UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11
THE CHRISTIAN BROTHERS' INSTITUTE, *et al.,*	Case No. 11-22820 (RDD)
	(Jointly Administered)
Debtors.	

OBJECTION OF PACIFIC INDEMNITY COMPANY TO CONFIRMATION OF FIRST AMENDED JOINT CHAPTER 11 PLAN OF REORGANIZATION PROPOSED BY THE CHRISTIAN BROTHERS' INSTITUTE AND THE CHRISTIAN BROTHERS OF IRELAND, INC. AND THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS

AND

OBJECTION OF PACIFIC INDEMNITY COMPANY: 1) TO PROPOSED INSURANCE ASSIGNMENT UNDER SECTION 11.1 OF PLAN AND 2) TO PROPOSED APPOINTMENT OF REPRESENTATIVE UNDER SECTION 11.2 OF PLAN

Now comes Pacific Indemnity Company ("Pacific"), by its attorneys, and respectfully states as follows:

I.
SUMMARY

Pacific hereby objects to confirmation of the First Amended Joint Chapter 11 Plan of Reorganization (the "Plan") Proposed By The Christian Brothers Institute ("CBI") And The Christian Brothers Of Ireland, Inc. ("CBOI"), And The Official Committee Of Unsecured Creditors (the "Committee"). The Debtors and the Committee are together called the "Plan Proponents".

Specifically, 1) the Plan fails to contain adequate insurance neutrality language and therefore violates both bankruptcy and non-bankruptcy law by stripping Pacific of its contractual and legal rights; 2) the Plan violates both bankruptcy and non-bankruptcy law by assigning the Debtors' obligations in insurance policies (the "Proposed Insurance Assignment") to a plan trust that would be controlled by plaintiff interests and not by a true defendant, and further by appointing the trustee under the plan trust as the Debtors' representative; and 3) the Plan requires this Court to adjudicate the validity of the Proposed Insurance Assignment, and thereby not only seeks an impermissible advisory opinion, but

also submits an issue for adjudication which this Court lacks Constitutional authority to decide.

II.
FACTUAL BACKGROUND: INTEREST OF PACIFIC

A. The Alleged Policies – The Named Insureds And Denial of Debtors' Insured Status

Pacific allegedly issued policy number LAC173510 (the "Original Policy") providing coverage to "Corporation of the Catholic Archbishop of Seattle, Briscoe Memorial School and Congregation of Christian Brothers." The liability limits were $250,000 per person and $500,000 per occurrence for the term 10/11/66 to 10/11/69. The named insureds are the Corporation of the Catholic Archbishop of Seattle ("CCAS") and the Congregation of Christian Brothers ("CCB"). The policy is lost. There is a certificate of insurance issued by a broker to a third party that provides evidence of this policy.

There is also an alleged renewal of this policy, policy number LAC202280 effective October 11, 1969 (the "Renewal Policy"), which is also a lost policy. No claimant has alleged abuse at Briscoe School during this Renewal Policy period. The Briscoe School had ceased operations by the time of the renewal, although the transfer of the school property to a buyer (which was the certificate holder)

had not yet been completed. The Original Policy and the Renewal Policy are collectively called the "Pacific Policies."

Neither of the named insureds are debtors in these procedurally consolidated Chapter 11 cases. The Congregation of Christian Brothers is a juridic entity headquartered in Rome, Italy. By "juridic" entity is meant an entity that is organized and recognized under Canon Law. The legal entity status, if any, of the Congregation of Christian Brothers under American law (state or federal) remains unclear. The Congregation of Christian Brothers is a worldwide religious order or "institute." Like most orders or institutes, the Congregation of Christian Brothers has "provinces" which are separate juridic entities, each usually with a geographical scope. Here, there is a juridic entity called Congregation Christian Brothers – North American Province ("NAP"), an entity which is a "Participating Party" under the Plan.

Pacific denies that either of the Debtors are named insureds, additional insureds or otherwise insureds under the alleged Pacific Policies. Pacific has reserved, and does continue to reserve, all of its rights and remedies under the Policies and under the law.

B. Prepetition Abuse Claims Involving CCAS and Entities With "Christian Brothers" In Their Names

Prior to the commencement of these bankruptcy cases, numerous suits were brought against the CCAS alleging that the plaintiffs in those suits were sexually abused while attending schools administered under the auspices of the CCAS. Those suits typically named as defendants not only the CCAS but also numerous entities that have the words "Christian Brothers" in their name including both debtor and non-debtor entities, and including both legal and juridic entities. Typically, the individuals alleged to have committed sexual abuse belonged to an order or entities having the words "Christian Brothers" in its title.

A number of these suits were settled pre-petition. Settlements involving policy proceeds from the Pacific Policies were typically accompanied by releases signed by the CCAS and by various entities which had the words "Christian Brothers" in the entity name. This often included the NAP, which granted releases on behalf of the CCB.

There are approximately thirty-five pending abuse claims against the CCAS and various Christian Brothers entities. Of these, approximately five (5) allege abuse at the Briscoe School during the policy periods (10/11/1966-10/11/1969). There are a number of suits against the CCAS and various "Christian Brothers" entities that are not within the Briscoe policy periods. Pacific allegedly also insures CCAS under other policies that apply to some of these claims; but Pacific

Indemnity does not insure CCB, nor any other Christian Brother entity, under any other policies.

Thirty of the thirty-five pending abuse claims are represented by one Michael Pfau, Esq., including all known asserted claims within the periods of the Pacific Policies. Efforts to mediate a settlement of these claims have been unsuccessful to date. Pacific stands ready to continue its good faith participation in mediation efforts.

C. The Adversary Proceeding To Determine Coverage

The CCAS filed an adversary complaint in these bankruptcy cases on August 16, 2011, entitled *Corporation of the Catholic Archbishop of Seattle, v. Congregation of Christian Brothers of Ireland; Christian Brothers Institute, Maryland Casualty Company, a Subsidiary of Zurich Insurance Group; and Pacific Indemnity Company, a Subsidiary of Chubb & Son, Inc. Group*, Adv. No. 11-8332 (the "Coverage Adversary Proceeding.") In substance, the complaint seeks declaratory relief regarding the rights of CBI, CBOI and CCAS in the Pacific Policies, as well as in certain other policies allegedly issued by Maryland Casualty. In substance, the Debtors' answer joins in requesting that determination. Pacific denies that the Debtors are insureds. The Coverage Adversary Proceeding has been the subject of a voluntary stay by the parties pending the outcome of

negotiations. To date, negotiations have not resulted in a resolution of the Coverage Adversary Proceeding.

The Debtors' respective Schedules B, Dkt. Nos. 561 and 562, list the Pacific Policy No. LAC 173510 (i.e., the Original Policy) as an asset of their estates stating on their respective schedules that each has a "potential interest as an additional insured." The value of the policy is scheduled as "unknown." The Renewal Policy is not listed on any of debtors' schedules. Pacific denies that the Debtors are insureds under the Pacific Policies, and deny that the Debtors have any interest in the Policies. Debtors' schedules claiming an interest are incorrect both factually and as a legal conclusion.

D. <u>The Adversary Proceeding Seeking Substantive Consolidation</u>

The CCAS filed an adversary complaint in these bankruptcy cases on April 27, 2012 entitled *Corporation of the Catholic Archbishop of Seattle v. Congregation of Christian Brothers of Ireland; Christian Brothers Institute, Congregation of the Brothers of the Christian Schools of Ireland; Congregation of Christian Brothers; Congregation of Christian Brothers-North American Province a/k/a Western Province; the Christian Brothers of Ireland, Inc., Congregation of Christian Brothers-North American Province a/k/a Western Province a/k/a Eastern Province a/k/a American Province; Christian Brothers Institute of California, and*

Christian Brothers Institute of Michigan, Adv. No. 12-08236 (the "Substantive Consolidation Adversary Proceeding.") This Complaint seeks to substantively consolidate the Debtors along with numerous non-debtor entities having the words "Christian Brothers" in their names. Among the parties sought to be substantively consolidated is the Congregation of Christian Brothers.

Pacific moved to intervene in this adversary proceeding, and an order granting its motion was entered on August 14, 2012, Dkt. No. 53. Debtors have moved to dismiss this adversary proceeding. That motion has been continued for hearing until January 9, 2014, at 10:00 a.m. before this Court. Pacific has orally stated its position to this Court on the record at a prior status hearing that a substantive consolidation cannot increase the universe of insureds under the policies, and its principal interest is that it incur no liability beyond its original contractual liability.

III.
THE PLAN DOES NOT GIVE PACIFIC THE INSURANCE NEUTRALITY TO WHICH IT IS ENTITLED

Insurers are parties in interest with standing under 11 U.S.C. §1109 to challenge a plan when a plan is not insurance neutral. See, Motor Vehicle Cas. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.), 677 F.3d 869, 891 (9th Cir. Cal. 2012). Courts have consistently recognized that insurers are entitled to

reservation of their contractual rights under policies, including (but not limited to) those relating to coverage as well as those relating to the conduct of defenses and settlement of claims against the insured.

Insurance neutrality provisions are routinely included in bankruptcy plans. See e.g., In re Crabtree & Evelyn, Ltd., 2009 Bankr. LEXIS 4674, *250 (Bankr. S.D.N.Y. Nov. 19, 2009); In re T.H. Agric. & Nutrition, L.L.C., 2009 Bankr. LEXIS 4673, *37-38 (Bankr. S.D.N.Y. May 28, 2009); In re Federal-Mogul Global, 684 F.3d 355, 363 (3d Cir. Del. 2012); In re Combustion Engineering, Inc., 391 F.3d 190, 218 (3d Cir. Del. 2004). A plan is considered to be insurance neutral if it neither increases an insurer's pre-petition obligations nor impairs its prepetition contractual rights under the subject insurance policies. See e.g., In re Pittsburgh Corning Bankr. Corp., 453 B.R. 570, 584 (Bankr.; W.D. Pa. 2011) (finding the proposed plan, as drafted, was not insurance neutral.)

There are, of course, many unreported cases where insurance neutrality language is included as a matter of course. A good example is In re Canal Corporation, Case No. 08-36642-DOT (Bankr., E.D. Va) ("Canal"). In that case, Section 9.8 of the Second Amended Joint Plan of Liquidation of Canal Corporation And Certain of Its Affiliated Debtors (Dkt. No. 1324), confirmed by order at Dkt. No. 1416, provides in relevant part:

> "Similarly, the Plan and the Confirmation Order, including any exculpation provisions or releases, if applicable, shall not expand the scope of, or alter in any other way, the obligations of any insurers under any policies of insurance that may cover Claims against the Plan Debtors, the Estates, the Plan Administrator or any other Person and the insurers shall retain any and all defenses to coverage that such insurers may have."

Section 11.8 of the proposed Plan is the Plan's purported insurance neutrality provision. That section provides:

> "11.8 Insurance Neutrality
>
> Other than as expressly provided in this Section XI, no provision of this Plan shall diminish or impair the right of any Insurer to assert any defense to any Insurance Claim. The fact that the Trust is liquidating and paying/reserving monies on account of the Abuse Claims shall not be construed in any way to diminish any obligation of any Insurer under any Insurance Policy to provide Insurance Coverage to the Debtors, the Debtors' Estates or the Reorganized Debtors for Abuse Claims. The duties and obligations, if any, of the Non-Settling Insurers under each Non-Settling Insurer's Insurance Policy shall not be impaired, altered, reduced or diminished by: (a) the discharge granted to the Debtors under the Plan pursuant to Section 1141(d) of the Bankruptcy Code, (b) the exonerations, exculpations and releases contained in the Plan or (c) the Channeling Injunction."

By placing a provision in the Plan that is captioned "insurance neutrality" the Plan Proponents implicitly recognize the necessity of such a provision. But the provision comes up woefully short. For example, unlike the Canal plan, it does not reserve rights to deny coverage. Further, the

grammar of the first sentence implies that other parts of Section XI may impair or diminish rights to assert coverage or assert defenses to claims.

The problem with section 11.8 of the proposed plan is that it simply does not provide for true insurance neutrality *as to the insurer*. It provides, in essence, that none of the insured's rights are altered, but nowhere does it fully preserve insurer's rights. Attached as "Exhibit A" is proposed insurance neutrality language that is neutral as to the insurer. It is based on language that has appeared in other confirmed chapter 11 plans and was circulated to the Plan Proponents on October 29, 2013. It should be added to this Plan.

Pacific notes that, as of the time this objection is filed, efforts are ongoing to negotiate acceptable insurance neutrality language with the Plan's proponents.

IV.
THE ASSIGNMENT TO THE TRUST AND APPOINTMENT OF THE TRUSTEE AS DEBTORS' REPRESENTATIVE IS IMPROPER

A. Fundamental Practical Objection

Through clever and convoluted drafting, the Plan places the Plan Trustee, who is controlled by, and who is a representative of, Plaintiffs' interests in charge of Debtors'/Defendants' interests and obligations under insurance policies. The absurdity of the situation requires no elaboration. Simply put: how can a plaintiff

neutrally determine what defenses to raise against itself (or its fellow plaintiffs), or properly pursue them?

B. Caveat

Pacific's attack on the assignment provisions of the Plan is only relevant if the Debtors are insureds or have some interest in the Pacific Policies. Pacific denies that the Debtors are insureds. The issue of Debtors' insured status is presented in the Coverage Adversary Proceeding, and by Debtors' Schedules. If the Debtors and the Committee took the irrevocable position that the Debtors are not insureds (named or otherwise), and have no interest in the Pacific Policies, this present section (Section IV) of Pacific's objection would be unnecessary.

C. Exegesis of Plan Provisions

Section 11.1 of the Plan provides that "On the Effective Date . . . The Debtors, the Reorganized Debtors and each of the Participating Parties will be deemed to have assigned to the Trust [their] rights to all insurance claims and Insurance Recoveries against Non-Settling Insurers." Section 11.1 of the Plan further provides that the "transfer shall be effective to the maximum extent permissible under applicable law and under the terms of the Insurance Policies and shall not be construed as (a) an assignment of the Insurance Policies or (b) to

entitle any person to Insurance Coverage other than those persons or entities entitled to such coverage under the terms of the Insurance Policies."

However, Section 11.2 goes on to provide, in part, ". . . the Trust shall assume responsibility for, and be bound by, all of the obligations of the Debtors and participating parties under the Insurance Policies; provided the Trust's appointment shall not relieve the Debtor, The Reorganized Debtors or the Participating Parties from any obligations that such entities may have under the Insurance Policies." Earlier in the same Section 11.2 the Plan provides: "the Trustee is hereby appointed as the representative of the Debtor's estate for the purpose of retaining and enforcing Debtors Insurance Coverage for Insurance Claims with respect to Abuse Claims against the Debtors."

As a practical matter, this provision places the Trust in charge of the Debtors' defense and other obligations and would empower the Trust to negotiate settlements. That is highly problematic principally (but not solely) because the Trust is controlled by Plaintiffs' interests and will be represented by the same counsel who now represents the Committee. And while the Debtors purportedly retain their obligations under the policies (per Section 11.1 of the Plan), it is the Trust who will also take on those obligations. It is inconceivable that the Trust could carry out these duties properly. It would have an inherent

conflict of interest between asserting denials or defenses on behalf of Debtors while at the same time being beholden to Plaintiffs. Fundamentally, the Plan impermissibly alters who is the insured, alters who has the insured's obligations under the Policies and conflates the insured with the very interests that would be recovering policy proceeds.

Crucially, the Plan provides that the Debtors remain in existence and continue their business post-confirmation. (See, Section 15.6 of the Plan providing for the continued existence of the Reorganized Debtors.) Accordingly, there is no reason why the Debtors cannot continue in their full contractual role as an insured, and no reason to delegate their responsibilities to an entity with a profound and irredeemable conflict of interest.

D. The Proposed Assignment Violates Both Non-Bankruptcy and Bankruptcy Law

1. Violation of Non-Bankruptcy Law

Some cases do hold that the assignment of insurance policy benefits for losses that have accrued prior to the time of the transfer is permissible under non-bankruptcy law. See, e.g., Globecon Group, LLC v. Hartford Fire Insurance Co., 434 F.3d 165 (2nd Cir. 2006) ("Globecon Group"). Additionally, assignments of policy benefits are often allowed at such time after the liability of that accrued

loss has been determined. See, e.g. Public Utility Dist. No. 1 of Klickitat County v. International Insurance Company, 124 Wash.2d 789 (1994). But the rule is not universal. See, Henkel Corp. v. Hartford Accident & Indemnity Co., 62 P.3d 69 (Cal. 2003), holding that an anti-assignment condition in an insurance policy precluded the insured from transferring insurance rights without the insurer's consent, including liability insurance rights for bodily injury that happened prior to, but was not discovered until after, the transfer in question.

However, even courts permitting insurance assignments have explicitly held that the insurance policy would not apply if the assigned to party failed to satisfy the duties of the insured under the policy, such as notice and cooperation in the defense against claims. See, e.g. Northern Insurance Company of New York v, Allied Mutual Insurance Company, 955 F.2d 1353, 1358 (9th Cir. 1992); Globecon Group, 434 F.3d at 175 (finding a genuine issue of fact existed as to whether the insured presented a claim prior to assignment and what, if any, duties under the policy may be validly transferred under New York law). Thus, assuming arguendo that the purported insured's duties under the Pacific Policies could be transferred as a general proposition, in this case they cannot be properly transferred because the proposed assigned party will simply not be able to satisfy the duties of the

insured under the policy in defending against the liability to be asserted by that same proposed assigned party, the assignment cannot be valid.

2. Violation of Bankruptcy Law

a) Debtors Do Not State Whether 11 U.S.C. Sec. 365 Applies; But If It Does, They Have Not Complied With It

Section 16.2 of the Plan, q.v., provides generically for the assumption of executory contracts that are not rejected, and contemplates post-confirmation compliance with Sec. 365(b)(1). Debtors make no analysis of whether the policies are executory contracts within the meaning of 11 U.S.C. §365(a). The Second Circuit generally follows the so-called "Countryman Definition," or "material breach" criterion. See generally, In re Drexel Burnham Lambert Group, Inc., 138 B.R. 687 (Bankr. S.D. N.Y. 1992). Notably, the Original Pacific Policy is scheduled as personal property on Debtors' respective Schedules B, but is not listed in Debtors' respective schedules of executory contracts.

To the extent a contract is executory, it may not be assigned unless it is first assumed, 11 U.S.C. §365(f)(2). Further, adequate assurance of future performance by the assignee must be provided. Id. The Debtors neither assume the Policies, nor provide adequate assurance of the Trust's future performance, something which may not be possible given the Trust's divided loyalties,

discussed above. In any event, if the Policies are executory contracts, the proposed assignment to the Trust violates bankruptcy law because the Plan Proponents do not comply with 11 U.S.C. § 365 (f)(2).

As a further matter, any assignment of the Debtors' obligations under the Policies violates Sec. 365 (c)(1) of the Bankruptcy Code. That Section provides:

> "(c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if
>
> (**1**)(**A**) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and
>
> (**B**) such party does not consent to such assumption or assignment."

Pacific notes at the outset that it does not consent to the assignment to the Trust; thus subsection (c)(1)(B) is satisfied. Subsection (c)(1)(A) is satisfied because, as a matter of law, an insurer can not be compelled to accept performance from anyone other than its insured. See, Globecon Group, supra.

V.
THIS COURT LACKS CONSTITUTIONAL JURISDICTION TO ADJUDICATE THE VALIDITY OF THE ASSIGNMENT OR ITS EFFECTS UNDER NON-BANKRUPTCY LAW

A. Introduction

Section 11.1 of the Plan provides, in part:

> "The determination of whether the assignment of Insurance Claims …. is valid, and does not defeat or impair the Insurance Coverage shall be made by the Bankruptcy Court at the confirmation hearing."

A similar provision in Section 11.2 of the Plan requires this Court to determine the validity of the appointment of the Trustee as the Debtor's representative.

B. The Plan Requests An Impermissible Advisory Opinion

These provisions are anathema because they request an advisory opinion regarding state law insurance coverage issues. Advisory opinions have long been forbidden. See, e.g., Uhler v. AFL-CIO, 468 U.S. 1310, 1312 (1984), and Herb v. Pitcairn, 324 U.S. 117, 126 (1945). Crucially, the prohibition on advisory opinions is based on a Constitutional jurisdictional limitation: the judicial power of the United States extends to "cases and controversies." U.S. Const., Art. III, sec. 2, cl. 1. Bluntly: no federal court has the Constitutional authority to give the advisory opinions contemplated by secs. 11.1 and 11.2 of the Plan.

C. This Court Has No Constitutional Authority To Determine The Validity of The Assignment or Its Effect on Insurance Coverage

Yet there is another (and wholly separate) Constitutional limitation on this Court's ability to make the coverage determinations in secs. 11.1 and 11.2 of the Proposed Plan: under the principles of Northern Pipeline Constr. Co. v. Marathon

Pipe Line Co., 458 U.S. 50 (1982) ("Marathon") and Stern v. Marshall, 541 U.S. ___, 131 S. Ct. 2594 (2011) ("Stern"), this Court lacks Constitutional authority to adjudicate the quintessentially private rights controversy of insurance coverage.*

At the outset, it is irrelevant to the Constitutional issue whether this Court has statutory authority under 28 U.S.C. §157 to adjudicate the matter. Stern famously held that even though the bankruptcy court had statutory core authority to adjudicate a counter-claim under 28 U.S.C. §157(b)(2)(C), the court nevertheless lacked Constitutional authority to adjudicate it because the counterclaim included a quintessentially private right of the sort which Marathon held must be decided by an Article III Tribunal. See, Stern, 131 S.Ct. at 2601 and at 2614-15 (quoted infra, p 22).

That having been said, this Court lacks even statutory authority to make a coverage ruling. The Plan Proponents create an optical illusion of statutory jurisdiction by insinuating the requested adjudication into a confirmation hearing as if 28 U.S.C. §157(b)(2)(L), which confers core jurisdiction over plan confirmations, were somehow applicable. That statute can not sensibly be read that way, or else any controversy over which a bankruptcy court lacks statutory

*Pacific has timely raised its jurisdictional objection both in answering the Coverage Adversary Proceeding, see Answer, par. 9 (Dkt. No 43) (denying core jurisdiction) and has timely raised it in the objection. There is no issue here of implied consent as is now before the United States Supreme Court in Executive Benefits Insurance Agency v. Arkison, Case No. 12-1200. Arkison has been fully briefed and is scheduled for oral argument on January 14, 2014.

jurisdiction could be shoe-horned into a plan to create jurisdiction. The essence of this Court's statutory authority to confirm plans can only be its ability to determine the Plan's statutory compliance with 11 U.S.C. §1129(a), which begins with the words, "the court shall confirm a plan only if all of the following requirements are met." Suffice it to say that determining insurance coverage is not among the requirements enumerated in 11 U.S.C. §1129(a)(1) – (a)(16).

Most fundamentally, however, insurance coverage is a private rights controversy and can not be finally adjudicated by this Court because it is not an Article III Tribunal. Pacific realizes that this Court is deeply familiar with the history and jurisprudence of bankruptcy court jurisdiction. Pacific therefore provides only a short synopsis of that jurisprudence, and cuts to the chase with the main argument.

The Bankruptcy Code of 1978 enacted former 28 U.S.C. §1471 which, in essence, afforded bankruptcy judges the power to enter final orders in all matters arising in or related to bankruptcy cases. Bankruptcy Judges, however, were not given the Article III attributes of lifetime tenure or a guarantee against salary diminution. In Marathon, the Supreme Court held that jurisdictional scheme to be unconstitutional insofar as it facially gave judges who lack Article III attributes the power to decide controversies that require an Article III Tribunal. 458 U.S. at

87. At issue in Marathon was a private contact and warranty dispute governed by state law. Id., at 56.

Eventually, Congress enacted the current 28 U.S.C. §157, q.v., which distinguishes between "core" matters in which Bankruptcy Courts can enter final orders and non-core matters, in which Bankruptcy Courts may only make proposed findings of fact and conclusions of law, reviewable de novo by the District Court.

In Granfinanciera v. Nordberg, 492 U.S. 33, 36, the Supreme Court held that a defendant in a fraudulent conveyance action who had not otherwise submitted to bankruptcy court jurisdiction was entitled to a jury trial. The Court's analysis rested heavily on Congress' inability to give non-Article III judges adjudicatory power over "private rights" controversies.

> "If a statutory right is not closely intertwined with a federal regulatory program [that] Congress has the power to enact, and if that right neither belongs nor exists against the Federal Government, then it must by adjudicated by an Article III Court."
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> 492 U.S. 33, 54-55.

In Stern v. Marshall, the Supreme Court held that a bankruptcy court lacked constitutional jurisdiction to adjudicate a state law counterclaim, despite having statutory authority to do so under 28 U.S.C. §157(b)(2)(C). In so doing, the Court

carefully explicated the conditions under which a controversy is a private rights controversy demanding Article III adjudication:

> "Vickie's counterclaim—like the fraudulent conveyance claim at issue in Granfinanciera—does not fall within any of the varied formulations of the public rights exception in this Court's cases. It is not a matter that can be pursued only by grace of the other branches, as in Murray's Lessee, 18 How. at 284, 59 U.S. 272, 15 L. Ed. 372, or one that "historically could have been determined exclusively by" those branches, Northern Pipeline, *supra,* at 68, 102 S. Ct. 2858, 73 L. Ed. 2d 598 (citing Ex parte Bakelite Corp., 279 U.S., at 458, 49 S. Ct. 411, 73 L. Ed. 789, 1929 Dec. Comm'r Pat. 279). The claim is instead one under state common law between two private parties. It does not "depend[ ] on the will of congress," Murray's Lessee, *supra*, at 284, 59 U.S. 272, 15 L. Ed. 372; Congress has nothing to do with it.
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> In addition, Vickie's claimed right to relief does not flow from a federal statutory scheme, as in Thomas, 473 U.S., at 584-585, 105 S. Ct. 3325, 87 L. Ed. 2d 409, or Atlas Roofing, 430 U.S., at 458, 97 S. Ct. 1261, 51 L. Ed. 2d 464. It is not "completely dependent upon" adjudication of a claim created by federal law, as in Schor, 478 U.S., at 856, 106 S. Ct. 3245, 92 L. Ed. 2d 675. And in contrast to the objecting party in Schor, id., at 855-856, 106 S. Ct. 3245, 92 L. Ed. 2d 675, Pierce did not truly consent to resolution of Vickie's claim in the bankruptcy court proceedings. He had nowhere else to go if he wished to recover from Vickie's estate. See Granfinanciera, *supra*, at 59, n. 14, 109 S. Ct. 2782, 106 L. Ed. 2d 26 (noting that "[p]arallel reasoning [to Schor] is unavailable in the context of bankruptcy proceedings, because creditors lack an alternative forum to the bankruptcy court in which to pursue their claims")."

Stern v. Marshall, 131 U.S. 2594, 2614-15.

The above exposition is revealing and applies perfectly to the insurance coverage determination requested by the Plan Proponents in this case: it is not a matter that can only be pursued by the grace of the other branches of the federal government; it is not a matter that historically could have been determined exclusively by these branches; it does not flow from a federal regulatory scheme; it is not completely dependent upon a claim created by federal law, and Pacific does not consent to its adjudication by this Court. In short, this Court can not Constitutionally make the adjudication of insurance coverage requested by the Plan Proponents. Plan confirmation must therefore be denied as a Constitutional matter.

VI.
THE PLAN CAN NOT IMPAIR PACIFIC'S RIGHTS AGAINST NAP

Under the Plan, so-called "Participating Parties" are released from any contribution and indemnity claim by the Debtors and given the protection of a channeling injunction. See Sec. 2.77 of the Plan. This approximates the relief that a Participating Party would receive from its own bankruptcy discharge.

Under the Proposed Plan, NAP is a Participating Party. NAP is also a party to the Coverage Adversary Proceeding. Pacific denies that NAP is an insured; however, NAP in the past has given releases on behalf of CCB in settlements that

have involved proceeds of the Pacific policy. Unfortunately, the channeling injunction in the proposed Plan could be construed as preventing determination of the Coverage Adversary Proceeding as to NAP, as well as to prevent determination of related matters such as NAP's authority to act as CCB's agent. That is a complete misuse of a channeling injunction.

The principal purpose of a channeling injunction is to protect the debtor against future claims, including indemnity claims against the debtor from parties who may be liable with the debtor or subrogated to the debtor. See, e.g. In re W.R. Grace & Co., 386 B.R. 17 (Bankr. Del., 2008) (justifying channeling injunction as protecting debtor against indemnity claims); In re Cumbustion Engineering, Inc., 295 B.R. 459 (D.Del., 2003), vacated 391 F.3d 190 (3d Cir., 2004) (justifying channeling injunction to enhance insurance proceeds available to estate); and see, In re Supermercado Gamboa, Inc., 68 B.R. 230 (Bankr. D.P.R. 1986) (pivotal question is whether debtor will suffer irreparable harm if proceedings against non-debtor go forward). Here, NAP is being protected from actions that do not even necessarily involve monetary relief against it, much less against the debtor. The presently proposed channeling injunction, even if it were valid to some extent, is overbroad and the Plan should not be confirmed.

In that regard, a channeling injunction, such as this one, that confers a de facto discharge on a non-debtor should be beyond this Court's power under 11 U.S.C. §105. See, In re Zale Corp., 62 F.3d 746 (5th Cir. 1995). For that reason as well, the Plan is improper under bankruptcy law and should not be confirmed.

VII.
THE PLAN SHOULD PROVIDE MORE FLEXIBILITY FOR A POST CONFIRMATION FCR AND CHANNELING INJUNCTION

As stated above, there has been ongoing mediation to resolve and settle abuse claims involving the Debtors, CCG and the CCAS. Those claims include those occurring at the Briscoe School during the Policy periods. As discussed by Debtors' counsel in open court at the hearing on approval of the Disclosure Statement, Sections 10.12.1 and 10.12.2 were introduced into the proposed Plan at the hearing on the Disclosure Statement in order to accommodate a potential settlement of those claims which could involve an FCR and a channeling injunction benefitting the parties to such potential settlement. No actual settlement has been reached.

After reflection, Pacific submits that, in order to facilitate settlement, Section 10.12.2 should be clarified to provide that the Court may approve such future claims reserve and such scope of channeling injunction as may be submitted by the FCR after notice and a hearing.

VIII.
RESERVATIONS OF RIGHTS

Pacific explicitly reserves, and does not waive, it right to raise any argument and any authority in opposition to the Plan at the hearing on confirmation. Pacific is informed and believes that the Plan Proponents intend to upload a proposed confirmation order, an initial draft of which has been circulated as courtesy to Pacific's counsel and certain other parties in interest. Without limitation, Pacific reserves all objections to the form and substance of such proposed order as may be uploaded by the Plan Proponents.

CONCLUSION

For the reasons stated above, the Plan should not be confirmed and the Court should grant such other and further relief as it deems just.

Respectfully submitted,

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Dated: January 2, 2014

EXHIBIT A:

DRAFT PROPOSED INSURANCE NEUTRALILTY PROVISION

No provision in the Plan, in the Confirmation Order or in any Plan Document, shall impose, or be deemed or construed to impose, any obligation on any Insurer (whether or not it is a "Settling Insurer" under the Plan) to provide a defense for, settle, or pay any judgment with respect to, any claim, including without limitation any "Insurance Claim" (as defined in the Plan); rather, an Insurer's obligations, if any, with respect to any claim, shall be determined solely by and in accordance with the allegedly applicable policies and with applicable non-bankruptcy law.

Nothing in the Plan, in the Confirmation Order or in any other Plan Document shall diminish or impair, or be deemed or construed to diminish or impair, the rights of any Insurer to assert any claim, including, but not limited to, any claim for contribution or subrogation, defense, indemnity, setoff or counterclaim in connection with any claim, including any Insurance Claim, or any Insurance Policy. Without limiting the generality of the foregoing, nothing in the Plan, the Confirmation Order or any other Plan Document shall, under any theory, (1) constitute a trial, an adjudication on the merits or evidence establishing the liability of any Insurer in any current and/or subsequent litigation for any claim, or under any Insurance Policy; (2) constitute, or be deemed, a determination of the reasonableness of the amount of any claim, either individually or in the aggregate with other Claims; (3) grant or be deemed to grant to any Person any right to sue any Insurer directly, in connection with a Claim, or any Insurance Policy; (4) constitute or be deemed a finding or determination that any Debtor and/or third party is a named insured, additional insured or insured in any other way under any Insurance Policy; or that any Insurer has any defense or indemnity obligation with respect to any claim.

It is the intent of this Plan that Insurers shall retain, and be permitted to assert, (y) all of their rights and defenses with respect to coverage of any claim, notwithstanding any provision of the Plan, the Confirmation Order or any other Plan Document, and (z) all of the Debtors' defenses to liability in connection with any claim, and that the Insurers' rights to assert all such underlying defenses to liability and all such defenses to coverage of any claim, will not be impaired or

prejudiced in any way by the Plan, the Confirmation Order or any other Plan Document.

No Insurer shall be bound in any current or future litigation concerning any claim, or any Insurance Policy by any orders, including the Confirmation Order, factual findings or conclusions of law issued in connection with confirmation of the Plan (including on appeal or in any subsequent proceeding necessary to effectuate the Plan), and no such order, including the Confirmation Order, findings of fact or conclusions of law shall: (1) be admissible, used as evidence, referenced or argued as persuasive to the case of the Debtors, or any holder in any subsequent coverage litigation; or (2) have any res judicata, collateral estoppel or other preclusive effect on any claim, defense, rights, remedies or counterclaim of such Insurer that has been asserted or that may be asserted in any current or subsequent litigation concerning any claim.

Notwithstanding any of the above, the Debtors, and any Person, including, without limitation, the Trust as assignee, are bound by the terms of the Insurance Policies. Any other party to an Insurance Policy, including any Insurer, shall also be bound to the terms of that Insurance Policy.

Nothing in the preceding should negate or undo the voluntary alteration of an Insurer's rights should it elect to become a "Settling Insurer" under the Plan.

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