09-14

FILED
OCT 29 2009
CLERK OF COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

IN THE MATTER OF ENDOSCOPY CENTER AND ASSOCIATED BUSINESSES	ADMINISTRATIVE ORDER NO.09-14

ADMINISTRATIVE ORDER REGARDING ENDOSCOPY CENTER AND ASSOCIATED BUSINESSES

WHEREAS pursuant to EDCR 1.30 Judge Alan Earl was assigned in Administrative Order 08-01 (attached hereto as Exhibit "1") the responsibility for coordinating all of the discovery and pretrial motion practice of cases involving these entities under A534756 and the related cases;

WHEREAS the On July 17, 2009, Endoscopy Center of Southern Nevada, LLC, Case No. 09-22780; Gastroenterology Center of Nevada, LLP, Case No. 09-22776; and, Desert Shadow Endoscopy Center, LLC, Case No. 09-22784 filed voluntary petitions for liquidation under Chapter 7;

WHEREAS further proceedings as to Endoscopy Center of Southern Nevada, LLC, Gastroenterology Center of Nevada, LLP, and, Desert Shadow Endoscopy Center, LLC, have been stayed pursuant to Section 362(a).

WHEREAS on September 9, 2009, the Bankruptcy Court lifted the stay against Endoscopy Center of Southern Nevada, LLC, Case No. 09-22780; Gastroenterology Center of Nevada, LLP, Case No. 09-22776; and, Desert Shadow Endoscopy Center,

T. ARTHUR RITCHIE, JR.
DISTRICT JUDGE
FAMILY DIVISION, DEPT. H
LAS VEGAS, NEVADA 89155

LLC, as to certain cases in the proceedings governed by Administrative Order 08-01. (attached hereto as Exhibit "2")

WHEREAS Michael Washington vs. Endoscopy Center of Southern Nevada, et al, Case No. A558164; Henry Chanin vs. Endoscopy Center of Southern Nevada, et al, Case No. A560647; Gwendolyn Martin vs. Endoscopy Center of Southern Nevada, et al, Case No. A558827 are no longer subject to a bankruptcy stay.

WHEREAS Michael Washington vs. Endoscopy Center of Southern Nevada, et al, Case No. A558164; Henry Chanin vs. Endoscopy Center of Southern Nevada, et al, Case No. A560647; Gwendolyn Martin vs. Endoscopy Center of Southern Nevada, et al, Case No. A558827 are each set for trial.

NOW, THEREFORE, it is ordered that effective November 2, 2009 pursuant to EDCR 1.30 the responsibility for handling pretrial motion practice of all cases subject to Administrative Order 08-01 are returned to the respective assigned departments and any motion will be heard by the assigned department.

Entered this 29th day of October, 2009.

By: _____
Elizabeth Gonzalez
Presiding Judge, Civil Division

By: _____
T. Arthur Ritchie, Jr.
Chief Judge

EXHIBIT 1

CLARK COUNTY COURTS
CLARK COUNTY, NEVADA

FILED
MAR 19 2 43 PM '08

In the Matter of
Endoscopy Center and
Associated Businesses

Administrative Order No. 08-1

CLERK OF THE COURT

WHEREAS NRS 3.220 declares that "[t]he district judges shall possess equal coextensive and concurrent jurisdiction and power" and that "[t]hey each shall exercise and perform powers, duties and functions of the court and of judges thereof and of judges at chambers," and

WHEREAS NRS 3.026(1) requires the Chief Judge to ensure that "[t]he procedures which govern the consideration and disposition of cases and other proceedings within the jurisdiction of the district court are applied as uniformly as practicable," and

WHEREAS NRS 3.026(2) further requires the Chief Judge to ensure that "[c]ases and other proceedings within the jurisdiction of the district court are considered and decided in a timely manner," and

WHEREAS EDCR 1.30(b)(5) allows the Chief Judge to "[m]ake regular and special assignments of all judges," and

WHEREAS EDCR 1.30(b)(15) authorizes the Chief Judge to "[r]eassign cases from a department to another department as convenience or necessity requires," and

WHEREAS EDCR 1.30(b)(18) requires the Chief Judge to "assure that court duties are timely and orderly performed," and

WHEREAS EDCR 1.60(a) declares that the Chief Judge "shall have the authority to assign and reassign all cases pending in the district," and

WHEREAS, in *Halverson v. Hardcastle*, 123 Nev. Adv. Op. No. 29, 163 P.3d 428 (2007), the Nevada Supreme Court of Nevada held that the judiciary has "inherent

authority to administrate its own procedures and to manage its own affairs, meaning that the judiciary may make rules and carry out other incidental powers when 'reasonable and necessary' for the administration of justice," and,

WHEREAS, on March 17, 2008, Judge Allan Earl in District Court Department 19, is available to coordinate all cases arising out of the Endoscopy Center and associated business, therefore;

IT IS HEREBY ORDERED that Judge Allan Earl is appointed pursuant to EDCR 1.30, for the coordination of discovery and pretrial motion practice of the case files listed below:

07-A-534756-C	01/19/07	Rexford, Kevin v. Carroll MD, Clifford
08-A-558091-C	02/28/08	Cordero, Michael v Endoscopy Center
08-A-558164-C	02/29/08	Washington, Michael v Endoscopy Center
08-A-558169-C	02/29/08	Jarrel, Allison v Endoscopy Center
08-A-558225-C	02/29/08	Hall-Hilty, Deborah v Endoscopy Center
08-A-558226-C	02/29/08	Shaw, Nancy J v Endoscopy Center
08-A-558227-C	02/29/08	Trammell, David v Endoscopy Center
08-A-558294-C	03/03/08	Dunn, Victor v Endoscopy Center
08-A-558376-C	03/05/08	English, Craig v Endoscopy Center
08-A-558404-C	03/05/08	Brown, James A v Endoscopy Center
08-A-558416-C	03/05/08	Perry, Sandra J v Endoscopy Center
08-A-558423-C	03/05/08	Harris, Leland v Endoscopy Center
08-A-558427-C	03/05/08	Scott, Gloria M v Endoscopy Center
08-A-558428-C	03/05/08	Lewis, Robert v Endoscopy Center
08-A-558443-C	03/06/08	Houston, Kenneth v Endoscopy Center
08-A-558451-C	03/06/08	Turner, Sylvester v Endoscopy Center
08-A-558453-C	03/06/08	Rogers, Ernestine v Endoscopy Center
08-A-558454-C	03/06/08	Becker, Michael v Endoscopy Center
08-A-558455-C	03/06/08	Nelson, Keith v Endoscopy Center
08-A-558457-C	03/06/08	Clark, Dickson v Endoscopy Center
08-A-558458-C	03/06/08	Green, Charlette v Endoscopy Center
08-A-558470-C	03/06/08	Howard, Rodney v Endoscopy Center
08-A-558495-C	03/06/08	Johnson, Dena v Endoscopy Center
08-A-558736-C	03/11/08	Duran, Humberto v Endoscopy Center
08-A-558739-C	03/11/08	Cason, Theda v Endoscopy Center
08-A-558740-C	03/11/08	Hopper, Clifford v Endoscopy Center
08-A-558741-C	03/11/08	Ray, Michael J v Endoscopy Center
08-A-558742-C	03/11/08	Bradley, Eric M v Endoscopy Center
08-A-558744-C	03/11/08	Jones, Ken v Endoscopy Center
08-A-558745-C	03/11/08	O'Neill, Michael v Endoscopy Center
08-A-558746-C	03/11/08	Paris, Tommy v Endoscopy Center
08-A-558748-C	03/11/08	Thomas, Joseph W v Endoscopy Center

08-A-558749-C	03/11/08	Davis, Cary v Endoscopy Center
08-A-558750-C	03/11/08	Washington, Melvin v Endoscopy Center
08-A-558751-C	03/11/08	Douglas, Henry v Endoscopy Center
08-A-558752-C	03/11/08	Smith-Martin, Joslyn v Endoscopy Center
08-A-558753-C	03/11/08	Branch, Richard E v Endoscopy Center
08-A-558754-C	03/11/08	Williams, Juanita v Endoscopy Center
08-A-558755-C	03/11/08	Wilkie, Jeff v Endoscopy Center
08-A-558757-C	03/11/08	Chaney, Linda v Endoscopy Center
08-A-558758-C	03/11/08	Gibson, Glenda v Endoscopy Center
08-A-558759-C	03/11/08	Gerhardt, Susan v Endoscopy Center
08-A-558760-C	03/11/08	Baker, Katherine L v Endoscopy Center
08-A-558761-C	03/11/08	Bell, Karen v Endoscopy Center
08-A-558762-C	03/11/08	Wheeler, James E v Endoscopy Center
08-A-558763-C	03/11/08	Westbrook, Edna A v Endoscopy Center
08-A-558764-C	03/11/08	Copley, William v Endoscopy Center
08-A-558765-C	03/11/08	Allen, Isaac E v Endoscopy Center
08-A-558827-C	03/11/08	Martin, Gwendolyn v Endoscopy Center
08-A-558165-C	02/28/08	Rader Jr, Charles A v Endoscopy Center
08-A-558544-C	03/06/08	Chamberlain, Rod v Endoscopy Center

IT IS FURTHER ORDERED that this order is to become effective on March 19, 2008.

3/19/2008

Date

KATHY HARDCASTLE, Chief District Court Judge

EXHIBIT 2

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re ENDOSCOPY CENTER OF SOUTHERN NEVADA, LLC, Debtor.	Case No. BK-S-09-22780-MKN Chapter 7 Date: August 26, 2009 Time: 1:30 p.m.

MEMORANDUM DECISION ON EMERGENCY MOTION FOR RELIEF FROM THE AUTOMATIC STAY AND WAIVER OF THE 10-DAY STAY OF ORDER

This matter was heard on August 26, 2009. The appearances of counsel were noted on the record. After oral arguments were presented, the matter was taken under submission.

BACKGROUND[1]

On July 17, 2009, Endoscopy Center of Southern Nevada, LLC filed a voluntary petition for liquidation under Chapter 7. On the same date, similar petitions were filed by Gastroenterology Center of Nevada, LLP, Case No. 09-22776 and Desert Shadow Endoscopy Center, LLC, Case No. 09-22784. (All three entities are collectively referred to as "Debtors" in

[1] In the text and footnotes of this Memorandum Decision, all references to "Section" shall be to provisions of the Bankruptcy Code appearing in Title 11 of the United States Code unless otherwise indicated. All references to "Bankruptcy Rule" shall be to provisions of the Federal Rules of Bankruptcy Procedure unless otherwise indicated. All references to "Local Rules" shall be to the Local Rules of Practice for the United States District Court for the District of Nevada unless otherwise indicated.

this memorandum.)[2] Brian D. Shapiro was appointed as the Chapter 7 trustee ("Trustee") to administer all three bankruptcy cases.[3]

Debtors performed endoscopy procedures at outpatient clinics or "centers" located in the Las Vegas area. As a result of an investigation into the practices at the centers, public health alerts were issued by the Southern Nevada Health District and other health agencies asking patients who visited the centers between March 2004 and January 11, 2008, to undergo testing for hepatitis C and other infectious diseases. All of the centers run by the Debtors have ceased operations.

Debtors are named as defendants in a number of lawsuits ("Hepatitis Litigation") pending in the Eighth Judicial District Court for Clark County, Nevada ("State Court"), including Case Nos. A558164, A560641, A558827, A562216, A562230, A562606, A563891, A564321, A570736, and A572949.[4] The primary plaintiffs in those cases, in the same order, are Michael Washington, Henry Chanin, Gwendolyn Martin, Stacy Hutchison, Bonnie Brunson, Patty Aspinwall, Carol Grueskin, Rodolfo Meana, Jim Williams, and Maria Pagan.[5] In addition to the

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[2] At the hearing on the instant matter, counsel for the bankruptcy trustee indicated that a request to consolidate or jointly administer the three related bankruptcy cases would be filed with the court.

[3] Initially, the Desert Shadow case was assigned to Yvette Weinstein, another standing Chapter 7 trustee for this judicial district. The case subsequently was reassigned to Brian Shapiro due to its relationship to the other two cases.

[4] A Schedule of Assets and Liabilities accompanied the Endoscopy Center bankruptcy petition that was filed on July 17, 2009. Included in the 252 pages of schedules is a 229 page table listing multiple lawsuits pending against the Endoscopy Center as of the petition date. The table includes the litigants who brought the instant motions for relief from stay. It appears that identical tables were included in the schedules filed by the Debtors in the Gastroenterology Center and Desert Shadow cases as well.

[5] In this memorandum, these individuals are collectively referred to as "Plaintiffs" or individually by their last names only, if appropriate.

Debtors[6], the named defendants also include Dipak Desai, who apparently was the operating surgeon for the Debtors[7], various other medical professionals, and certain manufacturers and/or distributors of products used by the Debtors. The latter entities include Teva Parental Medicines, Inc., Sicor, Inc., and McKesson Medical-Surgical, Inc. (collectively "Product Defendants").

Trial in the Washington action is scheduled to commence on October 19, 2009. Chanin is scheduled for trial on December 7, 2009, Martin on January 18, 2010, and Hutchison on March 9, 2010. The other trials are scheduled to commence from April 5, 2010, through November 14, 2011. Apparently, the cases are in varying stages of readiness for trial, with the Washington case being the most prepared. The bankruptcy petition of the Debtor, as well as the related entities, was filed shortly before the scheduled depositions of certain of defendants' experts were to be taken in the Washington case. As a result of the filing of the bankruptcy petitions, further proceedings as to the Debtors have been stayed pursuant to Section 362(a). There is no automatic stay in place[8], however, as to any other defendants named in the Hepatitis

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[6] For purposes of the instant motions, the court has not independently examined or verified which of the Plaintiffs has named which of the Debtors in the aforementioned actions pending in the State Court. The bankruptcy court has assumed that relief from stay is being sought for a specific Plaintiff in a specific Debtor's bankruptcy case because that Debtor is a named defendant in the Plaintiff's action. Thus, because Washington is seeking relief from stay to proceed in State Court against the Endoscopy Center in Case No. A558164, the court has assumed, until informed otherwise, that the Endoscopy Center is a named defendant in that proceeding.

[7] Dipak Desai is shown on each of the bankruptcy petitions as being the general partner of the Debtor entity.

[8] It appears that relief from stay was obtained in connection with a bankruptcy proceeding that was commenced in the Middle District of Georgia by Ronald E. Lakeman, Case No. 09-40374, who is an individual that was named as a defendant in the Washington action. See Exhibit "A" to RAS Motion.

Litigation.[9]

On July 23, 2009, Chanin and Martin filed an Emergency Motion for Relief from the Automatic Stay and Request for Waiver of 10-Day Stay of Order Pursuant to FRBP 4001(A)(3) in the Desert Shadow proceeding. On the same date, Chanin and Martin, along with Hutchison, Brunson, Aspinwall, Grueskin, Meana, Williams and Pagan, filed an Emergency Motion for Relief from the Automatic Stay and Request for Waiver of 10-Day Stay of Order Pursuant to FRBP 4001(A)(3) in both the Endoscopy Center and Gastroenterology Center proceedings. (Collectively, these motions are referred to as "Chanin RAS Motion".) On July 31, 2009, Washington filed an Emergency Motion for Relief from the Automatic Stay and Request for Waiver of 10-Day Stay of Order Pursuant to FRBP 4001(A)(3) ("Washington RAS Motion") in both the Endoscopy Center and Gastroenterology Center proceedings. All of the motions (collectively "RAS Motions") were set for hearing on August 26, 2009.

A Declaration of Will Kemp, Esq. ("Kemp Declaration") was filed in support of each motion. With slight differences, the Kemp Declaration is the same in each case. A notice was filed in each case indicating that the RAS Motions would be heard by the bankruptcy court on August 26, 2009. By these motions, each of the plaintiffs[10] named in the Hepatitis Litigation seeks relief from the automatic stay to pursue the litigation in State Court against the Debtors.[11]

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[9] As noted by the Plaintiffs, the automatic stay does not apply to the other defendants named in the State Court proceedings and the Hepatitis Litigation may still proceed to trial as to Depak Desai and Jane Drury, neither of whom have sought bankruptcy protection. See Reply at 2:26 to 4:2, citing Edwards v. Ghandour, 159 P.3d 1086, 1088 (Nev. 2007). There is no co-debtor stay and no injunction seeking to prevent action against any co-defendants has been sought from this court. See, e.g., A.H. Robins Co., Inc. v. Piccinin (In re A.H. Robins), 788 F.2d 994 (4th Cir. 1986)(debtor granted preliminary injunction to prevent Dalkon Shield products liability action from proceeding against non-debtor co-defendants).

[10] According to counsel, all of the Plaintiffs seeking relief from stay at this time have been diagnosed with hepatitis and some are very ill. See Kemp Declaration at ¶ 6.

[11] As will be discussed below, the language of the RAS Motions originally indicated that the Plaintiffs were seeking only to pursue claims against applicable insurance proceeds of the Debtors. In subsequent written and oral argument, the moving parties clarified that no collection

The Trustee filed written opposition ("Trustee Opp") to the RAS Motions in each case accompanied by the Declaration of Brian D. Shapiro ("Shapiro Declaration"). (Dkt#s 57 and 58) With respect to three of the RAS Motions, the Trustee also filed preliminary written opposition ("Trustee Initial Opp") as well.[12] Plaintiffs filed a reply ("Reply") that was accompanied by the Declaration of Robert Cottle, Esq. ("Cottle Declaration") (Dkt#s 59 and 60) A further Declaration of Will Kemp, Esq. ("Kemp Declaration II") (Dkt# 32) was filed in the Desert Shadow case. Plaintiffs also filed a supporting Declaration of Monica Jacobs in the Endoscopy Center case. ("Jacobs Declaration") (Dkt#69) The Product Defendants also filed a statement responding to the Reply that includes a supporting Declaration of Michael E. Stoberski ("Stoberski Declaration"). (Dkt#71) With minor differences, these oppositions, replies and declarations are identical in each case.[13]

At the hearing, oral arguments on the RAS Motions were presented and the matters were taken under submission.

DISCUSSION

Under Section 362(a)(1), the filing of a bankruptcy petition gives rise to an automatic

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of a favorable judgment would be sought from insurance proceeds or other sources without further order from the bankruptcy court.

[12] In the Endoscopy Center case, the Trustee filed his "Initial Opposition to Emergency Motion for Relief from Automatic Stay" (Dkt#40) on August 10, 2009, with respect to the Chanin RAS Motion. In the Gastroenterology case, the Trustee filed an identical opposition (Dkt#24) with respect to the Chanin RAS Motion. In the Desert Shadow case, the Trustee filed an identical opposition (Dkt#23) with respect to the Chanin RAS Motion.

[13] In this memorandum, citations to the oppositions, replies and declarations will be by page, line or paragraph as appropriate. For example, "Trustee Opp at 4:12" would refer to page 4, line 12 of that document. Where there is a slight difference in the substantially identical document filed in each case, that document will be distinguished by a parenthetical reference identifying the moving party. Thus, "Kemp Declaration (Chanin)" would refer to the declaration filed in connection with the RAS Motions brought on behalf of Chanin and Martin. Unless so distinguished, all documents cited will be those filed in the Endoscopy Center case. Likewise, the docket numbers assigned ("Dkt#") are those found in the Endoscopy Center case unless a specific case is otherwise indicated.

stay that bars the "commencement or continuation" of legal proceedings against the debtor to recover a claim that arose before the commencement of the case. There is no dispute that this provision clearly applies to the Hepatitis Litigation as well as any other proceedings against the Debtors that are described in the Schedules. Under Section 362(d)(1), a party may obtain relief from stay upon a showing of "cause." In any hearing seeking relief from stay under Section 362(d) of any act encompassed by Section 362(a), the moving part has the burden of proof "on the issue of the debtor's equity in property" while the opposing party has the burden of proof on all other issues. See 11 U.S.C. § 362(g).

Although the term "cause" is not defined, relief from the stay under Section 362(d)(1) may be granted when necessary to permit pending litigation to be concluded in another forum if, for example, the nonbankruptcy suit involves multiple parties or is ready for trial. See, e.g., Christensen v. Tucson Estates, Inc. (In re Tucson Estates, Inc.), 912 F.2d 1162, 1166 (9th Cir. 1990) (stating that "[w]here a bankruptcy court may abstain from deciding issues in favor of an imminent state court trial involving the same issues, cause may exist for lifting the stay as to the state court trial").[14]

The burden of proof on a motion to modify the automatic stay is a shifting one. See Sonnax Industries, Inc. v. Tri Component Products Corp. (In re Sonnax Industries, Inc.), 907 F.2d 1280, 1285 (2d Cir. 1990). To obtain relief from the automatic stay, the moving party must first establish a prima facie case that "cause" exists for relief under Section 362(d)(1). See Duvar Apartments, Inc. v. Federal Deposit Insurance Corp. (In re Duvar Apartments, Inc.), 205 B.R. 196, 200 (B.A.P. 9th Cir. 1996). Once a prima facie case has been established, the burden shifts to the debtor to show that relief from the stay is unwarranted. See 11 U.S.C. § 362(g)(2);

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[14] The legislative history of Section 362 supports this conclusion: "[I]t will often be more appropriate to permit proceedings to continue in their place of origin, when no great prejudice to the bankruptcy estate would result, in order to leave the parties to their chosen forum and to relieve the bankruptcy court from many duties that may be handled elsewhere." H.R. REP. NO. 595, 95TH CONG., 1ST SESS. 341 (1977); S. REP. NO. 989, 95TH CONG., 2D SESS. 50 (1978).

Sonnax, 907 F.2d at 1285; Duvar Apartments, 205 B.R. at 200. If the moving party fails to meet its initial burden, relief from the automatic stay should be denied. See Schneiderman v. Bogdanovich (In re Bogdanovich), 292 F.3d 104, 110 (2d Cir. 2002).

Relief from the automatic stay to permit a litigant to seek recovery against a debtor's insurance policy is not unusual. Typical cases involve automobile collisions where an accident victim seeks to pursue nonbankruptcy litigation to determine a bankruptcy debtor's liability for purposes of obtaining payment from the debtor's automobile insurance. See, e.g., In re Robertson, 244 B.R. 880 (Bankr.N.D.Ga. 2000); In re Honosky, 6 B.R. 667 (Bankr.S.D.W.Va. 1980). Other cases have involved relief from stay being granted for purposes of recovering from medical malpractice insurance, see, e.g., In re Glunk, 342 B.R. 717 (Bankr.E.D.Pa. 2006), legal malpractice insurance, see, e.g., In re Krank, 84 B.R. 372 (Bankr.E.D.Pa. 1988), business liability insurance, see, e.g., In re Scott Wetzel Services, Inc., 243 B.R. 802 (Bankr.M.D.Fla. 1999), fire insurance policies, see, e.g., Matter of Fernstrom Storage and Van Co., 938 F.2d 731 (7th Cir. 1991), and a state real estate recovery fund, see, e.g., In re Harris, 85 B.R. 858 (Bankr.D.Colo. 1988).

Relief from the discharge injunction to permit a litigant to proceed nominally against the debtor and/or an applicable policy of insurance also may be granted. See, e.g., In re Jones, 348 B.R. 715 (Bankr.E.D.Va. 2006); In re Columbia Gas Transmission Corporation, 219 B.R. 716 (S.D.W.Va. 1998); Perez v. Cumberland Farms, Inc., 213 B.R. 622 (D.Mass. 1997); In re Edgeworth, 993 F.2d 51 (5th Cir. 1993); In re Pappas, 106 B.R. 268 (D.Wyo. 1989). Where a discharge has been granted, however, an individual debtor's interest in the outcome of continued litigation is much different than it would be when a reorganization process is ongoing.[15]

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[15] An individual Chapter 7 debtor who has received a discharge typically has little interest in the non-exempt assets of the estate being liquidated by the bankruptcy trustee unless the bankruptcy estate is solvent. An individual Chapter 13 debtor receives a discharge only after the Chapter 13 plan has been completed. A non-liquidating Chapter 11 debtor, other than an individual, typically obtains a discharge upon plan confirmation and the outcome of such litigation usually will not by itself prevent the revested debtor from continuing operations. In the

Most courts consider the following twelve nonexclusive factors in determining whether to lift the automatic stay to permit pending litigation to continue in another forum:

1. Whether the relief will result in a partial or complete resolution of the issues;
2. The lack of any connection with or interference with the bankruptcy case;
3. Whether the foreign proceeding involves the debtor as a fiduciary;
4. Whether a specialized tribunal has been established to hear the particular cause of action and whether that tribunal has the expertise to hear such cases;
5. Whether the debtor's insurance carrier has assumed full financial responsibility for defending the litigation;
6. Whether the action essentially involves third parties, and the debtor functions only as a bailee or conduit for the goods or proceeds in question;
7. Whether the litigation in another forum would prejudice the interests of other creditors, the creditors' committee and other interested parties;
8. Whether the judgment claim arising from the foreign action is subject to equitable subordination under Section 510(c);
9. Whether movant's success in the foreign proceeding would result in a judicial lien avoidable by the debtor under Section 522(f);
10. The interests of judicial economy and the expeditious and economical determination of litigation for the parties;
11. Whether the foreign proceedings have progressed to the point where the parties are prepared for trial, and
12. The impact of the stay on the parties and the "balance of hurt."

These twelve factors originally were discussed in In re Curtis, 40 B.R. 795, 799-800 (Bankr.D.Utah 1984), were adopted by the court in Sonnax, 907 F.2d at 1285, and have been used by courts in this circuit. See, e.g., Adelson v. Smith (In re Smith), 389 B.R. 902, 918-19 (Bankr.D.Nev. 2008); Truebro, Inc. v. Plumberex Specialty Products, Inc. (In re Plumberex Specialty Products, Inc.), 311 B.R. 551 (Bankr.C.D.Cal. 2004). As noted in Sonnax, not all of

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latter circumstance, however, the availability of insurance plays a radically different role for the reorganizing debtor. As Judge Paskay observed in Scott Wetzel Services, supra, "Although a debtor's legal interest become property of the estate in both Chapter 7 and Chapter 11 cases, the debtor's equitable interests are very different... '[The Chapter 11 debtor] has equitable interests in the proceeds of such policies because of its need to decrease liability from which third parties' claims derive, [to] affect the outcome of suits against its insurers, and [to] retain the ability to structure settlements of classes of claims. Therefore, despite the recognition of those types of equitable interests in the cases cited in which suits against insurers were stayed during Chapter 11 reorganization proceedings, those equitable interests are not relevant or present in this [Chapter 7] case.'" 243 B.R. at 805, quoting In re Correct Manufacturing Corporation, 88 B.R. 158, 162 (Bankr.S.D.Ohio 1988).

the twelve factors are relevant in every case. 907 F.2d at 1286. Nor is a court required to give each of the factors ("Curtis/Sonnax factors") equal weight in making its determination. See In re Smith, supra, 389 B.R. at 919.

The parties have briefed nine of the factors as being applicable to this case.[16] In addition to suggesting that these factors do not support granting relief from stay for the Hepatitis Litigation to proceed, the Trustee suggests three independent reasons why Plaintiffs' requests should be denied. The court will address those arguments before considering the Curtis/Sonnax factors.[17]

A. The Trustee's Independent Grounds for Denial of the RAS Motions.

The Trustee contends that the Plaintiffs did not give sufficient notice of the RAS Motions to all parties who are entitled to receive notice, that he has not had sufficient time to familiarize himself with the Debtors' cases to be able to respond to the motions, and that the proceeds of the insurance policies pertinent to the Hepatitis Litigation are property of the Debtors' bankruptcy estates. For all or any of these reasons, the Trustee maintains that the automatic stay should remain in place, thereby preventing the litigation from proceeding against the Debtors.

1. Adequacy of Notice.

With respect to the adequacy of notice, Bankruptcy Rule 4001(a)(1) specifies who must be served in Chapter 11 reorganization proceedings but sets forth no particular service

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[16] The third, eighth and ninth factors are not addressed by the parties. No argument is made that the Hepatitis Litigation involves the Debtors as fiduciaries, that any judgment would be subject to equitable subordination under Section 510(c), or that any such judgment could be avoided under Section 522(f).

[17] In addition to seeking relief from stay, Plaintiffs request a waiver of Bankruptcy Rule 4001(a)(3) which provides that the effect of an order granting relief from stay it itself stayed for a period of ten days unless the court orders otherwise. Given the imminent trial schedules of the Hepatitis Litigation involving these Plaintiffs, particularly Washington, Plaintiffs have requested that the stay under Bankruptcy Rule 4001(a)(3) also be waived. No objection to this aspect of the RAS Motions has been made by the Trustee.

requirement in bankruptcy cases brought under other Chapters. In addition to the parties specified in Chapter 11 cases, Bankruptcy Rule 4001(a)(1) indicates that a motion for relief from stay must be served "...on such other entities as the court may direct." Local Rule 4001(a)(1)(A) requires a motion for relief from stay to be served on any lien holder identified in the debtor's schedules. In the Endoscopy Center and Desert Shadow cases, the secured creditor Schedule "D" lists no lien holders. In the Gastroenterology Center case, only Pitney Bowes is listed as a secured creditor and the RAS Motion brought in that case was served on Pitney Bowes by first class mail. Other than as may be implied from Local Rule 4001(a)(1), the court has not directed that a relief from stay motion be served on any other parties in a non-Chapter 11 proceeding.

The Trustee argues that the notice given by the Plaintiffs did not comply with Local Rule 9014(b)(1)(B) because the notices of hearing did not contain a "brief description of the relief sought." See Trustee Opp at 7:6. In absence of such a description, the Trustee argues that adequate notice of the substance of the RAS Motions was not given to all persons who should have received notice. Id. at 7:6-9.[18] According to the certificate of service attached to the notices, they were served by electronic service. The notice of electronic filing indicates that the notices of hearing were electronically mailed to the Trustee, counsel for the Trustee, counsel for the Debtor, and the Office of the United States Trustee. The notice of electronic filing accompanying the RAS Motions also indicates that the same parties were sent the motion by electronic mail. Because the RAS Motions were sent to the same parties as the notices of hearing, the court concludes that any deficiency in the description appearing in the notices of hearing was insignificant.

The Trustee also argues that notice should have been served on all parties affected by the RAS Motions in compliance with Bankruptcy Rule 4001(d). See Trustee Opp at 7:11-12. The

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[18] The notice of hearing also refers to a Local Rule 3014(d)(1) rather than Local Rule 9014(d)(1), but does include the correct information for filing opposition to the relief requested.

latter provision, however, only applies to agreements relating to relief from stay which, ironically, the Trustee is unwilling to enter into. The Trustee more broadly argues that all persons potentially having infection claims against the Debtors are "interested parties" who were entitled to notice. See Trustee Initial Opp at 6:8-21, citing Walthall v. U.S., 131 F.3d 1289 (9th Cir. 1997). According to the Trustee, the objectionable impact of the RAS Motions on such parties is that they "may be precluded from sharing in the insurance if the policy limits are exhausted prior to their having an opportunity to present a claim." See Trustee Initial Opp at 6:20-21. As will be discussed below, Plaintiffs are not currently seeking to satisfy any favorable judgment from the insurance available to the Debtors. Additionally, the insurance available to satisfy claims apparently will not be depleted by the costs of litigation. Thus, the evil that the Trustee seeks to prevent is not implicated by the relief that is now sought.

Plaintiffs make a variety of other arguments as to why they believe notice was sufficient[19], including that electronic notice of the RAS Motions was given to all the claimants who sued in State Court, using that court's electronic filing procedure. See Reply at 4:15-19.[20] Plaintiffs also argue that the hearing date for the RAS Motions was widely publicized, id. at 5:11-12, and that counsel of record for 4,000 "non-infected persons" was given notice of the RAS Motions. Id. at 5:22 to 6:11.[21] While none of these indicia alone constitute evidence of a

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[19] Plaintiffs also attack the Trustee personally, asserting that "the Trustee obviously cares little about the interests of these 4,000 non-infected persons because they have all sued the debtor and the Trustee is opposing their claims." See Reply at 4:9-11. Not only are such assertions ineffective, they reflect a fundamental ignorance of the bankruptcy process.

[20] Copies of the notices filed in the State Court, advising parties of the hearing on the relief from stay motions scheduled in the bankruptcy court, are attached as Exhibits "1", "2" and "3" to the Reply. The notices include copies of the relief from stay motions.

[21] Plaintiffs' Reply is accompanied by the Cottle Declaration that attests, inter alia, that attorney Cottle did not authorize the Trustee to raise a notice objection or any other objection on behalf of his clients, that he supports the RAS Motion, that he authorized the filing of a relief from stay motion as to several of his clients, including Chanin, and that he believes "that I and my 4,000 clients have gotten more notice of the motions to lift stay that I can recall getting for any other motion in my career." The Trustee, of course, does not need counsel's permission to

broad range of notice, the court concludes that Plaintiffs have complied with the dictates of Bankruptcy Rule 4001(a)(1) as well as Local Rule 4001(a)(1).[22]

No additional notice was required because the relief requested will not impact the amount of insurance that may be available to satisfy allowed claims in this case. The court will require, however, that notice of the disposition of the RAS Motions be served on all creditors on the Debtors' bankruptcy mailing matrices as well as counsel for the parties in the Hepatitis Litigation.

2. Adequacy of Time for the Trustee to Respond.

The Trustee acknowledges that he has undertaken numerous tasks since the Debtors filed their bankruptcy petitions on July 17, 2009. See Trustee Opp at 3:3-12. He argues, however, that he has not had sufficient time investigate the Debtors' financial affairs, and more particularly, to familiarize himself with the Hepatitis Litigation. Id. at 8:13-26. The Trustee acknowledges that he has met with representatives of the Debtors' insurance carrier,

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raise any of the objections since he has fiduciary obligations to all parties in interest under Section 704(a).

[22] In connection with all three bankruptcy proceedings, the Trustee also argues that Plaintiffs' counsel did not "meet and confer" with him prior to filing the RAS Motion in violation of Local Rule 4001(a)(3). See Trustee Initial Opp at 7:2-7. That rule directs parties "to communicate in good faith regarding resolution of the motion before filing a motion for relief from stay." The Trustee asserts that the RAS Motion was filed shortly after the bankruptcy petition was filed "without prior consultation with me." See Shapiro Declaration at ¶ 12. In response, counsel for the Plaintiffs attests that he had a 45 minute conversation with the Trustee on July 23, 2009, seeking an agreement to lift the automatic stay and that the Trustee declined to do so. See Kemp Declaration II at ¶ 4. Attached as an exhibit to the Jacobs Declaration is a redacted time entry for "WK", presumably Will Kemp, reflecting a telephone conference with the Trustee on the same date regarding the Endoscopy Center matter. Counsel also indicates that he later discussed this conversation with the Trustee's counsel who expressed that the Trustee had simply forgotten about the July 23, 2009, conversation. At oral argument, the Trustee's counsel did not dispute this characterization of the events nor was leave requested to submit a contrary declaration. It therefore does not appear from the record that Local Rule 4001(a)(3) was violated. Although the Desert Shadow case was not assigned to the Trustee until August 10, 2009 (Dkt#10), the filing of the RAS Motions in all three of the cases should not have been a surprise.

Nevada Medical Insurance Company ("NMIC"), that NMIC has retained counsel to defend the Debtors, and that he also has met with such counsel. See Shapiro Declaration at ¶ 5. He asks for additional time, however, to employ special counsel for the bankruptcy estates with respect to the Hepatitis Litigation. Id. at ¶ 11. The Trustee also fears that he might be inundated with document and information requests if the litigation is allowed to proceed, id. at ¶ 18, and that he is hampered in obtaining information about the Debtors' prior operations because former officers and employees of the Debtors are asserting their privilege against self-incrimination. Id. at ¶ 7.

Assuming that it is necessary for the Trustee to have special counsel for the bankruptcy estate separate from or in addition to counsel for the Debtors currently provided by NMIC, the record indicates that the Trustee already has two law firms assisting him in the bankruptcy case. See Order Authorizing Employment of an Attorney Nunc Pro Tunc From the Date of Filing of the Petition entered August 10, 2009 (Dkt#38) and Order Granting Ex Parte Motion for an Order Authorizing Employment of Special Counsel Nunc Pro Tunc entered August 18, 2009 (Dkt#54). Additionally, it appears that the Trustee already has engaged the law firm of Diamond McCarthy LLP as proposed special litigation counsel.[23] It therefore is unclear what additional time, or assistance for that matter, the Trustee needs to prepare for the Hepatitis Litigation.[24]

The Trustee's concern over responding to document and information requests may be

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[23] The Trustee's opposition memoranda and other papers submitted in connection with the RAS Motions all indicate that they are filed by Diamond McCarthy LLP as proposed special litigation counsel for the Trustee, and by M. Nelson Segel, Chartered as special counsel for the Trustee and as local counsel for Diamond McCarthy LP. A pro hac vice petition was filed for Diamond McCarthy on August 25, 2009 (Dkt#73) and an application to authorize employment of that firm as special counsel presumably will be filed. As of the date of this memorandum decision, the latter application has not been filed.

[24] The Trustee has not suggested at this point that the Plaintiffs should only file proofs of claim against the Debtors, and that such claims should be liquidated through a process other than trial. Nor has the Trustee suggested that he will need to appear at trial in the Hepatitis Litigation in lieu of special litigation counsel. Presumably the Trustee would not be a percipient witness since all of the events giving rise to liability in the Hepatitis Litigation occurred before the Debtors filed for bankruptcy relief.

genuine, but not significant at this point. The Trustee already may be subjected to information requests pursuant to Section 704(a)(7) and nothing prevents him from seeking protective orders as appropriate from the State Court or the bankruptcy court if such requests, if any, become too burdensome.[25] As to his investigation of the Debtors' financial affairs, the Trustee does not explain how allowing the Hepatitis Litigation to proceed in State Court will affect the willingness or unwillingness of the Debtors' former officers and employees to testify.

Absent any additional showing, the Trustee's arguments are not persuasive. Of course, if relief from stay is permitted, nothing would prevent the Trustee from seeking a continuance of trial from the State Court.

3. Characterization of the Insurance Proceeds.

As a final argument, the Trustee contends that the proceeds of the available insurance policies constitute property of the bankruptcy estate under Section 541(a) that must be preserved for the benefit of all creditors, not just the Plaintiffs who are seeking relief from stay. See Trustee Opp at 13:23 to 16:23, citing, e.g., In re Metropolitan Mortgage & Securities Co., Inc., 325 B.R. 851 (Bankr.E.D.Wash. 2005). He argues that the "Debtor is itself an insured party under these same medical malpractice insurance policies and may have claims against such insurance policies," see Trustee Opp at 13:26 to 14:1, and that "Just as in *Metropolitan Mortgage*, the Debtor is an insured under these insurance policies and has potential claims against co-insureds giving the estate a direct claim to the proceeds." Trustee Opp at 16:15-17. Because the insurance policies and their proceeds are property of the estate, the Trustee argues that the Plaintiffs should not be able to satisfy their claims before other creditors, lest there be insufficient proceeds later in the case to pay claims. See Shapiro Declaration at ¶¶ 20 and 21.

Not surprisingly, Plaintiffs disagree with the Trustee, arguing that the proceeds of the

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[25] Section 704(a)(7) directs a Chapter 7 trustee to furnish information requested by a party in interest "unless the court orders otherwise." In circumstances where a Chapter 7 trustee is unduly burdened by such requests in connection with ongoing litigation, protective orders may be entered or the parties may reach agreement to bear the expenses of producing such information and documents.

insurance policies are not property of the bankruptcy estate. See Reply at 10:1 to 12:8, citing, e.g., In re Spaulding Composites Company, Inc., 207 B.R. 899 (B.A.P. 9th Cir.1997). Because Plaintiffs now are seeking relief from stay to complete their lawsuits in State Court but not to collect any favorable judgment from the available insurance coverage, however, they argue that it is premature to determine whether the insurance proceeds are property of the bankruptcy estate. See Reply at 12:9-20.

While Plaintiffs' argument in reply to the Trustee represents a shift from the relief they originally requested, they are correct that a determination of the relevant legal issue is unnecessary at this time. As will be discussed below, the difference in the relief they now seek also is significant to the analysis of the remaining issues.

By themselves, the court is not persuaded that the independent arguments raised by the Trustee are sufficient to deny the RAS Motions. The court therefore addresses the substance of Plaintiffs' request for relief from stay below.

B. Application of the Curtis/Sonnax Factors.

1. Whether the relief will result in a partial or complete resolution of the issues.

The Trustee maintains that relief from stay will not resolve the claims of the vast majority of potential plaintiffs having claims against the Debtor. See Trustee Opp at 10:12-15. The argument misses the point, of course, since the claims between these Plaintiffs and the Debtors would be resolved completely if the State Court litigation is concluded.[26]

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[26] Plaintiffs suggest that completion of trial in their lawsuits may "partially resolve the entire state court litigation because it may create collateral estoppel determinations that eliminate the need for subsequent trials." See Reply at 13:7-8. In Five Star Capital Corporation v. Ruby, 194 P.3d 709 (Nev. 2008), the Nevada Supreme Court articulated four elements now required under Nevada law for the doctrine of issue preclusion to apply: (1) the issue decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial ruling must have been on the merits and have become final; (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation; and (4) the issue was actually and necessarily litigated. Id. at 713. Of course, it remains to be seen whether the legal and factual issues are identical as between infected and non-infected claimants.

This factor favors the Plaintiffs.

2. The lack of any connection with or interference with the bankruptcy case.

While the CDC Litigation obviously has a connection with the bankruptcy cases, Plaintiffs argue that allowing the litigation to go forward will not interfere with the Chapter 7 liquidation of the Debtors. Moreover, Plaintiffs contend that legal defense fees and costs are being paid by the insurance carriers since there are no unpaid legal expenses listed in the Debtors' schedules of liabilities. See RAS Motion at 6:19 to 7:2. As to the latter contention, the Trustee takes no issue, perhaps because he has acknowledged that NMIC has retained counsel to defend the Debtor and that the Trustee already has met with such counsel. See discussion at 12, supra. Rather, the Trustee maintains that he will be inundated by document and information requests, and that collection of any judgments will exhaust any available insurance. See Trustee Opp at 10:20-26.

For the reasons previously discussed, any unduly burdensome document requests can be addressed through protective orders if necessary, and the collection of any judgments from available insurance is not currently being requested. It is true, of course, that the myriad claims against the Debtors must be liquidated for purposes of allowance and distribution. Whether the liquidation of these claims against the Debtors takes place through a claims estimation process[27], through mediation, or through trial proceedings, the parties do not dispute that the likely source of payment on any allowed infection claims will be the available liability insurance. The purported "interference" with the bankruptcy cases therefore is more a question of convenience rather than necessity.

This factor favors the Plaintiffs.

3. Whether a specialized tribunal has been established to hear the particular cause of action and whether that tribunal has the

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[27] Whether the state court plaintiffs or other potential claimants must file separate, individual proofs of claim or will be permitted to file a combined or even class-wide claims has not been discussed.

expertise to hear such cases.

There also is no dispute that the State Court has gone to great lengths to administer the large number of lawsuits against the Debtors that involve thousands of plaintiffs. Discovery and pretrial proceedings in all of the infection cases are supervised by the same judge and a special master has been appointed to coordinate and oversee discovery. Medical malpractice lawsuits apparently have a specific calendaring procedure and priority. Plaintiffs do not suggest that the State Court is a specialized tribunal, but do argue that it has specialized expertise in handling mass disaster and medical malpractice claims. See Reply at 14:2-4.

The purpose of this factor is to consider whether one tribunal or another is better suited to hear the particular case. While both the Plaintiffs and the Trustee have discussed the administration of the Hepatitis Litigation in State Court, neither of them have addressed the requirements of 28 U.S.C. section 157 that governs the procedure for administering bankruptcy cases. Subsection (b)(5) provides that "The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending." Absent a finding of waiver, see, e.g., In re Smith, supra,[28] a personal injury tort claim asserted in a bankruptcy case may be tried, if at all,[29] only in the appropriate federal district court rather than before the bankruptcy court.

Because neither the Plaintiffs nor the Trustee has addressed the role of the federal district court in administering mass tort or medical malpractice claims, this factor arguably favors neither party. Because the burden of proof on the RAS Motions rest with the party seeking

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[28] In Smith, the bankruptcy court found that the plaintiff waived compliance with 28 U.S.C. section 157(b)(5) by including in his dischargeability complaint a request for a monetary award on his libel claims, by failing to seek withdrawal of the reference from the bankruptcy court to the district court, and by failing to timely demand a jury trial. 389 B.R. at 913-16.

[29] As previously noted, a claims estimation process under Section 502(c) also might be employed in mass tort cases in lieu of trial. See generally 4 Collier on Bankruptcy ¶ 502.04 (Alan N. Resnick and Henry J. Sommer eds., 15th ed. rev. 2009).

relief, however, the court concludes that this factor favors the Trustee.

4. Whether the debtor's insurance carrier has assumed full financial responsibility for defending the litigation.

The Trustee asserts that the insurance carrier, presumably NMIC, "is unlikely to assume full financial responsibility for defending the litigation" and that "once the insurance proceeds have been exhausted by judgments or settlements, the Trustee anticipates that the insurance carriers will argue that they have no remaining obligation to defend the Estate, potentially leaving the estate with no means to defend the remaining litigation." See Trustee Opp at 11:6-11. The Trustee acknowledges that he met with representatives of NMIC as well as the defense attorneys retained by NMIC to defend the Debtors. See Shapiro Declaration at ¶ 5. The Trustee does not mention a refusal by NMIC to continue with a defense nor that a defense is being provided under a reservation of rights. There is no declaration or affidavit from a representative of NMIC evidencing the Trustee's position, nor has the Trustee pointed to any declaratory relief action pending to resolve an insurance coverage dispute.

Because any judgments in Plaintiffs' favor will not be satisfied from the available insurance at this juncture, the Trustee's concern is premature and not persuasive. More important, based on their counsel's review of the applicable insurance policies, Plaintiffs assert that the insurance coverage is not through "exhausting policies", i.e., where the costs of defense would reduce the maximum amounts available to satisfy claims. See Reply at 14:9-10; Kemp Declaration at ¶ 10.[30] Compare In re Metropolitan Mortgage, supra, 325 B.R. at 855-56 & n.1

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[30] In his opposition, the Trustee objects to Paragraph 10 of the Kemp Declaration on grounds that it "consists entirely of statements of opinion, conclusive statements and arguments that do not constitute facts or expert opinions", see Trustee Opp at 6:15-18, but cites no provisions of the Federal Rules of Evidence to support the objections. The Trustee also does not identify what statements made in Paragraph 10 are objectionable. As to the statement "Your Affiant has reviewed the Nevada Mutual policies and there is no aggregate cap on defense costs...", it is in the nature of a relevant factual statement based on the witness's personal knowledge. Moreover, it is a statement that easily can be rebutted by the Trustee but it was not. As to the remaining statements set forth in Paragraph 10, some appear to be statements of

(referring to "wasting" or "burning candle" insurance policies where defense costs exhaust the policy limits). The Trustee does not dispute this characterization.[31]

It therefore appears from the record that NMIC has assumed financial responsibility for defending the Hepatitis Litigation. As will be discussed briefly below, it also appears that the relevant resources available to satisfy claims will not be significantly diminished by allowing certain litigation to move forward.

This factor also favors the Plaintiffs.

5. Whether the action essentially involves third parties, and the debtor functions only as a bailee or conduit for the goods or proceeds in question.

The Trustee asserts, and the Plaintiffs agree, that the Debtors are active parties in the litigation rather than simply bailees or conduits with respect to the recovery sought. Compare Trustee Opp at 11:13-14 with Reply at 14:15-16. Curiously, the Trustee argues that "This supports keeping the stay in place so that all of the Estate's creditors can benefit from the resolution of the litigation." Trustee Opp at 11:14-16. It is unclear to the court exactly how the litigation will be resolved if the automatic stay remains in place.

This factor simply does not apply and supports neither party.

6. Whether the litigation in another forum would prejudice the interests of other creditors, the creditors' committee and other interested parties.

The Trustee's only argument is that other claimants will be prejudiced if the Plaintiffs' claims are satisfied from the insurance proceeds before anyone else. In addition to reiterating the activities of the State Court in administering the Hepatitis Litigation, see RAS Motion at 7:18-21, Plaintiffs argue that the State Court somehow is less busy than the bankruptcy court and by implication may be more willing "to delve into the realm of protracted

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opinion or argument and others not, but the Trustee has failed to specify which. The objection is therefore overruled.

[31] This characterization was not disputed at oral argument either.

medical malpractice litigation." Id. at 9:23.

Putting aside the obvious pandering, Plaintiffs' argument again fails to take into account the role that would be played by the federal district court in the event that the infection cases were tried in the context of the bankruptcy proceeding. Federal district courts do hear mass tort cases as well as medical malpractice cases. As previously discussed, personal injury cases ordinarily are to be tried in federal district court rather than in bankruptcy court pursuant to 28 U.S.C. section 157(b)(5). Moreover, for any court, state or federal, mass tort cases can crowd a busy docket or create a busy docket even if they never go to trial. The correct focus should be, as the factor indicates, on whether other creditors and parties in interest are prejudiced if the litigation goes forward.

No prejudice appears to exist in this instance since relief from stay would not alter the order in which the Plaintiffs' cases are already set to go to trial. The costs of defense apparently are being born by the insurance carrier. More important, those costs also will not reduce the amount of coverage available under the policies. Because any favorable judgments will not be paid from the insurance proceeds and assets of the bankruptcy estate at this time, the interests of other claimants are not prejudiced.

This factor also favors the Plaintiffs.

7. **The interests of judicial economy and the expeditious and economical determination of litigation for the parties.**

The Trustee again asserts that there is insufficient insurance coverage to pay all the possible claims and that insurance coverage will be exhausted if the Plaintiffs satisfy their judgments, if any, before the other claimants. See Trustee Opp at 11:22 to 12:2. At oral argument, Plaintiffs' counsel suggested that allowing the State Court to liquidate the claims would be more economical.

Both parties agree that the claims must be liquidated in some fashion and apparently also assume that it must be through a trial. The Trustee's argument does not address the economies of the process but only the availability of funds to satisfy claims. Plaintiffs' argument apparently

focuses more on the status of the cases for which trial is imminent and the possible impact on the remaining cases if they are successful. For those cases in which discovery has been completed or nearly completed, it certainly appears to this court that it would be more economical to allow the trials to go forward.[32]

An equally important consideration is that the automatic stay applies only to the Debtors and not to any of the co-defendants, including Dipak Desai, other employees of the Debtors, and the Product Defendants. See discussion at n.7, supra. Assuming those cases go forward as to any non-bankruptcy defendants, it certainly would be more economical for the trials to include all possible claims that are ready for determination.

Overall, this factor favors the Plaintiffs.

8. Whether the foreign proceedings have progressed to the point where the parties are prepared for trial.

As to the Washington case, set for trial to commence on October 19, 2009, Plaintiffs contend that only the depositions of the defense experts remained to be completed when the bankruptcy petitions were filed. See RAS Motion at 8:2-4. While not disputing this, the Trustee simply argues that discovery is not complete and the case therefore is not ready for trial. See Trustee Opp at 12:2-5. No written or oral argument was presented, however, that any depositions of the defense experts could not be completed before the current trial date. No declaration or affidavits from the counsel retained by NMIC to defend the Debtors has been presented in support of the Trustee's argument.

As to the Chanin case, set for trial to commence on December 7, 2009, and the Martin case, set for trial on January 18, 2010, Plaintiffs argue that critical discovery is underway in anticipation of those trial dates. See Chanin RAS Motion at 8:11-12. Apparently, depositions of "key fact witnesses" in the Chanin case were abated after the bankruptcy petitions were filed and

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[32] At least one of the Product Defendants apparently have asserted cross-claims for contribution and indemnity against the Debtors, but counsel's representations conflict over whether the Debtors have asserted cross-claims against the Product Defendants. Compare Kemp Declaration at ¶ 7 with Stoberski Declaration at ¶ 4.

designation of experts in the Martin case is imminent. See Kemp Declaration (Chanin) at ¶ 9. No specific mention is made of the status of discovery in the Hutchison case that is set for trial on March 9, 2010. Discovery in the other Plaintiffs' cases is stayed as to the Debtor as well.

At this juncture, the Washington case is at the point where trial preparations can be completed expeditiously. The Chanin and Martin cases do not appear to be as close as Washington to being trial ready, and no information appears in the record as to the status of the Hutchison case. Relief from any of the presently scheduled trial dates could, of course, be sought from the State Court.

With respect to Washington, this factor favors the Plaintiffs. With respect to Chanin and Martin, this factor slightly favors the Plaintiffs. With respect to Hutchison and the other Plaintiffs seeking relief from stay, this factor favors the Trustee.

9. The impact of the stay on the parties and the "balance of hurt."

Consistent with the relief originally sought in their motions, Plaintiffs argued that the equities weigh in favor of granting relief from stay to prevent "a windfall to the [Debtor's] insurance compan[ies]." RAS Motion at 8:9, quoting In re Turner, 55 B.R. 498, 502 (Bankr.N.D.Ohio 1985) and citing Matter of Holtkamp, 669 F.2d 505, 508 (7th Cir. 1982).[33] Naturally, the Trustee argues that allowing the Plaintiffs to satisfy any judgment from the insurance policies would harm other creditors if the coverage proves inadequate to pay all similarly situated claimants. See Trustee Opp at 12:5 to 13:22, citing, e.g., In re A.H. Robins,

[33] In Turner, the individual debtor filed a Chapter 13 proceeding and confirmed a plan of adjustment. Two of his scheduled creditors filed a RICO complaint in federal district court naming various defendants, including the debtor. The court granted relief from stay to determine the debtor's liability so that the plaintiffs could seek recovery against a fidelity bond covering officers and employees of the creditors. No recovery was being attempted against the debtor, his property or from property of his bankruptcy estate. In Holtkamp, the individual debtors filed a Chapter 11 proceeding five days before the scheduled trial of a personal injury action against them. Relief from stay was granted on an emergency basis to allow liability and damages to be determined, but the plaintiff was prohibited from attempting to enforce any judgment. The common theme in both cases was that relief from stay was granted to liquidate claims against the debtors but not to enforce the claims.

supra, Tringali v. Hathaway Machinery Co., Inc., 796 F.2d 553 (1st Cir. 1986) and In re Johns-Manville Corp., 33 B.R. 254 (S.D.N.Y. 1983).[34] Neither position is relevant at this time, however, since the Plaintiffs no longer seek to satisfy their judgments, if any, from the insurance coverage until permitted to do so by the bankruptcy court.

In "balancing the hurt" between the Plaintiffs and the Trustee, the court considers the Plaintiffs' interests in including their claims against the Debtors in litigation that may go forward in any event. The impact of the stay on the Plaintiffs is that they could go to trial without completing resolution of all pertinent issues and claims. In contrast, the Trustee desires to marshal the assets of the estate to ratably pay claims of similarly situated creditors. This includes unpaid trade vendors of the Debtors whose claims likely are of equal priority of payment in the bankruptcy distribution scheme. For the Trustee, however, relief from the stay will not impact his ability to marshal the assets since any judgments will not be paid immediately and the litigation costs also will not exhaust the available insurance coverage. Moreover, this is not a Chapter 11 proceeding where the efforts of management would be diverted from formulating a plan of reorganization to preserve an ongoing business operation. It appears that the Trustee can still investigate the financial affairs of the Debtors, marshal the available insurance proceeds and assets of the estate, and perform all of the other duties imposed by Section 704(a). While he may be inconvenienced, it does not appear that the Trustee is "hurt" by allowing at least some of the Plaintiffs to proceed to liquidate their claims in State Court. The

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[34] Like A.H. Robins, the Johns-Manville case involved efforts to enjoin litigation pending in connection with the debtor's Chapter 11 case from proceeding against co-defendants whose liability might be satisfied from common insurance policies. In Tringali, another Chapter 11 debtor (Hathaway Machinery) was attempting to reorganize and had competing tort claims payable from its insurance coverage. The court of appeals concluded that the automatic stay should remain in place to prevent an action in state court designed to collect Tringali's tort judgment that had been issued by a federal district court. Maintenance of the automatic stay allowed the reorganizing debtor's insurance coverage to be preserved for all possible claimants. In the present case, the limited relief now sought by the Plaintiffs does not implicate the dissipation or reorganization concerns that were at the heart of the A.H. Robins, Tringali and Johns-Manville decisions.

automatic stay in these circumstances will continue to do exactly what it was intended to do: prevent a piecemeal dismantling of the Debtors' insurance coverage, which may be the only meaningful source of payment to the Plaintiffs and all other similarly situated claimants.

Overall, this factor favors the Plaintiffs.

CONCLUSION

Of the nine factors disputed by the parties, the majority of them favor the Plaintiffs and few favor the Trustee. The Curtis/Sonnax factors clearly overlap, however, and the numerical advantage that Plaintiffs' enjoy does not make the Trustee's concerns any less legitimate. Frankly, attempting to pigeonhole factual arguments into static categories is rarely more useful than a totality of circumstances approach. Nonetheless, utilizing the Curtis/Sonnax common factors analysis, the court concludes that the Plaintiffs have met their burden of establishing cause to modify the automatic stay to permit the Washington case to proceed to trial in State Court. With respect to the Chanin and Martin actions, cause also has been established sufficiently to allow those cases to proceed to trial. As to Hutchison and the remaining Plaintiffs, cause has not been established on the current record to permit such litigation to go forward as to the Debtors. As to those Plaintiffs, the RAS Motion will be denied without prejudice. The parties should be mindful that the automatic stay in these bankruptcy cases does not apply to any non-Debtor party in the Hepatitis Litigation.

Separate orders have been entered in each of the Debtors' bankruptcy cases concurrently with this memorandum decision.

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