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ATTORNEYS FOR ANTHONY ZIEBRON AND JAMES VRANA

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re: METALDYNE CORPORATION, *et al.*, Debtors.	Chapter 11 Case No. 09-13412 (MG) Jointly Administered

MOTION (I) TO LIFT THE AUTOMATIC STAY, AND (II) TO EXTEND TIME FOR FILING PROOFS OF CLAIM BY UNKNOWN POTENTIAL MEMBERS OF THE CLASS IN AN ACTION FILED IN THE EASTERN DISTRICT OF MICHIGAN

Movants, Anthony Ziebron and James Vrana, individually, and all others similarly situated as described in the Complaint in the case *Anthony Ziebron, et al., Plaintiffs v. Metaldyne Corporation, et al., Defendants* (Case No. 09-10164), pending in the United States District Court for the Eastern District of Michigan (collectively, the "Movants"), by their undersigned counsel, in support of their Motion for an Order lifting the automatic stay provisions of 11 U.S.C. §362(a)

and extending time for the filing of claims by unknown potential members of the plaintiff class, pursuant to 11 U.S.C. §§ 501 and 502 and Fed. R. Bankr. P. 3003(c)(3) and 9006(b)(1), state as follows:

Introduction

1. The debtors, Metaldyne Corporation and its affiliates (collectively, the "Debtors"), filed their Petitions for Relief under the provisions of Chapter 11 of Title 11 of the United States Code on May 27, 2009. Upon the filing, the automatic stay provisions of 11 U.S.C. § 362(a) became effective.

2. Previously, on January 14, 2009, Movants, through their attorneys, filed their Complaint in the U.S. District Court for the Eastern District of Michigan in the matter entitled *Anthony Ziebron, et al., Plaintiffs v. Metaldyne Corporation, et al., Defendants* (Case No. 09-10164)(the "Michigan Federal Securities Litigation"), a copy of which is attached hereto as **Exhibit 1**. Ziebron and Vrana are proposed as lead Plaintiffs for a class of individuals who held Metaldyne stock at the time of the sale of Metaldyne to Asahi Tech.

3. On February 2, 2009, the attorneys for Movants, pursuant to Section 27 of the Securities Act [sec. 27(a)(3)(A)(i)] published notice to any member of the purported class. (A copy of the Notice is attached as **Exhibit 2**.)

4. On March 2, 2009, the United States District Court for the Eastern District of Michigan, Southern Division (the "Michigan District Court"), entered an Order stating that none of the Defendants needed to respond to the Complaint until forty-five (45) days after the Court had appointed the lead Plaintiffs and lead counsel in the Michigan Federal Securities Litigation pursuant to the Private Securities Litigation Reform Act, 15 U.S.C. §78u-4(a)(3). (A copy of that Order is attached as **Exhibit 3**.)

5. On April 3, 2009, Movants filed their Motion for Class Certification, Appointment as Lead Plaintiffs, and Concomitant Selection of Lead Counsel in the Michigan Federal Secuirites Litigation. (A copy of that Motion is attached as **Exhibit 4**.)

6. On May 29, 2009, Defendant Metaldyne Corporation filed a Notice of Suggestion of Bankruptcy in the Michigan District Court. (A copy is attached hereto as **Exhibit 5**.)

7. As of May 29, 2009, the Michigan District Court had not entered an Order naming Anthony Ziebron and James Vrana lead plaintiffs and had not entered an Order appointing Smith Haughey Rice & Roegge (counsel for Messrs. Ziebron and Vrana) as lead counsel.

8. Thus, the various Defendants in the Michigan Federal Securities Litigation have not filed responsive pleadings and no discovery has taken place.

I. Relief From the Automatic Stay

9. Movants seek relief from the automatic stay in two separate and distinct ways:

a. Movants need to pursue (and obtain) discovery from Metaldyne Corporation to identify all individuals who are members of the class described in **Exhibit 1**; and

b. Movants wish to proceed against Metaldyne in the Michigan Federal Securities Litigation for the purposes of pursuing recovery under any applicable insurance policies, only. To the extent that a Judgment is obtained in excess of such insurance coverage, a liquidated Proof of Claim will be filed with the Bankruptcy Court.

10. Section 362(a) of the Bankruptcy Code provides, in relevant part, that a bankruptcy petition operates as a stay, applicable to all entities, of

> (1) the commencement or continuation … of a judicial, administrative or other action or proceeding against the debtor that was or could have been commenced before the commencement of the [bankruptcy case], or to recover a claim against the debtor that arose before the commencement of the [bankruptcy case]; …(3)

> any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate; … [and] (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of [the bankruptcy case]…

11 U.S.C. § 362(a).

11. The automatic stay is "one of the fundamental debtor protections provided by the bankruptcy laws." Mid-Atlantic Natl'l Bank v. New Jersey Dep't of Envtl. Prot., 474 U.S. 494, 503 (1986). It provides a debtor with a "'breathing spell' from the collection process." See, e.g., Eastern Refractories Co. Inc. v. Forty Eight Insulations Inc., 157 F.3d 169, 172 (2d Cir. 1998). "The principal purpose of the automatic stay of acts against property of the estate … is to preserve that property for distribution or use in reorganization of the debtor." Official Creditors' Comm. Of Unsecured Creditors v. PSS S.S. Co., Inc. (In re Prudential Lines, Inc.), 114 B.R. 27, 29 (Bankr. S.D.N.Y. 1989). The automatic stay "is necessary to exclude any interference by the acts of others or by proceedings in other courts where such activities or proceedings tend to hinder the process of reorganization." Fidelity Mortgage Inv. V. Camelia Builders, Inc., 550 F.2d 47, 53 (2d Cir. 1976).

12. The decision to lift or modify the automatic stay is committed to the discretion of the bankruptcy court. See Sonnax Indus., Inc. v. Tri-Component Prods. Corp. (In re Sonnax Indus., Inc.), 907 F.2d 1280, 1286 (2d Cir. 1990). Because Section 362(d) does not define "cause," courts determine what constitutes such cause based on the totality of the circumstances. In re Wilson, 116 F.3d 87, 90 (3d Cir. 1997); In re George, 315 B.R. 624, 628 (Bankr. S.D. Ga. 2004).

13. The party requesting relief from stay bears the initial burden to show cause why the automatic stay should be lifted. Sonnax, 907 F.2d at 1285 ("If the movant fails to make an initial showing of cause … the court should deny relief without requiring any showing from the

debtor that it is entitled to continued protection"). Further, "[c]onclusory statements that a continuance of the stay will cause irreparable harm or that injury will occur if relief is denied are insufficient to establish cause." In re Texaco Inc., 81 B.R. 820, 829 (Bankr. S.D.N.Y. 1988) (citing In re Penn Dixie, 6 B.R. 832 (Bankr. S.D.N.Y. 1980)).

14. A party seeking relief from stay must demonstrate "cause" for stay relief with reference to the twelve factors outlined by the Second Circuit in Sonnax for determining whether the automatic stay should be lifted. Sonnax, 907 F.2d at 1286. Those factors are:

(1) Whether relief would result in a partial or complete resolution of the issues;

(2) Lack of any connection with or interference with the bankruptcy case;

(3) Whether the other proceeding involves the debtor as a fiduciary;

(4) Whether a specialized tribunal with the necessary expertise has been established to hear the cause of action;

(5) Whether the debtor's insurer has assumed full responsibility for defending it;

(6) Whether the action primarily involves third parties;

(7) Whether litigation in another forum would prejudice the interests of other creditors;

(8) Whether the judgment claim arising from the other action is subject to equitable subordination;

(9) Whether movant's success in the other proceeding would result in a judicial lien avoidable by the debtor;

(10) The interests of judicial economy and the expeditious and economical resolution of litigation;

(11) Whether the parties are ready for trial in the other proceeding; and

(12) Impact of the stay on the parties and the balance of harms.

15. Application of the applicable Sonnax factors to the facts and circumstances relevant to this Motion confirms that this Court should exercise its discretion in favor of granting

relief from the automatic stay. To the extent applicable, each of the following Sonnax factors weigh in favor of the Movants:

- *Whether relief would result in a partial or complete resolution of the issues.* Relief from the automatic stay would result in at least partial, if not complete, resolution of all issues because Movants are informed and belief that their exists a policy of insurance providing coverage with respect to the allegations in the Michigan Federal Securities Litigation. Upon further information and belief, the stated policy limit is $25 million dollars.

- *Lack of any connection with or interference with the bankruptcy case.* As described hereinbelow. *See, e.g.*, ¶¶ 30, 31 and 32.

- *Whether a specialized tribunal with the necessary expertise has been established to hear the cause of action.* The Michigan District Court is prepared to hear the Michigan Federal Securities Litigation.

- *Whether the debtor's insurer has assumed full responsibility for defending it.* Movants attorneys have received from Debtors' counsel a copy of an AIG "Executive And Organization Liability Insurance Policy" (Policy No. 626-21-87), a copy of which is attached as **Exhibit 6**. Among other things, paragraph 19 of this policy provides that the Insureds "(a) waive and release any automatic stay… to the extent it may apply… to the proceeds of this policy…;" and (b) agree not to oppose or object to any efforts by the Insurer or any Insured to obtain relief from any stay or injunction applicable to the proceeds of this policy as a result of the commencement of…" any bankruptcy case.

- *Whether the action primarily involves third parties.* The Court "may lift a stay for actions which bear little relation to the bankruptcy case." The Michigan Federal Securities Litigation involves numerous non-Debtors ad defendants.

- *Whether litigation in another forum would prejudice the interests of other creditors.* Movants are not aware of any prejudice that would result from continuation of the Michigan Federal Securities Litigation.

- *The interests of judicial economy and the expeditious and economical resolution of litigation.* Judicial economy would be served as a result of the determination of pending motions by the Michigan District Court. The majority of the Movants reside in Michigan.

- *Impact of the stay on the parties and the balance of harms.* As described hereinbelow. *See, e.g.*, ¶¶ 30, 31 and 32.

16. Applying the applicable standards to the Movants' circumstances, it is submitted that the Movants are entitled to relief from the automatic stay in order to pursue their claims in the Michigan Federal Securities Litigation.

II. Extending the General Bar Date for Potential Class Members

17. Pursuant to an Order entered by this Court on July 7, 2009, (the "Bar Date Order")(Dckt. No. 394), the general claims bar date for the filing of proofs of claim is August 14, 2009.

18. Movants wish to extend the time for the filing of Proofs of Claim by unknown potential members of the class identified in **Exhibit 1** because, under the circumstances, Movants and their counsel are not presently able to identify these potential class members. This is due, in large part, to the fact that discovery has yet to be (and could not have previously been) undertaken to identify these individuals in the Michigan Federal Securities Litigations as a result of the imposition of the automatic stay within less than two (2) months of the filing of Movant's Motion for Class Certification.

19. Pursuant to 11 U.S.C. §§ 501 and 502 and Fed. R. Bankr. P. 3003(c)(3) and 9006(b)(1), Movants respectfully request that this Court extend the time for filing Proofs of Claim by all unknown potential members of the class identified in **Exhibit 1** because, under the circumstances, Movants and their counsel are not presently able to identify these potential class members. As noted above, no discovery has been (or could have been) undertaken to identify these individuals in the Michigan Federal Securities Litigation due to the filing of the Debtors' bankruptcy cases.

20. The United States Constitution requires that no person may be "deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. The loss of one's ability to file a proof of claim in a bankruptcy constitutes a deprivation of property that is subject to due process. Indeed, as stated by the United States Supreme Court in Mullane, "[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause but

there can be no doubt that at a minimum they require that deprivation of … property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313, 70 S.Ct. 652, 656, 94 L.Ed. 865 (1950).

21. Due process requires that when a creditor does not have adequate notice of a bankruptcy, the creditor must be permitted to file a tardy claim when the creditor does so promptly after learning of the bankruptcy. U.S. v. Cardinal Mine Supply, Inc., 916 F.2d 1087, 1089-90 (6th Cir. 1990). As stated by the Southern District of New York:

> Whether a creditor received adequate notice is a fact-specific inquiry and depends on the facts and circumstances of each case. Nonetheless, "[d]ue process is met if notice is 'reasonably calculated to reach all interested parties, reasonably conveys all of the required information, and permits a reasonable amount of time for response.'" Therefore, unless a creditor is given reasonable notice of the bankruptcy proceeding and relevant bar dates, its claim cannot be constitutionally discharged.

DePippo v. Kmart Corp., 335 B.R. 290, 295 (S.D.N.Y. 2005) (citations omitted); *see also* In re Spiegel, Inc., 354 B.R. 51, 56 (Bankr. S.D.N.Y. 2006) ("Due process is met if notice is 'reasonably calculated to reach all interested parties, reasonably conveys all of the required information, and permits a reasonable amount of time for response.'") (*quoting* Mullane, 339 U.S. at 314, 70 S.Ct. at 652).

22. Here, potential claimants have not been identified and did not receive adequate notice of the Bar Date because, upon information and belief, they did not have any notice or knowledge of the injuries caused by the Debtors in time to file a timely proof of claim. Hence, having no notice that they had been injured by the Debtors, the potential claimants did not receive "all of the required information", and thus were not afforded due process.

23. Accordingly, and because the lack of adequate notice in this case fails to satisfy constitutional due process standards, Movants respectfully submit that the Court should grant the potential claimants additional time to file their Proofs of Claim.

24. Fed. R. Bankr. P. 3003(c)(1) provides that "[a]ny creditor … may file a proof of claim within the time prescribed by subdivision (c)(3) of this rule." Subdivision (c)(3), in turn, states, in relevant part, that "[t]he court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed." (Emphasis supplied.)

25. As noted above, the Bankruptcy Court established August 14, 2009 as the Bar Date for filing Proofs of Claim against the Debtors. However, pursuant to Fed. R. Bankr. P. 9006(b)(1), a proof of claim may be deemed timely filed by a bankruptcy court "where the failure to act was the result of excusable neglect."

26. Although Movants submit that there has not been any "neglect" on the part of the currently unknown "potential claimants", they further submit that the decision of the United States Supreme Court in Pioneer Inv. Servs. Crop. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 113 S.Ct. 1489 (1993), is helpful and instructive in connection with rhe relief sought pursuant to this Motion. In Pioneer, the United States Supreme Court considered the allowance of a late-filed proof of claim in a chapter 11 case, and applied the "excusable neglect" standard found in Fed. R. Bankr. P. 9006(b). In holding that the creditor should be allowed to file its proof of claim outside the bar date, the Supreme Court stated as follows:

> [T]he Rule [9006(b)(1)] grants a reprieve to out-of-time filings that were delayed by 'neglect.' The ordinary meaning of 'neglect' is to give little attention or respect' to a matter, or, closer to the point for our purposes, 'to leave undone or unattended to *esp[ecially] through carelessness.*' Webster's Ninth New Collegiate Dictionary 791 (1983) (emphasis added). The word therefore encompasses both simple, faultless omissions to act and, more commonly, omissions caused by carelessness. Courts properly assume, absent sufficient indication to the contrary, that Congress intends the words in its enactments to

> carry 'their ordinary, contemporary, common meaning." Perrin v. United States, 444 U.S. 37, 42, 100 S.Ct. 311, 314, 62 L.Ed.2d 199 (1979). Hence, by empowering the courts to accept late filings 'where the failure to act was the result of excusable neglect,' Rule 9006(b)(1), Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control.

Id. at 388; 113 S.Ct. at 1494-95.

27. In its analysis of what sort of "neglect" for failing to meet a filing deadline is "excusable," the Supreme Court "conclude[d] that the determination is at bottom an equitable one, taking into account all relevant circumstances surrounding the party's omission." Pioneer, 380 U.S. at 395; 113 S.Ct. at 1498. The factors adopted by the *Pioneer* Court for analyzing "excusable neglect" are: (1) the danger of prejudice to the debtor; (2) the length of delay and its potential impact on judicial proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the movant; and (4) whether the movant acted in good faith. Id.; *see also* In re O'Brien Environmental Energy, Inc., 188 F.3d 116, 125-30 (3d Cir. 1999) (adopting the *Pioneer* factors, and concluding that the bankruptcy court abused its discretion in failing to find excusable neglect). In addition, in the Third Circuit, "[a]ll factors must be considered and balanced; *no one factor trumps the others.*" In re Garden Ridge Corp., 348 B.R. 642, 645 (Bankr. D. Del. 2006) (emphasis added, citations omitted).

28. As demonstrated below, multiple factors weigh in favor of granting the relief sought in this Motion and permitting the potential claimants to file Proofs of Claim beyond the current Bar Date.

29. Initially, it is submitted that there is no danger of prejudice to the Debtors. Bankruptcy courts consider the following factors in determining prejudice:

> [W]hether the debtor was surprised or caught unaware by the assertion of a claim that it had not anticipated; whether the payment of the claim would force the return of amounts already paid out under the confirmed Plan or affect the

> distribution to creditors; whether payment of the claim would jeopardize the success of the debtor's reorganization; whether allowance of the claim would adversely impact the debtor actually or legally; and whether allowance of the claim would open the floodgates to other future claims.

Garden Ridge, 348 B.R. at 646.

Here, Debtors were aware of the filing of the Michigan Federal Securities Litigation and the various claims asserted therein prior to the Petition Date. Debtors were also aware of the Movants' pending Motion for Class Certification when they filed their Chapter 11 cases on May 27, 2009.

30. Moreover, allowing the claimants to file proofs of claim after the August 14th Bar Date would not compel the return of amounts already paid out under a confirmed plan or affect a distribution to creditors. In fact, and upon information and belief, the Debtors' have no yet even filed a proposed plan as of this date. Nor would allowing the filing of these (potential) claims open the floodgates to other future claims.

31. Hence, as there will be no prejudice to the Debtors or to other creditors by the virtue of the allowance of the relief sought by Movants, the Court should extend the Bar Date until (i) Movants can obtain the discovery necessary to identify other potential claimants, (ii) the Michigan District Court can rule upon Movants' request to certify a class, and (iii) those newly identified claimants have ample opportunity to determine the nature and extent of their claims and file Proofs of Claim with respect thereto.

32. It is anticipated that the impact of any delay beyond the Bar Date will be relatively minimal in light of the bankruptcy cases' history and current posture. As noted above, a plan has yet to be proposed and the Court has not been called upon to otherwise resolve the claims against the Debtors. Thus, allowance of the late filing of Proofs of Claim will have, at most, a *de minimis* effect upon the Debtors' bankruptcy proceedings.

33. Moreover, it is submitted that the reason for the potential claimants' delay is that they do not have meaningful notice of the Debtors' bankruptcy cases or their potential claims against the Debtors prior to the Bar Date. Upon information and belief, the potential claimants have no notice or knowledge of their injuries/damages so as to have been able to file a timely claim.

34. Finally, Movants submit that they have at all times acted in good faith and have acted in an expeditious manner to make known to the Debtors their intent to proceed and to protect their rights and the rights of others similarly situated. Significantly, Anthony Ziebron, James Vrana and approximately twenty-seven others have already filed their own Proofs of Claim in these cases. They are now, by this Motion, seeking to protect the rights, claims and interests of other potential claimants of the (potential) class.

35. For the reasons set forth hereinabove, Movants submit that operation of the current Bar Date to preclude the potential claimants' claims fails to satisfy constitutional due process standards. Moreover, Movants have satisfied their burden of showing the requisite "cause" under Fed. R. Bankr. P. 3003(c)(3). Accordingly, Movants respectfully request that this Court enter an order directing:

A. That the automatic stay be lifted to permit Movants to (i) proceed with the Michigan Federal Securities Litigation in the Michigan District Court in order to obtain discovery as to the identity of other potential claimants and class members, (ii) proceed with the Michigan Federal Securities Litigation up to and including judgment; and (iii) execute upon any such judgment obtained, with such execution to be limited, pending further order of this Court, to all applicable policies of insurance;

B. That all subsequently identified claimants be permitted to file Proofs of Claim against the Debtors in order to assert claims against the Debtors and their estates to the extent that any sums due to said claimants are not paid, or payable, from Debtors' applicable insurance policies; and

C. That Movants be granted such other and further relief as the Court may deem just and proper under the circumstances.

Dated: August 13, 2009
Florham Park, NJ

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