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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

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

OPPOSITION AND OBJECTION TO MOTION OF THE DEBTOR FOR ENTRY OF A THIRD INTERIM ORDER EXTENDING THE AUTOMATIC STAY TO STAY ASBESTOS-RELATED ACTIONS AGAINST NON-DEBTOR DEFENDANTS

NOW INTO COURT, through undersigned counsel, come Janet Rivet and Kayla Rivet (surviving spouse and child of Tommy Rivet), Maxine Becky Polkey Ragusa, Valerie Ann Ragusa Primeaux, and Stephanie Jean Ragusa Connors (surviving spouse and children of Frank P. Ragusa,

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Jr.), and Erica Dandry Constanza and Monica Dandry Hallner (surviving children of Michael Dandry, Jr.) (collectively "Creditors"), who oppose the Motion for Entry of A Third Interim Order Extending the Automatic Stay to Stay Asbestos-Related Actions Against Non-Debtor Defendants filed by Hopeman Brothers, Inc. ("Hopeman").[1] For the reasons set forth below, Creditors oppose an extension of the automatic stay solely to the extent it seeks to stay Louisiana direct action claims against non-debtor, Liberty Mutual Insurance Company ("Liberty Mutual"), pursuant to the primary Comprehensive General Liability ("CGL") policies issued by Liberty Mutual covering Hopeman. In its motion, Hopeman incorporates by reference the arguments set forth in its original motion to stay, and omnibus reply.[2] Likewise, the Roussel & Clement Creditors incorporate by reference the arguments set forth in the oppositions to the original motion to stay.[3]

I. The Unusual Circumstances Required to Extend the Automatic Stay to Non-Debtors Do Not Exist As to Liberty Mutual In This Case

"Extending the automatic stay or issuing an injunction for non-debtors contravenes a basic and compelling principle of federal bankruptcy law"[4], and "[t]he burden of proof to show that the automatic stay is applicable to a non-debtor is on the party invoking the stay."[5] As stated by the U.S.

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[1] R. Doc. 579.

[2] R. Doc. 579 at p. 9.

[3] R. Doc. 86, 135, 138, 141.

[4] *In re Qimonda Ag*, 482 B.R. 879, 895 (Bankr. E.D. Va. 2012) (quoting *Vitro v. ACP Master, Ltd. (In re Vitro)*, 455 B.R. 571, 581 (Bankr. N.D. Tex. 2011)).

[5] *In re Xenon Anesthesia of Tex., PLLC*, 510 B.R. 106, 111 (Bankr. S.D. Tex. 2014) (citing *Beran v. World Telemetry, Inc.*, 747 F. Supp. 2d 719, 723 (S.D. Tex. 2010) ("The party invoking the stay has the burden to show that it is applicable. See 2 William L. Norton, Jr., Norton Bankruptcy Law and Practice § 43:4 (3d ed. Supp. 2010) (noting that in bankruptcy court proceedings, 'the party seeking to extend the stay will bear the burden to show that 'unusual circumstances' exist warranting such an extension of the stay to a nondebtor').

Fourth Circuit, "[s]ubsection (a)(1) is generally said to be available only to the debtor, not third party defendants or co-defendants."[6] Furthermore, the Fourth Circuit has explained that this is so because of the "plain wording of the statute itself"[7]:

> It provides only for an automatic stay of any judicial proceeding "against the debtor." Section 362(a)(1). The words "applicable to all entities" denotes that the stay accorded the "debtor" is without limit or exception and that the "debtor" is protected from the pursuit of actions by any party of any character during the period of the stay. That insulation, however, belongs exclusively to the "debtor" in bankruptcy. It is to be noted also that of the remaining subsections of Section 362(a), namely 2, 5, 6, 7, and 8 (listing the kinds of proceedings stayed), specifically refer to "the debtor," and that subsections 3 and 4 refer to "the estate of the bankrupt."[8]

While the Fourth Circuit has held that there are limited cases where the stay may be applied to non-debtors entities, "there must be 'unusual circumstances' and certainly ''something more than the mere fact that one of the parties to the lawsuit has filed a Chapter 11 bankruptcy must be shown in order that proceedings be stayed against non-bankrupt parties.''"[9]

Hopeman argues that the automatic stay should be extended as to Liberty Mutual because Liberty Mutual "has informed the Debtor that it intends to assert alleged contractual indemnification claims against the Debtor if the Direct Action Lawsuits are allowed to proceed against LMIC."[10] According to Hopeman, under Fourth Circuit case law, because Hopeman would be the real party

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[6] *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 999 (4th Cir. 1986) (citing *Lynch v. Johns-Manville Sales Corp.*, 710 F.2d 1194, 1196-1197 (6th Cir. 1983); *Williford v. Armstrong World Industries, Inc.*, 715 F.2d 124, 126-27 (4th Cir. 1983)).

[7] *Williford v. Armstrong World Indus., Inc.,* 715 F.2d 124, 126 (4th Cir. 1983).

[8] *Id.*

[9] *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 999 (4th Cir. 1986) (quoting *Johns-Manville Sales Corp.*, 26 Bankr. 405, 410 (S.D.N.Y. 1983)).

[10] R. Doc. 579.

defendant, asbestos-related actions that would implicate indemnity obligations are also stayed.[11] Hopeman fails to explain how such threatened contractual indemnification claims could have an impact on Hopeman as it is currently under the protection of an automatic stay, and its current plan is to dissolve itself after receiving an injunction "permanently and forever prohibiting and enjoining the commencement, conduct, or continuation of any Claim" including Asbestos PI Claims which specifically include the sort of indemnification claims threatened by Liberty Mutual.[12] If a plaintiff were to file a direct action against Liberty Mutual for exposure to asbestos by Hopeman, and Liberty Mutual asserted an indemnification claim against Hopeman, Hopeman would not need to defend itself in the indemnification suit because the automatic stay would prohibit Liberty Mutual from prosecuting that indemnification suit during the pendency of this bankruptcy. Furthermore, if Hopeman's plan is confirmed, Liberty Mutual will be permanently and forever prohibited and enjoined from commencing, conducting, or continuing any indemnification claim against Hopeman, and Hopeman will be dissolved.[13] Instead, Liberty Mutual could submit an indirect asbestos PI claim to the liquidation trust.[14] Given the automatic stay, and the contemplated injunction and dissolution of Hopeman, Liberty Mutual's threatened indemnification claims can have no effect on Hopeman, and any extension of the automatic stay in this matter should not include Liberty Mutual.

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[11]R. Doc. 579 at p. 9; R. Doc. 157 at pp. 15-16, 30-31 (citing *A.H. Robins Co. Inc. v. Piccinin*, 788 F.2d 994 (4th Cir. 1986)).

[12]R. Doc. 56 at pp. 10, 16, 35.

[13]R. Doc. 8 at p. 15; R. Doc. 56 at pp. 10, 16, 35.

[14]R. Doc. 56 at pp. 10, 16, 35.

In *Willet v. Vitek, Inc.*, the District of Nevada considered whether the *A.H. Robins* "unusual circumstances" rule, upon which Hopeman is relying[15], applied to a case where DuPont argued that an automatic stay in favor of its co-defendant, Vitek, should be extended to protect DuPont, because DuPont could make an indemnity claim against the debtor.[16] The court held that "the case law extending the protection of the automatic stay to non-debtors in unusual circumstances does not support such an extension" and that "as a practical matter, allowing this case to proceed against Du Pont will not have a practical adverse effect or impact on Vitek's estate."[17] The court explained that while DuPont's indemnification arguments were meritorious in theory, the practical realities of bankruptcy law made such arguments meritless.[18]

First, the *Willet* court explained that pursuant to bankruptcy law, DuPont could not assert its indemnification claims against Vitek until–if ever–after the close of the bankruptcy case:

> Du Pont argues that if plaintiff were to obtain a judgment against Du Pont, such a verdict necessarily would indicate that the product was defective and entitle Du Pont to receive full indemnity from Vitek. In such a situation, Du Pont argues, Vitek's estate would be hurt by the continuation of proceedings to allow a judgment to be entered against Du Pont because Du Pont's claim for indemnity would diminish the property in Vitek's estate.
>
> While Du Pont's argument is meritorious in theory, the facts of this case indicate that such argument is meritless. Even though as a matter of tort law, Du Pont might be entitled to indemnity from Vitek if a jury were to determine that the product was defective, Du Pont's conduct precludes it from asserting an indemnity claim against

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[15] R. Doc. 579 at p. 9; R. Doc. 157 at pp. 15-16, 30-31 (citing *A.H. Robins Co. Inc. v. Piccinin*, 788 F.2d 994 (4th Cir. 1986)).

[16] *Willett v. Vitek, Inc.*, 139 B.R. 723, 724 (D. Nev. 1992) (In its papers, Du Pont does not address the relationship between Du Pont and Vitek other than Du Pont's claim that it would be entitled to indemnity from Vitek.).

[17] *Willett v. Vitek, Inc.,* 139 B.R. 723, 727 (D. Nev. 1992).

[18] *Willett v. Vitek, Inc.*, 139 B.R. 723, 725-726 (D. Nev. 1992).

> Vitek. First, Du Pont did not file a cross-claim against Vitek for indemnity or contribution. Of course, once Vitek declared bankruptcy and the automatic stay took effect, Du Pont could not file such a cross-claim. The facts indicate, however, that plaintiff filed her complaint on December 11, 1989 and Vitek did not declare bankruptcy until June 17, 1990. Thus, Du Pont had over six months to file a cross-claim before the automatic stay took effect.
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> Second, and more important, Du Pont had to file any claim or potential claim it possessed against Vitek by November 5, 1990, since Du Pont is conceivably a creditor, distinct from the tort-plaintiff creditors, of Vitek. Tort-plaintiff creditors had until October, 1991, to file their claims. Plaintiff asserts and Du Pont does not dispute that Du Pont to this date has never filed a claim with the trustee of Vitek's estate. Thus, even if Du Pont is entitled to full indemnity from Vitek as a matter of tort law, as a matter of bankruptcy law, Du Pont may not assert such a claim until, if ever due to the discharge provisions of the bankruptcy code, after bankruptcy case is closed.[19]

Similarly, in this case, Liberty Mutual has never filed an indemnification claim against Hopeman relating to direct action claims against Liberty Mutual, and the automatic stay that took effect when Hopeman filed this bankruptcy case would prohibit Liberty Mutual from pursuing any indemnification claim against Hopeman until after this bankruptcy case is closed.

Second, the *Willet* court explained that, because the debtor was seeking liquidation, at the close of the bankruptcy case, the debtor and its estate would no longer exist, and thus as a practical matter, neither the debtor nor its estate would be adversely affected by an indemnity claim:

> Since Vitek has filed under Chapter 7 for liquidation, at the close of the bankruptcy case Vitek and the estate no longer will exist. That is, there will be no property from which Du Pont can recover. Thus, even if we allow the proceedings to continue and plaintiff obtains a judgment against Du Pont, which under tort law would entitle Du Pont to indemnity from Vitek, Vitek's estate cannot be adversely affected by such facts because practically, Du Pont will be unable to obtain indemnity from Vitek.

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[19] *Willett v. Vitek, Inc.,* 139 B.R. 723, 725 (D. Nev. 1992).

> First, Du Pont failed to file a claim. Second, Vitek and property of the estate no longer will exist after the bankruptcy case is closed.[20]

Similarly, in this case, "After transferring its current Asbestos-Related Claims, any remaining cash, and insurance assets to the Liquidation Trust, the Debtor will dissolve and no longer be subjected to additional Asbestos-Related Claims, as provided for in the proposed Plan."[21] Thus, neither Hopeman, nor its estate would be adversely affected by Liberty Mutual's threatened indemnity claims because at the close of this bankruptcy, neither Hopeman, nor its estate will exist, and Liberty Mutual will be unable to obtain indemnity from Hopeman. While Liberty Mutual could submit an indirect asbestos PI claim to the liquidation trust,[22] payment of such asbestos claims is exactly what the liquidation trust is meant to do.

Third, the *Willet* court explained that while the "unusual circumstances" rule might apply to a case where the debtor was seeking reorganization, it did not apply to cases where the debtor was seeking liquidation, because the debtor could not be adversely affected by a subsequent indemnification claim:

> In *A.H. Robins Co. v. Piccinin*, 788 F.2d 994 (4th Cir.1986), a case involving a Chapter 11 reorganization, the court held that in unusual circumstances the automatic stay will apply to a solvent, co-defendant of the debtor/defendant. *Id.* at 999. The court held that there must be "such identity between the debtor and the third party defendant that the debtor may be said to be the real party defendant and that a judgment against the third party defendant will in effect be a judgment or finding against the debtor." *Id.*
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> *In Matter of Lockard*, 884 F.2d 1171, 1179 (9th Cir.1989), the Ninth Circuit refused to apply the "unusual circumstances" rule from *Piccinin*. Even if this circuit were to

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[20] *Willett v. Vitek, Inc.,* 139 B.R. 723, 725 (D. Nev. 1992).
[21] R. Doc. 8 at p. 15.
[22] R. Doc. 56 at pp. 10, 16, 35.

> apply the rule in some situations, we conclude that the circuit would not apply the rule under the facts of our case. As stated in our previous order, the *Piccinin* court was concerned about the impact on the debtor because the debtor was attempting to reorganize after the close of the bankruptcy case. Thus, the debtor would continue to exist after the end of the bankruptcy case.
>
> In our case, if Vitek were attempting to reorganize, and Du Pont's claim for indemnity survived the discharge provisions of the bankruptcy code, a judgment in favor of plaintiff against Du Pont clearly would adversely impact Vitek because after the close of the bankruptcy case, Du Pont would be able to sue Vitek for indemnity. Especially considering that the judgment probably would be very large, a judgment in favor of Du Pont and against Vitek in the indemnity action would seriously hinder, if not destroy, Vitek's reorganization.
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> The facts of our case, however, are that Vitek is seeking to liquidate under Chapter 7, not reorganize under Chapter 11. Thus, as outlined above, a judgment in favor of plaintiff and against Du Pont will not have an impact practically on Vitek's estate. No matter how we decide the stay issue, all Vitek's assets will be distributed, either to the tort plaintiffs through a settlement fund (see below), or to non tort plaintiff creditors who have filed claims with the bankruptcy court. After such distribution, Vitek's estate will have no property. Since Du Pont did not file a claim, even if it could obtain a judgment for indemnity, it would not be able to satisfy its judgment from Vitek's estate.[23]

Similarly, in *In re First Cent. Fin. Corp.*, the Bankruptcy Court for the Eastern District of New York explained that the "unusual circumstances" required under *A.H. Robins* simply do not exist where a debtor who will not be reorganizing is threatened with potential indemnification suits:

> The Fourth Circuit, in the *A.H. Robins* case, stated that " 'where the debtor and another are joint tort feasors or where the nondebtor's liability rests upon his own breach of a duty,' " an automatic stay " 'would clearly not extend to such *19 nondebtor.' " 788 F.2d at 999 (quoting *Plessey Precision Metals, Inc. v. Metal Ctr., Inc. (In re Metal Ctr., Inc.),* 31 B.R. 458, 462 (Bankr.D.Conn.1983)). Actions against non-debtors associated with the debtor may be stayed under § 362(a)(1) only when "unusual circumstances" are present. Id. The court explained that

[23] *Willett v. Vitek, Inc.*, 139 B.R. 723, 725–26 (D. Nev. 1992).

[t]his "unusual situation," it would seem, arises when there is such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor.

Id.; accord *F.T.L., Inc. v. Crestar Bank (In re F.T.L., Inc.)*, 152 B.R. 61, 63 (Bankr.E.D.Va.1993); *General Dynamics Corp. v. Veliotis (In re Veliotis)*, 79 B.R. 846, 848 (Bankr.E.D.Mo.1987).

According to the Trustee, the Lipson Action, and any other potential lawsuits against the Officers and Directors, are essentially suits against the Debtor. They may give rise to indemnification claims against the Debtor and findings made in such suits may be binding on the Debtor by way of collateral estoppel. Notwithstanding these contentions, "unusual circumstances" are just non-existent.

The Trustee cites *A.H. Robins*, 788 F.2d at 999–1001, *Gillman v. Continental Airlines (In re Continental Airlines)*, 177 B.R. 475, 481 (D.Del.1993), and *Johns–Manville Corp. v. Asbestos Litig. Group (In re Johns–Manville Corp.)*, 26 B.R. 420, 428–29 (Bankr.S.D.N.Y.1983), aff'd, 40 B.R. 219 (S.D.N.Y.1984) for the proposition that § 362(a)(1) exists precisely to prevent lawsuits from proceeding when they might lead to indemnification demands upon a debtor. The reliance is misguided.

Those cases presented unique circumstances not found here. Numerous lawsuits were pending against the Chapter 11 debtors' officers and directors. Permitting the maintenance of those suits would have, in all likelihood, resulted in a massive depletion of estate assets and inhibited key personnel from the important business of getting the corporate debtor back on its feet. See, e.g., *A.H. Robins*, 788 F.2d at 996 (commenting on the "avalanche of actions" filed nationally and internationally, which **compelled extension of the stay in order to allow the reorganization to go forward**).

Clearly, **the underlying purpose behind embracing non-debtor officers and directors within the stay provided by § 362(a)(1) is to suspend actions that pose a serious threat to a corporate debtor's reorganization efforts**. See *In re United Health Care Org.*, 210 B.R. 228, 234 (S.D.N.Y.1997) (staying creditor suits against non-debtors where those actions would harm the reorganization effort); *In re Continental Airlines*, 177 B.R. at 479 (staying litigation that would adversely affect the debtor's "ability to pursue a successful plan of reorganization under Chapter 11"). *In Gray v. Hirsch*, 230 B.R. 239, 243 (S.D.N.Y.1999), the court refused to stay a shareholders action brought against the corporate debtor's principal for alleged

> violations of securities laws. **The court explained that extending the stay was inapplicable in a Chapter 7 case because a debtor's stay may extend to a non-debtor only when necessary to protect the debtor's reorganization.** The threatened harm may be to needed debtor funds (e.g., when non-debtors are entitled to indemnification) or personnel (e.g., when debtors need the services of non-debtors facing crushing litigation). **The question is whether the action against the non-debtor is sufficiently likely to have a "material effect upon ... reorganization effort [s]" that debtor protection requires an exception to the usual limited scope of the stay.** *Id.* at 243 (citing *CAE Indus. Ltd. v. Aerospace Holdings Co.*, 116 B.R. 31, 34 (S.D.N.Y.1990)).
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> Although we are aware that the Officers and Directors possess a right to indemnification for loss not covered under the Policy, even with the "right to indemnification ..., the magnitude of the harm to debtor if no stay is in force does not approach the scope of the potential injuries besetting the debtors in *Robins* and *Johns–Manville*." *All Seasons Resorts, Inc. v. Milner (In re All Seasons*), 79 B.R. 901, 904 (Bankr.C.D.Cal.1987).
>
> Here, mass litigation is non-existent, there is no reorganization effort which would require the participation of the Officers and Directors, and no discernible harm can be ascribed to the Debtor if the Officers and Directors ultimately file claims for indemnification in this Chapter 7 case. The Trustee is arguing semantics. He asserts that the Officers' and Directors' indemnification demands may eventually be filed in this case, but we are mystified as to how this constitutes harm to the Debtor.[24]

The *First Cent. Fin. Corp*. court also explained that even if the parties seeking indemnity were to file their indemnity claims in the bankruptcy case itself and such indemnity claims were to lessen the overall percentage of a pro rata distribution available to creditors, it would still not damage the estate, and would not constitute unusual circumstances necessitating the extension of the automatic stay:

> Further, we are unconvinced that potential indemnification demands would damage the estate. Although claims for indemnification filed in this Chapter 7 liquidation might lessen the overall percentage of a pro rata distribution to creditors, such

[24] *In re First Cent. Fin. Corp.,* 238 B.R. 9, 18–20 (Bankr. E.D.N.Y. 1999) (emphasis added).

> distributive adjustment does not damage the estate. Cf. *Louisiana World,* 832 F.2d at 1400 ("There is not the potential for increasing the estate's exposure by payment of liability [insurance] proceeds due."). A potential for additional claims in this case, without more, does not constitute "unusual circumstances" which would necessitate imposition of the automatic stay upon the Lipson Action.[25]

Likewise, in *In re Uni-Marts, LLC,* the Bankruptcy Court for the District of Delaware explained that the purpose served by extending the automatic stay to parties indemnified by the debtor must be consistent with the purpose of the stay itself which is to suspend actions that pose a serious threat to a corporate debtor's reorganization efforts:

> It is true that the Court in *A.H. Robins* noted an "illustration" of unusual circumstances warranting extension of the stay is "a suit against a third-party who is entitled to absolute indemnity by the debtor." *Id.* See also, *Am. Film Techs*., 175 B.R. at 853 (extending the automatic stay to non-debtor directors and officers in part because "there is an entitlement to indemnification between the debtor and its officers and directors"); *Eastern Air Lines, Inc. v. Rolleston (In re Ionosphere Clubs, Inc.)*, 111 B.R. 423, 435 (Bankr.S.D.N.Y.1990), aff'd, 124 B.R. 635 (S.D.N.Y.1991) (finding the chairman of the board of directors' indemnification rights intertwined his interests with those of the debtor, creating a situation where the debtor was the real party in interest).
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> Yet the purpose served by extending the stay to directors and officers indemnified by the debtor must be consistent with the purpose of the stay itself, to "suspend actions that pose a serious threat to a corporate debtor's reorganization efforts." *First Cent.*, 238 B.R. at 19. See also *Gerard v. W.R. Grace & Co. (In re W.R. Grace & Co.)*, 115 Fed.Appx. 565, 570 (3d Cir.2004) (not precedential) ("Rather, courts employ a broader view of the potential impact on the debtor. The standard for the grant of a stay is generally whether the litigation could interfere with the reorganization of the debtor." (citations and quotations omitted)).
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> **The broader rule here is that a debtor's stay may extend to a non-debtor only when necessary to protect the debtor's reorganization**. The threatened harm may be to needed debtor funds (e.g., when non-debtors are entitled to indemnification) or personnel (e.g., when debtor needs the services of non-debtors facing crushing litigation). The question is whether the action against the non-debtor is sufficiently

[25] *In re First Cent. Fin. Corp.,* 238 B.R. 9, 20 (Bankr. E.D.N.Y. 1999).

> likely to have a "material effect upon ... reorganization effort[s]," that debtor protection requires an exception to the usual limited scope of the stay.
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> *Gray v. Hirsch,* 230 B.R. 239, 243 (S.D.N.Y.1999) (quoting *CAE Indus. Ltd. v. Aerospace Holdings Co.,* 116 B.R. 31, 34 (S.D.N.Y.1990)).[26]

Of note, the *Uni-Marts* court explained that even if the indemnification suits would result in losses to the estate, this would not justify an extension of the automatic stay if the impact of such losses would not impair the debtor's reorganization:

> Here, under the Debtor's Charter, the Debtor is required to indemnify Sahakian for any losses related to actions taken in his official capacity. Hypothetically, the Plaintiffs' suit against Sahakian could result in losses to the estate. However, the Debtor maintains a D & O policy to cover losses of this type. The proceeds of said policy may not actually be part of the estate. See *First Cent.*, 238 B.R. at 17 (" '[D & O] insurance policies are property of the estate ..., but the question of whether the proceeds are property of the estate must be analyzed in light of the facts of each case.' " (quoting *In re Sfuzzi, Inc.,* 191 B.R. 664, 668 (Bankr.N.D.Tex.1996))). Given the relatively modest size of the potential recovery in this adversary proceeding in relation to the limits on the Debtor's D & O policy (and the fact that any claim against the Debtor would be a pre-petition claim), it is difficult to see how the Debtor would sustain any loss, much less one that would materially impair its reorganization.[27]

Likewise, in *In re LTL MANAGEMENT, LLC,* the Bankruptcy Court of the District of New Jersey recognized that the mere existence of indemnification obligation from a debtor to a non-debtor is insufficient grounds for extending the automatic stay under, and that a party seeking such an extension must demonstrate that such indemnification obligations threaten the debtor's assets or reorganization:

> The Original TCC additionally argues that "the existence of an indemnification from the debtor to a non-debtor ... is an insufficient ground for extension of the automatic stay." Objection of Original TCC 57, ECF No. 14. Rather, the Original TCC insists

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[26] *In re Uni-Marts, LLC,* 399 B.R. 400, 416 (Bankr. D. Del. 2009) (emphasis added).
[27] *In re Uni-Marts, LLC*, 399 B.R. 400, 416–17 (Bankr. D. Del. 2009).

> that a debtor must also demonstrate that "the indemnification obligation threatens the debtor's assets or reorganization." Id. Relevant case law and the underlying purpose of the automatic stay support the Original TCC's interpretation. The court in Robins provided an illustration, noting that a situation in which extension of the stay would be warranted "would be a suit against a third-party who is entitled to absolute indemnity by the debtor on account of any judgment that might result against them in the case [because] ... [t]o refuse application of the statutory stay in that case would defeat the very purpose and intent of the statute." *A.H. Robins Co. v. Piccinin*, 788 F.2d at 999; see also *McCartney*, 106 F.3d at 510. Thus, a critical factor in deciding whether to extend the stay is the potential adverse impact on a debtor's estate and prospect of reorganization.[28]

Furthermore, in *In re Southside Lawn & Garden/Suffolk Yard Guard,* the sole general partners and full time operators of a debtor sought to have the automatic stay provision of 11 U.S.C. § 362(a) extended to their benefit, arguing that they were entitled to indemnification from the debtor relying upon *A.H. Robins*.[29] The Norfolk Division of the Bankruptcy Court for the Eastern District of Virginia rejected the non-debtors' request, explaining that the unusual circumstances present in *Robins* did not exist, and that the Robins holding is quite limited in its application and that the automatic stay will not ordinarily be extended to the benefit of nondebtor parties:

> In the instant case, the nondebtor individual plaintiffs ask the court to apply the holding in *Robins* to extend the automatic stay to their benefit on two grounds:
> (1) Since the plaintiffs are entitled to indemnification from the debtor to the extent they must pay claims against the debtor, a judgment against them is a judgment against the debtor.
> (2) Since the plaintiffs' management skills are vital to the debtor's reorganization, their being required to defend collection suits will have an adverse effect on the reorganization.
> This court rejects the plaintiffs' argument. The present case does not remotely involve the type of "unusual circumstances" present in *Robins*. The only significant similarity

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[28] *In re LTL MANAGEMENT, LLC*, 638 B.R. 291, 306 (Bankr. D.N.J. 2022).

[29] *In re Southside Lawn & Garden/Suffolk Yard Guard*, 115 B.R. 79, 79–81 (Bankr. E.D. Va. 1990).

> here is that the plaintiffs will be entitled to indemnification from the debtor to the extent they are required to pay partnership debt.
>
> Subsequent to *Robins*, the Fourth Circuit has considered a case having facts more in line with those here and held that the automatic stay should not extend to a guarantor of the debtor's liability. See *Credit Alliance Corp. v. Williams*, 851 F.2d 119 (4th Cir.1988). The court of appeals made it clear that the Robins holding is quite limited in its application and that the automatic stay will not ordinarily be extended to the benefit of nondebtor parties.
>
> This court recognizes that a contrary result is suggested *by First Nat. Bank of Louisville v. Kanawha Trace Dev. Partners (In re Kanawha Trace Dev. Partners*), 87 B.R. 892 (Bankr. E.D. Va.1988). However, this case is distinguishable since in Kanawha Trace the nondebtor party was an important continuing source of funds to the reorganization efforts of the debtor. Moreover, it should be noted that the Kanawha Trace opinion was filed on June 29, 1988, and that in Credit Alliance on July 5, 1988.
>
> Based upon the rationale of Credit Alliance, this court finds that the automatic stay provisions of § 362 should not be extended to plaintiffs, and the court will not exercise its equitable powers under § 105 to accomplish this result.[30]

The facts of Hopeman's bankruptcy case are that Hopeman is seeking liquidation, and a judgment against Liberty Mutual will not have an impact practically on Hopeman or its estate. All of Hopeman's assets will be transferred to the liquidation trust, and after such distribution, Hopeman will cease to exist and its estate will have no property. While Liberty Mutual could submit an indirect asbestos PI claim to the liquidation trust,[31] payment of such asbestos claims is exactly what the liquidation trust is meant to do, and would not constitute damage to the estate or constitute unusual circumstances under *A.H. Robins*. Accordingly, this Honorable Court should not enter an order extending the automatic stay as to direct action claims against Liberty Mutual.

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[30] *In re Southside Lawn & Garden/Suffolk Yard Guard*, 115 B.R. 79, 80–81 (Bankr. E.D. Va. 1990) (citing *Credit Alliance Corp. v. Williams*, 851 F.2d 119 (4th Cir.1988)).

[31] R. Doc. 56 at pp. 10, 16, 35.

II. Federal and State Courts Interpreting Louisiana's Direct Action Statute Have Held that Direct Action Claims against the Insurer of a Bankrupt Insured Do Not Violate the Automatic Stay

In *Landry v. Exxon Pipeline Co. Mendoza Marine, Inc.,* the Bankruptcy Court for the Middle District of Louisiana considered whether direct action claims under the Louisiana direct action statute should be stayed pursuant to 11 U.S.C. § 362(a)(1) and 362(a)(3)–the same provisions relied upon by Hopeman–and held that those sections do not apply to Louisiana direct action claims.[32] Similarly, the Southern District of New York has stated that "the automatic stay provision in 11 U.S.C. § 362 does not apply to prevent direct actions against insurers of a debtor in "direct action states such as Louisiana," because in these circumstances the tort plaintiff is seeking to recover against the insurer and not against the debtor or its property."[33] The Bankruptcy Court for the Middle District of Louisiana has explained that:

> The automatic stay prevents: the commencement or continuation of suits or proceedings to "recover a claim against the debtor;" the enforcement of a judgment against the debtor or property of the estate, and; any act to obtain possession or control over property of the estate. In most states outside Louisiana (the Court believes) where a suit to recover insurance funds has not been canceled, or, if commenced, has not been reduced to judgment, the plaintiff, because the debtor must be a named party in the action or must be cast in judgment before an action will lie, will be stayed from commencing or proceeding with a suit that (ultimately) seeks a judgment that can be enforced against the insurance company. Even if the debtor is named only nominally, such suits are stayed under 11 U.S.C. § 362(a)(1) because that provision prevents the continuation or commencement, of suit to recover on a claim against the debtor. Such a suit would seek to impose liability against the debtor, and thus, be an attempt to recover a claim against the debtor. Because the debtor

[32] *Landry v. Exxon Pipeline Co. Mendoza Marine, Inc.*, 260 B.R. 769, 795 (Bankr. M.D. La. 2001).

[33] *ACE Am. Ins. Co. v. Bank of the Ozarks*, 2014 U.S. Dist. LEXIS 140541, at *41-42 (S.D.N.Y. Sep. 30, 2014) (citing *Landry v. Exxon Pipeline Co. Mendoza Marine, Inc.*, 260 B.R. 769 (Bankr. M.D. La. 2001).

> necessarily must be a party, the suit is stayed. So, within states where there is a requirement that the debtor/insured be a party to the action, the action, because of the express terminology of § 362(a)(1) and (2) will be stayed by the commencement of the bankruptcy case.
>
> **In Louisiana, however, tort victims have a substantive right of action against the insurer of the debtor, and there is no necessity of naming, or attempting to recover against, if even nominally, the debtor. 11 U.S.C. § 362(a)(1) does not seem to apply.**[34]

While Hopeman has not offered argument under 11 U.S.C. § 362(a)(2), in *Landry* the Court held that 11 U.S.C. § 362(a)(2) also did not apply because funds payable to direct action plaintiffs would not be property of the estate:

> the policy's status as property of the estate is somewhat misleading. As discussed, the debtor's rights and equitable interests under the policy are property of the estate. A tort plaintiff is not suing to enforce the debtor's policy rights, a tort plaintiff wishes to enforce the judgment against the proceeds of that policy, in other words, funds payable by the insurer on account of the insurer's contractual assumption of liability via its insurance policy with the debtor. Such funds are not property of the estate, and thus, 11 U.S.C. § 362(a)(2) would not apply.[35]

The Bankruptcy Court for the Middle District of Louisiana further held that the:

> **same rationale extends to acts aimed at possession or control of property of the estate under 11 U.S.C. § 362(a)(3).** A tort plaintiff is not trying to possess the debtor's policy rights, nor is the tort plaintiff attempting to control the debtor's policy rights. By virtue of its substantive right of action against the insurer, the tort plaintiff is merely seeking to recover that which is not property of the estate.[36]

The U.S. Fifth Circuit has stated that "[t]he plain language of the statute evinces Louisiana's intent for the insolvency of the insured not to "release the insurer from the payment of damages" to

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[34] *Landry v. Exxon Pipeline Co. Mendoza Marine, Inc.*, 260 B.R. 769, 795 (Bankr. M.D. La. 2001) (emphasis added).

[35] *Id.*

[36] *Id.*

injured parties" and that the statute "is crafted to protect Louisiana's vital interest in liability insurance that covers injuries to people in the state."[37] Of note, the U.S. Supreme Court has held that even where an insurance contract expressly prohibited direct actions before a determination of the insured's liability, Louisiana's interest in protecting injured parties under its direct action statute overrode another State's interest in enforcing its contract rules.[38] The U.S. Supreme Court explained that:

> Louisiana's direct action statute is not a mere intermeddling in affairs beyond her boundaries which are no concern of hers. Persons injured or killed in Louisiana are most likely to be Louisiana residents, and even if not, Louisiana may have to care for them. Serious injuries may require treatment in Louisiana homes or hospitals by Louisiana doctors. The injured may be destitute. They may be compelled to call upon friends, relatives, or the public for help. Louisiana has manifested its natural interest in the injured by providing remedies for recovery of damages. It has a similar interest in policies of insurance which are designed to assure ultimate payment of such damages. Moreover, Louisiana courts in most instances provide the most convenient forum for trial of these cases.[39]

Louisiana courts interpreting Louisiana's direct action statute have also held that an automatic stay under 11 U.S.C. § 362 in favor of an insured does not stay claims against the insurer:

> Defendant argues that the trial court erred in denying the defendant's motion for a stay of proceedings, since actions against its insured were automatically stayed pursuant to the Bankruptcy Code, 11 U.S.C.A. § 362(a). Defendant alleges the stay should have applied to it also because its liability under the endorsement is that of a surety.

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[37] *Sosebee v. Steadfast Ins. Co.*, 701 F.3d 1012, 1022 (5th Cir. 2012) (citing *Watson v. Emp'rs Liab. Assur. Corp.*, 348 U.S. 66, 73, 75 S. Ct. 166, 99 L. Ed. 74 (1954)).

[38] *Watson v. Emp'rs Liab. Assur. Corp.*, 348 U.S. 66, 72-73, 75 S. Ct. 166, 99 L. Ed. 74 (1954)); see also *Sosebee v. Steadfast Ins. Co.*, 701 F.3d 1012, 1022 (5th Cir. 2012).

[39] *Watson v. Emp'rs Liab. Assurance Corp*., 348 U.S. 66, 72, 75 S.Ct. 166, 170, 99 L.Ed. 74, 82 (1954).

> The protection of the automatic stay provision of § 362(a) does not apply to co-debtors. *Wedgeworth v. Fibreboard Corp*., 706 F.2d 541 (5th Cir. 1983). The obligation of a surety toward a creditor is to pay him if the debtor does not satisfy the debt. La.Civ. Code art. 3045. A surety may not assert exceptions which are personal to the debtor. La.Civ. Code art. 3060. Bankruptcy is a "personal defense" within the meaning of art. 3060; therefore, the surety is prohibited from opposing the creditor by use of this exception. *Simmons v. Clark*, 64 So.2d 520 (La.App. 1st Cir. 1953).
>
> The Louisiana Statute, LSA-R.S. 22:655, giving a plaintiff the right of direct action against an insurer, applies even if proceedings have been stayed against the insured because of bankruptcy. 706 F.2d at 547.[40]

Louisiana creditors may pursue claims against the insurers of bankrupt entities because Louisiana law grants injured parties a substantive right to sue the insurance company on a tortfeasors' insurance policy as a third party beneficiary to the insurance contract.[41] Furthermore, for exposures occurring prior to 1989, Louisiana creditors have an unqualified right to pursue claims against insurers without having to fit their claims within the enumerated reasons set forth in La. R.S. 22:1269.[42] Under Louisiana law "[o]nce a party's cause of action accrues, it becomes a vested property right that may not be constitutionally divested."[43]

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[40] *Aaron v. Bankers & Shippers Ins. Co.*, 475 So.2d 379, 381-82 (La. App. 1 Cir. 1985).

[41] *West v. Monroe Bakery, Inc.,* 217 La. 189, 46 So.2d 122 (1950); *Leviere v. Williams*, 2002-1816 (La.App. 4 Cir. 1/17/03), 844 So.2d 32, 36, *writ denied*, 2003-1149 (La. 6/20/03), 847 So.2d 1236 ("The court noted that although Carver was not an insurer liable to the plaintiff under R.S. 22:655, 'it did undertake an obligation for the benefit of third parties like plaintiff, La. C.C. art. 1890, 4 and plaintiff therefore had a right of action….' Id. at 721. Thus, the law of this circuit supports a cause of action to enforce insurance contracts by third party beneficiaries to those contracts. La. R.S. 22:655 establishes that an injured party is a third party beneficiary to an insurance policy. The plaintiff therefore has a right of action against Progressive and may proceed against Progressive...").

[42] *Marchand v. Asbestos Defendants,* 10-1650 (La. App. 4 Cir. 7/21/10); 44 So.3d 355, 358; *Foltmer v. James*, 01-1510 (La. App. 4 Cir. 9/12/01); 799 So.2d 545, 548; *Marcel v. Delta Shipbuilding Co.*, 10-168 (La. App. 4 Cir. 8/4/10); 45 So.3d 634.

[43] *Austin v. Abney Mills*, 01-1598 (La. 9/4/02); 824 So.2d 1137, 1145 (citing *Cole v. Celotex*, 599 So.2d 1058, 1063 (La. 1992)).

WHEREFORE, Janet Rivet and Kayla Rivet (surviving spouse and child of Tommy Rivet), Maxine Becky Polkey Ragusa, Valerie Ann Ragusa Primeaux, and Stephanie Jean Ragusa Connors (surviving spouse and children of Frank P. Ragusa, Jr.), and Erica Dandry Constanza and Monica Dandry Hallner (surviving children of Michael Dandry, Jr.) submit that Hopeman Brothers, Inc.'s Motion for Entry of A Third Interim Order Extending the Automatic Stay to Stay Asbestos-Related Actions Against Non-Debtor Defendants[44] should be denied, and that the automatic stay should not be extended to apply to the Creditors' direct action claims against Liberty Mutual Insurance Company.

Dated: February 28, 2025

Respectfully submitted,

/s/Kollin G. Bender

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[44] R. Doc. 579.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 28, 2025, a true and correct copy of the foregoing Objection was filed electronically using the Court's CM/ECF system, which thereby sent notice to all parties who have registered to receive such notice in the above-captioned case.

/s/ Kollin Bender
Counsel