IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS (HOUSTON DIVISION)

In re:	Chapter 11
NPC INTERNATIONAL, INC., *et al*.,	Case No. 20-33353 (DRJ)
Debtors.[1]	(Jointly Administered)
	Hearing Date: October 20, 2020 at 9:30 a.m.

OBJECTION OF THE DRIVER CLASS CLAIMANTS TO EMERGENCY MOTION OF THE DEBTORS FOR ENTRY OF AN ORDER EXTENDING THE AUTOMATIC STAY TO CERTAIN OF DEBTORS' OFFICERS

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are NPC International, Inc. (7298); NPC Restaurant Holdings I LLC (0595); NPC Restaurant Holdings II LLC (0595); NPC Holdings, Inc. (6451); NPC International Holdings, LLC (8234); NPC Restaurant Holdings, LLC (9045); NPC Operating Company B, Inc. (6498); and NPC Quality Burgers, Inc. (6457). The Debtors' corporate headquarters and service address is 4200 W. 115th Street, Suite 200, Leawood, KS 66211.

Kristin Marshall, Romie Campbell, David Short, Jason Huyett, Amanda Lima, Anthony Hanna, Jack Carroll, Derrick Sapp, James Platt, Chancellor Myers, Blake Bolin, David Vega, Michelle Enyeart, Sentell Hill, Eric Brown, Susan Overturf, Steven Fultz, and Terry Struhall, in their individual and representative capacities (and with the class members, collectively, the "**Driver Class Claimants**"), submit this objection (the "**Objection**") to the *Emergency Motion of the Debtors for Entry of an Order Extending the Automatic Stay to Certain of Debtors' Officers* (the "**Motion**") [ECF No. 789] filed by NPC International, Inc. and its debtor affiliates in the above-captioned chapter 11 cases, as debtors and debtors in possession (collectively, the "**Debtors**"). In support of this Objection, the Driver Class Claimants respectfully state as follows:

BACKGROUND

A. Debtors' Employment Practices and Its Drivers' Costs.

1. Debtors are the largest Pizza Hut franchisee in the United States, with over one thousand locations and thousands of drivers making up the Driver Class Claimants who deliver pizza and other food and beverages to customers' doorsteps.

2. During a typical seven-hour shift, a typical delivery driver spends about five hours "on the road" making deliveries.

3. While on the road, Debtors required the Driver Class Claimants to maintain and provide a safe, functioning, insured, and legally-operable automobile to make deliveries, and also required the Driver Class Claimants to bear the out-of-pocket costs associated with their vehicles, including costs for gasoline, vehicle depreciation, insurance, maintenance, and repairs.

4. For decades, the Internal Revenue Service ("**IRS**") has calculated and published a standard mileage reimbursement rate ("**IRS Rate**") for businesses and employees to use in computing the minimum deductible costs of operating an automobile for business purposes.

5. From July 2011 through December 2012, the IRS Rate was $0.555 per mile; in 2013, the IRS Rate was $0.565 per mile; in 2014, the IRS Rate was $0.56 per mile; in 2015, the IRS Rate was $0.575 per mile; in 2016, the IRS Rate was $0.54 per mile; in 2017, the IRS Rate was $0.535 per mile; in 2018, the IRS Rate was $0.545 per mile; in 2019, the IRS Rate was $0.58 per mile; in 2020, the IRS rate is $.575 per mile.

6. Since 2010, many reputable companies that study the cost of owning and operating a motor vehicle and/or estimating reasonable reimbursement rates for vehicular travel, including the American Automobile Association, have consistently set the average cost of operating a vehicle at rates significantly higher than that set by the IRS.

7. Debtors' delivery drivers typically experienced lower gas mileage, more rapid vehicle depreciation, and greater vehicular expenses than the average business driver because they typically drove in urban areas, in "start-and-stop" traffic, on a tight schedule, at night, and in inclement weather.

8. Insurance providers recognize the hazards of working as a pizza delivery driver. Unsurprisingly, pizza delivery drivers pay significantly higher automobile insurance rates than do regular drivers,[2] and some pizza companies even provide their drivers with automobile insurance coverage.[3] Debtors do not provide insurance for their drivers.

9. Thus, the actual "out-of-pocket" costs that Debtors' delivery drivers paid to provide a safe, functioning, insured, and legally operable automobile for their deliveries was at least $0.535 per mile, the lowest IRS Rate of the last decade.

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[2] See *Auto insurance an important piece of the pie for pizza delivery vehicles*, NETQUOTE, http://www.netquote.com/auto-insurance/pizza-delivery-vehicles (last visited Oct. 13, 2020).

[3] See *The Hidden Risks of a Pizza Delivery Business*, TRUSTED CHOICE INDEPENDENT INSURANCE AGENTS, https://www.trustedchoice.com/small-business-insurance/restaurant-food/pizza-delivery/ (last visited Oct. 13, 2020).

10. Despite these costs, Debtors have typically reimbursed the Driver Class Claimants only between $0.25 and $0.35 per mile.

11. Thus, Debtors have under-reimbursed their delivery drivers by approximately $0.20 to $0.30 for each mile driven. Because the Driver Class Claimants and their colleagues typically drive an average of five to ten miles per delivery and typically make an average of four deliveries each hour, they are typically under-reimbursed by between $4.00 to $12.00 each hour.

12. Moreover, Debtors undercounted the number of miles the Driver Class Claimants and their colleagues actually drove, thereby exacerbating the under-reimbursement.

13. The Driver Class Claimants and their colleagues were paid the tipped minimum wage for their respective states of employment for all the time they spent on the road as delivery drivers for Debtors. Because Debtors paid the minimum wage, they were legally obligated to fully reimburse the Driver Class Claimants and their colleagues for the full amount of their driving expenses. However, Debtors failed to fully reimburse the drivers for the full amount of their driving expenses, thus forcing the drivers' total compensation far below the minimum.

14. Debtors' systematic failure to adequately reimburse delivery drivers for their automobile expenses constitutes a "kickback"[4] to Debtors, such that the hourly wages it pays and has paid to the Driver Class Claimants and other delivery drivers are not paid free and clear of all outstanding obligations to Debtors.

B. *Collins v. NPC International, Inc.*

15. The Driver Class Claimants consist of all persons Debtors employed as delivery drivers during any workweek in the maximum limitations period.

[4] As defined by U.S. Department of Labor regulations at 29 CFR § 531.35.

16. Representatives of the Driver Class Claimants originally filed a class and collective action against NPC International, Inc. in March 2017, *Collins v. NPC International, Inc.*, No. 17-cv-312 (S.D. Ill.) ("***Collins***").[5] The Driver Class Claimants are the named plaintiffs in the operative complaint of *Collins*. *Collins* seeks relief on behalf of the Driver Class Claimants and subclasses of the Driver Class Claimants who worked for Debtors in the states in which Debtors operate: Illinois, Arkansas, Colorado, Florida, Idaho, Iowa, Kentucky, Missouri, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Virginia, and Washington.

17. Plaintiffs in *Collins* proceeded expeditiously on behalf of the Driver Class Claimants, filing a motion for conditional certification of a nationwide collective under the Fair Labor Standards Act ("**FLSA**"), on March 31, 2017, one week after the complaint was initially filed.

18. Though *Collins* was filed in the spring of 2017, Debtors' repeated delay tactics resulted in over two years of stalling while Debtors prepared to file their bankruptcy petitions that began when Debtor NPC International, Inc. ("**NPC**") moved to compel arbitration in *Collins* on May 1, 2017. Prior to ruling on the motion for FLSA conditional certification, the District Court granted an initial stay of *Collins* on October 25, 2017 at NPC's request, pending the outcome of the Supreme Court's decision in *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), *cert granted*, 85 U.S.L.W. 3343 (U.S. Jan. 13, 2017) (No. 16-285), where the United States Supreme Court addressed whether employment contracts could legally bar employees from collective arbitration. Whether such contracts were enforceable would have a direct impact on how *Collins* would proceed.

[5] Though *Collins* was brought as both a collective and a class action, the Court's considerations of the Driver Class Claimants' claims are limited to an analysis of Federal Rule of Civil Procedure 23, as made applicable to these proceedings through Bankruptcy Rules 7023 and 9014. Any considerations of *Collins* as a collective action are not germane to this Court's analysis in whatever reply this Objection may evoke.

19. After the Supreme Court's decision in *Epic System Corp. v. Lewis*, 138 S. Ct. 1612 (2018), finding that arbitration agreements requiring individual arbitration are enforceable under the AAA, the District Court again stayed *Collins* on June 21, 2018 at NPC's request, so that the plaintiffs in *Collins* who had signed arbitration agreements as part of their employment could arbitrate their claims against NPC.

20. Following the stay, counsel in *Collins* requested arbitration agreements for represented drivers so that they could bring these matters in arbitration or negotiate a global settlement. NPC repeatedly asked for more time to locate these agreements, further delaying efforts to resolve their claims.

21. Though some of the plaintiffs, including Driver Class Claimants Marshall and Fultz (the "**Unsigned Drivers**") had never agreed to arbitration with any of the Debtors, they agreed, at NPC's request, as a courtesy, to delay renewing their claims in the District Court until after March 4, 2019 in order to allow NPC to locate purported arbitration agreements with the Unsigned Drivers (which do not exist).

22. Despite being given ample time, NPC was never able to produce arbitration agreements for the Unsigned Drivers.

23. Meanwhile, Driver Class Claimants Campbell, Short, Huyett, Lima, Hanna, Carroll, Sapp, Platt, Myers, Boloin, Vega, Enyeart, Hill, Brown, Overturf, and Struhall (the "**Waived Drivers**") each filed individual arbitration claims before the American Arbitration Association ("**AAA**"), pursuant to the arbitration agreements NPC had represented to exist between NPC and its employees.

24. AAA determined that each of the Waived Drivers had met all of the filing requirements necessary to initiate individual arbitration under the AAA rules and invoiced NPC for its share of the filing fees necessary to commence each arbitration.

25. The Waived Drivers were among over 1,300 Driver Class Claimants who also filed individual demands for arbitration against NPC in an attempt to take NPC at its word that its employees must bring their claims in arbitration.

26. After filing their demands, NPC refused to participate in the Waived Drivers' individual arbitrations. In fact, NPC refused to participate in any of the arbitrations brought by delivery drivers before the AAA—the sole forum NPC designated for hearing the Driver Class Claimants' claims.

27. Instead, NPC adopted a policy of refusing to arbitrate more than a small number of individual arbitrations at any given time, attempting to effectively deny its delivery drivers access to any forum whatsoever to vindicate their statutory rights, and seeking to deny its delivery drivers due process by delaying resolution of their claims by years or decades.

28. As a result of NPC's refusal to participate in the individual arbitrations NPC itself required, the AAA administratively closed all of NPC's pending arbitration proceedings and has now refused to administer any future employment matter involving NPC, asking NPC to remove its name from any and all of NPC's arbitration agreements.

29. NPC breached its contractual obligations to participate in AAA arbitration with the Waived Claimants, leading to unnecessary delay in *Collins* that lasted for over two years, until the AAA refused to put up with the farce NPC made of its own arbitration proceedings any longer.

30. When it became clear that NPC was in breach of its contractual obligations to participate in AAA arbitration with the Waived Drivers and over 1,000 other members of the

putative classes and collective, and that NPC ultimately would not be able to produce arbitration agreements for the Unsigned Drivers, the Driver Class Claimants moved on April 16, 2019, to have the stay on *Collins* lifted, so that they could again pursue their rights in court.

31. The District Court lifted the stay on *Collins* on June 19, 2019 and granted the Driver Class Claimant's motion to file an amended complaint on October 3, 2019. The Driver Class Claimants again moved expeditiously and on October 7, 2019, filed both an amended complaint and a renewed motion for FLSA conditional certification. However, NPC requested and received multiple extensions to respond to the FLSA conditional certification motion, ultimately not filing its opposition until January 27, 2020.

32. Briefing on FLSA collective certification was completed in *Collins* when NPC filed its suggestion of bankruptcy, staying *Collins* yet again in another attempt to avoid liability for bilking its own employees out of the already meager compensation it provided them.

33. As a result of Debtors' bankruptcy petitions, *Collins* has been subject to the automatic stay and the Driver Class Claimants have been enjoined from pursuing their claims outside of bankruptcy.

34. The Driver Class Claimants seek to hold Debtors accountable under the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*; the Illinois Minimum Wage Act, 820 Ill. Comp. Stat. Ann. § 105/1, *et seq.*; the Illinois Wage Payment and Collection Act, 820 Ill. Comp. Stat. Ann. § 115/3, *et seq.*; the Minimum Wage Act of the State of Arkansas, Ark. Code. Ann. § 11-4-201, *et seq*.; the Colorado Minimum Wage Act, Colo. Rev. Stat. § 8-6-101, *et seq*.; the Florida Constitution, Fla. Const., Art. X, § 24; the Idaho Wage Claim Act, Idaho Code § 45–606, *et seq*.; the Idaho Minimum Wage Law, Idaho Code § 44–1501, *et seq*.; the Iowa Wage Payment Collection Law, Iowa Code § 91A; the Iowa Minimum Wage Law, Iowa Code § 91D; the Kentucky Prevailing Wage Act, Ky.

Rev. Stat. Ann. § 337.010, *et seq*.; the Missouri Minimum Wage Law, Mo. Rev. Stat. § 290.500, *et seq*.; the North Carolina Wage and Hour Act, N.C. Gen. Stat. Ann. § 95-25, *et seq*.; North Dakota Century Code, N.D. Cent. Code § 34-06, *et seq*.; the North Dakota Minimum Wage and Work Conditions Order, N.D. Admin. Code § 46-02-07-01, *et seq*.; the Oklahoma Protection of Labor Act, 40 Ok. Stat. § 160, *et seq*.; Oregon's minimum wage law, Or. Rev. Stat. Ann. § 653.025; South Dakota's minimum wage law, S.D.C.L. § 60-11-3, *et seq*.; the Virginia Minimum Wage Act. Va. Code Ann. § 40.1-28.8, *et seq*.; the Washington Minimum Wage Act, Wash. Rev. Code Ann. § 49.46.005, *et seq*.; and for common law unjust enrichment.

C. *Kristin Marshall v. Jonathan Weber, et al.*

35. Under the FLSA, officers and directors can be personally liable if they have a direct role in setting the policy that results in the violation. 29 U.S.C. § 201 *et seq*. Reimbursement of delivery drivers is a high-profile issue in Debtors' industry. Indeed, the Debtors were previously sued for comparable FLSA violations and settled the litigation. *See, e.g., Wass v. NPC Int'l, Inc.*, No. 09-2254-JWL (D. Kan. 2011). Remarkably, the Debtors did not learn their lesson, and continue to systematically under-reimburse drivers in violation of the FLSA.

36. Upon information and belief, Debtors' key executives were involved in decisions regarding the reimbursement model that deliberately paid drivers below minimum wages. Importantly, such violations have continued post-petition (in violation of the FLSA and 28 U.S.C. § 959), meaning that the individuals responsible for such misconduct have knowingly caused the estate to incur post-petition damages of many millions of dollars subject to Chapter 11 administrative expense priority.

37. By actively participating in *Collins*, the Debtors and Debtors' officers have known about the Driver Class Claimants' claims since before the inception of these cases. Yet the Debtors and Debtors' officers have proceeded as if *Collins* never existed, and continue to violate federal

and state wage laws. To bring these issues to the forefront for the Court, the Driver Class Claimants filed their Class Claim Motion and objected to the Debtors' KEIP Motion, detailing the misconduct of the Debtors' officers and questioning the business validity of rewarding bonuses to the officers. Although the Court granted the KEIP, the Court commented that the Driver Class Claimants' claims will need to be addressed by the Debtors at some point prior to Plan confirmation. Sept. 17, 2020 Hearing Tr., 52:21-53:3.

38. Subsequent to the Court's approval of the KEIP, on September 23, 2020, the Driver Class Claimants commenced a class/collective action against the Debtors' officers in the United States District Court for the Western District of Missouri styled *Kristin Marshall v. Jonathan Weber, David Wahlert, and Lavonne Walbert*, Case No. 20-cv-00757 ("***Marshall***"). *Marshall* seeks to hold Jonathan Weber, David Wahlert, and Lavonne Walbert[6] ("***Marshall* Defendants**") personally liable for their willful violation of the FLSA and state wage laws.[7] As such, they are directly responsible for the Debtors' incurring hundreds of millions of dollars in liability to the Driver Class Claimants.

D. <u>The Driver Class Claimants' Damages.</u>

39. While the Driver Class Claimants are precluded from conducting further discovery because of the automatic stay, they estimate, based on data supplied by individual drivers and discovery regarding the size of the putative class, that Debtors' liability to the Driver Class Claimants exceeds $4,000 per Claimant, that there are over 80,000 Claimants, and that the aggregate damages of the Driver Class Claimants exceed $320 million.[8]

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[6] Jonathan Weber is the CEO and COO of NPC International; David Wahlert is the CFO of NPC International; and Lavonne Walbert is the Chief People Officer of NPC International.

[7] *Marshall* asserts the officers are personally liable for the following: Debtor's FLSA violations (as to all class members), violation of the Illinois Minimum Wage Act and Illinois Wage Payment and Collection Act (as to all Illinois class members) and violation of minimum wage laws in all other states where Driver Class members reside.

[8] To preserve the claims and rights of this class, on August 25, 2020, the Driver Class Claimants filed their motion seeking authority to file a class proof of claim on behalf of all the Driver Class Claimants in all states and territories

40. The Debtors' improper conduct has continued since the filing of the Chapter 11 petitions. Assuming a Plan is confirmed by year end, the Debtors will have accrued six months of administrative expense claims owing to the Driver Class Claimants of approximately $34 million.

41. In addition, at least 6,400 of the Driver Class Claimants have priority wage claims of approximately $4,000 each, earned within 180 days before the July 1, 2020 filing of the Debtors' petitions (the "**Petition Date**"). Based on these conservative figures, the Driver Class Claimants hold a priority claim of at least $25.6 million.[9]

THE AUTOMATIC STAY MUST NOT BE EXTENDED TO THE OFFICERS

I. THE INDEMNIFICATION CLAUSE IN NPC'S BY-LAWS DOES NOT APPLY.

42. The Debtors' sole argument in support of the Motion is that the officer indemnification provisions in NPC's by-laws requires the extension of the automatic stay to *Marshall*. The two indemnification provisions state:

> SECTION 1. INDEMNITY FOR THIRD PARTY ACTIONS — The Corporation shall indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (other than an action by or in the right of the Corporation) by reason of the fact that such person is or was an officer or director of the Corporation, or is or was serving at the request of the Corporation as a director, officer, member, employee or agent of another Corporation, partnership, joint venture, trust or other enterprise, against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement (collectively, "Losses") actually and reasonably incurred by such person in connection with such action, suit or proceeding to the maximum extent authorized by the General Corporation Law of the State of Kansas, as the same exists or may hereafter be amended (but, in the case of any such amendment, only to the extent that such amendment permits the Corporation to provide broader indemnification rights than said law permitted the Corporation to provide prior to such amendment), or by other applicable law as then in effect, ***except that a person shall be liable for any such Losses incurred by reason of***

of the United States, seeking to hold Debtors accountable for the economic harm they have imposed on their delivery drivers (the "**Class Claim Motion**") [ECF No. 507]. A hearing on the Class Claim Motion is scheduled for October 26, 2020.

[9] The Driver Class Claimants arrive at these figures using a conservative estimate that 8% of the estimated 80,000 Driver Class Claimants were employed during the 180 days prior to the Petition Date.

> ***gross negligence or willful misconduct by such person with the Corporation***. The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person acted in a manner that was either grossly negligent or of willful misconduct, and, with respect to any criminal action or proceeding, had reasonable cause to believe that such person's conduct was unlawful.
>
> SECTION 2. INDEMNITY FOR ACTION BY OR IN RIGHT OF CORPORATION — The Corporation shall indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action or suit by or in the right of the Corporation to procure a judgment in its favor by reason of the fact that such person is or was an officer or director of the Corporation, or is or was serving at the request of the Corporation as a director, officer or member of another Corporation, partnership, joint venture, trust or other enterprise, against Losses actually and reasonably incurred by such person in connection with the defense or settlement of such action or suit, ***except that a person shall be liable for any such Losses incurred by reason of such person's gross negligence or willful misconduct***, and except that no such indemnification shall be made in respect of any claim, issue or matter as to which such person shall have been adjudged to be liable to the Corporation unless and only to the extent that the court in which such suit or action was brought shall be determined upon application that, despite the adjudication of liability but in consideration of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses which such court shall deem proper.

ECF No. 790, Ex. 1 (emphasis added).

43. In their Motion, the Debtors selectively quote the indemnification provisions, tellingly omitting the gross negligence or willful misconduct exceptions to indemnification. The Debtors have to do so because the *Marshall* Defendants' behavior falls squarely within the exception.

44. Willful misconduct is "the intentional performance of an act with knowledge that the performance of that act will probably result in injury or damage[.]" *Staton Holdings, Inc. v. MCI WorldCom Commc'ns, Inc.*, No. CIV. A. 399CV2876D, 2001 WL 1041796, at *4 (N.D. Tex. Sept. 4, 2001) (citation omitted); *see also Bassam v. Am. Airlines*, 287 F. App'x 309, 314–15 (5th Cir. 2008) (same); *PNC Bank v. Branch Banking & Tr. Co.*, 704 F. Supp. 2d 1229, 1242 (M.D. Fla.

2010) *aff'd sub nom. PNC Bank, Nat'l Ass'n v. Branch Banking & Tr. Co.*, 412 F. App'x 246 (11th Cir. 2011) (same).

45. The *Marshall* Defendants have run Debtors' day to day operations for several years, and have been fully aware of the wage claims brought against the Debtors. They have policy-making roles and have responsibility for setting Debtors' wage practices. Over the last decade, Debtors have repeatedly been sued for their illegal conduct, first in *Wass*, then in *Collins*, and yet Debtors and their key officers still have not adjusted their wage policies to comply with the FLSA and wage laws of the states in which they operate.

46. The prior litigation brought against Debtors for their illegal conduct is enough to establish that the *Marshall* Defendants' conduct is willful, thus excluding any claims brought in *Marshall* from the indemnification clause of NPC's by-laws. *See, e.g.*; *Microsoft Corp. v. #9 Software, Inc.*, No. 4:10CV58, 2011 WL 13234769, at *3 (E.D. Va. Apr. 22, 2011) (finding willfulness where there had been a past suit for the same conduct); *Burberry Ltd. v. Euro Moda, Inc.*, No. 08 Civ. 5781(CM), 2009 WL 4432678, at *3 (S.D.N.Y. Dec. 4, 2009) (finding ample evidence of willfulness where a prior settlement put defendants on notice, yet defendants persisted in the same conduct); *Canopy Music Inc. v. Harbor Cities Broad., Inc.*, 950 F. Supp. 913, 916 (E.D. Wis. 1997) (willfulness found where defendant had been sued ten years earlier for the same conduct).

47. The *Marshall* Defendants' liability is contingent on their having acted willfully in setting and managing Debtors' wage policies. Any judgment rendered in *Marshall*, whether for or against the defendants in that case, will not affect the bankruptcy estates. Debtors suggest a parade of horribles that would befall the estates if the automatic stay is not extended to *Marshall*, yet Debtors make no mention of their by-laws' exceptions to their indemnification provisions, no

mention of whether insurance cover for indemnification (thus leaving the estates untouched), and no mention of the fact that any indemnification would be but another unsecured claim, hardly beggaring the estates.

48. The suggestion—or overt willingness—of the Debtors to indemnify the *Marshall* Defendants only goes to show that the Debtors are not performing their duty to their creditors. It certainly does not show that *Marshall* should be stayed.

II. *MARSHALL* WILL NOT IMPACT THESE CHAPTER 11 CASES.

49. In determining whether or not to exercise a discretionary stay, a main issue is whether or not litigating the claims against the *Marshall* Defendants will injure the estates in the bankruptcy proceedings. Debtors ask the Court to use its discretion to extend the automatic stay under 11 U.S.C. § 105(a), which empowers the Court "with the discretion and authority to issue [an] injunction, . . . *when those proceedings would threaten the debtor's estate*, and when the court has jurisdiction over a petition in bankruptcy." *In re Hunt*, 93 B.R. 484, 491 (Bankr. N.D. Tex. 1988), *modified*, No. 388-35725-HCA-11, 1989 WL 67827 (Bankr. N.D. Tex. Jan. 31, 1989), *and modified*, 95 B.R. 442 (Bankr. N.D. Tex. 1989) (emphasis in original).

50. Section 362(a) provides an automatic stay of actions by and against a bankrupt debtor. "Section 362 is rarely, however, a valid basis on which to stay actions against non-debtors." *Arnold v. Garlock, Inc.*, 278 F.3d 426, 436 (5th Cir. 2001). In other words, "a section 362(a)(1) stay is available only for the debtor's benefit and does not prohibit actions against nonbankrupt third parties or codefendants." *Matter of S.I. Acquisition, Inc.*, 817 F.2d 1142, 1147 (5th Cir. 1987).

51. An automatic stay may be extended to stay proceedings against non-debtors when there are "unusual circumstances" or where there is "such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment against the debtor." *Reliant Energy*

Servs., Inc. v. Enron Can. Corp., 349 F.3d 816, 825 (5th Cir. 2003). "The party seeking to invoke the stay through this provision has the burden to show it is applicable." *Luppino v. York*, 562 B.R. 894, 898 (W.D. Tex. 2016).

52. The Debtors have not argued any "unusual circumstances" in these cases. Rather, Debtors argue that, because the claims against the *Marshall* Defendants are similar to those against them, the Court should extend the automatic stay. However, as this District has said:

> the presence of identical allegations against the debtor and non-debtor defendants **are an insufficient ground to extend the stay to non-debtors**. There must be an actual, as opposed to an alleged or potential, identity of interests, such that a judgment against the nonbankrupt parties would in fact be a judgment against the bankrupt party.

Beran v. World Telemetry, Inc., 747 F. Supp. 2d 719, 724 (S.D. Tex. 2010) (emphasis added).

53. A judgment against the *Marshall* Defendants will not equate to a judgment against the Debtors. The Debtors' claim that the Driver Class Claimants' case against the *Marshall* Defendants is a scheme to gain leverage in these chapter 11 cases is pure *ipse dixit*. The Driver Class Claimants chose not to name the *Marshall* Defendants in *Collins* for a simple and obvious reason: NPC, the defendant in *Collins*, was solvent at the time *Collins* was filed. The Driver Class Claimants did not sue the *Marshall* Defendants in *Collins* for the same reason the other Debtors were not sued in that case: there was no need. That the Driver Class Claimants should now pursue recovery against the remaining solvent and equally liable *Marshall* Defendants for their individual roles in denying the Driver Class Claimants basic wages is reasonable, and indeed, should be expected especially where as here it is anticipated that insurance would be available to satisfy any judgment that the Driver Class Claimants may obtain.[10] In fact, in light of the Debtors' precarious

[10] The Fifth Circuit has held that, while any insurance policy covering the *Marshall* Defendants' actions may be property of the estates, the proceeds of those liability policies are not; "when the debtor has no legally cognizable

financial condition, claims against the Marshall Defendants may be the best manner for the Driver Class Claimants to obtain recompense.

54. *Marshall* will not impact these chapter 11 cases. As discussed above, Debtors owe no right of indemnification to the *Marshal* Defendants for the willful conduct alleged in *Marshall*. *Marshall* will not drain the Debtors' estates or slow these proceedings.

55. The claims in *Marshall* are not "inextricably interwoven" with those of these chapter 11 cases. The most recent court decision in the Fifth Circuit to address this very issue was the Northern District of Texas in *Gigi's Cupcakes, LLC v. 4 Box LLC*, No. 3:17-CV-3009-B, 2019 WL 1767003 (N.D. Tex. Apr. 22, 2019). There, plaintiffs brought claims against a non-debtor defendant for her individual actions giving rise to potential liability. The court found that no stay against the non-debtor was warranted. What differentiated the claims against the debtors and non-debtor was that the claims against the non-debtor were based on *her own actions*. *Id*. at *5. The details and misconduct of the *Marshall* Defendants are distinct from those of the Debtors.

56. The allegations in *Marshall* refer to conduct that relates to the *Marshall* Defendants' own personal liability. As the court in *Gigi's* pointed out, the claims against the *Marshall* Defendants "are based solely on [their] own alleged actions and actions of other nonbankrupt parties. In sum, a discretionary stay is not warranted as to the [claims against the *Marshall* Defendants] because they are not so inextricably interwoven with those against the Debtors. The Court can efficiently and effectively resolve those claims with little to no involvement from the Debtors." *Id.* The claims against the *Marshall* Defendants involve questions of management and day to day operational decision-making, not the *implementation* of those decisions. Judgment on

claim to the insurance proceeds, those proceeds are not property of the estate." *Matter of Edgeworth*, 993 F.2d 51, 56 (5th Cir. 1993). Payment of those proceeds will not impact the estate, and Debtors have no right to them.

the *Marshall* Defendants for their conduct would be entirely separate from any judgment on Debtors stemming from the claims in *Collins*.

57. Nor can it be said that the *Marshall* Defendants' defense of that action will negatively impact Debtors' managers' ability to navigate these chapter 11 process. Debtors have retained competent bankruptcy counsel and other professionals who are more than capable of ensuring a smooth transition during the sale and reorganization of Debtors' estates. Moreover, *Marshall* is in its infancy, in part because the *Marshall* Defendants have refused to accept service of process. While it may be personally inconvenient to be a defendant in litigation, such are the risks of refusing to pay employees what they earn. Regardless, given that Debtors expect to emerge from these chapter 11 cases by year's end, it is highly unlikely that the *Marshall* Defendants would be forced to dedicate any significant time to litigation before the effective date of a plan. Thus, there is no reason to delay the prosecution of an action against these non-debtors.

58. The Debtors and their officers have continued to flout the FLSA during this bankruptcy, thereby causing the Debtors to incur post-petition liability to the Driver Class Claimants. This liability is a $34 million administrative expense of the estate that must be satisfied in full as of the Plan Effective Date. Likewise, the Driver Class Claimants have a pre-petition wage priority claim under section 507(a)(4) of approximately $25.6 million. The *Marshall* Defendants are equally liable for these damages. Allowing the *Marshall* action to continue would not only serve the interests of justice, but also save the estates from claims that could more effectively be brought against the masterminds behind Debtors' policies without diluting value to other creditors.

CONCLUSION

Debtors have needlessly wasted this Court's time asking for an extension of the automatic stay to a non-debtor action that will not impact these chapter 11 cases. Granting the Motion will cause delay in a case that will not be affected by the Debtors' reorganizations and will carry on

long after these cases are concluded. Debtors' Motion is just another attempt to impede their minimum wage workers from being able to secure any relief after years of abuse.

For all the foregoing reasons, the Driver Class Claimants respectfully request that an Order be entered denying approval of the Motion and granting such other and further relief as the Court deems just and proper.

Respectfully submitted,

Dated: October 19, 2020

By: */s/ Seth A. Meyer*

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of October, 2020, I caused to be served true and correct copies of the foregoing by filing it with the Court's CM/ECF system.

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