UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re	Chapter 11
SPECIALTY PRODUCTS HOLDING CORP., *et al.*,	Case No. 10-11780 (JKF)
	(Jointly Administered)
Debtors.	**Hearing Date: July 14, 2010 at 11:00 a.m.**
	Objection Deadline: June 30, 2010 at 5:00 p.m.

INSURERS' MOTION AND MEMORANDUM OF LAW IN SUPPORT OF MOTION SEEKING DECLARATION THAT AUTOMATIC STAY DOES NOT APPLY TO DEBTORS BONDEX AND RPM'S CLAIMS IN THE COVERAGE ACTION

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PRELIMINARY STATEMENT

Debtors Bondex International, Inc. ("Bondex") and RPM, Inc. ("RPM"), as well as an affiliated company, sued Movant insurers in the district court for the Northern District of Ohio in 2003 seeking coverage for asbestos bodily injury claims under policies that by their plain terms were already exhausted (the "Coverage Action").[1] Indeed, that same year RPM announced that the insurance limits were fully depleted. For six years, the insurers have defended themselves in that meritless action—filing countless pleadings, conducting extensive fact and expert discovery, and engaging in multiple rounds of motion practice. In December 2008, the district court granted the insurers' summary judgment motion and correctly dismissed all of the Debtors' claims. Undeterred, the Debtors and their co-plaintiff appealed that decision to the Sixth Circuit. That appeal was on the verge of being fully briefed, with all main briefs already on file and reply and sur-reply briefs due to be filed by June 28 and July 28, 2010, respectively, when the Debtors and their co-plaintiff—likely seeking to avoid affirmance of the district court's judgment—tried to leverage their bankruptcy filings to bring that proceeding to a halt, by moving the Sixth Circuit to stay "certain aspects of this appeal," and at the same time, seeking to "stay the entirety of this appeal."

Although the Sixth Circuit issued an administrative order allowing a 90-day abeyance of the appeal schedule (before the insurers could respond), this Court should independently apply the Bankruptcy Code and hold that the appeal may proceed because 11 U.S.C. § 362(a) does not stay the Coverage Action. In the alternative, the Court should modify the stay "for cause" to permit the Sixth Circuit to control its own docket, the progress of the appeal, and any mandate it might issue.

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[1] Movants are identified on the signature block. RPM filed its Chapter 11 bankruptcy petition under the name Specialty Products Holdings Corporation ("SPHC").

Using the automatic stay as a sword to stop the entire Coverage Action would contravene express Third Circuit precedent holding that the automatic stay under Bankruptcy Code Section 362 does not apply to claims the debtor initiates: "the clear language of section 362(a) indicates that it stays only proceedings ***against*** a 'debtor'—the term used by the statute itself." *Maritime Elec. Co. v. United Jersey Bank*, 959 F.2d 1194, 1204 (3d Cir. 1991) (emphasis in original) (citation omitted). The purpose of the automatic stay is to protect the debtor from creditors' lawsuits, and that policy surely has nothing to do with lawsuits the debtor brings. Bondex and RPM concede as much in their Sixth Circuit motion by stating that only "certain aspects of this appeal will be automatically stayed."

Even if this Court were to decide that the automatic stay applies, this Court can and should grant relief for cause under Section 362(d)(1) to permit the Coverage Action to continue. All three "for cause" factors are satisfied here. First, the Debtors will suffer no prejudice if the judgment of the district court for the Northern District of Ohio (the forum that Bondex and RPM chose) is affirmed on appeal. In fact, all the parties will benefit if coverage issues are resolved before a plan is confirmed—which will likely seek to create a Section 524(g) trust funded in part with insurance policy proceeds, with the results of the Coverage Action being the only source of such proceeds. Second, the insurers will suffer hardship if affirmance of the Coverage Action is further delayed, and the insurers are forced to litigate in multiple courts for years to come in a case in which they have already been forced to fight meritless claims for six years. Third, a high probability exists that the Sixth Circuit will affirm the district court's judgment in favor of the insurers.

* * *

Why did the Debtors not assert the protections of the automatic stay or seek an injunction to supplement the stay in this Court, and instead ask the Sixth Circuit to "stay the entirety of this appeal"? It is because the Debtors and their co-plaintiff are well aware that Section 362 does not stay their claims against the insurers. As it has in numerous other asbestos bankruptcies, this Court should declare that Section 362's automatic stay has no bearing on the Debtors' affirmative claims in the Coverage Action.

BACKGROUND

What are Bondex and RPM?

In 1966, Republic Powdered Metals Company ("Republic") acquired The Reardon Company's ("Reardon") assets and assumed its liabilities.[2] Reardon had manufactured asbestos-containing products.[3] Republic continued to use "The Reardon Company" trade name."[4] Republic also acquired the right to use the trade name "Bondex," the nationally-known brand name Reardon had used for years.[5] In 1971, Republic changed its name to RPM and incorporated a new entity called Republic Powdered Metals, Inc.[6] In 1972, RPM became a holding company and formed Bondex International, Inc. as a wholly-owned subsidiary, purportedly transferring to that company the assets and liabilities of "The Reardon Company Division."[7] From 1972 on, Bondex continued The Reardon Company Division's product line.[8]

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2 *See* Pls.' First Am. Compl. ¶¶ 20, 23 (attached as Ex. A to the June 24, 2010 Declaration of Lauren M. Frank ("Frank Decl."), submitted in support of this motion).

3 *See* Memorandum and Order in Coverage Action, at 3, dated February 10, 2009 (Docket No. 885) (Frank Decl. Ex. B).

4 *See id*. at 4.

5 *See id.*

6 *See* Frank Decl. Ex. A ¶¶ 3, 23.

7 *See id*. ¶¶ 24, 26.

8 *See id*. ¶ 24.

The Debtors and their co-plaintiff are sued for asbestos bodily injuries.

Beginning in the 1980s, the Debtors and their co-plaintiff were sued throughout the country in asbestos bodily injury actions resulting from exposure to products manufactured by several entities including RPM, Bondex, and Republic.[9] By mid-2006, about 15,000 asbestos claims, involving 32,000 individual claimants, had been filed.[10] In some of these lawsuits, the claimants alleged exposure to Reardon products, and/or exposure to asbestos-containing products before 1966, and/or exposure to "The Reardon Company Division" products.[11] RPM, Bondex, and Republic, in turn, sought insurance coverage under various primary and excess policies issued to RPM, Bondex and/or Republic.[12]

The insurers issued policies.

The Debtors and their co-plaintiff previously had coverage under policies issued by the insurers or companies succeeded by the insurers.[13] These policies provided coverage to the policies' "Named Insured" or "Insured."[14] The policies also contained aggregate limits of liability that applied to "products hazard" and "completed operations hazard" claims that under the policies arose out of products manufactured by the "Named Insured" or "Insured."[15]

- Century Indemnity Company ("Century") issued two primary liability insurance policies to RPM.[16] Century Policy No. BAL 23172 was effective from September 15, 1972 to September 15, 1975, and provides that a $500,000 aggregate limit applies to "products or completed operations or both combined."[17] Century

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9 *See id*. ¶ 27.

10 *See* Frank Decl. Ex. B, at 4.

11 *See* Frank Decl. Ex. A ¶ 27.

12 *See* Frank Decl. Ex. B, at 7.

13 *See id.* at 5.

14 *See id.*

15 *See id.*

16 *See* Frank Decl. Ex. A ¶ 47.

17 *See id.* ¶¶ 47, 52.

Policy No. GAL 215595 was issued to RPM effective September 15, 1975 until it was cancelled effective May 18, 1977.[18] The 1975-1977 Century policy similarly provides that the $500,000 aggregate limit applies to "all bodily injury . . . included within the products hazard."[19]

- Continental Casualty Company ("Continental") issued two umbrella excess third party liability insurance policies to RPM that were effective from 1972 to 1976.[20] Both policies provide that a $5,000,000 aggregate limit applies to "all personal injury . . . included within the products hazard and . . . within the completed operations hazard."[21]

- Columbia Casualty Company ("Columbia") issued four umbrella excess third party liability insurance policies to RPM that were effective from 1976 to 1980.[22] All Columbia policies provide that a $1,000,000 aggregate limit applies to claims arising out of the "completed operations hazard" and the "products hazard."[23]

- Northbrook Excess and Surplus Insurance Company ("Northbrook") issued four excess umbrella liability insurance policies to RPM that were effective from 1976 to 1979.[24] The Northbrook policies provide that a $4,000,000 aggregate limit applies to claims arising out of the "completed operations hazard" and the "products hazard."[25] Allstate Insurance Company ("Allstate") is the successor to Northbrook.[26]

- Gibraltar Casualty Company ("Gibraltar") issued one excess liability insurance policy to RPM, providing that a $4,000,000 aggregate limit applies to claims arising out of the "completed operations hazard" and the "products hazard" that was effective from 1979 to 1980.[27] Moreover, Gibraltar issued four umbrella liability insurance policies to RPM with an aggregate limit applying to occurrences "because of . . . the Products Hazard and . . . the Completed

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[18] *See id.* ¶ 47.

[19] *See id.* ¶ 52.

[20] *See id.* ¶ 60.

[21] *See id.* ¶¶ 60, 64–65.

[22] *See id.* ¶ 71.

[23] *See id.* ¶ 75.

[24] *See id.* ¶ 79.

[25] *See id.* ¶ 83.

[26] *See id.* ¶ 8.

[27] *See id.* ¶¶ 87, 91.

Operations Hazard" that were effective from 1980 to 1984.[28] Mt. McKinley Insurance Company ("Mt. McKinley") is the successor to Gibraltar.[29]

The parties enter into a global agreement.

In 1993, certain insurers entered into a global settlement agreement with the Debtors and their co-plaintiff to resolve disputes under their respective insurance policies.[30] Over the next seven years, these insurers paid millions of dollars under this agreement to defend and indemnify the Debtors and their co-plaintiff in connection with underlying asbestos bodily injury claims, including claims arising out of alleged exposure to Reardon products. As the result of these payments, the applicable aggregate limits of these insurers' policies were exhausted in 1997 and 2000, respectively. Recognizing exhaustion of the Century policies, the Debtors and their co-plaintiff stopped tendering claims to Century and instead pursued coverage from Continental and Columbia Casualty Company (together, "Continental"), which provided insurance in excess of the Century policies. The Debtors and their co-plaintiff ultimately exhausted the Continental/Columbia coverage and all other available primary and excess coverage, collecting more than $100 million from their various insurers.

The Debtors and their co-plaintiff file the Coverage Action.

In January 2003, RPM publicly announced that its liability insurance limits for asbestos bodily injury claims would soon be fully depleted, which in fact occurred that summer. Immediately after, RPM's stock plummeted.[31] On July 3, 2003, the Debtors and affiliated corporation Republic filed a complaint in the United States district court for the Northern District

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[28] *See id.* ¶¶ 95, 101.

[29] *See id.* ¶ 9.

[30] That agreement (the "Claims Handling Agreement") is confidential, but movants can make a copy available to the Court for *in camera* review.

[31] *See* RPM Int'l Inc., Annual Report (Form 10-K), at 2, 14–15 (Aug. 29, 2003) (Frank Decl. Ex. C).

of Ohio alleging for the first time that the aggregate limits of the insurers' policies do not apply to claims involving Reardon products.

The complaint alleges that certain asbestos bodily injury claims for which the Debtors and their co-plaintiff seek coverage arise out of products manufactured by Reardon rather than by any of the named insureds under the policies.[32] All three plaintiffs further allege that because Reardon is not a "named insured" under the policies, claims arising out of Reardon products do not fall within the definition of either "completed operations hazard" or "products hazard."[33] According to the complaint, the aggregate limit of liability applicable to such claims does not apply to Reardon product claims, and without an applicable aggregate limit the Debtors and their co-plaintiff assert that the insurance policies can never be exhausted with respect to asbestos bodily injury claims filed against RPM and Bondex arising from Reardon products.[34] The complaint seeks in the main a declaratory judgment that the insurers continue to have a duty to defend and indemnify RPM and Bondex in asbestos bodily injury claims arising out of products manufactured by Reardon, and that the limits of the policies have not been properly exhausted.[35] As explained below, the district court rejected the Debtors' coverage theory.

In addition, one insurer, Mt. McKinley, asserted a counterclaim against the Debtors seeking a declaration that its policy had been exhausted and that the Debtors and their co-plaintiff owed it over $200,000 from overpayment of applicable policy limits.[36] Certain insurers also filed cross-claims against one another for contribution that were contingent on the Debtors

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[32] *See* Frank Decl. Ex. A ¶ 11.

[33] *See id.* ¶ 56.

[34] *See id.* ¶ 136.

[35] *See id.* ¶¶ 136–38.

[36] *See* Frank Decl. Ex. B at 21.

and their co-plaintiff succeeding on their coverage theory.[37] The district court mooted those cross-claims by granting summary judgment in the insurers' favor.

The district court has presided over Coverage Action discovery for six years and has been otherwise extensively engaged in the case.

Throughout the past six years the parties engaged in extensive fact and expert discovery in the Coverage Action.[38] In all, the parties exchanged and analyzed over 145,000 separate documents totaling over a million pages, took the depositions of over 75 different fact and expert witnesses, submitted over a dozen expert reports, and reviewed and analyzed thousands of individual underlying asbestos claims.[39] The parties then engaged in extensive dispositive motion practice involving several thousand pages of supporting memoranda and exhibits, which took well over a year to adjudicate.[40] The court has ruled on dozens of motions, including the dispositive summary judgment motions, and conducted approximately 13 hearings and conferences.[41]

The Coverage Action is at an advanced stage as the district court has dismissed on summary judgment the claims filed by the Debtors and their co-plaintiff.

On February 27, 2007, certain insurers moved for summary judgment seeking a declaration that Reardon is a "Named Insured" under certain policies, and that therefore those policies' products limits have been fully exhausted.[42] Additionally, Century filed a separate motion seeking a declaration that, regardless of whether Reardon is a "Named Insured," all of the

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37 *See id.* at 20–21.

38 *See* the June 24, 2010 Declaration of Michael J. Baughman ("Baughman Decl."), submitted in support of this motion, ¶ 3.

39 *See id.* ¶¶ 4–6.

40 *See id.* ¶¶ 7–8.

41 *See id.* ¶ 9.

42 *See* Frank Decl. Ex. B, at 1.

Insureds' claims result from a single occurrence, and Century's payments have exhausted the policies' occurrence limits.[43]

The Debtors and their co-plaintiff cross-moved for summary judgment, arguing that Reardon should not be considered a "Named Insured" under the policies, even though all three plaintiffs held themselves out to the public as Reardon for decades, telling their customers, corporate regulators in Missouri, the United States Government, their insurers, and underlying claimants that all three plaintiffs in the Coverage Action and Reardon are one and the same.[44] The Debtors and their co-plaintiff claimed that Reardon products were not "Named Insured" products because the Reardon transaction was purportedly an asset purchase only.[45] Thus, all three Coverage Action plaintiffs argued that they did not subsume Reardon, which therefore is not a "Named Insured" under the policies.[46] While the Debtors and their co-plaintiff themselves acknowledged for over a decade that certain insurers' aggregate limits were being eroded by their payments of claims arising from Reardon products, all three plaintiffs asserted that they could avoid the aggregate limits of the policies by applying those same product liability claims to parts of the policies other than the "Products Hazard" based on their newly-minted theory.[47]

Recognizing just one of the many fatal flaws in the Debtors and their co-plaintiff's newfound theory, the district court held that RPM's 1966 acquisition of Reardon was a *de facto* merger and Reardon was a "Named Insured" whose products were subject to the applicable aggregate limits of the policies.[48] Having found a *de facto* merger, the district court granted the

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43 *See id.* at 18.

44 *See id.* at 3.

45 *See id.*

46 *See id.*

47 *See id.*

48 *See id.* at 15.

insurers' motions for summary judgment and dismissed the Debtors and their co-plaintiff's claims for declaratory judgment, breach of contract, and "bad faith."[49]

The district court also denied the Debtors and their co-plaintiff's motions for summary judgment; granted Mt. McKinley summary judgment on its claims that its policy had been exhausted and that it was owed $230,000 in reimbursement from the Debtors and their co-plaintiff; and denied as moot the remaining summary judgment motions relating to the cross-claims between insurers.[50] The district court then entered judgment in favor of the insurers and dismissed the action in its entirety and designated the order final and appealable.[51]

The Debtors and their co-plaintiff appeal the district court's decision to the Sixth Circuit.

The Debtors and their co-plaintiff appealed to the United States Court of Appeals for the Sixth Circuit on December 29, 2008.[52] The insurers filed alternative and contingent cross-appeals on the ground that they would be entitled to contribution from other insurers if the Sixth Circuit were to reverse the district court's decision.[53] The Sixth Circuit's affirmance of the order dismissing the Debtors and their co-plaintiff's claims would dispose of the alternative and contingent appeals. The insurers now seek a declaration that the Section 362 stay does not apply only to the Debtors' appeal of the order dismissing their claims—that is, the Debtors' claims against the insurers, which the district court dismissed with prejudice. To be clear, the alternative and contingent cross-appeals are not the subject of this motion.

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49 *See id.* at 25.

50 *See id.* at 16–18, 21, 25.

51 *See id.*

52 *See* Plaintiffs' Amended Notice of Appeal in Coverage Action, filed on March 12, 2009 (Docket No. 892) (Frank Decl. Ex. D).

53 *See* Baughman Decl. ¶ 42.

On May 6, 2010, the Sixth Circuit issued an amended scheduling order requiring all briefing to be completed by July 28, 2010.[54] The Debtors and their co-plaintiff filed their 79-page opening brief on January 26, 2010. Certain insurers filed their opening briefs on March 31, 2010, which totaled several hundred pages. But the Debtors and their co-plaintiff recently moved the Sixth Circuit not only to stay "certain aspects of this appeal" but also to "stay the entirety of this appeal, vacate the remaining briefing schedule, and hold this case in abeyance until the stay is modified or terminated by the Delaware Bankruptcy Court."[55] Under the Sixth Circuit's rules, the insurers had until June 28, 2010 to respond to the Debtors and their co-plaintiff's motion. But before that deadline, on June 21, 2010, the Sixth Circuit issued a one-sentence administrative order (without prejudice) holding the briefing schedule in abeyance. The Debtors and their co-plaintiff were also ordered to submit a status report to the Sixth Circuit every 90 days.

ARGUMENT

POINT I

THE AUTOMATIC STAY DOES NOT APPLY BECAUSE BONDEX AND RPM FILED THE COVERAGE ACTION

The Bankruptcy Code provides for an automatic stay of all actions against a debtor seeking recovery on claims that were commenced pre-petition. *See* 11 U.S.C. § 362(a)(1). While the automatic stay's scope is broad, the Third Circuit has held more than once that it applies only to claims commenced ***against*** a debtor—not actions that the debtor files:

> Although the scope of the automatic stay is broad, the clear language of section 362(a) indicates that it stays only proceedings

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[54] *See id.*, Amended Briefing Schedule, filed May 6, 2010 (Frank Decl. Ex. E).

[55] *See* Motion of Plaintiffs-Appellants/Cross-Appellees to Stay Appeal Due to Bankruptcy Filing or, in the Alternative, to Enlarge the Briefing Schedule, filed June 14, 2010 (Frank Decl. Ex. F).

> ***against*** a "debtor"—the term used by the statute itself. . . . Thus, the dispositive question is whether a proceeding was ***originally brought*** against the debtor.

Maritime Elec., 959 F.2d at 1204 (emphasis in original) (citation omitted); *see also Ass'n of St. Croix Condo. Owners v. St. Croix Hotel Corp.*, 682 F.2d 446, 448 (3d Cir. 1982) ("Section 362 by its terms only stays proceedings against the debtor."). Courts in this district have likewise held that "the automatic stay does not apply to actions brought by the debtor. Rather, the automatic stay only applies to actions brought against the debtor." *Safety Nat'l Cas. Corp. v. Kaiser Aluminum & Chem. Corp. (In re Kaiser Aluminum Corp.)*, 303 B.R. 299, 303 (Bankr. D. Del. 2003); *see also In re OMNA Med. Partners, Inc.*, 2000 WL 33712302, at *3-*4 (Bankr. D. Del. June 12, 2000) (recognizing that state court action commenced by debtor pre-petition was unaffected by automatic stay).

The same is true where the non-bankruptcy case is the subject of an appeal. *See Rhone-Poulenc Surfactants & Specialties, L.P. v. Comm'r*, 249 F.3d 175, 180 (3d Cir. 2001) (Section 362 does not stay appeal in Tax Court proceeding brought by debtor); *In re Porter*, 371 B.R. 739, 747 (Bankr. E.D. Pa. 2007) (holding that bankruptcy stay would not preclude adjudication of debtor's appeal from adverse judgment on her claims against creditor). And when the automatic stay does not apply, defendants may freely defend themselves. *See In re Northwood Flavors, Inc.*, 202 B.R. 63, 66-67 (Bankr. W.D. Pa. 1996) (Section 362(a) stay does not prevent entity that debtor sued pre-petition from protecting itself and avoiding liability).[56] As one court observed, "[t]he purpose of the rule granting a debtor relief by reason of the automatic stay is to protect debtors from legal harassment. That purpose has no application where the debtor is in the position of the assailant . . . . Too great a potential for abuse of the bankruptcy procedures

[56] *See also U.S. Abatement Corp. v. Mobil Exploration & Producing U.S., Inc. (In the Matter of U.S. Abatement Corp.)*, 39 F.3d 563, 568 (5th Cir. 1994) (permitting defendant's motion to reinstate and seek summary judgment on debtor's pre-petition offensive claims).

exists in such a situation." *Hydramar, Inc. v. Gen. Dynamics Corp.*, No. 85-1788, 1986 WL 6223, at *4 (E.D. Pa. May 30, 1986) (citation omitted).

Here, there is no dispute that the Debtors are two of the plaintiffs (together with Republic) in the Coverage Action against the insurers. The Debtors filed a complaint seeking, among other things, a declaration that they are entitled to coverage under the insurance policies in dispute. Then, after the district court properly dismissed all the Debtors and their co-plaintiff's claims on summary judgment, all three plaintiffs appealed. This appeal is now being briefed to the Sixth Circuit—with all main briefs now on file. Plainly, the insurers' defenses in the Coverage Action—including their responses to the Sixth Circuit appeal—arise from the Debtors' coverage claims and are therefore not barred by the automatic stay.

The principles that give a non-debtor the right to defend itself under Section 362(a)(1) also give it the same right under Section 362(a)(3), which stays actions to obtain possession or control over the estate's property. *See Martin-Trigona v. Champion Fed. Sav. & Loan Ass'n*, 892 F.2d 575, 577 (7th Cir. 1989) (entities that debtor has sued may protect their rights under Sections 362(a)(1) or (a)(3)) (citing the Third Circuit's *Ass'n of St. Croix Condo. Owners*, 682 F.2d at 448, for proposition that automatic stay applicable only to actions against the bankrupt or to seizures of property of the bankrupt); *see also In re Merrick*, 175 B.R. 333, 337-38 (B.A.P. 9th Cir. 1994) (holding that it would be inequitable to use Section 362(a)(3) to prevent a defendant from freely exercising its legal rights in a suit filed against it); *United States v. Inslaw, Inc.*, 932 F.2d 1467, 1473 (D.C. Cir. 1991) (holding that it is not a violation of automatic stay under Section 362(a)(3) for defendant to contest a plaintiff-debtor's view of its right); *Kilmer v. Flocar, Inc.*, 212 F.R.D. 66, 72-73 (N.D.N.Y. 2002) (recognizing that defendant's motion for summary judgment in action brought by debtor-plaintiff is not stayed by Section 362(a)(1) or (a)(3));

Justus v. Fin. News Network Inc. (In re Fin. News Network Inc.), 158 B.R. 570, 572-73 (S.D.N.Y. 1993) (finding that Section 362 does not prevent defendants from protecting their rights).

The insurers' defense in a suit that the Debtors filed does not amount to seeking possession of the Debtors' property because if they were to win they would not receive possession or control of the Debtors' estate. As the Third Circuit has held, defenses to claims "do not violate the automatic stay because the stay does not seek to prevent defendants sued by a debtor from defending their legal rights and the defendant in the bankrupt's suit is not, by opposing that suit, seeking to take possession of it." *ACandS, Inc. v. Travelers Cas. & Sur. Co.*, 435 F.3d 252, 259 (3d Cir. 2006) (internal quotation marks and citation omitted);[57] *see also Martin-Trigona*, 892 F.2d at 577 (although debtor's cause of action may be considered an estate asset, defendants opposing suit and seeking its expedited dismissal are not trying to take possession of it); *Washington Mut., Inc. v. F.D.I.C.*, 659 F. Supp. 2d 152, 155-56 (D.D.C. 2009) (same). Because the insurers' successful defense serves only to prove that the estates did not have a right to claim the value of the asset in the first place, the Debtors cannot seek a stay to protect something that could never belong to the estate.

Indeed, Bondex and RPM conceded in their Sixth Circuit motion that some claims pending before that court are not subject to the automatic stay—presumably the ones the Debtors

[57] The court in *ACandS* held that the Section 362 applied to a debtor-initiated arbitration where the panel made an affirmative award against the debtor after the debtor filed for bankruptcy. The arbitration context makes *ACandS* different from court-based litigation because, as the Third Circuit explained, "[w]hile in the context of a trial it is simple to distinguish between claims and counter-claims that may support judicial relief, in the context of arbitration, especially in the absence of a joint statement of issues submitted, it is impossible to definitively classify the arguments presented." *Id.* Distinguishing the Debtors' claims in the Coverage Action is clearly not a problem here.

initiated. Accordingly, this Court should enter an order declaring that the 362(a) automatic stay does not apply to the Debtors' Coverage Action claims or their appeal in the Sixth Circuit.[58]

POINT II

EVEN IF THE STAY WERE TO APPLY TO THE COVERAGE ACTION, AMPLE CAUSE EXISTS FOR RELIEF FROM THE AUTOMATIC STAY.

If this Court were somehow to determine that Section 362(a) applied to the Coverage Action and the pending appeal—which the Bankruptcy Code and Third Circuit law make clear is not the case—then this Court should grant relief "for cause" from the stay under Bankruptcy Code Section 362(d)(1). Specifically, a stay can be lifted or modified under Section 362(d)(1) where (i) no great prejudice to the debtor will result from its continuance; (ii) hardship will inure to the non-debtor if relief is not granted; and (iii) the non-debtor's claims in the other action have a probability of success. *See In re Tribune Co.*, 418 B.R. 116, 126 (Bankr. D. Del. 2009); *In re SCO Group, Inc.*, 395 B.R. 852, 856-57 (Bankr. D. Del. 2007). As this Court explained, the legislative history of Section 362(d)(1) is particularly relevant when proceedings in another tribunal are at stake:

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[58] In all events, the automatic stay does not encompass claims initiated by non-debtor Coverage Action plaintiff Republic. Section 362's automatic stay applies only to proceedings "against the debtor." 11 U.S.C. § 362 (a)(1). As the Third Circuit has held, "the automatic stay is not available to non-bankrupt co-defendants of a debtor even if they are in a similar legal or factual nexus with the debtor." *Maritime Elec.*, 959 F.2d at 1205. Because Republic is not on the Chapter 11 petition, it is not a debtor as a matter of law, and therefore has no standing to seek an automatic stay. *See Brown v. JEVIC*, 575 F.3d 322, 328 (3d Cir. 2009) ("The clear language of Section 362(a)(1) . . . extends the automatic stay provision only to the debtor filing bankruptcy proceedings and not to non-bankrupt co-defendants.") (internal quotation marks and citation omitted); *Radogna v. Williams Twp. (In re Radogna)*, 331 Fed. Appx. 962, 2009 WL 1416696, at *2 (3d Cir. May 21, 2009) (where Chapter 13 petition bore mother's name and she remained only debtor until estate was discharged, her son was not a "co-debtor" and had no standing to enforce automatic stay either on mother's behalf or his own behalf). As the Third Circuit has cautioned, "formal distinctions between debtor-affiliated entities are maintained when applying the stay." *Maritime Elec.*, 959 F.2d at 1205; *see also Northwood Flavors*, 202 B.R. at 66 (finding that Section 362 does not bar action against principals of debtor even though it protects debtor-corporation). The presence of overlapping legal issues is insufficient to extend the stay to non-debtors. For example, an automatic stay does not apply to the debtor's president and employees, despite the possibility of the debtor being collaterally estopped from re-litigating issues decided against these co-defendants. *See Forcine Concrete & Constr. Co. v. Manning Equip. Sales & Serv.*, 426 B.R. 520, 523-26 (E.D. Pa. 2010); *Kesar, Inc. v. Uni-Marts, LLC (In re Uni-Marts, LLC)*, 405 B.R. 113, 126-28 (Bankr. D. Del. 2009) (refusing to extend automatic stay to claims against debtor's president, despite debtor's obligation to indemnify president).

> It will often be more appropriate to permit proceedings to continue in their place of origin, when 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 any duties that may be handled elsewhere.

SCO Group, 395 B.R. at 856 (citing H.R. Rep. No. 95-595 at 341 (1977)). Here, the "chosen forum" was selected by the Debtors and their co-plaintiff when they sued the insurers. While the Debtors will suffer no prejudice from having their claims determined on their own appeal, delay will continue to harm insurers who have already been forced to litigate for six years to defeat claims in the Coverage Action that the district court found to be without merit. Moreover, continuing the Coverage Action would facilitate—rather than interfere with—the bankruptcy case, by clarifying the bankruptcy estate's assets.

There is absolutely no reason why Bondex and RPM cannot brief and argue their own Sixth Circuit appeal in an action that they initiated. Indeed, many courts, including this Court, have allowed coverage litigation to continue—including trials—post-petition in other asbestos bankruptcies:

- *In re Owens Corning*, Case No. 00-3837 (Bankr. D. Del.) (debtors defended coverage action in state court and in multiple separate arbitrations that continued throughout the bankruptcy case);
- *In re Federal Mogul-Global, Inc.*, Case No. 01-10578 (Bankr. D. Del.) (coverage litigation proceeded in district court originally and then in the state courts after the bankruptcy court lifted the stay and abstained);
- *In re Kaiser Aluminum Corp*, Case No. 02-10429 (Bankr. D. Del) (debtors participated in coverage litigation that continued throughout bankruptcy case);
- *In re Congoleum*, Case No. 03-51524 (Bankr. D.N.J.) (debtors defended coverage action through discovery and trial);
- *In re Quigley*, Case No. 04-15739 (Bankr. S.D.N.Y.) (court lifted stay to allow debtor to arbitrate under Wellington Agreement);
- *In re Combustion Eng'g*, Case No. 03-10495 (Bankr. D. Del.) (adversary proceeding litigated while confirmation process went forward); and

- *In re Plant Insulation Co.*, Case No. 09-31347 (Bank. N.D. Cal.) (court lifted stay to allow state court coverage trial to proceed).

And in *In re Mid-Valley, Inc.*, Case No. 03-355592 (Bankr. W.D. Pa.), the debtor formally acceded to a request that the bankruptcy court grant relief from the automatic stay to allow related state court insurance coverage litigation to proceed during the reorganization's pendency. The case for relief here is stronger because all the Debtors need to do is file an appellate reply brief and make an oral argument, rather than conduct discovery and then have a trial.

A. Relief from the automatic stay will not harm the Debtors.

The Debtors will suffer no prejudice if the stay is lifted because they are plaintiffs in the Coverage Action and their complaint seeks in the main a declaration of their policy rights. *See In re Tribune*, 418 B.R. at 127 (debtor will not suffer prejudice if district court declaratory action proceeds where same issues are raised as in bankruptcy); *see also SCO Group*, 395 B.R. at 858 (finding no prejudice to debtor from allowing trial to proceed and rejecting argument that debtors would have to focus on trial instead of reorganization); *In re Cooke*, 2007 WL 2102687, at *3 (Bankr. D. Del. July 13, 2007) (holding that "the harm to the Debtor associated with having to litigate this dispute in the Court of Chancery does not outweigh the benefit to be achieved by having one court dispose of the intertwined claims against the Debtor and [his wife]"). As one court explained—where the debtors were actually the defendants in a separate coverage action—debtors will "suffer little prejudice when they are sued by plaintiffs who seek nothing more than declarations of liability that can serve as a predicate for a recovery against insurers, sureties, or guarantors." *In re Fernstrom Storage & Van Co.*, 938 F.2d 731, 736 (7th Cir. 1991). After all, it is in the Debtors' interest to have coverage issues resolved as soon as possible so that everyone knows what assets are available to the estate and the Section 524(g) reorganization may progress in a meaningful way.

What is more, the Coverage Action has been completed at the trial court level and is now on appeal. If the Sixth Circuit affirms dismissal of the Debtors and their co-plaintiff's claims, nothing more will happen in the Coverage Action. It is hard to imagine a more expeditious and efficient way to resolve the Coverage Action than allowing the Sixth Circuit to rule on the appeal. Courts routinely modify stays to allow proceedings that have matured to the late stages of litigation to continue in the interests of judicial economy. *See*, *e.g.*, *In re Wilson*, 116 F.3d 87, 91 (3d Cir. 1997) (reversing district court's refusal to lift stay of state court action where such "relief will expedite the resolution of [movant's] claim . . . [which can also] be resolved more quickly in state court on appeal than in the bankruptcy proceedings."); *In re Mid-Atlantic Handling Sys.*, *LLC*, 304 B.R. 111, 131 (Bankr. D.N.J. 2003) (lifting stay and finding that "the substantial time, effort, and resources already expended by the parties, [judge], and the Discovery Master in moving this case closer to trial should not be interfered with by this Court"); *OMNA Med. Partners,* 2000 WL 33712302, at *4 (modifying stay where allowing non-bankruptcy court to rule on issues "will allow a speedier vindication of the Debtor's rights than the bifurcated process of litigation in this Court and enforcement through state process"); *In re Pursuit Athletic Footwear*, 193 B.R. 713, 719 (Bankr. D. Del. 1996) (modifying stay to allow another case to continue that was in an advanced stage).

Moreover, the Debtors will ask this Court to confirm a plan that will likely seek to create a Section 524(g) trust funded with insurance policy proceeds.[59] But given the district court's judgment that the Debtors are not entitled to any further insurance, the funding for any such plan would need to come from other sources. Under these circumstances, it is essential that this Court and creditors know ***before*** considering any plan whether the Debtors' long-shot attempt to

[59] Press Release, RPM International Inc., RPM Subsidiaries Move to Permanently Resolve Bondex Asbestos Liability (May 31, 2010), available at rpminc.com (Frank Decl. Ex. G).

reverse the district court's ruling will succeed. Where, as here, important issues raised in the non-bankruptcy action are on the verge of being determined on appeal ***before*** plan confirmation, courts in this Circuit have readily modified, lifted, or annulled the automatic stay to permit such actions to proceed. *See*, *e.g.*, *Levitz Furniture Inc. v. T. Rowe Price Recovery Fund, L.P. (In re Levitz Furniture Inc.*), 267 B.R. 516, 523 (Bankr. D. Del. 2000) (holding that even if stay applied, it should be annulled where state action issues "must be decided before the confirmation of the Debtors' plan of reorganization, whose feasibility is premised on the effectiveness" of agreements litigated in state court); *Izzarelli v. Rexene Prods. Co. (In re Rexene Prods. Co.)*, 141 B.R. 574, 577 (Bankr. D. Del. 1992) (granting relief from stay to allow prosecution of lawsuit in federal court against debtor where claim had to be resolved before confirmation).

Indeed, all parties will benefit if the Sixth Circuit resolves the coverage issues that will likely touch on key plan-funding issues. And continuing the Coverage Action appeal will not threaten a piecemeal liquidation of the bankruptcy estate. Thus, seeing through the Sixth Circuit appeal to its conclusion will not prejudice the interests of the Debtors or other creditors.

B. Hardship will inure to the insurers if this Court does not grant this Motion.

Denying this motion would result in significant hardship to the insurers. As this Court has held, staying a case pending in another forum when "both parties have already spent all of the necessary time and resources in prepar[ing]" that case is an unnecessary delay and burden on the non-debtor. *SCO Group*, 395 B.R. at 858-59 (holding that where non-debtor had already prepared extensively for trial and debtor then filed for bankruptcy, non-debtor was "burdened by further delay and the fact that it will have to prepare again . . . [because the non-debtor] has already spent significant time and resources preparing for the trial"). The *SCO Group* court held that the non-debtor suffered hardship because without a ruling in the non-bankruptcy case, the

non-debtor's "rights in these bankruptcy cases remain undetermined and the value of [its] claim will remain a troubling issue for the Court, [the non-debtor] and Debtors." *Id.* at 858.

This is exactly the case here. The insurers have spent years developing the facts and arguments to oppose the Debtors' coverage claims. Throughout this time, the insurers have (i) filed dozens of pleadings; (ii) briefed countless motions, including case dispositive summary judgment motions; (iii) conducted fact and expert discovery; and (iv) filed appellate briefs. After committing such extensive efforts over a period of many years, the insurers prevailed when the district court granted their summary judgment motions and dismissed Debtors' claims with prejudice. Any delay in obtaining an affirmance of the district court's judgment will cause the insurers hardship and burden because they would have to participate in this bankruptcy proceeding to protect their rights when, instead, they should be able to ignore this proceeding after the Sixth Circuit affirms the lower court's judgment with a final and no-longer-appealable order. In short, the insurers will suffer hardship if their rights remain undetermined while a stay is in effect.

C. The insurers have a high probability of succeeding in the Sixth Circuit appeal.

The insurers have a high probability of success in the Sixth Circuit appeal. To satisfy the "probability of success on the merits" prong of the three-part test to determine whether the stay should be lifted to allow non-bankruptcy litigation to proceed, "[t]he required showing is very slight." *In re Rexene Products Co.*, 141 B.R. at 578; *see also In re Levitz Furniture Inc.*, 267 B.R. at 523 (stating that this prong "merely requires a showing that [the movant's] claim is not frivolous."); *Tribune*, 418 B.R. at 129 (noting that "even a slight probability of success" is sufficient to lift stay and holding that non-debtor met low threshold); *In re Continental Airlines, Inc.*, 152 B.R. 420, 426 (Bankr. D. Del. 1993) ("Even a slight probability of success on the

merits may be sufficient to support lifting an automatic stay in an appropriate case."). At the same time, the Debtors bear the burden of proof. *See Tribune*, 418 B.R. at 127.

The district court has already granted the insurers' motion for partial summary judgment and dismissed all of the Debtors' claims against them. On this record alone, the insurers' satisfy the "very light" probability of success on the merits prong. *See Rexene Prods.*, 141 B.R. at 578 ("This slight showing is easily met by the fact that there has already been a denial of [debtors'] motion for summary judgment in the lawsuit.").

D. Discretionary abstention supports granting stay relief.

This Court should lift the stay for the separate and independent reason that discretionary abstention from the Coverage Action and the pending appeal is appropriate under 28 U.S.C. § 1334(c)(1), which provides that "[n]othing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11." 28 U.S.C. § 1334(c)(1). Here, state-law issues of insurance and contract are at the heart of the Coverage Action and the pending appeal, and therefore abstention is appropriate. *See In re OMNA Medical Partners, Inc.*, 2000 WL 33712302, at *3-*5 (finding that abstention was appropriate where, among other factors, state-law contract law dominated issues, there were no unique bankruptcy issues, and debtor had already availed itself of the non-bankruptcy court on the claims at issue); *see also In re Porter-Hayden Co.*, 304 B.R. 725, 736 (Bankr. D. Md. 2004) (granting insurer's motion to abstain pursuant to § 1334(c)(1) where state issues predominated over bankruptcy issues regarding plaintiff's pre-petition insurance contracts covering asbestos-related liabilities); *In re Mid-Atlantic Handling Sys., LLC*, 304 B.R. at 126 (finding discretionary abstention applied). Moreover, as in *Porter-Hayden Co.*, because "the resolution of these issues is currently pending in [another] proceeding, that proceeding represents

the most economical and expeditious resolution to the dispute." 304 B.R. at 736. The same is true here, where the Coverage Action court has spent six years presiding over all issues in the case, including dispositive motions.

CONCLUSION

The insurers respectfully request that this Court enter an order (i) declaring that the Section 362 automatic stay does not apply to the Debtors' Coverage Action claims or their appeal in the Sixth Circuit, and, in the alternative, (ii) directing that the automatic stay be modified pursuant to Section 362(d)(1) to allow the Debtors' Sixth Circuit appeal to proceed to resolution.

Dated: June 25, 2010
Wilmington, Delaware

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