IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

IN RE:	§	**Chapter 11**
REGENT PARK CAPITAL, LLC	§	**CASE NO. 14-11731-TMD**
Debtor.	§	

PLAINSCAPITAL BANK'S RESPONSE TO DEBTOR'S EMERGENCY MOTION TO EXTEND THE AUTOMATIC STAY
[Related to Docket No. 64]

TO THE HONORABLE TONY M. DAVIS, BANKRUPTCY JUDGE

PlainsCapital Bank ("Plains") files this Response to Debtor Regent Park Capital, LLC's (the "Debtor" or "Regent") Emergency Motion to Extend Automatic Stay and would show the Court as follows:

I. PRELIMINARY STATEMENT

1. This Court should deny the Debtor's request to extend the automatic stay to protect a non-bankrupt guarantor, Lester N. Pokorne, individually and as Trustee of The Lester N. Pokorne Revocable Living Trust Dated April 30, 1999 (collectively, "Pokorne"). Although the Debtor argues that "unusual circumstances" in this case justify an extremely rare extension of the automatic stay to protect a non-debtor, Plains' prosecution of its lawsuit against a non-bankrupt guarantor is far from unusual. The guaranty at issue is an unconditional guaranty of payment and a primary obligation of Pokorne, and a judgment against Pokorne would not deplete the existing bankruptcy estate. If Pokorne wishes to file for bankruptcy individually, then he may do so. Until

he takes such action, however, the automatic stay applicable to the Debtor under 11 U.S.C. § 362 should not bar Plains' prosecution of its state-court lawsuit against Pokorne.

II. BACKGROUND FACTS

2. On or about December 9, 2008, Regent entered into a commercial loan agreement with Plains as the lender (the "Loan Agreement"), to be effective as of December 25, 2008. The Loan Agreement provided Regent with a revolving line of credit under which Regent could borrow in amounts not to exceed $6,500,000.00 from Plains.

3. As a condition of entry into the Loan Agreement with Plains, Pokorne agreed to guaranty the payment and performance of all of Regent's liabilities to Plains. To that end, Pokorne executed a guaranty agreement (the "Guaranty Agreement") on December 19, 2008 to be effective as of December 25, 2008. The Guaranty Agreement guarantees payment; not collection, so Pokorne is primarily liable along with Regent.[1] Further, under the Guaranty Agreement, Pokorne irrevocably and unconditionally guaranteed the payment of the debt at issue and further agreed that Plains could enforce the Guaranty Agreement against Pokorne without having to: (i) institute or exhaust remedies against the borrower; (ii) enforce its rights against any security; or (iii) join borrower or any others liable on the debt. Further, the Guaranty Agreement provides that any indebtedness that Regent owes to Pokorne shall be subordinate in all respects to the Guaranteed Indebtedness owing to Plains, and Pokorne shall not be entitled to enforce or receive payment from Regent until the Guaranteed Indebtedness has been paid in full.

[1] "[The Guarantors] hereby guarantee[] to [Plains] ***the prompt and full payment*** of the Guaranteed Indebtedness…"

4. As part of the continuing line of credit to Regent under the Loan Agreement, on or about July 15, 2013, Regent executed and delivered a Variable Rate Commercial Revolving or Draw Note (the "Note"), in the original principal amount of $6,500,000.00 payable to Plains. Plains is the owner and holder of the Note and is entitled to receive all money due under its terms. The Note was given in renewal and extension of amounts outstanding under a series of like promissory notes given by the Regent and payable to the order of Plains.

5. The Note matured in accordance with its terms and therefore became due and payable on July 15, 2014, but neither Regent nor Pokorne repaid the Note to Plains. Plains issued a Notice of Default and Demand to Regent and Pokorne on August 15, 2014, demanding payment of the entire outstanding balance of the Note and all other fees and expenses payable to Plains under the terms of the loan documents.

6. On September 16, 2014, Plains filed its Original Petition against Pokorne and Regent in Case No. D-1-GN-14-003687, in the 419th Judicial District Court of Travis County, Texas (the "Lawsuit"). Although the automatic stay under § 362 has abated Plains' pursuit of its claims against Regent in the Lawsuit, Plains has elected to pursue its claim on the Guaranty Agreement against Pokorne, the non-bankrupt guarantor.

II. ARGUMENT AND AUTHORITIES

7. In *GATX Aircraft Corporation v. M/V Courtney Leigh*, 768 F.2d 711 (5th Cir. 1985), the United States Fifth Circuit Court of Appeals clearly stated that, "while the stay protects the debtor who has filed a bankruptcy petition, litigation can proceed against other co-defendants." *Id.* at 716. Indeed, it is well-established that "[s]ection 362 is

rarely ... a valid basis on which to stay actions against non-debtors." *Arnold v. Garlock, Inc.*, 278 F.3d 426, 435 (5th Cir. 2001) (emphasis added) (*citing Wedgeworth v. Fibreboard Corp.*, 706 F.2d 541, 544 (5th Cir. 1983)).

8. In this case, the Debtor asserts that "the automatic stay may be extended to cover non-debtors where certain unusual circumstances exist." (Motion at ¶ 19.) In support, the Debtor argues that the automatic stay should extend to Pokorne on the grounds that continuation of the Lawsuit would "embroil him in time-consuming and intensive efforts to defend against those actions" and/or would "likely force Pokorne to file his own individual bankruptcy proceeding." (Motion at ¶¶ 21, 22.)

9. The Debtor's motion cites several different standards that courts from other circuits have applied when determining whether § 362 should cover non-debtors. The Fifth Circuit, however, has recognized only an extremely narrow exception to the general rule that § 362 applies only to debtors: "a bankruptcy court may invoke § 362 to stay proceedings against nonbankrupt co-defendants where 'there is such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor.'" *Reliant Energy Services, Inc. v. Enron Canada Corp.*, 349 F.3d 816, 825 (5th Cir. 2003) (*citing A.H. Robins, Co. v. Piccinin*, 788 F.2d 994, 999 (4th Cir.1986)). *See also Arnold*, 278 F.3d 426, 436.

10. In this case, the liability of Pokorne (as unconditional guarantor) is distinct, independent, and separate from the liability of the Debtor. Thus, there is no basis to establish that a judgment against Pokorne would "in effect" be a judgment against the

Debtor. *See, e.g., Beran v. World Telemetry, Inc*., 747 F. Supp. 2d 719, 724 (S.D. Tex. 2010) (holding that identical allegations against the debtor and non-debtor defendants do not provide grounds to extend the stay to the non-debtors). Accordingly, the Fifth Circuit's limited exception is not applicable to the instant facts. *See, e.g., Compass Bank v. Vey Finance, L.L.C., et al.*, No. EP–10–cv–137–PRM, 2011 U.S. Dist. LEXIS 98064, at *6, 2011 WL 3666614 (W.D. Tex. Jun. 1, 2011) (holding that this exception did not apply to non-debtor principals of the debtor who asserted that the claims against the principals "will impact the [debtor's] core bankruptcy proceedings" and cause the individual principals "to file a Chapter 11 proceeding to stay the litigation").

11. Further, the Fifth Circuit has specifically rejected arguments that § 362 should be expanded to protect non-debtor guarantors like Pokorne. In *GATX*, as in this case, the non-bankrupt co-defendants were guarantors of the debtor's obligation to the plaintiff, GATX. *GATX*, 768 F.2d at 713. When the bankrupt parties defaulted, GATX sued both the non-bankrupt guarantors and the bankrupt parties. *Id.* at 714. The Fifth Circuit held that "[t]o prevent or delay GATX from enforcing its rights in a situation foreseen by it and contractually provided for with each guarantor would be, under these circumstances, legally inequitable." *Id.* at 717. The Fifth Circuit's holding in *GATX* is equally applicable to the instant facts. Courts from other circuits have also recognized that § 362 should not apply to non-bankrupt guarantors who contractually agree to take on the obligations of a defaulting debtor.

12. "It is universally acknowledged that an automatic stay of proceedings accorded by § 362 may not be invoked by entities such as sureties, guarantors, co-

obligors, or others with a similar legal or factual nexus to the…debtor." *Lynch v. Johns-Manville Sales Corp.*, 710 F.2d 1194, 1196 (6th Cir. 1983). To extend the stay in this case would improperly bar Plains from asserting "the protection…sought and received when [it] required a third party to guaranty the debt." *Credit Alliance Corp. v. Williams*, 851 F.2d 119, 121 (4th Cir. 1988); *see also, McCartney v. Integra Nat. Bank North*, 106 F.3d 506, 509-510 (3d Cir. 1997).

13. The Guaranty Agreement at issue in the Lawsuit constitutes an unconditional guaranty of payment and primary obligation of Pokorne. "Nothing in § 362 suggests that Congress intended for that provision to strip from the creditors of a bankrupt debtor the protection they sought and received when they required a third party to guaranty the debt." *Credit Alliance Corp*., 851 F.2d at 121. "The very purpose of a guaranty is to assure the creditor that in the event the debtor defaults, the creditor will have someone to look to for reimbursement." *Id*. at 122. This purpose "would be frustrated by interpreting § 362 so as to stay [the creditor's] action against the non-bankrupt guarantor when the defaulting debtor petitioned for bankruptcy." *Id*. Accordingly, an extension of the automatic stay in this case to protect Pokorne, the non-bankrupt guarantor, would subvert the purpose of the bargained-for Guaranty Agreement.

WHEREFORE, PlainsCapital Bank asks the Court to deny Debtor's Emergency Motion to Extend the Automatic Stay so that PlainsCapital Bank may proceed with its Lawsuit against Pokorne.

Respectfully submitted,

DUBOIS, BRYANT & CAMPBELL, LLP

By: */s/ Seth E. Meisel*
Seth E. Meisel
State Bar No. 24037089
303 Colorado Street, Suite 2300
Austin, Texas 78701
(512) 457-8000
(512) 457-8008 (Fax)
smeisel@dbcllp.com

ATTORNEYS FOR PLAINSCAPITAL BANK

CERTIFICATE OF SERVICE

The undersigned certifies that on the 9th day of June, 2015, a true and correct copy of the foregoing document was served via the Court's CM/ECF notification system or by electronic mail and/or by regular first class mail, postage prepaid on the parties listed below.

DEBTOR'S COUNSEL
Stephen W. Lemmon
Rhonda Mates
Husch Blackwell, LLP
111 Congress Ave., Ste. 1400
Austin, TX 78701
Rhonda.mates@huschblackwell.com

FIRST STATE BANK CENTRAL TEXAS
Blake Rasner
Haley & Olson, PC
510 N. Valley Mills Dr., Ste. 600
Waco, TX 76710
brasner@haleyolson.com

ATTORNEY FOR DEFENDANT LESTER N. POKORNE, INDIVIDUALLY AND AS TRUSTEE OF THE LESTER N. POKORNE REVOCABLE LIVING TRUST DATED APRIL 30, 1999
C. Randall Carr
Attorney at Law
1609 Shoal Creek Boulevard
Suite 301
Austin, Texas 78701
randy@carrlawyer.com

/s/ Seth E. Meisel