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11 **UNITED STATES BANKRUPTCY COURT**
12 **DISTRICT OF NEVADA**

13 In re:) Case No.: 16-16655-BTB
14)
15 Robert C. Graham, Ltd., F/D/B/A/ ROB) Chapter 7
16 Graham & Associates and Lawyerswest,)
17 Debtor.) Hearing Date: March 14, 2017
18) Hearing Time: 10:00 a.m.
19)

19 **OPPOSITION TO THE MOTION OF MARKEL INSURANCE**
20 **COMPANY FOR RELIEF FROM STAY PURSUANT TO**
21 **11 U.S.C. 362 TO PROCEED IN NON-BANKRUPTCY FORUM**

22 Victoria L. Nelson, trustee (the “Trustee”) in the Chapter 7 bankruptcy case (the “Chapter 7
23 Case”) of Robert C. Graham, Ltd., F/D/B/A/ ROB/ Graham & Associates and Lawyerswest (the
24 “Debtor”), by and through her proposed special bankruptcy counsel, Schwartz Flansburg PLLC
25 (“SF”), hereby files her opposition (the “Opposition”) to the motion (the “Motion”) of Markel
26 Insurance Company (“MIC) for relief from the automatic stay. In support of the Opposition, the
27 Trustee respectfully states as follows:
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Preliminary Statement

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2 1. As stated in the Motion, attorney Robert C. Graham (“**Mr. Graham**”), not the Debtor,
3 was indicted on three counts of theft of client funds and other criminal misconduct. Due to these
4 unfortunate circumstances, approximately 390 parties are aggrieved, losing millions of dollars, and
5 may only have MIC’s Policy (defined herein) to receive any recovery for their losses.
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8 2. MIC seeks to modify the automatic stay to pursue an action for declaratory relief
9 outside of this Bankruptcy Court so that it may terminate and rescind the MIC Lawyers Professional
10 Liability Insurance Policy (the “**Policy**”) it issued to the Debtor, and seek a court order that no
11 coverage is available.
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14 3. The Motion should be denied for several reasons. First, the Motion is premature.
15 While MIC argues the Policy can be rescinded because Mr. Graham’s misappropriations began before
16 he signed the Policy in December 2015, the exact facts are not yet known, and are only “allegations”
17 in an indictment.
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20 4. Second, even if Mr. Graham’s misappropriations did begin prior his signing the
21 application for the Policy in December 2015, it is unknown whether any other officers or directors of
22 the Debtor knew of Mr. Graham’s misappropriations. In fact, the State Bar of Nevada’s disciplinary
23 complaint against Mr. Graham alleges his employees and staff had no knowledge of Mr. Graham’s
24 intent to abandon his law practice and close his office. See Complaint, entitled State Bar of Nevada v.
25 Robert C. Graham, Esq., Case No. OBC16-1504, ¶¶ 5-6, a copy of which is attached hereto as **Exhibit**
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28 **A.**

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30 5. In fact, MIC’s Motion indicates there are other individual professionals who may be
31 “Insureds” under the Policy and who may be targets of claims by the Debtor’s former clients. See
32 Motion, p. 17. Importantly, however, there is no evidence or any allegation in the Motion that these
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1 other officers, directors and professionals knew about any of Mr. Graham's wrongdoings.
2 Accordingly, until these facts are fleshed out, the Motion is premature and should be denied.

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4 6. Notwithstanding the above, "cause" does not exist to terminate or modify the automatic
5 stay and the Motion should be denied. While MIC argues the interests of judicial economy are better
6 served by forcing: (i) the Debtor to litigate outside this Court; and (ii) 390 claimants to intervene in an
7 action outside this Court, in a lawsuit that has not even commenced, the Curtis factors do not support
8 such a conclusion. Accordingly, as set forth below, the Motion should be denied in its entirety.
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11 **Argument**

12 **The Motion is Premature.**

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14 7. As MIC acknowledges, allegations regarding Mr. Graham's misappropriation of client
15 funds, the abandonment of his law practice and the closure of the Debtor's offices all came about in
16 December 2016, approximately 2 months prior to the filing of MIC's Motion. At the early stages of
17 this case, the Motion is premature as the facts are still being brought to light, and facts are not known
18 regarding: (i) when the misappropriation started; and (ii) whether any other principals of the Debtor,
19 aside from Mr. Graham, knew of any of the misappropriation.
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22 8. In fact, the Motion admits that there may be claims against the Debtor's other
23 "individual professionals" and that MIC will still be entitled to litigate a coverage action against those
24 professionals who may qualify as "Insureds" under the Policy. See Motion, p. 17, ¶ ll. 25-27. Other
25 insureds include the attorneys Linda Graham and Delwyn Webber, both of whom may not have any
26 knowledge of Mr. Graham's acts, but are protected by the Policy.
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29 9. Simply put, it is unknown whether any other principals, officers or directors of the
30 Debtor knew of any of Mr. Graham's misappropriations, and whether such principals, officers or
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1 directors may be entitled to coverage under the Policy. As a result, until these facts are fleshed out,
2 the Motion is premature and should be denied.

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4 **Cause Does Not Exist to Modify the Automatic Stay to
Commence Litigation in a Non-Bankruptcy Forum.**

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6 10. Notwithstanding the above, the Motion should still be denied as MIC has not
7 established “cause” to terminate or modify the automatic stay.

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9 11. Pursuant to Section 362 of the Bankruptcy Code, the filing of a bankruptcy petition
10 stays the enforcement of actions against the debtor or property of the estate. 11 U.S.C. § 362(a).
11 Importantly, Congress intended the scope of Section 362(a) to be broad, staying nearly every type of
12 formal or informal action against the debtor or property of the estate. Delpit v. Comm’r Int’l Revenue
13 Serv., 18 F.3d 768, 771 (9th Cir. 1994).

14
15 12. Under Section 362(d)(1) of the Bankruptcy Code, the court shall grant relief from the
16 stay . . . such as by terminating, annulling, modifying, or conditioning such stay . . . for cause. 11
17 U.S.C. § 362(d)(1). As the party seeking stay relief, MIC must first establish a *prime facie* case that
18 cause exists for relief under Section 362(d)(1) of the Bankruptcy Code. See United States v. Gould (In
19 re Gould), 401 B.R. 415, 426 (B.A.P. 9th Cir. 2009). In this instance, MIC fails to meet its burden.

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21 13. Specifically, MIC seeks relief from the automatic stay to “commence” litigation in state
22 court to rescind the Policy and obtain a declaration that there is no coverage under the Policy. As set
23 forth herein, an analysis of the Curtis factors demonstrates that “cause” does not exist, and given the
24 fact that there could be over 390 claimants and a Chapter 7 trustee to administer all claims under the
25 Policy, litigation should remain in the Bankruptcy Court.

1 14. The “Curtis Factors” enumerated in In re Curtis, 40 B.R. 795, 799-800 (Bankr. D. Utah
2 1984), are for the most part, correctly cited in the Motion. For the reasons that follow, those factors
3 show that MIC’s Motion should be denied.
4

5 A. Whether the Relief Will Result in a Partial or Complete Resolution of the Issues.
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7 15. The first Curtis factor weighs against granting the relief requested in the Motion.
8 Contrary to MIC’s assertions, adjudicating whether the Policy is void or whether there is coverage
9 under the Policy in another forum will not completely resolve the issues at hand. Specifically, the
10 Trustee, 390 claimants and the Debtor’s other officers, directors and professionals will be adjudicating
11 issues in the Debtor’s bankruptcy case, including claims against the Policy.
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13 16. Commencing a malpractice suit in a non-bankruptcy forum will not “conclude” the
14 issues between the parties, or allow for the efficient resolution of 390 claims. Accordingly, this factor
15 weighs against modifying the automatic stay.
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18 B. The Lack of Any Connection With or Interference With the Bankruptcy Case.
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20 17. The second Curtis factor strongly supports denial of the Motion, as the Policy and
21 claims thereof have a strong connection with the Debtor’s Chapter 7 case.
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23 18. First, the “Policy” is property of the bankruptcy estate, a fact MIC appears not to
24 dispute. Rather, MIC argues the second Curtis factor falls in its favor because the “proceeds”
25 stemming from the Policy and payable to third parties may not be property of the Debtor’s bankruptcy
26 estate. See Motion, pp. 11-13. To support its position, MIC cites In re Endoscopy Ctr. Of S. Nevada,
27 LLC, 451 B.R. 527, 547 (Bankr. D. Nev. 2011) (holding, among other things, that insurance policy
28 “proceeds” payable to third parties are not property of the bankruptcy estate).
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31 19. MIC’s reliance on In re Endoscopy Ctr. Of S. Nevada, LLC is misplaced for multiple
32 reasons. First, the issue in that case involved a Chapter 7 trustee’s settlement agreement with the
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1 Debtor's insurer, which directly involved the "proceeds" of the underlying policy. Here, MIC's
2 motion primarily relates to the "Policy" (not the proceeds) and whether MIC can rescind it based on
3 Mr. Graham's allegations.
4

5 20. Second, whether the proceeds of the Policy are property of the estate is determined on a
6 case by case basis. Indeed, when a debtor corporation owns an insurance policy that covers its own
7 liability vis-à-vis third parties, courts have cleared or least implied that both the policy and the
8 proceeds of that policy are property of the debtor's bankruptcy case. Matter of Vitek, Inc., 51 F.3d
9 530, 535 (5th Cir. 1995), citing Louisiana World Exposition, 832 F.2d 1391, 1399-1400 (5th Cir.
10 1987).
11

12 21. Third, as pointed out by Judge Nakagawa in In re Endoscopy Ctr. Of S. Nevada, LLC,
13 even if proceeds are not property of the Debtor's bankruptcy estate, there may be instances where
14 there is a secondary impact that still affects the Debtor's bankruptcy estate. Specifically, this Court,
15 quoting the Fifth Circuit case of In re Edgeworth, 993 F.2d 51, 55 (5th Cir. 1993), stated as follows:
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18 A secondary impact might include a situation where there were more claims than policy
19 proceeds, thus creating a scenario where the remaining assets in the bankruptcy estate
20 might be diminished by those portions of the claims exceeding the policy limits.
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22 In re Endoscopy Ctr. Of S. Nevada, LLC, 451 B.R. at 544, n. 39, citing In re Edgeworth, 993 F.2d at
23 56.
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25 22. Here, by MIC's own admission, claims of the 390 potential claimants are in excess of
26 \$13 million, while the Policy has limits of \$1 million per claim and \$2 million aggregate. See Motion,
27 p. 6. In other words, the potential claims against the Policy far exceed the Policy's limits, thus
28 creating the exact same scenario this Court and the Edgeworth court envisioned. Therefore, regardless
29 of whether the "proceeds" are property of the Debtor's estate, because the claims against the Policy far
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1 exceed the Policy limits, any resolution of the Policy and its coverage will have a direct and
2 substantial impact on the Debtor's bankruptcy estate.

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4 23. Indeed, in similar situations, courts have held that when the proceeds are much less
5 than the claims, the proceeds need to be marshalled through the bankruptcy court to prevent a "free-
6 for-all" against the debtor's estate, and courts will find such proceeds to be property of the estate,
7 because the automatic stay of section 362 will adequately protect the interests of all parties involved.
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9 In re Sfuzzi, Inc., 191 B.R. 664, 667-68 (Bankr. N.D. Tex. 1996).

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11 24. Furthermore, the cases MIC relies on, In re Pintlar Corporation, 124 F.3d 1310 (9th Cir.
12 1997) and Peerless Ins. Co. v. Rivera, 208 B.R. 313 (D.R.I. 1997), are distinguishable and not
13 applicable here. Specifically, the Pintlar case involved a separate lawsuit against third-party directors
14 and officers of the debtor in state court to determine whether coverage applied to the directors and
15 officers. Id. at 1312. The Court determined relief from the automatic stay was appropriate because:
16 (i) a creditor's trust had been substituted in as the plaintiff in the separate action; and (ii) the debtor
17 was not a party to the separate state court action. Id. at 1313. Here, MIC is seeking relief to directly
18 adjudicate the rights of the Debtor under the Policy, and argues the 390 possible claimants can simply
19 intervene in a separate state court action. Accordingly, the Pintlar case is not applicable.
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24 25. Similarly, the Peerless case does not apply to this case. Peerless involved a car accident
25 due to the negligence of one of the debtor's employees, and Peerless, the insurer, sought declaratory
26 relief in state court that coverage did not apply. Peerless, 208 B.R. at 315. In granting relief from the
27 automatic stay, the Delaware bankruptcy court relied upon a Delaware statute allowing actions to be
28 brought directly against a debtor's insurance carrier when the debtor is in bankruptcy. Id. at 315-16.
29 The Delaware court also found that it was unlikely the debtor would be bound by any determination
30 that no coverage exists between the car accident claimants and the insurer. Id. Here, the Delaware
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1 state statute does not apply, and the Debtor will be directly impacted by any relief from the automatic
2 stay sought by MIC.

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4 26. Accordingly, given the size of the potential claimants, the amount of potential claims,
5 the limits of the Policy and the direct impact the relief sought in state court would have on the
6 Debtor's estate, the second Curtis factor weighs against granting the Motion.

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8 C. Whether the foreign proceeding involves the debtor as a fiduciary.

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10 27. MIC claims that where the debtor is a fiduciary, the purpose of the automatic stay to
11 protect the debtor from his creditors, is not advanced. The Debtor submits this factor is inapplicable
12 because the Policy was purchased by the Debtor to defend against wrongdoings of its principals,
13 officers, and directors. Plus, it was not the Debtor, but rather, Mr. Graham who answered the
14 questions on the Application.
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17 D. Whether a Specialized Tribunal has been Established to hear the Particular Cause of
18 Action and Whether that Tribunal has the Expertise to hear such Cases.

19 28. MIC asserts that this factor does not apply. See Motion, p.14. The Debtor agrees.

20
21 E. Whether the Debtor's Insurance Carrier has assumed Full Financial Responsibility
22 for Defending the Litigation.

23 29. While MIC argues this factor does not apply, the Debtor disagrees. Obviously, MIC
24 will not assume full financial responsibility to defend litigation against itself where MIC indicates it
25 intends to rescind the Policy and obtain a declaration that there is no coverage.
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27 30. Accordingly, if relief from the automatic stay is granted, the Debtor will be forced to
28 pay for and defend litigation in another forum, while simultaneously dealing with 390 claimants and
29 administering and prosecuting the Debtor's Chapter 7 case. Accordingly, this factor weighs strongly
30 against granting relief from the automatic stay.
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1 F. Whether the Action Essentially Involves Third Parties, and the Debtor
2 Functions Only as a Bailee or Conduit for the Goods or Proceeds in Question.

3 31. MIC asserts that if found that it must pay for damages asserted by third-party victims,
4 the Debtor would only function as a conduit of the Insurance Policy proceeds based on the large
5 number of claims brought against it. See Motion, pp. 14-15.
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7 32. Contrary to MIC's assertion, however, the MIC's action seeks to rescind the Policy
8 against the Debtor based on the misrepresentations of Mr. Graham. This action directly involves the
9 Debtor. While many third parties may benefit from proceeds that flow from the Policy, the Debtor is
10 more than just a bailee or conduit. Indeed, as admitted by MIC, the Policy limit is \$2 million, while
11 the potential claims against the Debtor total over \$13 million. Accordingly, the Debtor will be required
12 to administer these claims against the estate and distribute proceeds pro rata. Therefore, this factor
13 does not support relief from the automatic stay.
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17 G. Whether the Litigation in Another Forum Would Prejudice the Interests of Other
18 Creditors, the Creditor's Committee and Other Interested Parties.

19 33. MIC asserts that all parties will benefit from bringing the one malpractice suit in a non-
20 bankruptcy forum. MIC's analysis here is flawed and without merit.
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22 34. MIC cites to the Pintlar case and argues MIC may proceed with such an action in state
23 court naming the non-Debtor professionals without violating the automatic stay. See Motion, p. 15.
24 In the very next sentence, however, MIC argues a "[s]ingle action, involving the Debtor as well as the
25 professionals would be more efficient, and those who have claims against the Debtor would
26 presumably have an opportunity to intervene if they felt their interests were at stake." Id.
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29 35. MIC's above analysis is wrong for several reasons. First, MIC admits this case is not
30 like Pintlar because it seeks to bring the state court action against non-debtor professionals and the
31 Debtor. Relief from the stay was granted in Pintlar because the lawsuit was only against non-debtor
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1 professionals. Second, MIC admits it has received inquiries from approximately 390 aggrieved
2 parties, yet argues these parties can simply intervene in the state court suit.

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4 36. Contrary to MIC's arguments, it is much better to litigate any Policy rescission and
5 claims under the Policy in this Court, where the Trustee can litigate on behalf of the estate in one
6 forum, and all 390 creditors will have their interests protected. Otherwise, all creditors and interested
7 parties would be prejudiced by MIC's litigation in state court. Accordingly, this factor weighs against
8 granting relief from the automatic stay.
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11 H. Whether the Judgment Claim arising from the Foreign Action is subject to
12 Equitable Subordination under Section 510 (c).

13 37. MIC asserts that this factor does not apply. See Motion, p.15. The Debtor agrees.

14
15 I. Whether Movant's Success in the Foreign Proceeding would Result in a Judicial
16 Lien Avoidable by the Debtor under Section 522(f).

17 38. MIC asserts that this factor does not apply. See Motion, p.16. The Debtor agrees.

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19 J. The Interests of Judicial Economy and the Expeditious and Economical
20 Determination of Litigation for the Parties.

21 39. The eleventh Curtis factor strongly supports denial of the Motion, as allowing a
22 separate action to proceed in state court would require that a separate court hear and determine the
23 merits of these issue, force the 390 aggrieved parties to spend their resources getting involved in a
24 second legal action, and waste the already limited resources of the Debtor litigating in a non-
25 bankruptcy forum against potentially 390 intervening parties.
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28 40. MIC asserts that allowing a single non-bankruptcy proceeding will "eliminate
29 duplicative and needless litigation." See Motion, p.16. MIC also asserts any interested parties could
30 "presumably intervene if they felt their interests were at stake." Id. at p. 15. Indeed, MIC's argument
31 is that it serves the interests of judicial economy to have 390 parties intervene in a separate state court
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1 action rather than litigate with the Trustee in this Court. MIC, however, ignores the logistical and
2 financial nightmare it would be for the 390 claimants to intervene in a separate state court action.

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4 41. Indeed, the “most important factor in determining whether to grant relief from the
5 automatic stay to permit litigation against the debtor in another forum is the effect of such litigation on
6 the administration of the estate.” In re Curtis, 40 B.R. at 806. The inevitable consequence of allowing
7 a separate state court action to proceed is that eventually, when the state court action concludes,
8 irrespective of the outcome, all 390 claimants will have to return to this Court to litigate the aftermath
9 of the theoretical state court action. Overall, this would have a decidedly negative effect on the
10 administration of the estate because this Court would be left applying the decision of a state court, in
11 conjunction with the administration of the bankruptcy estate.
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15 42. Additionally, as discussed in In re Sonnax Industries, Inc., a court should deny relief
16 from the automatic stay when “the interests of judicial economy and the speedy and economical
17 determination of litigation” require such a denial. 907 F.2d 1280, 1287 (2d Cir. 1990). In In re
18 Sonnax, the Court was justified in denying relief from the stay when the litigation in state court had
19 not progressed to the discovery stage. Here, the litigation in state court has not even begun; rather,
20 MIC is requesting the ability to bring an action in state court with a claim that could be brought and
21 dealt with more expeditiously and less expensively in this Court.
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25 43. As bankruptcy courts are courts of equity, judicial economy will be much better served
26 if the litigation related to the Policy is heard in this Court and all 390 claimants have their interests
27 protected in one place. Therefore, allowing MIC to bring a redundant action as it requests would
28 contradict the purpose of the Curtis factors. Accordingly, this factor weighs against granting relief
29 from the automatic stay.
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1 44. In the event MIC will not consent to the jurisdiction of this Court to enter final
2 judgments, MIC may apply to withdraw the reference to District Court.

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4 K. Whether the Foreign Proceeding has Progressed to the Point Where the Parties are
5 Prepare for Trial.

6 45. This factor weighs heavily against granting relief from the automatic stay, as the
7 foreign proceeding has not even begun, let alone to a point where the parties are prepared for trial.
8 Accordingly, this factor weighs against granting relief from the stay.
9

10 L. The Impact of the Stay and the “Balance of Hurt.”

11 46. Finally, MIC asserts that potentially multiple proceedings to determine the coverage of
12 the Insurance Policy may be brought against MIC at its detriment and at no benefit for the state or its
13 creditors. See Motion at pp. 17-18. MIC further claims that a single proceeding in a non-bankruptcy
14 forum resolves this issue.
15

16 47. If this case remains in this Court, proceeds to trial and MIC will not consent to this
17 Court entering a final judgment, it may simply move to withdraw the reference to district court. This
18 will not result in multiple lawsuits, but rather, will allow the case and discovery to proceed to trial, and
19 trial to occur in district court.
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22 48. Any harm or prejudice to MIC regarding the above procedural issues is greatly
23 outweighed by the harm to the Debtor’s estate of having to administer the Debtor’s Chapter 7 case,
24 while litigating in another forum against MIC. Moreover, the harm to forcing 390 claimants to
25 “intervene” in a state court action to protect their interests outweighs any harm to MIC in refusing to
26 consent to this Court to enter final judgments. Accordingly, this factor detracts to finding cause for
27 lifting the automatic stay.
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1 WHEREFORE, the Debtor requests that the Motion be denied, and for such other relief as the
2 court may deem just or appropriate.

3 Dated this 28th day of February, 2017.

4
5 Respectfully Submitted,

6 /s/ Samuel A. Schwartz

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a true a correct copy of the foregoing was sent via the Court's CM/ECF System on February 28, 2017, to the following:

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