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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

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In re:	Chapter 7
DAVID BIRNBAUM,	Case No. 11-50359 (ESS)
Debtor.	

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MOTION OF THE DEBTOR FOR AN ORDER GRANTING RELIEF FROM AUTOMATIC STAY AND RELATED RELIEF IN CONNECTION WITH ADVERSARY PROCEEDING

TO: THE HONORABLE ELIZABETH S. STONG, UNITED STATES BANKRUPTCY JUDGE:

David Birnbaum, the debtor in the above-captioned Chapter 7 proceeding (the "Debtor"), by and through his attorneys, Goetz Fitzpatrick LLP, hereby submits this motion (the "Motion") for (i) entry of an order pursuant to Section 362(d)(1) of title 11 of the United States Code (the "Bankruptcy Code") to allow him to proceed with an appeal of the District Court's decision in Guggenheim Capial, LLC, et al. v. Toumei, et al., No. 10 Civ. 8830, slip op. (S.D.N.Y. July 14, 2011) (the "Judgment"); and (ii) pursuant to Section 105 of the Bankruptcy Code, holding the Adversary Proceeding (as hereinafter defined) in abeyance except for periodic status conferences during the pendency of the appeal. In support of the Motion, the Debtor respectfully states as

follows:

PRELIMINARY STATEMENT

1. The Judgment, by which the United States District Court, Southern District of New York granted a default judgment against the Debtor, is the basis for an adversary proceeding [Adv. Pro. No. 12-01011 (ESS) (the "Adversary Proceeding")] filed by Guggenheim Capital, LLC and Guggenheim Partners, LLC (together, "Guggenheim") that seeks to determine the non-dischargeability of the judgment debt arising therefrom.

2. At a pretrial hearing in the Adversary Proceeding, held on April 24, 2012, counsel for the parties advised the Court that they would participate in a meet-and-confer conference call with the goal of determining whether the adversary proceeding could be adjourned while the Debtor appealed the Judgment. Given that Guggenheim's complaint [Adv. Pro. ECF. No. 5, the "Complaint"] seeks a non-dischargeability ruling based entirely on the District Court's Judgment, the suggestion was that the parties should wait to commence discovery in the Adversary Proceeding until the appeal of the Judgment has been decided.

3. During the meet-and-confer, counsel for Guggenheim declined to adjourn the adversary proceeding while the District Court's judgment is appealed. Moreover, counsel for Guggenheim indicated that they would **not** consent to relief from the automatic stay to allow the Debtor to pursue its appeal. Accordingly, the Debtor makes the instant motion.

4. The Debtor seeks to lift the automatic stay to allow the appeal to the Second Circuit to proceed. Section 362(d)(1) of the Bankruptcy Code allows for the automatic stay to be lifted if, among other reasons, "cause" to lift the stay exists. There are numerous reasons why "cause" exists to lift the stay with respect to the Debtor's appeal of the Judgment.

5. Importantly, the case is beyond the trial court level and the issue adjudged in the Judgment – whether the Debtor had defaulted in the District Court case – is determinative of the Adversary Proceeding filed by Guggenheim.

6. Additionally, the Second Circuit has outlined twelve distinct factors to weigh in determining whether it is appropriate to lift the automatic stay to allow for litigation to be resolved in another forum. Among these factors are:

a. whether litigation in another forum would prejudice [or enhance] the interests of other creditors (here the estate would be enhanced by allowing the appeals to continue),

b. the interests of judicial economy and economical resolution of litigation (should the Judgment be overturned, Guggenheim's Complaint would be subject to dismissal); and

c. the balance of harms (as detailed below, the Debtor has asserted numerous, detailed, affirmative defenses to the Adversary Proceeding, defenses he was unable to raise in the District Court) .

7. As discussed herein, these and all of the other relevant factors militate in favor of lifting the automatic stay to allow the Debtor to proceed with the appeal in the Second Circuit.

8. The Debtor also seeks an adjournment of the Adversary Proceeding during the pendency of the Adversary Proceeding. Section 105 of the Bankruptcy Code allows the Court to issue any order necessary or appropriate to carry out the provisions of the Bankruptcy Code.

9. As described herein, because Guggenheim seeks a non-dischargeability ruling based entirely on the District Court's Judgment, the Court should stay the Adversary Proceeding during the pendency of the Second Circuit appeal.

JURISDICTION

10. This Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334.

11. This is a core proceeding pursuant to 28 U.S.C. § 157.

12. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

13. The relief requested in this Motion is predicated on 11 U.S.C. 362(d)(1) and Rules 4001 and 9014 of the Federal Rules of Bankruptcy Procedure.

BACKGROUND

14. Guggenheim filed this Adversary Proceeding as set forth in ¶1 supra.

15. The Debtor has defended against Guggenheim in this Adversary Proceeding on the ground that the claims and findings embodied in the Judgment and the Fees Order are not entitled to a collateral estoppel effect because the Debtor did not substantially participate in the underlying litigation, based on one or more of the following facts:

16. Guggenheim initiated the District Court action with the filing of a successful application for *ex parte* relief, based in part on inaccurate, false or distorted factual claims against the Debtor, despite the lack of any emergency or – as ultimately acknowledged by plaintiffs and the District Court – either actual harm to Guggenheim or benefit to the Debtor arising from his alleged conduct. Yet the findings made by the District Court on its consideration of the original *ex parte* application by plaintiffs became the blueprint for a series of repeated orders and, ultimately, the final Judgment and Fees Order – owing to the following facts:

a. The Debtor was born in Germany and lived much of his life in the State of Israel, and hence is not a native speaker of English;

b. The Debtor was unrepresented by counsel for much of the litigation, including during the pendency of the default motion by Guggenheim which resulted in the Judgment and Fees Order, as set out more fully below;

c. The Debtor was arrested on criminal charges arising solely out of Guggenheim's spurious claims of wrongful conduct and was advised by his *pro bono* assigned criminal counsel that while those charges were pending – they have since been dropped due to a lack of evidence – to take no action in defense of the claims against him in this litigation that could prejudice his Fifth Amendment right against self-incrimination;

d. The Debtor was assigned criminal counsel based on a determination of the District Court that he was eligible to proceed *in forma pauperis*, but was refused in his request for an assignment of pro bono civil litigation counsel notwithstanding

    a. the identity of factual issues between the civil and criminal claims and

    b. the Debtor's intention to assert, in that litigation, his privilege against self-incrimination under the Fifth Amendment upon the advice of criminal counsel;

e. The Debtor's motion for a stay pending the resolution of the criminal charges against him, which were dismissed in September of 2011 – only weeks after the entry of the Judgment and Fees Order – was denied by the District Court despite the lack of any finding of emergent circumstances or the risk of flight or dissipation of assets by the Debtor such that the temporary restraints

already in effect would not have wholly sufficed to protect Guggenheim's rights until the criminal charges were resolved;

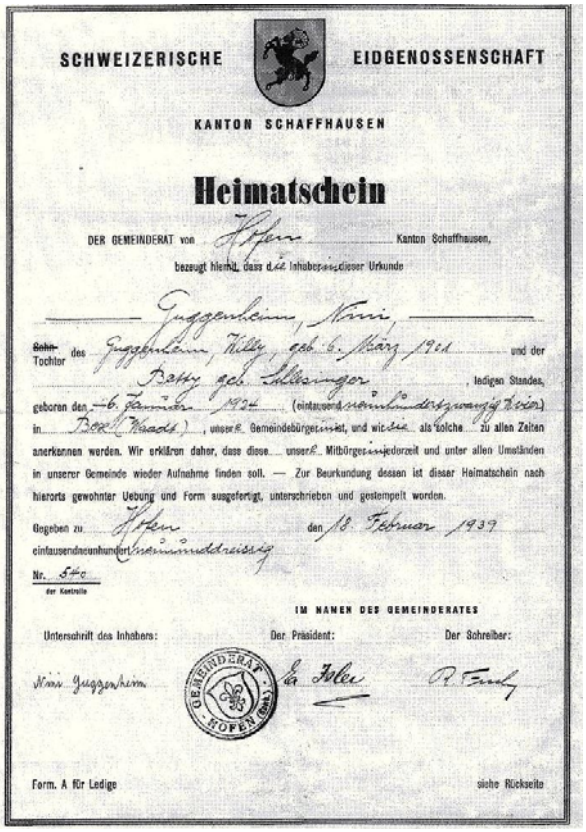
f. The Judgment and Fees Order was entered based on a number of purported defaults by the Debtor, e.g., failure to engage in discovery, which were entirely consistent with the Debtor's assertion of his constitutional right to assert his privilege against self-incrimination under the Fifth Amendment upon the advice of criminal counsel;

g. The District Court neither employed nor entertained the imposition of any other sanctions short of default and the entry of a massive seven-figure statutory damages judgment, notwithstanding the District Court's finding that there was no proof of actual damages, on Guggenheim's motion for a default judgment – which was unopposed for the foregoing reasons (i.e., the Debtor's lawful invocation of his Fifth Amendment rights and his lack of civil litigation counsel);

h. The Debtor is primarily an independent scholar with no income who was never able to retain counsel with sufficient experience and resources to resist the litigation onslaught begun and essentially determined by Guggenheim's original *ex parte* filings and, as acknowledged by them in court papers, who prosecuted these claims at the cost of over $800,000 in legal fees billed to their financial institution client, utilizing seven attorneys in two cities;

i. The Debtor has no experience in legal matters or genuine sophistication regarding commerce;

j. The Debtor has, in part because of the foregoing (i.e., his language deficit and his lack of adequate or in much of the litigation any counsel), throughout this litigation been completely confused by the claims against him and the orders prohibiting him from using his own family name (Guggenheim), in light of the fact that the Debtor is in fact a member of the famous Jewish-German Guggenheim family, whose mother, Nini Guggenheim, was born in Berlin in 1924 (see below-left, the German-language ***Heimatschein*** of certificate of family origin and right of residence in the Canton of Schaffhausen, Switzerland for Nini Guggenheim) and subsequently used the surnames Birnbaum and Guggenheim in varying order depending on local custom, as did the Debtor (see Nini Guggenheim Birnbaum's Swiss passport, below-right).



SCHWEIZERISCHE EIDGENOSSENSCHAFT

KANTON SCHAFFHAUSEN

Heimatschein

DER GEMEINDERAT von Hofen Kanton Schaffhausen,

bezeugt hiemit, dass die Inhaberin dieser Urkunde

Guggenheim, Nini

~~Sohn~~ Tochter des Guggenheim, Willy, geb. 6. März 1901 und der

Betty geb. Schlesinger, ledigen Standes,

geboren den 6. Januar 1924 (eintausendneunhundertzwanzigvier)

in Berlin (Preussen), unserer Gemeindebürgerin ist, und wir sie als solche zu allen Zeiten

anerkennen werden. Wir erklären daher, dass diese unsere Mitbürgerin jederzeit und unter allen Umständen

in unserer Gemeinde wieder Aufnahme finden soll. — Zur Beurkundung dessen ist dieser Heimatschein nach

hierorts gewohnter Uebung und Form ausgefertigt, unterschrieben und gestempelt worden.

Gegeben zu Hofen den 10. Februar 1939

einfausendneunhundert neunundreissig

Nr. 540

der Kontrolle

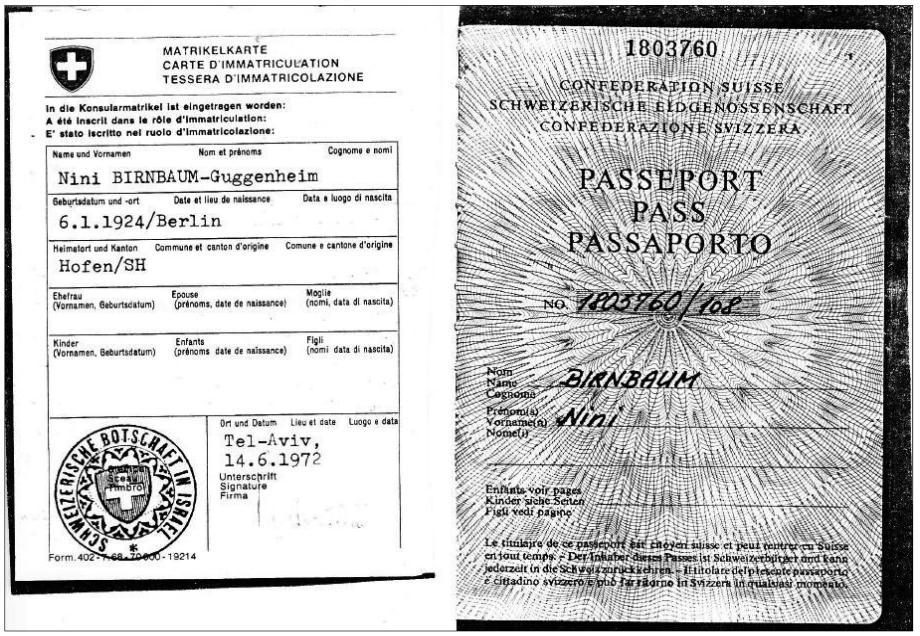
IM NAMEN DES GEMEINDERATES

Unterschrift des Inhabers: Der Präsident: Der Schreiber:

Nini Guggenheim

GEMEINDERAT HOFEN

Form. A für Ledige siehe Rückseite



MATRIKELKARTE
CARTE D'IMMATRICULATION
TESSERA D'IMMATRICOLAZIONE

In die Konsularmatrikel ist eingetragen worden:
A été inscrit dans le rôle d'immatriculation:
E' stato iscritto nel ruolo d'immatricolazione:

Name und Vornamen / Nom et prénoms / Cognome e nomi	
Nini BIRNBAUM-Guggenheim	
Geburtsdatum und -ort / Date et lieu de naissance / Data e luogo di nascita	
6.1.1924/Berlin	
Heimatort und Kanton / Commune et canton d'origine / Comune e cantone d'origine	
Hofen/SH	
Ehefrau (Vornamen, Geburtsdatum) / Epouse (prénoms, date de naissance) / Moglie (nomi, data di nascita)	
Kinder (Vornamen, Geburtsdatum) / Enfants (prénoms date de naissance) / Figli (nomi data di nascita)	

SCHWEIZERISCHE BOTSCHAFT IN ISRAEL

Ort und Datum / Lieu et date / Luogo e data: Tel-Aviv, 14.6.1972

Unterschrift / Signature / Firma

Form. 402-1-68-70-00-19214

1803760

CONFEDERATION SUISSE
SCHWEIZERISCHE EIDGENOSSENSCHAFT
CONFEDERAZIONE SVIZZERA

PASSEPORT
PASS
PASSAPORTO

No 1803760/108

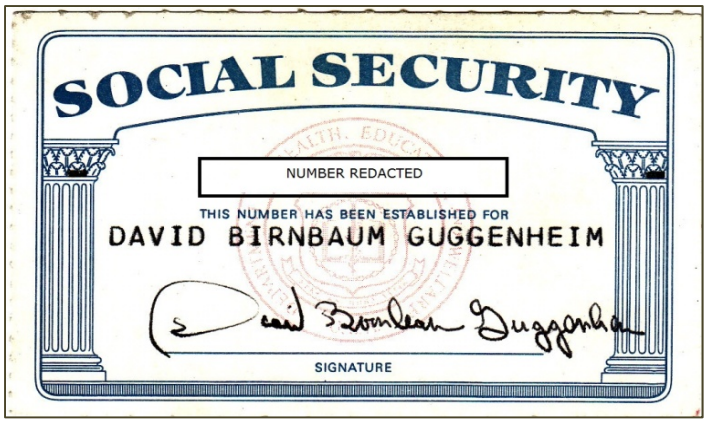
Nom / Name / Cognome: BIRNBAUM

Prénom(s) / Vornamen(n) / Nome(i): Nini

Enfants voir pages / Kinder siehe Seiten / Figli vedi pagine

Le titulaire de ce passeport est citoyen suisse et peut rentrer en Suisse en tout temps. / Der Inhaber dieses Passes ist Schweizerbürger und kann jederzeit in die Schweiz zurückkehren. / Il titolare del presente passaporto è cittadino svizzero e può ritornare in Svizzera in qualsiasi momento.

k. Thus, the Debtor has legitimately and lawfully used the Guggenheim name throughout his life for both personal and business purposes prior to any acquisition of rights in that name by plaintiffs; by way of example only, defendant owns a bona fide social Security Card showing his name as DAVID BIRNBAUM GUGGENHEIM (see below); and



l. Virtually none of the foregoing information concerning the Debtor's ancestry and use of his family name was, due to the procedural irregularities and other issues preventing consideration of Guggenheim's claims on the merits, ever considered by the District Court.

17. As mentioned above, after the criminal charges, which were later dropped, were filed against the Debtor, the District Court ruled the Debtor eligible to proceed *in forma pauperis* and assigned the Debtor *pro bono* assigned counsel in the criminal case but denied the Debtor's request for assignment of civil counsel in the underlying litigation, leaving him without counsel for much of the litigation, including during the pendency of Guggenheim's motion for a default judgment; and

18. The Debtor was one of several defendants, and the only one who appeared in the District Court action. The others acted in the Debtor's name without his permission or in explicit

disregard of his expressed wishes, but the Debtor had no practical opportunity to demonstrate this on the record or even to file appropriate denials of the pleadings in light of the foregoing.

19. The Debtor respectfully submits that the following factors should militate in favor of a charitable view by the Court of the pending appeal:

- The judgment being appealed is a default judgment. "Strong public policy favors resolving disputes on the merits." Am. Alliance Ins. Co., Ltd. v. Eagle Ins. Co., 92 F.3d 57, 61 (2d Cir. 1996).
- "[D]ismissal with prejudice is a harsh remedy to be used only in extreme situations," Bobal v. Rensselaer Polytechnic Inst., 916 F.2d 759, 764 (2d Cir. 1990). Yet the default judgment was imposed by way of sanction and upon a motion by Guggenheim against an unrepresented party who had repeatedly sought a stay of the action due to pending criminal charges, and with little or no attempt to impose lesser sanctions tailored to the circumstances.
- The default judgment was entered only three months after the motion for default judgment – a relatively short period of time under the circumstances – against a party not represented by counsel and acting on advice of criminal counsel. See Pecarsky v. Galaxiworld.com Ltd., 249 F.3d 167, 172 (2d Cir. 2001) (noting typical amount of time afforded between filing of motion for default motion and granting of the same, and observing that defendant's "inability to find new counsel is not surprising, and its failure to appear cannot accurately be described as willful").
- The Court made reference to, and relied on, the criminal charges against the Debtor at numerous points in its Default Judgment opinion of July 15, 2011 (Docket No. 102). Even accepting the premise that the mere filing of criminal against a party is a legitimate

factor to weigh when considering the merits of a civil case or the severity of sanctions to be entered against that party, those charges have been dismissed.

- In light of the dismissal of the criminal charges against the Debtor last fall, the question of the District Court's exercise of its discretion in refusing to enter a stay of the proceedings in this action pending resolution of the criminal complaint against the Debtor can certainly be seen in a different light. As the same District Court has observed,

> That the Constitution does not prevent litigants from prosecuting civil and criminal actions does not mean that courts have no power to do so. Rather, it is equally well-established that a court may decide in its discretion to stay civil proceedings when the interests of justice seem to require such action. Courts are afforded this discretion because the denial of a stay could impair a party's Fifth Amendment privilege against self-incrimination, extend criminal discovery beyond the limits set forth in Federal Rule of Criminal Procedure 16(b), expose the defense's theory to the prosecution in advance of trial, or otherwise prejudice the criminal case. A stay may be entered to address the interests of a defendant who faces the choice of being prejudiced in the civil litigation if he asserts his Fifth Amendment rights or prejudiced in the criminal litigation if those rights are waived. . . .
>
> There is no question that a court has discretion to stay a civil litigation even in favor of a pending investigation that has not ripened into an indictment. Rather, each case must be evaluated individually in a case-by-case determination, with the basic goal being to avoid prejudice. Courts have accordingly exercised their discretion to stay civil forfeiture proceedings even where no party to those proceedings has been indicted.

In re 650 Fifth Ave., 1:08-CV-10934-RJH, 2011 WL 3586169 (S.D.N.Y. Aug. 12, 2011) (citations and internal quotes omitted); accord, In re AOL Time Warner, Inc., Sec. & "Erisa" Litig., 02 CV. 5575 (SWK), 2007 WL 2741033 (S.D.N.Y. Sept. 20, 2007).

- There is a legitimate question to be raised, as a matter of substantive trademark law, regarding the sufficiency of the Court's determination, in its default judgment opinion, that the trademarks in question were "famous" or that this case constitutes a appropriate application of the anticounterfeiting provisions of the Lanham Act.

- The Court found that "there is no evidence that defendants reaped any profit from their infringing conduct," Order dated July 15, 2011 (Docket No. 102) at 6, nor is there any proof of damage to plaintiffs. Yet the Court imposed a $1.25 million judgment against a party it had already found was entitled to proceed *in forma pauperis*. The magnitude of this award of statutory damages is a significant departure from like cases. See Lyons P'ship, L.P. v. D & L Amusement & Entm't, Inc., 702 F. Supp. 2d 104, 117 (E.D.N.Y. 2010) ("Where the infringement has been shown to be willful, a statutory award should incorporate a compensatory as well as a punitive component to discourage further wrongdoing by the defendants and others. In similar situations courts in this circuit have awarded $25,000 per infringing mark or group of marks.")

It is respectfully submitted that these are among the legitimate issues that are being placed before the Circuit Court of Appeals, and that the Court should not accede reflexively to plaintiffs' insistence that no aspect of the default judgment from which the Debtor appeals is amenable to appellate scrutiny.

RELIEF REQUESTED

I. Relief from the Automatic Stay is Warranted Under 11 U.S.C. § 362(d)(1)

20. The Debtor seeks relief from the automatic stay, to which it is entitled, to proceed with an appeal of the District Court's Judgment. Section 362(d)(1) of the Bankruptcy Code provides that:

> (d) On request of a party in interest after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay –
>
> (1) for **cause**, including the lack of adequate protection of an interest in property of such party in interest;...

11 U.S.C. § 362(d) (emphasis added). Under the application of §362(d)(1), relief from the automatic stay with respect to the Debtor is warranted for "cause."

21. Courts have often found to permit "litigation to be concluded in another forum, particularly if the nonbankruptcy suit involves multiple parties or is ready for trial." Lawrence P. King, COLLIER ON BANKRUPTCY (15th ed. 2006) at 362.07[3][a]; see also In re Sonnax Indus., Inc. v. Tri Component Prods. Corp., 907 F.2d 1280 (2d Cir. 1990), In re Castlerock Properties, 781 F.2d 159 (9th Cir. 1986); In re Curtis, 40 B.R. 795 (Bankr. D. Utah 1984).

22. Lifting the stay for cause is merited because the Debtor has not had the opportunity to defend himself on the merits in the District Court, yet Guggenheim filed the Adversary Proceeding in this Court, seeking a ruling that certain debt is nondischargeable. This is precisely a circumstance under which lifting the automatic stay for cause is appropriate, as to do otherwise would result in a depletion of resources, both for the Court and for the Debtor: Because Guggenheim's Complaint is predicated entirely on the Judgment, discovery and trial in the Adversary Proceeding would be a waste of the Court's time should the Judgment be overturned on appeal.

The Sonnax Factors Compel Relief From the Automatic Stay

23. As the Court is aware, in addition to the recognized fact patterns in multiple jurisdictions that courts have determined to constitute "cause" for lifting the automatic stay under §362(d)(1), such as permitting litigation to conclude in another forum, the United States Court of Appeals for the Second Circuit in In re Sonnax Indus., Inc. v. Tri Component Prods. Corp., 907 F.2d 1280, 1286 (2d Cir. 1990) (hereinafter "Sonnax") referenced twelve specific factors to be weighed in deciding whether the automatic stay should be lifted to permit litigation to continue in another forum. See Sonnax at 1286, citing In re Curtis, 40 B.R. 795. These factors are:

> (1) whether the 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 interests 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 a judicial lien avoidable by the debtor;
> (10) the interests of judicial economy and the expeditions and economical resolution of litigation;
> (11) whether the parties are ready for trial in the other proceedings; and
> (12) impact of the stay on the parties and the balance of harms.

Id.

24. Of course, not all of the twelve factors will be relevant in every case, and, accordingly, not all of the factors are relevant to appealing the Judgment. See Mazzeo v. Lenhart (In re Mazzeo), 167 F.3d 139, 143 (2d Cir. 1999), In re Enron Corp., 306 B.R. 465, 476 (Bankr.S.D.N.Y. 2004). The factors that are relevant here, however, weigh strongly in favor of lifting the automatic stay with respect to allowing the Debtor to appeal the Judgment to the Second Circuit.

25. Perhaps most importantly, if the automatic stay is lifted and the Debtor prevails, the Second Circuit ruling will axiomatically lead to dismissal of the Adversary Proceeding. Guggenheim's Complaint provides for each cause of action that "The claims and findings

embodied in the Judgment and the Fees Order…" set forth a prima facie case for nondischargeability. Complaint, ¶¶ 40, 43, 45. Should the Judgment be overturned, the Complaint would fail to state a cause of action for which relief can be granted. Lifting the stay would thus result in a complete resolution of the Adversary Proceeding.

26. Additionally, both the interests of judicial economy as well as the balance of harm to the parties militates lifting the automatic stay to allow the Debtor to appeal to the Second Circuit while retaining a hold on proceedings in this action. As described above, there is no reason to deplete the Court's resources or the Debtor's estate by litigating the Adversary Proceeding when the issue to be determined in the Adversary Proceeding – whether the Debtor had a full and fair opportunity to litigate in the District Court – will be determined on appeal.[1]

27. Moreover, the Debtor is substantially prejudiced by an inability to appeal the Judgment. The criminal charges that prevented the Debtor from defending himself in the District Court have been dismissed.

28. Furthermore, until the appeal is resolved, the Debtor remains deprived of his right to enjoy the use of his own name. The appeal should be allowed to proceed.

II. The Adversary Proceeding Should Be Adjourned Pursuant to § 105.

29. Section 105 of the Bankruptcy Code invests the court with broad equitable powers to protect its jurisdiction and the property of the estate from any interference with the administration of the debtor's estate under the aegis of the court. 11 U.S.C. § 105.

30. This Court, in In re South Side House, LLC, No. 09-43576-ESS, 2012 WL 907758 (Bankr.E.D.N.Y. March 16, 2012), recently discussed the bankruptcy court's power to stay adversary proceedings:

[1] Indeed, Guggenheim has already wasted the Debtor's and the Court's resources and time by refusing to consent to the relief requested herein, to which the Debtor is plainly entitled.

> The bankruptcy court's power to stay adversary proceedings has been recognized in several settings. For example, one court stayed the non-arbitral claims in an adversary proceeding pending the outcome of the arbitration. See Kittay v. Landegger (In re Hagerstown Fiber Ltd. P'ship), 277 B.R. 181, 199 (Bankr.S.D.N.Y. 2002). Another court found that the bankruptcy court did not abuse its discretion in declining to stay an adversary proceeding pending the outcome of a RICO action. See Uni–Rty Corp. ., 1998 WL 299941, at *7 (citing Landis, 299 U.S. at 254–55).
>
> A stay may be appropriate for a variety of reasons. For example, a stay may be appropriate to promote judicial economy, or to avoid confusion and possible inconsistent results, but only if it will not cause "undue hardship or prejudice against the plaintiff." Hagerstown Fiber, 277 B.R. at 199 (internal quotation marks omitted). At the same time, a court may decline to issue a stay where the outcome of a proceeding "is uncertain as to possible success and timing." Allan Applestein Ttee FBO D.C.A. Grantor Trust v. Province of Buenos Aires, 2003 WL 1990206, at *4 (S.D.N.Y. Apr.29, 2003). In that case, the court granted the plaintiff's motion for summary judgment, but stayed execution of the judgment pending resolution of other matters. Province of Buenos Aires, 2003 WL 1990206, at *5 .

Id. at *21.

31. This Court listed factors to be considered in weighing whether to stay an action: "(1) the private interests of the plaintiffs in proceeding expeditiously with the civil litigation as balanced against the prejudice to the plaintiffs if delayed; (2) the private interests of and burden on the defendants; (3) the interests of the courts; (4) the interests of persons not parties to the civil litigation; and (5) the public interest." Id. (citing Kappel v. Comfort, 914 F.Supp. 1056, 1058 (S.D.N.Y. 1996) (quoting Volmar Distribs. v. N.Y. Post Co., 152 F.R.D. 36, 39 (S.D.N.Y. 1993)).

32. Here, the Adversary Proceeding seeks a determination that certain debt is non-dischargeable based entirely on the District Court's Judgment. Staying this action while the Judgment is appealed will not prejudice Guggenheim, as the Debtor's Chapter 7 case will not

reach the discharge stage during the pendency of the Appeal. Moreover, the burden on the Debtor and the interest of the Court both weigh heavily in favor of a stay. Should the Judgment be reversed, the Adversary Proceeding would be subject to dismissal, as the entire complaint is premised on the findings set forth in the Judgment. The Debtor should not be prejudiced in defending a litigation that may have no basis in law.

33. Accordingly, the Court should exercise its discretion and stay the Adversary Proceeding while the Judgment is appealed.

WAIVER

34. Because the authority for the relief requested is cited herein, the Debtor respectfully requests that the Court waive the requirement of Local Rule 9013-1(b) that a separate memorandum of law be submitted herewith.

CONCLUSION

WHEREFORE, the Debtor prays that the automatic stay be lifted so that he may appeal the Judgment to the Second Circuit Court of Appeals, that the Adversary Proceeding be stayed during the pendency of the appeal, and that the Court grant such other and further relief as is just and proper.

Dated: New York, New York
May 21, 2012

Goetz Fitzpatrick LLP
Attorneys for the Debtor

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