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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY

In re:	:	Chapter 11
LTL MANAGEMENT LLC,	:	Case No. 21-30589
Debtor.	:	

MOVANT'S REPLY TO DEBTOR'S OBJECTION TO HIS MOTION FOR ORDER LIFTING PRELIMINARY INJUNCTION

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The law firm of Kazan, McClain, Satterley & Greenwood, A Professional Law Corporation, and local counsel Saiber LLC, on behalf of their dying mesothelioma client and personal-injury claimant Vincent Hill ("Movant"), through his undersigned counsel, hereby submits this reply (the "Reply") to the objection of Debtor LTL Management LLC ("Debtor") to Movant's motion (the "Motion") for the entry of an order pursuant to Section 362(d)(1) of the Bankruptcy Code granting Movant relief from the Preliminary Injunction as to Johnson & Johnson ("J&J"), non-debtor distributor Owens & Minor Distribution Inc. ("Owens & Minor"), and non-debtor retailers Albertsons Companies, Inc., Safeway Inc., and Thrifty Corporation (collectively, "Retailers") and waiving the stay of Fed. R. Bankr. P. 4001(a)(3). In support of this Reply, Movant respectfully represents as follows:

PRELIMINARY STATEMENT

1. Movant is afflicted with terminal malignant mesothelioma and his health is rapidly declining. To allow him a meaningful opportunity of exercising his constitutional right to a jury trial, Movant respectfully requests that this Court issue an order lifting the stay imposed by the Preliminary Injunction so that he may prosecute his viable and valuable claims against J&J, Owens & Minor, and the Retailers. Nothing in Debtor's objection to the Motion warrants a contrary result.

2. ***First***, it cannot be disputed that Movant has met his initial burden by showing that "cause" exists to permit his personal-injury action to be concluded in the Superior Court of California against non-debtor entities J&J, Owens & Minor, and the Retailers. *See In re Mid Atlantic Handling Sys., LLC,* 304 B.R. 111, 130 (Bankr. D.N.J. 2003) ("It is well-settled that a basis for granting relief from the automatic stay for 'cause' exists when it is necessary to permit litigation to be concluded in another forum, particularly if the non-bankruptcy suit involves multiple non-debtor parties or is ready for trial."). As a result, the burden of proof on all issues

(except for one not at issue here) has shifted to Debtor to show why relief should not be granted. *In re Telegroup, Inc.*, 237 B.R. 87, 91 (Bankr. D.N.J. 1999); 11 U.S.C. § 362(g)(2).

3. ***Second***, Debtor's scare tactics grounded in speculation and conjecture falls far short of meeting its burden of proof to show that "cause" does not exist to lift the stay under the Preliminary Injunction. 11 U.S.C. § 362(g)(2). Rather than address the facts and relevant authorities, Debtor argues that granting the Motion will create a "tidal wave" or "avalanche" of similar motions from other claimants who are affected by the Preliminary Injunction and therefore defeat the "fundamental tenet" of the automatic stay. [Main Dkt. 1061 at pp. 8, 13.] This "parade of horribles" argument is not grounded in fact because Debtor fails to identify any authority or instance in which a movant who was afforded stay relief resulted in a bankruptcy court being bombarded with similar motions filed by other claimants. Indeed, such an argument is an affront to this Court because it implies that this or any other bankruptcy court is unable to control their own docket. Also, Debtor's argument is not grounded in law because (i) section 362(d) allows Movant to seek relief from the Preliminary Injunction, and (ii) none of the *Mid-Atlantic* factors even contemplates any of Debtor's "parade of horribles" argument. The bottom line is the Court should decide this Motion, not some hypothetical future motions.

4. ***Third***, Debtor relies on the findings of the North Carolina Bankruptcy Court to support its argument that no stay is warranted here. However, that court made plain in its Preliminary Injunction order that the factual findings therein are not binding on this Court.

5. ***Fourth***, Debtor's claim that granting the Motion impacts any purported "indemnification agreement" is flawed. Movant disputes the validity of those agreements, including the one between Old JJCI and Owens & Minor. Even if any valid "indemnification

agreement" exists, any indemnification that may exist between Debtor and non-debtor entities would be an unsecured claim just like any other cancer victim.

6. ***Fifth***, the relevant *Mid-Atlantic* factors weigh heavily in favor of granting the Motion. As previously mentioned, Debtor's scare tactics do not help it meet its ultimate burden of showing why Movant's requested relief should not be granted. In contrast, Movant has shown that lifting the stay imposed by the Preliminary Injunction is, among other things, (i) beneficial to Movant, (ii) lessens the likelihood of prejudice against the other non-talc defendants in the underlying personal-injury action, (iii) is in the interest of judicial economy, (iv) would result in the expeditious and economical resolution of the litigation, (v) does not interfere with the bankruptcy case, and (vi) does not prejudice the interest of other talc claimants.

7. Accordingly, Movant requests that this Court grant the Motion, and for such other relief to which he is entitled.

DISCUSSION

I. Movant's Claim is Unlike Any Other Mesothelioma Talc Claim in the Country.

8. Debtor argues that Movant's claim is indistinguishable from any other Enjoined Talc Claim and therefore is not entitled to relief from the Preliminary Injunction. Debtor is wrong.

9. First, Debtor recognizes that Movant's claims are unlike any other mesothelioma talc claim in the country. [Main Dkt. 1061 at p. 7.] Indeed, Debtor does not rebut the fact that Debtor's personal-injury action is the only one in the country that (i) names Owens & Minor as a defendant, (ii) alleges both occupational and personal exposure to asbestiform fibers from Johnson's Baby Powder talc, (iii) had a December 13, 2021 preferential trial date that was later continued to February 14, 2022 as a result of the Preliminary Injunction, (iv) involves asbestos-exposure claims against non-talc defendants, and (v) would result in two trials involving duplicative issues absent Movant's request for relief from the Preliminary Injunction. [Main

Dkt. 932-1, at ¶¶ 11-13, 22, 24-25, 29-30, 46-47.] Thus, Debtor's argument that Movant's claims have no meaningful difference from the 430 mesothelioma talc cases or the tens of thousands of ovarian cancer cases filed against J&J does not withstand scrutiny.

10. Second, Debtor glosses over the fact that the so-called "indemnity agreement" between Owens & Minor and Old JJCI that purportedly obligates Debtor to defend and indemnify Owens & Minor in Movant's underlying personal-injury lawsuit is a sham that was drafted and signed about five months after the meeting with Jones Day in April 2021 to create the sham bankruptcy. [Main Dkt. 932-4, at pp. 295-296.] And even before the Jones Day meeting, Debtor's chief legal officer John Kim testified that he and others at J&J "started looking at the transaction – so the divisional merger and bankruptcy – ***from time to time for the last couple of years***, but most recently about maybe six months ago." [Adv. Dkt. 142-14 at 60:21-61:9 (emphasis added).] Hence, this purported "indemnity agreement" was created at least several months after Debtor knew it was seeking bankruptcy protection and merely to protect Owens & Minor—a solvent Fortune 500 "global healthcare solutions company" with revenue in the billions of dollars. [*See* Owens & Minor Financial Results at https://tinyurl.com/2p9yszdd.] Movant's dispute about the validity of Debtor's purported indemnity obligation towards Owens & Minor is thus based on fact, rather than "supposition or innuendo." [Main Dkt. 1061 at p. 8.]

11. Third, even if a valid indemnification exists between Owens & Minor and Debtor, which Movant strongly disputes, it would not threaten Debtor's reorganization. Any indemnification that may exist "would be treated like any pre-petition, unsecured claim." *See In Re: All Seasons Resort, Inc.*, 79 B.R. 901, 905 (C.D. Cal. 1987).

II. Debtor's "Parade of Horribles" Argument Lacks Merit.

12. Debtor argues that granting the Motion runs afoul of the "fundamental tenet of the automatic stay" and would result in a "tidal wave" of similar requests from "thousands of other claimants." [Main Dkt. 1061 at p. 9, ¶ 13.] This argument is legally and factually flawed.

13. First, none of the *Mid-Atlantic* factors considers whether granting the movant's request for stay relief would result in a "tidal wave," "spate," or "avalanche" [Main Dkt. 1061 at pp. 8, 9, 13] of similar requests from other claimants. *In re Mid-Atlantic,* 304 B.R. at 130. Instead, the *Mid-Atlantic* factors focus on the litigation at issue in the motion, not some hypothetical future stay relief motion that is not before the Court. Hence, Debtor's argument lacks any authority and is merely an attempt to scare this Court from granting Movant's requested relief.

14. Second, Movant's request does not "violate a fundamental tenet of the automatic stay" [Main Dkt. 1061 at p. 9, ¶ 12] because section 362 allows Movant to seek relief from the Preliminary Injunction. Section 362(d) states that "the court ***shall*** grant relief from the stay. . . by terminating, annulling, modifying, or conditioning such stay [ ] for ***cause*** ..." 11 U.S.C. § 362(d)(1) (emphasis added). And bankruptcy courts have considerable discretion when determining if stay relief is appropriate. *In re Mid-Atlantic*, 304 B.R. at 130. Hence, granting the Motion in no way "defeats the purpose of the automatic stay." [Main Dkt. 1061 at p. 8.] Instead, it advances the purpose of the statute by allowing parties, such as Movant here, relief from the stay for cause shown. 11 U.S.C. § 362(d)(1).

15. Third, Debtor's argument is not grounded in fact. Debtor cites no authority or instance in which a bankruptcy court is suddenly inundated with section 362(d) motions merely because another party successfully obtained relief from the automatic stay or a preliminary injunction. Thus, Debtor's claim that granting Movant's motion creates a parade of horribles is mere speculation and conjecture.

16. Accordingly, this Court is well within its discretion to reject Debtor's "tidal wave" argument because it is not grounded in law or fact.

III. The *Mid-Atlantic* Factors Weigh in Favor of Granting Movant's Motion for Relief.

17. It is undisputed that section 362(d) of the Bankruptcy Code provides that Movant is entitled to relief from the Preliminary Injunction for cause shown. [Adv. Dkt. 102 at p. 9, ¶ 8; 11 U.S.C. § 362(d)(1).] "Cause" is a "broad and flexible concept," and a court is granted wide discretion to determine whether to lift the automatic stay on that basis. *In re Mid-Atlantic*, 304 B.R. at 130.

18. Initially, the movant bears the burden to assert "cause" for relief. *In re Telegroup, Inc.,* 237 B.R. at 91. If the movant meets that burden, the ultimate burden of proof on all issues (other than the debtor's equity in property) then shifts to the debtor to show why relief should not be granted. *Id.*; 11 U.S.C. § 362(g)(2).

19. Here, Movant has shown that "cause" exists under section 362(d)(1) for relief from the Preliminary Injunction to allow him to conduct discovery against several non-debtor parties (J&J, Owens & Minor, and Retailers) and gives him the opportunity to appear and have his case tried before he passes. "It is well-settled that a basis for granting relief from the automatic stay for 'cause' exists when it is necessary to permit litigation to be concluded in another forum, particularly if the non-bankruptcy suit involves multiple non-debtor parties or is ready for trial." *In re Mid-Atlantic,* 304 B.R. at 130.

20. As a result, Debtor bears the ultimate burden of proof to show that "cause" does not exist to lift the stay under the Preliminary Injunction. 11 U.S.C. § 362(g)(2). As detailed below, Debtor has failed to meet its burden of proof because the *Mid-Atlantic* factors, on balance, militate in favor of relief from the Preliminary Injunction.

A. Relief from the Preliminary Injunction would result in a complete resolution of Movant's talc-related claims.

21. Debtor claims that "lifting the stay as requested by Movant will not completely resolve the issues" and instead would "foster efforts to pursue piecemeal litigation and serial presentation of the same issues in different courts around the country." [Main Dkt. 1061 at p. 11, ¶ 17.] Debtor misinterprets and misapplies this *Mid-Atlantic* factor.

22. The first *Mid-Atlantic* factor, whether relief would result in a partial or complete resolution of the issues, focuses on the issues specific to Movant's case. It does not, as Debtor claims, consider whether resolution of Debtor's issues in state court somehow resolves similar issues in other courts. Here, the issue is whether permitting Movant's state court personal-injury action to proceed will result in a complete resolution of the issue of J&J, Owens & Minor, and Retailers' alleged liability to Movant for his mesothelioma stemming from his substantial exposure to asbestiform fibers from Johnson's Baby Powder talc. It is undisputed that relief from the stay will certainly result in the complete resolution of Movant's claims against those non-debtor entities because (i) they are alleged to be in the talc powder product's chain of distribution, and (ii) potentially jointly and severally liable for Movant's full damages without a showing of negligence. *Wimberly v. Derby Cycle Corp.,* 56 Cal.App.4th 618, 633 (Cal. App. 4th Dist. 1997). Hence, the relief requested will allow Movant to pursue his viable and valuable claims against J&J, Owens & Minor, and the Retailers in state court and will result in the complete resolution of the talc-related issues against those non-debtor entities in his personal-injury case. This factor weighs in favor of granting the Motion.

23. Debtor provides no basis to support its claim that granting the Motion would result in "piecemeal litigation" and "serial presentation" of duplicative issues nationwide. As addressed

in Sections I and II above, Movant's personal-injury claim is unique and Defendant's parade of horribles is not grounded in law or fact.

B. The relief requested would not interfere with the bankruptcy case and primarily involves third parties.

24. As to second (interference with bankruptcy case) and sixth (third parties) *Mid-Atlantic* factors, Debtor argues that the non-debtor entities at issue in the Motion are "Protected Parties" and allowing Movant's personal-injury case to proceed against them interferes with the bankruptcy case for a variety of reasons (triggering indemnification obligations, issues related to res judicata and collateral estoppel, etc.). [Main Dkt. 1061 at pp. 11-12, ¶ 18, and p. 13, ¶ 21.] Debtor then cites to the Preliminary Injunction order to support them. [*Id.*] Debtor is mistaken.

25. The factual findings set forth in the Preliminary Injunction order are not binding on this Court. The order itself states: "For the avoidance of doubt, all of the Court's findings and conclusions herein are without prejudice, as set forth in the record, to . . . any further finding by a subsequent court with jurisdiction over this proceeding (the 'Presiding Court') . . ." [Adv. Dkt. 102 at p. 4, ¶ E.] Further, the Preliminary Injunction order "is not intended to bind a subsequent Presiding Court" and "[t]he injunction and the Court's interim stay ruling herein shall expire on the date that is 60 days after the entry of this Order (the 'Termination Date'), unless modified or extended by an order of the Presiding Court." [*Id.* at pp. 7-8, ¶¶ 4-5.] Thus, the Preliminary Injunction order belies Debtor's claim this Court is bound by the prior court's factual findings.

26. Further, there is no dispute that J&J, Owens & Minor, and the Retailers are third parties. However, Debtor claims that those non-debtor entities are "Protected Parties" under the Preliminary Injunction order. Any obligation that Debtor has to "Protected Parties" that are not in bankruptcy, including J&J, Owens & Minor, and Retailers, were manufactured shortly before the bankruptcy filing. As more fully set forth in the objection of the Official Committee of Talc

Claimants to Debtor's motion to extend the automatic stay to actions against non-debtors, all of Debtor's agreements with the "Protected Parties" were unilaterally and intentionally allocated to the Debtor by J&J and its affiliates just two days before the bankruptcy filing. [Adv. Dkt. 142 at pp. 50-56.] Unlike what the Debtor has done here, the authorities approving the extension of the automatic stay to non-debtors involved commercial contracts that an operating debtor signed, or assumed, in the ordinary course of business well in advance of the debtor's bankruptcy filing. [*Id.*] What Debtor seeks here is unprecedented and avails non-debtors, like solvent entities J&J, Owens & Minor, and Retailers all the benefits, but none of the burdens, of the Bankruptcy Code. [*Id*.]

27. Hence, Debtor fails to rebut Movant's claim that his personal-injury action involves third parties and would not interfere with the bankruptcy case. Indeed, Movant has independent claims against (i) Owens & Minor for its supply of Johnson's Baby Powder to Movant's employer; (ii) the Retailers because they supplied Johnson's Baby Powder talc to Movant and his family members; and (iii) J&J for its own direct involvement with Johnson's Baby Powder talc, including its manufacture of that product prior to 1979, all health and safety policy decisions it made with regard to asbestos and talc products, and ownership of certain Vermont mines that supplied the talc used in Johnson's Baby Powder from the 1960's to 1989. [*See* Main Dkt. 932-1 at pp. 13-14.] This factor weighs in Movant's favor.

C. It is undisputed that the California trial court has the necessary expertise to hear Movant's claims against the non-debtor entities.

28. Debtor concedes that the Superior Court of California has the expertise to hear Movant's personal personal-injury lawsuit. [Main Dkt. at p. 12, ¶ 19.] Nonetheless, Debtor claims that this factor weighs against granting the Motion by repeating its arguments that Movant's claims are indistinguishable from other talc claimants and this bankruptcy case is the only way for Debtor to resolve all of its talc-related claims. However, as set forth above, Debtor is wrong because

(i) Movant's claims are unlike those of any other talc claimant, (ii) Movant seeks relief against non-debtor entities, and (iii) any indemnification that may exist between Debtor and non-debtor entities is a sham and, regardless, would be an unsecured claim just like any other cancer victim.

D. Whether the Debtor's insurer has assumed full responsibility for defending Movant's claims has no bearing on this Motion.

29. Debtor contends that it "'believes that it has rights to extremely valuable insurance coverage for its Debtor Talc Claims," although no insurer has acknowledged those obligations. [Main Dkt. 1061 at pp. 12-13, ¶ 20.] This *Mid-Atlantic* factor does not weigh against granting the Motion because Movant is seeking to prosecute his claims against the non-debtor entities. Thus, Debtor's insurance coverage is not at issue. Indeed, J&J has admitted that it has plenty of money to satisfy any talc-related judgment against it. [Adv. Dkt. 142-14 at 116:20-118:3 (testimony of Mr. Kim: "Don't worry. We have plenty of money to satisfy these judgments. And so our insurance isn't relevant.").]

E. Debtor fails to show that permitting the state court action to proceed would prejudice the interests of other creditors.

30. Contrary to Debtor's argument, Movant's underlying personal-injury lawsuit in California would not prejudice Debtor's creditors. As discussed above, Movant's claims are unique and therefore do not prejudice the interests of other talc claimants. Indeed, resolution of those talc-related issues must be addressed and damages, if any, fixed so that the extent of creditors' claims are known. *See In re Mid-Atlantic*, 304 B.R. at 130-131 (allowing the plaintiff to proceed with his claims against the debtor in state court because it would not prejudice the debtor's creditors). This factor weighs in favor of granting the Motion.

F. Assuming this action is not dismissed, Movant agrees to not enforce any damages award without this Court's approval.

31. Debtor does not address, and therefore concedes that the ninth *Mid-Atlantic* factor (whether Movant's success in the other proceeding would result in a judicial lien avoidable by Debtor) weighs in Movant's favor. As previously stated, the Official Committee of Talc Claimants has moved to dismiss Debtor's Chapter 11 Case. [Main Dkt. 632.] In the event this Court denies that motion and grants Movant's requested relief, Movant agrees that any damages award to Movant will be subject to this Court's approval.

G. Relief from the Preliminary Injunction is in the interests of judicial economy and the expeditious and economical resolution of the litigation.

32. Debtor repeats its parade of horribles argument when it contends that Movant's requested relief would not promote judicial economy and the expeditious and economical resolution of the litigation. [Main Dkt. 1061 at pp. 13-14.] For the reasons set forth above, the bankruptcy code provisions allowing stay relief contemplate the relief Movant requests here [11 U.S.C. § 362(d)] and the so-called "avalanche of similar requests" that Debtor surmises will occur if this Court grants the Motion is grounded in fiction, not reality.

33. As a result, Debtor fails to rebut Movant's arguments in support of this tenth *Mid-Atlantic* factor, all of which weigh heavily in favor of granting the Motion. Such an order is in the interests of judicial economy because it allows Movant to proceed with his personal-injury claims against all parties (talc and non-talc defendants) and avoids the need for multiple and duplicative trials. For those same reasons, the relief requested would also result in prompt and efficient resolution of the litigation. Absent the requested relief, the non-talc defendants may be prejudiced if the trier of fact in state court makes an intentional tort finding against any of them, thus giving J&J, Owens & Minor, and the Retailers a significant and unfair windfall. *B.B. v. County of Los Angeles,* 10 Cal.5th 1, 24, 30 (2020).

H. Lifting the stay allows the affected parties to promptly prepare for trial.

34. Movant's personal-injury action was given preferential status and an expedited pre-trial discovery schedule. [Main Dkt. 932-4 at pp. 276-318.] Given that Movant, J&J, Owens & Minor, and the Retailers are represented by experienced asbestos lawyers in the personal-injury lawsuit, those parties have ample time to conduct discovery and soon be ready for trial.

35. Debtor argues that the North Carolina Bankruptcy Court's refusal to lift the automatic stay as to the *Vanklive* personal-injury case shows that the same result should happen here. [Main Dkt. 1061 at p. 14.] However, as previously discussed above, this case is unlike any other asbestos talc case in the country, including *Vanklive*. The only similarity between *Vanklive* and Movant's talc claims is that they both involve terminally ill mesothelioma patients. The Motion respectfully requests that the Court decide this Motion, not a prior motion from a prior case. Further, as set forth above, the North Carolina Bankruptcy Court has stated that its findings are not binding on this Court.

I. The Preliminary Injunction severely harms Movant.

36. Debtor glosses over the fact that staying Movant's personal-injury action against J&J, Owens & Minor, and the Retailers divests his right to a jury trial under the Seventh Amendment of the United States Constitution and Article 1, Section 16 of the California Constitution. As more fully set forth in the Motion of the Official Committee of Talc Claimants to Dismiss Debtor's Chapter 11 Case, there is a serious constitutional question of whether an Article I judge may properly preside over litigation transferred to the bankruptcy court by virtue of a chapter 11 filing that serves no reorganizational purpose. [Main Dkt. 632-1 at ¶ 39.] Further, as set forth in the Motion, the Preliminary Injunction precludes Movant from gathering evidence regarding Owens & Minor. [Main Dkt. 932-1 at pp. 17-18.]

37. On the other hand, allowing Movant to prosecute his viable claims against J&J, Owens & Minor, and the Retailers in state court in no way jeopardizes Debtor's ability to resolve its talc claims. Debtor does not dispute that should this Court deny the motion to dismiss but grant this Motion, any damages award to Movant will be subject to this Court's approval. Further, even if any of these non-debtor entities have indemnification rights, it would not threaten the successful reorganization of the Debtor because such rights would be treated as an unsecured claim.

38. It is undisputed that Movant is dying of mesothelioma. Allowing the Preliminary Injunction to stand denies Movant to have his case heard during his lifetime. *Looney v. Superior Court,* 16 Cal.App.4th 521, 532, fn. 12 (Cal. App. 2d Dist. 1993) (recognizing that Cal. Code Civ. Proc. § 36 ensures that an early trial date for persons who might die or become incapacitated before their cases come to trial). This factor heavily weighs in favor of granting the Motion.

CONCLUSION

39. For the reasons and based on the authorities set forth above and in the Motion, Movant respectfully requests entry of an Order lifting the Preliminary Injunction pursuant to Section 362(d)(1), waiving the stay of Fed. R. Bankr. P. 4001(a)(3), to permit his personal-injury action pending in the Superior Court of California to continue against J&J, Owens & Minor, and the Retailers, and for such other relief to which Movant is entitled.

Respectfully submitted:

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- and -

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By: /s/ John M. August
JOHN M. AUGUST

DATED: January 7, 2022