IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: UBI Liquidating Corp., *et al.*[1], Debtors.	Case No. 10-13005 (KJC) Chapter 11 (Jointly Administered) **Hearing Date: March 16, 2016 at 10:00 a.m. (ET)** **Response Deadline: February 16, 2016 at 4:00 p.m. (ET)**

MOTION FOR ENTRY OF ORDER ALLOWING FOR ADVANCEMENT OF DEFENSE COSTS UNDER THE INSURANCE POLICY

Michael Abate[2] (the "Insured Party" or "Mr. Abate") by and through his undersigned counsel, McElroy, Deutsch, Mulvaney & Carpenter, LLP, hereby moves this Court (the "Motion") for the entry of an order substantially in the form attached hereto as **Exhibit A** (the "Proposed Order") pursuant to Sections 105(a), 362(d), 524, and 1141 of title 11 of the United States Code (the "Bankruptcy Code"), Rule 4001 of the Federal Rules of Bankruptcy Procedure (the "Federal Rules"), and Rule 4001-1 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "Local Rules"), for an

[1] The Debtor in this case is UBI Liquidating Corp. (3678). On May 18, 2012, the Court entered an order closing the chapter 11 cases of 100% Girls Ltd. (4150), 100% Girls of Georgia, Inc. (4159), 100% Girls of New York, Inc. (2149), 100 Percent Girls of New Jersey, Inc. (4167), A.S. Interactive, Inc. (3472), ASL Liquidating Corp. (4541), Ashley Stewart Apparel Corporation (4049), Ashley Stewart Clothing Company, Inc. (4051), ASMCI Liquidating Corp. (4053), ASWL Liquidating Corp. (4152), ASIL 6, Inc. (3996), ASNJ 10, Inc. (4004), Carraizo Alto Apparel Corporation (4651), Church Street Retail, Inc. (5954), Kid Spot Ltd. (2585), Kidspot of Delaware, Inc. (2596), Kidspot of Illinois, Inc. (2606), Kidspot of Michigan, Inc. (2603), Kidspot of New Jersey, Inc. (2601), Kidspot of Ohio, Inc. (4705), Kidspot of Pennsylvania, Inc. (2599), Kidspot of Texas, Inc. (3809), Large Apparel of Alabama, Inc. (0624), Large Apparel of California, Inc. (2129), Large Apparel of Connecticut, Inc. (5161), Large Apparel of District of Columbia, Inc. (8613), Large Apparel of Florida, Inc. (2209), Large Apparel of Georgia, Inc. (3894), Large Apparel of Illinois, Inc. (4650), Large Apparel of Indiana, Inc. (4055), Large Apparel of Louisiana, Inc. (3790), Large Apparel of Maryland, Inc. (5158), Large Apparel of Michigan, Inc. (9420), Large Apparel of Mississippi, Inc. (5913), Large Apparel of Missouri, Inc. (2135), Large Apparel of New Jersey, Inc. (5157), Large Apparel of New York, Inc. (5956), Large Apparel of North Carolina, Inc. (8611), Large Apparel of Ohio, Inc. (3815), Large Apparel of Pennsylvania, Inc. (4057), Large Apparel of South Carolina, Inc. (2029), Large Apparel of Tennessee, Inc. (3895), Large Apparel of Texas, Inc. (3787), Large Apparel of Virginia, Inc. (2809), Large Apparel of Wisconsin, Inc. (3898), Marianne Ltd. (3940), Marianne USPR, Inc. (2193), Marianne VI, Inc. (2206), Metro Apparel of Kentucky, Inc. (7533), Metro Apparel of Massachusetts, Inc. (1367), The Essence of Body & Soul, Ltd. (4165), UACONJI Liquidating Corp. (2976), UACONYI Liquidating Corp. (4103), and UBTHC Liquidating Corp. (5909). The Debtor's corporate office is located at 100 Metro Way, Secaucus, New Jersey 07094.

[2] At various time, Abate served as Vice President and Secretary of the Debtor.

order: (1) authorizing, to the extent required, American International Group, Inc. ("AIG"), as claims administrator for claims arising under insurance policy number 01-819-77-63 (the "Policy") to Urban Brands, Inc. ("UBI") by Nation Union Fire Insurance of Pittsburgh, PA ("National Union"), to advance Defense Costs (as defined in the Policy); and (2) finding that the advancement of Defense Costs does not violate Section 362 or 524 of the Bankruptcy Code or any provision of the Plan. Alternatively, the Insured Party seeks entry of an order (a) lifting the stay, to the extent it still exists, to allow advancement of Defense Costs; or (b) allowing modification of the Plan injunction, to the extent necessary, to allow advancement of Defense Costs under the Policy. In support of this Motion, the Insured Party respectfully states as follows:

JURISDICTION

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334(b). The claims against the Insured Party constitute a non-core proceeding under 28 U.S.C. § 157. Venue is proper in this district under 28 U.S.C. §§ 1408 and 1409.

2. The bases for relief requested by this Motion are Sections 105(a) and 362(d) of the Bankruptcy Code, as supplemented by Rule 4001 of the Federal Rules and Rule 4001-1 of the Local Rules.

BACKGROUND

3. UBI filed a Chapter 11 Voluntary Petition in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court") on September 21, 2010 (the "Petition Date") (D.I. 1). A Motion for joint administration was subsequently filed, and the Bankruptcy Court granted the Motion on September 22, 2010. (D.I. 3; D.I. 35).

4. This Court approved the Debtor's *Joint Plan of Liquidation* (the "Plan") on October 19, 2011, (the "Confirmation Order"). (D.I. 1447). The Plan Effective Date was December 1, 2011. (*Notice of Effective Date*, D.I. 1493).

5. The Insured Party is a prior officer of Urban Brands, Inc., and is a named defendant in a proceeding commenced in the Superior Court of New Jersey, Hudson County – Law Division, Docket No., L-3889-15 (JAT) captioned *Ethan Shapiro v. Trimaran Capital Partners, Dean Kehler, Michael Abate, and Ronald W. Gaswirth* (the "State Court Matter") filed on September 28, 2015, by Ethan Shapiro ("Shapiro"), former President and CEO of UBI.

6. The Policy is a PrivateEdge Plus Insurance Policy, which includes coverage for Directors and Officers of UBI ("D&O"), such as Mr. Abate.

7. The Insured Party believes that the Policy[3] provides, *inter alia*, direct coverage of the Defense Costs associated with the claims asserted in the State Court Matter.

8. The Policy provides coverage up to the Limit of Liability of $17,500,000.00, with a separate Limit of Liability to D&Os of $5,000,000.00. There is no self-insured retention required pursuant to Clause 2(o) of the D&O Coverage Section as a result of UBI's bankruptcy filing. A true and correct copy of the Policy is attached hereto as **Exhibit B**.

9. The Insured Party has incurred Defense Costs to date and is likely to incur further Defense Costs in connection with the State Court Matter

10. In accordance with the Policy, the Insured Party has made a demand on AIG to advance the Defense Costs he has incurred and is continuing to incur in defensing himself in the State Court Matter.

[3] The representations and descriptions made herein regarding the Policy are qualified in their entirety by the actual terms and conditions of the Policy, and no such representation or description is intended or will operate to change or affect any of the terms or conditions of the Policy.

RELIEF REQUESTED

11. By this Motion, the Insured Party seeks an order, substantially in the form submitted herewith: (1) authorizing, to the extent required, AIG, as claims administrator for claims arising under the Policy, to advance Defense Costs (as defined in the Policy); and (2) finding that the advancement of Defense Costs does not violate Section 362 or 524 of the Bankruptcy Code or any provision of the Plan. Alternatively, the Insured Party seeks entry of an order (a) lifting the stay, to the extent it still exists, to allow advancement of Defense Costs; or (b) allowing modification of the Plan injunction, to the extent necessary, to allow advancement of Defense Costs under the Policy.

BASIS FOR RELIEF

12. The Insured Party seeks an order authorizing AIG to advance Defense Costs, within the terms of the Policy, and to the extent necessary, lift the stay and Plan injunction, to allow advancement of Defense Costs. Section 105(a) of the Bankruptcy Code allows this Court to issue an order "to carry out the provisions of" the Bankruptcy Code. 11 U.S.C. § 105(a). Rule 3020 of the Bankruptcy Rules allows this Court, following confirmation of a plan, to "issue any other order necessary to administer the estate." Fed. R. Bankr. P. 3020(d). These provisions provide this Court with the authority to impose and interpret the Plan's injunctive and discharge provisions. *See In re Carematrix Corp.*, 306 B.R. 318, 326 n.11 (Bankr. D. Del. 1999), *aff'd*, *In re Continental Airlines, Inc.*, 279 F.3d 226 (3d Cir. 2002).

13. The Plan's effective date is December 1, 2011. Pursuant to Article IV, Section J of the Plan, the automatic stays provided for in Sections 105 and 362 remain in place until the closing of the Chapter 11 case.

14. The Plan makes no specific reference that the Policy prohibits the advancement of Defense Costs. Further, nothing in Section 524 of the Bankruptcy Code prohibits the advancement of Defense Costs. Thus, the Insured Party is entitled to an order authorizing AIG to advance Defense Costs consistent with the Policy.

15. Alternatively, the Insured Party requests relief from the stay, the Section 524 injunction, and the Plan provisions (to the extent they hold otherwise). Section 524(a)(2) of the Bankruptcy Code "establishes" an injunction against the continuation of an action. 11 U.S.C. § 524(a)(2). An injunction can be modified "for good cause on the motion of a person adversely affected by it." *In the Matter of Hendrix*, 986 F.2d 195, 198 (7th Cir. 1993).

16. Courts generally utilize Section 362 of the Bankruptcy Code's "cause" analysis when determining whether to alter a plan's provisions under Section 524 of the Bankruptcy Code. *See In the Matter of Shondel*, 950 F.2d 1301, 1404-05 (7th Cir. 1991); *In re Stone Res., Inc.*, 482 Fed. App'x 719, 720 (3d Cir. 2012); *Rolo v. Gen. Dev. Corp.*, 949 F.2d 695, 704 (3d Cir. 1991).

17. Section 362(a)(3) of the Bankruptcy Code provides for an automatic stay of any action seeking to obtain control over property of the bankruptcy estate. Section 362(d) of the Bankruptcy Code allows courts to lift the automatic stay:

> On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay . . . for cause.

11 U.S.C. § 362(d). "Cause" is determined on a case-by-case basis. *In re Matter of Rexene Prods. Co.*, 141 B.R. 574, 576 (Bankr. D. Del. 1992) (citations omitted).

18. Some courts view insurance policies of a debtor as property of the estate and, as such, covered by the automatic stay provisions of the Bankruptcy Code. *See, e.g., MacArthur*

Co. v. Johns-Manville Corp., 837 F.2d 89 (2d Cir. 1998); *In re Allied Digital Techs. Corp.*, 306 B.R. 505, 512 (Bankr. D. Del. 2004). However, courts have also distinguished between ownership of a policy and ownership of the proceeds of a policy. *See, e.g.*, *Allied Digital*, *supra*, 306 B.R. at 511; *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 463-64 (S.D.N.Y. 2004) (holding that even if a director and officer policy is an estate property, the insured individuals have the right to use the policy's proceeds to cover their defense and settlement costs).

19. This Court has recognized that the proceeds of a liability insurance policy that provides direct coverage to directors and officers is not property of the estate. *In re Downey Fin. Corp.*, 428 B.R. 595, 603 (Bankr. D. Del. 2010) ("[W]hen the liability insurance policy only provides direct coverage to directors and officers, courts generally hold that the proceeds are not property of the estate."); *c.f. In re First Central Fin. Corp.*, 238 B.R. 9, 16 (Bankr. E.D.N.Y. 1999) ("D&O policies are obtained for the protection of individual directors and officers. . . . In essence and at its core, a D&O policy remains a safeguard of officer and director interest and is not a vehicle of corporate protection."). Other courts have also found that the proceeds of a D&O policy are not part of the bankruptcy estate where, as here, a director is a beneficiary of the policy. *See In re Adelphia Comm. Corp.*, 298 B.R. 49, 53 (S.D.N.Y. 2003) (finding that director policies were not part of the bankruptcy estate because the estate had "[n]o cognizable equitable and legal interest in the proceeds" of the policies); *In re Edgeworth*, 993 F.2d 51, 55-56 (5th Cir. 1993) ("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.").

20. Even when a liability insurance policy provides the debtor with indemnification coverage, the policy is not party of the bankruptcy estate if "indemnification either has not occurred, is hypothetical, or speculative . . . ." *Allied Digital*, *supra*, 306 B.R. at 512; *see also In re Downey*, 428 B.R. at 607 (finding that the policy was not part of the estate because indemnification was either "hypothetical or speculative"); *see also Adelphia*, *supra*, 298 B.R. at 53 ("Although the D & O Policies reimburse each estate to the extent that the estate advances funds because of indemnification obligations in the charter or by-laws . . . it has not been suggested that any of the Debtors has made any payments for which it would be entitled to indemnification coverage, or that any such payments are now contemplated. . . ." (internal quotation marks omitted) (citation omitted)).

21. Even if an insurance policy provides for direct coverage other than indemnification coverage to the debtor, such provisions, when the policy as a whole provides direct coverage to directors and officers, is not part of the estate unless the "depletion of the proceeds would have an adverse effect on the estate to the extent the policy actually protects the estate's other assets from diminution." *Allied Digital*, *supra*, 306 B.R. at 512. The provisions of the Policy make it clear that no direct coverage is available to protect other assets of the estate before protecting the directors and officers. The estate will not be adversely impacted by distribution of the proceeds to pay for defense of the directors and officers – here, Mr. Abate – because that is exactly what the Policy provides and is intended to accomplish. Thus, the proceeds would not be considered property of the bankruptcy estate.

22. Even assuming *arguendo* that proceeds from the Policy were considered property of the estate in this instance, Sections 362(d) and 524 of the Bankruptcy Code provide that the Court shall grant relief from the automatic stay "for cause" or if "such property is not necessary

to an effective reorganization." 11 U.S.C. § 362(d); 11 U.S.C. § 524. Courts typically consider the following factors when balancing the movant and debtor's competing interests in lifting or retaining the automatic stay: (1) the prejudice that would be suffered should the stay be lifted; (2) the balance of hardships facing the parties; and (3) the probable success on the merits if the stay is lifted. *See In re Continental Airlines*, 152 B.R. 420, 424 (D. Del. 1993); *Rolo*, *supra*, 949 F.2d at 704. Here, all three factors weigh in favor of the Insured Party. Given the nature of the claims against Mr. Abate, and the defenses available thereto, there is a strong possibility that Mr. Abate will be successful in defending against the State Court Matter.

23. Courts routinely find cause to lift the stay and authorize payment of insurance proceeds to the directors and officers to avoid substantial and irreparable harm. *See, e.g.*, *Downey*, *supra*, 428 B.R. at 609-11 (holding that the automatic stay should be lifted to the extent applicable because directors and officers would otherwise suffer readily identifiable harm if they could not pay defense costs, whereas any harm to the debtor was solely hypothetical).

24. Mr. Abate would be irreparably harmed if unable to fund his defense in the State Court Matter. *See, e.g.*, *Allied Digital*, *supra*, 306 B.R. at 514 (stating that "[w]ithout funding, the Individual Defendants will be prevented from conducting a meaningful defense to the [ ] claims any may suffer substantial and irreparable harm.").

25. In addition, "[e]ven a slight probability of success on the merits may be sufficient to support lifting an automatic stay in an appropriate case." *Continental Airlines*, *supra*, 152 B.R. at 426.

26. For the reasons set forth above, the Insured Party respectfully requests that this Court (1) find that the proceeds are not the property of the Debtor's estate, or, to the extent necessary, lift the stay and injunction to allow the advancement of Defense Costs under the

Policy from AIG to the Insured Party; (2) enter the Proposed Order attached hereto as Exhibit "A"; and (3) grant such other relief as it deems equitable and just under the circumstances.

NOTICE OF MOTION

27. Notice of the relief requested in this Motion has been provided to (a) the United States Trustee for the District of Delaware, (b) counsel to the Debtors (c) counsel to the UBI Liquidating Trust, (d) AIG, and (e) all parties who have requested notice pursuant to Bankruptcy Rule 2002.

WHEREFORE, the Insured Party respectfully requests that this Court (1) grant this Motion and the relief requested herein; (2) enter the Proposed Order attached hereto as Exhibit A; and (3) grant such other relief as it deems equitable and just under the circumstances.

Dated: January 28, 2016

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