The Honorable Christopher M. Alston
Chapter 11
Hearing Location: U.S. Courthouse,
Courtroom 7206, 700 Stewart Street,
Seattle, Washington 98101-1271
Hearing Date: November 18, 2016
Hearing Time: 9:30 a.m.
Response Due: November 10, 2016

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In re NORTHWEST TERRITORIAL MINT, LLC, Debtor.	NO. 16-11767-CMA Chapter 11 BRADLEY STEPHEN COHEN AND COHEN ASSET MANAGEMENT, INC.'S MOTION FOR AN ORDER OF NON-APPLICABILITY OF THE AUTOMATIC STAY OR, IN THE ALTERNATIVE, RELIEF FROM THE AUTOMATIC STAY

I. INTRODUCTION

Creditors Bradley Stephen Cohen and Cohen Asset Management, Inc. (collectively, "the Cohen Creditors"), by and through undersigned counsel, move the Court pursuant to 11 U.S.C. § 362(d), Rules 4001-1(a) and 4001-1(c) of the Local Rules of Bankruptcy Procedure for the Western District of Washington, and Rule 4001(a) of the Federal Rules of Bankruptcy Procedure for an order of non-applicability of the automatic stay, or, in the alternative, relief from the automatic stay to file suit, prosecute, enforce, and collect against Berkley National Insurance Company ("Berkley") under a series of Primary Commercial General Liability

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Policies ("Primary Policies") and Umbrella Commercial General Liability Policies ("Umbrella Policies") (collectively, "the Policies") issued by Berkley to the debtor in the above-captioned bankruptcy case, Northwest Territorial Mint, LLC ("Debtor"), for the policy periods July 1, 2011 through September 1, 2013. The grounds for this Motion are set forth below.

II. JURISDICTION AND VENUE

The Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding in accordance with 28 U.S.C. § 157(b)(2). Venue is proper before the Court pursuant to 28 U.S.C. § 1409.

III. STATEMENT OF FACTS

A. The Cohen Creditors

On March 1, 2016, the United States District Court for the District of Nevada entered, in the case of *Bradley Stephen Cohen, et al. v. Northwest Territorial Mint, LLC, Ross B. Hansen, et al.*, Case No. 2:12-cv-01401-JCM-PAL ("Cohen Litigation"), a "Judgment on Jury Verdict" (the "Judgment") in favor of the Cohen Creditors and against (i) the Debtor in the sum of $12,500,000 and (ii) Ross B. Hansen, the Debtor's sole owner, manager and member, in the sum of $25,500,000.[1] The Judgment was based on the Cohen Creditors' defamation *per se* and false light/invasion of privacy claims.[2] The Judgment recites that the conduct of Debtor and Hansen on which the Judgment is based amounted to "fraud, oppression and malice."[3] The Cohen Creditors constitute, by far, the two largest creditors of Debtor's estate.[4]

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[1] Ex. C at pp. 1–3.
[2] *Id.* at 2–3.
[3] *Id.*
[4] Ex. D at pp. 2–3.

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B. The Insurance Policies

Berkley issued a series of Primary Policies to Debtor, a Named Insured.[5] The initial Primary Policy is numbered BPK 2000554-10 and was effective July 1, 2011 to July 1, 2012.[6] Debtor and Berkley subsequently renewed the policy for continuous coverage ending September 1, 2013.[7] Each of these Primary Policies includes Insurance Services Office, Inc. ("ISO") commercial general liability coverage form CG 00 01 12 07.[8]

During the same time period, Berkley also issued a series of Umbrella Policies to the Debtor, a Named Insured.[9] The initial Umbrella Policy is numbered policy number BPK 2000554-10 and was effective July 1, 2011 to July 1, 2012.[10] This policy was also renewed by Debtor and Berkley for continuous coverage ending September 1, 2013.[11] Each of these Umbrella Policies includes ISO commercial liability umbrella coverage form CU 00 01 12 07.[12]

The Primary Policies provide that Berkley "will pay those sums that the insured becomes legally obligated to pay as damages because of 'personal and advertising injury' to which this insurance applies,"[13] while the Umbrella Policies provide that Berkley "will pay on behalf of the insured the 'ultimate net loss' in excess of the 'retained limit' because of 'personal and advertising injury' to which this insurance applies."[14] Moreover, the Policies explicitly state that the Cohen Creditors "may sue [Berkley] to recover on an agreed settlement or on a final judgment against an insured."[15] Subject to terms and conditions, the Primary Policies'

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[5] Ex. A at pp. 1, 4, 8, 11.
[6] *Id.* at p. 1.
[7] *Id.* at pp. 1, 4, 8, 11.
[8] *Id.* at p. 13.
[9] Ex. B at pp. 1, 4, 8, 11.
[10] *Id.* at p. 1.
[11] *Id.* at pp. 1, 4, 8, 11.
[12] *Id.* at p. 13.
[13] Ex. A at p. 13.
[14] Ex. B at p. 13.
[15] Ex. A at p. 23; Ex. B at p. 24.

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limit is $1,000,000 for each "occurrence," $1,000,000 for "personal and advertising injury" with a general aggregate limit of $2,000,000.[16] The Umbrella Policies' limit, subject to terms and conditions, is $5,000,000 for each "occurrence," $5,000,000 for "personal and advertising injury" with a general aggregate limit of $5,000,000.[17] The Policies define "personal and advertising injury" as "injury, including consequential 'bodily injury,' arising out of one or more of the following offenses: . . . [o]ral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services [and o]ral or written publication, in any manner, of material that violates a person's right to privacy."[18] The Policies define "bodily injury" as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time,"[19] and the Umbrella Policies include "mental anguish or other mental injury resulting from 'bodily injury'" within the definition of "bodily injury."[20]

C. Debtor's Bankruptcy Filing

On April 1, 2016, Debtor filed this voluntary bankruptcy petition under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Western District of Washington.[21]

IV. ARGUMENT

All bankruptcy courts deciding whether the proceeds of a liability insurance policy not payable directly to a debtor are "property of the estate" under 11 U.S.C. § 541 and thereby subject to the automatic stay contained in 11 U.S.C. § 362, have held that the proceeds are not

[16] Ex. A at pp. 1, 4, 8, 11.
[17] Ex. B at pp. 1, 4, 8, 11.
[18] Ex. A at p. 26; Ex. B at p. 27.
[19] Ex. A at p. 25; Ex. B at p. 26.
[20] Ex. B at p. 26.
[21] Ex. F at p. 1.

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"property of the estate."[22] Accordingly, first and foremost, the Cohen Creditors seek an order that the automatic stay does not apply to an independent action against Berkley to collect the proceeds of the Policies as set forth herein. In the event the Court believes that the stay applies to a claim against the proceeds of the Policies, the Cohen Creditors alternatively seek entry of an order granting relief from the stay for "cause" pursuant to 11 U.S.C. § 362(d) for the purpose of advancing, prosecuting, enforcing, and collecting on policy-based claims against Berkley in independent litigation.

A. The Policy Proceeds at Issue Here Are Not Property of Debtor's Estate Because the Policies Are Third-Party Claims-Made Policies

Where a court finds insurance proceeds to be property of the bankruptcy estate the automatic stay will apply to direct actions against insurers, *see* 11 U.S.C. § 362(a)(3), but where the proceeds of an insurance policy are not property of the estate, direct actions against the insurer will not be affected by the stay, *see* 11 U.S.C. § 362. Although it is well established in

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[22] *See, e.g.*, *In re Stevens*, 130 F.3d 1027, 1029 (11th Cir. 1997) ("[T]he fact that the insurance policy is property of the bankruptcy estate, however, does not necessarily mean that the proceeds from that policy are also property of the estate. In some circumstances, a creditor or beneficiary other than the debtor may be entitled to proceeds distributed pursuant to an insurance policy that is property of a bankruptcy estate."); *In re Cont'l Airlines*, 203 F.3d 203, 216–17 (3d Cir. 2000) (observing that the "proceeds from [an] insurance policy should be evaluated separately from the debtor's interest in the policy itself"); *In re Louisiana World Expositions, Inc.*, 832 F.2d 1391, 1401 (5th Cir. 1987) (holding that liability proceeds of an insurance policy were not part of a bankruptcy debtor's estate); *In re Dewayne Florian*, 233 B.R. 25, 27 (Bankr. D. Conn. 1999) (concluding that proceeds of a liability insurance policy were not part of a debtor's estate); *In re Scott Wetzel Servs., Inc.*, 243 B.R. 802, 804–06 (Bankr. M.D. Fla. 1999) (holding that a debtor does not have a cognizable interest in proceeds of a typical liability policy, of kind sufficient to bring proceeds into "property of the estate," because proceeds will normally be payable only for benefit of those harmed by the debtor under the terms of an insurance contract); *In re Doug Baity Trucking, Inc.*, 2005 WL 1288018, *2–9 (Bankr. M.D. N.C. Apr. 21, 2005) (holding that an insured had no equitable interest in the proceeds of a liability policy and thus such proceeds were not property of the bankruptcy estate); *In re Babcock & Wilcox Co.*, 69 F. App'x 659, 2003 WL 21356060, *1 (5th Cir. 2003) (holding that the proceeds of a liability policy were not property of the debtor's estate because it would be released directly to third parties).

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the Ninth Circuit that a debtor's insurance policies are deemed property of the estate under 11 U.S.C. § 541, the same does not hold true for the proceeds of those policies.[23]

As noted above, circuit courts as well as bankruptcy courts across the country have uniformly held that the proceeds of a liability insurance policy are not property of the estate when those proceeds are not payable directly to the debtor. At least one court sitting in the Ninth Circuit has squarely addressed this question. In *In re Endoscopy*, the United States Bankruptcy Court for the District of Nevada provided invaluable guidance by noting that "[w]ith respect to third party liability claims-made policies, like the one in question here, case authority suggests that the proceeds are not property of the estate or, at least, that any interest the estate has in these policies is *de minimis*."[24] In support of that position, the Nevada Bankruptcy Court cited a Fifth Circuit decision explaining that the primary question in determining whether insurance proceeds are property of the estate is whether the debtor has a right to receive and keep those proceeds when the insurer pays the claim:

> The overriding question when determining whether insurance proceeds are property of the estate is whether the debtor would have a right to receive and keep those proceeds when the insurer paid on a claim. When a payment by the insurer cannot inure to the debtor's pecuniary benefit, then that payment should neither enhance nor decrease the bankruptcy estate. In other words, when the debtor has no legally cognizable claim to the insurance proceeds, those proceeds are not property of the estate.
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> Examples of insurance policies whose proceeds are property of the estate include casualty, collision, life, and fire insurance policies in which the debtor is a beneficiary. Proceeds of such insurance policies, if made payable to the debtor rather than a third party such as a creditor, are property of the estate and may inure to all bankruptcy creditors. But under the typical liability policy, the debtor will not have a cognizable interest in the proceeds of the policy. Those

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[23] *See In re Pintlar Corp.*, 124 F.3d 1310, 1313–14 (9th Cir. 1997) (holding that "the persuasive effect of a judgment involving third parties does not have a sufficient potential impact on the value of the estate to fall under the Bankruptcy Code's stay provision."); *In re Mila, Inc.*, 423 B.R. 537, 542–43 (B.A.P. 9th Cir. 2010).

[24] *In re Endoscopy Ctr. of S. Nev.*, LLC, 451 B.R. 527, 542 (Bankr. D. Nev. 2011) (citations omitted).

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> proceeds will normally be payable only for the benefit of those harmed by the debtor under the terms of the insurance contract.[25]

Espousing the reasoning of the *Edgeworth* and *Landry* decisions, the Nevada Bankruptcy Court held that the proceeds of the third-party liability claims-made policy at issue was not property of the estate.[26] In making this determination, the bankruptcy court emphasized that the type of insurance at issue was pivotal to its holding:

> [The insurer] has, under the Policy, agreed to pay damages on behalf of the Debtors to any third party injured by Debtors because of a medical incident(s) during the policy period. [The insurer] pays the sums directly to the injured parties on behalf of the Insureds; [the insurer] does not reimburse or pay any Policy proceeds directly to the Insureds. Under no circumstances can the Debtors or other Insureds seek or obtain payment from [the insurer] under the Policy; nor can they be reimbursed from or by Policy proceeds.[27]

As in *In re Endoscopy*, the Policies at issue here are third-party liability claims-made policies, rather than "first-party" indemnification policies (such as casualty, collision, life, uninsured motorist, or fire insurance) in which the debtor is the direct beneficiary of the proceeds. Thus, when a claim is paid on the Policies, any corollary proceeds will not flow through Debtor's estate—which remains unaffected regardless of the claim's success—but will be

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[25] *Id.* at 545 (quoting *In re Edgeworth*, 993 F.2d 51, 55–56 (5th Cir. 1993)); *see Landry v. Exxon Pipeline Co. v. Mendoza Marine, Inc.*, 260 B.R. 769, 789 (Bankr. M.D. La. 2001) (explaining that "[c]ertain types of insurance, such as fire, life, collision, uninsured motorist, and casualty insurance proceeds are property of the estate assuming the debtor is a beneficiary of those proceeds" because "the debtor has the legal right and interest to the proceeds"). Another instance where courts have concluded that a liability policy's proceeds are property of the estate involves D&O policies that directly indemnify directors or officers. *See In re Pasquinelli Homebuilding, LLC*, 463 B.R. 468, 472 (Bankr. N.D. Ill. 2012) ("However, where the policy provides both direct coverage to the directors and officers, and direct entity coverage, the general rule is that since the insurance proceeds *may be payable to the debtor* they are property of the debtor's estate." (citations and quotations omitted) (emphasis added)). *Cf. In re Allied Digital Techs., Corp.*, 306 B.R. 505, 512–13 (Bankr. D. Del. 2004) (holding that when a debtor's liability policy provides a debtor with indemnification coverage, but indemnification either has not occurred or is hypothetical or speculative, policy proceeds are not included in "property of the estate").

[26] *See In re Endoscopy*, 451 B.R. at 546.

[27] *Id.*; *see also In re Cini*, 2012 WL 2374224, *7 (Bankr. D. Mt. June 22, 2012) ("In this Court, motions to modify stay seeking relief limited to insurance coverage routinely are granted, with the relief usually limited to the extent of insurance coverage . . . ." (citations omitted)).

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disbursed without deviation to the injured third party.[28] Here, the Primary Policies explicitly obligate Berkley to "pay those sums that the insured becomes legally obligated to pay as damages because of 'personal and advertising injury' to which this insurance applies."[29] Likewise, the Umbrella Policies confirm that Berkley "will pay *on behalf of the insured* the 'ultimate net loss' in excess of the 'retained limit' because of 'personal and advertising injury' to which this insurance applies."[30] Consequently, although Debtor holds legal title to the Policies, the proceeds of the Policies are decidedly not property of the Debtor's bankruptcy estate because the Debtor has no claim to, and no right to receive, the proceeds of the Policies.[31]

B. Even if the Policy Proceeds Are Deemed to be Property of Debtor's Estate, "Cause" Exists for Relief from the Automatic Stay

Even if the Court were to conclude that the Policies' proceeds are property of Debtor's bankruptcy estate, "cause" exists for relief from the automatic stay to permit the Cohen Creditors to bring an action, prosecute, enforce, and collect on a judgment against Berkley in independent litigation.

Under 11 U.S.C. § 362(d)(1), the Court "shall grant relief" from the automatic stay "for cause, including the lack of adequate protection of an interest in property of such party in interest . . . ." Because the statute uses the word "including," a lack of adequate protection "is

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[28] *See Sosebee v. Steadfast Ins. Co.*, 701 F.3d 1012, 1024 (5th Cir. 2012) ("Because liability insurance proceeds are generally not property of the bankruptcy estate, if a direct action claimant succeeds in obtaining a judgment against an insurer, the claimant recovers from the insurer directly rather than from the bankruptcy estate.").

[29] Ex. A at p. 13.

[30] Ex. B at p. 13.

[31] Notably, cases in which courts have deemed liability insurance proceeds that are not paid directly to the debtor to be "property of the estate" are limited to the mass-tort context. *See, e.g.*, *Sosebee*, 701 F.3d at 1023 ("Only in the limited instance of a mass tort action where hundreds or thousands of claims against the debtor's insurer might exhaust insurance proceeds and thus threaten the debtor's estate over and above limits of liability insurance policies have courts held the proceeds of liability insurance policies are property of the bankruptcy estate." (citations omitted)). Here, the Cohen Creditors' tort claims against Debtor were the result of an isolated incident to which the mass tort precedents are inapplicable, and there is nothing to suggest that Berkley requires protection from a blitzkrieg of claims under Debtor's policies.

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but one example of 'cause' for relief from stay."[32] Whether "cause" exists for purposes of this section is determined on a case-by-case basis and is left to the sound discretion of the bankruptcy judge.[33] While the principal role of the automatic stay is to protect the debtor, the Court should also consider the relative harms to other interested parties if the stay is not modified or lifted.[34] The debtor bears the burden to disprove the existence of cause.[35]

In this case, "cause" exists for granting relief from the stay to permit the Cohen Creditors to bring an independent action against Berkley for recovery under the Policies. Should such a suit be successful, Debtor's estate would be assuaged—at least in part—of one of its largest creditors. Namely, because any monies paid pursuant to the Policies would be that of Berkley, not of the estate,[36] additional capital would be emancipated for other creditors of the estate.[37] If, however, the Court does not permit the Cohen Creditors to seek payment from Berkley in an independent action, their only viable source of relief for their extensive injuries will be to seek a payout from the bankruptcy estate.[38] Because tort victims are merely unsecured creditors, they are disadvantaged vis-à-vis the debtor's secured creditors and unsecured creditors who have a higher priority in the payout.[39] As of October 17, 2016, claims filed against the Debtor's estate amount to more than $71,500,000, with over $4,500,000 owed to secured and priority creditors.[40] If prevented from seeking payment under the Policies, the Cohen Creditors may

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[32] *In re Ellis*, 60 B.R. 432, 435 (B.A.P. 9th Cir. 1985); *see* 11 U.S.C. § 102(3) ("'includes' and 'including' are not limiting").
[33] *See In re Castlerock Props.*, 781 F.2d 159, 163 (9th Cir. 1986); *In re Kennedy*, 165 B.R. 488, 490 (Bankr. W.D. Wash. 1994).
[34] *See In re San Clemente Estates*, 5 B.R. 605, 611 (Bankr. S.D. Cal. 1980) (weighing the "balance of hurt" to a party who sought relief from an automatic stay against the harm to the debtor's estate).
[35] *In re Gauvin*, 24 B.R. 578, 580 (B.A.P. 9th Cir. 1982).
[36] *Id.*
[37] *See Landry*, 260 B.R. at 800
[38] *See* 11 U.S.C. § 101(10)(A).
[39] *See* 11 U.S.C. §§ 507, 725–26; *see, e.g.*, *In re Chance Indus., Inc.*, 367 B.R. 689, 696 (Bankr. D. Kan. 2006) ("No funds were recovered and available for distribution to unsecured creditors.").
[40] Ex. D at p. 4.

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receive only a fraction of the amount Debtor owes them from the bankruptcy payout. Conversely, if the Cohen Creditors establish insurance coverage in an independent action, they would be able to recover at least a portion of the Judgment directly from Berkley,[41] leaving more monies in the estate for the Debtor's hundreds of other creditors.

Furthermore, "cause" exists for the elementary reason that the Debtor's estate has no right to receive the proceeds of the Policies. Thus, permitting the Cohen Creditors to seek relief against Berkley would not impair—or even impact—the rights of any party with an interest in the estate. More to the point: no other creditor of the estate could ever collect a payment from Berkley under the aforementioned provisions of the Policies based on the Cohen Creditors' claims. This right belongs to the Cohen Creditors alone.

Based on the foregoing reasons, "cause" exists under 11 U.S.C. § 362(d) to warrant relief from the stay for the purpose of permitting the Cohen Creditors to file suit, prosecute, enforce, and collect against Berkley based on the Policies.

V. CONCLUSION

For the foregoing reasons, the Cohen Creditors respectively request an order that the automatic stay does not apply to the commencement, prosecution, and collection of the actions based on the proceeds of the Policies. In the alternative, the Cohen Creditors request relief from the automatic stay based on "cause" in order to assert and prosecute any claims they may have against Berkley in an independent action, and enforce and collect on the judgment.

[41] *See Landry*, 260 B.R. at 800.

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DATED this 25th day of October, 2016.

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DATED this 25th day of October, 2016.

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