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

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

DEBTOR REGENT PARK CAPITAL, LLC'S
EMERGENCY MOTION TO EXTEND THE AUTOMATIC STAY

TO THE HONORABLE TONY M. DAVIS,
UNITED STATES BANKRUPTCY JUDGE:

Regent Park Capital, LLC, Debtor-in-Possession ("Regent Park") files this Motion to Extend the Automatic Stay ("Motion"). In support of its Motion, the Debtor states the following:

I.
Introduction

1. Regent Park requests that this Court equitably and temporarily extend the automatic stay to protect its sole equity holder and source of post-petition financing from continued prosecution of a state-court lawsuit premised upon a guaranty of the Debtor's obligation. More specifically, Regent Park seeks to enjoin any further actions in a lawsuit initiated by PlainsCapital Bank ("PlainsCapital") against the Debtor and Lester N. Pokorne, both in his individual capacity and as trustee of the Lester N. Pokorne Revocable Living Trust dated April 30, 1999 (collectively, "Pokorne") until confirmation of its chapter 11 plan. PlainsCapital's continued prosecution and collection efforts in the state court proceeding would (i) divert Pokorne's time, efforts and financial resources away from the Debtor, and (ii) potentially work an end-around of this bankruptcy proceeding by allowing PlainsCapital to seek a charging order against Pokorne's ownership interest in the Debtor. In sum, PlainsCapital's continued prosecution of the lawsuit would substantially frustrate Regent Park's ability to reorganize.

II.
Jurisdiction and Venue

2. This Court has jurisdiction over this matter under 28 U.S.C. § 1334. Venue is proper in this district under 28 U.S.C. § 1409(a). This is a core proceeding under 28 U.S.C. § 157(b)(2)(A).

III.
Background

3. Regent Park, previously known as Pokorne Private Capital Group, LLC, is a Texas limited liability company formed March 16, 1999. Pokorne is the sole managing member and sole equity holder of Regent Park. Pokorne has a long history of real estate development and financing centered around the Austin, Texas market.

4. Regent Park is what is sometimes referred to as a "hard-money lender." That is, it made loans (the "RPC Loans") to borrowers (the "RPC Borrowers") on a short-term basis for the acquisition and/or development of real property in Texas – mainly Austin, but also the Houston and Dallas areas (the "Collateral Real Property"). The RPC Borrowers would execute a Promissory Note secured by a Deed of Trust on the Collateral Real Property.

5. To fund the RPC Loans, Regent Park borrowed money from PlainsCapital and First State Bank Central Texas ("First State") (collectively the "Banks") under revolving lines of credit (the "Bank Notes"). Pokorne guaranteed the Bank Notes. The Banks advanced on the Bank Notes on a deal-by-deal basis. In other words, Regent Park would present specific RPC Loans to the Banks, and, if approved, the Banks would advance all or a portion of the amount of the RPC Loan to Regent Park. Typically, the Banks funded only a portion of the RPC Loan amount, and Regent Park funded the balance of the RPC Loan to the RPC Borrowers. In turn, Regent Park pledged the notes and deeds of trust securing the RPC Loans to the Banks as collateral for the Bank Notes (the "Pledged Collateral"). As each RPC Loan was paid off, Regent Park would repay the Bank the full amount of principal (plus interest) advanced by the Bank for that particular RPC Loan. With the Banks' knowledge and consent,

Regent Park retained the principal and interest due on the portion of the RPC Loan advanced by Regent Park to fund its operations.

6. As of the Petition Date (as later defined), there were 27 outstanding RPC Loans pledged to the Banks. Most of those RPC Loans were in default, and all but two have matured and are past due. Despite the high rate of default on the RPC Loans , the Banks restricted Regent Park's ability to foreclose or otherwise enforce its remedies against the RPC Borrowers. This inaction by the Banks prevented Regent Park from gaining control of the Collateral Real Property securing the RPC Loans at an early date in order to resell the property and pay down the Bank Notes. In fact, PlainsCapital continues to refuse to allow Regent Park to foreclose on any RPC Loans.[1]

7. The PlainsCapital Bank Note matured in accordance with its terms on July 15, 2014. On August 15, 2014, PlainsCapital made formal demand for payment of the entire outstanding balance and amounts due and subsequently posted the Pledged Collateral for foreclosure on November 24, 2014. In addition, on September 16, 2014, PlainsCapital filed its Original Petition against Pokorne and Regent Park to initiate Case No. D-1-GN-14-003687, in the 419th Judicial District Court of Travis County, Texas (the "Lawsuit").

8. On November 21, 2014 (the "Petition Date"), Regent Park filed a voluntary petition for bankruptcy under Chapter 11 of the Bankruptcy Code. As of the Petition Date, Regent Park owed PlainsCapital and First State the sums of $6,194,630.88 and $2,050,371.89, respectively. The automatic stay enjoined any further actions against Regent Park in the Lawsuit as of that date.[2]

9. Pursuant to an Order dated January 15, 2015, this Court approved Pokorne to provide debtor-in-possession financing in the amount of $18,000 per month through July 2015. Pokorne has

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[1] First State agreed to let Regent Park post two Collateral Real Properties for foreclosure on June 2, 2015, but then requested that Regent Park postpone foreclosures pending resolution of several logistical issues.

[2] On September 10, 2014, First State also filed suit against Regent Park and Lester N. Pokorne, individually, in the 169th Judicial District Court of Bell County, Texas. However, First State has not affirmatively pursued its claims against Pokorne.

consistently funded the approved amount, and these funds have allowed Regent Park to continue its efforts to administer the Pledged Collateral in a manner that benefits both Banks.

10. Both prior to and since the Petition Date, Regent Park has made repeated attempts to reach a consensual resolution of this proceeding with the Banks. At times, those negotiations have appeared to be moving forward, only to later come to a standstill. Since the Petition Date, several RPC Borrowers have paid off their RPC Loans. Regent Park presently has $2,127,801.62 in its debtor-in-possession cash collateral account, and a substantial portion of this amount will be distributed to the Banks pending a future order of this Court. Absent Pokorne's DIP financing and hands-on management of Regent Park, Regent Park would have never realized these funds for the benefit of the Banks.

11. On May 18, 2015, PlainsCapital filed its motion for summary judgment against Pokorne in the Lawsuit. On May 29, 2015 at noon, PlainsCapital informed counsel for Regent Park and Pokorne that it intended to set its motion for a hearing during the week of June 22, and gave opposing counsel until 4:30 p.m. that day to provide conflicting dates. That afternoon, PlainsCapital set the motion for summary judgment for a hearing on June 22, 2015.

12. Pokorne is a resident of Florida, where he is presently undergoing radiation treatments subsequent to a procedure to remove a cancerous growth from his neck. While Pokorne continues to actively manage Regent Park through its reorganization efforts, his ability to travel has been temporarily restricted due to the nature and timing of his medical treatments. PlainsCapital is aware of the existence and timing of these treatments, but has nonetheless chosen to move forward on the Lawsuit. Based upon various discussions between counsel for PlainsCapital and Pokorne, PlainsCapital appears to be using the timing of the summary judgment hearing in order to pressure Pokorne to consent to the appointment of a chapter 11 trustee in this proceeding.

IV.
Relief Requested

13. Pursuant to Bankruptcy Code §§ 105(a) and 362, Regent Park seeks to extend the automatic stay to enjoin continued prosecution of the Lawsuit filed by PlainsCapital against Pokorne. If the automatic stay is not extended to stay the Plains Lawsuit, the Debtor and its estate will be irreparably damaged, and the purposes of the Bankruptcy Code will be frustrated because the continued prosecution of the Lawsuit will require Pokorne, the sole managing member of Regent Park, as well as other key members of Regent Park's management team, to expend substantial time and resources in participating in the litigation to the detriment of Regent Park's reorganization efforts.

A. The Automatic Stay and Powers of the Court Pursuant to Bankruptcy Code §§ 105(a) and 362

14. A primary vehicle for enforcement of the bankruptcy court's jurisdiction is the automatic stay under Bankruptcy Code § 362. In particular, Bankruptcy Code 362(a)(1) provides in relevant part as follows:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities, of
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> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title.

15. The legislative history of Bankruptcy Code § 362 indicates that Congress intended that the scope of the automatic stay be sweeping in order to effectuate its protective purposes on behalf of both debtors and creditors:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

> H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 49 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5840-41, 5963.

16. Although the automatic stay imposed by Bankruptcy Code § 362(a) applies only to actions against a debtor, Bankruptcy Code § 105(a) confers broad equitable powers on bankruptcy courts to achieve the protections and promote the purposes of title 11. Specifically, Bankruptcy Code § 105(a) provides bankruptcy courts with broad authority to enjoin or stay actions that are subject to the automatic stay, as well as actions that may not directly be subject to the automatic stay:

> The court has ample . . . powers to stay actions not covered by the automatic stay. Section 105 . . . grants the power to issue orders necessary or appropriate to carry out the provisions of title 11. The district court and the bankruptcy court as its adjunct have all the traditional injunctive powers of a court of equity.
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> H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 49 (1978).

17. Numerous courts, including Texas courts, have affirmed the appropriateness of using the broad discretionary powers under Bankruptcy Code § 105(a) to extend the automatic stay and enjoin proceedings or actions against non-debtors. S*ee, e.g., In re Philadelphia Newspapers, LLC*, 407 B.R. 606 (Bankr. E.D. Pa. 2009); *SAS Overseas Consultants v. Benoit*, Civ. No. 99-1663, 2000 WL 140611 (E.D. La. Feb. 7, 2000); *Robert Plan Corp. v. Liberty Mut. Ins. Co.*, 2010 WL 1193151 (E.D.N.Y. Mar. 23, 2010); *Gulfmark Offshore, Inc. v. Bender Shipbuilding & Repair Co.*, 2009 WL 2413664 (S.D. Ala. Aug. 3, 2009). *See also* H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 49 (1978) ("the effect of an exception to the automatic stay under section 362(b) is not to make the action immune from injunction, and the court has power, under section 105, to stay actions not covered by the automatic stay").

18. The Fifth Circuit has stated that "beyond the automatic stay provisions of section 362(a)(1) and (3), the bankruptcy court may affirmatively stay proceedings pursuant to its broad discretionary powers embodied in 11 U.S.C. § 105 . . . . Section 105 does empower the bankruptcy

court to stay proceedings against nonbankrupt entities." *S.I. Acquisition, Inc. v. Eastway Delivery Service, Inc. (In re S.I. Acquisition, Inc.)*, 817 F.2d 1142, n.3 (5th Cir. 1987). The power to restrain creditors of a debtor from proceeding with litigation against third party non-debtors stems from the idea that such actions contravene the policies inherent in the Bankruptcy Code and adversely impact the debtor. *See A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1003 (4th Cir. 1986); *In re Johns-Manville Corp.*, 33 B.R. 254, 263 (Bankr. S.D.N.Y. 1983) ("[a] Court . . . may extend the automatic stay under Section 362 of the Bankruptcy Code to stay and enjoin proceedings or actions by or against non-debtors where such actions would interfere with, deplete or adversely affect property of the [debtor's estate] or which would frustrate the statutory scheme embodied in Chapter 11 or diminish [the debtor's] ability to formulate a plan of reorganization"); *Eastern Air Lines, Inc. v. Rolleston (In re Ionosphere Clubs, Inc.)*, 111 B.R. 423, 435 (Bankr. S.D. N.Y. 1990), aff'd in relevant part, 124 B.R. 635 (S.D.N.Y. 1991) ("The paramount policy and goal of Chapter 11, to which all other bankruptcy policies are subordinated, is the rehabilitation of the debtor. This policy was clearly articulated by the United States Supreme Court in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, [79 L. Ed. 2d 482, 104 S. Ct. 1188] (1984) which stated 'the fundamental purpose of reorganization is to prevent the debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources.'").

B. Extension of Automatic Stay—Existence of Unusual Circumstances

19. The automatic stay may be extended to cover non-debtors where certain unusual circumstances exist. *Zale Corp. v. Feld (In re Zale)*, 62 F.3d 746, 761 (5th Cir. 1995); *American Imaging Services, Inc. v. Eagle-Picher Indus., Inc. (In re Eagle-Picher Indus., Inc.)*, 963 F.3d 855 860-61 (6th Cir. 1992). These circumstances include (1) when the non-debtor and the debtor enjoy such an identity of interests that the suit against the non-debtor is essentially a suit against the debtor and (2) when the third-party action will have an adverse impact on the debtor's ability to accomplish reorganization. *Zale*, 62 F.3d at 761; *A.H. Robins*, 788 F.2d at 999.

20. Cause exists to extend the automatic stay to non-debtor third parties "where the pending litigation, though not brought against the debtor, would cause the debtor, the bankruptcy estate, or the reorganization plan 'irreparable harm.'" *Fernstrom Storage & Van Co. of Va. v. Fernstrom Storage & Van Co. (In re Fernstrom Storage & Van Co.)*, 938 F.2d 731, 736 (7th Cir. 1991) (quoting *Lomas Fin. Corp. v. N. Trust Co. (In re Lomas Fin. Corp.)*, 117 B.R. 64, 67 (S.D.N.Y. 1990)). Courts have found unusual circumstances and/or irreparable harm warranting a stay under Bankruptcy Code § 105(a) "when actions brought against nondebtor officers and principals would distract them from the debtor's daily business affairs and divert resources from the debtor's reorganization efforts." *SAS Overseas*, 2000 WL 140611 *4 (citing *In re Lazarus Burman Assocs., L.B.*, 161 B.R. 891, 901 (Bankr. E.D.N.Y. 1993); *In re MacDonald/Associates, Inc.*, 54 B.R. 865, 870 (Bankr. D.R.I. 1985); *In re Johns-Manville Corp.*, 26 BR. 420 (Bankr. S.D.N.Y. 1983), aff'd, 40 B.R. 219 (S.D.N.Y.), vacated in part by 41 B.R. 926 (S.D.N.Y. 1984)). *See also Philadelphia Newspapers*, 407 B.R. at 616 (The court found that unusual circumstances existed because "the diversion of resources caused by the state action against the Non-Debtors will impact the Debtors' ability to engage in timely and effective reorganization."); *Ionosphere*, 111 B.R. at 435, ("[t]he massive drain on [key officers'] time and energy at [a] crucial hour of plan formulation in either defending themselves or in responding to discovery requests could frustrate if not doom [the debtors'] vital efforts at formulating a fair and equitable plan of reorganization.")

21. Here, a clear irreparable harm exists which, if allowed to happen, would severely damage if not destroy the Regent Park's ability to successfully reorganize. *See, e.g., In re Steven P. Nelson, D.C., P.A.*, 140 B.R. 814, 815-817 (Bankr. M.D. Fla. 1992) (enjoining collection action against sole owner-manager-guarantor); *see also In re Hillsborough Holdings Corp.*, 123 B.R. 1004, 1016 (Bankr. M.D. Fla. 1990) (enjoining litigation action against Debtors' corporate executives). First and

foremost, if PlainsCapital continues to prosecute its lawsuit against Pokorne and obtains a judgment or takes other collection action against him, PlainsCapital will likely force Pokorne to file his own individual bankruptcy proceeding. If that occurs, it would diminish Pokorne's capacity to continue managing Regent Park's reorganization efforts, thereby causing this proceeding to be in considerable jeopardy.

22. Next, permitting collection actions against Pokorne promises to embroil him in time-consuming and intensive efforts to defend against those actions. As the sole managing member of Regent Park, Pokorne needs to focus his time and energy on formulating Regent Park's plan of reorganization and exit from bankruptcy. *In re Steven P. Nelson*, 140 B.R. at 817. Moreover, Pokorne is the sole source of DIP financing for Regent Park and these unencumbered funds are essential to the reorganization. Requiring Pokorne to respond to collection actions at this critical stage of the bankruptcy would so distract him from the chapter 11 process that Regent Park and its creditors would suffer both immediate and irreparable harm. On its own, the protection of these interests have been sufficient to extend the stay to non-debtor third parties. *Lomas*, 117 B.R. at 66-67.

23. Finally, the entry of a monetary judgment against Pokorne in the Lawsuit could effectuate an end-run around the protections afforded to Regent Park in this chapter 11 proceeding. Pokorne's most substantial unencumbered asset is his ownership interest in Regent Park. Allowing PlainsCapital to levy against or otherwise take control of that interest through collection efforts could give the bank effective control over this bankruptcy case.

C. Applicable Standard for Injunctive Relief

24. To the extent Regent Park is required to meet the standard for an injunction in order to obtain the relief requested herein, it must show: (1) a substantial likelihood that the movant will prevail on the merits; (2) a substantial threat that the movant will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury to the movant outweighs the threatened harm an injunction

may cause to the party opposing the injunction; and (4) that the granting of the injunction will not disserve the public interest. *Nichols v. Alcatel USA, Inc.*, 532 F.3d 364, 372 (5th Cir. 2008); *see also SAS Overseas*, 2000 WL 140611, *4.

25. Regent Park intends to confirm a chapter 11 plan of reorganization. While the Debtor-in-Possession has made significant strides in its reorganization efforts, Regent Park will suffer irreparable injury if the requested relief is not granted. By diverting significant resources away from its estate, Regent Park's ability to reorganize would be hampered. Moreover, PlainsCapital will not suffer any prejudice if the Court grants the relief requested. It is free to take any other action necessary to protect its interests provided that such actions are taken in the appropriate forum – that is, in Regent Park's chapter 11 case before this Court, consistent with the provisions and policies of the Bankruptcy Code. Additionally, granting the relief requested will serve the public interest and policy of reorganization and rehabilitation codified in the Bankruptcy Code. Furthermore, the very policies underlying the automatic stay will be frustrated if the relief requested herein is not granted.

WHEREFORE, Regent Park respectfully requests that this Court enter an order extending the automatic stay to Lester N. Pokorne, individually and as trustee of the Lester N. Pokorne Revocable Living Trust dated April 30, 1999, enjoining PlainsCapital from prosecuting the Lawsuit, and granting Regent park such other and further relief as it is justly entitled.

Respectfully submitted,

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ATTORNEYS FOR REGENT PARK CAPITAL, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of June, 2015, a true and correct copy of this pleading was served, via the Court's CM/ECF notification system to the parties registered to receive such notice and on the 4th day of June, 2015, via first class mail to the parties on the list who did not receive ECF service.

/s/ Stephen W. Lemmon
Stephen W. Lemmon