Docket #0772 Date Filed: 8/5/2014

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 11
MPM SILICONES, LLC, *et al.*,[1]	:	Case No. 14-22503 (RDD)
	:	(Jointly Administered)
Debtors.	:	

DEBTORS' MEMORANDUM OF LAW IN OPPOSITION TO: (A) 1.5 LIEN TRUSTEE'S MOTION FOR MODIFICATION OF THE AUTOMATIC STAY TO DECELERATE THE NOTES OR, ALTERNATIVELY, FOR ADEQUATE PROTECTION; AND (B) FIRST LIEN TRUSTEE'S JOINDER TO MOTION

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[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are Juniper Bond Holdings I LLC (9631), Juniper Bond Holdings II LLC (9692), Juniper Bond Holdings III LLC (9765), Juniper Bond Holdings IV LLC (9836), Momentive Performance Materials China SPV Inc. (8469), Momentive Performance Materials Holdings Inc. (8246), Momentive Performance Materials Inc. (8297), Momentive Performance Materials Quartz, Inc. (9929), Momentive Performance Materials South America Inc. (4895), Momentive Performance Materials USA Inc. (8388), Momentive Performance Materials Worldwide Inc. (8357), and MPM Silicones, LLC (5481).

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PRELIMINARY STATEMENT

1. The Trustee has not established, and cannot establish, cause to modify the automatic stay. By the Motion, the Trustee seeks relief from the automatic stay to permit the delivery of a rescission notice and, in effect, undo the automatic acceleration of the 1.5 Lien Notes that occurred as a result of the Debtors' bankruptcy filing. The Trustee is required to

[2] BONY has been replaced by BOKF, N.A. as First Lien Trustee, but is still listed in the caption.

[3] All "Ex. __" references are to the Kozusko Declaration.

obtain relief from the stay because serving such a notice would interfere with the Debtors' contractual rights under the indenture governing those Notes.[4] (See Argument Point I.)

2. The Trustee bears the burden of establishing cause to modify the automatic stay, but cannot do so here under either section 362(d)(1) or 362(d)(2). The Second Circuit's decision in U.S. Bank National Association v. AMR Corp. (In re AMR Corp.), 730 F.3d 88 (2d Cir. 2013) precludes any showing of cause under section 362(d)(1) because the Court in AMR affirmed the denial of a motion to lift the stay in precisely these circumstances, *i.e.*, where a trustee sought to lift the stay to rescind an automatic acceleration of notes that occurred upon a bankruptcy filing, in an attempt to increase the amount of noteholders' claims against the debtor to include a redemption premium to which those noteholders lacked any contractual entitlement. The Trustee has failed to distinguish AMR or provide any reason why this Court should not follow it here. (See Argument Point II.).

3. Equally flawed is the Trustee's argument to lift the stay pursuant to section 362(d)(2), a provision of the Bankruptcy Code that Congress enacted to address attempts to foreclose on collateral. Section 362(d)(2) has no application where, as here, a creditor seeks to lift the stay to interfere with the Debtors' contractual rights rather than to foreclose on property of the estate that is secured by that creditor's claims or liens. Indeed, the Motion cites no authority whatsoever to support extending the reach of section 362(d)(2) beyond the foreclosure context intended by Congress. (See Argument Point III.)

4. Finally, the Trustee's attempt to recover a redemption premium as a form of adequate protection fails because the Trustee has not demonstrated that it is entitled to any

[4] On August 1, 2014, the Debtors learned the stay had, in fact, already been violated: eight funds associated with Fidelity that are holders of First Lien Notes recently sent notices of Rescission of Acceleration to the Debtors, despite the pending Motion to lift the stay. (Ex. 8.)

adequate protection beyond what this Court awarded in the Final DIP Order. Nor has the Trustee cited any authority for having its claim against the Debtors for recovery of a redemption premium decided under the guise of awarding adequate protection. (See Argument Point IV.)

5. Accordingly, the Motion should be denied in its entirety.[5]

BACKGROUND

6. MPM is an issuer of $1.1 billion of 8.875% First-Priority Senior Secured Notes due 2020 (the "First Lien Notes") issued pursuant to an Indenture (the "First Lien Indenture"), dated as of October 25, 2012, with BONY as indenture trustee (the "First Lien Trustee") and certain other Debtors, other than Momentive Performance Materials Holdings Inc. ("Holdings"), as guarantors. (Ex. 1.) The First Lien Notes mature on October 15, 2020 (the "First Lien Maturity Date"). (Id. at Exhibit A-4; Exhibit B-2.)

7. MPM is also an issuer of $250 million of 10% Senior Secured Notes due 2020 (the "1.5 Lien Notes" and, together with the First Lien Notes, the "Notes") issued pursuant to an Indenture (the "1.5 Lien Indenture" and, together with the First Lien Indenture, the "Indentures"), dated as of May 25, 2012, with Wilmington Trust, N.A. as successor indenture trustee and the other Plaintiffs, other than Holdings, as guarantors. (Ex. 2.) The 1.5 Lien Notes mature on October 15, 2020 (the "1.5 Lien Maturity Date" (Id. at Exhibit A-4; Exhibit B-2) and, together with the First Lien Maturity Date, the "Maturities"). (Exs. 1, 2.) The Indentures and the Notes are governed by, and construed in accordance with, the laws of the State of New York, without regard to principles of conflicts of law. (Exs. 1, 2 § 13.09.)

[5] As the Motion is meritless, the Debtors reserve all rights to dispute any of the Trustees' attorneys' fees accrued in connection with the Motion as unreasonable and therefore unavailable for reimbursement by the Debtors pursuant to section 506(b) of the Bankruptcy Code.

8. The terms of the Indentures permit MPM to redeem the Notes voluntarily prior to October 15, 2015 (the "Redemption Date"). (Ex. 1 at Exhibit A-9; Ex. 2 at Exhibit A-8-A-9.) Section 5 of the Notes, entitled "Optional Redemption" (the "Optional Redemption Provision"), provides as follows:

> [P]rior to October 15, 2015, [MPM] may redeem the Notes at its option, in whole at any time or in part from time to time, upon not less than 30 nor more than 60 days' prior notice delivered electronically or mailed by first-class mail to each Holder's registered address, at a redemption price equal to 100% of the principal amount of the Notes redeemed plus the Applicable Premium as of, and accrued and unpaid interest and Additional Interest, if any, to, the applicable redemption date (subject to the right of the Holders of record on the relevant record date to receive interest due on the relevant interest payment date).

9. Section 1.01 of the Indentures defines "Applicable Premium" as follows:

> "Applicable Premium" means, with respect to any Note on any applicable redemption date, the greater of:
>
> (1) 1% of the then outstanding principal amount of such Note; and
>
> (2) the excess of:
>
> (a) the present value at such redemption date of (i) the redemption price of such Note, at October 15, 2015 (such redemption price being set forth in paragraph 5 of the applicable Note) plus (ii) all required interest payments due on such Note through October 15, 2015 (excluding accrued but unpaid interest), computed using a discount rate equal to the Treasury Rate as of such redemption date plus 50 basis points; over
>
> (b) the then outstanding principal amount of such Note.

10. Under the Optional Redemption Provision, the Applicable Premium is due only when MPM exercises its option to redeem the Notes prior to the Redemption Date. (Ex. 1 at Exhibit A-9; Ex. 2 at Exhibit A-8-A-9.)

11. Under the terms of the Indentures, the Notes may become due and payable by virtue of the automatic acceleration of the maturity of the Notes. (Exs. 1, 2 § 6.02.)

Specifically, Section 6.02 of the Indentures (the "Acceleration Provision") provides that, upon certain Events of Default, including MPM's "commenc[ing] a voluntary case" under the Bankruptcy Code, "the principal of, premium, if any, and interest on all the Notes shall ipso facto become and be immediately due and payable without any declaration or other act on the part of the Trustee or any of the Holders."

12. On April 13, 2014 (the "Petition Date"), each of the Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Southern District of New York [Docket No. 1].

13. On May 9, 2014, the Debtors instituted separate adversary proceedings against the Trustees seeking declaratory judgments that the Applicable Premium (as defined in the Indentures) is not due under either the First Lien Indenture or 1.5 Lien Indenture, respectively. (Exs. 3, 4.) On June 18, 2014, the Trustees filed answers and asserted counterclaims to the Debtors' adversary complaints. (Exs. 5, 6.) At a June 19, 2014 hearing, the Court determined that such adversary proceedings would be decided contemporaneously with confirmation of the Debtors' proposed chapter 11 plan of reorganization (6/19/14 Hr'g Tr. (Ex. 7) at 157:7–157:11, 171:3-171:21, 174:1-174:13; 179:13-182:20) and, on June 26, 2014, entered an order to that effect [Docket No. 551].

14. On June 18, 2014, the 1.5 Lien Trustee filed the related Motion seeking relief from the automatic stay "in the unlikely event that the Court concludes that the automatic stay extends to stay the Holders' delivery of a rescission notice" or, in the alternative, for adequate protection in the amount of the Applicable Premium [Docket No. 463]. On June 24,

2014, the First Lien Trustee filed a joinder to the Motion requesting that the Court grant the relief requested in the Motion as to the First Lien Noteholders as well [Docket No. 468].

ARGUMENT

I. The Automatic Stay Prohibits The Trustees From Serving A Notice of Deceleration Or Otherwise Attempting To Interfere With The Debtors' Contractual Rights.

15. The automatic stay is "'one of the fundamental debtor protections provided by the bankruptcy code.'" In re Salov, 510 B.R. 720, 725 (Bankr. S.D.N.Y. 2014) (quoting E. Refractories Co. v. Forty Eight Insulations Inc., 157 F.3d 169, 172 (2d Cir. 1998)). Section 541(a)(1) of the Bankruptcy Code defines property of the estate broadly to include "[a]ll legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541; U.S. Bank Nat'l Ass'n v. Am. Airlines, Inc. (In re AMR Corp.), 485 B.R. 279, 294 (Bankr. S.D.N.Y. 2013), aff'd, 730 F.3d 88 (2d Cir. 2014); see also 48th St. Steakhouse, Inc. v. Rockefeller Grp., Inc. (In re 48th St. Steakhouse, Inc.), 835 F.2d 427, 430-31 (2d Cir. 1987) (property of the estate is defined broadly; holding that a landlord's attempt to send a termination notice to a tenant would have resulted in the destruction of debtor-subtenant's property of the estate, *i.e.*, its possessory interest in real property); Computer Commc'ns, Inc. v. Codex Corp. (In re Computer Commc'ns, Inc.), 824 F.2d 725, 729 (9th Cir. 1987) (recognizing property of the estate is defined broadly and includes the debtor's contractual rights).

16. The Second Circuit has made clear that the Debtors' contractual rights in the Indentures are property of the estate and, thus, any action purporting to modify those contractual rights, including deceleration in order to provide for an optional redemption payment, is barred by the automatic stay. See AMR, 730 F.3d at 102-03 (the debtor "had the contractual right, pursuant to the Indentures, to repay its accelerated debt without Make-Whole Amount. We therefore agree with the bankruptcy court that any attempt by U.S. Bank to rescind acceleration

now – after the automatic stay has taken effect – is an effort to affect American's contract rights, and thus property of the estate."); In re Solutia Inc., 379 B.R. 473, 485 (Bankr. S.D.N.Y. 2007) ("[A]ny attempt at [deceleration] would violate the automatic stay since it is a direct attempt to get more property from the debtor and the estate, either through a simple increase in the amount of a pro-rata plan distribution or through recovery of a greater amount of the collateral which secures the claim. In either case, [deceleration] is an attempt to 'assess' an increased claim against the amount of the surplus that would otherwise be available to the estate and creditors."); see also In re Enron Corp., 300 B.R. 201, 212 (Bankr. S.D.N.Y. 2003) ("Courts have consistently held that contract rights are property of the estate, and that therefore those rights are protected by the automatic stay."); Garcia v. Garcia (In re Garcia), 494 B.R. 799, 810 (Bankr. E.D.N.Y. 2013) ("As a general rule, contract rights and the interests arising from them are property of the estate.").

17. The Motion asks this Court to ignore the law of this Circuit. On the one hand, it concedes that "bondholders' de-acceleration of a debtor's obligations is an act against property [of the estate]." (Mot. ¶ 18 (citing AMR and Solutia).) At the same time, the Trustee contends that serving a notice to rescind the automatic acceleration of the Notes that occurred upon the Debtors' bankruptcy filing would not violate the automatic stay. (Id. ¶ 1 ("[T]he Indenture Trustee believes that the automatic stay . . . does not even bar the taking of such action."); id. ¶ 4 (deeming it an "unlikely event that the Court concludes that the automatic stay extend to stay the Holders' delivery of a rescission notice"). In making this contention, the Trustee does not even attempt to distinguish AMR or any other authority cited above, but dismisses them as coming from "[c]ourts in this Circuit." (See id. ¶ 18) AMR, of course, is not merely a decision from a "[c]ourt in this Circuit" (id.), but from the Second Circuit itself, in

which that Court considered—and rejected—the exact type of relief sought by the Trustee in an almost identical situation. AMR, 730 F.3d at 111-12. The Motion does not even attempt to show why AMR does not control here, much less actually do so. Accordingly, here as in AMR and Solutia, any attempt to waive the Debtors' bankruptcy default and decelerate the Notes is an attempt to "exercise control over" property of the Debtors' estates that is barred by the automatic stay. [6] 11 U.S.C. § 362(a)(3).

II. The Trustee Has Failed To Demonstrate That Cause Exists to Lift the Stay Pursuant to Section 362(d)(1).

18. The Trustee may not act against the Debtors' property or interfere with the Debtors' contractual rights unless the automatic stay is lifted. The Court may grant relief from the automatic stay for "cause" shown. See 11 U.S.C. § 362(d)(1). The Trustee, however, has failed to meet its burden of showing that cause exists to lift the stay under section 362(d)(1), for the reasons that follow.

19. Although the Bankruptcy Code requires that "cause" exist in order to lift the automatic stay, it does not set forth the specific bases for such cause. See Mazzeo v. Lenhart (In re Mazzeo), 167 F.3d 139, 142 (2d Cir. 1999); Sonnax Indus., Inc. v. Tri Component Prods. Corp. (In re Sonnax Indus., Inc.), 907 F.2d 1280, 1285 (2d Cir. 1990). Rather, the circumstances of each case determine whether the stay should be lifted, see id., but "cause" may be established

[6] Additionally, any assertion by the Trustees that the automatic stay does not preclude delivery of a notice of deceleration because section 555 permits the liquidation, acceleration, or termination of a securities contract is disingenuous and wholly inapplicable. Section 555 was intended to ensure that "the stay provisions of the Code are not construed to prevent brokers from closing out the open accounts of insolvent customers or brokers. The prompt closing out or liquidation of such open accounts freezes the status quo and minimizes the potentially massive losses and chain reactions that could occur if the market were to move sharply in the wrong direction." 5 Collier on Bankruptcy ¶555.LH (16th ed.). Such securities contract safe harbor provision cannot be shoehorned into allowing the enforcement of contractual rights under indentures. Accordingly, the Trustees cannot rely on the protections of section 555.

in only limited circumstances. See 3 Collier on Bankruptcy ¶ 362.07[3][a] (16th ed.) (stating that "cause" to lift the stay may exist when a debtor has commenced the action in bad faith, when relief is necessary to permit litigation to be concluded in another forum, or when the action only remotely relates to the case under title 11).

20. It is the moving party who bears the burden of making an initial showing of "cause." Id.; see also Grocery Haulers, Inc. v. Great Atl. & P. Tea Co. (In re Great Atl. & P. Tea Co.), 467 B.R. 44, 55 (S.D.N.Y. 2012). Indeed, in Sonnax, the Second Circuit made clear that "[i]f the movant fails to make an initial showing of cause . . . the court should deny relief without requiring any showing from the debtor that it is entitled to continued protection." 907 F.2d at 1285.

21. Determining whether cause exists is within the bankruptcy court's discretion. See In re Lehman Bros. Holdings Inc., 435 B.R. 122, 138 (Bankr. S.D.N.Y. 2010) (quoting Sonnax, 907 F.2d at 1286).[7] "Courts regularly employ the Second Circuit's twelve-factor test, commonly referred to as the 'Sonnax factors,' to determine whether the movant has made the requisite initial showing of cause." Great Atl. & P. Tea Co., 467 B.R. at 55. The twelve Sonnax factors are:

> (1) whether relief would result in a partial or complete resolution of the issues; (2) lack of any connection with or interference with the bankruptcy case; (3) whether the other proceeding involves the debtor as a fiduciary; (4) whether a specialized tribunal with the

[7] The Court also enjoys broad equitable powers under section 105(a) of the Bankruptcy Code and "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). The only limitation on the Court's exercise of its broad equitable powers under section 105(a) is that they may not be used in contravention of express provisions of the Bankruptcy Code. See Momentum Mfg. Corp. v. Emp. Creditors Comm. (In re Momentum Mfg. Corp.), 25 F.3d 1132, 1136 n.4 (2d Cir. 1994); Law Debenture Trust Co. of N.Y. v. Calpine Corp. (In re Calpine Corp.), 356 B.R. 585, 594 (S.D.N.Y. 2007); In re Gen. Motors Corp., 407 B.R. 463, 517 n.136 (Bankr. S.D.N.Y. 2009). Accordingly, when evaluating whether "cause" exists to lift the automatic stay, and in connection with the balancing of the harms test, courts may exercise their equitable powers pursuant to section 105(a) to deny a party's request for relief from the stay.

> necessary expertise has been established to hear the cause of action; (5) whether the debtors' insurer has assumed full responsibility for defending it; (6) whether the action primarily involves third parties; (7) whether litigation in another forum would prejudice the interests of other creditors; (8) whether the judgment claim arising from the other action is subject to equitable subordination; (9) whether Movant's success in the other proceeding would result in a judicial lien avoidable by the debtor; (10) the interests of judicial economy and the expeditious and economical resolution of litigation; (11) whether the parties are ready for trial in the other proceeding; and (12) impact of the stay on the parties and the balance of harms.

Sonnax, 907 F.2d at 1286.

22. In applying the Sonnax factors to determine whether a movant has made the requisite initial showing of cause, the court need only apply those relevant to the particular case and does not need to give each factor equal weight. In re Project Orange Assocs., LLC, 432 B.R. 89, 103 (Bankr. S.D.N.Y. 2010).

23. Key factors that courts in this district consider in determining whether a movant has made the showing of "cause" required to lift the stay are the impact of the stay on the parties and the administration of a debtor's chapter 11 case. See AMR, 485 B.R. at 295, aff'd, 730 F.3d at 88 (focusing on "interference with the bankruptcy case and the impact of the parties and the balance of harms" in denying creditor's motion to lift the automatic stay); Great Atl. & P. Tea Co., 467 B.R. at 56-57 (affirming Judge Drain's decision to deny motion to lift the stay where, if lifted, debtors would face a "monetary strain that could impact their creditors as well as [a] successful reorganization"); In re Penn-Dixie Indus., Inc., 6 B.R. 832, 835-36 (Bankr. S.D.N.Y. 1980) (citing legislative history of section 362 and noting "[i]nterference by creditors in the administration of the estate, no matter how small . . . is prohibited" and that "the Debtor should not be required to devote energy to this collateral matter at this juncture"); Narumanchi v. St. Vincents Catholic Med. Ctrs. of N.Y. (In re St. Vincents Catholic Med. Ctrs. of N.Y.), No. 11

Civ. 9431, 2012 WL 4462030, at *4 (S.D.N.Y. Sept. 27, 2012) (affirming bankruptcy court's denial of creditor's motion to lift the stay where allowing creditor to pursue its claim "could prejudice other, similarly situated creditors" and creditor "proffered no compelling reason why he should have been treated any differently from every other creditor whose assertion of injury was at least as compelling as his").

24. The Trustee's request to lift the stay cannot be reconciled with the courts' rulings in AMR and Solutia. AMR, 485 B.R. at 294-96, aff'd,730 F.3d at 111-12; Solutia, 379 B.R. at 484-85. In both cases, an indenture trustee sought to lift the stay in order to serve a notice that would rescind an automatic acceleration of notes that occurred upon a debtor's bankruptcy filing. See id. The purpose of serving that notice was the same in both cases: an attempt to increase the amount of noteholders' claims against the debtor to include a redemption premium to which those noteholders lacked any contractual entitlement. See id. In both cases, the bankruptcy court found that the Sonnax factors favored the debtor and refused to lift the stay—and, on appeal, the Second Circuit affirmed Judge Lane's refusal to lift the stay. See id.

25. This case is no different from AMR and Solutia. That is, the Trustee seeks to lift the stay in order to allow it to serve "a notice rescinding the acceleration of the Debtors' obligations under the Indenture and 1.5 Lien Notes" that occurred automatically "upon a bankruptcy filing." (Mot. ¶ 3.) And the Trustee is explicit about the purpose of serving that notice, *i.e.*, "to perfect the Holders' entitlement to a Make-Whole Claim" and thereby increase the amount of those Holders' recovery in bankruptcy. (See id.) But, as the Debtors have already demonstrated, under the unambiguous terms of the Indentures, the Noteholders have no contractual entitlement whatsoever to a Make-Whole Claim. (Exs. 1, 2; see also Docket No. 640) In AMR, the Second Circuit made clear that Judge Lane properly refused to lift the stay in

precisely these circumstances, and Judge Beatty reached the same result in Solutia. AMR, 730 F.3d at 111-12; Solutia, 379 B.R. at 484-85. The Motion does not even attempt to distinguish these on-point authorities. Accordingly, the outcome here should be the same and the Motion denied.

26. Indeed, the relevant Sonnax factors illustrate why the Trustee's attempt to lift the stay fails. Two of those factors apply here: factor two ("lack of any connection with or interference with the bankruptcy case") and factor twelve ("impact of the stay on the parties and the balance of harms"). In re Sonnax, 907 F.2d at 1286. Neither factor, however, is of any help to the Trustee in discharging its burden of demonstrating that cause exists to lift the stay. On the contrary, both factors weigh heavily against lifting the automatic stay.

27. The second Sonnax factor supports denying the Motion because the administration of the Debtors' chapter 11 cases would be negatively impacted if the Trustee were permitted to deliver a notice rescinding the automatic acceleration of the Notes that occurred upon the Debtors' bankruptcy filing. The Trustee asserts that the "rescission of the automatic acceleration of the Debtors' 1.5 Lien Note obligations will not disrupt these chapter 11 cases" and "delivery of the notice would cause no disturbance to the Debtors' property." (Mot. ¶ 30.) Neither of these assertions is correct. What the Trustee fails to recognize is that allowing it to deliver a rescission notice would grant the Noteholders rights they did not bargain for—payment of a redemption premium in the event of a bankruptcy filing by the Debtors—and operate to the detriment of the Debtors' estates and the other creditors by reducing the amount of funds available for distribution to those creditors. Indeed, it was precisely on this basis that the courts in AMR and Solutia refused to lift the stay. AMR, 730 F.3d at 112 (permitting service of a notice of deceleration "would only serve to increase the size of the [Indenture Trustee's] claim

(to an amount greater than that to which it is entitled pursuant to the Indentures), harming the estate and [the Debtors'] other creditors."); Solutia, 379 B.R. at 485 (deceleration "is an attempt to 'assess' an increased claim against the amount of the surplus that would otherwise be available to the estate and creditors.").

28. Likewise, the twelfth Sonnax factor, the impact of the stay on the parties and the balance of the harms, also weighs heavily in favor of denial of the Motion. The Debtors (and the Restructuring Support Agreement parties) have relied on the plain language of the Indentures in negotiating, drafting, and soliciting votes on the Plan. See AMR, 485 B.R. at 294-95 ("A deceleration of these notes would have the effect of assessing the Debtors with a Make-Whole not currently owed under the Indentures, and thwart the Debtors' reliance on the Indentures as written."). Moreover, the Debtors' other creditors and parties in interest have similarly relied on their estimated distributions under the Plan based on the statements made in the Plan, which are dependent on the plain language of the Indentures. Permitting the Trustee to decelerate the Notes at this point solely to obtain a contractual right for which it did not bargain (*i.e.*, payment of a redemption premium in the event of a bankruptcy filing) would result in exceptional prejudice to other parties in these cases, including a steep reduction in the value of the equity received under the Plan by holders of Second Lien Notes.

29. In short, the Trustee has failed to demonstrate why AMR and Solutia do not control the outcome of the Motion. Here, as in AMR and Solutia, the Trustee has failed to meet its burden of demonstrating that, under the applicable Sonnax factors, cause exists to lift the stay under section 362(d)(1). On the contrary, those factors compel the opposite result because lifting the stay would place an administrative burden on the Debtors' estate to the detriment of

other creditors and parties in interest, while the balance of harms overwhelmingly weighs in favor of denying the Motion. Accordingly, the Motion should be denied in its entirety.

III. The Trustee Has Failed To Demonstrate That Cause Exists to Lift the Stay Pursuant to Section 362(d)(2).

30. The Trustee's contention that the automatic stay should be lifted pursuant to section 362(d)(2) of the Bankruptcy Code is likewise flawed. To begin with, the Trustee has failed to demonstrate that section 362(d)(2)—which Congress enacted specifically to address the situation where a debtor files a bankruptcy petition on the eve of a foreclosure—even applies where the stay protects against interference with the Debtors' contractual rights as opposed to a foreclosure. Indeed, all of the cases cited by the Trustee involve a secured creditor seeking to lift the stay to foreclose on estate property secured by its claims or liens and none suggests that section 362(d)(2) has any application beyond this limited context. Thus, the Trustee has failed to demonstrate any grounds for disregarding Congressional intent and extending the reach of section 362(d)(2) to contractual rights that are property of the estate.

31. Congress intended for section 362(d)(2) of the Bankruptcy Code, which allows a court to lift the automatic stay if the debtor lacks equity in the property *and* the property is unnecessary to an effective reorganization, to be construed quite narrowly. The legislative history could not be more clear:

> This section [362(d)(2)] is intended to solve the problem of real property mortgage *foreclosures* of property where the bankruptcy petition is filed on the eve of foreclosure. The section is not intended to apply if the business of the debtor is managing or leasing real property, such as a hotel operation, even though the debtor has no equity if the property is necessary to an effective reorganization of the debtor.

House Debate on Compromise Bill, 124 Cong. Rec. H 11092-11093 (daily ed. Sept. 28, 1978) (remarks of Rep. Edwards) (emphasis added); see also In re Sulzer, 2 B.R. 630, 635 (Bankr.

S.D.N.Y. 1980) (recognizing that the purpose of 362(d)(2) "is directed toward real property mortgage foreclosures where the petition for relief was filed on the eve of the foreclosure."); In re Nw. Airlines Corp., No. 05-17930, 2006 WL 2583647, at *3 n.2 (Bankr. S.D.N.Y. Aug. 28, 2006) (recognizing Congressional intent that section 362(d)(2) was meant to deal with foreclosure); In re Indian Palms Assocs., Ltd., 61 F.3d 197, 208 n.15 (3d Cir. 1995) ("it appears that section 362(d)(2) was intended to protect a creditor's right to foreclosure").

32. It is no surprise, therefore, that all of the section 362(d)(2) cases cited by the Trustee (see Mot. ¶¶ 20, 22, 27) involve a creditor requesting relief from the automatic stay so that it may *foreclose on collateral*. See, e.g., Pegasus Agency, Inc. v. Grammatikakis (In re Pegasus Agency, Inc.), 101 F.3d 882, 883 (2d Cir. 1996) (seeking "relief from the stay to pursue a state-court foreclosure action on a parcel of land owned by" the debtor); Indian Palms Assocs., 61 F.3d at 200 (seeking relief to foreclose on a 176-unit apartment complex); In re de Kleinman, 156 B.R. 131, 132 (Bankr. S.D.N.Y. 1993) (describing a "garden variety motion to lift the automatic stay to permit foreclosure of a lien on a residential cooperative apartment"); In re WorldCom, Inc., No. 02-13533, 2003 WL 22025051, at *1 (Bankr. S.D.N.Y. Jan. 30, 2003) (seeking transfer of "cash collateral . . . held in an investment account"); In re Diplomatic Elecs. Corp., 82 B.R. 688, 689 (Bankr. S.D.N.Y. 1988) (creditor seeking relief from the stay so that it could "foreclose its perfected security interests in the debtor's accounts receivable and inventory"); In re Tex. State Optical, Inc., 188 B.R. 552, 554-56 (Bankr. E.D. Tex. 1995) (creditor seeking to lift stay to foreclose on promissory notes).

33. The Debtors have been unable to locate a single case in which a court in this Circuit granted a motion for relief from the automatic stay pursuant to section 362(d)(2) for any reason other than to permit a movant to foreclose on property that secured a debt. On the

contrary, courts in this district have found the application of section 362(d)(2) to be limited in practice and refused to apply it in situations where foreclosure on collateral was not at issue. In Lawrence v. Motors Liquidation Co. (In re Motors Liquidation Co.), No. 10 Civ. 36, 2010 WL 4630327 (S.D.N.Y. Nov. 8, 2010), a creditor sought to lift the stay under section 362(d)(2) to proceed with an ERISA action against the debtor, on the grounds that the debtor had no equity in the property. Id. at *3. In affirming Judge Gerber's refusal to lift the stay, Judge Holwell explained: "This argument is directed at the wrong section of section 362 . . . . *Since Appellant's ERISA action is not an action to enforce a secured interest in real property, section 362(d)(2) does not apply and his motion for relief from the stay can only be granted for 'cause' under section 362(d)(1).*" Id. (emphasis added); Nw. Airlines, 2006 WL 2583647, at *3 (refusing to apply section 362(d)(2) to situation where creditor was attempting to lift the stay to proceed with a class action lawsuit and noting that 362(d)(2) was meant to deal with foreclosures).

34. Here, it is undisputed that delivery of a notice of deceleration is not an act to foreclose on the collateral that secures the Notes. Indeed, the Trustee expressly disclaims any such intent. (Mot. ¶ 4 ("It cannot be overemphasized that this Motion is not a request for relief to permit the Indenture Trustee to enforce liens, to realize upon or to collect from the proceeds of collateral, or otherwise to exercise any remedies with respect to the collateral securing the 1.5 Lien Notes or other assets of these estates.").) Instead, what the Trustee aims to accomplish by delivering a notice of deceleration is to act against the Debtors' contractual rights under the Indentures. Congress, however, never intended section 362(d)(2) to apply to such a situation, and the Trustee's Motion is bereft of any authority at all that supports applying section 362(d)(2)

to permit a modification of the Debtors' contractual rights. Accordingly, the Trustee cannot rely on this provision of the Bankruptcy Code as a basis for lifting the automatic stay.

IV. The Trustee Has Failed To Demonstrate That It Is Entitled To Additional Adequate Protection Above And Beyond What This Court Has Already Approved.

35. "[A] secured creditor's position *as of the petition date* is entitled to adequate protection against deterioration" under 362(d)(1). Travelers Life & Annuity Co. v. Ritz-Carlton of D.C., Inc. (In re Ritz-Carlton of D.C., Inc.), 98 B.R. 170, 173 (S.D.N.Y. 1989). The secured creditor "lacks adequate protection if the value of its collateral is declining as a result of the stay." In re Elmira Litho, Inc., 174 B.R. 892, 902 (S.D.N.Y. 1994). "It must, therefore, prove this decline in value—or the threat of a decline—in order to establish a prima facie case." Id.

36. The Trustee, however, does not devote even one line of the Motion to explaining how and why its prepetition interest in the collateral securing the Notes is not sufficiently protected here. Nor does the Trustee explain why the adequate protection this Court has already approved is not sufficient.[8] This Court's Final DIP Order [Docket No. 253] awarded the Trustee the following adequate protection payments in an amount equal to the aggregate diminution in value of their interests in the Prepetition Collateral (as defined in that order): (a) adequate protection liens; (b) section 507(b) claims; (c) all accrued and unpaid interest due under the Indenture; (d) all reasonable professional fees and expenses excluding those of counsel related to any dispute over whether the Applicable Premium is due; and (e) reasonable access to the Debtors' attorneys and advisors and to such information as may be reasonably requested.

[8] Indeed, this Court has previously questioned whether the Trustee is entitled to such adequate protection in the first place. In re MPM Silicones, LLC, No. 14-22503, First Day Hearing Transcript (Apr. 14, 2013), at 86, 107, 132-33, 136, 143-44.

(Id. ¶¶ 18, 20.) Accordingly, the Trustee has failed to meet its burden of demonstrating its entitlement to any additional adequate protection here. Elmira Litho, 174 B.R. at 902.

37. Even if it could do so, the Trustee has still failed to demonstrate an entitlement to the particular form of adequate protection sought here, *i.e.*, allowance of its claim for a redemption premium. (Mot. ¶ 50.) Indeed, not a single authority cited by the Trustee to support its adequate protection argument (id. ¶¶ 47, 49)[9] stands for the proposition that a creditor may receive, as a form of adequate protection, the monetary value of a contested claim. On the contrary, AMR forecloses the Trustee's attempt to recover a redemption premium under the guise of adequate protection: "[T]he usual ground for lifting the stay for a secured creditor is to secure adequate protection of the creditor's rights, which usually comes in the form of periodic payments to the creditors. But that is not an issue here given that . . . U.S. Bank is receiving the contractual payments that it is due under the Indentures." AMR, 485 B.R. at 295. Here, the Trustee, like its counterpart in AMR, is receiving, as adequate protection, the contractual payments due under the Indenture, *i.e.*, post-petition interest and reimbursement of reasonable professional fees. Compare id. with Indentures (Exs. 1, 2) §§ 4.01, 7.1 (payment of Notes plus

[9] See New England Dairies, Inc. v. Dairy Mart Convenience Stores, Inc. (In re Dairy Mart Convenience Stores, Inc.), 351 F.3d 86 (2d Cir. 2003) (denying adequate protection to creditor as creditor was not a secured creditor and thus not entitled to adequate protection); United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365 (1988) (affirming Fifth Circuit's holding that undersecured creditor is not entitled to interest on its collateral during the stay as form of adequate protection); Crocker Nat'l Bank v. Am. Mariner Indus., Inc. (In re Am. Mariner Indus., Inc.), 734 F.2d 426, 433, 435 (9th Cir. 1984), abrogated on other grounds by Timbers, 484 U.S. 365 (recognizing that adequate protection should "compensate for present value" and "insure the safety of the principal," and holding that creditor was entitled to adequate protection in "the form of monthly interest payments at the market rate on the liquidation value of the collateral"); In re Olde Prairie Block Owner, LLC, 448 B.R. 482 (Bankr. N.D. Ill. 2011) (holding that lender's interest was adequately protected and not entitled to additional adequate protection); In re Watkins, No. 05-CV-344, 2005 WL 6955328 (E.D.N.Y. Aug. 24, 2005) (affirming bankruptcy court's decision to lift stay as creditor-landlord's interest in property being leased by debtor was inadequately protected because debtor failed to pay post-petition rent and lacked the funds to do so in the future); In re 495 Cent. Park Ave. Corp., 136 B.R. 626 (Bankr. S.D.N.Y. 1992) (holding that debtor established that creditor's secured position was adequately protected as debtor's proposed financing would renovate the debtor's property and therefore increase the value of the debtor's property for the benefit of the creditor's secured claim); In re Aurora Cord & Cable Co., 2 B.R. 342 (Bankr. N.D. Ill. 1980) (recognizing that IRS was due adequate protection in the form of periodic payments and liens).

interest; compensation of fees) and Final DIP Order ¶¶ 18, 20. The Trustee is not entitled to anything further here.

CONCLUSION

For all of the foregoing reasons, the Debtors respectfully request that the Court deny the Motion in its entirety and award the Debtors such other and further relief as is just and proper.

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