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

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| In re: | ) | CHAPTER 11 |
| | ) | |
| UBI LIQUIDATING CORP., *et al.*, | ) | Case No. 10-13005 (KJC) |
| | ) | (Jointly Administered) |
| Debtors. | ) | |
| | ) | **Hearing Date: March 2, 2016 at 11:00 a.m.** |
| | ) | **Objection Deadline: February 24, 2016 at 4:00 p.m.** |

**MOTION OF ODETTE PICHARDO**
**FOR RELIEF FROM THE AUTOMATIC STAY AND/OR**
**FOR RELIEF FROM THE PLAN RELEASE AND INJUNCTION**
**AND/OR FOR ABSTENTION TO LIQUIDATE CLAIM AND FOR RELATED RELIEF**

ODETTE PICHARDO ("Pichardo" or "Movant") files this motion for relief from the automatic stay under 11 U.S.C. § 362(d) and/or from the plan release and injunction and/or for abstention to liquidate her claim and for related relief including the production of insurance policies.

## JURISDICTION AND VENUE

1. This Court has jurisdiction to consider the Motion pursuant to 28 U.S.C. §§ 157 and 1334.

2. This is a core proceeding pursuant to 28 U.S.C. § 157(b).

3. Pursuant to 28 U.S.C. § 1409, venue of this Motion is proper in this Court.

4. Pursuant to Del. Bankr. L.R. 9013-1(f), Movant does consent to the entry of final orders or judgments by the Court if it is determined that the Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

## FACTUAL BACKGROUND

### A. The Injury and the State Court Action

5. On September 15, 2010, Pichardo was a lawful pedestrian walking on a public throughfare and sidewalk in front of and/or adjacent to the premises located at 224 West 125th Street, New York, New York.

6. While Pichardo was lawfully walking at the aforesaid location, she tripped/slipped and fell due to the negligence of debtor Urban Brands, Inc. d/b/a Ashley Stewart Ltd. (the "Debtor").

7. On or about March 22, 2011, Pichardo commenced a civil action (the "State Court Action") against the Debtor and certain other parties in the Supreme Court of New York, in and for New York County (the "New York Court"). A copy of the complaint initiating the State Court Action is attached hereto as Exhibit "1."

8. In the State Court Action, Pichardo seeks damages against Debtor for, *inter alia*, negligence.

### B. The UBI Bankruptcy

9. On September 21, 2010 (the "Petition Date"), Debtor, along with certain of its subsidiaries and affiliates (collectively the "Debtors") filed their chapter 11 petitions with this Court. Pichardo was not aware of the bankruptcy at the time she filed the State Court Action.

10. The Debtors' cases were consolidated for procedural purposes and are being jointly administered under Case No. 10-13005 (KJC).

11. By virtue of 11 U.S.C. § 362(a), the State Court Action was stayed as to Debtor.

12. By order dated October 19, 2011 (D.I. 1447, the "Confirmation Order"), this Court confirmed the Debtor's Joint Plan of Liquidation (D.I. 1384, the "Plan"). The Plan effective date is December 1, 2011.

13. Pursuant to the Plan, the State Court Action would be stayed pursuant to the Plan release and injunction. See generally Plan, Art. IX D. and E.

## RELIEF REQUESTED AND REASONS THEREFOR

### A. Relief from the Automatic Stay and/or the Plan Release and Injunction is Warranted

14. Pichardo seeks relief from the Confirmation Order, including the Plan release and injunction, so that she can proceed with the State Court Action.

15. Rule 60(b) of the Federal Rules of Civil Procedure, made applicable to this case by Rule 9024 of the Federal Rules of Bankruptcy Procedure, permits the Court to relieve a party from a final judgment or order for reasons including ". . . (6) any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b).[1]

16. While this Motion technically seeks relief under Fed. R. Civ. P. 60(b), the Motion is nevertheless akin to a motion for relief from the automatic stay to liquidate a personal injury claim in another forum. Movant submits that case law arising under 11 U.S.C. § 362(d) in such context is hence instructive.

[1] Rule 60(b) of the Federal Rules of Civil Procedure, made applicable to this case by Rule 9024 of the Federal Rules of Bankruptcy Procedure, provides, in relevant part, as follows:

> On motion and upon such terms as are just, the court may relieve a party … from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; or (6) such other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken…. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding … or to set aside a judgment for fraud upon the court. … [T]he procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by independent action.

17. By virtue of 11 U.S.C. § 362(a), the State Court Action as it pertains to the Debtor was stayed.

18. Section 362(d) of the Bankruptcy Code provides:

> (d) 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—
>
> > (1) for cause, including lack of adequate protection of an interest in property of such part in interest;
> >
> > (2) with respect to a stay of an act against property under subsection (a) of this section, if—
> >
> > > (A) the debtor does not have an equity in such property; and
> > >
> > > (B) such property is not necessary to an effective reorganization.

19. In determining whether cause exists to lift the stay to permit a party to pursue an action outside of the Bankruptcy Court, this Court may consider whether:

a. Any great prejudice to either the bankrupt estate or the debtor will result from continuation of the civil suit,

b. The hardship to the non-bankrupt party by maintenance of the stay considerably outweighs the hardship of the debtor, and

c. The creditor has a probability of prevailing on the merits.

*In re Rexene Prods. Co.*, 141 B.R. 574, 576 (Bankr. D. Del. 1992); *see also American Airlines, Inc. v. Continental Airlines, Inc. (In re Continental Airlines, Inc.)*, 152 B.R. 420, 424 (D. Del. 1993); *Levitz Furniture Inc. v. T. Rowe Price Recovery Fund, L.P. (In re Levitz Furniture Inc.)*, 2000 Bankr. LEXIS 1322, *15 (Bankr. D. Del. 2000); *Save Power Limited v. Pursuit Athletic Footwear, Inc. (In re Pursuit Athletic Footwear, Inc.),* 193 B.R. 713, 718 (Bankr. D. Del. 1996). Further, courts are directed to consider the following legislative history:

> It will often be more appropriate to permit proceedings to continue in their place of origin, where no great prejudice to the bankruptcy estate would result, in order to leave the parties to their chosen forum and to relieve the bankruptcy court from many duties that may be handled elsewhere.

*Rexene Products*, 141 B.R. at 576; *In re Wilson*, 85 B.R. 722, 728-29 (Bankr. E.D. Pa. 1988) (citing S. Rep. No. 989, 95th Cong., 2d. Sess. 50, reprinted in [1978] *U.S. Code Cong. & Ad. News* 5836).

20. The legislative history of section 362 indicates that cause may be established by a single factor such as "a desire to permit an action to proceed . . . in another tribunal," or "lack of any connection with or interference with the pending bankruptcy case." H.R. Rep. No. 95-595, 95thCong., 1st Sess., 343-344 (1977) *U.S. Code Cong. & Admin. News*, pp. 5787, 6300. *See also In re Rexene*, 141 B.R. at 576 ("cause" for relief was found in order to allow civil plaintiffs to proceed with a class action against the debtor because discovery was nearly complete, both parties were nearly ready for trial prior to the bankruptcy filing, trial of the claim in bankruptcy court would be burdensome to plaintiffs and risk unnecessary, duplicative litigation, and plaintiffs had at least some probability of success on merits of suit); s*ee also In re Drexel Burnham Lambert Group, Inc.*, 113 B.R. 830, 838 n. 8 (Bankr. S.D.N.Y. 1990) (citing various examples of "cause" to permit litigation in another forum such as liquidation of a personal injury, arbitration or specialized jurisdiction claims).

21. This Court, in the *Continental Airlines* decision referred to above, set forth the following framework for analyzing motions for relief from the automatic stay:

> There is no rigid test for determining whether sufficient cause exists to modify an automatic stay. Rather, in resolving motions for relief for "cause" from the automatic stay courts generally consider the policies underlying the automatic stay in addition to the competing interests of the debtor and the Movants. In balancing the competing interests of the debtor and the Movants,

> Courts consider three factors: (1) the prejudice that would be suffered should the stay be lifted; (2) the balance of the hardships facing the parties; and (3) the probable success on the merits if the stay is lifted. *See Int'l Business Machines v. Fernstrom Storage & Van Co. (In re Fernstrom Storage & Van Co.*) 938 F. 2d 731. 734-37 (7th Cir. 1991).

*In re Continental Airlines*, 152 B.R. at 424.

22. Pichardo seeks relief from the automatic stay and/or the Plan release and injunction solely to liquidate her claim against Debtor.

23. Application of the standards above weighs strongly in favor of granting the Motion.

24. First, there is no prejudice to the Debtors. The allowance or disallowance of Pichardo's claim in a commercial bankruptcy such as this would have no discernable effect on the administration of the Debtors' cases, particularly as much or most of the claim may be satisfied through insurance.

25. On the other hand, Pichardo would suffer considerable hardship if this Motion were denied. On information and belief, all of the witnesses and documents are located in or near New York, New York. None are located in Delaware. It would be extremely inconvenient for the litigants and for third party witnesses to have this matter adjudicated outside of New York, particularly as Pichardo has limited financial resources.

26. Additionally, Pichardo will be prejudiced by the continued delay resulting from the automatic stay and/or the Plan release and injunction, due to fading memories, lessened witness availability and the inevitable loss of documentary and electronic evidence.

27. It may also be noted that this Court has among the heaviest docket loads in the Country and judicial economy would be hindered rather than promoted by requiring this Court to adjudicate a purely state law controversy involving witnesses, facts and documents located in

New York. Indeed, Pichardo's claim is one for personal injury under 28 U.S.C. § 157(b)(5). Hence, the Bankruptcy Court may not even hear Pichardo's claim. Rather, her claim must be adjudicated either in the United States District Court for the District of Delaware or in the district where the claim arose—here, New York. This again heavily favors granting Pichardo the relief sought.

**B. Pichardo Does not Seek to Revoke or Modify the Confirmation Order**

28. Pichardo does not seek to "revoke" the Confirmation Order in any respect. Accordingly, the time limits on seeking revocation of a confirmation order under section 1144 of the Bankruptcy Code do not apply. As the Third Circuit noted in Branchburg Plaza Assocs. L.P. v. Fesq (In re Fesq), 153 F.3d 113, 117 n. 4 (3d Cir. 1998), *cert. denied*, 536 U.S. 1018, 119 S.Ct. 1253, 143 L.Ed.2d 350 (1999), "although Rule 60(b) cannot be used as a vehicle for revoking such orders [of confirmation] for reasons other than fraud, it may still be used to correct some other problems that arise with such orders." (emphasis added). Section 1144 does not by its terms prohibit a court from relieving a party from a confirmation other by means other than outright revocation of the order. Thus, the Court can modify the Confirmation Order under Rule 60(b), without running afoul of Section 1144. See In re 401 East 89th Street Owners, Inc., 223 B.R. 75 (Bankr. S.D.N.Y. 1998) (granting motion of equity holder in cooperative apartment corporation for relief from order confirming corporation's Chapter 11 plan, pursuant to which its equity interest in debtor and its related interests in proprietary apartments were terminated based on its failure to timely pay assessments specified in confirmed plan; evidence indicated that equity holder never received notice of assessment required by terms of confirmed plan).

29. Moreover, the relief sought by Pichardo would not require a modification of the Plan under section 1127 of the Bankruptcy Code. Instead, Pichardo seeks only limited relief

from the Confirmation Order that does not conflict with the provisions of the Plan. Pichardo is not seeking to collect on or enforce her claim in another forum. Rather, Pichardo is seeking only to liquidate her claim in a more appropriate forum. This distinction is significant, because some courts, including this Court, have held that confirmed plans may be modified only pursuant to Section 1127(b) of the Code, which permits only the reorganized debtor or a plan proponent to request modification of a plan after confirmation, and only before substantial consummation of the plan. As a result, courts have denied motions for relief under Rule 60(b) in cases in which the motion amounted to an attempt to circumvent § 1127(b). See In re Vencor, Inc., 284 B.R. 79 (Bankr. D. Del. 2002) (Walrath, C.J.) (creditor's request for relief from provision of confirmed chapter 11 plan releasing non-debtor denied as tantamount to request for modification of substantially consummated plan itself); In re Rickel & Assocs., Inc., 260 B.R. 673 (Bankr. S.D.N.Y. 2001) (denying debtor's motion to modify confirmation order to change treatment of equity class which, under terms of confirmed plan, did not retain any interest and was not entitled to any distribution of unanticipated surplus; "Rule 60(b) cannot be invoked to bypass § 1127(b).").[2]

30. In contrast, the relief sought by Pichardo in the present case does not constitute an attempt to circumvent § 1127(b), because the relief requested would not change the Plan. Indeed, it would not affect the Debtors' substantive rights; rather, it would merely change the forum for liquidating Pichardo's claim from the District Court to the New York Court.

[2] Other courts, however, have held that Rule 60(b) permits even confirmed plans themselves to be modified under certain circumstances. See e.g., Bill Roderick Distribution, Inc. v. A.J. Mackay Co. (In re A.J. Mackay Co.), 50 B.R. 756 (D. Utah 1985) (Bankruptcy Court has equitable power to modify confirmed plan of reorganization upon request of creditor, so long as court still has jurisdiction over case, including power to correct errors; § 1127 applies only to modifications requested by debtor or plan proponent).

**C. Abstention from the Liquidation of Pichardo's Claim is Appropriate**

31. In the alternative, Pichardo requests that this Court exercise its authority to abstain from hearing Pichardo's claim in favor of the New York Court.

32. The relevant factors in deciding a request for permissive abstention under 28 U.S.C. § 1334(c)(1) are well established:

> (1) the effect or lack thereof on the efficient administration of the estate; (2) the extent to which state law issues predominate over bankruptcy issues; (3) the difficulty or unsettled nature of the applicable state law; (4) the presence of a related proceeding commenced in state court or other non-bankruptcy court; (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334; (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case; (7) the substance rather than the form of an asserted "core" proceeding; (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with the enforcement left to the bankruptcy court; (9) the burden on the court's docket; (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties; (11) the existence of a right to a jury trial; and (12) the presence in the proceeding of non-debtor parties.

OMNA Medical Partners, Inc. v. Carus Healthcare, P.A., 257 B.R. 666, 668 (D. Del. 2000) (citing 156 B.R. 441, 443 (Bankr. D. Del. 1993); TTS, Inc. v. Stackfleth, 142 B.R. 96, 100-01 (Bankr. D. Del. 1992)). All twelve factors either weigh in favor of abstention or are neutral.

33. Abstention would promote the efficient administration of the Debtors' estates by having Pichardo's claim adjudicated in a forum familiar with the facts and law and convenient to the parties and to witnesses.

34. There are no issues of federal or bankruptcy law in the State Court Action. There may be technical issues of state law, however.

35. The State Court Action has been pending for almost five years and there would be no jurisdictional basis in this Court absent 28 U.S.C. § 1334.

36. While the State Court Action involves a direct claim against the Debtor, it surely bears no causal relationship with the Debtors' bankruptcy and is of no significance in the Debtors' bankruptcy cases.

37. While the State Court Action embraces a claim against the Debtors' estate, the claims asserted in the State Court Action are of a non-core nature.

38. There are no difficulties involved in separating the State Court Action from the bankruptcy case.

39. As noted above, the burden on this Court's docket weighs in favor of deferring to the New York Court.

40. Forum shopping is not implicated.

41. There is a jury demand and this Court may not, absent consent of the parties, conduct jury trials.

42. Of the several parties to the State Court Action, only one is a Debtor.

**REQUEST FOR PRODUCTION OF INSURANCE POLICIES**

43. In order to determine whether and to what extent insurance may be available to cover Pichardo's claim, Pichardo also requests under Fed. R. Bankr. P. 2004 that the Debtors produce any insurance policies or information related to any insurance policies (or to the extent they may be self-insured, escrow, guaranty or other funds designated to cover claims such as Pichardo's).

44. The insurance information sought is plainly relevant to the claims against the Debtors and the administration of the Debtors' estates and is hence subject to production under Rule 2004. Even if not available under Rule 2004, as this Motion constitutes a contested matter, Pichardo is entitled to the information sought under F.R.B.P. 7033 and 7034.

45. As this Motion is akin to one for relief from stay in a personal injury action, pursuant to Del. Bankr. L. R. 4001-1, this Motion is being served only on the Debtors, counsel for the Debtors, counsel for the Official Committee of Unsecured Creditors[3], and the Office the United States Trustee.

WHEREFORE, Pichardo moves this Court for entry of an order, substantially in the form attached, granting her relief from the automatic stay of 11 U.S.C. § 362(a) and/or the confirmation order and plan so that she may proceed with the State Court Action to its conclusion (including any appeals and post-judgment proceedings), and compelling the Debtors to produce all insurance and self-insured information that may be applicable to the Pichardo's claims, and granting further relief as is just and proper.

DATED: February 8, 2016

/s/ Christopher D. Loizides

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[3] Now known in this case as the "Liquidating Trust Committee".