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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

In re: HOPEMAN BROTHERS, INC., Debtor.	Chapter 11 Case No. 24-32428 (KLP)

LIMITED OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO THE DEBTOR'S MOTION FOR EXTENSION OF THE AUTOMATIC STAY TO ENJOIN ASBESTOS-RELATED ACTIONS AGAINST NON-DEBTOR DEFENDANTS

The Official Committee of Unsecured Creditors ("**Committee**") of Hopeman Brothers, Inc. ("**Debtor**"), by and through its undersigned counsel, hereby objects to the *Motion of the Debtor for Entry of Interim and Final Orders Extending the Automatic Stay to Stay Asbestos-Related Actions Against Non-Debtor Defendants* (Docket No. 7) ("**Motion**" or "**Mot.**") to the extent it seeks to enjoin direct actions by asbestos claimants against Liberty Mutual Insurance Company ("**Liberty**"). The grounds supporting this limited objection are as follows.

PRELIMINARY STATEMENT

1. Through its Motion, the Debtor seeks to "extend" the automatic stay to enjoin direct actions brought by asbestos claimants against nondebtor "Protected Parties" that are not identified by name in the Motion. The Committee now understands, however, through discovery requests served on the Debtor, that the entities the Debtor seeks to protect include several insurance companies, including, most notably, Liberty. For decades, Liberty provided to the Debtor primary and umbrella-level liability insurance coverage that was—and still remains—responsive to asbestos-related claims against the Debtor. There is no proper basis for staying direct actions against Liberty for two reasons.

2. First, direct actions against Liberty are not stayed under § 362(a)(3) of the Bankruptcy Code because, according to the Debtor itself, those actions do not implicate and would not affect property of the Debtor's estate. The Debtor has disclaimed any interest in the Liberty insurance coverage, contending that the Liberty coverage "is exhausted and released" based on an agreement the Debtor entered into with Liberty in 2003.[1] But, even though the Debtor believes that it has released *its* interest in the Liberty coverage, asbestos claimants across the country, who possess enforceable rights under the applicable policies, have not released *their* interests, which cannot be extinguished or altered by a subsequent bilateral agreement between the Debtor and Liberty. *See, e.g.*, *Smith & Wesson v. Birmingham Fire Ins. Co.*, 510 N.Y.S.2d 606, 608 (N.Y. App. Div 1987) ("[I]f a settlement is recognized as binding upon the nonparticipating injured third party, the insurer and insureds would have a strong incentive to settle, merely to limit the amount the injured third party could collect against the insurer. This would defeat the beneficial purposes

[1] Thus far, the Debtor has refused to provide the Committee with this agreement, claiming that there must first be "an appropriate protective order or confidentiality agreement." Debtor's Resps. and Objs. to First Set of Interrogs. and Reqs. for Produc. of Docs. of Official Committee of Unsecured Creditors at 14 ("**Discovery Responses**").

of [New York] Insurance Law § 3420."); *Sales v. U.S. Underwriters Ins. Co*., No. 93 CIV. 7580 (CSH), 1995 WL 144783, *9 (S.D.N.Y. Apr. 3, 1995) ("[P]laintiffs' right of action under [New York Insurance Law] Section 3420(a)(2) accrued at the time of the injury, and . . . any subsequent settlement or release effectuated by . . . [the tortfeasor] and . . . [insurance company] is not determinative of plaintiffs' rights."); *Shapiro v. Republic Indem. Co. of Am.*, 341 P.2d 289, 291 (Cal. 1959) (noting that persons injured by a tortfeasor are "third-party beneficiaries of the [tortfeasor's] policy" and "had an interest that could not be altered or conditioned by independent action of the insurer and the insured. Nor can these rights be conclusively determined against the injured persons in an action to which they were not made parties").[2]

3. Second, direct actions against Liberty are also not stayed under § 362(a)(1) of the Bankruptcy Code. By its express statutory terms, § 362(a)(1) stays proceedings against only debtors, not nondebtor codefendants. And the Fourth Circuit has rejected several attempts to expand the protection of the automatic stay under § 362(a)(1). The Debtor nevertheless suggests that "unusual circumstances" favoring an expansion of the stay exist based on the alleged "identity of interest" between the Debtor and Liberty. But the Debtor, which has the burden on its Motion, fails to explain why this alleged "identity" is material here. And the "unusual circumstances" test for expanding the stay should not even apply because staying direct actions against Liberty is not necessary for the Debtor to successfully reorganize; the Debtor has chosen not to reorganize at all

[2] New York Insurance Law § 3420 requires liability policies issued or delivered in New York to contain certain provisions that, *inter alia*, ensure that (i) "the insolvency or bankruptcy of the person insured, or the insolvency of the insured's estate, shall not release the insurer from the payment of damages for injury sustained or loss occasioned during the life of and within the coverage of such policy or contract" and (ii) under certain conditions, judgment creditors of the insured may maintain an action "against the insurer under the terms of the policy or contract for the amount of such judgment not exceeding the amount of the applicable limit of coverage under such policy or contract." Virginia law requires the same thing of insurance policies issued or delivered in the Commonwealth. *See* Va. Code Ann. § 38.2-2200 (West).

and instead intends to liquidate. For all the reasons explained herein, the Motion should be denied as to direct actions against Liberty.

ARGUMENT

4. The Debtor bears the burden of demonstrating that the automatic stay should be "extended" to enjoin the actions against nondebtors. *See, e.g.*, *In re Earl L. Pickett Enters., Inc.*, No. 12-81284C-11D, 2012 WL 6050567, at *3 (Bankr. M.D.N.C. Dec. 5, 2012) (denying motion to extend stay to nondebtor under § 362(a) because "there has been no showing of 'unusual circumstances' in this case that would permit the court to extend the automatic stay"); *In re Riverfront Props., LLC*, 405 B.R. 570, 575 (Bankr. D.S.C. 2009) (noting that "[t]he debtor-in-possession must necessarily bear the burden of proof" to extend stay to nondebtor under section 362(a) and holding debtor-in-possession failed to meet this burden).[3] As explained below, the Debtor fails to meet that burden.

I. There Is No Basis to Stay Direct Actions Against Liberty Under § 362(a)(3) Because Those Actions Do Not Implicate or Affect Property of the Estate

5. Section 362(a)(3) of the Bankruptcy Code stays "any act . . . to exercise control over property of the estate." 11 U.S.C. § 362(a)(3). The Debtor contends that the direct actions "will threaten or adversely affect . . . [its] estate" because they "will deplete the Debtor's insurance coverage" and thus be violative of § 362(a)(3). Mot. ¶¶ 23 & 25 (citations omitted). But the Debtor's argument fails when it comes to direct actions against Liberty.

6. *First*, the Debtor has disclaimed any interest in Liberty's coverage or insurance obligations. Tellingly, none of the "primary layer and excess insurance" from Liberty is listed on

[3] *See also Nike USA, Inc. v. First to the Finish Real Est., LLC*, No. 21-CV-3187, 2022 WL 2483611, at *4 (C.D. Ill. July 6, 2022) (declining to extend stay to nondebtors because movants had "not shown that they fall into either of § 362(a)'s automatic stay exceptions"); *In re Divine Ripe, L.L.C.*, 538 B.R. 300, 302, 314 (Bankr. S.D. Tex. 2015) (noting that "[t]he party invoking the stay [for nondebtor] has the burden to show that it is applicable" and declining to extend stay because "the Debtor's exhibits and witness testimony in support of its Motion to Extend the Automatic Stay provide no evidentiary support" for doing so).

the Debtor's schedule of assets. Debtor's Schedules of Assests and Liabilities and Statements of Financial Affairs, at 21-23, Docket No. 59.[4] This is because, as it has represented to the Court, from the Debtor's perspective, "all of the primary layer and excess insurance that Hopeman purchased from . . . [Liberty] is exhausted" and "released" by virtue of a 2003 compromise between the Debtor and Liberty.[5] Thus, the Debtor has no reported interest in any liability insurance coverage from Liberty that could be property of the estate. Accordingly, the Debtor has no basis to assert that direct actions against Liberty would affect estate property.

7. *Second*, even though the Debtor has disclaimed any interest in the Liberty coverage based on alleged "exhaustion and release," asbestos claimants still have rights to access that coverage. Persons injured by a tortfeasor obtain rights under the tortfeasor's liability insurance policies that the actions of the tortfeasor and its insurance carrier cannot impair. *See, e.g.*, *Shapiro*, 341 P.2d at 291. For asbestos victims, these rights accrue at the time of injury—which in the case of asbestos-related injury and diseases is commonly understood to commence upon exposure to the tortfeasor's asbestos or asbestos-containing products. *See, e.g.*, *Cole v. Celotex Corp.*, 599 So. 2d 1058, 1063, 1075 (La. 1992) (observing that exposure to harmful substances causing injury triggers insurance coverage). Claimants' rights as beneficiaries to tortfeasors' insurance contracts are commonly codified in statutes, like New York's and Virginia's cited *supra* note 2, that effectively render a liability insurance policy "a tri-partite contract" between the insurer, the policyholder, and the tort victim. *See Storm v. Nationwide Mut. Ins. Co.*, 97 S.E.2d 759, 764 (Va. 1957); *see also Davis v. Nat'l Grange Ins. Co.*, 281 F. Supp. 998, 1000 (E.D. Va. 1968) (stating that "in Virginia anyone injured by the negligence of the insured under the policy is a beneficiary

[4] The Debtor's schedule includes workers' compensation coverage issued by Liberty, but that insurance is not at issue in the underlying direct-action lawsuits.

[5] Lascell Decl. Supp. Chapter 11 Pet. ¶ 34, Docket No. 8; Disc. Resps. at 6.

of the policy"), *disapproved of on other grounds by Rowe v. U. S. Fid. & Guar. Co.*, 421 F.2d 937 (4th Cir. 1970). As the Virginia Supreme Court observed in *Storm*, that the Debtor may have released its rights under the Liberty policies does not impact the claimants' rights to that coverage: "Quite an anomalous situation would exist if rights and interests of injured parties for whose benefit and protection this legislation was enacted could be defeated by actions at law or in equity solely between the other two parties to what the statutes make a tri-party contract." 97 S.E.2d at 764.

8. In *Courville v. Lamorak Insurance Co.*, Liberty tried to limit its liability to asbestos victims through a settlement agreement it entered into with another asbestos company, Reilly-Benton Company, Inc. 301 So. 3d 557, 560 (La. Ct. App. 2020). The Lousiana court in *Courville* rejected Liberty's position, stating:

> The plain language of La. Rev. Stat. 22:1262 is clear: insurers and insured cannot retroactively rescind or annul policy contracts by agreement post-occurrence. Nonetheless, the 2013 settlement agreement at issue in this case essentially rescinded or annulled policy contracts for injuries sustained years ago. Accordingly, under Louisiana public policy, the settlement agreement is not enforceable against the third-party tort victim in this case, *i.e.*, the plaintiff.

Id. Thus, even though the Debtor may have relinquished its rights to the Liberty coverage, the rights of asbestos claimants to access the Liberty coverage remain intact. In other words, the 2003 agreement between Liberty and the Debtor that allegedly "released" the Liberty coverage could not have impacted the rights of asbestos claimants to access the coverage, which remains available to them if not to the Debtor.[6] Accordingly, there is no basis for staying direct actions against Liberty under § 362(a)(3).

[6] Of course, Liberty is entitled to claim, and attempt to prove, in these suits that the coverage is "exhausted." It is likely, however, that many of the claims implicate Liberty's "operations" coverage, which is not subject to aggregate limits of liability. *See, e.g.*, *Gen. Ins. Co. of Am. v. United States Fire Ins. Co.*, 886 F.3d 346, 350 (4th Cir. 2018) (construing insurance policies similar to the Debtor's and concluding that there are no aggregate coverage limits for

II. The Debtor Fails to Demonstrate "Unusual Circumstances" and Thus Cannot Justify an Extension of the Stay Under § 362(a)(1)

9. The Debtor contends that the automatic stay applies to asbestos actions against nondebtor "Protected Parties," including Liberty,[7] under 11 U.S.C. § 362(a)(1). Mot. at 8. But, as a threshold matter, this is incorrect. By its express terms, the stay under § 362(a)(1) applies only to "proceeding[s] *against the debtor*." § 362(a)(1) (emphasis added). And the Fourth Circuit has maintained that the "plain wording" of § 362(a) does not shield nondebtor codefendants from asbestos lawsuits. *See Williford v. Armstrong World Indus., Inc.*, 715 F.2d 124, 126 (4th Cir. 1983) ("[Section 362(a)(1)] provides only for an automatic stay of any judicial proceeding 'against the debtor.'"). In *Williford*, nondebtor codefendants argued that asbestos claims against them were "inextricably interwoven and present such closely related issues of law and fact that just resolution of the case cannot be accomplished without the presence at the trial of the defendants now seeking relief in the bankruptcy court." *Id.* Nonetheless, the Fourth Circuit declined to extend the automatic stay because the stay "belongs exclusively to the 'debtor' in bankruptcy." *Id.*; *see also In re Correct Mfg. Corp.*, 88 B.R. 158, 162 (Bankr. S.D. Ohio 1988) ("[T]he automatic stay imposed by 11 U.S.C. § 362(a) exists for the benefit of the debtor or the estate. . . . An insurer is not the intended beneficiary of that stay.").

10. Similarly, in *Kreisler v. Goldberg*, the Fourth Circuit rejected extending the automatic stay to prevent creditors from pursuing an ejectment action against the debtors' wholly owned subsidiary in state court, because absent "unusual circumstances," subsection (a)(1) [of section 362] was "available only to the debtor, not third party defendants or co-defendants." 478 F.3d 209, 213 (4th Cir. 2007) (quoting *A.H. Robins Co., Inc. v. Piccinin*, 788 F.2d 994, 999 (4th

"operations claims," which are claims of exposures occurring during the insured's ongoing activities), as amended (Mar. 28, 2018).

[7] *See* Discovery Responses at 19.

Cir. 1986)). Noting the "fundamental precept of corporate law that each corporation is a separate legal entity with its own debts and assets, even when such corporation is wholly owned by another corporate entity," the *Kreisler* court found that, if the wholly owned subsidiary "wished to receive the protections afforded by [section] 362(a)(1), it must have filed for bankruptcy." *Id.* at 213-14.

11. Likewise, in *Credit Alliance Corp. v. Williams*, the Fourth Circuit determined that the automatic stay did not block a creditor from obtaining a judgment against a nonbankrupt guarantor of the debtor's obligations, even if recovery from the guarantor would give the guarantor claims for reimbursement or contribution against the debtor. 851 F.2d 119, 121 (4th Cir. 1988). The court further underscored its view that "Congress knew how to extend the automatic stay to non-bankrupt parties when it intended to do so," citing 11 U.S.C. § 1301(a)'s "narrowly drawn provision to stay proceedings against a limited category of individual cosigners of consumer debtors" in chapter 13. *Id.*[8]

12. Nevertheless, the Debtor contends that the automatic stay should be extended beyond its plain terms based on the "unusual situation" that exists as a result of an alleged "identity of interest" between the Debtor and nondebtor third parties. Mot. ¶ 24 (citing*, inter alia*, *Piccinin*, 788 F.2d at 999). Specifically, the Debtor contends that the claims it seeks to stay "are identical and co-extensive in every respect to" claims that have been or may be asserted against the Debtor. *Id.* ¶ 26. But the Debtor fails to demonstrate how this is true, or even why it would matter even if it were true, when it comes to direct actions against Liberty. The Debtor further argues that continuing asbestos actions against "Protected Parties" will "deplete the Debtor's insurance

[8] *See also Runkle v. Genesis Worldwide II, Inc.*, 143 F. App'x 515, 517 (4th Cir. 2005) (declining to stay action against two nondebtor codefendants where the remaining defendants were in bankruptcy); *Winters ex rel. McMahon v. George Mason Bank*, 94 F.3d 130, 133 (4th Cir. 1996) (noting that it is "well settled that the automatic stay does not apply to non-bankrupt codebtors, . . . nor does the automatic stay prevent actions against guarantors of loans" (citing *Williford*, 715 F.2d at 126, and *Credit Alliance*, 851 F.2d at 121)).

coverage." *Id.* ¶ 26. Yet, as discussed above, the Debtor has disclaimed any interest in the Liberty coverage, so none of its insurance coverage would be at risk of being "deplete[d]" if direct actions against Liberty were to proceed. *See supra* part I.

13. Moreover, the Debtor's argument misconstrues the nature of Louisiana direct actions. The Louisiana direct action statute creates "a separate and distinct cause of action against the insurer which an injured party may elect in lieu of his action against the tortfeasor." *Lumbermen's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 51 (1954). Under the direct action statute, "a plaintiff may sue a tortfeasor's liability insurer without joining the tortfeasor as a defendant and establish both the insured's liability and the insurer's obligation in a single suit." *Gateway Residences at Exch., LLC v. Ill. Union Ins. Co.*, 917 F.3d 269, 272 (4th Cir. 2019) (citing La. Stat. Ann. § 22:1269(B)). The direct action statute thus confers "substantive rights on third parties to contracts of public liability insurance, which become vested at the moment of the accident in which they are injured." *West v. Monroe Bakery, Inc.*, 46 So. 2d 122, 123 (La. 1950). Thus, the statutory direct action claims of asbestos claimants against Liberty are independent and exist separate and apart from the common law or statutory claims they possess against the Debtor.

14. Furthermore, the "unusual circumstances" that the Fourth Circuit sought to address through injunctive relief in *Piccinin*, a case in which the debtor was seeking to reorganize, supplies no basis for departing from the § 362(a)(1)'s plain language when, as here, the Debtor seeks liquidation under chapter 11. "The overarching basis upon which courts have held that unusual circumstances justify expanding the automatic stay to non-debtor parties is to prevent an adverse impact on the debtor's ability to formulate a Chapter 11 plan [of reorganization]." *In re Plan 4 Coll., Inc.*, 09-17952DK, 2009 WL 3208285, at *2 (Bankr. D. Md. Sept. 24, 2009) (concluding that, because "there is no corporate reorganization as this is a Chapter 7 liquidation," the "Florida

actions in no way have a negative impact upon an attempt by the Debtor in this bankruptcy case to reorganize") (citing *Piccinin*, 788 F.2d at 1003); *accord In re Env't Manucraft Inc.*, 118 B.R. 404, 405-06 (Bankr. D.S.C. 1989) (finding there were no unusual circumstances to justify staying nondebtor actions where the plan was to liquidate and not reorganize).

15. Here, where the Debtor seeks to liquidate, the unusual circumstances justifying an expansion of the automatic stay to shield Liberty from Louisiana direct actions does not exist as there are no reorganization efforts to protect. *See Cortes v. Juquila Mexican Cuisine Corp.*, No. 17-CV-3942 (RER), 2020 WL 13550200, at *3 (E.D.N.Y. July 30, 2020) ("In assessing whether immediate adverse economic consequences are likely to flow from a claim against a non-debtor, courts often have differentiated petitions for relief filed under Chapter 7 from those filed under Chapter 11, finding that the risk of adverse economic impact is absent when the debtor is liquidating under Chapter 7, as opposed to reorganizing under Chapter 11."); *In re Pitts*, No. 808-74860-REG, 2009 WL 4807615, at *6 (Bankr. E.D.N.Y. Dec. 8, 2009) ("In our case, there is no risk to any reorganization if the stay is not extended to the Corporate Defendants because the Debtor is liquidating.").[9]

16. In none of the cases cited by the Debtor did the courts find unusual circumstances to justify a stay to protect nondebtors in a liquidation. *See* Mot. ¶ 23 (citing cases). Indeed, in *Eastern Airlines, Inc. v. Rolleston* (*In re Ionesphere Clubs, Inc.*), which the Debtor cites (Mot. ¶ 23), the court found that extending an automatic stay to nondebtors applies only "when such an injunction is necessary to protect the debtors and the parties in interest *to the reorganization in their attempt to reorganize successfully*." 124 B.R. 635, 642 (Bankr. S.D.N.Y. 1990) (emphasis

[9] *See also Le Metier Beauty Inv. Partners LLC v. Metier Tribeca, LLC*, No. 13 CIV. 4650 JFK, 2014 WL 4783008, at *4 (S.D.N.Y. Sept. 25, 2014) ("[A]llowing Plaintiffs to continue their action against [the nondebtor] cannot pose a serious threat to the Debtor's reorganization efforts because there is no reorganization to threaten. Instead, Debtor's operating assets have been liquidated.").

added).[10] Because the Debtor is not seeking to reorganize in chapter 11, there are no "unusual circumstances" justifying an expansion of the automatic stay to enjoin direct actions against Liberty.

RESERVATION OF RIGHTS

17. The Committee reserves all rights to move for entry of an order modifying or lifting the stay if, during its ongoing discovery or analysis, the Committee determines that the stay should not extend to protect certain insurers or other nondebtor entities.

CONCLUSION

For the reasons explained above, the Court should deny the Motion to the extent it seeks to stay or enjoin direct actions against Liberty and grant such other and further relief as this Court deems just and appropriate.

[*Signature of counsel on following page*]

[10] *Kaiser Gypsum*, cited by the Debtor, was a reorganization, not a liquidation. Mot. ¶ 23. And the court there later lifted the automatic stay so asbestos claimants could file or continue their cases in the tort system, and enforce settlements and judgments against the debtors' unlimited insurance assets. *See* Order Lifting the Automatic Stay Pursuant to 11 U.S.C. § 362 as to Certain Asbestos Personal Injury Claims ¶ 2, *In re Kaiser Gypsum Co.*, No. 3:16-bk-31602 (Bankr. W.D.N.C. Aug. 9, 2018), Docket No. 1108.

Respectfully submitted,

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