

Hearing Date and Time: _____
Objection Deadline: _____

DAVIS, SAPERSTEIN & SALOMON, P.C.
110 East 55th Street, 12th Floor
New York, New York, 10022
(201) 907-5000

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK**

_____	:	
In re	:	
	:	
THE NEW RESINA CORPORATION	:	Chapter 11
	:	Case No.: 02-13826 jf
	:	
_____	:	

MOTION FOR RELIEF FROM AUTOMATIC STAY

Efrain Vargas (“Vargas”), by counsel, Davis, Saperstein & Salomon, P.C., hereby move before the court for an Order Terminating, Annulling, Modifying or Conditioning the Automatic Stay of 11 U.S.C. §362(d) for the purpose of permitting the Law Division of Ocean County Superior Court, New Jersey, to proceed to adjudicate the prepetition personal injury action filed by Vargas against Resina Automatic Machinery Co., Inc., The New Resina Corporation, and Resina Screw Cappers under Docket No.: OCN-L-510-01 (the “Pending State Court Action”) and as grounds, respectfully state as follows:

Jurisdiction

1. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.
2. This motion is brought pursuant to 11 U.S.C. § 362(d) and Federal Rules of Bankruptcy Procedure 4001 and 9014.

Facts

3. Efrain Vargas resides at 5 Hull Court, Barnegat, Ocean County, New Jersey.
4. On March 16, 1999, the plaintiff was an employee of West (Paco) Pharmaceutical Services and a machine operator for the employer’s capping machine, identified as a “Resina Screw Capper,” which applies caps to the tops of bottles filled with liquid. On

the date of the accident, the plaintiff was attempting to clean a spill of a bottle from the belt assembly. He opened the lower doors, made of steel, on the machine and attempted to clean the spill with paper towels. There were no interlocks in place on the lower doors to de-energize the machine and the stop button was out of reach by the plaintiff. The plaintiff's right hand became caught in the machine, thereby proximately causing multiple partial traumatic amputations of the right, dominant hand with multiple open fractures of the right index, middle ring and small fingers.

5. As a direct and proximate result of the injuries suffered by Vargas, an action was commenced in the Ocean County Superior Court of the State of New Jersey for personal injury damages, pre-petition on February 13, 2001 against the defendants, Resina Automatic Machinery Co., Inc., The New Resina Corporation, Resina Screw Capers, ABC Entity 1-5 (fictitious), XYZ Entity 1-5 (fictitious) and John Doe 1-5 (fictitious). Jurisdiction and venue exist and are appropriate in that Court. The parties are engaged in discovery in the Pending State Court Action.

6. The Debtor filed its voluntary petition for relief in this Court under Chapter 11 of Title 11 of the United States Code on March 26, 2002.

7. Vargas is informed and believes, and upon such information and belief, that the entire exposure of Debtor in the Pending State Court Action is covered by insurance issued through Atlantic Mutual Insurance Company to the New Resina Corporation, effective 2/22/99 through 2/22/00, with policy limits of \$1,000,000.00 per occurrence, policy number 480304692. Additionally, Vargas is informed and believes, and upon such information and belief, alleges, that costs attributable to the defense of the Debtor in the Pending State Court Action are being, and have been, defrayed by the Debtor's insurance carriers.

Argument

8. Under section 362(d)(1) of the Bankruptcy Code, the Court may modify the stay for "cause." 11 U.S.C. §362(d)(1).

9. The Second Circuit has enumerated the following factors to be considered in determining if "cause" exists to modify the stay:

- (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 necessary expertise has been established to hear the cause of action;
- (5) whether the debtor's 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 interest 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 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 other proceeding; and (12) impact of the stay on the parties and balance of harms.

Sonnax Industries, Inc. v. Tri Component Products Corp. (In Re Sonnax Industries, Inc.), 907 F.2d 1280, 1285 (2d Cir. 1990). "Not all of the factors will be relevant in every case." *Mazzeo v. Lenhart (In re Mazzeo)*, 167 F.3d 139, 142-143 (2d Cir. 1999). Additionally, each element does not need to be accorded equal weight. *In re Keene Corp.*, 171 B.R. 180, 183 (Bankr. S.D.N.Y. 1994). See also, *In re New York Medical Group, P.C.*, 265 B.R. 408, 413 (Bankr. S.D.N.Y. 2001).

10. In this case, the majority of the elements weigh in favor of lifting the stay:

Element 1. Relief would result in a complete resolution of the issues in that Vargas' claim against the Debtor would be liquidated.

Element 2. Since this is a case for damages arising from personal injury under New Jersey law, it lacks any connection with and will not interfere with the bankruptcy case.

Element 5. The Vargas' have been informed in the Pending State Court Action that the Debtor's insurer has assumed responsibility for defending the action.¹ By virtue of the insurance coverage, a modification or termination of the automatic stay to permit the Pending State Court Action to proceed to judgment and collection against the insurer would have not impact on the bankruptcy estate. The insurance proceeds necessary to pay the claim are not the property of the estate and the Debtor does not have any equity in such insurance proceeds. See, *In re New York Medical Group*, 265 B.R. 408, 415 ("collecting a judgment from available insurers will not prejudice the estate"); *Elliot v. Hardison*, 25 B.R. 305, 308 (E.D. Va. 1982) (affirming bankruptcy court order which allowed enforcement of any judgment to the extent of insurance coverage, is which debtor admitted he had not equity and no property interest). Accordingly, Vargas

¹ Even if the Debtor's insurance were not covering the defense costs of the Pending State Court Action, the Debtor would have to defend the action (either in this court or in the Court in New Jersey) to determine the claim amount because, as discussed below, Vargas' claim amount cannot be estimated. Accordingly, litigation expenses have been held insufficient reason to deny a motion fore relief from the stay. *In re Keen Corp.*, 171 B.R. 180, 185 (litigation costs do not constitute prejudice requiring denial of motion for relief from the stay); *In re Anton*, 145 B.R. 767, 770 (Bankr. E.D.N.Y. 1992) (cost of defending litigation does not preclude relief from the stay); *In re Rabin*, 53 B.R. 529, 532 (Bankr. D.N.J. 1985) ("[i]t is clear that movants' claim will have to be liquidated either in state court or the bankruptcy court. In either instance, the debtor will have to defend that action").

also requests that the stay be lifted to collect any judgment against the Debtor's insurance carrier (or their successors).

Element 6. The action involves third parties, namely two other defendants. As the injury took place in New Jersey, there are also non-party witnesses as well as other evidence in New Jersey.

Element 7. The Pending State Court Action will not prejudice the interests of other creditors.

Element 8. Any judgment arising from the Pending State Court Action will not be subject to equitable subordination.

Element 9. Any judgment arising from the Pending State Court Action will not result in a judicial lien avoidable by the Debtor.

Element 10. The interests of judicial economy and expeditious and economical resolution of the litigation lie in allowing the action to proceed in New Jersey in rather than forcing Vargas to proceed in two separate actions, one against the other defendants in New Jersey and one against the Debtor in New York. *See, e.g. In re Anton*, 145 B.R. 767, 770 (“[j]f the stay is not lifted, Movants will have to try the same facts twice, once against the other defendants in the District Court and a second time against the Debtor in the Bankruptcy Court. Multiplicity of suits involving unnecessary time and expense on the part of Movants should be avoided”).

Element 12. The balance of harms is greater to Vargas who has no adequate remedy or protection to redress his injuries except to proceed in the pending tort action against those alleged to be liable for such injuries. *See, Jessie v. Honosky (In re Honosky)*, 6 B.R. 667 (Bankr. S.D. W.V. 1980) (“were this Court no to lift the stay to permit the plaintiff to proceed against the Debtor, she would be effectively precluded from any recovery for her alleged injuries”).

11. Moreover, pursuant to *Section 157(b)(2)(O)* of Title 28, personal injury tort claims are specifically excluded from the list of core proceedings in which bankruptcy courts can enter final judgments and orders. Indeed, bankruptcy courts cannot liquidate or estimate contingent or unliquidated damages in personal injury torts or wrongful death claims. *In re C & G Excavating, Inc.*, 217 B.R. 64 (Bankr. E.D. Pa. 1998). Vargas has

demanded a jury trial in the Pending State Court Action and does not consent to a jury trial in this Court.

Conclusion

12. Pursuant to the Local Rules for the Eastern District of New York, because there are no novel issues of law presented herein, Vargas respectfully requests that the Court waive the requirement that Vargas file a memorandum in support of this Motion.

13. No previous Motion for relief sought in this Motion has been made to this or any other Court.

WHEREFORE, Vargas respectfully requests that the Court enter an Order:

1. Terminating or modifying the automatic stay pursuant to 11 U.S.C. §362 to permit the Ocean County Superior Court of the State of New Jersey:
 - a. to adjudicate to a final conclusion the personal injury action before it in Docket No.: OCN-L-510-01;
 - b. to determine liability, if any, of Debtor, for any injuries suffered by Vargas;
 - c. to liquidate the amount, if any, determined to be owed by Debtor (or its insurers) to compensate fairly Vargas for such injuries as have been suffered by them and obtain a judgment for that amount;
2. Permitting execution on any judgment awarded in the Pending State Court Action against Debtor's insurers or their successors; and
3. Granting such other and further relief as may be just and proper.

Respectfully submitted,

DAVIS, SAPERSTEIN & SALOMON, P.C.
Counsel for the plaintiff, Efrain Vargas

By: Marc C. Saperstein
For the Firm

November _____, 2002

Hearing Date and Time: _____
Objection Deadline: _____

DAVIS, SAPERSTEIN & SALOMON, P.C.
110 East 55th Street, 12th Floor
New York, New York, 10022
(201) 907-5000

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK**

In re :
:
:
THE NEW RESINA CORPORATION : **Chapter 11**
: **Case No.: 02-13826 jf**
:
:

**NOTICE OF HEARING ON MOTION OF EFRAIN VARGAS FOR AN ORDER
GRANTING RELIEF FROM THE AUTOMATIC STAY PURSUANT TO
SECTION 362(D) OF THE BANKRUPTCY CODE**

PLEASE TAKE NOTICE that a Motion, dated _____, 2002 (“Motion”), of Efrain Vargas, for an Order, pursuant to Section 362(d) of the Bankruptcy Code and Federal Rule of Bankruptcy Procedure 6004, granting relief from the automatic stay to allow Vargas to continue his pre-petition personal injury action to determine the liability, if any, of The New Resina Corporation (the “Debtor”) for injuries suffered by Vargas, liquidate any amount determined to be owed by the Debtor to Vargas, obtain a judgment for any such amount and permit execution on any such judgment against Debtor’s insurance carriers or their successors, shall be considered at a hearing to be held before The Honorable _____, United States Bankruptcy Judge, in Room _____, of the United States Bankruptcy Court for the Eastern District of New

York, 75 Clinton Street, Brooklyn, New York (the "Bankruptcy Court"), on _____, _____, 2002 at 10:00 a.m. (New York City Time), or as soon thereafter as counsel may be heard;

PLEASE TAKE FURTHER NOTICE that responses or objections, if any, to the relief requested in the Motion, must be in writing, conform to the Federal Rules of Bankruptcy Procedure and the Local Rules of the Bankruptcy Court, and be filed with the Bankruptcy Court electronically in accordance with General Order M-242 (General Order M-242 and the User's Manual for the Electronic Case Filing System can be found at www.nyeb.uscourts.gov, the official website for the Bankruptcy Court), by registered users of the Bankruptcy Court's case filing system, and by all other parties in interest, on a 3.5 inch disk, preferably in Portable Document Format ("PDF"), WordPerfect or any other Windows-based word processing format (with a hard copy delivered directly to Chambers) and shall be served in accordance with General Order M-242 and upon the Debtor through their general counsel, Joseph L. Fox, 112 Madison Avenue, New York, New York 10016; and any person, or counsel if retained, appointed pursuant to 28 U.S.C. § 1104, so as to be actually received by not later than 5:00 p.m. (New York City Time), on _____, _____, 2002.

DAVIS, SAPERSTEIN & SALOMON, P.C.
Counsel for the plaintiff, Efrain Vargas

By: Marc C. Saperstein
For the Firm

November _____, 2002

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**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK**

In re	:	
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THE NEW RESINA CORPORATION	:	Chapter 11
	:	Case No.: 02-13826 jf
	:	
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**ORDER GRANTING RELIEF FORM THE AUTOMATIC STAY PURSUANT TO
SECTION 362(D) OF THE BANKRUPTCY CODE**

Upon consideration of the Motion for Relief from the Automatic Stay, dated _____, _____, 2002 (“Motion”), of Efrain Vargas (“Vargas”), for an Order, pursuant to section 362(d) of the Bankruptcy Code and Federal Rule of Bankruptcy Procedure 6004, granting relief from the automatic stay to allow Vargas to continue his pre-petition personal injury action to determine the liability if any, of The New Resina Corporation (the “Debtor”) for injuries suffered by Vargas, liquidate any amount determined to be owed by the Debtor to Vargas, obtain a judgment for any such amount and permit execution on any such judgment against the Debtor’s insurance carriers or their successors; and it further appearing that the Court has jurisdiction to consider the Motion; and it appearing that due notice of the Motion has been given and no further notice need be given; and upon the proceedings before the Court and good and sufficient cause appearing, it is hereby;

ORDERED that the Motion is granted and the automatic stay is lifted to permit the action pending in the Ocean County Superior Court, New Jersey, Docket No.: OCN-510-01, to continue to determine the liability, if any, of the Debtor for the injuries alleged by Vargas, to liquidate the amount, if any, determined to be owed by the Debtor to Vargas and to obtain a judgment for any such amount;

IT IS FURTHER ORDERED that the automatic stay is lifted to permit Vargas to execute on any such judgment against the Debtor's insurers or their successors.

Dated: New York, New York

December _____, 2002

The Honorable _____
United States Bankruptcy Judge