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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: MADISON SQUARE BOYS & GIRLS CLUB, INC.,[1] Debtor.	Chapter 11 Case No. 22-10910 (SHL)

OBJECTION OF THE ROCKEFELLER UNIVERSITY TO THE DEBTOR'S MOTION FOR ENTRY OF AN ORDER (I) TEMPORARILY SUSPENDING ITS CHAPTER 11 CASE PURSUANT TO 11 U.S.C. §§ 105 AND 305, AND (II) GRANTING RELATED RELIEF

The Rockefeller University (the "University"), by and through its undersigned counsel, hereby files this objection (the "Objection") to the *Debtor's Motion for Entry of an Order (I) Temporarily Suspending its Chapter 11 Case Pursuant to 11 U.S.C. §§ 105 and 305, and (II) Granting Related Relief* [Docket No. 8] (the "Suspension Motion"), and respectfully states as follows:[2]

[1] The last four digits of the Debtor's federal tax identification number are 6792. The Debtor's mailing address is 250 Bradhurst Avenue, New York, New York 10039.

[2] Capitalized terms used but not otherwise defined herein shall have the meaning ascribed to such terms in the Suspension Motion and/or the *Response Of The Rockefeller University To The Debtor's Motion For Entry Of An Order (I) Appointing The Honorable Shelley C. Chapman As Mediator; (II) Referring Certain Matters To Mediation; And (III) Granting Related Relief* [Docket No. 42] (the "University's Response to Mediation Motion"). Unless otherwise indicated, all references to "section" refer to Title 11 of the United States Code.

PRELIMINARY STATEMENT

1. By the Suspension Motion, the Debtor seeks extraordinary, unprecedented relief that is by no means "narrowly tailored to what is strictly necessary to fit the unique circumstances of this chapter 11 case." Suspension Motion ¶ 6. The relief sought would allow the Debtor to obtain the benefits of the automatic stay while being relieved of the burdens of, and enjoining most of the creditor protections afforded by, the Bankruptcy Code. The Debtor says the purpose of such relief is to preserve its limited assets for its creditor constituencies, including CVA Claimants. The Debtor concedes that it is seeking "unusual relief," and indeed, as demonstrated below, there is no statutory basis for the broad and extraordinary relief that the Debtor requests under Bankruptcy Code sections 105 and 305.

2. The Debtor's request ignores the interests of the University, and likely the interests of many other creditors, that would be substantially prejudiced by the relief requested by the Debtor. In essence, the Debtor seeks to rely on the University's assets to fund the Debtor's responsibility in the form of a compensation trust to be negotiated with CVA Claimants at the Mediation, to which the University is not a party. As stated by the Debtor, the compensation trust would include not only claims against the Debtor, but also the Debtor's claims against others, such as the University. *See* Mediation Motion ¶¶ 2, 24, First Day Declaration ¶ 62. At the same time, although the Debtor has been sharing information with CVA Claimants and the Suspension Motion would allow CVA Claimants to obtain further discovery from the Debtor, the Debtor has kept the University in the dark and has not shared any such information with the University. Further, the Suspension Motion would bar the University from seeking any information from the Debtor. With this arrangement, the University would not be able to defend against the Debtor's claims against the University, assert the University's claims against the Debtor, or demonstrate the Debtor's

overwhelming responsibility for the CVA Claims relating to Dr. Archibald that allegedly occurred at the Debtor's facility. Although the Debtor claims that the University might be given access to information at a later time, the Debtor repeatedly speaks to the need for an expeditious resolution. Thus, it can be expected that, if the information were to be provided after mediation and the suspension was lifted, the Debtor would oppose any request for additional time by the University, so that it might review the information. Moreover, while the Debtor enjoys the benefit of a stay in all actions, including in other forums, the University cannot take discovery from the Debtor in those actions while the CVA Claimants can proceed against the University. The Debtor's requested relief, taken as a whole, seeks to maximize the Debtor's opportunity to hold the University responsible for the Debtor's own liability for alleged conduct at the Debtor's facilities and unfairly tap into the University's resources for the Debtor's compensation fund. This is patently unfair and substantially prejudicial to the University.

BACKGROUND

I. The University

3. The University is a New York not-for-profit biomedical research and education institution. Founded in 1901, the University is the oldest biomedical research center in the United States. The University's credo is: Science for the Benefit of Humanity. To that end, University scientists have been working to improve human health and have made momentous discoveries, including the development of vaccines for meningitis, pneumococcal pneumonia, and yellow fever; the development of the first successful cocktail therapy for HIV-AIDS; the development of biochemical assays that paved the way for drugs that cure Hepatitis C; and the pursuit of ongoing elucidating research on the COVID-19 virus.

II. The Debtor's Bankruptcy Case and the CVA Claims

4. The Debtor's chapter 11 filing follows a spate of litigation against the Debtor under New York's Child Victims Act, which, after its enactment in 2019, opened a two-year "revival window" for survivors of childhood sexual abuse to assert previously time-barred claims. *See* First Day Declaration ¶¶ 9-10. The Debtor was named as a defendant in 86 lawsuits involving 149 CVA Claimants alleging abuse by Dr. Archibald as well as ten other alleged pedophiles. *See id*. ¶ 10. The University also was named as a co-defendant with the Debtor in a number of those suits brought by 88 CVA Claimants, the vast majority of which allege conduct only at the Debtor's facilities. *See id*. Instead of taking its responsibility for the alleged abuse at its own facilities, the Debtor asserts that the University bears the "overwhelming responsibility for all claims related to Dr. Archibald's misconduct (*i.e.*, with respect to more than 90% of the pending CVA Claims against Madison)."[3] *See id.* ¶¶ 10, 55.

III. The Debtor's Suspension and Mediation Motions

5. Notwithstanding the Debtor's statements that "Madison has significant claims against Rockefeller" and that the University is a "key stakeholder" at the center of its reorganization strategy, the Debtor has excluded the University from the Mediation, and also seeks to "suspend" this chapter 11 case during the Mediation (the "Suspension Period") for the purpose of "engaging with its key stakeholders" (but not the University). *See* Proposed Order on Suspension Motion ¶ 2; First Day Declaration ¶ 62; Mediation Motion ¶¶ 2, 17, 25.

6. Specifically, the Debtor seeks to suspend the chapter 11 case while the Mediation occurs, except as to certain proceedings and matters that are beneficial to the Debtor, including:

[3] In addition to these 88 CVA Claims, the Debtor seeks to shift its responsibility to the University for other CVA Claims, alleging conduct by Dr. Archibald only at the Debtor's facilities in which the Debtor, but not the University, is named as a defendant.

(i) establishment of a bar date, (ii) post-petition financing, and (iii) retention and payment of professionals. *See* Proposed Order on Suspension Motion ¶ 4. The Debtor's proposed order on the Suspension Motion would also permit an official committee including CVA Claimants—which is to be a party to the upcoming Mediation—to file Bankruptcy Rule 2004 motions for discovery, but all other creditors and parties in interest, including the University (which also will be excluded from the Mediation), would be enjoined from seeking the same Bankruptcy Rule 2004 discovery. *See id*. ¶ 5.

IV. The University's Proof of Claim

7. In its attempt to shift its responsibility for the CVA Claims to the University, the Debtor asserts, among other things, that the University was negligent because it had a duty to warn the Debtor of Dr. Archibald's alleged abuse and did not do so. *See* First Day Declaration ¶ 62. However, as previewed for the Court in the University's Response to Mediation Motion ¶¶ 6-7, the Debtor was clearly on notice of the alleged abuse by Dr. Archibald *as well as at least 10 other alleged pedophiles* at the Debtor's facilities. Thus, as will be set forth in more detail in the University's forthcoming proof of claim, if such a legal duty to warn exists, it was the *Debtor's* obligation to warn the University of Dr. Archibald's alleged conduct. To the extent there was a legal duty to warn, the Debtor, not the University, breached that duty, and as a result, the University suffered substantial damages, making it one of the largest creditors in this chapter 11 case, including on account of the University's contribution claims.

OBJECTION

I. THE RELIEF REQUESTED BY THE DEBTOR MAY NOT BE GRANTED PURSUANT TO BANKRUPTCY CODE SECTION 305

8. The extraordinary relief the Debtor seeks—to selectively choose which provisions of the Bankruptcy Code apply to its bankruptcy case and what proceedings may and may not

proceed—cannot be approved pursuant to section 305 for two reasons. *First,* pursuant to section 305, the Court's authority is limited to determining whether to dismiss the bankruptcy case or suspend "*all proceedings*" in the bankruptcy case. 11 U.S.C. § 305. The Court is not given the authority to choose which matters proceed and which do not during a suspension, and the Debtor cannot carry its evidentiary burden to show under the circumstances that the Suspension is proper. *Second,* while section 105 may provide this Court with the statutory authority to selectively stay some, but not all proceedings, it does not provide the Court with the authority to suspend operation of the Bankruptcy Code. The relief requested by the Debtor would be prejudicial to the interests of the Debtor's creditors, including the University.

A. Bankruptcy Code Section 305 Only Authorizes The Court To Either Dismiss The Bankruptcy Case Or Suspend All Proceedings In The Bankruptcy Case

9. Under section 305, the Debtor has a choice—to seek either suspension of all proceedings or dismissal of the bankruptcy case in its entirety. Specifically, the relevant language of section 305(a) states: "The court, after notice and a hearing, may dismiss a case under this title, or may suspend *all proceedings* in a case under this title . . . ." 11 U.S.C. § 305(a) (emphasis added). Section 305 is strictly construed and should be used sparingly. *See In re Schur Mgmt. Co., Ltd.*, 323 B.R. 123, 129 (Bankr. S.D.N.Y. 2005) (suspension under section 305 is considered an "extraordinary remedy that should be used sparingly").

10. By its express terms, the statute provides only for the suspension of "all proceedings;" the statute does not permit a debtor to select, or the Court to approve, suspension of some but not all proceedings in a bankruptcy case.[4] Thus, under Section 305, the bankruptcy court only has authority to either dismiss the case or, in the alternative, suspend "all proceedings" within

[4] As used in section 305(a), "everything that occurs in a bankruptcy case is a proceeding." *In re S.E. Hornsby & Sons Sand and Gravel Co., Inc.*, 45 B.R. 988, 994 (Bankr. M.D. La. 1985).

the case. *See In re Bellucci*, 119 B.R. 763, 771 (Bankr. E.D. Cal. 1990) (section 305 "is applicable on *an all-or-nothing basis* to the bankruptcy 'case,' i.e. the umbrella bankruptcy action that is created by the filing of a petition for relief under the Bankruptcy Code and that normally terminates either by dismissing or by closing the case. *The court cannot rely on section 305 abstention to pick and choose proceedings within the case*[]") (citations omitted, emphasis added); *see also In re Reed*, 94 B.R. 48, 53 (E.D. Pa. 1988) (Section 305 "grants to bankruptcy courts the authority to suspend or dismiss entire cases as opposed to a proceeding in a case"). The Debtor's leading case on the standard for relief under section 305 relief confirms that suspension must apply to "all proceedings." *In re Newbury Operating LLC*, 20-12976-JLG, 2021 WL 1157977, at *10 (Bankr. S.D.N.Y. Mar. 25, 2021) ("By its terms, section 305(a) applies to entire cases or all proceedings in a case, not particular proceedings in a case."); Suspension Motion ¶ 19. The Court cannot authorize the relief requested by the Debtor in the Suspension Motion on this statutory basis alone. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (if the language of the statute is clear, the court must enforce the statute according to its terms).[5]

11. Indeed, when a suspension order is entered under section 305, the bankruptcy court is declining to exercise jurisdiction (or abstaining). *See* H.R. Rep. No. 95-595, 325 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6281 (section 305 "recognizes that there are cases in which it would be appropriate for the court to decline jurisdiction"); *see also In re Mazzocone*, 183 B.R. 402, 420-22 (Bankr. E.D. Pa. 1995) ("Pursuant to 11 U.S.C. § 305(a)(1), . . . [the court] may exercise [its] discretion to temporarily relinquish jurisdiction over a case"); *In re Bellucci*, 119

[5] The legislative history of section 305 also makes clear that suspension under section 305(a) applies to all proceedings in a case: "the court is permitted, if the interests of creditors and the debtor would be better served by dismissal of the case or suspension of *all proceedings in the case*, to so order." *See* H.R. Rep. No. 95-595, 325 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6281 (emphasis added); *see also In re Pine Lake Vill. Apt. Co.*, 16 B.R. 750, 752 (Bankr. S.D.N.Y. 1982) (under section 305, "legislative history indicates that in some situations the interests of the creditors and the debtor might be better served by a dismissal or suspension of *all proceedings in a bankruptcy case*") (emphasis added).

B.R. 763, 771, n.18 (Bankr. E.D. Cal. 1990) (stating as to section 305 that "[l]egislative history clarifies that the Congress was deliberately rejecting the general rule that courts with jurisdiction over a matter must take jurisdiction" and recognizing that abstention under section 305 is abstention from the entire bankruptcy case and that such abstention of jurisdiction over the bankruptcy case is a complete rejection of bankruptcy relief). The Debtor concedes that it does not want such broad relief. The Debtor seeks, for example, the benefit of the automatic stay pursuant to section 362, which would otherwise also be suspended. *See* Suspension Motion ¶ 29; Proposed Order on Suspension Motion ¶ 7.[6] As the cases cited by the Debtor demonstrate, "[s]uspension under § 305(a) divests the bankruptcy court of jurisdiction over the entire case during the suspension period" and would therefore also suspend the Bankruptcy Code and Bankruptcy Rules during the suspension period. *See In re Picacho Hills Util. Co.*, Case No. 13-10742 TL7, 2017 WL 1067754, *5-6 (Bankr. D.N.M. Mar. 21, 2017). If the Court were to grant the Debtor's request pursuant to section 305, the Bankruptcy Court would be declining jurisdiction to hear or oversee any proceedings, including the Mediation or motions for relief from or to enforce the automatic stay. The Court cannot use section 305 to provide the extraordinary relief the Debtor seeks.

B. Section 305 Does Not Apply Where The Debtor Seeks To Obtain The Benefits Of Chapter 11 And Reorganize Under The Bankruptcy Code

12. Suspension under section 305 is considered an extraordinary remedy that should be used sparingly. *See In re Monitor Single Lift I, Ltd.*, 381 B.R. 455, 462 (Bankr. S.D.N.Y. 2008) ("abstention [under section 305] in a properly filed bankruptcy case is an extraordinary remedy");

[6] The Debtor misreads *In re Compania de Alimentos Fargo, S.A.*, 376 B.R. 427, 441 (Bankr. S.D.N.Y. 2007), which it argues "implie[s] in dicta that a section 305 suspension may not terminate section 362's automatic stay." Suspension Motion ¶ 29. The petitioners in that case merely requested a suspension order that would leave the stay in place; the court did not address whether such an order was permissible and instead opted to enter an order of dismissal. *In re Compania de Alimentos Fargo, S.A.*, 376 B.R. at 441.

Sapphire Dev., LLC v. McKay, 523 B.R. 1, 7 (D. Conn. 2014) ("Section 305 is reserved for those rare occasions when both the creditors generally and the debtor itself are better served by dismissal or suspension") (internal citations and quotations omitted). Thus, the Debtor carries a heavy burden to demonstrate not only that relief under section 305 is in the Debtor's interests, but also that it is in the best interests of its creditors. *See In re Schur Mgmt. Co., Ltd.*, 323 B.R. 123, 129 (Bankr. S.D.N.Y. 2005) (the test for suspension (as well as dismissal) is "whether the relief would be in the 'best interests' of both the debtor *and* its creditors.") (emphasis in original); *In re Monitor Single Lift I, Ltd.*, 381 B.R. at 462 ("[D]ismissal is appropriate under § 305(a)(1) only in the situation where the court finds that both 'creditors and the debtor' would be 'better served' by a dismissal.") (citation omitted).

13. To determine whether a movant has met this heavy burden, courts in the Second Circuit consider the following factors: "(1) the economy and efficiency of administration; (2) whether another forum is available to protect the interests of both parties or there is already a pending proceeding in state court; (3) whether federal proceedings are necessary to reach a just and equitable solution; (4) whether there is an alternative means of achieving an equitable distribution of assets; (5) whether the debtor and the creditors are able to work out a less expensive out-of-court arrangement which better serves all interests in the case; (6) whether a non-federal insolvency has proceeded so far in those proceedings that it would be costly and time consuming to start afresh with the federal bankruptcy process; and (7) the purpose for which bankruptcy jurisdiction has been sought." *In re Monitor Single Lift I, Ltd.*, 381 B.R. at 464–65 (citations omitted).

14. As these factors demonstrate, section 305 is not designed to provide the relief the Debtor seeks. Unlike virtually all other cases in which section 305 is raised, the Debtor here wants

to remain in the Bankruptcy Court and reorganize under the Bankruptcy Code—not proceed in state court or other non-bankruptcy forum—thereby effectively conceding each of the seven-factors favoring the Bankruptcy Court as the forum. While the Debtor argues that "there is another forum—the mediation—to protect the interests of the Debtor, the CVA Claimants, and other parties in interest," *see* Suspension Motion ¶ 28, the true "forum" is this Court, as demonstrated by the Debtor's anticipated use of chapter 11 to propose and confirm a plan post-mediation. *See, e.g., In re TPG Troy, LLC*, 492 B.R. 150, 160-61 (Bankr. S.D.N.Y. 2013) (abstaining from cases under section 305(a) in part, because availability of another forum existed to protect the interests of both parties when there were proceedings pending in *state and federal courts*) (emphasis added). This is not a case where a suspension is requested to permit proceedings in another non-bankruptcy forum, which is what section 305 facilitates.

C. The Debtor Cannot Demonstrate That The Relief Requested In The Suspension Motion Is In The Best Interests Of Both The Debtor And Its Creditors

15. Moreover, the Debtor cannot meet its evidentiary burden to establish that the suspension serves the interests of both the debtor *and its creditors*. *See In re Monitor Single Lift I, Ltd.*, 381 B.R. at 462 ("Granting an abstention motion pursuant to § 305(a)(1) requires more than a simple balancing of harm to the debtor and creditors; rather, the interests of both the debtor and its creditors must be served by granting the requested relief.") (citation omitted).

16. The relief requested by the Suspension Motion would substantially prejudice the interests of the University. The stated reorganization purpose of the case is: (i) to resolve claims with the CVA Claimants with the Debtor's available assets and (ii) to confirm a plan of reorganization with a compensation trust to allocate the Debtor's available assets, including any claims against the University arising from the CVA Claims and possibly others. The University accepted the Debtor's earlier invitation to participate in a pre-bankruptcy mediation and continues

to be amenable to working with others to expeditiously resolve claims so as to enable both the Debtor and the University to move forward in pursuit of their worthy missions. The Debtor's requested relief, taken as a whole, however, would allow the Debtor and the CVA Claimants to agree to a liability, for which the Debtor claims the University is largely responsible, without the University having any ability to defend itself by negotiating at the Mediation or meaningfully assess the merits of the Debtor's claim against the University or assert the University's claim against the Debtor.

17. To date, the Debtor has withheld from the University access to information, which would allow the University to (i) assess the alleged claims the Debtor has against the University, against which claims the University will vigorously defend, (ii) evaluate the University's potential liability for CVA Claims that were also asserted by CVA Claimants against the Debtor, based on alleged conduct that took place on the Debtor's premises, (iii) develop any claims it has against the Debtor, (iv) assess the Debtors' restricted and unrestricted assets and liabilities, (v) assess the assets of the Madison Square Boys & Girls Club Foundation, Inc. and its relationship to the Debtor, or (vi) assess the relationship between the Debtor and the Boys & Girls Clubs of America. The Debtor, stating that it acted with transparency, already shared a data room of information with the Ad Hoc Committee, and could easily provide the same information to the University. The Suspension Motion would also preclude the University from seeking the findings of Covington & Burling LLP's "independent investigation" of Dr. Archibald's conduct that the Debtor commissioned in 2019, which findings have not been released publicly by the Debtor and will likely shed further light on the Debtor's knowledge of, and failures surrounding, Dr. Archibald's alleged abuse at the Debtor's facilities.

18. The Debtor likely will argue that there is no reason to provide *any* information to the University at this time. However, to the extent that the Debtor is concerned with reaching a resolution with speed, its withholding of information from the University will simply delay resolution. The Debtor cannot seriously dispute that the information must and will be produced before the Debtor can proceed with proposing and confirming a plan of reorganization. Such discovery will be necessary to assess any claims that the Debtor and the University have against each other, and the treatment of those claims under a plan. It will also be necessary for the University to assess any settlement resulting from the Mediation, and if necessary, challenge confirmation. And critically, and as a matter of fairness, the University needs this information now in order to prepare and defend itself in pending state and federal cases, concerning Dr. Archibald's alleged conduct at the Debtor's facilities, where CVA Claims are proceeding against the University, and in which the automatic stay against the Debtor precludes the University from obtaining discovery from the Debtor.

19. Further, the Suspension as proposed would apparently suspend the application of critical statutory provisions of the Bankruptcy Code that impact the Debtor's creditors in general, such as suspension of lease payments pursuant to section 365 and suspension of certain proceedings and deadlines related to a plan and disclosure statement pursuant to sections 1121 and 1129. Notably, this case is not an involuntary proceeding or a two-party dispute, as is most frequently the case when section 305 is invoked. Here, the interests of all creditors must be considered. The Debtor has not shown that suspension of these statutory provisions and deadlines thereunder are in the best interests of its creditors. Accordingly, the extraordinary relief sought in the Suspension Motion should be denied under section 305.[7] *See In re Pine Lake Vill. Apt. Co.*,

[7] In support of the Suspension Motion, the Debtor relies on *In re Modell's Sporting Goods Inc*. for its contention that this Court may fashion extraordinary relief under sections 305 and 105 to suspend select proceedings for the

16 B.R. 750, 753 (Bankr. S.D.N.Y. 1982) ("It defies credulity to say that the debtor's interest would be better served by a dismissal [under section 305] when the debtor voluntarily sought the mechanics of Chapter 11 for the purpose of rehabilitation and a fresh start.").

D. Section 305 May Not Be Used To Preclude Motions For Relief From The Automatic Stay Nor To Alter The Statutory Standards For Such Relief

20. The Suspension Motion also seeks relief that could impair the University's ability to appeal certain state court rulings and/or to defend itself in actions where the University and the Debtor are co-defendants. *See* First Day Declaration ¶ 56. The proposed suspension order seeks to alter the "for cause" standard for modification of the automatic stay to a heightened standard that requires any party seeking stay relief to demonstrate "exigent and unforeseen circumstances." *See* Proposed Order on Suspension Motion ¶ 7. This heightened standard is neither proper nor necessary and is highly prejudicial to the University. Because the University's state court appeals would be of rulings in favor of the CVA Claimants, not the Debtor, the University's appeals are not stayed; however, to the extent the Debtor contends otherwise and to the extent the University seeks stay relief, it is plainly improper to attempt to change the standard for relief under Bankruptcy Code section 362 through a "suspension" order under section 305.

benefit of the Debtor and Ad Hoc Committee. However, the Debtor's case is easily distinguishable from the extraordinary circumstances in *In re Modell's Sporting Goods Inc.*, wherein the debtors filed for relief under chapter 11 in March 2020—right at the onset of an unprecedented COVID-19 global pandemic, which was declared a national emergency by the President of the United States. *See In re Modell's Sporting Goods Inc.*, Case No. 2:20-bk-14179 (Bankr. D.N.J. Mar. 11, 2020) [Docket Nos. 166, 294, 371] (granting several requests so debtors could "mothball" the vast majority of the bankruptcy case pursuant to sections 105 and 305(a)(1) at an unprecedented time). The Debtor states that this bankruptcy case is "unique" but there is no comparable exigency that warrants the extraordinary remedy sought by the Debtor. *See* Suspension Motion ¶ 6. The Debtor failed to articulate any extraordinary or "unique" facts, necessitating the Suspension.

II. THE RELIEF REQUESTED BY THE DEBTOR PURSUANT TO BANKRUPTCY CODE SECTION 105 CANNOT BE GRANTED

21. The Debtor alternatively seeks relief under section 105. The Supreme Court, however, has explained that it is "hornbook law" that section 105(a) does not allow a bankruptcy court to "override explicit mandates of other sections of the Bankruptcy Code." *Law v. Siegel*, 134 S. Ct. 1188, 1194 (2014); *see also In re Dairy Mart Convenience Stores, Inc.*, 351 F.3d 86, 92 (2d Cir. 2003) (section 105(a) does not allow the bankruptcy court "to create substantive rights that are otherwise unavailable under applicable law") (quotations and citations omitted). The Debtor relies on *In re Duratech* to argue that the Court has broad discretion to abstain from certain proceedings under section 105 of the Code (Suspension Motion ¶ 34), but ignores language by the court in that case that: "Section 105, however, does not permit the bankruptcy courts to contravene the express provisions of the Bankruptcy Code." *In re Duratech Indus.*, 241 B.R. 283, 288 (E.D.N.Y. 1999).

22. Allowing the Debtor to proactively suspend (*i.e.*, enjoin) most proceedings in this case on the basis of section 105(a) would be to craft a substantive right that does not exist and set a dangerous precedent of improperly expanding the breadth of section 105. Indeed, this Court is being asked to ignore the fact that, fundamentally, the Debtor is seeking an injunction against all of its creditors outside the context of a declaratory judgment action, without any actual controversies before it, and without a hearing (evidentiary or otherwise) to determine whether a particular action should be stayed.

23. The Debtor cannot use section 105 to provide this Court with "a license . . . to disregard the clear language and meaning of the bankruptcy statutes and rules." *See In re Barbieri*, 199 F.3d 616, 620–21 (2d Cir. 1999) (citations and quotations omitted). While the relief requested in the Suspension Motion is not entirely clear, the Debtor appears to request the suspension of the

entirety of the Bankruptcy Code and all of its requirements and protections for creditors—except for certain delineated carve-outs. Section 105 provides no authority for a bankruptcy court to, among other things:

- Extend or stay the statutory period in which a debtor must file a plan under section 1121, without specific notice of the basis for that request and a hearing on the specific request to extend that statutory period;
- Prohibit parties in interest from seeking to terminate exclusivity under section 1121;
- Limit a party's statutory right to seek stay relief under Bankruptcy Code section 362 for cause;
- Extend the statutory period of time in which a court must rule on a motion to modify the automatic stay under section 362(d); and
- Extend or stay the statutory period in which a debtor must assume or reject executory contracts or unexpired nonresidential real property leases pursuant to section 365.

24. While section 105 may be used to stay certain proceedings when such a stay would not otherwise conflict with the Bankruptcy Code, the relief requested in the Suspension Motion is too broad and may significantly impair the rights of creditors and parties in interest. And, as with section 305, section 105 certainly cannot be used to heighten the statutory standard for relief from the automatic stay. Consequently, the Suspension Motion should be denied, without prejudice to the Debtor's right to seek a stay or an injunction regarding any particular proceeding, when and if such a proceeding is commenced.

WHEREFORE, the University respectfully requests that the Court (a) deny the Motion, and (b) grant such other and further relief as the Court deems just and proper.

Dated: July 13, 2022
New York, New York

ROPES & GRAY LLP

/s/ *Gregg M. Galardi*

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CERTIFICATE OF SERVICE

I certify that on July 13, 2022, I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of New York.

/s/ Gregg M. Galardi
Gregg M. Galardi