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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

In re:	§	
	§	**Case No. 08-45664 (DML)**
Pilgrim's Pride Corporation, *et al.*	§	
	§	**Chapter 11**
Debtors.	§	
	§	**Jointly Administered**
	§	
	§	

DEBTORS' MOTION TO AUTHORIZE ST. PAUL/TRAVELERS TO MAKE ADVANCEMENTS AND PAYMENTS IN ACCORDANCE WITH THE DEBTORS' FIDUCIARY INSURANCE POLICY

TO THE HONORABLE D. MICHAEL LYNN,
UNITED STATES BANKRUPTCY JUDGE:

Pilgrim's Pride Corporation ("PPC") and its affiliated debtors in the above-referenced chapter 11 cases, as debtors and debtors in possession (collectively, the "Debtors")[1] file this Motion (the "Motion") and respectfully represent in support thereof:

[1] The Debtors are Pilgrim's Pride Corporation, PFS Distribution Company, PPC Transportation Company, To-Ricos Ltd, To-Ricos Distribution, Ltd., Pilgrim's Pride Corporation of West Virginia, Inc., and PPC Marketing, Ltd.

Background

1. On December 1, 2008 (the "Commencement Date"), the Debtors each commenced with this Court a voluntary case under chapter 11 of title 11 of the United States Bankruptcy Code (the "Bankruptcy Code") in the Bankruptcy Court for the Northern District of Texas, Fort Worth Division (the "Bankruptcy Court"). The Debtors are authorized to continue to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

2. The Debtors' chapter 11 cases have been consolidated for procedural purposes only and are being jointly administered pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

Pilgrim's Pride Business

3. PPC, together with its debtor and non-debtor subsidiaries (collectively, "Pilgrim's Pride"), has one of the best brand names in the chicken industry. It is one of the largest producers of chicken in the United States and the second-largest producer in Mexico. Pilgrim's Pride has operations throughout the continental United States, Puerto Rico, and Mexico. Formed in 1946 as a retail feed store partnership between Lonnie A. "Bo" Pilgrim and his brother, Aubrey E. Pilgrim, PPC has been a publicly traded company since 1986.

4. Through vertical integration, Pilgrim's Pride manages the breeding, hatching and growing of chickens. Pilgrim's Pride also manages the processing, preparation, packaging, sale and distribution of its product lines, which Pilgrim's Pride believes has made it one of the highest quality, lowest-cost producers of chicken in North America. In the continental United States, Pilgrim's Pride produces both prepared chicken products and fresh chicken products. In Mexico and Puerto Rico, it produces exclusively fresh chicken products. Pilgrim's Pride's

products are sold to foodservice, retail and frozen entrée customers, and are distributed primarily through retailers, foodservice distributors, and restaurants.

The ERISA Litigation

5. Kenneth Patterson and Denise Smalls, on behalf of themselves and others similarly situated (collectively, the "Patterson and Smalls Plaintiffs"), each filed a putative class action in the District Court for the Eastern District of Texas (Marshal Division) (the "Patterson and Smalls Cases") pursuant to, among others, section 502 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132. On October 9, 2009, David Simmons, Carla Simmons, Dickie L. Funkhouser, and Patty Funkhouser, on behalf of themselves and others similarly situated (collectively with the Patterson and Smalls Plaintiffs, the "Plaintiffs"), filed a third ERISA class action in the District Court for the Northern District of West Virginia at Wheeling, No. 09-00121-JPB (the "Simmons Case"). In all three cases, the Plaintiffs allege generally that the Defendants (as defined below) breached fiduciary duties of prudence and loyalty owed to participants and beneficiaries of certain plans due to the decline in value of PPC common stock held in these plans, and that the Defendants failed to provide accurate information to participants and beneficiaries in connection with alleged misstatements contained in public securities filings of PPC.

6. Neither PPC nor any of the other Debtors were made defendants in the class actions. Instead, the class action complaints, taken together, name the following individual defendants, all of whom are current or former officers and directors of the Debtors: Lonnie Pilgrim, Lonnie Ken Pilgrim, Clifford E. Butler, O.B. Goolsby, J. Clinton Rivers, Richard A. Cogdill, S. Key Coker, Keith W. Hughes, Blake D. Lovette, Vance C. Miller, James G. Vetter, Donald L. Wass, Charles L. Black, Linda Chavez, Don Jackson, Jane Brookshire, Gerry

Evenwel, and Renee Debar (collectively, the "Defendants"). PPC has indemnity obligations to each of the Defendants.

7. On July 20, 2009, the Patterson and Smalls Cases were consolidated under the caption "*In re Pilgrim's Pride Stock Investment Plan ERISA Litigation*, No. 2:08-cv-472-TJW (collectively with the Simmons Case, the "ERISA Litigation").

8. Currently, in the Patterson and Smalls Cases, all deadlines have been adjourned by court order for the purposes of allowing mediation to proceed. The parties are required to submit a joint proposed schedule by January 15, 2010 if mediation is not successful. The Simmons Case Complaint, to the best of PPC's knowledge, has not yet been served on any defendant.

The Debtors' Insurance Policies

9. St. Paul Mercury Insurance Company of the Travelers Insurance Group, Inc. ("St. Paul/Travelers") issued Fiduciary Liability Policy No. EC00300433 (the "Policy") effective November 30, 2007 to November 30, 2008 (the "Policy Period"). Subject to its terms, conditions, limitations, and exclusions, the Policy provides the following coverage:

> The Insurer shall pay on behalf of the Insureds Loss for which the Insureds become legally obligated to pay on account of any Claim first made against the Insureds during the Policy Period…for a Wrongful Act taking place before or during the Policy Period by an Insured or by any person for those Wrongful Acts the Insured is legally responsible.

10. A Wrongful Act is defined to mean:

1. any breach of the responsibilities, obligations or duties imposed upon Insureds in their capacity as fiduciaries of any Plan by ERISA or by the common or statutory law of the United States or any other jurisdiction anywhere in the world;

2. any other matter against the Sponsor Company (PPC) or an Insured Person solely because of their service as fiduciaries of any Plan; or

3. any negligent act, error or omission solely in the administration of any Plan.

11. An Insured includes "Insured Persons" who include "any one or more natural persons who were, now are or shall be duly elected or appointed directors, trustees, officers or employees of the Sponsor Company or any Plan…."

12. The definition of a Plan includes (1) employee benefit plans subject to ERISA which are operated solely by the Sponsor Company, PPC, or jointly with a labor organization and (2) non-ERISA employee benefit plans sponsored solely by the Sponsor Company or any Plan. Any such Plan must be for the benefit of employees and be in existence prior to the Policy Period.

13. The Policy applies to all "Loss," which is defined as:

> the amount which the Insureds become legally obligated to pay on account of each Claim and for all Claims in the Policy Period…made against them for Wrongful Acts for which coverage applies, including but not limited to damages, judgments, settlements, and Defense Costs.

14. Moreover, St. Paul/Travelers "shall have the right and duty to appoint counsel and defend any Claim, for which coverage under this Policy applies, even if any of the allegations are groundless, false or fraudulent." Thus, it is the duty of St. Paul/Travelers to select defense counsel and defend any Claim covered under the Policy. The Policy limit is $10 million for each policy period. Defense Costs reduce and exhaust such limit. Therefore, Defense Costs must be paid before other Loss.

15. St. Paul/Travelers has indicated that it will not, out of an abundance of caution, make advancements towards defense costs or payments of Loss under the Policy absent an order from this Court. St. Paul/Travelers has also indicated that it is prepared to make those advancements and payments once an order from this Court is entered.

Jurisdiction and Venue

16. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

Relief Requested

17. Although the Debtors do not believe Court approval is necessary for St. Paul/Travelers to make advancements or payments under the Policy, out of an abundance of caution, the Debtors seek an order authorizing and directing St. Paul/Travelers to make advancements and payments with respect to outstanding defense costs and other Loss of the Insureds under the Policy.

The Court should Clarify that the Automatic Stay does not Apply to the Policy and that St. Paul/Travelers may Perform Thereunder

18. Section 362 of the Bankruptcy Code provides, in relevant part, that the automatic stay imposed as of the petition date stays "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." Property of the estate is defined as "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). The legislative history makes clear that the scope of section 541 is broad, including all kinds of property, tangible or intangible. *See, e.g.*, *Burgess v. Sikes (In re Burgess)*, 392 F.3d 782, 785 (5th Cir. 2004).

19. The Fifth Circuit has distinguished between a debtor's ownership of a policy from total ownership of the proceeds of that policy. *See In re La. World Exposition, Inc.*, 832 F.2d 1391, 1399 (5th Cir. 1987). In the *La. World Expedition* case, the Fifth Circuit Court of Appeals held that proceeds from D&O liability insurance were not part of a corporation's bankruptcy estate even though the policies were purchased and owned by the corporation. *See id.* "The

central question when determining whether insurance proceeds associated with a policy are property of the bankruptcy estate is whether, in the absence of the bankruptcy proceeding, the proceeds of the policy would belong to the debtor when the insurer pays a claim." *In re Equinox Oil Co., Inc.*, 300 F.3d 614, 618-619 (5th Cir. 2002).

20. A good example is the case *In re Edgeworth*, 993 F.3d 51 (5th Cir. 1993), which involved ownership of proceeds of a medical malpractice insurance policy. A plaintiff sued for medical malpractice seeking recovery from Dr. Edgeworth's insurance carrier after the debtor (the insured under the policy) had been discharged. The question was whether the discharge acted to bar the suit if the plaintiff agreed to foreswear recovery from the debtor personally and to look only to the policy proceeds. Finding that the release of the debtor did not affect the liability of the insurer, the court stated:

> The overriding question when determining whether proceeds are property of the estate is whether the debtor would have a right to receive and keep those proceeds when the insurer paid on a claim. When a payment by the insurer cannot inure to the debtor's pecuniary benefit, then that payment should neither enhance nor decrease the bankruptcy estate. In other words, when the debtor has no legally cognizable claim to the insurance proceeds, those proceeds are not property of the estate. *Id.* at 55-56.

21. The opinion goes on and gives examples of insurance policies whose proceeds are property of the estate: casualty, collision, life and fire insurance policies in which the insured debtor is the beneficiary. *Id.* at 56. These are contrasted with liability policies, proceeds of which would ordinarily be payable only for the benefit of those harmed by the insured. *Id.* at 56. Thus, proceeds are not property of the estate when, as Senior Judge Joe Fish explained, the "proceeds from a policy—whether they are first paid to the Insured or not—are owed not to the Insured but to the successful third-party claimants against the Insured, as well as to the Insured's attorneys defending against those claims." *Executive Risk Indemnity, Inc. v. Integral Equity, LP,*

No. 03-cv-0269, 2004 U.S. Dist. LEXIS 3742, at *47 (N.D. Tex. Mar. 10, 2004).

22. The Policy has language strikingly similar to the relevant policy language in the *Executive Risk Indemnity* case. In that case, the policy covered "reasonable legal fees and expenses" and "damages, judgments, awards, settlements and Defense Expenses which an Insured is *legally obligated* to pay as a result of a Claim." *Id.* (emphasis in original). The Policy in this case states: "[t]he Insurer shall pay on behalf of the Insureds Loss for which the Insureds become *legally obligated* to pay on account of any Claim…." And, as stated above, Loss includes "damages, judgments, settlements, and Defense Costs." Also like with the *Executive Risk Indemnity* case and the policy in *Edgeworth*, the Insureds do not receive the proceeds; the proceeds are paid on behalf of the Insureds to the claimant or the attorneys of the Insureds. Accordingly, consistent with the Fifth Circuit Court of Appeals and Northern District of Texas case law, the proceeds are not part of the Debtors' estates.

To the Extent the Court Finds that the Proceeds of the Policy are Property of the Estate, the Court should Lift the Automatic Stay to Allow Performance

23. Even if this Court were to find that the Debtors had a cognizable property interest in the proceeds of the Policy, relief from the stay is appropriate and should be authorized. In deciding whether to grant such relief, the Court should weigh any potential harm to the estate of the Debtors against the rights of the Insureds with respect to their direct entitlements under the Policy to defense costs and payment on account of liability. As noted in a leading bankruptcy treatise, "none of the cases finding directors' and officers' insurance proceeds to be estate property stopped actual payment from the insurance carriers to the directors and officers" except for one, and that was by consent. *See* COLLIER ON BANKRUPTCY ¶ 541.10[10]. For example, the court in *In re First Cent. Fin. Corp.*, 238 B.R. 9 (Bankr. E.D.N.Y. 1999) described the distinct and important role of D&O insurance, which is similar to the fiduciary liability insurance

involved in this case:

> D&O policies are obtained for the protection of individual directors and officers. Indemnification coverage does not change this fundamental purpose. There is an important distinction between the individual liability and the reimbursement portion of a D & O policy. The liability portion of the policy provides coverage directly to officers and directors, insuring the individuals from personal loss for claims that are not indemnified by the corporation. Unlike ordinary liability insurance policy, in which a corporate purchaser obtains primary protection from lawsuits, a corporation does not enjoy direct coverage under a D & O policy. It is insured indirectly for its indemnification obligations. In essence and at its core, a D & O policy remains a safeguard of officer and director interests and not a vehicle for corporate protection. *Id.* at 16.

24. Similarly, in *In re Boston Med. Ctr., Inc.*, 285 B.R. 87, 94 (Bankr. D. Mass. 2002), the insurer sought relief from the stay which prohibited the insurer from paying the reasonable expert costs in connection with the proceedings against the directors, officers and trustees of the debtor. The estate had a claim on the policies for the loss from certain claims for indemnification asserted by the insured officers, directors and trustees. *Id.* at 88. The *Boston* court found that the need of the insureds for the payment was pressing and denying them "their right…to a share of the policy proceeds" would impair their interests while any harm to the estate by virtue of allowing such payment was not irreparable nor was such harm even guaranteed to occur. *Id.* at 97. As such, the *Boston* court allowed interim stay relief and permitted the payment by the insurer of expert costs. *Id.* at 98.

25. Here, the harm to the Debtors' estate will likely be minimal, if any from allowing St. Paul/Travelers to make advancements or pay losses. The damage to the individual Defendants, however, if they are not able to recover the proceeds of the Policy to pay Defense Costs or losses will likely be high and will seriously impair their interests. Accordingly, in the event the automatic stay is impacted here, relief from the automatic stay is warranted and should be granted.

Notice

26. Notice of this Motion has been provided to: (i) the Office of the United States Trustee; (ii) counsel to the statutory committees appointed in these chapter 11 cases; (iii) counsel to the Debtors' prepetition secured lenders; (iv) counsel to the Agent to the Debtors' postpetition lenders; (v) the Defendants; (vi) counsel for the Plaintiffs; and (vii) all parties on the Master Service List filed with this Court (collectively, the "Notice Parties"). The Debtors submit that no other or further notice need be provided.

No Previous Request

27. No previous request for the relief sought herein has been made by the Debtors with respect to this or any other court.

WHEREFORE the Debtors respectfully request that the Court grant the relief requested herein and such other further relief as it deems just and proper.

Dated: November 9, 2009
Fort Worth, Texas

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