs to represent present asbestos claimants (the "Ad Hoc Committee").

F. The Pre-Petition Future Claimants' Representative

In order to satisfy the requirements of section 524(g) of the Bankruptcy Code with regard to obtaining a channeling injunction, the Company retained Lawrence Fitzpatrick to serve as an independent third-party representative. Mr. Fitzpatrick's purpose is to protect the rights of persons that might subsequently assert asbestos-related personal injury or wrongful death claims against the Company (the "Pre-Petition Future Claimants' Representative").

Following extensive due diligence by the Ad Hoc Committee and the Pre-Petition Future Claimants Representative, representatives of the Company, the Ad Hoc Committee and the Pre-Petition Future Claimants' Representative spent considerable time negotiating the terms of a

possible plan of reorganization for the Company. Ultimately, the Company, the Ad Hoc Committee and the Pre-Petition Future Claimants' Representative reached an agreement on the terms for a proposed plan of reorganization.

G. The Bankruptcy Filing

On September 7, 2018, the Debtors each filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (the "Petition Date"). The Debtors' chapter 11 cases have been consolidated for procedural purposes only and are being administered jointly.

Also on the Petition Date, the Debtors filed a Prenegotiated Plan of Reorganization (the "Plan") and a Disclosure Statement (the "Disclosure Statement") with respect thereto.

H. Post-Petition Activity

Since the Petition Date, the Court has granted the Debtors' requested first day motions and entered final orders. The Court has scheduled a hearing on the adequacy of the Debtors' Disclosure Statement for October 15, 2018 (the "Disclosure Statement Hearing"), and the Debtors are planning to request a hearing on confirmation in early December. The U.S. Trustee and the Moving Insurers have filed objections to the Disclosure Statement.

On September 26, 2018, the Office of the United States Trustee appointed an Official Committee of Asbestos Claimants (the "Official Committee").

The Moving Insurers and the U.S. Trustee both objected to the Debtors' Motion to Appoint a Legal Representative ("the Legal Representative Objections"). The Court has permitted limited discovery on this issue, and documents demands and deposition notices have been served on the Debtors, the Pre-Petition Future Claimants' Representative, and asbestos plaintiffs' counsel. The final argument on the Legal Representative Objections also is scheduled for October 15, 2018.

Finally, the U.S. Trustee has requested and received an extension of time to review the retention applications of the Debtors' counsel and financial advisor until December 4, 2018.

LEGAL ARGUMENT

The Moving Insurers' arguments are entirely lacking in substantive support and are particularly weak with respect to the alleged lack of prejudice to the Debtors and presence of "good cause" for lifting the stay. Moving Insurers' stated concern for both the Debtors and creditors regarding the purported importance of determining "rights and obligations" under the relevant insurance policies in order to determine the policies' "value" are transparently false. These arguments are little more than thinly-veiled efforts to hold up Plan confirmation, and tie up the Debtors in distracting litigation that could take years to resolve fully.

The purpose behind the Motion has nothing to do with determining the "value" of the insurance assets, as "value" has no effect on the feasibility of the Plan. Rather, Moving Insurers seek to lift the stay and pursue the New York Litigation simply to put pressure on the Debtors and create leverage in order to obtain favorable settlement terms. Because there is no cause at all, much less "good cause," to lift the automatic stay, the Motion should be denied.

A. The Automatic Stay Applies to the New York Litigation, and the Moving Insurers Offer No Valid Grounds for Lifting the Stay.

The automatic stay of section 362 of the Bankruptcy Code is "one of the most fundamental protections granted the debtor under the Bankruptcy Code." *Izzarelli v. Rexene Prods. Co. (In re Rexene Prods. Co.)*, 141 B.R. 574, 576 (Bankr. D. Del. 1992) (citing *Midlantic Nat'l Bank v. N.J. Dept. of Envt'l Prot.*, 474 U.S. 494, 503 (1986)). The purpose of the automatic stay is three-fold: "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." *Borman v. Raymark Ind., Inc.*, 946 F.2d 1031, 1036 (3d Cir. 1991) (quoting *St. Croix Condo. Owners v. St. Croix Hotel*, 682 F.2d 446, 448 (3d Cir. 1982)), *quoted in Rexene Prods*, 141 B. R. at 576 (emphasis added).

The automatic stay is designed to give a debtor a "breathing spell" free from lawsuits while the debtor attempts to reorganize its affairs. *See Maritime Elec. Co. v. United Jersey Bank*, 959 F.2d 1194, 1204 (3d Cir. 1991); H.R. Rep No. 595, 95th Cong. 1st Sess. 340 (1977). Implementation and maintenance of the automatic stay is fundamental to the effective administration of pending bankruptcy cases. The automatic stay provides a debtor protection from a "chaotic and uncontrolled scramble for the debtor's assets in a variety of uncoordinated proceedings in different courts." *Litton Sys., Inc. v. Frigitemp Corp. (In re Frigitemp Corp.)*, 8 B.R. 284, 289 (S.D.N.Y. 1981) (internal citations omitted).

Providing the "breathing spell" inherent to the automatic stay is a central tenet of the policies underlying the Bankruptcy Code. *Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection*, 474 U.S. 494, 502 (1986) (the automatic stay is "one of the fundamental debtor protections provided by the bankruptcy laws.") *McCartney v. Integra Nat'l Bank North*, 106 F. 3d 506, 509 (3rd Cir. 1997) ("The stay also protects creditors by preventing particular creditors from acting unilaterally to obtain payment from a debtor to the detriment of other creditors"). Indeed, the stay provides a debtor with "a breathing spell from . . . [its] creditors" and permits it "to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove . . . [it] into bankruptcy." *Grady v. A.H. Robins Co.*, 839 F. 2d 198 200 (4th Cir. 1988). That "breathing spell" applies to the New York Litigation respecting the Debtors' insurance policies.

Not only does the automatic stay prevent "the . . . continuation . . . of a judicial . . . proceeding against the debtor that was . . . commenced before the commencement of the case . . . ", but it also stays "any act to . . . exercise control over property of the estate." 11 U.S.C. § 362(a)(1) and (3). Significant to this case, it is well-established that general liability insurance policies, such as those at issue in the New York Litigation, are property of the Debtors' estates under 11 U.S.C. § 541(a). Indeed,

> A products liability policy of the debtor is similarly within the principle: it is a valuable property of a debtor, particularly if the debtor is confronted with substantial liability claims within the coverage of the policy in which case the policy may well be, as one court has remarked in a case like the one under review, '"the most important asset of [i.e., the debtor's] estate." *In re Johns Manville Corp.*, 40 B.R. 219, 229 (S.D.N.Y 1984). Any action in which the judgment may diminish this "important asset' is unquestionably subject to a stay under this subsection.

In re A.H. Robins Co, Inc., 788 F. 2d 994, 1001 (4th Cir. 1986).

Bankruptcy Judge Wizmur noted that similar respect is paid to insurance policies owned by a debtor. *In re GB Holdings, Inc.*, 2006 Bankr. LEXIS 4131, *4 (Bankr. D.N.J. 2006) ("The Third Circuit recently confirmed that insurance policies constitute property of the estate under Section 541") (citing *ACandS, Inc. v. Travelers Cas. and Sur. Co.*, 435 F. 3d 252, 260 (3rd Cir.) It follows, then, that a lawsuit brought by an insurance company, seeking to eviscerate the availability of coverage under policies it sold to a debtor, quintessentially is the type of matter stayed by Section 362. *Safety Nat'l Cas. Corp. v. Kaiser Aluminum & Chem. Corp. (In re Kaiser Aluminum Corp.)*, 303 B.R. 299, 303 (D. Del. 2003).

Here, it is not coincidental that the hearing on the Moving Insurers' Motion is scheduled for October 15, 2018, the same date as the Disclosure Statement Hearing. The Moving Insurers have, as expected, objected to the Disclosure Statement and undoubtedly will object to

confirmation of the Debtors' Plan. The Motion is just another of what will become many attempts to impede the progress of the chapter 11 cases.

The Moving Insurers' actions come as no surprise. Attempted obstruction by insurance companies is commonplace in asbestos-related bankruptcy cases, and particularly in those cases in which the debtor and its alleged personal injuries creditors have achieved a *modus vivendi* prior to commencement of the case. Counting on debtors' as being preoccupied during the hectic early days of a chapter 11 case, insurance companies contractually obliged to cover the injuries of a debtor's creditors will try seek to lift the automatic stay in order to gain some perceived procedural advantage in their state court cases.

In this case, the Moving Insurers are racing to get back to New York because they wish to use the New York Litigation as a leverage point in ongoing negotiations, but there is no basis or need for that case to proceed prior to Plan confirmation. Because the Moving Insurers offer no legitimate reasons for lifting the automatic stay, the Court should not grant the Motion.

B. No "Cause" Exists to Modify the Automatic Stay.

Section 362(d)(1) of the Bankruptcy Code permits a court to grant relief from the automatic stay only "for cause" 11 U.S.C. § 362(d)(1). "The term 'cause' as used in section 362(d) has no obvious definition and is determined on a case-by-case basis." *Alliance Assocs. V. Integrated Health Servcs., Inc. (In re Integrated Health Servcs., Inc.),* 2000 Bankr. LEXIS 1319, at *4-5 (Bankr. D. Del. Aug. 11, 2000). Courts consider what constitutes "cause" for stay relief based on the totality of the circumstances in each particular case. *In re Wilson*, 116 F.3d 87, 90 (3d Cir. 1997) (citing *Trident Assocs. v. Metropolitan Life Ins. Co. (In re Trident Assocs.),* 52 F.3d 127 (6th Cir. 1995)).

In order to proceed with a lawsuit pursuant to 11 U.S.C. § 362(d), a plaintiff insurance company must demonstrate "cause" for stay modification. Because "cause" is not defined in the

Bankruptcy Code, there is no inherent right to relief from the stay, *In re MacDonald*, 755 F. 2d 715, 717 (9th Cir. 1985). In determining whether "cause" exists, courts in this Circuit consider the following three factors:

> (1) whether any great prejudice to either the bankruptcy estate or the debtor will result from lifting the stay;
>
> (2) whether the hardship to the non-bankrupt party by the maintenance of the stay considerably outweighs the hardship to the debtor if the stay is lifted; and
>
> (3) whether it is probable that the creditor will prevail on the merits of its case against the debtor.

See In re Telegroup, Inc., 327 B.R. 87, 91 (Bankr. D.N.J. 1999); *see also In re Scarborough-St. James Corp.*, 535 B.R. 60, 67–68 (Bankr. D. Del. 2015); *In re Aleris Int'l, Inc.*, 456 B.R. 35, 47–48 (Bankr. D. Del. 2011); *In re Downey Fin. Corp.*, 428 B.R. 595, 608-609 (Bankr. D. Del. 2010), citing *In re W.R. Grace & Co.*, 2007 Bankr. LEXIS 1214, 2007 WL 1129170, at *2 (Bankr. D. Del. 2007) (citing *In re Continental Airlines*, 152 B.R.420, 424 (Bankr. D. Del 1993)); *The SCO Group*, 395 B.R. 852, 856-57 (Bankr. D. Del 2007); *Save Power Ltd. v. Pursuit Athletic Footwear, Inc.* (*In re Pursuit Athletic Footwear, Inc.*), 193 B.R. 713, 718 (Bankr. D. Del. 1996) (citing *In re Rexene Products Co.*, 141 B.R. 574, 576 (Bankr. D. Del. 1992)) (all adopting a nearly identical three-prong test).

As will be detailed below, the Moving Insurers have failed to demonstrate "cause" for stay modification as required under 11 U.S.C. § 362(d). Rather, the Moving Insurers' Motion is a predictable and calculated attempt to distract the Debtors and the Bankruptcy Court from the real focus of the Debtors' chapter 11 cases. The Moving Insurers' arguments are devoid of any true legal or factual basis for stay relief. In fact, the Moving Insurers cannot even set forth a complete argument as they are only able to address two of the three criteria for relief in this

District. Accordingly, under relevant case law in this circuit (consistent with similar holdings in sister circuits), the Motion should be denied.[2]

1. Stay Modification Would Substantially Prejudice the Debtors.

Contrary to the Moving Insurers' assertion, compelling reasons exist for *not* lifting the stay at this juncture. Most notably, lifting the stay now likely would disrupt these bankruptcy cases and harm the Debtors' estates. Requests to lift the stay are frequently denied where lifting the stay would distract from or prejudice the Debtors' efforts to reorganize. *See, e.g.*, *In re W.R. Grace & Co.*, 2007 WL 1129170, at *2-3 (Bankr. D. Del. April 13, 2007) (denying lift stay motion where granting relief would "impede the administration of the estate[,] . . . interfere [ ] with the orderly rehabilitation of the Debtors" and would "be a distraction from the reorganization process"); *In re Gyro-Trac (USA), Inc.*, 441 B.R. 470, 489 (Bankr. D. S.C. 2010) (denying creditor's motion for relief from stay where lifting the stay would "substantially frustrate[]" the debtor's ability to reorganize); *In re Comdisco, Inc.*, 271 B.R. 273, 280 (Bankr. N.D. Ill. 2002) ("[A]bsent a compelling reason, it would be irresponsible and subversive of the purpose of the automatic stay to allow any resources and attention of the Debtor to be diverted to other matters not directly related to its reorganization."); *In re Enron Corp.*, 306 B.R. 465, 477 (Bankr. S.D.N.Y. 2004) (declining to lift stay in part because "[a]t the time the Motion was filed, [Enron North America Corp.], along with all the above-captioned debtors, was in the process of negotiating and formulating a plan of reorganization" and "[t]o divert that process in order to proceed with litigation in a non-bankruptcy forum would interfere with the reorganization process."); *see also Millard v. Dev. Disabilities Institute, Inc.*, 266 B.R. 42, 44 (E.D.N.Y. 2001)

[2] Moving Insurers' first legal contention is that the Debtors' mandatory counterclaims are not formally barred by the automatic stay. *See*, Motion, p. 8. Regardless of whether this is correct, the Debtors consent to having their counterclaims treated on equal footing with Moving Insurers' causes of action and urge the Court to issue an appropriate order clarifying that the New York Litigation is stayed in all respects.

("The purpose of the automatic stay is to allow the debtor to focus all attention on reorganization efforts without the distraction of having to defend against outside litigation."); In re Curtis, 40 B.R. 795, 806 (Bankr. D. Utah 1984) ("The most important factor in determining whether to grant relief from the automatic stay to permit litigation to proceed against a debtor in another forum is the effect of such litigation on the administration of the estate. Even slight interference with the administration may be enough to preclude relief in the absence of a commensurate benefit.").

The instant chapter 11 cases were filed mere weeks ago, and – notwithstanding substantial pre-bankruptcy planning – like all cases, face challenges both anticipated and otherwise to their eventual success. To allow the New York Litigation to proceed would needlessly compound the difficulties faced by the Debtors. Indeed, lifting the automatic stay this early in a complex chapter 11 case – even one "prenegotiated" – is contrary to tradition, case law, and common sense. "[A] bankruptcy court should be reluctant to deprive a debtor of the benefits of chapter 11 relief before it has an adequate opportunity to utilize its rehabilitative features." *In re Dupell*, 235 B.R. 783 (Bankr. E.D. Pa. 1999).

Confirmation of Debtors' Plan does not concern the viability of the insurance coverage available under the insurance policies provided by the Moving Insurers. To require the Debtors to simultaneously litigate coverage issues relating to confirmation and those of concern in the New York Litigation would be wasteful, potentially duplicative, and wholly unnecessary. In such circumstances, lifting the automatic stay is improper. *In re Conejo Enters., Inc*., 96 F.3d 346, 352 (9th Cir. 1996) (affirming bankruptcy court's refusal to lift stay to permit state court litigation to proceed because maintenance of stay "promoted judicial economy by minimizing the duplication of litigation in two separate forums"); *In re Salazar*, 448 B.R. 814, 825 (Bankr. S.D.

Cal. 2011) (denying lift stay motion because lawsuits simultaneously pending in state and bankruptcy courts created "the potential for confusion and a waste of judicial resources."); *In re Henderson*, 352 B.R. 439, 441 (Bankr. N.D. Tex. 2006) (denying request to modify stay to permit federal district court lawsuit to proceed where similar lawsuit was pending in bankruptcy court because "proceeding to trial in one forum and not the other should save judicial resources, prevent duplicative litigation, and avoid potentially inconsistent results").[3]

Moreover, continued activity in the New York Litigation could require an extensive expenditure of Debtor resources from both temporal and financial standpoints. The New York Litigation involves issues that cannot be resolved via motion, and will require discovery including multiple depositions, and an eventual jury trial. Allowing the New York Litigation to proceed now would be substantially prejudicial to Debtors as a result; thus, the Motion should be denied.

2. Balancing the Harms Favor the Debtors.

Importantly, a "balancing of harms" in this case clearly favors the Debtors and weighs heavily against granting the Motion. No harm whatsoever will befall the Moving Insurers if the Motion is denied; they can litigate their issues before the Bankruptcy Court in connection with confirmation, while preserving any remaining issues in the New York Litigation for such later time, if any, when their resolution becomes necessary, if ever. In such circumstances, the stay should not be lifted. *In re Chari*, 262 B.R. 734, 737 (Bankr. S.D. Ohio 2001) (denying lift stay motion where there were "serious concerns about the potential harm that the bankruptcy estate could suffer" if stay was lifted to allow state court litigation to proceed); *In re Ramkaran*, 315

[3] Concerns regarding the potentially duplicative nature of the New York Litigation and the confirmation process are self-evident, particularly to the extent that any issues of insurance availability potentially impact a streamlined determination of Plan feasibility under 11 U.S.C. §1129(a)(11). Plan confirmation manifestly does *not* require a plenary determination of the multiple issues at hand in the New York Litigation.

B.R. 361, 364 (D. Md. 2004) (affirming denial of motion to lift stay because requesting party "did not . . . assert[] any significant hardship."); *In re Danzik*, 549 B.R. 804, 810 (Bankr. D. Wyo. 2016) (explaining that relief from stay is not appropriate if it only shifts the burden from another party to the debtor). [4]

3. Moving Insurers' Additional Arguments to Lift the Stay Must Fail.

In detailing the purported "cause" for lifting the automatic stay, Moving Insurers again claim concern that "the parties to this bankruptcy proceeding have a strong interest in resolving the insurance coverage issues now, rather than waiting until after plan confirmation." *See* Motion, at pp. 10-11. In fact, the converse is true: the Debtors, the Ad Hoc Committee, the Official Committee and the Pre-Petition Future Claimants' Representative – everyone *except for* the Moving Insurers – already have agreed that plan confirmation is the ultimate goal. Moving Insurers' fantasy that the New York Litigation and all corresponding coverage issues can be decided "now," as if with a finger snap, is at odds with reality, and further evinces the self-serving nature of the Motion.[5]

Moreover, Moving Insurers' continued assertion that the parties "cannot fully evaluate the value" of the insurance assets without conclusive litigation of the coverage issues, *see* Motion, at p. 10, makes no sense in light of the fact that the insurance assets policies are being assigned to Asbestos Personal Injury Trust "as is, where is". The outcome of the New York

[4] The Moving Insurers do not address the third prong of the "cause" analysis, i.e., whether they will prevail on the merits of their claims in the New York Litigation. While the required showing on the third factor, probability of success on the merits, is "slight", *In re Rexene Products Co.*, 141 BR 574, 576 (Bankr. D. Del. 1992), the Moving Insurers neglect this factor intentionally. To prevail, the Moving Insurers will need to secure the reversal of decades of well-settled New York law on allocation of defense costs under "duty to defend" policies and on the inability of an insurance company to unilaterally insert an exclusion months after policy inception. Because there is overall uncertainty on their likelihood of reversing precedent, this factor weighs against the Moving Insurers.

[5] The cases cited in footnote 5 at page 11 of the Motion are entirely distinct in that those courts all lifted the automatic stay in cases where the claims in state court necessarily *had to be decided* in order for the bankruptcy case to proceed. That is simply not true here.

Litigation cannot affect confirmation of the Plan. Further, there certainly is no urgent rush to decide potential arguments as to the *timing* that policy limits will be paid out.

Each of these additional factors raised by Moving Insurers fail to provide any good cause for lifting the automatic stay. *See* Motion, at pp. 11-12.[6] First, although Debtors agree that the presiding judge in the New York Litigation is highly competent to resolve the disputed issues. In addition to the five-year history of the case, including one appeal to the Appellate Division, there are hundreds of paging of briefing on the multiple pending motions, and the New York court timely was informed of the bankruptcy filing last month. Ultimately, there is no guarantee of any quick resolution of the pending motions, much less the New York Litigation as a whole given the issues requiring trial. The presumed competence of the new judge consequently does not favor lifting the stay.

Similarly, it is meaningless for the Moving Insurers to argue that the "New York court is in a position to completely resolve the insurance coverage issues." *See* Motion, at p. 11. The New York court certainly could resolve all the insurance issues *eventually*, but that could take months or years even ignoring the possibility – or likelihood – of appeals. This factor provides no "cause" for lifting the automatic stay. Nor does "clarifying the assets and obligations of the bankruptcy estate" – a "straw man" argument – because the value of the insurance assets is not material to confirmation.

Moving Insurers' assertion that resolving the New York Litigation "will not prejudice the interests of other creditors" is an admission that there exists no good cause for lifting the automatic stay at this time. Because the insurance issues and obligations can be resolved in the

[6] Moving Insurers fare no better under the Second Circuit's *Sonnax* test cited in footnote 6 at page 11 of the Motion. Specifically, both factors cited in that footnote – achieving full resolution of relevant issues and judicial and financial efficiency – weigh in favor of maintaining the automatic stay in this case.

ordinary course following plan confirmation, it would needlessly harm both creditors and the Debtors to delay confirmation for the unnecessary resolution of coverage issues.

Contrary to Moving Insurers' arguments, it is simply wrong that lifting the stay would in any way aid judicial efficiency. *See* Motion, at pp. 11-12. Moving Insurers' own points reveal the contradictory and misleading nature of this argument, as they first refer to the New York Litigation as being at "an advanced stage," yet then refer to whether or not "discovery is … deemed necessary" in the next bullet point. *Id*. Surely, there are issues that will involve extensive discovery, but none of these issues impact the feasibility of the Plan. The Moving Insurers are disingenuous, at best, when suggesting that the New York Litigation is going to (a) result in immediate rulings on the multiple pending motions, and (b) be scheduled for a trial date any time in the near future. The reality is that post-confirmation the legal representative on behalf of the Asbestos Personal Injury Trust and the insurers can continue to litigate all open coverage issues as appropriate, in due course.

Finally, the Moving Insurers vaguely allude to the supposed harm they will suffer based on maintaining the automatic stay. *See* Motion, at p. 12. The Debtors plan to request a hearing on confirmation in early December. Consequently, it is unclear to what Moving Insurers are referring regarding an inability to obtain "clarity as to operation of the proposed prepackaged plan, which depends upon a resolution of coverage issues favorable to [the Debtors]." The Moving Insurers are mistaken. In fact, the prenegotiated plan does not depend in any way, shape, or form on whether coverage issues ultimately are resolved in favor of the Debtors because the Ad Hoc Committee, the Official Committee and the Pre-Petition Future Claimants' Representative already have agreed to the assignment of the insurance assets to Asbestos Personal Injury Trust "as is, where is". There is no prejudice whatsoever to the Moving Insurers

which post-confirmation may argue for any and all rights and obligations under the policies. Moving Insurers have failed to raise a single valid ground supporting lifting the automatic stay, and the Motion should be denied.

C. The Eventual Resolution of the New York Litigation Does Not Mandate Immediate Stay Modification.

Moving Insurers' only remaining contention is that because the New York Litigation concerns legal issues that eventually may require resolution, it must be contested *now*. *See*, Motion, p.12.[7] Moving Insurers again are incorrect. At present, the Debtors are planning to request a hearing on confirmation in early December. Even if the status of the Future Claimants' Representative remains unresolved at that date, there is no immediate reason to consider the Motion prior to the hearing on Plan confirmation. Indeed, once the Plan is confirmed, and the Debtors' rights to asbestos-related insurance coverage are transferred to the Asbestos Personal Injury Trust for the benefit of holders of *bona fide* claims for asbestos-related injury, the Bankruptcy Court then could enter an appropriate order addressing when to allow any continuation of the New York Litigation.

[7] Moving Insurers' contend that the Bankruptcy Court would be required to abstain from hearing the New York Litigation. *See*, Motion, p. 12. It appears that the Moving Insurers are concerned that Debtors, as is their right pursuant to 28 U.S.C. §1452, might remove the lawsuit to the Eastern District of New York, and seek either application of the standing order of reference to the Bankruptcy Court in that District or simply to change venue to the District of New Jersey. This is an interesting, if convoluted, academic hypothetical, but Moving Insurers' speculation as to the Debtors' ultimate strategy (or that of the reorganization trust) is at best premature. The attendant legal issues respecting abstention from hearing a sister State litigation manifestly are unripe.

CONCLUSION

For the foregoing reasons, the Debtors respectfully request that the Court enter an order denying the Moving Insurers' Motion for Relief from the Automatic Stay.

Dated: October 8, 2018

Respectfully submitted,

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