IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re: PURDUE PHARMA L.P., et al., Debtors	Case No. 19-23649 (RDD) Chapter 11
PURDUE PHARMA L.P., et al. Plaintiffs, v. AIG SPECIALTY INSURANCE COMPANY (F/K/A AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE COMPANY), et al., Defendants.	Jointly Administered Adv. Case No. 21-07005-rdd

MEMORANDUM OF LAW IN SUPPORT OF THE ARBITRATION INSURERS' JOINT MOTION TO STAY THE CLAIMS AGAINST THEM IN THE ADVERSARY PROCEEDING IN FAVOR OF ARBITRATION

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The undersigned Defendant Insurers ("Arbitration Insurers") respectfully submit this memorandum of law in support of their joint motion to stay the claims against them in this adversary proceeding in favor of arbitration ("Joint Motion to Stay in Favor of Arbitration") under the arbitration provisions in their respective insurance policies ("Arbitration Policies"), pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq*., § 201 *et seq.,* and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention").[1]

PRELIMINARY STATEMENT

The broad and mandatory arbitration provisions in the Arbitration Policies preclude Plaintiffs from litigating coverage claims against the Arbitration Insurers through this adversary proceeding. Plaintiffs' claims arise under contracts antecedent to the Debtors' chapter 11 petition, they are based on state (and foreign) law, not bankruptcy law, and as the massive plan of reorganization filed just weeks ago confirms, the Debtors' reorganization does not depend on the outcome of the disputed coverage claims. In these circumstances, the FAA requires the Court to enforce the agreements to arbitrate in the Arbitration Policies.

Under the FAA, a court "shall" stay the litigation of an arbitrable matter. 9 U.S.C. § 3. The FAA embodies a strong federal policy in favor of enforcing arbitration provisions, particularly those in contracts, like many of the Arbitration Policies, which are international and fall under the Convention, implicating matters of foreign commerce. This federal mandate is no less binding in bankruptcy court. Plaintiffs therefore are bound by the agreements to arbitrate, unless they can meet the formidable burden of demonstrating that their enforcement would be contrary to Congressional intent, as expressed in the Bankruptcy Code. *See Shearson/Am. Exp., Inc. v.*

[1] The Arbitration Insurers do not consent to entry of final orders or judgment by the Bankruptcy Court. *See* Fed. R. Bankr. P. 7012.

McMahon, 482 U.S. 220, 226-27 (1987); *In re Residential Cap., LLC*, 563 B.R. 756, 767 (Bankr. S.D.N.Y. 2016) ("*ResCap*").

As this Court and the Second Circuit have directed, if: (1) the parties have agreed to arbitrate; and (2) the arbitration provision covers plaintiff's claim; then (3) the court must enforce the agreement to arbitrate unless the plaintiff can demonstrate that arbitration of the claim would irreconcilably conflict with the Bankruptcy Code. Here, the Arbitration Policies contain binding agreements to arbitrate, which cover the disputes that Plaintiffs assert in the adversary proceeding. And, as reflected in the Debtors' proposed Plan itself, and the negotiations that preceded it, neither the viability nor the success of the Debtors' reorganization in any way depends on the outcome of Plaintiffs' claims, creating no conflict between the FAA and the Bankruptcy Code.

This Court and many others have held that arbitration provisions like those at issue here encompass the very kind of coverage disputes in this adversary proceeding, and it is well-established that any doubts on that score must be resolved in favor of arbitration. In *ResCap*, and *In re MF Global Holdings Ltd*., 571 B.R. 80 (Bankr. S.D.N.Y. 2017) ("*MF Global*"), Judges Lane and Glenn each examined arbitration provisions similar, if not identical, to most of the arbitration provisions in the Arbitration Policies, which typically mandate arbitration of any dispute "arising out of," "arising under" and/or "related to" the Arbitration Policies. Each recognized that plaintiffs could not escape the "broad scope" of those provisions. *ResCap*, 563 B.R. at 770; *MF Global*, 571 B.R. at 92-94. The result here should be no different.

This leaves the question whether enforcement of the Arbitration Insurers' bargained-for rights to arbitrate the Debtors' insurance coverage claims would conflict with the Bankruptcy Code in the context of these chapter 11 proceedings. When conducting that analysis, courts examine whether the proceeding giving rise to potential arbitration is a core proceeding under the

Bankruptcy Code. "Bankruptcy courts generally do not have discretion to refuse to compel arbitration of 'non-core' bankruptcy matters," and even in core proceedings, arbitration provisions must be enforced unless enforcement would cause an "inherent[] conflict" between the Bankruptcy Code and the FAA. *MBNA Am. Bank, N.A. v. Hill*, 436 F.3d 104, 108 (2d Cir. 2006).

To determine whether claims arising under a contract are core, courts consider (1) whether the contract is antecedent to the reorganization petition; and (2) the degree to which the proceeding is independent of the reorganization. It cannot be disputed that the Arbitration Policies are antecedent to the reorganization petition. The adversary proceeding also is entirely independent of the reorganization. The Debtors' recently-filed plan and disclosure statement make crystal clear that the Debtors' ability to complete their reorganization successfully does not in any way depend on the outcome of this adversary proceeding. Any recovery of insurance funds in the adversary proceeding would do nothing more than augment the assets of the estate, to be distributed over time through a variety of trusts. As this Court and the Second Circuit have emphasized time and again, augmentation of the estate's assets is an insufficient reason to conclude that contract claims are core proceedings. *See, e.g., In re Orion Pictures Corp.*, 4 F.3d 1095, 1102 (2d Cir. 1993); Order Granting Defendants' Motion to Remand, Exhibit A (Transcript of Proceedings) at 20-21, *In re Century 21 Dep't Stores, LLC,* Case No. 20-01222, (Bankr. S.D.N.Y., Feb. 18, 2021), Dkt. No. 92-1 ("*Century 21*, Tr.*")* attached hereto as Exhibit B; *MF Global*, 571 B.R. 80 at 94.

Under materially indistinguishable circumstances, the *ResCap* and *MF Global* courts concluded they were required to enforce the arbitration provisions in debtors' liability insurance contracts. This Court should do the same.

BACKGROUND

A. The Chapter 11 Proceedings

Purdue Pharma, L.P. and certain affiliated entities ("Debtors") commenced a voluntary bankruptcy proceeding under Chapter 11 of the Bankruptcy Code on September 15, 2019. The Debtors initiated these bankruptcy proceedings to shield themselves and their owners from thousands of federal and state civil lawsuits seeking to hold the Debtors' accountable for alleged misconduct in the marketing and sale of opioids ("Opioid Claims"). *See* Adversary Complaint ¶ 5; Dkt. No. 2488, Disclosure Statement for the Chapter 11 Plan, at 3.

The first Opioid Claims were filed in or around 2001. *See, e.g., State of West Virginia ex rel. Darrell V. McGraw, Jr., et al. v. Purdue Pharma, L.P., et al.*, Case No. 1:01-cv-00557 (S.D.W. Va., filed June 21, 2001). In 2007, certain of the Debtors pled guilty to felony misbranding of OxyContin, with the intent to defraud or mislead, in violation of the Food, Drug, and Cosmetic Act. Dkt. No. 17, Debtors' Informational Brief, at 32-34. In or around 2016, a second wave of cases and investigations ensued, including civil and criminal investigations by the Department of Justice. *See* Disclosure Statement for Chapter 11 Plan, at 36. Before filing for bankruptcy, the Debtors were named in nearly 3,000 opioids lawsuits. *See* Adversary Complaint ¶ 5; Debtors' Complaint for Injunctive Relief ¶ 17; *State of West Virginia ex rel. Darrell V. McGraw, Jr., et al. v. Purdue Pharma, L.P., et al.*, Case No. 1:01-cv-00557 (S.D.W. Va., filed June 21, 2001). In 2020, certain of the Debtors pled guilty to conspiracy to defraud the United States and to violate the Food, Drug, and Cosmetic Act; and conspiracy to violate the Federal Anti-Kickback Statute. *See* Dkt. No. 2004, Order Pursuant to 11 U.S.C. § 105 and Fed R. Bankr. P. 9019 Authorizing and Approving Settlements between the Debtors and the United States; Dkt. No. 1828, Motion of Debtors Pursuant to 11 U.S.C. § 105 and Fed R. Bankr. P. 9019 Authorizing and Approving Settlements between the Debtors and the United States ¶¶ 20-22; *id*. at Exhibit B (Plea Agreement).

B. The Proposed Plan of Reorganization

On March 15, 2021, the Debtors filed a Joint Chapter 11 Plan of Reorganization ("Plan") and Disclosure Statement for the Chapter 11 Plan ("Disclosure Statement"). The Plan provides for the allocation of the Debtors' assets, and a $4.5 billion contribution from the Sackler family. *See* Dkt. No. 2488, Disclosure Statement, at 2, 12. Trusts that will receive cash distributions over a period of time will be established for the benefit of certain groups of creditors. *See id.* The Debtors estimate that a total of $5 billion in cash will be provided to the trusts, with an additional $700 million to $750 million to make payments directly to qualified personal injury claimants. *See id.* at 2. In addition to these cash assets directed to the creditor trusts, $200 million and substantially all of the Debtors' non-cash assets will be transferred to a new Delaware LLC, which will be operated for the benefit of two newly-established national opioid abatement trusts, the National Opioid Abatement Trust and the Tribe Trust. *Id.* at 6.

The viability of the Plan does not depend on any insurance recoveries. The Plan contemplates that the Debtors' insurance rights and assets related to the policies at issue in the adversary proceeding will be transferred to a Master Disbursement Trust ("MDT"), which shall be empowered to initiate, prosecute, defend, and resolve all legal actions in connection with the Debtors' insurance rights. Dkt. 2487, Plan, Sections 5.6(b), 5.6(h). The MDT is a parent trust that will be funded by certain of the Debtors' assets and a multi-billion dollar payment by the Sackler family, and that, in turn, will fund the other trusts. *See id.*, Sections 5.2, 5.6(b), 5.6(h). Up to $450 million of any insurance proceeds recovered by the MDT under the policies at issue in the adversary proceeding will be disbursed by the MDT for the benefit of personal injury claimants via disbursement to the "PI Trust." *Id.*, Section 5.2(d)(i)(D). Notably, the MDT will provide up to $400 million in funding for the PI Trust even if no insurance recoveries are realized. *See id.*, Section 5.2(d)(i)(D). If, on the other hand, insurance proceeds exceed $450 million, they will be distributed among creditors in accordance with a predetermined "MDT Priority Waterfall" upon the MTD's dissolution. *Id.*, Section 5.6(k). In its extensive discussion of "risk factors to be considered prior to voting," the Disclosure Statement does not even mention the insurance claims being asserted in the adversary proceeding. *See* Dkt. No. 2488, Disclosure Statement, at 180-88.

C. The Adversary Proceeding

Certain of the Debtors and their creditors, the Official Committee of Unsecured Creditors[2] and the Ad Hoc Committee of Government and Other Contingent Litigation Claimants[3] (collectively, "Plaintiffs"), filed this adversary proceeding against approximately 30 domestic and foreign insurance companies on January 29, 2021—fifteen months after the Debtors filed for bankruptcy, and only six weeks before the Debtors filed their proposed Plan. Plaintiffs seek insurance coverage for the Debtors' liability for the Opioid Claims, and allege that the Debtors are entitled to indemnification for damages and associated defense costs. Adversary Complaint ¶¶ 5, 63, 66-68.

The Complaint contains a single count for declaratory judgment under approximately 80 different pre-petition liability insurance policies issued over a period of 17 years, from 2001 through 2018. *See* Adversary Complaint, Exhibit A; *see also* Adversary Complaint ¶ 63. The Complaint alleges that the Insurers are "obligated . . . to provide coverage in full to the Debtors for the Debtors'

[2] The Official Committee of Unsecured Creditors includes Blue Cross and Blue Shield Association; CVS Caremark Part D Services L.L.C. and Caremark PCS Health, L.L.C.; Ryan Hampton; Cheryl Juaire; LTS Lohmann Therapy Systems, Corp.; Pension Benefit Guaranty Corporation; Walter Lee Salmons; Kara Trainor; West Boca Medical Center; Cameron County, Texas; the Cheyenne and Arapaho Tribes; and Thornton Township, Illinois High School District No. 205.

[3] The Ad Hoc Committee consists of ten States; the court-appointed Plaintiffs' Executive Committee in the multi-district litigation captioned *In re National Prescription Opiate Litigation*, Case No. 17-md-02804, MDL No. 2804 (N.D. Ohio); six political subdivisions of States; and one federally recognized American Indian nation.

liability" for the Opioid Claims, "subject only to applicable attachment points, limits of liability, and policy triggers (e.g., whether it is occurrence-based or claims-made), and applicable law." Adversary Complaint ¶¶ 68, 79. Without calculation or explanation, the Complaint baldly asserts that "[c]overage under the Debtors' Insurance Policies is subject to limits of liability, where applicable, of at least $3.3 billion." Adversary Complaint ¶ 6.

D. The Arbitration Policies

The Complaint omits that the insurance policies issued by the Arbitration Insurers contain mandatory arbitration provisions. These arbitration provisions generally require that all disputes concerning those policies must be resolved by arbitration. For example, multiple Arbitration Insurers issued policies under what is known as the Bermuda Form. Those policies, which include, but are not limited to, policies issued by Chubb Bermuda Insurance Ltd. and XL Bermuda Ltd., provide:

> Any dispute, controversy or claim arising out of or relating to this Policy or the breach, termination or invalidity thereof shall be finally and fully determined in London, England under the provisions of the Arbitration Acts of 1950, 1975, and 1979 . . . .

E.g., Declaration of Daren McNally in Support of Joint Motion to Stay in Favor of Arbitration, Exhibit A (Chubb Bermuda Insurance Ltd. Policy No. PRA-1031/5); Declaration of Richard Geddes in Support of Joint Motion to Stay in Favor of Arbitration, Exhibit A (XL Bermuda Ltd. Policy No. XLUMB-00342). The policy issued by Starr Excess Liability Insurance International Limited under policy number 201012 provides:

> Any and all disputes arising under or relating to this Policy, including its formation and validity, and whether between the Company and the Insured or any person or entity deriving rights through or asserting rights on behalf of the Insured, shall be finally and fully determined in Bermuda under the provisions of The Bermuda International Conciliation and Arbitration Act 1993 . . . .

Declaration of Mitchell J. Auslander in Support of Joint Motion to Stay in Favor of Arbitration, Exhibit B (Starr Excess Liability Insurance International Limited Policy No. 201012, IV.B.(1)(a)). Allied World issued policies under the numbers C001210/002 – 005, all of which provide that:

> Any and all disputes arising under or relating to this Policy, including its formation and validity, shall be fully determined in Hamilton, Bermuda under the provision of The Bermuda International Conciliation and Arbitration Act 1993 . . .

Declaration of George R. Calhoun in Support of Joint Motion to Stay in Favor of Arbitration, Exhibits B, C, D, E (Allied World Assurance Company, Ltd. Policy Nos. C001210/002 – 005). TIG Specialty Insurance Company ("TIG") issued a policy under the number XLX 38822826, which provides that:

> Any dispute arising under this policy shall be finally and fully determined in London, England under the provisions of the English Arbitration Act of 1950, as amended and supplemented, by a Board composed of three arbitrators …

Declaration of George R. Calhoun in Support of Joint Motion to Stay in Favor of Arbitration, Exhibit A.[4] The other policies issued by the Arbitration Insurers named in the Complaint contain similar broad and binding arbitration provisions. *See* Chart of Arbitration Provisions, attached hereto as Exhibit A.

The parties to the Arbitration policies chose arbitration with experts in insurance as decision-makers, selected the forum, designated protocols, and identified and agreed upon choice of law. Those bargained-for provisions were essential elements of the contracts, and an important factor in determining the premium charged to Debtors.

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[4] TIG, The Purdue Frederick Company, Inc., and Debtors Purdue Pharma L.P., Purdue Pharma Inc., and Purdue Pharmaceuticals L.P. already are parties to an arbitration proceeding pending in London in connection with the parties' respective rights and obligations under the policy issued by TIG. *See* TIG's Motion for Relief from the Automatic Stay, Dkt. No 712-1.

ARGUMENT

I. PLAINTIFFS BEAR A HEAVY BURDEN TO DEMONSTRATE WHY THE STRONG FEDERAL POLICY FAVORING ARBITRATION EMBODIED BY THE FAA MUST YIELD TO THE BANKRUPTCY CODE.

Under the FAA, "written agreements to arbitrate 'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" *MBNA*, 436 F.3d at 107-08 (quoting 9 U.S.C. § 2). The FAA thus "establishes a 'federal policy favoring arbitration agreements,' and mandates the enforcement of contractual arbitration provisions." *Id.* at 107 (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)); *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631(1985) (FAA codifies an "emphatic federal policy in favor of arbitral dispute resolution"). The federal policy favoring enforcement of arbitration provisions is both "liberal" and "strong." *See, e.g.*, *Brownstone Inv. Grp. v. Levey*, 514 F. Supp. 2d 536, 549 (S.D.N.Y. 2007) ("Through the [FAA], Congress has declared a strong federal policy favoring arbitration."); *In re Hagerstown Fiber Ltd. P'ship*, 277 B.R. 181, 197 (Bankr. S.D.N.Y. 2002) (same); *In re Winimo Realty Corp.*, 270 B.R. 108, 117 (Bankr. S.D.N.Y. 2001) ("The FAA thus establishes a federal policy favoring arbitration and requiring that federal courts rigorously enforce agreements to arbitrate") (internal quotations and citations omitted).

Under the New York Convention, and Chapter 2 of the FAA, which implements the Convention, "that federal policy applies with special force in the field of international commerce." *Mitsubishi Motors*, 473 U.S. at 631. The policies of fifteen Arbitration Insurers fall under the Convention and are governed by Article 2 of the FAA, because they are commercial contracts between entities that are citizens of two different signatories to the Convention that contain written agreements to arbitrate.[5]

"[U]pon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under" an agreement to arbitrate covered by the FAA, a court "shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. § 3. In light of the strong federal policy favoring enforcement of agreements to arbitrate, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Brownstone*, 514 F. Supp. at 549 (citations omitted); *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.* 796 F. App'x. 45, 48 (2d Cir. 2019); *Alfa Laval U.S. Treasury Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 857 F. Supp. 2d 404, 409 (S.D.N.Y. 2012); *see also In re Am. Exp. Financial Advisors Secs. Litig.*, 672 F.3d 113, 128 (2d Cir. 2011) (federal policy requires that arbitration clauses be construed "as broadly as possible").

The Second Circuit has recognized that in the event of a dispute that presents a fundamental conflict between the FAA and the Bankruptcy Code, a bankruptcy court may have discretion to decline to enforce an arbitration provision. *MBNA*, 436 F.3d at 108. Bankruptcy courts considering whether such a fundamental conflict exists first analyze whether the dispute is a core bankruptcy proceeding. "Bankruptcy courts generally do not have discretion to refuse to compel arbitration of 'non-core' bankruptcy matters, or matters that are simply 'related to' bankruptcy cases." *Id*. (citing *In re Crysen/Montenay Energy Co.*, 226 F.3d 160, 166 (2d Cir.2000)). And "even as to core

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5 *See Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 92 (2d Cir. 1999). "[A] district court's scope of inquiry in considering a petition to compel arbitration under Chapter Two of the FAA is 'very limited.'" *Id*. (citing *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 186 (1st Cir. 1982)); *see also Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1018 (2d Cir. 1993).

proceedings, the bankruptcy court will not have discretion to override an arbitration agreement unless it finds that the proceedings are based on provisions of the Bankruptcy Code that 'inherently conflict' with the Arbitration Act or that arbitration of the claim would 'necessarily jeopardize' the objectives of the Bankruptcy Code." *Id*. (citing *In re U.S. Lines, Inc.*, 197 F.3d 631, 640 (2d Cir. 1999)); *see also Hagerstown*, 277 B.R. at 200-01 (even as to a core claim, an "arbitration clause should be enforced unless doing so would seriously jeopardize the objectives of the Code") (internal quotations and citations omitted).

"In assessing whether it has discretion to refuse arbitration, the bankruptcy court applies a four-part test: '(1) did the parties agree to arbitrate; (2) does the dispute fall within their arbitration clause; (3) if federal statutory claims are raised, did Congress intend those claims to be arbitrable; and (4) if the court concludes that some but not all of the claims are arbitrable, should it stay the non-arbitrable claims pending the conclusion of the arbitration?'" *ResCap*, 563 B.R. at 767 (citing *In re Cardali*, No. 10-3531 (SHL), 2010 WL 4791801, at *5 (Bankr. S.D.N.Y. Nov. 18, 2010)). Some bankruptcy courts formulate the standard slightly differently, asking first "whether the proceeding at issue is core or non-core," because if the proceeding is non-core "the bankruptcy court generally does not have discretion" to deny arbitration. *Id*. at 768 n.12. If the proceeding is core, the question becomes "'whether any underlying purpose of the Bankruptcy Code would be adversely affected by enforcing [the] arbitration clause.'" *Id*. (quoting *In re Winimo*, 270 B.R. at 118). Plaintiffs, as the parties opposing arbitration, bear the burden of proving that the Arbitration Insurers' right to mandatory arbitration under the Arbitration Policies, the FAA and the Convention, can be overcome because of an irreconcilable conflict with the Bankruptcy Code. *See ResCap*, 563 B.R. at 767; *Hagerstown*, 277 B.R. at 198 ("Like any statutory directive, the [FAA's] mandate may be overridden by a contrary congressional command . . . The party opposing arbitration bears the burden of demonstrating that 'Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue.'") (internal citations omitted); *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 885 F.2d 1149, 1156 (3d Cir. 1989) ("[T]he district court lacked the authority and discretion to deny enforcement of the arbitration clause unless" the plaintiff "had met its burden of showing" that the "Bankruptcy Code conflicts with the enforcement of an arbitration clause," which the plaintiff had not.)

Under either formulation of the standard, the Adversary Complaint's claims against the Arbitration Insurers must be arbitrated, because the parties agreed to arbitrate, the claims fall within the scope of the parties' mandatory arbitration provisions, they are non-core claims, there are no federal claims, there are no non-arbitrable claims, and arbitration would not in any way be inconsistent with the Bankruptcy Code and the proposed Plan.

II. PLAINTIFFS' CLAIMS AGAINST THE ARBITRATION INSURERS ARE SUBJECT TO MANDATORY, BINDING ARBITRATION.

A. The Parties Agreed to Arbitrate.

The threshold inquiry of any motion to enforce an arbitration provision is "whether there was an agreement to arbitrate the claims asserted" in the complaint. *MF Global*, 571 B.R. at 91. The question whether the parties have agreed to arbitrate is an issue of contract law for judicial determination. *ResCap,* 563 B.R. at 768.

There can be no dispute that the Arbitration Insurers and the Debtors agreed to arbitrate. The existence of arbitration clauses in insurance contracts itself shows that the parties agreed to arbitrate. *See id; MF Global*, 571 B.R. at 91-92; *VAC Service Corp. v. Service Merchandise Co.,* 929 F. Supp. 143, 145 (S.D.N.Y. 1996) ("[W]here a contract contains an arbitration clause, there is a presumption of arbitrability that is overcome only be a definitive showing that the dispute in question is outside the arbitration clause."); *Associated Brick Mason Contractors of Greater N.Y.*, *Inc. v. Harrington*, 820 F.2d 31, 35 (2d Cir. 1987) ("The existence of an arbitration clause in the Agreement raises a presumption of arbitrability" of the dispute.). In *ResCap*, for example, the arbitration clauses provided: "Any dispute, controversy or claim arising out of or relating to this Policy or the breach, termination or invalidity thereof shall be finally and fully determined in London, England under the provisions of the Arbitration Acts of 1996 . . . ." 563 B.R. at 769. The court concluded that the clause was "a broad provision to send disputes about the policies to arbitration" that manifested the parties' agreement to arbitrate. *Id.*

The Arbitration Insurers' policies generally contain the same or similar broad and binding arbitration provisions as were at issue is *ResCap*. The policies conforming to the Bermuda form provide that "[a]ny dispute, controversy or claim arising out of or relating to this Policy or the or the breach, termination or invalidity thereof shall be finally and fully determined in London, England under the provisions of the Arbitration Acts of 1950, 1975, and 1979 . . . ." *E.g.*, Declaration of Richard Geddes in Support of Joint Motion to Stay in Favor of Arbitration, Exhibit A (XL Bermuda Ltd. Policy No. XLUMB-00342); *see also* Exhibit A, Chart of Arbitration Provisions. Other policies provide, for example, that "[a]ny and all disputes arising under or relating to this Policy . . . shall be finally and fully determined in Hamilton, Bermuda under the provisions of The Bermuda International Conciliation and Arbitration Act 1993 . . . ." Declaration of George R. Calhoun in Support of Joint Motion to Stay in Favor of Arbitration, Exhibits B, C, D, E (Allied World Assurance Company, Ltd. Policy Nos. C001210/002 – 005). All of the Arbitration Insurers' policies contain arbitration provisions. *See* Exhibit A, Chart of Arbitration Provisions. As in *ResCap*, the broad arbitration provisions in the Arbitration Insurers' policies unequivocally show that the parties here agreed to arbitrate.

B. Plaintiffs' Claims Fall within the Policies' Arbitration Provisions.

The second preliminary inquiry is whether the arbitration clause "covers the dispute at issue." *ResCap*, 563 B.R. at 769. In making this determination, "courts consider whether the arbitration clause is 'narrow' or 'broad' in light of the allegations of the complaint." *Id*. "[I]f the clause is broad, arbitrability will be presumed." *MF Global*, 571 B.R. at 92. In light of the policy favoring arbitration, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id*.; *ResCap*, 563 B.R. at 766; *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 796 F. App'x. at 48.

The arbitration provisions in the Arbitration Policies plainly cover this adversary proceeding. The majority of the Arbitration Policies use the same or similar phrasing in their arbitration clauses. *See, e.g.*, Declaration of George R. Calhoun in Support of Joint Motion to Stay in Favor of Arbitration, Exhibits B, C, D, E (Allied World Assurance Company, Ltd. Policy Nos. C001210/002 – 005) (requiring that "[a]ny and all disputes arising under or relating to this policy" be arbitrated in Bermuda); Declaration of Richard Geddes in Support of Joint Motion to Stay in Favor of Arbitration, Exhibit A (XL Bermuda Ltd. Policy No. XLUMB-00342) (requiring that "[a]ny dispute, controversy or claim arising out of or relating to this Policy or the or the breach, termination or invalidity thereof" be arbitrated in London); Declaration of Mitchell J. Auslander in Support of Joint Motion to Stay in Favor of Arbitration, Exhibit B (Starr Excess Liability Insurance International Limited Policy No. 201012) (requiring that "[a]ny and all disputes arising under or relating to this Policy, including its formation and validity" be arbitrated in Bermuda).

The Arbitration Policies use the same language that other courts have deemed sufficiently broad to apply to similar coverage disputes. *See ResCap*, 563 B.R. at 769-70; *MF Global*, 571 B.R. at 91-92; *see also McCowan v. Sears, Roebuck & Co*., 908 F.2d 1099, 1106 (2d Cir. 1990) (holding arbitration clause requiring "any controversy . . . arising out of or relating to this contract or the breach thereof shall be settled by arbitration" encompassed dispute, and reversing judgment denying motion for a stay pending arbitration). In *ResCap*, the Court held that the language in the arbitration clauses of the policies at issue—"[a]ny dispute, controversy or claim arising out of or relating to this Policy"— was "exceedingly broad" and covered the adversary proceeding against the insurers. *ResCap*, 563 B.R. at 769. Similarly, in *MF Global*, the Court determined that the parties had agreed to arbitrate and that the arbitration provisions in the Bermuda policies at issue (which are identical to those at issue here in all material respects) were broad. 571 B.R. at 91-92.[6]

The case law uniformly holds that insureds that agree to arbitrate coverage disputes are bound by those agreements, which compels the same result here. *E.g. MF Global*, 571 B.R. at 91-92; *ResCap,* 563 B.R. at 769-70; *VAC,* 929 F. Supp. at 145-46; *Raytheon Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.,* 306 F. Supp. 2d 346, 358 (S.D.N.Y. 2004); *Alfa*, 857 F. Supp. at 414; *Century Indem. Co.*, 2007 WL 1599157, at *3.

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[6] Two of the Arbitration Policies contain slightly different language. They mandate arbitration "[i]n the event of a disagreement as to the interpretation of … [the] policy." Declaration of Mitchell J. Auslander in Support of Joint Motion to Stay in Favor of Arbitration, Exhibit A (AIG Specialty Insurance Company Policy No. 267-47-08); Declaration of Monica T. Sullivan in Support of Joint Motion to Stay in Favor of Arbitration, Exhibits A, B (Evanston Insurance Company Policy No. XO-GA-1138-00). These arbitration provisions also apply because, according to Plaintiffs, *see* Adversary Complaint ¶ 65, Plaintiffs' claims turn on the disputed interpretation of several provisions of the Arbitration Policies. *See Century Indem. Co. v. Clearwater Ins. Co.*, 06 CIV 0424 SAS, 2007 WL 1599157, at *3 (S.D.N.Y. June 4, 2007) (holding that clause providing for arbitration of any "irreconcilable difference of opinion. . . as to the interpretation of this Contract" required arbitration of coverage dispute); *Alfa Laval U.S. Treas. Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 857 F. Supp. 2d 404, 406 (S.D.N.Y. 2012) (compelling arbitration of coverage dispute where arbitration clause provided for arbitration of disputes reading the "interpretation of the Indemnity Agreement.").

III. THE MANDATORY ARBITRATION PROVISIONS MUST BE ENFORCED BECAUSE THEIR ENFORCEMENT WOULD NOT CONFLICT WITH THE BANKRUPTCY CODE.

Because the Arbitration Policies contain binding arbitration provisions that apply to the claims asserted, the Court next must examine whether enforcement of those bargained-for arbitration rights would conflict irreconcilably with the Bankruptcy Code. The "principal inquiry" in making that determination is "whether the claims asserted are core or non-core in the bankruptcy." *ResCap*, 563 B.R. at 770. This is the "principal" inquiry because if the claims are non-core, the arbitration provisions must be enforced without further analysis. It may not be the only inquiry in all cases because even if claims are deemed core, arbitration is still required unless the plaintiff makes the additional showing that arbitration would create a serious conflict with the Bankruptcy Code in the context of the given bankruptcy proceedings. *MBNA Am. Bank*, 436 F.3d at 108. In this case, however, Plaintiffs have argued only that their insurance claims are core bankruptcy claims, Adversary Complaint ¶ 51, without further demonstrating how arbitration would conflict with the Code in this particular proceeding. But Plaintiffs are mistaken; their claims are not core bankruptcy claims, and must be arbitrated.[7]

The Supreme Court addressed the core vs. non-core distinction in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, observing that "the restructuring of debtor-credit relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages." 458 U.S. 50, 71 (1982). "The principal holding of *Marathon* is that Congress has minimal authority to

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[7] As demonstrated below, the proposed reorganization is entirely independent of the resolution of Plaintiffs' insurance claims, and arbitrating them would create no conflict with the Bankruptcy Code under any circumstances. Accordingly, even if the Court were to deem the claims to be core, it should still stay the proceeding pending arbitration, because Plaintiffs cannot establish that arbitration in this situation would create a meaningful conflict with the Code.

control the manner in which a right created by state law may be adjudicated as that right is independent of and antecedent to the reorganization petition that conferred jurisdiction upon the bankruptcy court." *In re Cardali*, 2010 WL 4791801, at *7 (citing *U.S. Lines*, 197 F.3d at 637). "Therefore, under *Marathon*, whether a contract proceeding is core depends on (1) whether the contract is antecedent to the reorganization petition; and (2) the degree to which the proceeding is independent of the reorganization." *Id.*; *see also In re Residential Cap.*, 15-cv-2712 (JPO), 2015 WL 9302834 at *3 (S.D.N.Y. Dec. 21, 2015) (quoting *Mt. McKinley Ins. Co. v. Corning Inc.*, 399 F.3d 436, 448 (2d Cir. 2005)); *Century 21*, Tr. at 19-20.

In other words, a "proceeding is encompassed within the bankruptcy court's core . . . jurisdiction if it invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case. *Kerusa Co. LLC v. W10Z/515 Real Estate Ltd. P'ship*, No. 04 Civ. 708 (GEL), 2004 WL 1048239, at *2 (S.D.N.Y. May 7, 2004). "By contrast, a proceeding is non-core if it exists independently under state law and is merely 'related to' the bankruptcy case because of a conceivable effect upon the debtor's estate." *Id*. If the lawsuit is only "related to" to the Debtors' bankruptcy cases, then it is "non-core." *E.g.*, *In re N.Y. Skyline, Inc.*, 512 B.R. 159, 172–73 (S.D.N.Y. 2014) ("As explained by the Supreme Court, '[t]he terms 'non-core' and 'related' are synonymous.'") (quoting *Stern v. Marshall*, 131 S. Ct. 2594, 2605 (2011)).

The Arbitration Policies are all antecedent to the reorganization, *see* Adversary Complaint, Ex. A, and they are brought under state and other relevant law, not under the Bankruptcy Code. *See id*. ¶¶ 6-80. Where, as here, an antecedent contract claim "does not depend on bankruptcy laws for its existence and . . . could proceed in a court that lacks federal bankruptcy jurisdiction," it typically is non-core. *DeWitt Rehab. & Nursing Ctr., Inc. v. Columbia Cas. Co.*, 464 B.R. 587, 591 (S.D.N.Y.

2012) (quoting *N. Am. Energy Conservation, Inc. v. Interstate Energy Res., Inc.*, Case No. 00-CV-4302 (SHS), 2000 WL 1514614, at *2 (S.D.N.Y. Oct. 10, 2000)).

Critically, the Debtors' reorganization in no way depends on the outcome of this adversary proceeding. The Plan contemplates that the various creditor trusts will receive cash assets in excess of $5.5 billion, and the two principal opioids abatement trusts also will receive all profits from the business that will emerge from the bankruptcy for years to come. Dkt. No. 2487, Plan, Section 5.2, 5.7; Dkt. No. 2488, Disclosure Statement, at 2, 6. While the Plan provides for the possibility of insurance recoveries through this proceeding, and while any such recoveries would supplement the many billions of dollars already being made available to creditors, the viability and success of the proposed reorganization do not hinge on the amount or timing of any potential insurance recoveries.

The Plan in fact allows for the possibility that the Debtors and creditors will recover absolutely nothing on their insurance claims. Under the Plan, up to $450 million of any proceeds recovered by the MDT pursuant to the Debtors' insurance policies will be disbursed by the MDT to the PI Trust for the benefit of personal injury claimants. Dkt. No. 2487, Plan, Section 5.2(d)(i)(D). But even if there are no insurance recoveries, the PI Trust is entitled to $400 million from the MDT generated from other sources, paid in scheduled installments at one-year intervals, from July 20, 2024 to July 20, 2026. *Id.*, Section 5.2(d)(i)(D). The effectiveness of the Plan is not made contingent on the amount or timing of insurance recoveries in any way, and the Disclosure Statement omits any discussion of insurance recoveries from its long list of potential risks to be considered prior to voting on the Plan. *See* Dkt. No. 2488, Disclosure Statement, at 180-88. Thus, the Debtors' proposed Plan itself belies the Complaint's assertion that potential insurance recoveries are such a substantial asset that their resolution would affect the "function of allocating and distributing" the Debtors' assets among creditors. *See* Adversary Complaint ¶ 51.

The Complaint also asserts that the adversary proceeding is core because "the proceeds from the disputed insurance coverage are, collectively, a very substantial asset of the Debtors' estates." *Id*. Even if this were true, it is irrelevant. It is well-established that claims are not transformed into core claims simply because they could affect the quantum of funds available to the estate. *See*, *e.g.*, *Mt. McKinley Ins. Co.*, 399 F.3d at 449-50 (simply affecting assets of the estate is not sufficient to directly affect a core bankruptcy function); *DeWitt Rehab. & Nursing Ctr.*, 464 B.R. at 592 (although an insurance coverage dispute involved assets of the estate, it was not core because policies were not the only source of funds available to the estate and resolution was not necessary to effectuate equitable distribution of funds among other creditors); *In re Lenders Abstract & Settlement Serv. Inc.*, 493 B.R. 385, 394 (E.D.N.Y. 2013) (action to recover insurance proceeds is not rendered core "simply because it involves property of the estate") (quoting *U.S. Lines*, 197 F.3d at 637); *In re John A. Rocco Co.*, No. 12-01277 (NLW), 2015 WL 1727474, at *6 (Bankr. D.N.J. Apr. 13, 2015) ("While the coverage determination will certainly impact the distribution ultimately received by creditors, it is well established that a claim's potential ability to bring in assets to the estate is not relevant to the core determination."); *In re Donington, Karcher, Salmond, Ronan & Rainone, P.A.*, 194 B.R. 750, 759 (D.N.J. 1996) (a proceeding is not core "merely because the resolution of the action results in more, or less, assets in the estate") (quotations omitted); *In re Stone & Webster, Inc.*, 367 B.R. 523, 527 (Bankr. D. Del. 2007) ("The economic effect that a claim may have on the bankruptcy estate . . . has no bearing on the core/non-core dichotomy.").

On the contrary, where, as here, "the insurance proceeds would only augment the assets of the estate for general distribution, the effect on the administration of the estate [is] insufficient to render the proceedings core." *U.S. Lines*, 197 F.3d at 638; *see also Orion*, 4 F.3d at 1102 (any contract action to recover funds could presumably benefit the estate and "thus concern its administration," but that does not make such an action a core proceeding); *MF Global*, 571 B.R. at 94-95 (potential augmentation of estate by insurance policy proceeds was insufficient to make coverage dispute core); *Little Rest Twelve, Inc. v. Visan*, 458 B.R. 44, 55 (S.D.N.Y. 2011) (action involving debtor and non-creditor in which "'the only relationship . . . to the bankruptcy proceeding [is] that determination of the action would affect the ultimate size of the estate' is not a core proceeding") (citation omitted); *In re Lawrence Grp., Inc.*, 285 B.R. 784, 787 (N.D.N.Y. 2002) ("policy would serve only to augment the assets of the estate for general distribution" and thus insurance coverage dispute was non-core).

This action thus stands in stark contrast to *U.S. Lines*, where proceeds under the insurance policies were the only source of funding to pay claimants, and the debtor had no assets with which to pay claims and then seek reimbursement. Multiple courts that have considered *U.S. Lines* have distinguished it on that very basis. In *Century 21*, *MF Global* and *ResCap*, each court emphasized that the insurance policies in *U.S. Lines* "represent[ed] the only potential source of cash available" to certain creditors. *Century 21*, Tr. at 21-22; *MF Global*, 571 B.R. at 95; *ResCap*, 563 B.R. at 772. As Judge Glenn explained in *MF Global*, the estate in that case had other assets (just as the Debtors here have billions of dollars available apart from insurance), and the insurance policy at issue was not the sole source of recovery for any creditor group (just as is the case here). *MF Global*, 571 B.R. at 95.

ResCap and *MF Global* are directly on point. In *ResCap*, representatives of the underlying claimants and the bankruptcy trustee brought an adversarial proceeding against certain insurers under contracts with mandatory arbitration provisions. Judge Lane noted that the claims related entirely to pre-petition contracts, and the allegation that the claims arose post-petition did not affect their non-core nature. He further explained that the claims were non-core because the Bankruptcy

Court was not "uniquely able to interpret and enforce" the provisions of the insurance policies at issue. 563 B.R. at 773 (citing *MBNA*, 436 F.3d at 109). Judge Lane also rejected the argument, made by plaintiffs here, that permitting arbitration would lead to piecemeal litigation. *See* Adversary Complaint ¶ 51; *ResCap*, 563 B.R. at 766-67 ("The Supreme Court has held that the Arbitration Act requires courts to 'compel arbitration of pendant arbitrable claims when one of the parties files a motion to compel' even when doing so would create 'separate proceedings in different forums.'") (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985)). Debtors agreed to arbitrate knowing there could be disputes with their different insurers. They cannot walk away from those agreements because of any purported inconvenience to them.

In *MF Global*, Judge Glenn stayed an adversarial coverage action based on an arbitration provision substantially identical to most of the arbitration provisions at issue here. 571 B.R. at 96-97. The Court determined that the parties had agreed to arbitrate, and that the arbitration provisions in the Bermuda policies at issue were broad. *Id.* at 90-91. The Court then concluded that the coverage dispute had "almost none of the hallmarks of a typical substantively core claim" as it was "entirely 'based on the parties' pre-petition relationship," and the Plaintiffs were not asserting the claim based on any "rights created under the Bankruptcy Code." *Id*. at 96 (citing *Hagerstown*, 277 B.R. at 203). The Court expressly rejected an argument that the coverage case was "a 'core' proceeding because the adjudication of this coverage dispute will have a significant bearing on the availability of estate assets." *Id*. at 94. The Court held that sending the dispute to arbitration would not conflict with the Bankruptcy Code, and ordered the parties to arbitrate. *Id.* at 96-97.

In another very recent decision of this Court concerning non-insurance contract claims, Judge Chapman granted defendants' motion for abstention and remanded an adversary proceeding to New York State Court. *Century 21*, Tr. at 36. The Court found that the adversary proceeding concerned a "prepetition contract dispute that exists independent of the bankruptcy process" and the state law breach of contract claim "neither arises in the debtor's Chapter 11 case, nor arises under the Bankruptcy Code." *Id*. at 23. Therefore, the Court held that the action was a non-core proceeding. *Id*. at 25-26.

Many other courts that have addressed the issue have held that insurance coverage actions are not core proceedings. *See, e.g., Mt. McKinley Ins. Co. v. Corning Inc.*, 399 F.3d 436, 450 (2d Cir. 2005) (adversary proceeding seeking declaratory judgment under insurance policy was non-core); *DeWitt Rehab. & Nursing Ctr. v. Columbia Cas. Co.*, 464 B.R. 587 (S.D.N.Y. 2012) (same); *In re Stone*, 367 B.R. at 527 (same); *Maryland Casualty Co. v. Aselco, Inc.*, 223 B.R. 217, 220 (D. Kan. 1998) (same); *In re Gulf USA Corp.*, Nos. 95-6039, 93-02987, 1995 WL 653383, *1 (Bankr. D. Idaho Oct. 25, 1995) (same); *In re R.I. Lithograph Corp.*, 60 B.R. 199, 203-04 (Bankr. D. R.I. 1986) (adversary proceeding asserting breach of contract claim under insurance policy was non-core); *In re Lawrence Grp., Inc.*, 285 B.R. at 787 (same); *In re Dayton Title Agency, Inc.*, 264 B.R. 880, 884 (Bankr. S.D. Ohio 2000) (adversary proceeding asserting breach of contract, breach of fiduciary duty, and tortious bad faith was non-core).

In short, this adversary proceeding offers the Court no reason to override the FAA and the strong federal policy favoring the enforcement of agreements to arbitrate. Regardless of the merits of Plaintiffs' claims against the Arbitration Insurers, they are not core bankruptcy claims: they are antecedent to the reorganization; they do not rest on bankruptcy law; and they exist independent of the Debtors' reorganization. The Court therefore should enforce the arbitration agreements in the Arbitration Policies, and stay this non-core adversary proceeding against the Arbitration Insurers in favor of arbitration.

CONCLUSION

For the foregoing reasons, the Arbitration Insurers respectfully request that the Court stay the claims against them in adversary proceeding in favor of arbitration, and grant such other and further relief as may be just and proper.

Dated: New York, New York
April 5, 2021

COUNSEL FOR ARBITRATION INSURERS

WILLKIE FARR & GALLAGHER LLP

/s/ *Mitchell J. Auslander*

Mitchell J. Auslander
Willkie Farr & Gallagher LLP
787 Seventh Avenue
New York, NY 10019-6099
(212) 728-8201
mauslander@willkie.com

Joseph G. Davis (*pro hac vice* pending)
1875 K. Street, NW
Washington, DC 20006-1238
(202) 303-1131
jdavis@willkie.com

Counsel for Defendants AIG Specialty Insurance Company, American International Reinsurance Company, and New Hampshire Insurance Company

ABRAMS, GORELICK, FRIEDMAN & JACOBSON, LLP

/s/ *Michael E. Gorelick*

Michael E. Gorelick
Thomas R. Maeglin
Abrams, Gorelick, Friedman & Jacobson, LLP
1 Battery Park Plaza (4th floor)
New York, NY 10004
(212) 422-1200
mgorelick@agfjlaw.com
tmaeglin@agfjlaw.com

Counsel for Defendant Liberty Mutual Insurance Europe S.E.

BATESCAREY LLP

/s/ *Kent A. Wilson*
Kent A. Wilson
Adam H. Fleischer
R. Patrick Bedell
Kristi S. Nolley
BatesCarey LLP
Suite 2400
191 N. Upper Wacker Drive
Chicago, Illinois 60606
312-762-3100
kwilson@batescarey.com

Counsel for Defendants Chubb European Group SE (formerly ACE Insurance S.A.-N.V.), QBE UK Limited (formerly QBE International Insurance Company Limited), SR International Business Company SE (formerly SR International Business Insurance Company Limited), Darag Insurance UK Limited (formerly The Underwriter Insurance Company Limited), Zurich Specialties London Limited (formerly Zurich Reinsurance (London) Limited)

-- and ---

HURWITZ & FINE

Dan D. Kohane
Lee Siegel
Hurwitz & Fine
1200 Liberty Building
Buffalo, New York 14202
(716) 849-8900

IFRAH PLLC

/s/ *George R. Calhoun, V*
George R. Calhoun, V (*pro hac vice*)
IFRAH PLLC
1717 Pennsylvania Avenue NW
Suite 650
Washington, DC 20006-2004
(202) 524-4140 – Tel.
(202) 524-4141 – Fax
george@ifrahlaw.com

Counsel for Defendants Ironshore Specialty Insurance Company, formerly known as TIG Specialty Insurance Company, and Allied World Assurance Company, Ltd.

MORRISON MAHONEY, LLP

/s/ *Arthur J. Liederman*
Arthur J. Liederman
Nicole Battisti
Nicole Khalouian
Morrison Mahoney, LLP
88 Pine Street
New York, NY 10005
(212) 825-1212

Counsel for Defendant HDI Global SE / HDI Global SE – UK as successor to Gerling Konzern General Insurance Company UK Branch

CLYDE & CO US LLP

/s/ *Paul R. Koepff*
Paul R. Koepff
Harris Wiener
Clyde & Co US LLP
The Chrysler Building
405 Lexington Ave., 16th Floor
New York, NY 10174
(212) 710-3900

--- and ---

O'MELVENY & MYERS LLP

Tancred Schiavoni
Maria DiConza
O'Melveny & Myers LLP
Times Square Tower
7 Times Square
New York, NU 10036
(212) 326-2000

Counsel for Defendant
Arch Reinsurance Ltd

DENTONS US LLP

/s/ *Lauren Macksoud*

Lauren Macksoud
Dentons US LLP
1221 Avenue of the Americas
New York, New York 10020
(212) 768-5347

Patrick Maxcy (*pro hac vice* pending)
Keith Moskowitz (*pro hac vice* pending)
Dentons US LLP
233 South Wacker Drive
Suite 5900
Chicago, IL 60606-6361
(312) 876-2810

--- and ---

KENNEDYS

Richard Geddes
Kennedys
100 N Riverside Plaza, Suite 2100
Chicago, IL 60606
(312) 800-5036

Counsel for Defendant
XL Bermuda Ltd.

CLYDE & CO US LLP

/s/ *Daren McNally*
Daren McNally
Barbara Almeida
Harris Wiener
Matthew Gennaro
Clyde & Co US LLP
The Chrysler Building
405 Lexington Ave., 16th Floor
New York, NY 10174
(212) 710-3900

--- and ---

O'MELVENY & MYERS LLP

Tancred Schiavoni
Maria DiConza
O'Melveny & Myers LLP
Times Square Tower
7 Times Square
New York, NY 10036
(212) 326-2000

Counsel for Chubb Bermuda Insurance Ltd

NICOLAIDES FINK THORPE MICHAELIDES SULLIVAN LLP

/s/ *Monica T. Sullivan*
Monica T. Sullivan
Nicolaides Fink Thorpe Michaelides
Sullivan LLP
10 S. Wacker Drive
Suite 2100
Chicago, Illinois 60606
(312) 585-1400

Jodi S. Green
Nicolaides Fink Thorpe Michaelides
Sullivan LLP
626 Wilshire Blvd., Suite 1000
Los Angeles, California 90049
(213) 402-1248

--- and ---

GEOFFREY T. RAICHT, PC

Geoffrey T. Raicht
Geoffrey T. Raicht, PC
1 Kittle Road
Chappaqua, New York 10514
(917) 344-0036

Counsel for Defendant Evanston Insurance Company

Exhibit A

to MEMORANDUM OF LAW IN SUPPORT OF THE
ARBITRATION INSURERS' JOINT MOTION TO STAY THE CLAIMS AGAINST THEM
IN THE ADVERSARY PROCEEDING IN FAVOR OF ARBITRATION

Chart of Arbitration Provisions

Defendant Insurer	Policy Numbers	Arbitration Provisions – Key Language
AIG Specialty Insurance Company (successor to American International Specialty Lines Insurance Company)	267-47-08	"In the event of a disagreement as to the interpretation of this policy, the disagreement shall be submitted to binding arbitration before a panel of three (3) arbitrators. within thirty (30) days of a written request for arbitration by either you or us, each party will choose an arbitrator, such arbitrator shall, at the request of either party, be selected by the American Arbitration Association in accordance with its rules and procedures." Declaration of Mitchell J. Auslander in Support of Joint Motion to Stay in Favor of Arbitration, Exhibit A.
Allied World Assurance Company, Ltd.	C001210/002 C001210/003 C001210/004 C001210/005	"Any and all disputes arising under or relating to this Policy, including its formation and validity, shall be finally and fully determined in Hamilton, Bermuda under the provision of The Bermuda International Conciliation and Arbitration Act 1993 (exclusive of the Conciliation Part of such Act), as may be amended and supplemented, by a Board composed of three arbitrators to be selected for each controversy as follows: . . . ." Declaration of George R. Calhoun in Support of Joint Motion to Stay in Favor of Arbitration, Exhibits B, C, D, E.
American International Reinsurance Company (successor to Starr Excess Liability Insurance International Limited)	201012	"Any and all disputes arising under or relating to this Policy, including its formation and validity, and whether between the Company and the Insured or any person or entity deriving rights through or asserting rights on behalf of the Insured, shall be finally and fully determined in Bermuda under the provisions of The Bermuda International Conciliation and Arbitration Act 1993 (exclusive of the Conciliation Part of such Act), as may amended and supplemented, by a Board composed of three arbitrators to be selected for each controversy as follows: . . . ." Declaration of Mitchell J. Auslander in Support of Joint Motion to Stay in Favor of Arbitration, Exhibit B.
Arch Reinsurance Ltd.	B4-UFP-03233-01 B4-UFP-03233-02 B4-UFP-03233-03 UFP0018240-00	"Any and all disputes arising under or relating to this Policy, including its formation and validity, and whether between the Company and the Insured or any person or entity deriving rights through or asserting rights on behalf of the Insured, shall be finally and fully determined in London, England under the provisions of the Arbitration Act 1996 and/or any statutory modifications or amendments thereto, for the time being in force, by a Board composed of three arbitrators to be selected for each controversy as follows: . . . ." Declaration of Paul R. Koepff in Support of Joint Motion to Stay in Favor of Arbitration, Exhibits A, B, C, D.

Defendant Insurer	Policy Numbers	Arbitration Provisions – Key Language
Chubb Bermuda Insurance Ltd	PRA-1031/5	"Any dispute, controversy or claim arising out of or relating to this Policy or the breach, termination or invalidity thereof shall be finally and fully determined in London, England under the provisions of the Arbitration Acts of 1950, 1975 and 1979 and/or any statutory modifications or amendments thereto, for the time being in force, by a Board composed of three arbitrators to be selected for each controversy as follows: . . . ." Declaration of Daren McNally in Support of Joint Motion to Stay in Favor of Arbitration, Exhibit A.
Chubb European Group SE (f/k/a ACE Insurance S.A.-N.V.)	823/KE0002108	"Any dispute arising under this Policy shall be finally and fully determined in London, England under the provisions of the English Arbitration Act of 1950, as amended and supplemented by a Board composed of three arbitrators to be selected for each controversy as follows: . . . ." Declaration of Kent A. Wilson in Support of Joint Motion to Stay in Favor of Arbitration, Exhibit E.
Darag Insurance UK Limited (f/k/a The Underwriter Insurance Company)	823/KE0002108	"Any dispute arising under this Policy shall be finally and fully determined in London, England under the provisions of the English Arbitration Act of 1950, as amended and supplemented by a Board composed of three arbitrators to be selected for each controversy as follows: . . . ." Declaration of Kent A. Wilson in Support of Joint Motion to Stay in Favor of Arbitration, Exhibit E.
Evanston Insurance Company	XO-GA-1138-00	"In the event of a disagreement as to the interpretation of this policy, the disagreement shall be submitted to binding arbitration before a panel of three (3) arbitrators. within thirty (30) days of a written request for arbitration by either you or us, each party will choose an arbitrator, such arbitrator shall, at the request of either party, be selected by the American Arbitration Association in accordance with its rules and procedures. . . ." Declaration of Monica T. Sullivan in Support of Joint Motion to Stay in Favor of Arbitration, Exhibits A, B.
HDI Global SE / HDI Global SE – UK (successor to Gerling Konzern General Insurance Company UK Branch)	823/KE9801816 823/KE9801818 823/KE9901926	"Any dispute arising under this Policy shall be finally and fully determined in London, England under the provisions of the English Arbitration Act of 1950, as amended and supplemented by a Board composed of three arbitrators to be selected for each controversy as follows: . . . ." Declaration of Arthur J. Liederman, Esq. in Support of Joint Motion to Stay in Favor of Arbitration, Exhibits A, B, C.
Ironshore Specialty Insurance Company (f/k/a TIG Specialty Insurance Company)	XLX 38822826	"Any dispute arising under this policy shall be finally and fully determined in London, England under the provisions of the English Arbitration Act of 1950, as amended and supplemented, by a Board composed of three arbitrators to be selected for each controversy as follows: . . . ." Declaration of George R. Calhoun in Support of Joint Motion to Stay in Favor of Arbitration, Exhibit A.

Defendant Insurer	Policy Numbers	Arbitration Provisions – Key Language
Liberty Mutual Insurance Europe SE	823/KE9901928	"Any dispute arising under this Policy shall be finally and fully determined in London, England under the provisions of the English Arbitration Act of 1950, as amended and supplemented by a Board composed of three arbitrators to be selected for each controversy as follows: . . . ." Declaration of Michael E. Gorelick in Support of Joint Motion to Stay in Favor of Arbitration, Exhibit A.
New Hampshire Insurance Company	823/KE0002108	"Any dispute arising under this Policy shall be finally and fully determined in London, England under the provisions of the English Arbitration Act of 1950, as amended and supplemented by a Board composed of three arbitrators to be selected for each controversy as follows . . . ." Declaration of Mitchell J. Auslander in Support of Joint Motion to Stay in Favor of Arbitration, Exhibit C.
QBE UK Limited (f/k/a QBE International Insurance Company Limited)	823/KE0002108	"Any dispute arising under this Policy shall be finally and fully determined in London, England under the provisions of the English Arbitration Act of 1950, as amended and supplemented by a Board composed of three arbitrators to be selected for each controversy as follows: . . . ." Declaration of Kent A. Wilson in Support of Joint Motion to Stay in Favor of Arbitration, Exhibit E.
SR International Business Company SE (f/k/a SR International Business Insurance Company Limited)	823/KE9901927 823/KE0002108	"Any dispute arising under this Policy shall be finally and fully determined in London, England under the provisions of the English Arbitration Act of 1950, as amended and supplemented by a Board composed of three arbitrators to be selected for each controversy as follows: . . . ." Declaration of Kent A. Wilson in Support of Joint Motion to Stay in Favor of Arbitration, Exhibits D, E.
XL Bermuda Ltd.	XLUMB-00342	"Any dispute, controversy or claim arising out of or relating to this Policy or the breach, termination or invalidity thereof shall be finally and fully determined in London, England under the provisions of the Arbitration Acts of 1950, 1975, and 1979 and/or any statutory modifications or amendments thereto, for the time being in force, by a Board composed of three arbitrators to be selected for each controversy as follows: . . . ." Declaration of Richard Geddes in Support of Joint Motion to Stay in Favor of Arbitration, Exhibit A.
Zurich Specialties London Limited (f/k/a Zurich Reinsurance (London) Limited)	823/KE9801815 823/KE9801817 823/KE9901925	"Any dispute arising under this Policy shall be finally and fully determined in London, England under the provisions of the English Arbitration Act of 1950, as amended and supplemented by a Board composed of three arbitrators to be selected for each controversy as follows: . . . ." Declaration of Kent A. Wilson in Support of Joint Motion to Stay in Favor of Arbitration, Exhibits A, B, C.

Exhibit B

to MEMORANDUM OF LAW IN SUPPORT OF THE
ARBITRATION INSURERS' JOINT MOTION TO STAY THE CLAIMS AGAINST THEM
IN THE ADVERSARY PROCEEDING IN FAVOR OF ARBITRATION

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 20-12097-scc

Adv. Case No. 20-01222-scc

- x

In the Matter of:

CENTURY 21 DEPARTMENT STORES LLC,

Debtor.

- x

CENTURY 21 DEPARTMENT STORES LLC, et al.,

Plaintiffs,

v.

STARR SURPLUS LINES INSURANCE CO., et al.,

Defendants.

- x

21-07025-rdd Doc 52-1 Filed 04/05/21 Entered 04/05/21 17:14:51 Exhibit A -
Pg 2 of 80

United States Bankruptcy Court
One Bowling Green
New York, NY 10004

February 12, 2021
10:00 AM

B E F O R E :
HON SHELLEY C. CHAPMAN
U.S. BANKRUPTCY JUDGE

ECRO: UNKNOWN

HEARING re Doc #469 First Interim Fee Application of Proskauer Rose LLP, as Counsel to the Debtors

HEARING re Doc #468 First Interim Application of Stretto for Allowance of Compensation

HEARING re Doc #462 Application for Interim Professional Compensation for Lowenstein Sandler LLP, Creditor Comm Aty

HEARING re Doc #513 First Interim Fee Application Of AlixPartners, LLP, Financial Advisor To The Official Committee of Unsecured Creditors

HEARING re Doc #226 Acro Display LLCs Motion for Allowance and Payment of Administrative Expense

HEARING re Adversary proceedings: 20-01222-scc Century 21 Department Stores LLC et al. v. Starr Surplus Lines Insurance CO. et al. Status Conference

Transcribed by: Sonya Ledanski Hyde

20-10702-shl Doc 92-1 Filed 04/05/21 Entered 04/05/21 17:21:55 Exhibit B Pg 4 of 80

A P P E A R A N C E S :

PROSKAUER ROSE LLP
Attorneys for the Debtor
Eleven Times Square
New York, NY 10036

BY: MATTHEW SKRYNSKI (TELEPHONICALLY)
PETER YOUNG (TELEPHONICALLY)

UNITED STATES DEPARTMENT OF JUSTICE
Attorneys for the U.S. Trustee
201 Varick Street, Suite 1006
New York, NY 10014

BY: ANDREA SCHWARTZ (TELEPHONICALLY)

WHITE and WILLIAMS LLP
Attorneys for Acro Display LLC
7 Times Square
New York, NY 10036

BY: JAMES VANDERMARK (TELEPHONICALLY)

20-01025-shl Doc 59-2 Filed 02/16/21 Entered 02/16/21 13:17:55 Exhibit B Pg 5 of 80

WILMER, CUTLER, PICKERING, HALE & DORR LLP

Attorneys for Starr Surplus Lines Insurance Co., et al.

7 World Trade Center, 250 Greenwich Street

New York, NY 10007

BY: PHILIP ANKER (TELEPHONICALLY)

LOWENSTEIN SANDLER LLP

Attorneys for Official Committee of Unsecured Creditors

One Lowenstein Drive

Roseland, NJ 07068

BY: BRENT WEISENBERG (TELEPHONICALLY)

MORGAN, LEWIS & BOCKIUS LLP

Attorneys for JP Morgan Chase Bank, N.A.

One Federal Street

Boston, MA 02110

BY: JULIA FROST-DAVIES (TELEPHONICALLY)

ALSO PRESENT TELEPHONICALLY:

DENISE MARTE

TRACY KLESTADT

BENJAMIN LOVELAND

MATTHEW BURKE

DANIELE SALVATORE

LAUREN LIFLAND

CYNTHIA BERNSTIEL

NICOLE KOZLOWSKI

JEFF MARWIL

BRIAN CASHMAN

JEFFREY COHEN

ROBERT KLAMSER

KATHRYN MCGLYNN

DAVID RILEY

KAITLYN SUNDT

VLADIMIR JELISAVCIC

TAL SINGER

PAUL ADAMS

JOHN JURELLER

ISABELLA STANKOWSKI-BOOKER

JOANNA YOUNG

EZRA HUSNEY

DENNIS T. D’ANTONIO

WILLIAM COONEY

TYLER FLYNN

C. RUSSELL

MICHAEL HYNES

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P R O C E E D I N G S

THE COURT: Good morning, everyone. This is Judge Chapman. We're here this morning in the Century 21 Department Stores cases, Case No. 20-12907. If everybody could please keep your phones on mute until you speak, I would appreciate it. Thank you.

This hearing is being conducted entirely telephonically via the Court Solutions platform and a recording of the hearing is being made. No private recordings of the hearing are permitted.

I have a long roster of those who have registered to participate this morning. I appreciate that we have a number of matters on the calendar this morning. Please identify yourself for the record when you speak and identify the party on whose behalf you're appearing and please do so each time that you speak so that we can create an accurate record.

All right. I did get an amended agenda sometime recently, perhaps early this morning. Who would like to start from the Proskauer firm?

MR. SKRZYNSKI: Good morning, Your Honor. This is Matthew Skrzynski of Proskauer Rose on behalf of the Debtors. That's correct, we sent over an amended agenda this morning to Your Honor; it's found at Docket No. 632, and it reflects updates to the status of discussions on fee applications.

THE COURT: All right, very good.

MR. SKRZYNSKI: Before we proceed -- great.

THE COURT: Go ahead, go ahead.

MR. SKRZYNSKI: Before we get to the agenda, just by way of quick update. As Your Honor may have seen, the debtors filed a plan, a disclosure statement, and a motion to approve solicitation procedures; those are Dockets 614, 615, and 616 respectively.

And if Your Honor is amenable to it, proposing to begin with the agenda then at item 1, and after that, counsel for the adversary proceeding can drop off.

THE COURT: Partially okay, but I'm going to mix it up a little bit. I'd like to take the fee applications first, so that those parties can drop off, particularly in light of the fact that all outstanding issues on those have been resolved. So if could please start with the fee applications and go through those quickly and then I can have those parties drop off, and then I'll turn to the adversary proceeding.

MR. SKRZYNSKI: Sounds good. Thank you, Your Honor. My colleague, Peter Young, will address the fee applications.

THE COURT: All right, thank you. Good morning, Mr. Young.

MR. YOUNG: Good morning, Judge Chapman. Hope you're well.

I'm pleased to report, as Mr. Skrzynski said, that each of the professionals subject to the order that we delivered to chambers this morning, and that includes Proskauer, Stretto, Lowenstein Sandler, and AlixPartners, have reached agreements with the United States Trustee on voluntary write-offs. Those write-offs, Your Honor, are all reflected, both in the numbers and in the footnotes that appear on Schedule A, the official form from the Southern District for approving fee applications.

And unless Your Honor has questions -- and I believe, by the way, to Your Honor's point, that each of the professionals is represented on the call -- we ask that you enter the order approving the fees as reduced by the agreement with the United States Trustees.

THE COURT: In the interest of candor, I have not had time to review the revised order that you submitted. I would be grateful if you could put on the record what the new numbers are; hopefully, you have that at your fingertips.

MR. YOUNG: I do, Your Honor, and I'm happy to do it.

THE COURT: All right.

MR. YOUNG: Your Honor, would you like me to --

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THE COURT: You neglected to mention Weg & Myers.

MR. YOUNG: Yes. I'm sorry, Your Honor, I'm getting a little feedback on the phone. I didn't hear the question.

THE COURT: Yeah, I'm just trying to figure out where that's coming from. If everybody could please keep your phones on mute, other than Mr. Young, that would be great. My question was about Weg & Myers.

MR. YOUNG: Yeah.

THE COURT: When you recited the fee applications, you neglected to mention them. That's before me today as well, yes?

MR. YOUNG: It is not, and I neglected purposefully, Your Honor. Weg & Myers will file its final fee application any day now and set it for hearing. As of the December 30th closing on the insurance participation interest sale, the fees and expenses of Weg & Myer are picked up by the buyer of the insurance claim participation interest, and Weg and Myer will no longer be engaged by the estate.

And so, we'll submit a notice in connection with their final fee application informing the Court and all parties-in-interest in the case of that fact and seek approval of final fees, but they will not be included as an interim fee application party.

THE COURT: Okay. All right, great, that makes a lot of sense. So if you could just run through the other four, I would be grateful.

MR. YOUNG: Certainly, Your Honor, and in doing that, would you like me just to run through what the write-off amounts were or what the actual amounts were all across the chart?

THE COURT: Yeah, just if you could run up what the write-off amounts were, and then I'm just going to ask Ms. Schwartz to confirm that she's in agreement with what you put on the record.

MR. YOUNG: Oh, absolutely, absolutely. Just one moment, Your Honor, I'm happy to do that. Okay.

As reflected on Schedule A in the order that we submitted to chambers to resolve objections that the United States Trustee raised informally: Stretto agreed to voluntarily reduce its fees in the amount of $645; Proskauer agreed to voluntarily reduce its fees in the amount of $43,656.61, and also its expenses in the amount of $1,216.80; Lowenstein Sandler agreed to voluntarily reduce its fees in the amount of $27,000 even; and AlixPartners agreed to voluntarily reduce its fees in the amount of $33,518 even.

Those are the aggregate write-offs, Your Honor.

THE COURT: All right, thank you very much. And, Ms. Schwartz, are you there?

MS. SCHWARTZ: Yes. Good morning, Your Honor. Andrea Schwartz --

THE COURT: Good morning.

MS. SCHWARTZ: -- the United States Trustee. Your Honor, those numbers are correct. All of the professionals took our comments very seriously, and we agree with the proposed reductions and they resolve all of our informal objections.

THE COURT: All right, thank you so much. All right, and thank you, Ms. Schwartz, as always for handling these matters so efficiently. If no one else wishes to be heard, I've reviewed the applications, the reductions sound fine to me. After we conclude this hearing, I'll take a look at the revised order and we'll get it on the docket by the end of today.

All right, thank you very much for that.

MR. YOUNG: Thank you, Your Honor.

THE COURT: And next up -- and I encourage everybody to get a cup of coffee if you would like to get a fresh one -- I'm going to read you a bench decision on the insurer's motion to remand. Fair warning, it's going to take a little while, and I'm going to get started.

All right. Before the Court is a motion to remand filed by the defendants in Adversary Proceeding No. 20-1222, collectively the defendants or the insurers.

By the motion, the defendants request that this Court, one, abstain from hearing the adversary proceeding as required by 28 U.S.C. Section 1334(c)(2); or, two, in the alternative, (a) abstain from hearing the adversary proceeding as permitted by 28 U.S.C. Section 1334(c)(1) or (b), or (b) equitably remand the adversary proceeding to the Supreme Court of the State of New York for the County of New York, the State Court, pursuant to 28 U.S.C. Section 1452(b).

Century 21 Department Stores, LLC, or the debtor, together with certain of its non-debtor affiliate plaintiffs in the action, and joined by the Official Committee of Unsecured Creditors, objects to the motion.

The Court has considered the motion, the declaration filed in support of the motion, the debtors' objection, the committee's joinder, the defendants' reply, and the arguments of counsel at the hearing held before this Court on December 16th, 2020.

In the interest of giving you a disposition today without the additional passage of time, I'm going to read this ruling into the record, but I do retain my right to issue a more formal written decision if that should be appropriate subsequent to delivering this bench decision.

First, let me turn to the background of this adversary. While the Court assumes familiarity with the background of these Chapter 11 cases and with this adversary proceeding, the Court will provide a brief summary of pertinent background facts for the purposes of this bench ruling.

The debtor and several of its non-debtor affiliates are named insured under various insurance policies issued by the defendants. The insurance policies, inter alia, provided property damage-based business interruption coverage for the period from August 1st, 2019 to August 1st, 2020 in the aggregate amount of up the $350 million, subject to the terms, conditions, limitations and exclusions set forth in the insurance policies.

In mid-March 2020, with the onset of the COVID-19 pandemic and the various social distancing orders issued by governmental authorities, the debtor closed its retail locations. The debtor states that it has suffered tremendous losses as a result of the store closures and alleges that the insurers have not honored their obligations under the insurance policies.

On July 8th, 2020, Century 21 Department Stores, LLC and the other plaintiffs filed a Complaint against the insurers in the State Court, hereinafter the insurance actions, alleging that the insurers breached the relevant insurance policies by failing to compensate the plaintiffs for business losses sustained due to the effects of the COVID-19 pandemic between March 2020 and May 31st, 2020. Pursuant to the insurance action, the plaintiffs seek some $175 million in damages.

The debtor and certain of its affiliates filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code on September 10th, 2020. On September 11th, 2020, the debtor removed the insurance action from the State Court State Court to the United States District Court for the Southern District of New York, after which it was transferred to this Court pursuant to the District Court's standing order of reference.

Next, I will provide a summary of the arguments that the parties to the adversary proceeding have advanced. The debtor -- the defendants argue that the insurance action is a prepetition contractual dispute, which should be remanded back to the State Court where the action was filed in July 2020 prior to the petition date. Specifically, the defendants argue that mandatory extension applies here because all of the elements of the statutory test have been met; essentially, that the action is based on non-core state law claims that can be timely adjudicated in the State Court.

Alternatively, defendants submit that even if this Court is not required to abstain from hearing the insurance action, this Court should nonetheless elect to abstain or equitably remand the action back to the State Court pursuant to Section 1334(c)(1) or Section 1452(b) of Title 28, based on the same factors that compel mandatory abstention, as well as the predominance of state law issues in the insurance action and its, quote/unquote, "tenuous at best connection to the debtors' Chapter 11 case."

The debtor and the non-debtor plaintiffs oppose the motion. They argue that mandatory abstention is not required, and that permissive abstention is not warranted. With respect to mandatory abstention, they assert that the insurance action is a core proceeding which renders mandatory extension inapplicable. Even assuming the insurance action is not a core proceedings, plaintiffs argue that the State Court cannot timely adjudicate the insurance action in conjunction with the administration of the debtors' bankruptcy estates in this Court, and as such, mandatory extension would be improper.

With respect to permissive abstention, the plaintiffs argue that it is, quote/unquote, "undeniable that this Court is more competent to adjudicate the insurance flaw issues presented and that the State Court has no advantage over this Court since the State Court has not yet determined which state's laws apply to the claims in the insurance action." Plaintiffs request that the motion be

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denied, and that the insurance action remain before this Court.

I'll now go through the law with respect to mandatory abstention. Pursuant to Section 1334(c)(2) of Title 28, Bankruptcy Courts must abstain from hearing an action when, quote: (1) the motion to abstain was timely; (2) the action is based on a state law claim; (3) the action is related to but not arising in a bankruptcy case or arising under the Bankruptcy Code; (4) Section 1334 provides the sole basis for federal jurisdiction; (5) the action is commenced in State Court; and (6) the action can be timely adjudicated in State Court. See 28 U.S.C. Section 1334(c)(2), In re. AOG Entertainment, Inc., 569 B.R. 563 at 572 (Bankr. S.D.N.Y. 2017).

It is the opposing party's burden to show that mandatory abstention should not apply. See Multibank, Inc. v. Access Global Capital, LLC, 594 B.R. 618, 629 (Bankr. S.D.N.Y. 2018). Quote, "In determining whether to abstain, if the Court finds that any element of the test has not been satisfied, then it must find that mandatory abstention is improper." Smith v. McClesky, In re. Bay Vista of Virginia, Inc., 394 B.R. 820 at 833 (Bankr. E.D. of Va. 2008).

Mandatory abstention, thus, is only required if the Court finds that all six elements of Section 1334(c)(2) are satisfied. There is little disagreement among the parties regarding four of the six elements, specifically that: (1) the motion to abstain was timely filed; (2) the action is based on a state law claim; (3) Section 1334 provides the sole basis for federal jurisdiction; and (4) the action was commenced in State Court.

Principally in dispute here are the third and sixth elements of Section 1334(c)(2), to wit, whether the action is related to but not arising in a bankruptcy case or arising under the Bankruptcy Code, and whether the action can be timely adjudicated in State Court. Accordingly, if the Court finds that, one, the insurance action is related to but not arising in the debtors' bankruptcy case and the insurance action can be timely adjudicated in the State Court, then Section 1334(c)(2) by its terms requires the Court to abstain from hearing the insurance action.

First, I will address the issue of whether the insurance action is related to but not arising in the bankruptcy case or arising under the Bankruptcy Code.

Section 157(b)(1) of Title 28 provides that, quote, "Bankruptcy judges may hear and determine all cases under Title 11 and all core proceedings arising under Title 11 or arising in a case under Title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments subject to review under Section 158 of this title."

Section 157 distinguishes core proceedings from non-core proceedings, which the Bankruptcy Court may hear, but for which the Bankruptcy Court is only empowered to submit proposed findings of fact and conclusions of law to the District Court for de novo review. See Orion Pictures Corporation v. Showtime Networks, In re. Orion Pictures Corp., 4 F.3d 1095, 1100 to 1101, (2d Cir. 1993).

Abstention is only mandated with respect to non-core matters, matters that are related to but do not arise in a bankruptcy case or arise under the Bankruptcy Code. In re. Petrie Retail, 304 F.3d, 223 at 231 (2d Cir. 2002).

Section 157(b)(2) provides a non-exhaustive list of core proceedings, including: (a) matters concerning the administration of the estate; and (o) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor relationship.

In assessing whether an adversary proceeding involved in a contract dispute is a core proceeding, Courts consider: (1) whether the contract is antecedent to the reorganization petition, and (2) the degree to which the proceeding is independent of the reorganization. In re. DPH Holdings Corporation, 448 F.App'x 134 at 136 (2d Cir. 2011). The Second Circuit has stated that a proceeding may be core if the proceeding is, quote, "unique to or uniquely affected by the bankruptcy proceeding," end quote, or the proceeding, quote, "directly affects a core bankruptcy function," end quote. In re. Petrie Retail, 304 F.3d at 229.

The debtors argue that the insurance action is a core proceeding because, quote, "proceeds of the insurance action are the largest asset in the debtors' estates and an integral part of any type of resolution of the debtors' Chapter 11 cases." The value of the insurance action is crucial to a successful outcome in Chapter 11 cases since it will pay the secured lenders' deficiency claims and provide a portion of the recovery to the unsecured creditors. Opposition brief at paragraph 24.

The insurers disagree stating that, quote, "The mere assertion that an action would affect the ultimate size of the estate does not establish core jurisdiction." Motion at paragraph 30, citing Orion Pictures v. Showtime Networks. Specifically, the insurers submit that courts in this district have repeatedly held that insurance coverage disputes, such as the insurance action, are non-core matters. Opposition brief at paragraphs 28 to 31.

In Orion, the Second Circuit held that where the outcome of a prepetition contract dispute would only augment the assets of the estate for general distribution, the effect on the administration of the estate was insufficient to render the proceedings core. Orion, 4 F.3d at 1102. Stated differently, an action is not a core proceeding where the action's only relationship to the bankruptcy case is that a recovery in such action would result in augmentation of the bankruptcy estate. See Little Rest Twelve, Inc. v. Visan, 458 B.R. 44 at 55 (S.D.N.Y. 2011).

The debtor and the committee argue that Orion is distinguishable and that the Second Circuit's holding in United States Lines v. American SS Owners' Mutual Protection and Indemnity Association, In re. U.S. Lines, 197 F.3d 631 (2d Cir. 1999) supports a finding that, in circumstances such as those present here, a dispute regarding a prepetition insurance claim can be a core matter.

The insurers respond that the Second Circuit's holding in U.S. Lines was a narrow one with facts readily distinguishable from those here. As such, they argue the holding in U.S. Lines does not mandate a finding here that the insurance action is a core proceeding.

The Court agrees with the insurers. In U.S. Lines, the Second Circuit determined that a dispute relating to prepetition insurance contracts was a core proceeding, nothing that, quote, "resolving disputes relating to major insurance contracts are bound to have a significant impact on the administration of the estate." In re. U.S. Lines, 197 F.3d at 638.

In contrast to the interest case, however, U.S. Lines involved a third-party indemnity policy where the insurance proceeds were, quote, "almost entirely earmarked for paying the personal injury claimants and represented the only potential source of cash available to that group of creditors." Id at 637.

The insurance policies at issue in U.S. Lines contained so-called pay first provisions that conditioned recovery on the policies on the allowance and payment of personal injury claims by the debtors, which payment required the use of estate funds. The Second Circuit found that under those circumstances, a declaratory judgment was warranted in order to determine, among other things, when the insurers' coverage obligations were triggered, and that such determination was a core proceeding because it directly impacted the Bankruptcy Court's core administrative function of asset allocation among creditors. Id at 638, 639.

Here, the insurance coverage at issue and the related facts are entirely distinguishable from U.S. Lines and do not involve issues of equitable distribution among creditors. Instead, any potential recovery in the insurance action would only augment the debtors' estate for general distribution. Funds recovered are not earmarked for specific creditors.

The Court finds that the insurance action falls under the Court's related-to jurisdiction. It is a prepetition contract dispute that exists independent of the bankruptcy process. The fact that some recovery in dispute may flow to the bankruptcy estate is insufficient to render it a core proceeding. The insurance action, a state law breach of contract claim, could have and indeed was asserted outside of the bankruptcy case and neither arises in the debtors' Chapter 11 case, nor arises under the Bankruptcy Code.

In addition, developments in the debtors' Chapter 11 cases after the motion was fully briefed compel the conclusion that resolution of the insurance action will have even less of an impact on the administration of the debtors' estates than originally argued by the debtor because the debtor has monetized its claims against the insurers.

On December 11, 2020, the debtors filed a motion, the sale motion, for an order authorizing and approving, (1) the sale of the debtors' interest in the insurance action, the sale, and (2) the settlement of claims by and between the debtors and the committee on the one hand and certain of the debtors' affiliates and equity holders, collectively defined in the sale motion as the Gindi parties; see Docket No. 324.

The sale motion was approved by this Court by order dated December 28th, 2020. The sale documents memorializing the terms of the sale provide, inter alia, for the Gindi parties purchase of the debtors' interest in the insurance action for $59 million in cash, which amount the Court understands has already been paid to the estate. Only if the outcome of the insurance action results in a total recovery to the plaintiffs in excess of a $75 million threshold will any additional recovery inure to the debtor, and such amounts would only be 10 percent of any total recovery over such threshold.

In support of their request for authority to enter into the sale documents, the debtors stated, quote, "that they continue to believe that a sale of the insurance action now is in the best interest of the debtors' estates in that it: (a) maximizes the value of a contingent asset; (b) provides means to satisfy the ABL facility and other secured debts in full; (c) provides means to satisfy Chapter 11 administrative expenses and priority claims in full; and (d) provides an immediate and meaningful distribution to the debtors' general unsecured creditors, while at the same time, preserving their ability without risk to the debtors to receive additional consideration through the proceeds sharing if the proceeds of the insurance action exceed a threshold." Sale motion at paragraph 34.

Now that the Court has approved the sale, the bulk of any recovery from the insurance action will inure to the benefit of the non-debtors who own and control the action going forward. As such, the debtors' argument that the

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insurance action is a core proceeding because resolution of the insurance action would monetize the debtors' largest asset, i.e., the insurance claim, and thus augment the debtors' estates rings somewhat hollow. Instead, the effect on the administration of the debtors' estate, if any, will be significant less than originally anticipated at the time of removal of the insurance action to this Court and may indeed be nothing at all.

During oral argument at the hearing on December 16th, 2020, in connection with the Court's approval of the sale, debtors' counsel conceded that even assuming recovery of the full proof of loss in the insurance action of $175 million and leaving aside interest and damages for the alleged breach of the covenant of good faith, any additional potential recovery to the debtors' estate would likely reach a maximum of $10 million. December 16th, 2020 hearing transcript at page 20, lines 4 to 9.

Accordingly, because resolution of the insurance action, a prepetition contract action, based on state law and existing independent of the debtors' bankruptcy proceedings would only increase the assets of the debtors' estate for general distribution and does not implicate any core bankruptcy function.

This Court finds that the insurance action is a non-core proceeding over which this Court has related-to

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jurisdiction.

I'm going to pause for a moment. I'm about two-thirds of the way there. I'll be back in a moment.

(Pause)

THE COURT: Okay. I'm going to continue. Next, the Court will address the issue of timely adjudication, whether the insurance action can timely be adjudicated in the State Court within the meaning of Section 1334(c)(2) of Title 28.

In evaluating timely adjudication, Courts in this circuit considering the following four factors as set forth in Parmalat Capital Finance v. Bank of America, 639 F.3d 572 at 580 (2d Cir. 2011): (1) the backlog of the State Court's calendar relative to the Federal Court's calendar; (2) the complexity of the issues presented and the respective expertise of each forum; (3) the status of the relevant bankruptcy proceeding; and (4) whether the State Court proceeding would prolong the administration of the estate.

Timeliness is informed, but not determined, by speed. The Second Circuit has held that the inquiry, quote, "does not turn exclusively on whether an action could be adjudicated most quickly in State Court. It is, however, informed by the comparative speeds of adjudication in the federal and state forums." Parmalat v. Bank of America, 671 F.3d at 266.

Similarly, the Third Circuit has held that, quote, "The question is not whether the action will be more quickly adjudicated in the Bankruptcy Court than in State Court, but rather whether the action can be timely adjudicated in the State Court." In re. XI Technologies, 544 F.3d 196 at 218 (3d Cir. 2008).

The party opposing remand bears the burden of demonstrating that the State Court cannot adjudicate the claims in a timely manner. See BGC Partners, Inc. v. Avison Young (Canada) 919 F. Supp. 2d 310 at 319, Note 66 (S.D.N.Y. 2013).

The debtors argue that the State Court faces a significantly larger backlog in its calendar relative to this Court's calendar, and that remand of the insurance action to the State Court would prolong the administration of the debtors' estates. The debtors emphasize the, quote, "progress made in this Court over the past two months" compared to the, quote, "inactivity during the prior two months in the State Court and advocate for a one-stop-shop resolution of the debtors' bankruptcy proceedings and the insurance action in this Court." Opposition brief at paragraphs 47 and 53; December 16th, 2020 hearing transcript, page 28, lines 2 to 6.

In contrast, the insurers argue that the debtors' emphasis on the faster forum is misplaced, and that the

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importance of whether the State Court can timely adjudicate the action, quote, "is diminished in a liquidation scenario," such as here, where there is, quote, "no administrative urgency in play." See insurers reply at paragraph 40 to 42.

The Court has considered the Parmalat factors and finds that: (1) the debtors have failed to demonstrate that the State Court cannot timely adjudicate the insurance action; and (2) the timeliness inquiry supports mandatory abstention here. As the insurers point out, timely adjudication does not necessarily mean the faster forum.

The District Court has noted that a State Court may be a timely forum even if it requires longer to adjudicate an action than a Federal Court, as long as the relevant bankruptcy proceedings will not be hindered by the relative delay. Post Investors, LLC v. Gribble, 2012 WL 4466619, *5 (S.D.N.Y. Sept. 27, 2012).

With respect to the relative background of State and Federal Court calendars, the Court acknowledges that the COVID-19 pandemic has presented uncertainty for both State and Federal Courts, and the Court makes no finding regarding which Court would more swiftly adjudicate the insurance action. While the debtors point to the activity in the early months of the debtors' Chapter 11 cases, it bears noting that the debtors fail to acknowledge the burgeoning docket of the Bankruptcy Court and make no assumption about the ability of this Court to resolve the insurance action with greater speed than the State Court.

With respect to the complexity of the issues presented and the relative expertise of each forum, this factor also does not weigh heavily because both this Court and the State Court are fully capable of adjudicating the state law breach of contract claims at issue in the insurance action. Instead, the Court will focus on whether any delay would prolong the administration of the debtors' Chapter 11 cases.

The Court finds that the administration of the debtors' cases will not be lengthened by remand of the insurance action for several reasons: first, the debtors are selling their assets and informed the Court that they will be filing, and indeed have filed, a plan of liquidation. As such, the absence of the more traditional melting ice cube concerns typically found in a reorganization case undercuts the debtors' claimed need for a speedy adjudication of the insurance action.

The timeliness required, as the insurers note, can be, quote, "weighed relatively lightly in a liquidation scenario" when there is no, quote, "administrative urgency or plan of reorganization to facilitate." Worldview Entertainment Holdings v. Woodrow, 611 B.R. 10 at 19

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(S.D.N.Y. 2019).

Further, as already discussed, the debtors have sold their underlying claims in the insurance action, the results that nearly -- that all or nearly all of the recoveries obtained by plaintiffs in the insurance action will inure to the benefit of the Gindi parties and not to the debtors' estate. Thus, the sale further diminishes: (1) the debtors' asserted connection between their bankruptcy estates and the state law claims in the insurance action; and (2) the debtors' claimed need for quick resolution of the insurance action in order to timely administer their Chapter 11 cases.

Moreover, the debtors' retention of upside potential in the event that proceeds from the insurance action exceed $75 million will not interfere with the administrative of and future closure of the debtors' cases when warranted. As highlighted by counsel to the insurers during oral argument, by the sale documents, the debtors provided for the possibility that a plan of liquidation may be confirmed in the Chapter 11 cases prior to resolution of the insurance action; specifically, Section 8(a) of the participation agreement for the sale of the debtors' interest in the insurance action, which section is entitled, assignment after emergence from bankruptcy, specifically provides for the transfer of the insurance action to a post-emergence litigation trust in the event of the closure of the debtors' Chapter 11 case. See December 16th, 2020 hearing transcript, page 31, lines 10 to 32, citing to Section 8(a) of the participation agreement, which was annexed as Exhibit 1 to Exhibit A to the sale motion filed at Docket No. 324.

Simply put, resolution and, indeed, closure of the debtors' bankruptcy cases no longer depends on resolution of the insurance action. Accordingly, the Court concludes that the State Court can timely adjudicate the insurance action within the meaning of Section 1334(c)(2) of Title 28.

With respect to the remaining four factors under Section 1334(c)(2), the parties do not dispute they are satisfied here. Accordingly, for all the foregoing reason, the Court concludes that each of the requirements under Section 1334(c)(2) for mandatory abstention has been met and will remand the insurance action to the State Court.

Taking a breath before I turn to permissive abstention.

All right. While the foregoing ruling ends the inquiry, the Court will nonetheless discuss the insurers request for permissive abstention or equitable remand, assuming arguendo that mandatory abstention is not required.

Section 1334(c)(1) of Title 28 provides that nothing prevents a Court, quote, "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. Section 1334(c)(1).

Similarly, under Section 1452(b) of Title 28, the Court, quote, "may remand such claim or cause of action on any equitable ground." 28 U.S.C. Section 1452(b). Courts employ the same tests for permissive abstention and equitable remand. See CAMO-FI Master LDC v. U.S. Coal Corp., 527 B.R. 138 at 143 (S.D.N.Y. 2015).

In determining whether to permissively abstain, courts consider numerous factors, including: (1) the effect or lack thereof on the efficient administration of the estate if a Court recommends abstention; (2) the extent to which state law issues predominate over bankruptcy issues; (3) the difficulty or unsettled nature of the applicable law; (4) the presence of a related proceeding commenced in state court or other non-bankruptcy court; (5) the jurisdictional basis, if any, other than 28 U.S.C. Section 1334; (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case; (7) the substance, rather than form, of an asserted core proceeding; (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in State Court with enforcement left to the Bankruptcy Court; (9) the burden on the Court's docket; (10) the likelihood that the commencement of the proceeding in a Bankruptcy Court involves forum shopping by one of the parties; (11) the existence of a right to jury trial; and (12) the presence in the proceeding of non-debtor parties. See Deutsche Oel & Gas settlement agreement v. Energy Capital Partners Mezzanine Opportunities Fund A, LP, 2020 WL 5814233 at *12 (S.D.N.Y. Sept. 30, 2020).

In essence, courts have a compelling reason to permissively abstain when the relevant state action, quote, "sounds in state law and bears a limited connection to the debtors' bankruptcy case." Channel Bell Associates v. W.R. Grace, 1992 WL 232085 at *8 (S.D.N.Y. Aug. 31, 1992).

Courts have held that the, "more substantial factors to consider in determining whether to abstain from hearing an action are: (1) the effect on the administration of the estate; (2) whether the claim involves only state law issues; and (3) whether the proceeding is core or non-core." See Fruit of the Loom v. Magnetek, 407 B.R. 593 at 600 (Bankr. D. Del. 2009).

The decision whether or not to abstain is within the Bankruptcy Court's sound discretion. In re. Nasser, 2020 WL 5985427 at *3 (Bankr. E.D.N.Y. Oct. 8, 2020). The movant has the burden of showing that permissive abstention is appropriate. In re. Tronox, 603 B.R. 712 at 726 (Bankr.

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S.D.N.Y. 2019).

Assuming arguendo that mandatory abstention is not required here, after considering each of the factors identified by the District Court in Deutsche Oel & Gas, the Court finds that an overwhelming majority of such factors weigh in favor of permissive abstention and remanding the insurance action to the State Court.

Specifically, the Court has focused on certain factors identified as more substantial by the Bankruptcy Court for the District of Delaware in Fruit of the Loom: the effect on the administration of the estate if the Court recommends abstention; whether the claim involves only state law issues or to the extent to which state law issues predominate; and whether the proceeding is core or non-core.

The Court has also considered the degree of relatedness or remoteness of the proceeding to the main bankruptcy case as highly relevant here.

With respect to the affect remand would have on the efficient administration of the estates, the debtors argue that adjudication in this Court would facilitate the efficient administration of the debtors' estate, and I quote, "distributions to general unsecured creditors hinge, at least in part, on the resolution of the insurance action as the insurance action is the largest asset to be monetized in order to pay distributions to unsecured creditors."

Opposition brief at paragraph 65. However, as previously noted, that is simply no longer the case.

Following the hearing on the motion to remand, the Court approved the sale of the debtors' interest in the insurance action and that sale has now closed. The debtors have monetized this asset and payment for the asset has been made to the estate. Distribution to general unsecured creditors no longer largely hinges on the resolution of the insurance action; in fact, the resolution of the insurance action may have little impact on the administration of the debtors' estate.

Second, regarding the extent to which state law issues predominate over bankruptcy issues, this factor heavily support permissive abstention here. The insurance action is indisputably a state law cause of action commenced prepetition in State Court and solely involves issues of state law. As the insurers properly point out, there is no question of bankruptcy law or any other federal law to resolve. See insurer's reply at paragraph 47.

Finally, this Court has determined that the insurance action is a non-core proceeding, which also weighs in favor of remand. The Court does find that the insurers have met their burden to demonstrate that permissive abstention is warranted here in the event that mandatory abstention would not apply.

Conclusion. For all of the foregoing reasons, the Court concludes that all of the requirements under Section 1334(c)(2) of Title 28 for mandatory abstention have been met and the motion to remand the insurance action to the State Court is granted. Assuming arguendo that abstention is not mandatorily required, the Court nonetheless determines in the exercise of its discretion to abstain and remand the insurance action pursuant to Section 1334(c)(1) and 1452(b) of Title 28.

Parties are directed to submit an order consistent with the foregoing bench decision.

Okay, that concludes the ruling. Is everybody still there?

MR. ANKER: Yes, Your Honor.

THE COURT: Mr. Anker, how are you?

MR. ANKER: I am fine, Your Honor. Happy New Year. I hope you are continuing to do well in these crazy times.

THE COURT: We're doing well. I was thinking about asking you all to join me on Zoom and I might have delivered that opinion with a cat filter on my screen, but I decided against that, so there you have it.

All right. So Mr. Anker, you'll reach out to the folks at Proskauer. Please prepare an order, submit it, we'll get it on the docket. Please indicate in the order that for the reasons stated on the record and the motion is granted and you should incorporate the transcript of the ruling into the order. All right, any questions on the adversary proceeding?

Okay. Well, hearing none, I would suggest that anyone who has dialed in in order to listen to the adversary proceeding, you're welcome to drop off. I'm going to take about a two-minute break to drink some water and then we're going to turn to the administrative claim issue.

Thank you all on the adversary proceeding. It's at least good to hear Mr. Anker's voice on behalf of you all.

MR. ANKER: Thank you, Your Honor.

THE COURT: I'll be back in about four minutes.

(Recess)

THE COURT: All right. Thank you for waiting, everyone. I see we've lost quite a few folks, but I see I still have Mr. Vandermark and some folks from Proskauer. So we're going to now turn to the Acro Display motion for allowance and payment of an administrative expense claim. I have the pleadings, and I am going to ask Mr. Vandermark. Good morning.

MR. VANDERMARK: Good morning, Your Honor. James Vandermark with White and Williams on behalf of Acro Display.

THE COURT: All right. It's your motion, Mr. Vandermark, you should assume that I've read everything carefully, but I'm going to give you an opportunity to make whatever presentation you'd like.

MR. VANDERMARK: Thank you, Your Honor. Your Honor, as you've mentioned, you've read everything. The significant sort of evidence in this case is presented in the stipulation of fact, which is on the docket at no. 566.

Relative here, Your Honor, is the fact that Acro Display is a small family-owned company that was defrauded by the debtors in this case pursuant to UCC 2702(2), because the debtors took the goods at issue in this case at a time when the debtor -- or when the debtors were insolvent.

I don't think there's any dispute between the parties that Acro Display timely and properly asserted a reclamation demand pursuant to UCC 2702 as adopted in New York, New Jersey and Florida, and as modified by Section 546 of the Bankruptcy Code.

For clarity of the record, the debtor in this case admits that it was insolvent during the relevant periods, the demand was timely made, the goods were identifiable, and the goods were in the debtors' possession at the time the demand was served.

What is in dispute in this case, Your Honor, is whether the debtors can avoid paying for the use of goods

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because of a floating lien held by the prepetition agent in this case. Critical to addressing this issue is a determination of the parties' interests in the reclamation and let me start with the debtors in this case. When the goods were delivered to the debtors, they held only the feasible title interest in the reclamation goods at issue. That title was subject to the obligation to pay for the goods. They did not do so. Instead, they took possession of these goods and Acro Display treated the defrauded seller under UCC 2702(2), and that's clear under the relevant state laws that are cited in our papers.

And I think it's significant that the Second Circuit in the Koreag decision, and that's 961 F.2d 341, has already addressed the effects of a reclamation demand under UCC 2702(2) and its effect on the debtors' estate. In that decision, the Second Circuit determined that a valid reclamation demand removes the subject goods from the debtors' estate, so it is our position that the reclamation goods in this case are not part of the debtors' estate.

And so, the conclusion of that, Your Honor, is that the debtors no held title or interest in the goods after the reclamation demand was served.

The reverse of that, of course, is that Acro Display held title to the reclamation goods. As a result of the reclamation demand, it was the title owner of those goods while the debtors used them during this case. And that laud and novel sort of concept as far as Acro Display's claim goes because the debtor is sort of the same thing as a landlord-tenant case, which we reference in our raise of the Koreag case where, you know, a debtor who occupies or uses goods of another party has to pay for that use or occupancy of those goods.

Let me turn to the prepetition agent's interest in the goods. I mean, as probably aware, the parties motion dispute from what interest the prepetition agent holds in the goods at issue. Much like the debtors, our position is that the prepetition agent holds no interest in those goods; it was a defeasible interest under UCC 2702, and upon the reclamation then, that was also reverted to the Acro Display.

The very purpose of Section 2702 is to protect a defrauded seller. As the Sixth Circuit noted in the (indiscernible) case, allowing debtors to use reclamation goods during a bankruptcy case without paying for that use would allow the debtors to benefit from the fruits of their fraud and defeat the very object and purpose of UCC 2702.

So allowing the debtors in this case to use the goods, to pay other creditors for the benefit of the estate without paying for that use is exactly what the (indiscernible) decision is trying to address. However, as

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we've laid out in our papers, even if the prepetition agent lien attached and were not defeasible, it would not relieve the debtors from their obligation to return the reclamation goods to Acro Display. The debtors simply had no right to use the reclamation goods during this case.

Even as the Circuit City Stores case, which the debtors rely upon in their papers, addressed, that administrative expense claim is appropriate where debtors simply ignore the reclamation demand, and the result is a benefit to the estate.

I think just for sort of a real short address on sort of the cases relied upon by the debtors, I think there's a clear distinction in some of the Southern District cases we rely on, such as the Dana Corp. and Dairy Mart cases.

First, the administrative claim asserted in those cases is under 546 and not 503(b), so the Courts addressed the right to administrative claim in those cases under 546 and didn't address 503(b).

Second, there's also no real dispute between the parties as to the property rights and interest in those cases. In fact, in the Dairy Mart case, it was agreed that the lien creditor held a priority claim. There's no discussion, sort of give the (sound glitch) those parties in those cases. I think if you look at the (indiscernible) and

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the Marigold Shoes case out of the Sixth Circuit where property rights were at dispute, there's a much more in-depth address. The Court addresses the property rights of the parties much more in-depth, and it gets to the conclusion that a seller holds title and the liens created by the debtors were defeasible.

So here, Acro Display is contesting the debtors' assertion that the prepetition agent has a lien on the reclamation goods on that same principle.

Finally, I think the other distinguishing point between Dana Corp. and Dairy Mart and with similar cases is that the goods were sold and the cash used to pay for the lenders' claims. In fact, I think it was in the Dana Corp. case, Judge Lifland specifically states that it was the sale of the goods that rendered the reclamation claim valueless.

Here, the goods were not sold by the debtors and they weren't used to pay the prepetition agent. Rather, they were used by the debtors just like any holdover tenant uses an apartment, and when the debtors no longer had any use for the reclamation goods, they were abandoned.

So I think those are sort of our reasons for why we addressed the issues we did in our brief, and we would assert that Acro Display is entitled to the administrative claim based on the use, the value and benefit to the debtors' estate during the period.

I think your Court will notice that the parties address in their stipulation of facts in paragraph 17, the period for the use, both prepetition and post-petition, and it's Acro Display's contention that the debtors should pay for the use -- the administrative claim that's recognized there in the post-petition column.

THE COURT: Okay. Let me ask you one question, Mr. Vandermark. You alluded or stated at the beginning of your presentation what a devastating impact from an economic standpoint the situation between Acro and Century 21 is, and part of your request is for immediate payment of an allowed administrative claim.

I'm not sure that you -- it's unclear to me, other than the general desire of a creditor who wishes to be paid, what there is in the record that supports an exception to the usual rule that the administrative claim would be paid under a confirmed plan.

MR. VANDERMARK: Yes, Your Honor. I think at this point, Acro Display will agree to be paid in the normal course of its administrative claim if granted.

THE COURT: Okay, that takes care of that issue. All right. Did you have anything else, Mr. Vandermark?

MR. VANDERMARK: No, Your Honor.

THE COURT: Okay, all right. And who is going to take this up on behalf of the debtor?

MR. YOUNG: Your Honor, Peter Young on behalf of Proskauer. Ms. Kweskin left me with this on her way out, so I appreciate that, and I'll take it on her behalf.

THE COURT: Well, Ms. Kweskin did a great job stewarding these cases through the beginning and we wish her well. But in her stead, I'm now going to give you the hard time that I would have given her.

MR. YOUNG: Of course, of course. Thank you, Your Honor, I appreciate that.

THE COURT: Thank you for being, in advance, for being a good sport, Mr. Young.

MR. YOUNG: Sure.

THE COURT: This is just a head scratcher to me. It's $133,000. There's unquestionably a benefit to Century 21. Acro asked for its stuff back; the debtor didn't give Acro its stuff back. It used, you know, the shelving during the liquidation sale. The lender hasn't asserted a lien; the lender's been paid in full.

And here's one notable non-fact: the committee hasn't objected to this. So I suppose you could say, well, you know, Acro is an unsecured creditor, they're not going to object to a claim by one of their own. But, you know, as a fiduciary, the committee would assert an objection to the allowance of an administrative claim that would take, you know, recovery out of their pockets, and the committee

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hasn't filed an objection here.

So I don't understand what the calculus was to expend the resources to litigate this. I can't, you know, I won't speculate about whether there could have been a settlement at some discount, but we are where we are. And you could probably guess where I'm going, but I'll nonetheless give you an opportunity to try to do as good a job as Ms. Kweskin would have done if she were here to argue today.

MR. YOUNG: I appreciate that, Your Honor, and thank you for your preview. I believe the committee supports the debtors' position, but I won't speak for Mr. Weisenberg, who I know is participating.

Your Honor, let me start by saying this: The debtors appreciate the position in which Acro Display finds itself and, indeed, the position in which all of the creditors of the debtors find themselves. But if the Court were to adopt the position taken today and in the papers by Acro Display, Your Honor, it would mean that a prepetition creditor whose reclamation claim was rendered valueless by applicable statutes, who's unable to avail itself of a claim under Section 503(b)(9) of the Bankruptcy Code, and with which the debtors had zero post-petition transactions can elevate its general unsecured claim to an administrative expense of the debtors' estates to the detriment of the debtors' other general unsecured creditors.

THE COURT: You've lost me. You lost me a couple of moments ago.

MR. YOUNG: Sure.

THE COURT: Why don't they -- you're assuming the conclusion that you want. I mean, they made a reclamation demand, and at that point title reverted to the goods and the debtor kept the shelving.

MR. YOUNG: Your Honor, if I may. The title didn't revert to the goods, right, and here's why. I think that --

THE COURT: Then let me put it differently. The debtors at that point were obligated to return the goods.

MR. YOUNG: Your Honor, we weren't obligated on account of the fact that title passed the moment that the debtors took possession of those shelving units, and as soon as title passed, they became immediately subject to our senior lenders' liens. And so, Section 546 --

THE COURT: But the lender --

MR. YOUNG: Go ahead, I'm sorry.

THE COURT: The lender didn't assert the lien. I mean --

MR. YOUNG: Your Honor, the lender absolutely asserted the lien. In fact, the stipulation of facts I think Your Honor provides that we approached JPMorgan, we

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said we have a one reclamation claim that was received in these cases, in large part because, you know, we weren't purchasing goods and inventory prior to the filing. We were essentially self-liquidating, selling the assets of the business.

We informed -- and this is included, Your Honor, in the stipulation of facts at paragraph 15 -- I'm sorry, at paragraph 13 -- that as soon as the liquidation sales concluded -- in some cases, that was going to be 30 days after the petition date, Your Honor might recall given the store closing motion -- that Acro Display could, in fact, come and reclaim those goods. But it took, you know, it took that period for those goods to be reclaimed.

I think the problem here, Your Honor, for Acro is this, that 546(c) and 2702 of the Uniform Commercial Code render reclamation claims by suppliers of goods subject to the prior lender in every case where the senior lender is owed more than the amount of the reclamation claim.

Here, our senior lenders were --

THE COURT: I just don't understand.

MR. YOUNG: Sure.

THE COURT: I mean, didn't the agent tell the debtors that Acro could retrieve its stuff?

MR. YOUNG: No, certainly not. And, Your Honor, I think Ms. Frost-Davies is on the phone and willing to support the argument of the debtors that they weren't willing to release any bit of the collateral package that they had securing their loan at that time. And like I said, immediately upon the debtors' receipt of those goods and taking title, they became subject to that lien. We couldn't strip from the debtors' assets collateral that belonged to our senior lender.

And I think, Your Honor, that, you know, it was in Dana Corporation --

THE COURT: Could you look at the stipulation of facts, paragraph 15?

MR. YOUNG: Yes. That was a time, Your Honor, when -- yeah, so there were five stores at which the shelving units were installed. There were two stores that closed the doors within 30 days of the petition date; there were three stores that closed the doors within, you know, 90 days of the petition date when all of the other stores closed.

At the point at which the stores closed, Your Honor, because the shelving unit was sort of custom to the stores, those shelving units were of no value. So Hilco Resale, who was, as you know --

THE COURT: Hold on, hold on. You can't -- you're making that up. I mean, they issued a reclamation demand, right.

MR. YOUNG: Right.

THE COURT: And then within two weeks or so, the prepetition agent said Acro can get its stuff. And, you know, I just, you know, the problem here is that -- and I'm going to kind of cut to the chase. I mean, I just find this -- the amount -- the opposition to this and the course of conduct to be offensive and troubling. It's hyper-technical. The creditors' committee, I mean, you can say that they support your position; they didn't file anything. The creditors' committee did not file an objection, so I'm really not going to hear from them now to say that they're down with this treatment.

It's pretty clear that the lender wasn't too concerned about this. It is very troubling to me that you would rely on the argument that there was no benefit to the estate because you can't readily quantify it.

Let me distinguish between something that was, you know, of no value to the estate. I mean, the classic debate that you have in an administrative claim argument where there was something that occurred or that existed post-petition but there is no, quote/unquote, "benefit" and people argue about the benefit.

So here, of course there was a benefit. This was -- you know, you're not making the argument that this was, you know, somewhere in some warehouse and it provided no benefit; of course, it provided a benefit. And I just simply do not understand -- and I'm tempted to ask -- you know, what the amount of money that the debtors' estate has spent litigating this. I just don't get it. I just don't get it. You're not -- you know, there's no danger here in this entirely fact-intensive backdrop for there to be a concern that somehow this is going to change the law and provide an avenue for unsecured creditors to convert their claims into administrative expense claims. I just -- I'm absolutely not seeing it.

MR. YOUNG: Your Honor, I'm not sure about that because I think what this does is -- if you are right and certainly, you know, I hear you on that position, you're essentially talking about elevating, I guess, under a 503(b)(1) claim to administrative expense status a claim that has no post-petition transaction, right.

I mean, we can talk in a minute about the benefit to the debtors' estates, which is the second element of it, but a 503(b)(1) claim in the first instance requires a post-petition transaction, right; this was stuff delivered to the debtors all prepetition. And so, our problem here is that if you treated anyone who delivered goods or inventory or anything else to the debtors prepetition, then any creditor who supplies any debtor with anything that the debtors use in any capacity post-petition could give rise to an administrative expense claim? I just don't think that's the case. That can't be the standard because if it is --

THE COURT: Yeah. You know, you are shading the facts to fit your argument. I think the facts here are distinguishable. The flip side of it is that with your reliance on the fact that the stuff -- I mean, what's a reclamation claim? A reclamation claim always involves stuff that arrives prepetition.

MR. YOUNG: Totally right, Your Honor, but in recognition, right, that the fact that reclamation claims are often defeated by the floating blanket liens that exist in so many of these cases that you see. Congress enacted 503(b)(9) to address that issue. And if a creditor can qualify for a 503(b)(9) claim, then that's some recourse that takes them outside the purview of a reclamation demand under either state law or 546(c).

THE COURT: But look, they made a -- they made a reclamation demand. The lender said no problem. You said too bad, you cannot --

MR. YOUNG: No, no, no, Your Honor, I'm sorry, let me clear up the record. The lender did not say no problem. The lender said absolutely not, those goods are subject to our lien. It was only after the lender understood that those goods were going to be abandoned in connection with the store closings did we say to Acro, listen, we'll organize with our landlords your ability to go and get that stuff if you want it back.

Now, Acro, probably thinking that those --

THE COURT: Mr. Young.

MR. YOUNG: Sorry, Your Honor, go ahead.

THE COURT: I'm going to ask you to stop. I'm going to ask you to stop, okay.

Mr. Weisenberg, you have your hand up.

MR. WEISENBERG: Thank you, Your Honor. For the record, this is Brent Weisenberg on behalf of the Official Committee of Unsecured Creditors.

Your Honor, you mentioned the committees having not filed a pleading either supportive of the debtor in this case or otherwise. The reason we didn't file anything, Your Honor, was precisely as you identified, which was the cost benefit analysis of spending additional administrative fees on this issue.

With that said, we were supportive of the debtor holding our creditors --

THE COURT: Mr. Weisenberg, it doesn't work like that. You don't get to, in this hearing, now say had you filed an objection, you know -- you could of, without breaking a sweat, filed a joinder. So I'm sorry, it doesn't count, too little too late.

MR. WEISENBERG: Oh, Your Honor, I apologize. You may be misunderstanding me. What I'm saying is that we were supportive of the debtor holding a creditor to its burden, but if Your Honor ultimately believes that the creditor fulfilled its burden, then we are entirely supportive of a creditor being paid what it's owed.

And so, I'm not belatedly trying to assert an objection. What we're merely saying is, again, that if a creditor can meet its burden of having an administrative priority, you're exactly correct, Your Honor, that this is relatively de minimis for this estate and, therefore, the creditor should be paid what it's owed.

THE COURT: Okay. I'm not even going to respond. That's just a statement of the law, so that's not significant. Obviously, I would find -- obviously, there's going to be a basis for finding that there's an administrative claim, so I just don't even know what to say.

Does anyone -- someone else has their hand up. Ms. Frost-Davies.

MS. FROST-DAVIES: Good afternoon, Your Honor. Actually, I think we're still in the morning. Good morning, Your Honor. Julia Frost-Davies on behalf of JPMorgan Chase.

Your Honor, I find myself in a bit of an awkward spot because the issue is a 503(b)(9) administrative expense issue, which is junior to my client's claims and, therefore, I haven't weighed into this point.

The only thing I'd like to clarify, so it's not misconstrued by counsel for Acro or otherwise, is that the goods were subject to the prepetition agent's lien. From our perspective, whether or not we, you know, asserted in this connection, well, we weren't paid off, and the lenders don't need to resort to that is a different issue.

But under 546(c) and the interim cash collateral order, page 6, footnote 4, reclamation goods are expressly not permitted liens. So I simply wanted to make that clear as a matter of our law and so, to your point, Your Honor, as to where there may be precedent. So with 503(b)(9), it's junior to my clients. I don't have a dog in that hunt.

THE COURT: Thank you.

MR. YOUNG: Just to clarify, Your Honor -- it's Peter Young again at Proskauer -- this wasn't asserted as a 503(b)(9) claim; it was asserted as a 503(b)(1)(A) claim.

THE COURT: Okay. Mr. Vandermark, do you want to reply to any of that?

MR. VANDERMARK: Just briefly, Your Honor. I think what's really, I think, distinguishing here is that counsel for the debtors does not address sort of the property rights issues, neither in their papers or at today's hearing, which I think is critical sort of, for Acro Display's rights here and the continued use post-petition.

When they look at what is the post-petition transaction, it's the continued use that wasn't permitted. They sort of unlawfully used those, because they had the obligation to return them and title verted to Acro Display, so that's the basis for the transaction. And the benefit I think has already been addressed; I won't go further on that.

But I think that's all I have to respond to on what's been addressed, Your Honor.

THE COURT: All right. Mr. Young, do you want to say anything else?

MR. YOUNG: I'm nervous, Your Honor, but I will say this. If you're inclined to grant Acro -- and it sounds like you are -- an administrative expense against the estates under 503(b)(1)(A), I don't think that claim should be in the amount reflected on Acro Display's invoices as the price of the shelves.

Again, three of the stores in which the shelves were installed ceased operating on October 7th, less than a month after the petition date, and the other two stores in which they were installed ceased operating on December 7th, which was, you know, three months after the petition date.

And there's no evidence in the record, Your Honor, that any of the debtors' sales of goods in this case were attributable to the fact that the shelves provided by Acro were the means by which the debtors displayed that inventory. So if you're inclined to --

THE COURT: We really -- are we really going to do this? You didn't make any argument about the amount. You made the argument that it's not quantifiable. You really want to have an evidentiary hearing on what was on the shelves in each of the stores for what periods of time? Two stores used these shelves for 87 days. three stores used the shelves for 27 days; that's what the stipulation says.

MR. YOUNG: Your Honor, I'm happy to drop the arguments in light of your comments.

THE COURT: Well, again, I just am perplexed by this. As I've indicated I view the debtors' arguments as hyper-technical and, frankly, inequitable. I think that the debtors need to compensate Acro for their impermissible and continued use of the reclamation goods, and that there's no doubt that the reclamation goods -- use of the reclamation goods meet the standard of being an actual and necessary cost of operating the debtors' business in a way that maximized the values of the debtors' estate.

I think the argument that there's not a quantifiable benefit rings particularly hollow here, and indeed, that this was custom shelving; it was used to display and sell the debtors' goods during the liquidation sales. If it was not going to provide any benefits, they should have let Acro come and pick it up and they didn't do

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that.

There seems to be a lot of emphasis on the fact that there's no so-called post-petition transaction, focusing on the fact that the shelving was installed in the stores before the petition date. But again, I view this as that argument is hyper-technical. It ignores the fact that there are a number of ways to find the existence of post-petition transaction.

First, you can look through the service of the reclamation demand itself and the debtors' refusal to return the reclamation goods, which I think can be characterized as a post-petition transaction. And secondly, the debtors continued use of the goods during the post-petition period for the benefit of the estate itself can be considered a post-petition transaction.

Mr. Vandermark, I think, addressed the other arguments persuasively in the reply brief that was filed on behalf of Acro. At the top, I did challenge Mr. Vandermark to demonstrate the need for administrative expense claim now and he's conceded that point, so that makes that easier.

And with respect to the amount, there was no in the alternative argument that the amount was wrong or should be subject to further dispute.

I do not think fundamentally that this is a good use of estate funds to continue to litigate this matter, and

I think there's an ample basis to grant Acro's motion for the allowance of the administrative expense claim in the amount requested, and such claim should be payable pursuant to the confirmed plan of liquidation.

So I'm going to ask you to submit an order incorporating the record of this hearing and stating that for the reasons set forth on the record, Acro's motion is granted.

MR. VANDERMARK: Thank you, Your Honor.

THE COURT: All right. Mr. Young?

MR. YOUNG: Thank you, Your Honor. I think that brings us to conclusion.

THE COURT: All right. Sorry to give you a hard time, but...

MR. YOUNG: I've had hard times before, Your Honor. I appreciate that, thank you.

THE COURT: All right, thank you. Okay. Well, we did our best today to address everything that's pending. We are very much looking forward to scheduling the disclosure statement and plan hearing and moving these cases toward a swift conclusion. All right?

I think that's all we have. Please everybody, stay safe, Happy Valentine's Day, and we'll keep an eye out for all of the orders. Thank you.

MR. VANDERMARK: Thank you, Your Honor.

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(Whereupon these proceedings were concluded at 11:30 AM)

I N D E X

RULINGS

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

Digitally signed by Sonya Ledanski Hyde
DN: cn=Sonya Ledanski Hyde, o, ou, email=digital@veritext.com, c=US
Date: 2021.02.15 16:28:52 -05'00'

Sonya Ledanski Hyde

Veritext Legal Solutions

330 Old Country Road

Suite 300

Mineola, NY 11501

Date: February 15, 2021

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