AMERICAN BANKRUPTCY INSTITUTE

Central States Bankruptcy Workshop

Business Track

Mass Torts and Insurance Issues

Gregory M. Gotwald
Plews Shadley Racher & Braun LLP | Indianapolis

Robert P. Handler
Commercial Recovery Associates, LLC; Chicago

Hon. Robyn L. Moberly
U.S. Bankruptcy Court (S.D. Ind.) | Indianapolis

Peter J. Roberts
Cozen O'Connor | Chicago

Melissa M. Root
Jenner & Block LLP | Chicago

CONCURRENT SESSION

2023

ABI Central States—Mass Torts and Insurance Issues

Friday, June 9: 11:00-12:15
Saturday, June 10: 9:15-10:30

Judge Robyn Moberly, United States Bankruptcy Court for the Southern District of Indiana

Greg Gotwald, Plews Shadley Racher & Braun

Peter Roberts, Cozen O'Connor

Melissa Root, Jenner & Block

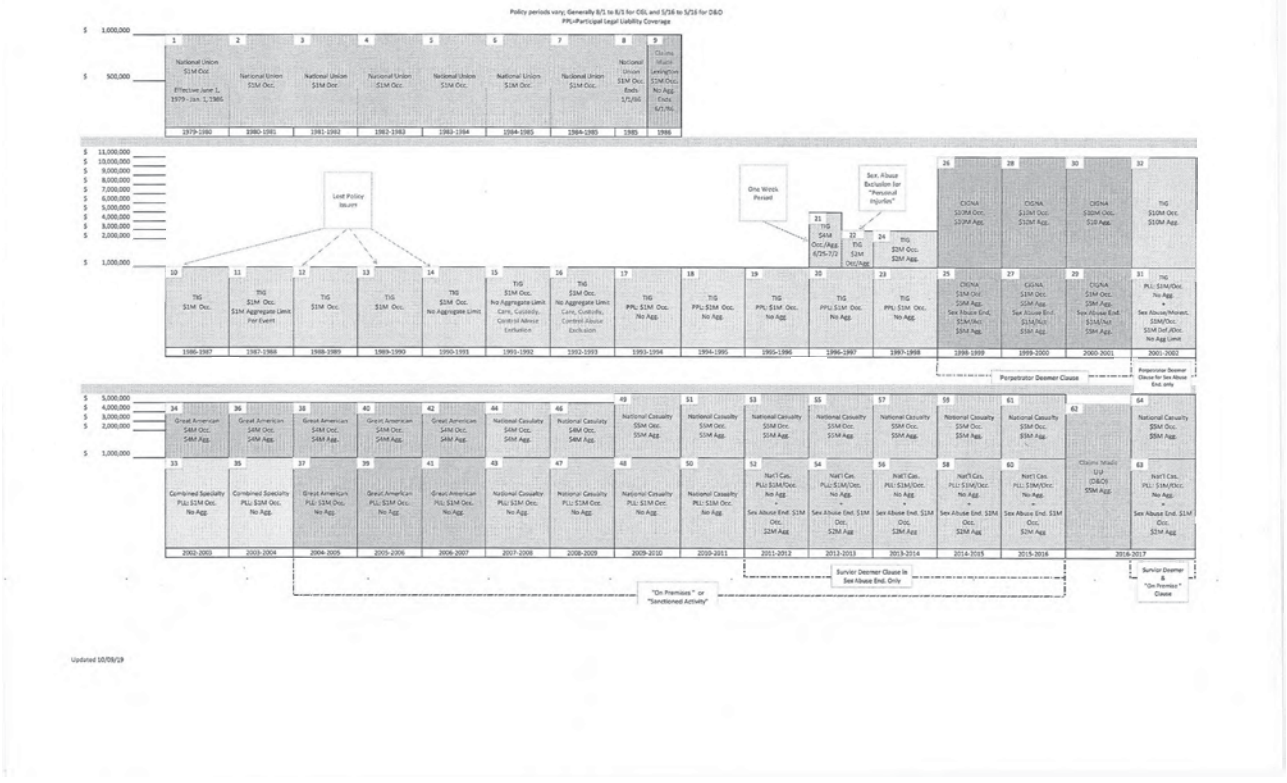
TOPICS:

- Benefits of a Bankruptcy Court as a Forum to Resolve Mass Tort/Insurance Issues, *In re USA Gymnastics*, a case study
- Insurance Issues in Mass Tort Cases
- What is next? *LTL, Aearo, Purdue*

Key Insurance Issues Mass Tort Cases

- Identifying applicable polices and ownership/property of the estate issues in policies versus proceeds
- What insurance asses constitute "property of the estate"?
- Importance of State Law
- Resolving issues and determining coverage among multiple insurers (*see attached sample coverage chart*)
- Use of Adversary Proceedings to determine coverage at the outset of the case
- Policy buy-backs and the rights of additional insureds—a means to support releases
- Bankruptcy costs as "costs of defense" (*see attached brief and opinion from In re USA Gymnastics*)

SAMPLE COVERAGE CHART



IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

In re:	)	Chapter 11
	)	
USA GYMNASTICS, INC.	)	Case No. 18-09108-RLM-11
	)	
Debtor.	)	Adv. Proc. No. 1:19-ap-50012
	)	
	)	
USA GYMNASTICS, INC.	)	
	)	Hon. Robyn L. Moberly
Plaintiff,	)	Chief Judge
	)	
vs.	)	
	)	
ACE AMERICAN INSURANCE COMPANY f/k/a CIGNA INSURANCE COMPANY, GREAT AMERICAN ASSURANCE COMPANY, LIBERTY INSURANCE UNDERWRITERS INC., NATIONAL CASUALTY COMPANY, RSUI INDEMNITY COMPANY, TIG INSURANCE COMPANY, VIRGINIA SURETY COMPANY, INC. f/k/a COMBINED SPECIALTY INSURANCE COMPANY, WESTERN WORLD INSURANCE COMPANY, and DOE INSURERS,	)	
	)	
Defendants.	)	

USA GYMNASTICS' MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST CERTAIN INSURERS TO RECOVER DEFENSE COSTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes & Rules

Secondary Authority

INTRODUCTION

This Court recently recognized that "the bankruptcy process has systemic advantages" for resolving claims in mass tort litigation. [Case No. 18-09108-RLM-11 ("**Bankr.Dkt.**") 1021 at 7.] One commentator explains why:

> Chapter 11 "offers a structured system to manage multiple liabilities and has provided a forum for companies with massive liabilities to attempt to do so." Courts in bankruptcy proceedings may employ procedural mechanisms similar to those employed by nonbankruptcy courts to resolve common issues underlying multiple claims. One of the major advantages of such proceedings is that threshold issues that may be dispositive of whole categories of claims can be addressed in a uniform fashion in a single forum. Such centralized resolution of claims is difficult to achieve in the civil litigation system and has significant benefits for the consistent and efficient disposition of claims.[1]

The "systematic advantages" that a chapter 11 defense provides is the reason why USA Gymnastics ("**USAG**") filed its chapter 11 bankruptcy case. Simply put, USAG filed for bankruptcy because individualized litigation of each of the survivors' claims was not working. The sheer number of lawsuits asserting claims based primarily on Larry Nassar's actions—at least 109 cases involving over 380 plaintiffs pending in 14 different courts as of USAG's petition date—was unsustainably costly and was precluding USAG from carrying out its mission.

Continued litigation in the civil court system advantaged no one. USAG's limited insurance coverage meant those survivors who won the race to the courthouse and prevailed would recover. Those whose cases were not selected first for trial faced the prospect that insurance could run out, leaving them unpaid even if they prevailed. USAG's insurance carriers faced years of expense defending these suits and paying claims with the only finality occurring when policies were exhausted and litigation over whether those policies had in fact been exhausted itself ended. And for USAG, continued civil litigation would distract from its most

[1] D. Smith, *Resolution of Mass Tort Claims in the Bankruptcy System*, 41 U.C. DAVIS L. REV. 1613, 1634 (2008).

important goals of resolving survivors' claims equitably and revamping its organization to protect its athletes and members. Before bankruptcy, USAG participated in multiple rounds of mediation. But those multiple efforts failed because not all of the defendants were at the settlement table and there was no mechanism available in the civil courts that could provide finality and no workable settlement structure was anywhere in sight.

Faced with these defense problems, USAG, like many other entities facing mass tort liability, elected to file a chapter 11 case. USAG's bankruptcy became its defense strategy. USAG had no financial need to and never would have filed for bankruptcy but for the sexual abuse lawsuits. USAG had no secured or unsecured debt to restructure, no executory contracts to reject, and none of the other typical financial problems that cause companies to file for chapter 11 relief. The one and only reason USAG filed for bankruptcy was the sexual-abuse litigation.

Once USAG filed for bankruptcy, virtually all of the work that USAG's bankruptcy counsel performed had as its sole purpose the goal of resolving the survivors' claims. Bankruptcy counsel:

(i) prepared the paperwork necessary to establish a bar date so that the universe of claims could be determined and so that any resolution could achieve finality for the Defense Cost Insurers;

(ii) negotiated a claim form with the insurance carriers and the survivors that obtained information from each survivor that the insurance companies requested so as to avoid unnecessary (and costly) discovery about the substance of survivors' claims and to provide sufficient information to allow for a settlement of the claims;

(iii) consulted with the insurance carriers and survivors about a proposed mediator, and prepared the necessary paperwork to obtain the mediator's appointment and to start the mediation process;

(iv) worked with the insurance carriers and survivors to select a Future Claimants' Representative to address unknown future claims and provide finality for the Defense Cost Insurers;

(v) negotiated a stay of all third-party litigation and prosecuted an action to obtain that stay over the objection of certain parties, thereby saving the insurance carriers additional money and more importantly facilitating the mediation process;

(vi) obtained the agreement of third parties, such as the United States Olympic and Paralympic Committee ("**USOPC**"), to participate in the mediation, thereby avoiding one of the primary problems that doomed the pre-bankruptcy mediations;

(vii) reviewed the Survivors' claims;

(viii) produced documents to the Survivors so that they had the information they stated they needed to proceed to mediation;

(ix) prepared mediation statements and participated in mediations;

(x) drafted settlement documents; and

(xi) objected successfully to the class claims filed by certain survivors.

In short, all of bankruptcy counsel's work has been geared toward resolving the survivors' claims. That is because, again, the survivors' claims are the only reason USAG is in bankruptcy.

The decision to move the survivors' individual claims into the bankruptcy court greatly advantaged the carriers because bankruptcy has superior features for resolving mass tort claims. Bankruptcy also saved them a tremendous amount of money in defense costs as it resulted in all of the Nassar claims against both of their insureds—USAG and USOPC—being stayed. The bankruptcy meant that two firms would defend USAG in the bankruptcy case, instead of multiple firms defending dozens of lawsuits filed by hundreds of plaintiffs in jurisdictions around the country.

Nonetheless, when USAG asked its insurance carriers to pay for its bankruptcy defense, they refused. The insurers refused even though these same insurers paid for defense counsel to

perform the same or very similar tasks in the civil courts before bankruptcy (*i.e.*, reviewing claims, participating in mediation, producing documents, and objecting to claims). The insurers' position that defense costs are not recoverable if counsel performs the defense work in bankruptcy court is as illogical as it is unfair. Like USAG's pre-bankruptcy defense counsel, the sole purpose of bankruptcy counsel's work is to resolve the survivors' claims.

That makes the fees and expenses of bankruptcy counsel defense costs under Indiana law. Indiana courts define defense costs as expenses incurred to minimize liability and resolve claims. *Thomson v. Ins. Co. of N. Am.*, 11 N.E.3d 982, 1026–27 (Ind. Ct. App. 2014) (citing *Great W. Cas. Co. v. Marathon Oil Co.*, 315 F. Supp. 2d 879, 882 (N.D. Ill. 2003) (Illinois law)); *see also Domtar, Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724, 738–39 (Minn. 1997). USAG would never have filed for bankruptcy except as a way to defend against and resolve the hundreds of pending claims, making its attorneys' work in the bankruptcy court a reimbursable defense cost.

Accordingly, for all of the reasons set forth herein, USAG moves this Court to declare that Ace American Insurance Company f/k/a Cigna Insurance Company, Great American Assurance Company, National Casualty Company, TIG Insurance Company, and Virginia Surety Company, Inc. f/k/a Combined Specialty Insurance Company (the "**CGL Insurers**") and Liberty Insurance Underwriters, Inc. ("**LIU**," together with the CGL Insurers, the "**Defense Cost Insurers**") are required to pay USAG's attorneys' fees and the other defense costs that it is incurring in connection with its chapter 11 case. USAG asks that the Court also enter a judgment in the amount of the defense costs incurred in connection with the bankruptcy to date—$5,954,098.36 as of the filing of this Motion—plus prejudgment interest through the date of any judgment—$301,853.49 as of the filing of this Motion and $1,279.28 per day thereafter.

Immediate relief is necessary for the survival of USAG. The CGL Insurers strongly encouraged that USAG file bankruptcy as a means to resolve the sexual abuse claims. When USAG did so, the Defense Cost Insurers reaped the benefits, including obtaining a mechanism for finality, bringing other defendants (and their insurers) to the table, and reducing fees and expenses. The Defense Cost Insurers now want to stick USAG with the bill, which has created severe financial difficulties for a not-for-profit organization that had no such problems before its chapter 11 case. This is fundamentally unfair, but more importantly is contrary to the terms of the insurance policies USAG purchased. The Defense Cost Insurers should not be allowed, through their delay and recalcitrance, to drive USAG into insolvency. No one benefits from that—least of all the survivors—who have waited far too long for a resolution of this case. If the Defense Cost Insurers are made to continue paying for USAG's defense, as required under their policies, perhaps they will realize that forestalling settlement is no longer to their advantage. The Court should enter judgment as quickly as possible.

STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

I. USAG And Its Applicable Insurance Policies.

USAG is a 501(c)(3) not-for-profit organization. The USOPC and the Fédération Internationale de Gymnastique have designated USAG as the national governing body for the sport of gymnastics in the United States. USAG selects and trains the United States gymnastics teams for the Olympic Games and World Championships, among other competitions. USAG also sanctions approximately 4,000 competitions and events throughout the United States each year. More than 200,000 athletes, professionals, and clubs are members of USAG.

For at least five years before filing its chapter 11 petition, USAG was solvent on a balance sheet basis and was paying its debts as those debts generally came due. [Adv.Dkt. 401-6, Barron Decl., at ¶4.] Before filing for bankruptcy, USAG purchased insurance policies from each

of the six Defense Cost Insurers. The policies USAG purchased all impose on the issuing carrier a duty to defend claims that potentially fall under the policy's coverage.[2] This Court has ruled in a related summary-judgment matter that LIU's policy, which is a D&O policy, imposes a duty to defend on LIU. [Adv.Dkt. 260, 310.] Each of the applicable policies also provide that "[b]ankruptcy ... of the insured's estate will not relieve us of our obligations...."[3]

II. The Sexual-Abuse Litigation.

Starting in 2016, individuals began suing USAG and others for claims related to Nassar's abuse of his patients. As of December 5, 2018, the date on which USAG filed its chapter 11 petition, there were at least 109 civil lawsuits, involving over 380 plaintiffs, pending in 14 different state and federal courts seeking to hold USAG liable for claims primarily related to Nassar's sexual abuse. [Adv.Dkt. 401-7, Gass Decl., ¶4.]

As these lawsuits were filed, USAG made a demand on the applicable insurer to provide a defense. The Defense Cost Insurers agreed to defend the bulk of the sexual-abuse lawsuits. The CGL Insurers do not deny that these are "suits" seeking "damages" that could be covered by the policies. [Adv.Dkt. 401-1, Gotwald Decl., ¶8.] Instead, the CGL Insurers have reserved the right to deny coverage for indemnity amounts on various grounds, including the policies' expected-or-intended exclusions. [Adv.Dkt. 401-4.] Under Indiana law, the CGL Insurers' reservation of

[2] The policies are attached as exhibits to the adversary complaint and the applicable duty to defend language for each policy is found at the following pages: Adv.Dkt. 2-5, at 5, 39, 79, 124, 165, 207, 259, 296, 337, 399, 521; Adv.Dkt. 2-6, at 65; Adv.Dkt. 2-7, at 19; Adv.Dkt. 2-8, at 18, 327, 464; Adv.Dkt. 2-9, at 609, 750, 898; Adv.Dkt. 2-10, at 23, 142; Adv.Dkt. 2-11, at 39, 160; Adv.Dkt. 2-12, at 34, 147, 242; Adv.Dkt. 2-13, at 43, 145; Adv.Dkt. 2-14, at 37; Adv.Dkt. 401-6, at 25. Certain of the TIG policies were lost, but in the litigation over the terms of lost TIG policies, TIG has not disputed that the lost policies impose a duty to defend. [*See, e.g.*, Adv.Dkt. 204, 205, 245.]

[3] [Adv.Dkt. 2-5, at 7, 45, 85, 128, 171, 213, 256, 301, 342, 407, 528; Adv.Dkt. 2-6, at 73; Adv.Dkt. 2-7, at 27; Adv.Dkt. 2-8, at 26, 334; Adv.Dkt. 2-9, at 471, 618, 759, 907; Adv.Dkt. 2-10, at 31, 150; Adv.Dkt. 2-11, at 47, 168; Adv.Dkt. 2-12, at 43, 156, 281; Adv.Dkt. 2-13, at 52, 155; Adv.Dkt. 2-14, at 47, 136.]

rights gives USAG the right to control its defense. [*E.g.*, *id.* at 1, 44]; *Armstrong Cleaners, Inc. v. Erie Ins. Exch.*, 364 F. Supp. 2d 797, 805–08 (S.D. Ind. 2005).

LIU is USAG's D&O insurer for the Nassar-related claims, including for the Nassar-related lawsuits. [Adv.Dkt. 2-14, at 132 (stating that LIU has "the right and duty . . . to defend any Claim").] LIU's policy imposes a duty to defend on LIU, and it is under a court order to defend the Nassar-related lawsuits. [Adv.Dkt. 260, 310.] LIU has also admitted that the sexual abuse lawsuits are "Claims" under its policy that it must defend. [Adv.Dkt. 401-4, at 8–11; *see also* Adv.Dkt. 131, at 12, 24–25; Adv.Dkt. 146, at 8, 47; Adv.Dkt. 163, at 8–9 (arguing that certain matters are not "Claims," but electing not to take that position with respect to the sexual abuse lawsuits).]

III. The Defense Cost Insurers' Payment For USAG's Pre-Bankruptcy Defense Of The Sexual Abuse Lawsuits.

In 2017, USAG retained the law firm of Miller Johnson to defend it against the initial lawsuits brought in Michigan. As the number of lawsuits grew, Miller Johnson coordinated a national defense of all of the lawsuits, supervising the activity of seven different law firms defending claims in 14 different courts. [Adv.Dkt. 401-7, Gass Decl., ¶¶4–5.]

Miller Johnson and the other firms that USAG hired to provide it with a defense in the sexual abuse lawsuits performed the following types of defense work: (i) reviewing the survivors' complaints to determine the nature of the claims asserted; (ii) preparing motions to dismiss and other necessary court filings; (iii) gathering and preserving the documents that USAG had related to the claims; (iv) producing documents and providing other discovery; (v) participating in the selection of a mediator and negotiating the terms of a mediation protocol; (vi) negotiating the contents of a mediation form for participating survivors to complete; (vii) preparing mediation statements; (viii) participating in mediation sessions; (ix) coordinating

with defense counsel for other defendants; and (x) advising the client USAG as to how best proceed to resolve the claims. [*Id.* ¶6.]

As the number of lawsuits grew, a number of entities commenced investigations into USAG's handling of the Nassar claims, including the United States Congress, the Indiana Attorney General, and the USOPC, which hired the law firm of Ropes & Gray to perform an independent investigation. Miller Johnson also coordinated USAG's responses to these inquiries as these investigations impacted the pending litigation and supervised the two additional firms that USAG hired to directly handle these investigations. [*Id.* ¶7.] The Defense Cost Insurers paid Miller Johnson's and the other counsel's bills for the above-described litigation. [*Id.* ¶8.]

IV. The Pre-Bankruptcy Mediation.

USAG and its insurers tried several times to negotiate a resolution of the sexual abuse survivors' lawsuits through mediation. [Adv.Dkt. 354, at 2.] The last pre-bankruptcy mediation was scheduled for October, 2018, but that mediation was cancelled. [Adv.Dkt. 401-7, Gass Decl., ¶9.]

The four pre-bankruptcy mediation sessions did not result in a settlement for two primary reasons. First, USOPC, which has claimed a right to coverage under USAG's insurance policies, did not participate. Thus, USAG's insurers could not settle the claims for all of their insureds. Second, individualized litigation did not provide an effective means for finally resolving all sexual abuse claims. Following Michigan State University's settlement with certain survivors, a second group of plaintiffs, referred to as the "wave 2 plaintiffs," sued Michigan State University (and in many instances USAG and USOPC as well). The problem is that any settlement could produce a third wave of plaintiffs. [*Id.* ¶10.]

V. USAG's Chapter 11 Filing.

Faced with defending 109 individual lawsuits involving over 380 plaintiffs pending in 14 different courts and a failed mediation, on November 9, 2018, USAG hired the law firm of Jenner & Block to explore other dispute resolution mechanisms. [Adv.Dkt. 401-8, Panos Decl., ¶3.] Partners Dean Panos, a nationally recognized expert in class action and mass tort defense, and Catherine Steege, chair of the firm's Restructuring Department and a fellow of the American College of Bankruptcy and a conferee of the National Bankruptcy Conference, led the engagement. [*Id.* ¶2.] USAG's Defense Cost Insurers strongly encouraged USAG to file a chapter 11 petition.

On December 5, 2018 (the "**Petition Date**"), USAG chose to defend the lawsuits and seek a global resolution of the survivors' claims by filing for bankruptcy. [Bankr.Dkt. 1.] As USAG's former chief financial officer stated in his Declaration in support of the first day motions, USAG believed the Bankruptcy Court provided "the best forum in which to implement appropriate procedures to equitably determine the rights to and allocate recoveries to survivors who have asserted claims against USAG." [Bankr.Dkt. 8, ¶12.] The Bankruptcy Court agreed, stating at one hearing: "[T]he bankruptcy court is the best place to resolve particularly this mass tort litigation." [Adv.Dkt. 401-10, at 7.]

USAG would not have filed for bankruptcy absent the sexual abuse lawsuits. As of its Petition Date, USAG was current in paying all of its ordinary course business creditors. Virtually all of these creditors are persons and companies whose current bills were not yet due for payment as of the Petition Date. Absent the sexual-abuse lawsuits, USAG was solvent on a balance sheet basis and would have had no reason to file for bankruptcy. [Adv.Dkt. 401-6, Barron Decl., ¶4.]

On December 19, 2019, the United States Trustee appointed the Additional Tort Claimants Committee Of Sexual Abuse Survivors (the "**Survivors Committee**"). [Bankr.Dkt.

97.] All nine of the women the United States Trustee appointed to the Survivors Committee had sued USAG asserting claims relating to sexual abuse. [Adv.Dkt. 401-7, Gass Decl., ¶11.] (Marcia Frederick Blanchette, No. 18-cv-11299 (D. Mass.); Alyssa Corn, No. 18-cv-1038 (W.D. Mich.); Rachel Denhollander, No. 17-cv-29 (W.D. Mich.); Kenzie Gassaway, No. 17-cv-222 (W.D. Mich.); Sarah Klein, No. 17-cv-222 (W.D. Mich.); Alexandra Raisman, No. 18-cv-2479 (N.D. Cal.); Kyla Ross, No. 30-2018-01019592 (Cal. Super. Ct.); Tasha Schwikert-Warren, No. 18-st-cv-2706 (Cal. Super. Ct.); Jessica Thomashow, No. 17-cv-29 (W.D. Mich.)). The nine members of the Survivors' Committee are represented individually in their lawsuits by law firms that collectively represent 325 of the survivors pursing claims against USAG as of its Petition Date. The law firms representing the members of the Survivors Committee were the same lawyers that led the negotiations for the survivors in the settlement discussions that occurred before the Petition Date. These same lawyers now represent 380 of the survivors who filed claims in USAG's bankruptcy case. [Adv.Dkt. 401-7, Gass Decl., ¶11.]

The United States Trustee did not appoint a committee of general unsecured creditors in USAG's chapter 11 case. No general unsecured creditors have asked for the appointment of an unsecured creditors committee to represent their interests in the chapter 11 case. [*See generally* Bankr.Dkt.]

VI. USAG's Defense Cost Insurers Refuse To Pay For USAG's Chapter 11 Defense.

Before filing its Chapter 11 petition, USAG asked its Defense Costs Insurers to pay for the costs of bankruptcy as a defense cost. [Adv.Dkt. 401-2, at 1–6.] [redacted]

[redacted]

[Adv.Dkt. 401-5, at 1.] In response to this request, none of the Defense Cost Insurers objected to USAG's decision to file for chapter 11 or asked USAG not to do so. [Adv.Dkt. 401-1, Gotwald Decl., ¶6.] [redacted]

[redacted] [Adv.Dkt. 401-5, at 1.]

On January 18, 2019, USAG again asked its Defense Cost Insurers to pay for the cost of USAG's chapter 11 defense. [Adv.Dkt. 401-3, at 1–2.] To support its request, USAG provided a litigation budget prepared by its primary defense counsel and a budget prepared by its bankruptcy counsel for the reorganization. [*Id.* at 3–11.] USAG explained that, if the abuse claims proceeded outside of bankruptcy, the estimated cost of defense in Michigan alone was $18.4 million, costs which the insurers would clearly be obligated to pay. [*Id.* at 1.] Using estimates for the California litigation ($3,239,625), the Insurers' defense exposure grows to approximately $21.6 million [Adv.Dkt. 401-7, Gass Decl., ¶12.] And these amounts did not include the costs of defending the individual suits pending in the other states.

With the tools available in bankruptcy, the total estimated cost of defending USAG shrunk substantially, to around $6 million (assuming resolution was reached in 2019). [Adv.Dkt. 401-3, at 1–2.] USAG demonstrated that these savings, unavailable outside of bankruptcy, reduced USAG's defense costs. [*Id.*] Although they did not dispute these savings, to date, the Defense Cost Insurers have refused to pay for any of USAG's bankruptcy defense. [Adv.Dkt. 401-1, Gotwald Decl., ¶10.]

VII. USAG's Defense Of The Survivors' Claims In Its Chapter 11 Case.

All of the work that Jenner & Block has performed to date in USAG's chapter 11 case is either: (i) directly comparable to and for the same purpose as the defense work performed in the pre-bankruptcy civil lawsuits; or (ii) only made necessary because of the chapter 11 filing and would not have been done but for the chapter 11 filing.

A. Negotiating The Sexual Abuse Claim Form, Filing the Claims Bar Notice, And Working To Ensure That The Notice Was Broadly Disseminated.

Before bankruptcy, the Defense Cost Insurers reimbursed USAG for all of the costs related to obtaining detailed mediation forms from all known survivors. [Adv.Dkt. 401-7, Gass Decl., ¶13.] Post-bankruptcy, the Defense Cost Insurers have refused to reimburse USAG for this same work accomplished through the proof of claim process even though the goal of the chapter 11 case, a goal which greatly benefits the Defense Cost Insurers, is a settlement of all survivors' claims through a negotiated settlement. [Adv.Dkt. 401-1, Gotwald Decl., ¶¶4, 10.]

USAG's Defense Cost Insurers have refused to pay for these defense costs even though they asked USAG to perform this work. On January 29, 2019, Michael Marick, counsel to Great American, sent an e-mail to USAG's counsel, in which he stated:

> The five USAG insurers have conferred and jointly propose the attached claim form for your consideration. *You will note that it substantially tracks the substance of the questionnaire used for prior mediations, with minor modifications which we hope and anticipate will not be controversial.* Kindly include all those insurer counsel copied on this email in your further communications. As always, we look forward to hearing from you and to working with you.

(emphasis added). USAG complied with this request. [Adv.Dkt. 401-9, Steege Decl., ¶6.] As this Court has noted in a recent decision: "[t]he debtor promptly asked the Court to set a claims bar date because it needed to know the number and amount of the sexual abuse claims and the amount of proceeds available from insurance policies to pay those claims." [*See* Bankr.Dkt. 1021 at 6.]

At the Defense Cost Insurers' request, USAG shared drafts of the motion and the sexual abuse proof of claim form with the Defense Cost Insurers. USAG also received and incorporated comments into the claim form from counsel for Combined Specialty, National Casualty, and TIG. USAG also shared drafts of the form with the Survivors' Committee. [Adv.Dkt. 401-9,

Steege Decl., ¶7.] On January 31, 2019, USAG filed the *Debtor's Motion For Order Establishing Deadlines For Filing Proofs Of Claim And Approving Form And Manner Of Notice Thereof* [Bankr.Dkt. 230] (the "**Bar Date Motion**"), in which it sought approval of the Insurer-requested specialized proof of claim form and a bar date within 60 days. USAG stated in the Bar Date Motion that "[g]iven that the Debtor and its insurers require certain information to assess the Sexual Abuse Claims that would not be provided if Survivors utilized the Official Forms, the Debtor seeks this Court's approval of the Proposed Sexual Abuse Proof of Claim Form." [Bar Date Motion, ¶53.]

The Survivors' Committee, the Indiana Attorney General, and certain survivors objected to the Bar Date Motion, and in particular to the length of the proof of claim form and the detail requested by the Insurers. [*See* Bankr.Dkts. 257, 261, 269.] Certain survivors objected that sixty days was not enough time to file claims. [Bankr.Dkt. 257.] Because USAG understood that a detailed proof-of-claim form and the establishment of a bar date were necessary for its Defense Cost Insurers to resolve the claims quickly and to avoid survivors having to respond to discovery and delayed recoveries, it pressed forward with the Bar Date Motion. [Adv.Dkt. 401-9, Steege Decl., ¶9.] Even after filing the Bar Date Motion, USAG continued to receive and incorporate comments from the Insurers on the form of the order, the proof of claim form, and the confidentiality agreement. [*Id.* ¶10.]

At the hearing on the Bar Date Motion, counsel for several of the Defense Cost Insurers addressed the Court:

> Good afternoon, Your Honor. Kevin Kamraczewski on behalf of [Combined Specialty]. I'd like to speak up for my client and the other insurers and say first of all, we're interested in expediting a resolution for the survivors. We have no interest in dragging this process out. *We are interested in using the proof of claim form which is basically modeled on the previously submitted forms in the former, earlier mediation process as exactly for what you said, Your Honor.* We want

> some fairness in the process. We want to be able to equally evaluate all the claims both those previously submitted and the ones that will be coming forward now.
>
> We have no interest in delaying the process by saying well, we'll start here and we'll ask further questions later. We'll start here and ask for some sample depositions. *The forms that were submitted in the previous mediation sessions* were sufficient for the insurance carriers to evaluate the claims in conjunction with the records received from USAG substantiating that Nassar or the individual survivor was at a particular event for example. *So this form in large part if filled out by the remainder of the claimants should allow us to fairly evaluate all the claims.*

[Bankr.Dkt. 331, at 52–53 (emphasis added).] Counsel for National Casualty and Great American also encouraged the Court to adopt the form that mirrored the pre-bankruptcy mediation form in substantial part. [*Id.* at 56–59.] The Court granted the Bar Date Motion and set April 29, 2019, as the Bar Date by which survivors of sexual abuse were required to file proofs of claim. [Bankr.Dkt. 301.]

USAG's counsel worked to ensure that notice was provided to every individual who might possibly make a claim. This Court held in a recent decision that:

> The debtor mailed notice of the bar date to more than 1,300 individuals. The debtor also sent notice to all known counsel for sexual abuse claimants ... The debtor emailed notice to more than 360,000 email addresses for former and current USAG members as well as placing the notice on its website, Facebook Twitter, and Instagram. Notice was published in USA today, certain gymnastics magazines, podcasts, and websites. The debtor also sent letters to each of its member gyms asking those facilities to post the notice and the claim form.

[Bankr.Dkt. 1021, at 3.] In total, 510 non-duplicative claims were timely filed by the Bar Date, and 12 non-duplicative sexual abuse claims have been filed late, one of which has not been deemed timely filed.[4] [Adv.Dkt. 401-9, Steege Decl., ¶12.] Of the claims filed by the Bar Date, 426 were filed by survivors who had previously sued USAG in lawsuits that the Defense Cost Insurers were defending. Of the late claims, 3 were filed by survivors who had previously sued

[4] In addition, 3 sexual abuse claims have been disallowed or withdrawn. [Bankr.Dkt. 722, 795, 1021.]

USAG in lawsuits that the Defense Cost Insurers were defending. [Adv.Dkt. 401-7, Gass Decl., ¶14.] Pursuant to §501 of the Bankruptcy Code, each of these claims started a contested proceeding that "is analogous to the filing of a complaint in a civil action, with the bankrupt's objection the same as the answer." *Matter of Cont'l Airlines*, 928 F.2d 127, 129 (5th Cir. 1991).

The Defense Cost Insurers paid for USAG's defense counsel to perform this same work outside of bankruptcy—*i.e.*, negotiating the mediation form and otherwise working to ensure that all known survivors (some of whom had not filed suit at the time of the first mediation) had the form and completed it. [Adv.Dkt. 401-7, Gass Decl., ¶13.] Nonetheless, the Defense Cost Insurers have refused to reimburse USAG's counsel for performing the same defense work in the bankruptcy case, even though the Defense Cost Insurers asked USAG to undertake this work as part of USAG's defense and even though this work was necessary to ensure finality for the Defense Cost Insurers. [Adv.Dkt. 401-1, Gotwald Decl., ¶¶4, 10; Adv.Dkt. 401-9, Steege Decl., ¶¶5–20.]

B. Selection Of A Mediator.

Before bankruptcy, the Defense Cost Insurers reimbursed USAG for all of the costs related to selecting a mediator and establishing mediation protocols. [Adv.Dkt. 401-7, Gass Decl., ¶15.] Post-bankruptcy, the Defense Cost Insurers have refused to reimburse USAG for this same work even though the goal of the chapter 11 defense, a goal which greatly benefits the Defense Cost Insurers, is a negotiated settlement of the survivors' claims. [Adv.Dkt. 401-1, Gotwald Decl., ¶¶4, 10.]

On February 22, 2019, counsel to National Casualty wrote counsel to USAG, "[i]n order to keep things moving, it seems this is an appropriate time to consider a Mediation Protocol. Your comments on the attached will be appreciated." [Adv.Dkt. 401-9, Steege Decl., ¶13.] All of the work that USAG's counsel performed to select a mediator tracked the similar work USAG's

counsel performed pre-bankruptcy. USAG's counsel worked with the Defense Cost Insurers and the Survivors' Committee to identify potential mediators. USAG's counsel spent the next several months engaged in discussions with the Defense Cost Insurers and the Survivors Committee over the selection of a mutually agreeable mediator and the parameters for the mediation. [*Id.* ¶14.] USAG also obtained USOPC's agreement to participate in the mediation. This greatly benefited the Defense Cost Insurers by allowing them to settle on behalf of all of their insureds. [*Id.* ¶15.]

The parties agreed to seek this Court's appointment of the Honorable Gregg Zive, a mediator the Defense Cost Insurers and Survivors Committee both supported. USAG filed the motion to approve the appointment on May 2, 2019. [Bankr.Dkt. 452.] On May 17, 2019, this Court approved the selection of Judge Zive as the mediator. [Bankr.Dkt. 514.] As the Order makes clear, the purpose of the mediation has been to resolve the disputes among USAG, the plaintiffs (represented by the Survivors Committee), the Insurers, the Future Claimants' Representative (the "FCR"), and third party co-defendants relating to the "Sexual Abuse Claims Mediated Matters." [*Id.* at ¶¶2–3.] Judge Zive's authority does not extend to other matters, such as resolving disputes among trade creditors or mediating a financial restructuring. [*Id.*]

Despite the fact that the Defense Cost Insurers reimbursed USAG for the same work pre-bankruptcy and they requested and actively participated in the process of obtaining a mediator, the Defense Cost Insurers have refused to reimburse USAG for the cost of this same defense work post-bankruptcy. [Adv.Dkt. 401-7, Gass Decl., ¶15; Adv.Dkt. 401-1, Gotwald Decl., ¶10.]

C. Selection Of A Future Claimants' Representative.

The Defense Cost Insurers paid defense counsel pre-bankruptcy to develop a plan to ensure that any settlement would finally resolve all of the survivors' claims against USAG. [Adv.Dkt. 401-7, Gass Decl., ¶16.] Following the bankruptcy, the Defense Cost Insurers have refused to pay for any of the work that USAG's counsel performed to select a Future Claimants'

Representative ("**FCR**"), even though the Defense Cost Insurers asked USAG to obtain the appointment of a FCR. [Adv.Dkt. 401-1, Gotwald Decl., ¶10.]

The Defense Cost Insurers asked USAG to obtain the appointment of a FCR. USAG's counsel discussed the scope of the FCR's authority and possible candidates with the Defense Cost Insurers. On May 2, 2019, the Defense Cost Insurers participated in the interviews of the four candidates. Following the selection of a FCR, National Casualty's counsel engaged in substantial negotiations to ensure that the order protected his client's view of what was needed to obtain finality. [Adv.Dkt. 401-9, Steege Decl., ¶16.] On May 17, 2019, this Court appointed a FCR. [Bankr.Dkt. 516.] Despite the fact that the Defense Cost Insurers reimbursed USAG for similar work pre-bankruptcy and requested and actively participated in the process of obtaining a FCR, the Defense Cost Insurers have refused to reimburse USAG for the cost of this defense work post-bankruptcy. [Adv.Dkt. 401-7, Gass Decl., ¶16; Adv.Dkt. 401-1, Gotwald Decl., ¶10.]

D. Obtaining A Third-Party Litigation Stay.

Before bankruptcy the Defense Cost Insurers reimbursed USAG to obtain stays. [Adv.Dkt. 401-7, Gass Decl., ¶17.] Post-bankruptcy the Defense Cost Insurers have refused to reimburse USAG for similar work. [Adv.Dkt. 401-1, Gotwald Decl., ¶10.] To facilitate the mediation by including the participation of all parties making claims under USAG's CGL policies, including importantly the USOPC, USAG's counsel sought and received the agreement of all of the survivors to stay their sexual abuse lawsuits against USOPC and others. [*See* Bankr.Dkt. 403 (*Agreed Stipulation And Order Pursuant To 11 U.S.C. §105 Enjoining The Continued Prosecution Of Certain Pre-Petition Lawsuits*).]

When certain defendants in these lawsuits objected to the stay, USAG filed an adversary proceeding and sought to enjoin the objecting parties from continuing the prepetition litigation. [Adv. Pro. 19-50075, Dkt. 71.] The Court granted the stay, stating it was "not a close call" and

that "I think it's extremely important that the focus remain on getting us as quickly as possible to a global mediation where everybody is involved." [Bankr.Dkt. 456, at 71–72.] Despite the fact that the Defense Cost Insurers reimbursed USAG for similar work pre-bankruptcy and directly benefited from this work and supported this relief, the Defense Cost Insurers have refused to reimburse USAG for this defense cost post-bankruptcy. [Adv.Dkt. 401-7, Gass Decl., ¶17; Adv.Dkt. 401-1, Gotwald Decl., ¶10.]

E. Reviewing And Objecting To Sexual Abuse Claims.

Before bankruptcy, the Defense Cost Insurers paid defense counsel to review and analyze the claims filed by survivors and to file motions to dismiss those claims. [Adv.Dkt. 401-7, Gass Decl., ¶18.] After bankruptcy, the Defense Cost Insurers have refused to reimburse USAG for the cost of having counsel review the proofs of claim, analyze those claims, eliminate certain claims as duplicates, and eliminate others on the merits. [Adv.Dkt. 401-1, Gotwald Decl., ¶10.]

To defend USAG against the sexual-abuse claims in bankruptcy, USAG has objected to certain claims [Bankr.Dkt. 635, 751, 885] and obtained orders disallowing those claims [Bankr.Dkt. 722, 762, 1021.] In addition, to participate in the mediation, USAG needed to understand the claims that were filed, so it could appropriately analyze them and participate meaningfully in their settlement. [Adv.Dkt. 401-9, Steege Decl., ¶17.] Despite the fact that the Defense Cost Insurers reimbursed USAG for this same work pre-bankruptcy and directly benefited from the elimination of certain claims and the analysis USAG provided post-bankruptcy, the Defense Cost Insurers have refused to reimburse USAG for the cost of this defense work. [Adv.Dkt. 401-7, Gass Decl., ¶18; Adv.Dkt. 401-1, Gotwald Decl., ¶10.]

F. Producing Documents To The Survivors.

Before bankruptcy, the Defense Cost Insurers paid defense counsel to produce documents to the survivors in connection with the mediation and in limited formal discovery. [Adv.Dkt.

401-7, Gass Decl., ¶19.] Post-bankruptcy, the Defense Cost Insurers have refused to reimburse USAG for these same costs of defense. [Adv.Dkt. 401-1, Gotwald Decl., ¶10.] The Survivors' Committee sought Rule 2004 discovery from USAG, initially informally and then with respect to certain categories of documents, pursuant to Bankruptcy Rule 2004. [Bankr.Dkt. 519, ¶16.] USAG produced substantial documents informally and produced those documents that the Court ordered produced. [Bankr.Dkt. 591; Adv.Dkt. 401-9, Steege Decl., ¶21.] Despite the fact that the Defense Cost Insurers reimbursed USAG for this same discovery work pre-bankruptcy, the Defense Cost Insurers have refused to reimburse USAG for the cost of this same defense work post-bankruptcy. [Adv.Dkt. 401-7, Gass Decl., ¶19; Adv.Dkt. 401-1, Gotwald Decl., ¶10.]

G. Mediation.

Before bankruptcy, the Defense Cost Insurers paid defense counsel to participate in the mediation, including preparing mediation statements, coordinating with the Defense Cost Insurers' counsel and other defense counsel, and attending all mediation sessions. [Adv.Dkt. 401-7, Gass Decl., ¶20.] Post-bankruptcy, the Defense Cost Insurers have refused to reimburse USAG for these same costs of defense. [Adv.Dkt. 401-1, Gotwald Decl., ¶10.]

[redacted]. [Adv.Dkt. 401-5, at 1.] The goal of the chapter 11 case has been to do so through a mediation. Thus, both before and after Judge Zive was appointed, and before the mediation began, USAG participated in in-person and telephonic meetings with counsel for the Insurers regarding the mediation and potential settlement of the sexual abuse claims. [Adv.Dkt. 401-8, Panos Decl., ¶5.] At a high level, the purpose of these meetings (which the Defense Cost Insurers requested) was for the Defense Cost Insurers to provide their analysis of the value of the sexual abuse claims and to discuss

negotiation and settlement strategies. [*Id.* ¶6.] The Insurers even provided USAG with a settlement term sheet. [*Id.*]

In preparation for the mediation, Jenner spent substantial time drafting USAG's mediation statement, participating in phone conferences with the Insurers, the Survivors Committee, and other parties in interest to prepare for the mediation, and conferring internally on a strategy for an efficient path forward. [*Id.* ¶7.] The first mediation session took place July 16-19, 2019, and 109 attorneys and principals attended, including USAG's CEO and Board Chair, the individual Survivors Committee members, counsel for the Survivors Committee, 20 plaintiffs' attorneys who represented more than a majority of the survivors in the prepetition litigation, and counsel and principals for each of the Insurers. [*Id.* ¶8.] Subsequent in-person mediation sessions with the Survivors Committee and Insurers occurred on August 20-21, 2019, and November 20-21, 2019. [*Id.* ¶9.] Telephonic and email mediation discussions have occurred in addition to these in-person sessions. [*Id.* ¶13.]

Each of these mediations involved exchanges of monetary demands between the Survivors Committee, on one hand, and USAG and USOPC, on the other hand, to resolve the sexual abuse claims, as well as settlement discussions between USAG and USOPC and their respective insurers over what offers the Defense Cost Insurers and USOPC's insurers (many whom are the same as the Defense Cost Insurers) would authorize USAG and USOPC to make. [*Id.* ¶10.] During these mediation sessions, Jenner attorneys negotiated directly with both Survivors' Committee counsel and attorneys representing individual survivors. [*Id.* ¶11.]

In between the August and November mediations, the Insurers requested the appointment of an additional mediator to focus specifically on the insurance coverage matters. [*Id.* ¶12.] USAG agreed to the Insurers' proposal, and on September 26, 2019, this Court appointed Paul

Van Osselaer to mediate insurance coverage issues. [Bankr.Dkt. 798.] Outside of the mediation sessions, USAG and its counsel participated in numerous telephone conferences and meetings with the Insurers with the goal of reaching agreement on a settlement proposal that would be acceptable to the Survivors' Committee and would fully and finally resolve the prepetition sexual abuse litigation. Those efforts are on-going. [Adv.Dkt. 401-8, Panos Decl., ¶13.] Despite the fact that the Defense Cost Insurers reimbursed USAG for this same mediation work pre-bankruptcy and they requested and actively participated in the mediation, the Defense Cost Insurers have refused to reimburse USAG for the cost of this same defense work post-bankruptcy. [Adv.Dkt. 401-7, Gass Decl., ¶20; Adv.Dkt. 401-1, Gotwald Decl., ¶10.]

H. Preparation Of Settlement Documents.

Before bankruptcy, the Defense Cost Insurers paid defense counsel to prepare terms sheets and other settlement documents. [Adv.Dkt. 401-7, Gass Decl., ¶21.] Post-bankruptcy, the Defense Cost Insurers have refused to reimburse USAG for these same costs of defense. [Adv.Dkt. 401-1, Gotwald Decl., ¶10.]

Before the mediation began, the Defense Cost Insurers provided USAG's counsel with terms sheets for matters they expected would be included in any settlement. USAG's counsel has prepared a plan of reorganization, which is the settlement document in a bankruptcy case, and related necessary documents. The Defense Cost Insurers all have provided comments to the document. [Adv.Dkt. 401-9, Steege Decl., ¶18.] USAG filed that plan on January 30, 2020. [Bankr.Dkt. 905], and filed a First Amended Plan and Disclosure Statement on February 21, 2020 [Bankr.Dkt. 928, 930.] Since filing the plan, USAG has been in frequent contact with its Defense Cost Insurers over the plan terms and a path toward resolution. [Adv.Dkt. 401-9, Steege Decl., ¶19.] On April 10, 2020, USAG provided the Insurers (among other parties) with further

amendments to the plan and disclosure statement that incorporated many of the comments USAG had received from the Defense Cost Insurers. [*Id.* ¶20.]

Despite the fact that the Defense Cost Insurers reimbursed USAG for this same type of work pre-bankruptcy and they actively participated in the drafting of the plan, the Defense Cost Insurers have refused to reimburse USAG for the cost of this same defense work post-bankruptcy. [Adv.Dkt. 401-7, Gass Decl., ¶21; Adv.Dkt. 401-1, Gotwald Decl., ¶10.]

I. Other Transactional Costs Of Bankruptcy.

As described above, the overwhelming majority of Jenner's work this this chapter 11 case has been on matters that are obviously the defense of sexual abuse claims. To put a number on it, 71.4% of Jenner's time has been billed to the following matters, each of which reflect work done to defend and resolve claims of sexual abuse: Mediation, Plan/Disclosure Statements, Stay Related Matters, Third Party Injunctions, Claims Administration, Investigations, Document Production, Communications with Official Committees, Attendance at Court Hearings, and Rule 2004 motions.

And unlike most commercial cases, USAG's chapter 11 case has not been about financial restructuring. There have been no extended analysis of rejecting or assuming leases and executory contracts, no restructuring of secured debt, and no general unsecured creditors committee. [*See generally* Bankr.Dkt.; Adv.Dkt. 401-9, Steege Decl., ¶23.] Thus, even the time spent on the administrative tasks required to run a chapter 11 case—general case administration, reporting to the U.S. Trustee, preparing first day motions, preparing schedules and statements of financial affairs, and similar tasks, are expenses USAG incurred solely because it used the forum of bankruptcy to resolve the sexual abuse claims.

As a result of its chapter 11 defense, USAG also is required to pay for the fees and expenses of the Survivors Committee and the FCR. 11 U.S.C. §§330, 1103. USAG would not

have incurred these expenses but for the need to defend the survivors' claims in a chapter 11 case.

VIII. USAG's Unpaid Defense Costs.

Each month, USAG's bankruptcy counsel and counsel for the Survivors Committee and FCR have submitted invoices to this Court under the *Order Establishing Procedures for Interim Compensation and Reimbursement of Professionals*. [Bankr.Dkt. 187.] Under the Bankruptcy Code, the Debtor is legally obligated to pay for the costs of the Survivors' Committee and the FCR. 11 U.S.C. §§330, 331, 1102(a)(1), 1103(a). No party, insurer or otherwise, has filed a substantive objection to those fees on the grounds that the fees sought are unreasonable. To date, these invoices total $5,954,098,36. [Adv.Dkt. 401-11, Kozak Decl., ¶12.] Tables of the invoices are included as Addenda A and B to this brief.[5]

ARGUMENT

USAG's Defense Cost Insurers have refused to pay for USAG's bankruptcy case. They have taken this position even though USAG's chapter 11 filing has saved them millions of dollars in on-going defense costs and even though the policies they sold to USAG and Indiana law require them to pay for this defense.

The CGL policies at issue all state that the insurer "will have the ... duty to defend any 'suit' seeking [covered] damages." [*E.g.*, Adv.Dkt. 2-5, at 39; *see* Adv.Dkt. 2-14, at 132 (imposing on LIU a duty to defend "Claims" rather than "suits").] This duty is broad. *Thomson*, 11 N.E.3d at 1026–27. *Thomson* held that the duty to defend extends to "*all* litigation by the insured which could defeat its liability," including affirmative proceedings commenced to lessen

[5] The U.S. Trustee objected to a recent set of invoices on the procedural basis that counsel had not filed interim fee applications. The U.S. Trustee did not object to the quality or reasonableness of the fees in question. [Bankr.Dkt. 1017, 1018, 1019.] Counsel have since filed interim fee applications.

the damages the policyholder (and ultimately, the insurer) would be required to pay. *Id.* Because the Defense Cost Insurers have left the term "defend" or "defense" undefined in their policies or define it only generally, under Indiana law USAG is entitled to coverage if "any reasonable construction" of those words includes using chapter 11 reorganization as a tool to defend the hundreds of tort lawsuits brought against USAG. *Am. Econ. Ins. Co. v. Liggett*, 426 N.E.2d 136, 144 (Ind. Ct. App. 1981); *Carter v. State Farm Fire & Cas. Co.*, 407 F. Supp. 3d 780, 783 (S.D. Ind. 2019) (an insurer can prevail only if it has the "only reasonable interpretation" of the disputed policy terms).

Given the widespread modern acceptance of using chapter 11 as a means to defend against and resolve mass tort liability, a reasonable construction of the policies at issue here is that they include the cost of USAG's chapter 11 case. The Court should therefore enter partial summary judgment compelling the Defense Cost Insurers to comply with their duty to defend and to pay for USAG's bankruptcy costs.[6]

I. Legal Standard.

A court must grant summary judgment when, as is the case here, there is no genuine dispute for trial on any material factual issue. FED. R. CIV. P. 56(a); FED. R. BANKR. P. 7056; S.D. Ind. B-7056-1(a). Summary judgment is particularly appropriate for cases involving contract interpretation, which is a pure issue of law for the court. *See Am. Nat'l Fire Ins. Co. v. Rose Acre Farms*, 846 F. Supp. 731, 735 (S.D. Ind. 1994) (Indiana law); *Wagner v. Yates*, 912 N.E.2d 805, 808 (Ind. 2009). This is particularly true in the insurance context, where ambiguities

[6] USAG contends that the CGL Insurers also are liable for USAG's bankruptcy costs by reason of the policies' supplementary payments provisions, which uniformly provide that the insurers must pay the costs of actions they ask the policyholder to take. [*E.g.*, Adv.Dkt. 401-6, at 30.] Because this Court ruled that USAG could not submit certain correspondence under seal [Adv.Dkt. 354], USAG is not pressing this claim at this time. It brings this Motion without prejudice to its right to raise this argument in a subsequent motion or to appeal the Court's ruling at the appropriate time.

in the policy are not resolved by a jury, but instead are construed against the insurer as a matter of law. *Id.*; *State Auto. Mut. Ins. Co. v. Flexdar, Inc.*, 964 N.E.2d 845, 848 (Ind. 2012); *Am. States Ins. Co. v. Kiger*, 662 N.E.2d 945, 947 (Ind. 1996).

Indiana has adopted a special set of rules for construing insurance policies. The most fundamental is that "[a]n insurance policy should be so construed as to effectuate indemnification ... rather than to defeat it." *Masonic Acc. Ins. Co. v. Jackson*, 164 N.E. 628, 631–32 (Ind. 1929). This honors the core purpose of insurance, which is to indemnify against loss. *Eli Lilly & Co. v. Home Ins. Co.*, 482 N.E.2d 467, 470–71 (Ind. 1985). The Indiana Supreme Court has made clear that "[i]t is the duty of the court" to construe any lack of clarity against the insurer. *Masonic*, 164 N.E. at 631–32. The reason for this strict construction is simple: "[T]he insurer drafts the policy and foists its terms upon the customer. The insurance companies write the policies; we buy their forms or we do not buy insurance." *Kiger*, 662 N.E.2d at 947 (quotations omitted).

"It is well settled that where there is ambiguity, insurance policies are to be construed strictly against the insurer and the policy language is to be viewed from the standpoint of the insured." *Allstate Ins. Co. v. Dana Corp.*, 759 N.E.2d 1049, 1056 (Ind. 2001) (quotations omitted). "Insurers are free to limit the coverage of their policies, but such limitations must be clearly expressed to be enforceable." *Flexdar*, 964 N.E.2d at 848. An insurer cannot prevail in a policy-interpretation case unless it has the "only reasonable interpretation" of the disputed term. *Carter*, 407 F. Supp. 3d at 783.

II. USAG's Bankruptcy Costs Fall Within The Scope Of The Duty To Defend Under Indiana Law.

A. Indiana Courts Broadly Define The Duty To Defend.

The leading Indiana case on the duty to defend is the Indiana Supreme Court's decision

in *Seymour Mfg. Co. v. Commercial Union Ins. Co.*, 665 N.E.2d 891, 892 (Ind. 1996). The Seventh Circuit and federal district courts in Indiana regularly cite *Seymour* for the proposition that "the insurer's duty is expansive, since the duty to defend is considerably broader than the duty to indemnify." *E.g.*, *Fed. Ins. Co. v. Stroh Brewing Co.*, 127 F.3d 563, 566 (7th Cir. 1997) (Indiana law); *Nat'l Union Fire Ins. Co. v. Mead Johnson & Co.*, 913 F. Supp. 2d 682, 685 (S.D. Ind. 2012) (Indiana law) (Young, J.). "Only if there is no possible factual or legal basis on which the insurer might be obligated to indemnify will the insurer be excused from defending its insured." *Property-Owners Ins. Co. v. Virk Boyz Liquor Stores, LLC*, 219 F. Supp. 3d 868, 873 (N.D. Ind. 2016) (Indiana law).

Under Indiana law, the duty to defend "encompass[es] *all* litigation by the insured which could defeat its liability." *Thomson*, 11 N.E.3d at 1026–27 & n.26. A policyholder is entitled to "[a] full and complete defense" to "protect [it] from whatever may happen." *Id.* at 1026. Although no Indiana court has addressed whether bankruptcy costs are defense costs, the seminal Indiana case on this issue, *Thomson*, is analogous. In that case, the Indiana Court of Appeals held that the insurer was obligated to pay for an affirmative action the insured brought to obtain indemnification from a third party, because it was a cost of the insured's defense. *Id.* at 1025–26.

In reaching the conclusion that affirmative actions filed by the insured are defense costs, the *Thomson* court held that "'[d]efense' is about avoiding liability. ... A duty to defend would be nothing but a form of words if it did not encompass *all litigation by the insured* which could defeat its liability." *Id.* at 1026 & n.26 (quoting *Marathon Oil*, 315 F. Supp. 2d at 882 (emphasis added)). Accordingly, under Indiana law, "[c]laims and actions seeking third-party contribution and indemnification are a means of avoiding liability just as clearly as is contesting the claims

alleged to give rise to liability." *Id.* at 1025–26 & n.26 (quoting *Marathon Oil*, 315 F. Supp. 2d at 882).

Thus, the *Thomson* court ordered the insurer to pay for "time spent pursuing indemnity claims against third parties." *Id.* at 1025. The justification for this was simple: "Such work ... actually assists the insurers by minimizing what they must pay. That is why courts have routinely allowed such costs." *Id.* (citing *Marathon Oil*, 315 F. Supp. 2d at 881–83 and *Oscar W. Larson Co. v. United Capitol Ins. Co.*, 845 F. Supp. 458, 461 (W.D. Mich. 1993)). The *Thomson* court also rejected the insurers' objection to paying some "administrative" costs incurred by the law firms, pointing out that "[t]hese costs help the insurers, and [the policyholder] is entitled to be reimbursed for them." *Id.*

Indiana law thus defines a defense cost as an expense that seeks to defeat, offset, or minimize liability for a claim the insurer must defend, including any cost that "actually assists the insurers by minimizing what they must pay" in defense of a claim. *Id.* As *Thomson* observed, this is the rule across the country. *Id.* "[D]efense costs [are] those expenses reasonably necessary *either* to defeat liability *or* to minimize the scope or magnitude of such liability." *Domtar*, 563 N.W.2d at 738–39. As the court in *Marathon Oil* explained, "the authority appears virtually uniform in holding that there is a class of affirmative cases that, if successful, have the effect of reducing or eliminating the insured's liability and that the costs and fees incurred in prosecuting such 'defensive' claims are encompassed in an insurer's duty to defend." 315 F. Supp. 2d at 881–82 (collecting cases); 4 NEW APPLEMAN ON INSURANCE LAW §27.01[4][b].

A defense, therefore, includes the cost of actions filed by the policyholder, where such actions are "an essential component of the defense of the main action." *Perchinsky v. New York*, 232 A.D.2d 34, 181 (N.Y. App. Div. 1997); *see also Thomson*, 11 N.E.3d at 1031–32, 1025–26

& n.26. Non-litigation costs, too, are covered if they are incurred to minimize or determine liability. *Thomson*, 11 N.E.3d at 1025–26, 1031–32 (citing *Aerojet-General Corp. v. Trans. Indem. Co.*, 948 P.2d 909, 927 (Cal. 1997)).[7] Put another way: "the insurer's duty with respect to affirmative claims brought by the insured depends on whether such claims are 'defensive' in nature, meaning 'filed to limit a [policyholder's] potential liability.'" *Marathon Oil*, 315 F. Supp. 2d at 881–82 (quoting *Int'l Ins. Co. v. Rollprint Packaging Prods., Inc.*, 728 N.E.2d 680, 694 (Ill. Ct. App. 2000)).

B. USAG's Bankruptcy Costs Fit Within Indiana's Broad Definition Of Defense Costs.

The legal fees and expenses USAG has incurred in its chapter 11 case easily fit within a "reasonable construction" of costs incurred to defend the survivors' claims for several reasons. *Liggett*, 426 N.E. 2d at 144; *Carter*, 407 F. Supp. 3d at 783.

1. USAG's Use Of Chapter 11 To Defend Mass Tort Lawsuits Is A Well-Accepted Defense Strategy.

It is important that USAG's affirmative use of chapter 11 to resolve the survivors' claims efficiently and fairly is a well-recognized defense strategy for entities facing mass tort liability. *See, e.g.*, Smith, 41 U.C. DAVIS L. REV. at 1627–32, 1646–51, 1662–63 (2008); S. Elizabeth Gibson, *Case Studies of Mass Tort Limited Fund Class Actions & Bankruptcy Reorganizations*, FED. JUD. CTR. (2000), *available at* www.uscourts.gov/sites/default/files/ masstort_1.pdf. As this Court itself recently recognized, bankruptcy law has many "systemic advantages" over ordinary

[7] Courts frequently treat non-litigation expenses as defense costs, depending on their function. *Aerojet-General Corp.*, 948 P.2d at 927 (environmental site investigations); *Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp.*, 790 F. Supp. 1318, 1333–38 (E.D. Mich. 1991) (recommending that all hydrogeological studies necessary to limit the scope and costs of remediation are defense costs), *recommendation adopted*, 790 F. Supp. 1318, 1321 (E.D. Mich. 1992); *Hi-Mill Mfg. Co. v. Aetna Cas. & Sur. Co.*, 884 F. Supp. 1109, 1117–18 (E.D. Mich. 1995) (EPA administrative oversight costs are defense costs); *Am. Bumper & Mfg. Co. v. Hartford Fire Ins. Co.*, 550 N.W.2d 475, 485–86 (Mich. 1996) (approving the *Hi-Mill/Ex-Cell-O* cases and holding that environmental site investigation costs were defense costs).

individualized litigation. [Bankr.Dkt. 1021, at 7.] It (1) "funnels claims into one forum for resolution," (2) "provides established mechanisms for notice and the management of large claims," and (3) places "all of the debtor's assets are under the control of the bankruptcy court, thus providing protection against a race to the judgment by creditors." [*Id.*]; *accord*, *Matter of Am. Reserve Corp.*, 840 F.2d 487, 489 (7th Cir. 1988).

Chapter 11 also benefits insurers because bankruptcy courts can enter channeling injunctions. This tool allows a bankruptcy court, where useful to the reorganization, to permanently enjoin lawsuits against non-debtor parties such as insurers, employees, and affiliated organizations that contribute value to a settlement. *See In re Global Indus. Techs.*, 645 F.3d 201, 205 & n.10 (3d Cir. 2011). It thus empowers the Court to provide permanent, enforceable finality to third parties involved in the debtor's affairs and who may otherwise be reluctant to give up their rights. Smith, 41 U.C. DAVIS L. REV. at 1662–63.

USAG's Defense Cost Insurers recognized that bankruptcy provided tools that would assist in the resolution of the survivors' lawsuits. When USAG filed for bankruptcy, [redacted] [Adv.Dkt. 401-5, at 1.]

The sheer number of organizations that have used chapter 11 successfully since the enactment of the modern Bankruptcy Code as a mechanism to resolve large numbers of tort claims also demonstrates that USAG's chapter 11 filing is an accepted means of defense.[8] The

[8] The following are just some of the not-for-profit institutions that have filed for chapter 11 to resolve large numbers of sex abuse claims: *In re Archdiocese of Portland, Or.*, No. 04-37154 (Bankr. D. Or. 2004); *In re Catholic Bishop of Spokane, Wash.*, No. 04-08822 (Bankr. E.D. Wash. 2004); *In re Diocese*

wide-spread use of chapter 11 to resolve mass tort liability—a practice that has been in place since the early 1980s—also defeats any claim that the Defense Cost Insurers did not "intend" their policies to cover chapter 11 as a defense cost. Had that been their intent, given the wide-spread use of chapter 11 to resolve such claims, the Defense Cost Insurers surely would have expressly stated so in their policies, as Indiana law requires. *Flexdar*, 964 N.E.2d at 848. Instead, the policies state: "[b]ankruptcy ... of the insured's estate will not relieve us of our obligations...."[9]

2. USAG's Bankruptcy Costs Are Defense Costs Because The Work Counsel Is Performing In The Chapter 11 Case Is The Same Work That The Defense Cost Insurers Paid For Outside Of Bankruptcy.

The most obvious reason why USAG's bankruptcy expenses are defense costs is that this Court is an alternative forum for the parties to resolve the sexual abuse claims. Before USAG's

---

of Davenport, No. 06-02229 (Bankr. S.D. Iowa 2006); *In re Diocese of San Diego*, No. 07-00939-A11 (Bankr. S.D. Cal. 2007); *In re Catholic Diocese of Wilmington, Inc.*, No. 09-13560-CSS (Bankr. D. Del. 2009); *In re Diocese of Milwaukee*, No. 11-20059-SVK (Bankr. E.D. Wis. 2011); *In re the Christian Bros.' Institute*, No. 11-22820-RDD (Bankr. S.D.N.Y. 2011); *In re Roman Catholic Church of the Diocese of Gallup, N.M.*, No. 13-13676-t11 (D. N.M. 2013); *In re Roman Catholic Bishop of Stockton, Inc.*, No. 14-20371 (E.D. Cal. 2014); *In re Archdiocese of St. Paul & Minneapolis*, No. 15-30125 (Bankr. D. Minn. 2014); *In re Diocese of Duluth*, No. 15-50792 (Bankr. D. Minn. 2015); *In re Diocese of Winona-Rochester*, No. 18-33707 (Bankr. D. Minn. 2018); *In re Crosier Father & Bros. Province, Inc.*, No. 17-41681 (Bankr. D. Minn. 2017); *In re Diocese of Great Falls-Billings, Mont.*, No. 17-60271 (Bankr. D. Mont. 2017).

The following are just some of the companies that have filed chapter 11 to resolve asbestos claims: *In re UNR Indus., Inc.*, Nos. 82-B-9841, 82-B-9851 (Bankr. N.D. Ill. 1982); *In re Forty-Eight Insulations, Inc.*, No. 85-B-5061 (Bankr. N.D. Ill. 1985); *In re Keene Corp.*, No. 93-B-46090 (Bankr. S.D.N.Y. 1993); *In re Eagle-Picher Indus.*, No. 1:91-bk-10100 (Bankr. S.D. Ohio 1991); *In re Celotex Corp.*, No. 8:90-bk-10016 (M.D. Fla., 1990); *In re Johns-Manville Corp.*, No. 82-11656 (Bankr. S.D.N.Y. 1982).

Others have used chapter 11 to resolve products liability claims: *In re Perdue Pharma, L.P.*, No. 19-23649 (RDD) (Bankr. S.D.N.Y. 2019); *In re Insys Therapeutics*, No. 19-11292-JTD (Bankr. D. Del. 2019); *In re Dow Corning Corp.*, No. 95-20512 (Bankr. E.D. Mich. 1995).

These lists are by no means exhaustive.

[9] [Adv.Dkt. 2-5, at 7, 45, 85, 128, 171, 213, 256, 301, 342, 407, 528; Adv.Dkt. 2-6, at 73; Adv.Dkt. 2-7, at 27; Adv.Dkt. 2-8, at 26, 334; Adv.Dkt. 2-9, at 471, 618, 759, 907; Adv.Dkt. 2-10, at 31, 150; Adv.Dkt. 2-11, at 47, 168; Adv.Dkt. 2-12, at 43, 156, 281; Adv.Dkt. 2-13, at 52, 155; Adv.Dkt. 2-14, at 47, 136.]

chapter 11 filing, there were at least 109 lawsuits, involving over 380 plaintiffs, pending in 14 different jurisdictions, seeking to hold USAG liable for Nassar's sexual abuse. These plaintiffs, plus additional individuals, have refiled their claims in this Court, with many of the sexual abuse claimants using the exact same form they submitted in the pre-bankruptcy mediation.

When these survivors filed their proofs of claim against USAG, they were commencing a contested proceeding that "is analogous to the filing of a complaint in a civil action, with the bankrupt's objection the same as the answer." *Matter of Cont'l Airlines*, 928 F.2d 127, 129 (5th Cir. 1991); *In re Avaya, Inc.*, No. 17-10089 (SMB), 2019 WL 1750908, at *7 (Bankr. S.D.N.Y. Mar. 28, 2019) ("The filing of a proof of claim is analogous to the commencement of an action within the bankruptcy proceeding."); *In re Bryant*, 397 B.R. 903, 904–05 (Bankr. N.D. Ind. 2008) (same). As the Supreme Court recognized in *Raleigh v. Illinois Department of Revenue*, the state substantive law governing claims outside of bankruptcy, including even burden of proof rules, govern a bankruptcy court's adjudication of proofs of claim. 530 U.S. 15, 20–21 (2000); *accord Archdiocese of Milwaukee v. Doe*, 743 F.3d 1101, 1105 (7th Cir. 2014) ("The substantive legal rules applicable to the claim are provided by state law."). In short, all the chapter 11 filing did was shift the venue of the sexual abuse litigation from individual courts across the country to one centralized forum—this Court.

Consistent with the fact that the defense of the survivors' claims has simply changed courtrooms, virtually all of the work USAG's bankruptcy counsel has performed is identical to work that defense counsel performed before USAG filed its chapter 11 case. As detailed above in the Statement of Uncontested Facts, USAG's bankruptcy attorneys analyzed the survivors' claims, discussed strategy with insurers, assisted in the mediation of the claims, objected to and defeated legally deficient claims, produced discovery to the survivors, obtained stays of

litigation, and drafted term sheets and settlement documents. Each of these tasks is the same as the defense work that USAG's counsel performed before the bankruptcy filed.

Yet, for all of the major tasks that one would expect defense counsel to perform, the Defense Cost Insurers have taken the illogical position that the work they previously paid for is no longer compensable simply because the same claims moved to this Court. The most obvious example of the illogical nature of the Defense Cost Insurers' position is their refusal to pay for the work performed in connection with the mediation of the survivors' claims. By definition, work performed mediating a settlement fits the definition of a defense because the whole purpose of a mediation is to resolve the claims being mediated and thereby minimize the liability of the defendant. Indeed, when this Court entered the order approving Judge Zive's appointment as the mediator, the Court's order stated that he was appointed solely for purposes of resolving the disputes among USAG, the plaintiffs (represented by the Survivors Committee), the Insurers, the Futures Claimants' Representative (the "FCR"), and third party co-defendants relating to the "Sexual Abuse Claims Mediated Matters." [Bankr.Dkt. 514, ¶¶2–3.] Judge Zive's authority did not extend to any other matters, such as resolving disputes among general unsecured creditors or mediating a financial restructuring. [*Id.*] Judge Zive was mediating the same disputes that the pre-bankruptcy mediators attempted to settle pre-bankruptcy.

From USAG's perspective, reaching a resolution of the survivors' claims in a mediation has been the focal point of both is pre-bankruptcy and post-bankruptcy defense. The work performed both before and after bankruptcy also has been virtually identical, making it illogical at best, and bad faith at worse, for the Defense Cost Carriers to refuse to reimburse USAG for this work. Specifically:

- **Mediation.**

  Before bankruptcy, the Defense Cost Insurers paid USAG's bankruptcy counsel to consult with the insurance carriers and survivors about a proposed mediator, to review the claims being made and to assess the merits of those claims and likely damage awards, and to prepare mediation statements. [Adv.Dkt. 401-7, Gass Decl., ¶¶13, 18, 20.]

  After bankruptcy, USAG's counsel consulted with the insurance carriers and survivors about a proposed mediator, reviewed the claims being made and assessed their merits, and prepared mediation statements, yet the Defense Cost Insurers have refused to pay USAG's bankruptcy counsel for the exact same work. [Adv.Dkt. 401-9, Steege Decl., ¶¶13–15, 17; Adv.Dkt. 401-8, Panos Decl., ¶7; Adv.Dkt. 401-1, Gotwald Decl., ¶10.]

  Before bankruptcy, the Defense Cost Insurers paid USAG's counsel to consult with co-defendants and strategize about the mediation and how to most effectively reach a settlement. [Adv.Dkt. 401-7, Gass Decl., ¶20.]

  After bankruptcy, the Defense Cost Insurers have refused to pay USAG's counsel for the exact same work even though post-bankruptcy, USAG was successful in obtaining the agreement of the USOPC to participate in the mediation, thereby providing more finality than was available before bankruptcy. [Adv.Dkt. 401-9, Steege Decl., ¶15; Adv.Dkt. 401-8, Panos Decl., ¶¶5–7; Adv.Dkt. 401-1, Gotwald Decl., ¶10.]

  Before bankruptcy, the Defense Cost Insurers paid USAG's counsel to participate in the mediation sessions and to work to negotiate a settlement. [Adv.Dkt. 401-7, Gass Decl., ¶¶20–21.]

  After bankruptcy, the Defense Cost Insurers have refused to pay USAG's counsel for participating in mediation sessions and working to negotiate a settlement. [Adv.Dkt. 401-8, Panos Decl., ¶¶5–7; Adv.Dkt. 401-1, Gotwald Decl., ¶10.]

While the Defense Cost Insurers' refusal to provide a defense post-bankruptcy is most inconsistent with respect to the work USAG's counsel performed to mediate the survivors' claims, the Defense Cost Insurers' refusal also is not justified with respect to the other work that USAG's counsel has performed. For example:

- **Fact-Gathering About the Survivors' Claims.**

  Before bankruptcy, the Defense Cost Insurers paid USAG's counsel to negotiate a mediation claim form with the Defense Cost Insurers and the survivors' counsel to be provided to all survivors with known claims so that the Defense Cost Insurers would have the necessary information to settle the claims. [Adv.Dkt. 401-7, Gass Decl., ¶13.]

  After bankruptcy, the Defense Cost Insurers have refused to pay for the preparation and negotiation of the paperwork necessary to establish a bar date and a specialized proof of claim form, even though they insisted on a specialized form that mirrored the one used in the pre-bankruptcy mediation so as to avoid unnecessary (and costly) discovery about the substance of survivors' claims and to provide sufficient information to allow for a settlement of the claims. [Bankr.Dkt. 331, at 52–59; Adv.Dkt. 401-1, Gotwald Decl., ¶10.]

  Before bankruptcy, the Defense Cost Insurers paid USAG's counsel to review complaints and analyze the claims that were being asserted against USAG. [Adv.Dkt. 401-7, Gass Decl., ¶18.]

  After bankruptcy, the Defense Cost Insurers have refused to pay USAG's counsel for reviewing the proofs of claim and preparing an analysis of those claims, even though that analysis was shared with and used by the Defense Cost Insurers. [Adv.Dkt. 401-9, Steege Decl., ¶17; Adv.Dkt. 401-1, Gotwald Decl., ¶10.]

- **Discovery.**

  Before bankruptcy, the Defense Cost Insurers paid USAG's counsel to provide pre-mediation discovery to the plaintiffs so that they could also meaningfully participate in the pre-bankruptcy mediation. [Adv.Dkt. 401-7, Gass Decl., ¶19.]

  After bankruptcy, the Defense Cost Insurers have refused to pay USAG's counsel to respond to the Survivors Committee's discovery requests even though the purpose of this discovery, like the pre-bankruptcy discovery, was to obtain the survivors' full participation in the mediation. [Adv.Dkt. 401-9, Steege Decl., ¶21; Adv.Dkt. 401-1, Gotwald Decl., ¶10.]

- **Litigation Stays.**

  Before bankruptcy, the Defense Cost Insurers paid USAG's counsel to obtain stays in the pending litigation pending mediation. [Adv.Dkt. 401-7, Gass Decl., ¶17.]

After bankruptcy, the Defense Cost Insurers have refused to pay USAG's counsel for negotiating a complete stay of all third party lawsuits even though that provided a tremendous cost savings and benefit to the Defense Cost Insurers since they not only provide coverage to USOPC, the principal third-party defendant under USAG's policies, but separately insure USOPC. Moreover, this action greatly facilitated and continues to facilitate the mediation process. [*See* Bankr.Dkt. 403; Adv.Dkt. 401-1, Gotwald Decl., ¶10.]

- **Obtaining Dismissals Of Claims.**

Before bankruptcy, the Defense Cost Insurers paid USAG's counsel to file motions to dismiss and other dispositive motions designed to adjudicate certain claims on the merits. [Adv.Dkt. 401-7, Gass Decl., ¶18.]

After bankruptcy, the Defense Cost Insurers have refused to pay USAG's counsel for the claims objections it filed to certain claims alleging sexual abuse and the work counsel performed to obtain the dismissal of those claims with prejudice. [Adv.Dkt. 401-9, Steege Decl., ¶17; Adv.Dkt. 401-1, Gotwald Decl., ¶10.]

- **Preparing Settlement Documents.**

Before bankruptcy, the Defense Cost Insurers paid USAG's counsel to prepare terms sheets and other documents related to resolving the claims. [Adv.Dkt. 401-7, Gass Decl., ¶21.]

After bankruptcy, the Defense Cost Insurers have refused to pay USAG's counsel for preparing the plan and related settlement documents, even though these documents are not functionally different from the settlement documents that would be prepared outside of bankruptcy, except in one important respect—they will provide the Defense Cost Insurers with greater protection and finality. The importance of these documents to the defense of the survivors' claims is underscored by the fact that the Defense Cost Insurers have asked USAG's counsel to make changes to those documents to further protect the Defense Cost Insurers' interests. Having requested that counsel spend substantial time to address their concerns, it is unfair for the Defense Cost Insurers to take the position that these costs are not covered as defense costs. [Adv.Dkt. 401-9, Steege Decl., ¶¶18–20; Adv.Dkt. 401-1, Gotwald Decl., ¶10.]

The fact that these tasks took place in a chapter 11 case, rather than in ordinary civil litigation, does not change their character. This is defense work. By paying for these costs pre-bankruptcy, the Defense Cost Insurers have conceded as much. They are therefore required to pay for this exact same work now that USAG is in bankruptcy.

3. USAG's Chapter 11 Costs Are Defense Work Because This Work Is Being Performed To Minimize And Resolve USAG's Liability.

All of USAG's bankruptcy costs are defense costs because an insurer's duty to defend "encompass[es] *all litigation* by the insured which could defeat [the insured's] liability." *Thomson*, 11 N.E.2d at 1026 & n.26 (emphasis added). Bankruptcy is one such form of litigation. When commenced to resolve a mass-tort case, the tools available in bankruptcy—from the automatic stay to the discharge injunction—serve to defend a debtor from its creditors' unliquidated tort claims. But those tools are not available unless the debtor also pays certain other costs, such as the administrative expenses of the estate and the attorneys' fees of any committee appointed to represent the tort claimants. Because the relief sought through a chapter 11 filing is defensive in nature, the transaction costs necessary to obtain that relief count as defense costs.

USAG filed for bankruptcy for one reason only: to resolve the hundreds of sexual abuse claims filed against it. At the time it filed its petition, USAG faced 109 suits brought by over 380 plaintiffs in 14 different courts. Its supervisory organization USOPC faced a smaller set of lawsuits, attempting to hold USOPC liable for sexual abuse in its gymnastics program. [Adv.Dkt. 401-7, Gass Decl., ¶23.] Of the plaintiffs suing USOPC over sexual abuse, 252 are also suing USAG. [*Id.* ¶24.] And a host of third party indemnity claims, other abuse claims, and complex additional insured claims arose from the sexual abuse claims.

The practical difficulties of litigating, let alone settling, all these claims in multiple courts across the nation are enormous. Every party has an interest in another proceeding, and many parties have an interest in multiple other proceedings. The ripple effects of resolving one matter are impossible to forecast, making parties (especially insurers) fearful of making commitments that could come back to haunt them in the future. The result is years of litigation, with enormous costs and delay in the fair resolution of the claims. A global resolution and a global release—essential from an insurer's perspective—becomes impossible, because one party can destroy the entire settlement by opting to litigate, rather than mediate. These problems are one reason USAG filed for bankruptcy. USAG needed a procedure that would allow it to consolidate all claims in a single court, mediate a global resolution, allow defendants and the insurers to emerge on the other side with enforceable finality, and allow all of the survivors to receive fair compensation.

The Bankruptcy Code is perhaps the only legal procedure that provides all of those tools. Bankruptcy law aims "to determine and implement in a single collective proceeding the entitlements of all concerned." *Am. Reserve*, 840 F.2d at 489. As this Court recently recognized, a bankruptcy case "funnels claims into one forum for resolution," "provides established mechanisms for notice and the management of large claims," and places all of the debtor's assets "under the control of the bankruptcy court, thus providing protection against a race to the judgment by creditors." [Bankr.Dkt. 1021 at 7.] A bankruptcy court also can enjoin the prosecution of third-party lawsuits that would interfere with a debtor's attempts to reorganize. 11 U.S.C. §105(a); *Smith*, 41 U.C. DAVIS L. REV. at 1662–63. This Court provided that relief here, enjoining the third-party lawsuits involving USAG's co-defendants and parties claiming indemnity from USAG, reasoning that "it's not a close call actually" because "the harm potentially for the bankruptcy estate would be huge" in allowing the suits to proceed, and would

"totally divert us from what we're supposed to be doing here which is to see if we can resolve all these claims in a global way." [Bankr.Dkt. 456, at 71–72; Bankr.Dkt. 426, at 2–4.]

If the validity or value of the claims must be litigated, bankruptcy also protects USAG from a judgment in excess of its insurance coverage, while allowing survivors to recover an equitable portion of that coverage. *Smith*, 41 U.C. DAVIS L. REV. at 1662–63. If the parties agree to a settlement, or if USAG's insurers make a reasonable settlement offer that is refused, §105(a) empowers the Court to issue a channeling injunction that effectively discharges *all* related parties contributing to the settlement from liability to USAG's tort creditors. *Id.*; 11 U.S.C. §§105(a), 1123(b); *see In re Global Indus. Techs.*, 645 F.3d at 205 & n.10.

These bankruptcy tools are clearly defensive in nature. The stays protect USAG from litigation while it tries to resolve the claims. The bankruptcy court's claims-management systems streamline the collection and management of claims. If no settlement occurs, the claims-allowance and discharge provisions protect USAG from excess liability, future claims, extended litigation, and a race to judgment by creditors. And the prospect of a channeling injunction keeps third parties at the table and incentivizes them to contribute value toward a settlement.

These tools—unique to the Bankruptcy Code—are not free. The Bankruptcy Code imposes significant requirements on organizations seeking to reorganize. The Debtor must prepare "first day" motions to set up the case, budget, prepare financial schedules and statements for the Court, petition the court to conduct certain business, attend hearings, administer the case, and respond to Bankruptcy Rule 2004 discovery requests. The Bankruptcy Code also *requires* the Debtor to pay the professional fees of firms hired by Official committees of unsecured creditors—here, the Survivors' Committee. 11 U.S.C. §§330, 1102(a)(1), 1103(a).

These requirements and procedural safeguards are at the core of the chapter 11 process. They are what allow a bankruptcy court to fairly compensate and extinguish creditors' claims, which in turn allows for the finality of discharge and channeling injunctions. They are what justify the automatic stay and third-party injunctions. An organization cannot file for bankruptcy, yet refuse to pay the expenses necessary to satisfy its obligations under the Bankruptcy Code. If the Debtor does not pay for these things, its case will fail.

These bankruptcy features are essential to a proper defense for USAG. Paying for them is equally essential. The immense complexity of this case makes it even more reasonable to interpret the word "defend" broadly—as Indiana law requires. *Thomson*, 11 N.E.3d at 1026–27. When litigation involves a huge web of parties, many of whom seek contribution or indemnity from each other (and from each other's insurers), a crabbed, plaintiff-versus-defendant view of the word "defend" is both unrealistic and harmful to the policyholder. Complex mass-tort litigation, in the real world, is not so binary. The duty to defend requires the insurer to provide a "full" and "complete" defense to "protect [the policyholder] from *whatever* may happen," not just from what happens in the first few pages of a civil-procedure textbook. *Thomson*, 11 N.E.3d at 1026–27. Chapter 11 is the last, best chance to resolve the sexual-abuse lawsuits without subjecting USAG, its insurers, and the survivors to lengthy tort litigation.

As a result, the Defense Cost Insurers are required to pay for the full cost of USAG's bankruptcy. They are also required to reimburse USAG for amounts paid to the Survivors' Committee and the FCR under §330 of the Bankruptcy Code and the Court's *Order Establishing Interim Compensation Procedures* [Bankr.Dkt. 187.]

4. USAG's Chapter 11 Filing Is A Defense Cost Because It Has Saved And Will Continue To Save The Defense Cost Insurers Substantial Amounts That They Would Otherwise Be Required To Pay To Defend The Survivors' Civil Suits Outside Of Bankruptcy.

All of the costs outlined above are defense costs because they are incurred to protect and defend USAG from the sexual abuse claims. But under *Thomson*, they are *also* defense costs because they "assis[t] the insurers by minimizing what they must pay." 11 N.E.3d at 1025. In short, on both the defense and indemnity fronts, "[t]hese costs help the insurers, and [USAG] is entitled to be reimbursed for them." *Id.*

Defending the individual claims in a chapter 11 case is substantially less expensive for the insurers than defending the claims in ordinary civil court, even after taking into account the "general" costs of bankruptcy. USAG's bankruptcy dramatically reduced the costs the insurers must pay to defend USAG from the individual claims. [Adv.Dkt. 401-3, at 1–2.] This is the definition of a defense cost. 4 NEW APPLEMAN ON INSURANCE LAW §27.01[4][b]; *Thomson*, 11 N.E.3d at 1031–32 (explaining defense costs include costs incurred to minimize costs under the policies).

Before filing this petition, USAG's Defense Cost Insurers were funding the defense of hundreds of sexual-abuse lawsuits in numerous jurisdictions across the country under cost-sharing agreements. [Adv.Dkt. 401-1, Gotwald Decl., ¶8.] The automatic stay, triggered by USAG's bankruptcy filing, halted those lawsuits. Defense counsel correctly estimated that defending the claims in bankruptcy, including all "administrative" costs of bankruptcy, would be at least three times cheaper than defending just the Michigan and California lawsuits in ordinary litigation. [Adv.Dkt. 401-3, at 1–2.] This does not even account for the numerous additional lawsuits pending in Illinois, Massachusetts, and other states. [Adv.Dkt. 2-1, at 2–3, 5, 8.] The

costs of USAG's bankruptcy are "transaction costs" that are absolutely necessary if USAG's insurers are to reap the benefits of the automatic stay and other bankruptcy relief.

Insurance companies cannot refuse to pay for a strategy that makes defending the policyholder less expensive. Doing so foists upon USAG the burden of reducing the insurers' defense obligation under the policies. This is freeloading at best, and bad faith at worst. USAG paid premiums so that the *Defense Cost Insurers* would bear the costs of a full defense, not so that *USAG* (a nonprofit with limited assets) would bear the costs of making the defense less expensive for insurance companies worth hundreds of millions of dollars.[10] The Defense Cost Insurers' refusal to pay for the millions of dollars in benefits they are getting from this bankruptcy violates their duty to give equal consideration of USAG's interests with their own. *Certain Underwriters of Lloyds of London v. Gen. Acc. Ins. Co.*, 699 F. Supp. 732, 737 (S.D. Ind. 1988) (Indiana law).

The insurers cannot sit back, delay, and gamble with USAG's future, while forcing USAG to pay for the millions of dollars of defense cost savings that the insurers are enjoying as a result of the bankruptcy relief obtained by USAG. The amounts spent in this bankruptcy "assis[ts] the insurers by minimizing what they must pay." *Thomson*, 11 N.E.3d at 1025. Since "[t]hese costs help the insurers," by reducing the burden of the defense costs that fall squarely on the insurers, "[USAG] is entitled to be reimbursed for them." *Id.*

Holding to the contrary would give insurance companies unfettered and unbargained-for power over their policyholders. An insurance company could insist that its policyholder file for bankruptcy to reduce or eliminate the insurer's defense obligation. Under the Defense Cost

[10] LIU, in particular, recently touted that it has several hundred million dollars in assets and therefore should not be required to post bond in order to appeal. [Case No. 1:18-1306-RLY-MP ("**Dist.Ct.Dkt.**") 157, at 23; Dist.Ct.Dkt. 158, ¶10; Dist.Ct.Dkt. 158-1, at 3 (showing over $284 million in assets).]

Insurers' view here, the policyholder would now be forced to file for bankruptcy under the policies' cooperation clause. The policyholder, however, is then left with an impossible choice. It can refuse to file bankruptcy and risk losing the indemnity protection insurance provides. Or, it can shoulder the financial burden of bankruptcy—which it likely cannot afford—to avoid jeopardizing its insurance. It becomes an inequitable Hobson's choice for a policyholder. This cannot and should not be the law. Requiring the insurer to pay for these substantial benefits not only comports with the law—it is fair.

5. The Insurers Also Benefit From The Finality Chapter 11 Provides.

In addition to saving the Defense Cost Insurers money, USAG's chapter 11 filing provides the Defense Cost Insurers with tremendous advantages at the indemnity stage. If a plan is confirmed, the discharge injunction clears the policyholder of "any debt that arose before the date of reorganization." 11 U.S.C. §1141(d)(1)(A). Any potential claimant who did not present a proof of claim will be barred from pursuing USAG going forward or will be required to demonstrate that she holds a future claim. Either way, USAG will not be liable. That sort of finality and protection against future claims is only available in bankruptcy.

Further, §105 of the Bankruptcy Code empowers bankruptcy courts to issue channeling injunctions barring action against non-debtor parties, including insurers, where such relief is useful or necessary to the reorganization process. 11 U.S.C. §§105(a), 1123(b); *In re Global Indus. Techs.*, 645 F.3d at 205 & n.10 (observing that at least three circuits have "concluded that trusts and channeling injunctions may be authorized under §105 . . . to address other [non-asbestos] tort liabilities"). USAG has sought a channeling injunction in its First Amended Plan because, as explained above, it is essential to reorganization. [Bankr.Dkt. 930.] This injunction, if adopted in a confirmed Plan, would *eliminate* the Defense Cost Insurers' liability to *everyone*

under their policies (upon the Defense Cost Insurers payment of the agreed sum). This includes additional insureds like the USOPC. This relief does not exist outside bankruptcy.

The amounts spent on "general" bankruptcy costs are essential to unlock the potent, permanent remedies available under the Bankruptcy Code. As a result, the costs of USAG's bankruptcy are defense costs. *Thomson*, 11 N.E.3d at 1031–32. From its general bankruptcy-related costs, to the specific efforts taken with respect to sexual abuse claims—the bar date, the injunctive relief, the survivors' claims analysis, the Survivors Committee and FCR, the mediation preparation and participation—every dollar spent on this bankruptcy is spent in an effort to efficiently, fully, finally, and fairly resolve the survivors' claims. That is precisely what "defense costs" are under *Thomson*—amounts paid to reduce, resolve, or eliminate liability. 11 N.E.3d at 1031–32.

C. USAG's Policies Do Not Exclude Bankruptcy As A Defense Cost.

The Defense Cost Insurers are likely to argue that the Court should not grant the Motion because USAG's argument to recover these costs is supposedly novel. But the correct question is not whether USAG's argument is novel. Rather, the question is whether USAG's argument is correct under Indiana law, and it is. Under Indiana law, "limitations [on coverage] must be clearly expressed to be enforceable." *Flexdar*, 964 N.E.2d at 848. The policies at issue here contain no limitation, either express or implied, that would exclude bankruptcy costs as a cost of defense. To the contrary, the policies explicitly confirm that "[b]ankruptcy . . . of the insured's estate will not relieve us of our obligations...."[11] The fact that USAG is in bankruptcy, and is defending the claims in this Court, does not reduce the insurers' obligations to shoulder the "full"

[11] [Adv.Dkt. 2-5, at 7, 45, 85, 128, 171, 213, 256, 301, 342, 407, 528; Adv.Dkt. 2-6, at 73; Adv.Dkt. 2-7, at 27; Adv.Dkt. 2-8, at 26, 334; Adv.Dkt. 2-9, at 471, 618, 759, 907; Adv.Dkt. 2-10, at 31, 150; Adv.Dkt. 2-11, at 47, 168; Adv.Dkt. 2-12, at 43, 156, 281; Adv.Dkt. 2-13, at 52, 155; Adv.Dkt. 2-14, at 47, 136.]

burden of defending USAG. *Thomson*, 11 N.E.3d at 1031–32. Here, defending USAG means paying the costs necessary to keep the Bankruptcy Code's remedies on the table to ensure that the sexual-abuse claims pending against USAG are resolved fully, finally, and in a fair manner.

Because the duty-to-defend provisions of the policies can reasonably be understood as requiring the payment of bankruptcy costs in the context of this case, that reading of the policy governs as a matter of law. *Eli Lilly* 482 N.E.2d at 470–71; *Liggett*, 426 N.E.2d at 144 ("Where any reasonable construction can be placed on a policy that will prevent the defeat of the insured's indemnification for a loss covered by general language, that construction will be given"); *Carter*, 407 F. Supp. 3d at 783. The insurers could only refuse to pay these costs if they are clearly not covered. *Id.* They did not exclude such costs or coverage for what has been a common mass-tort remedy since the early 1980s. Because they cannot make the required showing for *these* costs in *this* case, they are required to fund this proceeding.

III. The Court Should Enter Judgment For The Full Amount Of USAG's Bankruptcy Costs Plus Prejudgment Interest.

When an insurer wrongfully refuses to defend its policyholder, Indiana courts presume that the policyholder's legal fees on that matter are "reasonable and necessary." *Thomson*, 11 N.E.3d at 1023–24. This presumption exists for two reasons. *Id.* First, "the policyholder, which is defending itself without any assurance it will be reimbursed, provides a market-based check on the amounts spent, a better check than any court can provide after-the-fact." *Id.* Second, "it is unfair to let a breaching insurer nit-pick costs later when it could have—had it honored its duty to defend—initially directed the defense in any reasonable way it wished." *Id.*

Although *Thomson* provides the rule of decision, "even in a diversity suit the requirements of proof are governed by federal rather than state law." *Taco Bell Corp. v. Cont'l Cas. Co.*, 388 F.3d 1069, 1076 (7th Cir. 2008). This is because the manner of proving a fact, or

rebutting a presumption, "concern[s] how a particular court system, having regard for its resource constraints and the competing claims on its time, balances the cost of meticulous procedural exactitude against the benefits in reducing error costs." *Id.* Thus, *Taco Bell* held that, as a matter of federal law, a breaching insurer is not entitled to an evidentiary hearing based on its "hiring of an audit firm to pick apart a law firm's billing." *Id.* at 1077.

Thus, the Defense Costs Insurers must do more than hire someone to nit-pick at USAG's defense costs before the Court can hold a hearing or find that they have rebutted the *Thomson* presumption. *Id. Thomson* and *Taco Bell* require the insurers to provide evidence that the total amount spent is unreasonable to defend this case because another effective means of defense is cheaper. *Id.*; *Thomson*, 11 N.E.3d at 1023–24.

All of the invoices for which USAG seeks payment are in the record. These invoices are prima facie evidence of USAG's defense costs, and *Thomson* mandates a presumption that they are reasonable and necessary. The court should enter judgment for $5,954,098.36 in defense costs, plus prejudgment interest ($301,853.49 as of the date of this filing, and $1,279.28 per day thereafter until the entry of judgment). [Adv.Dkt. 401-11, Kozak Decl., ¶12]; *Thomson*, 11 N.E.2d at 1023–24; *Wolf Lake Terminals, Inc. v. Mut. Marine Ins.*, 433 F. Supp. 2d 933, 953–56 (N.D. Ind. 2005) (prejudgment interest appropriate where insurer wrongfully denied coverage). The insurers can only avoid the entry of judgment in this amount if they show that the total amount spent is unreasonable compared to some other means of defending the sexual-abuse lawsuits. *Thomson*, 11 N.E.3d at 1023–24.

CONCLUSION

The policies require the Defense Cost Insurers and LIU to pay the costs of this chapter 11 proceeding as part of USAG's defense. The Court should (1) declare that all of USAG's costs in maintaining this bankruptcy are defense costs; (2) enter a separate judgment under FED. R. CIV. P. 58 for **$6,255,951.85** ($5,954,098.36 in damages for the insurers' breach of their duty to defend, plus $301,853.49 in prejudgment interest accrued as of the date of this filing); (3) award $1,279.28 in prejudgment interest per day thereafter until the entry of judgment, (4) declare that the Defense Cost Insurers are jointly and severally liable for those damages; and (5) order the Defense Cost Insurers to (i) pay the judgment within 14 days of the order granting relief, and (ii) pay all future invoices immediately once the time for objections to a notice of draw has expired or after the objections have been resolved.

Respectfully Submitted,

/s/ George M. Plews /
George M. Plews (#6274-49)
Gregory M. Gotwald (#24911-49)
Tonya J. Bond (#24802-49)
Christopher E. Kozak (#35554-49)
PLEWS SHADLEY RACHER & BRAUN LLP
1346 N. Delaware St.
Indianapolis, IN 46202-2415
(317) 637-0700
Attorneys for USA Gymnastics
gplews@psrb.com
ggotwald@psrb.com
tbond@psrb.com
ckozak@psrb.com

Addendum A – Table of Invoices

Firm	Invoice	Bankr.Dkt.	Period	Covered Amt
Jenner & Block (Debtor's Counsel)	9471264	289-1	December 2018	$147,540.77
	9474765	289-2	January 2019	$120,639.78
	9475124	364-1	February 2019	$119,514.39
	9479260	447-1	March 2019	$169,166.91
	9486618	609-1	April 2019	$192,184.85
	9489904	609-2	May 2019	$269,370.96
	9490422	692-1	June 2019	$228,946.42
	9494262	701-1	July 2019	$336,675.75
	9497745	800-1	August 2019	$219,977.22
	9501292	825-1	Sept. 2019	$101,122.50
	9504916	841-1	October 2019	$73,439.28
	9508599	855-1	Nov. 2019	$164,103.26
	9512205	948-1	December 2019	$121,609.14
	9515925	948-2	January 2020	$319,749.55
	9523141	990-1	February 2020	$124,902.39
	9523783	1032-1	March 2020	$176,446.59
	9531103	1063-1	April 2020	$117,391.80
Firm Total				**$3,002,781.56**

Pachulski Stang Ziehl & Jones (Committee Counsel)	121256	304-1	December 2018	$14,168.10
	121542	304-2, 1025	January 2019	[12]$0
	121968	428-1	February 2019	$454,452.78
	121969	428-2	February 2019	$5,662.31
	122005	446-1	March 2019	$153,608.35
	122595	703-1	April 2019	$147,838.80
	122796	718-1, 1025	May 2019	[13]$233,680.49
	122837	726-1	June 2019	$187,604.90
	122917	749-1	July 2019	$261,977.54
	123338	821-1	August 2019	$164,729.89
	123347	821-2	Sept.2019	$39,864.30
	123606	857-1	October 2019	$24,989.05
	123620	859-1	Nov. 2019	$92,826.92
	124555	995-1	December 2019	$62,390.61
	124556	995-2	January 2020	$129,072.46
	124557	995-3	February 2020	$134,803.25
	124734	1024-1	March 2020	$287,519.35
	124735	1024-2	March 2020	$9,670.13
Total				**$1,395,448.40**

Rubin & Levin (Local Counsel to the Survivors' Committee)	244791	305-1	December 2018-January 2019	$44,831.33
	245105	429-1	February 2019	$52,219.18
	245699	429-2	March 2019	$24,938.41
	246047	531-1	April 2019	$26,884.24
	246798	623-1	May 2019-June 2019	$43,095.31
	247504	727-1	July 2019	$4,243.80
	248340	819-1	August 2019-September 2019	$19,513.47
	249688	880-1	October 2019-December 2019	$7,945.35
	250193	927-1	January 2020	$14,848.86
	250600	965-1	February 2020	$35,046.40
	250697	1002-1	March 2020	$33,135.20
Total				**$306,701.55**

[12] In their *First Interim Fee Application*, the Pachulski firm explained that the amounts in this invoice were inadvertently sought in another filing, [Bankr.Dkt. 428-1], resulting in double-billing. [Bankr.Dkt. 1025, at 3 & n.2.] The invoice in 304-2 is reduced to $0 to account for that error.

[13] This reflects the $775.00 reduction explained in the Pachulski firm's *First Interim Fee Application*. [Bankr.Dkt. 1025, at 4 & n.3.]

Fred Caruso (FCR)	12009	667-1	May 2019-June 2019	$50,610.00
	12030	705-1	July 2019	$27,090.00
	12082	759-1	August 2019	$4,060.00
	12231	875-1	September 2019-December 2019	$5,040.00
	12384	1006-1	January 2020-March 2020	$6,840.00
Frank Gecker (Counsel to FCR)	8830	664-1	May 2019-June 2019	$43,522.60
	8851	707-1	July 2019	$8,797.97
	8906	761-1	August 2019	$18,151.30
	9043	877-1	September 2019-December 2019	$9,034.10
	9044	1008-1	January 2020-March 2020	$18,556.80
Development Specialists, Inc. (Counsel to FCR)	12010	666-1	May 2019-June 2019	$29,944,74
	12051	706-1	July 2019	$7,152.27
	12083	760-1	August 2019	$2,047.50
	12230	879-1	September 2019-December 2019	$5,943.64
	12385	1007-1	January 2020-March 2020	$2,945.09
Total				**$239,809.27**
GRAND TOTAL				**$5,954,098.36**

Addendum B – Table of Jenner & Block Matters

Matter #	Matter Name	Amount
10015	USOC Various Jane Does	$452.70
10024	First Day Motions	$85,583.70
10032	Prep of Schedules – Statement of Financial Affairs	$41,082.75
10041	Budgeting	$2,601.00
10075	Plan of Reorganization – Disclosure Statement	$418,205.70
10083	Claims Administration & Objections	$457,650.00
10091	Fee Petition – Professional Retention	$119,025.90
10105	Communications with Creditors	$7,607.25
10113	Routine Motions	$104,400.00
10121	Attendance at Court Hearings	$58,067.55
10138	Communications with Board (Corp. Governance)	$55,647.90
10148	Communications with Official Committees	$19,845.00
10156	Reporting U.S. Trustee	$12,868.65
10164	Non-working Travel	$78,624.75
10172	Expenses	$112,730.87
10181	Stay Related Matters	$19,611.45
10199	Case Administration	$179,662.59
10202	Third Party Injunctions	$114,038.55
10229	Mediation	$950,597.55
10237	DIP	$57,321.00
10245	Rule 2004	$107,156.70
Total		**$3,002,781.56**

CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2020, a copy of the foregoing was filed electronically. Notice of this filing will be sent to the following parties through the Court's Electronic Case Filing System. Parties may access this filing through the Court's system.

Harley K. Means Stephen J. Peters Kroger Gardis & Regas, LLP hmeans@kgrlaw.com speters@kgrlaw.com Eric D. Freed Jonathan Toren Cozen & O'Connor efreed@cozen.com jtoren@cozen.com *Counsel for ACE American Insurance Company f/k/a CIGNA Insurance Company*	James P. Moloy Bose McKinney & Evans LLP jmoloy@boselaw.com Kevin P. Kamraczewski Law Offices of Kevin P. Kamraczewski kevin@kevinklaw.com Robert B. Millner Ronald D. Kent Susan M. Walker Dentons US LLP robert.millner@dentons.com ronald.kent@dentons.com susan.walker@dentons.com *Counsel for Virginia Surety Company Inc., f/k/a Combined Specialty Insurance Company*
Jeffrey B. Fecht Riley Bennett Egloff LLP jfecht@rbelaw.com Cassandra L. Jones Walker Wilcox Matousek LLP cjones@wwmlawyers.com *Counsel for RSUI Indemnity Company*	Wendy D. Brewer Phillip A. Martin Fultz Maddox Dickens PLC wbrewer@fmdlegal.com pmartin@fmdlegal.com Abigail E. Rocap Bates Carey LLP arocap@batescarey.com *Counsel for Endurance American Insurance Company*
Harley K. Means Stephen J. Peters Kroger Gardis & Regas, LLP hmeans@kgrlaw.com speters@kgrlaw.com Eric D. Freed Cozen & O'Connor efreed@cozen.com *Counsel for ACE American Insurance Company f/k/a CIGNA Insurance Company*	Bruce L. Kamplain Cynthia E. Lasher Norris Choplin Schroeder LLP bkamplain@ncs-law.com clasher@ncs-law.com *Counsel for Western World Insurance Company*

Ginny L. Peterson Casey R. Stafford Kightlinger & Gray, LLP gpeterson@k-glaw.com cstafford@k-glaw.com Nancy D. Adams Mathilda S. McGee-Tubb Laura Bange Stephens Mintz Levin Cohn Ferris Glovsky & Popeo, PC nadams@mintz.com msmcgee-tubb@mintz.com lbstephens@mintz.com *Counsel for Liberty Insurance Underwriters, Inc.*	Heather E. Simpson Kennedys CMK LLP Heather.simpson@kennedyslaw.com Scott P. Fisher Drewry Simmons Vornhem, LLP sfisher@dsvlaw.com George R. Calhoun Ifrah Law george@ifrahlaw.com *Counsel for TIG Insurance Company*
Susan N.K. Gummow Igor Shleypak Foran Glennon Palandech Ponzi & Rudloff PC sgummow@fgppr.com ishleypak@fgppr.com *Counsel for American International Group, Inc. & American Home Assurance Company*	Karen M. Dixon Michael M. Marick Skarzynski Marick & Black LLP kdixon@skarzynski.com mmarick@skarzynski.com Joshua D. Weinberg Katherine M. Hance Shipman & Goodwin LLP jweinberg@goodwin.com khance@goodwin.com *Counsel for Great American Assurance Company*
U.S. Trustee Office of U.S. Trustee ustpregion10.in.ecf@usdoj.gov	Hans H. J. Pijls Dinsmore & Shohl LLP Hans.pijls@dinsmore.com *Counsel for National Casualty Company*

/s/ George M. Plews /
George M. Plews

January 19, 2021

Robyn L. Moberly
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

In re: USA GYMNASTICS,[1] Debtor.	Chapter 11 Case No. 18-9108-RLM-11
USA GYMNASTICS, Plaintiff, v.	Adv. Pro. No. 19-50012 in 18-09108-RLM-11

[1] The last four digits of the Debtor's federal tax identification number are 7871. The location of the Debtor's principal office is 130 E. Washington Street, Suite 700, Indianapolis, Indiana 46204.

ACE AMERICAN INSURANCE COMPANY f/k/a CIGNA INSURANCE COMPANY, GREAT AMERICAN ASSURANCE COMPANY, LIBERTY INSURANCE UNDERWRITERS INC., NATIONAL CASUALTY COMPANY, TIG INSURANCE COMPANY, VIRGINIA SURETY COMPANY, INC. f/k/a COMBINED SPECIALTY INSURANCE COMPANY, AMERICAN HOME ASSURANCE COMPANY, and DOE INSURERS,

Defendants.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW ON USAG'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON BANKRUTPCY COSTS

Pursuant to 28 U.S.C. §157(c)(1), the Court now tenders its proposed findings and conclusions for de novo review by the district court. *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1947 (2015).

This matter came before the Court on USAG's motion for partial summary judgment ("the Motion") against its five General Liability ("GL") insurers and one of its Directors & Officers ("D&O") insurers (collectively, the "Insurers").[2] The Motion seeks an order compelling the Insurers to pay, as part of their duties to defend, the costs USAG has incurred in this bankruptcy case.

The Court provided the Insurers with an opportunity to take discovery, and the parties completed briefing. The Court heard oral argument on November 18, 2020. The Motion is ripe for decision. For the reasons stated below, the Court recommends that the district court DENY the Motion.

[2] The GL insurers are TIG Insurance Company ("TIG"), ACE American Insurance Company, f/k/a CIGNA Insurance Company ("ACE"), Combined Specialty Insurance Company, n/k/a Virginia Surety Insurance Company ("Combined Specialty"), Great American Insurance Company ("Great American"), and National Casualty Company ("National Casualty"). Liberty Insurance Underwriters, Inc. ("LIU") is the D&O insurer.

I. BACKGROUND

USA Gymnastics ("USAG") is the national governing body ("NGB") for gymnastics in the United States. As such, USAG is licensed to conduct certain events, including Olympic trials, and to use certain intellectual property, including the Olympic logo, in conjunction with those events. Beginning in 2017, hundreds of former and current athletes sued USAG for sexual abuse and acts of sexual misconduct perpetrated by Larry Nassar, a USAG volunteer. USAG provided notice to the GL Insurers, who agreed to defend under a reservation of rights. The GL Insurers agreed to USAG's choice of the law firm of Miller, Johnson, Snell & Cummiskey, PLC ("Miller Johnson") to defend the sexual abuse lawsuits. Miller Johnson's role was later expanded to that of coordinating USAG's defense on a national basis as the number of sexual abuse lawsuits grew. The GL Insurers have paid the fees of Miller Johnson incurred in defending USAG, as well as the fees of other defense counsel retained by USAG.

The United States Olympic and Paralympic Committee ("USOPC") is the federal statutorily created body that certifies NGB's for Olympic sports. The negative fallout from the sexual abuse lawsuits put USAG's NGB status in jeopardy. USAG replaced members of its Board of Directors and modified other internal operations in an attempt to restore the public's and USOPC's trust in USAG. USAG participated in four mediation sessions which did not result in settlement of the sexual abuse lawsuits. The USOPC filed a decertification complaint on November 5, 2018. USAG filed its chapter 11 case on December 5, 2018.

The prosecutions of the sexual abuse lawsuits have been stayed. A Tort Claimants' Committee comprised of the sexual abuse survivors was formed and is an active participant in this chapter 11. At USAG's request, the Court appointed mediators and a Future Claimants' Representative. After a stalemate was declared in the first extensive round of mediations, the court appointed another mediator and

mediation continues. USAG also obtained a third party litigation stay where the survivors agreed to stay their lawsuits against USOPC and others. USAG moved the Court to establish a claims bar date and devised a comprehensive, detailed proof of claim form tailored to obtain information unique to sexual abuse claims. It has objected to a claim on the basis that it was procedurally improperly filed as a class claim and has objected to certain late-filed claims. USAG has filed its plan of reorganization which offers the sexual abuse survivors a choice between a "litigation option" and a "settlement option". USAG sought, and obtained, the input of the both the Tort Claimants Committee and the Insurers on several of these matters. The majority of the work in this case, however, has involved insurance coverage issues.

USAG has incurred substantial costs in this bankruptcy and has asked the GL Insurers to pay for those costs that have been incurred as well as bankruptcy costs going forward as part of their defense obligation under the policies. The GL Insurers have declined. Thus, USAG seeks a declaration that USAG's costs in maintaining this bankruptcy are covered defense costs under the GL Insurers' policies in a precise dollar amount, including fees incurred by USAG's bankruptcy counsel, the law firm of Jenner & Block ("Jenner"), as well as counsel fees for the Future Claimants' Representative and the Tort Claimants Committee.

II. SUMMARY JUDGMENT

A party is entitled to summary judgment where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The moving party bears the burden of proving the absence of a genuine issue of material fact and the non-moving party must affirmatively demonstrate the existence of a genuine issue of material fact requiring trial. Fed.R.Civ.P. (56(a); *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986); *In Re Clark,* 550 B.R. 429, 431 (Bankr. N.D. Ind. 2016). In evaluating summary judgment motions, courts must view the facts and draw reasonable inferences in the light most favorable to the non-moving party. *Scott v. Harris,* 550 U.S. 372, 378 (2007); *Perdomo v. Browner,* 67 F.3d 140, 144 (7th

Cir. 1995) (reversing grant of summary judgment after "viewing the record and all reasonable inferences drawn from the record in the light most favorable to . . . the non-moving party."). Drawing all reasonable factual inferences in favor of the Insurers, the Court must determine whether they have presented "evidence of a genuine factual dispute" warranting a trial. *Hedberg v. Ind. Bell Tel. Co.*, 47 F.3d 928, 931 (7th Cir. 1995). The factual dispute must be material, one that "might affect the outcome of the suit under the governing law." *Freese v. Honda Mfg. of Ind.*, 1:18-cv-4016-JMS-MPB, 2020 WL 3473450 at *1 (S.D. Ind., June 25, 2020) (citing *Hampton v. Ford Motor Co.*, 561 F.3d 709, 713 (7th Cir. 2009). Factual disputes that are irrelevant to the legal question at issue will not be considered. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "Contract interpretation is a subject particularly suited to disposition by summary judgment" because the construction of a written contract is a question of law. *Grun v. Pneumo Abex Corp.*, 163 F.3d 411, 419-20 (7th Cir. 1998); *Celadon Trucking Services, Inc. v. Worth*, 70 N.E.3d 833, 842 (Ind. Ct. App. 2017); *Von Hor v. Doe*, 867 N.E.2d 276, 278 (Ind. Ct. App. 2007).

III. GOVERNING LAW AND THE POLICIES

A. Interpretation of Insurance Policies

The parties agree that Indiana substantive law governs the interpretation of the GL Policies for purposes of this Motion. USAG bears the burden to prove that the bankruptcy expenses it seeks to recover by this Motion fall within the scope of the GL Policies' insuring agreements. *PSI Energy, Inc. v. Home Ins. Co.*, 801 N.E.2d 705, 726-27 (Ind. Ct. App. 2004). Accordingly, USAG must show that all of the costs that it seeks constitute covered "defense costs" within the terms of the GL Policies.

As a federal court exercising diversity jurisdiction, this Court is required to follow the law as it is articulated by the Indiana Supreme Court. *See Lexington Ins. Co. v. Rugg & Knopp, Inc.*, 165 F.3d 1087, 1090 (7th Cir. 1999). If that Court has not spoken to the issue, the Court must predict how the Indiana Supreme Court would

decide the question. *Id.* "[I]n the absence of prevailing authority from the state's highest court, federal courts ought to give great weight to the holdings of the state's intermediate appellate courts." *Allstate Ins. Co. v. Menards, Inc.*, 285 F.3d 630, 637 (7th Cir. 2002). Federal courts "ought to deviate from those holdings only when there are persuasive indications that the highest court of the state would decide the case differently." *Id.*

Under Indiana law, "[a]n insurer's duty to defend claims against the insured is contractual, *i.e.*, as specified in the contract of insurance." *Drake Ins. Co. of N.Y. v. Carroll County Sheriff's Dept.*, 427 N.E.2d 1153, 1155 (Ind. Ct. App. 1981); *All-Star Ins. Corp. v. Steel Bar, Inc.*, 324 F. Supp. 160, 163 (N.D. Ind. 1971) ("The nature of the insurer's duty to defend is purely contractual. There is no common law duty to which the courts are free to devise rules. The obligation on the court is merely to interpret the language of the insurance contract."); *TIG Ins. v. City of Elkhart*, 122 F.Supp. 3d 795, 804 (N.D. Ind. 2015)("[w]hat really matters in deciding coverage questions is what the individual insurance policy at issue actually says. In other words, it is the language of the insurance contract that governs coverage, not some blanket judge-made rule").

The GL Policies "are subject to the same rules of construction as other contracts." *Burkett v. American Family Ins. Group*, 737 N.E.2d 447, 452 (Ind. Ct. App. 2000); *Colonial Penn Ins. Co. v. Guzorek*, 690 N.E.2d 664, 667 (Ind. 1997). It is the function of a court to "interpret an insurance policy with the goal of ascertaining and enforcing the parties' intent as revealed by the insurance contact." *Wright v. Am. States Ins. Co.*, 765 N.E.2d 690, 692 (Ind. Ct. App. 2002). "Clear and unambiguous language in insurance policy contracts, like other contracts, should be given its plain and ordinary meaning." *Cinergy Corp v. Associated Elec. & Gas Ins. Servs., Ltd.*, 865 N.E.2d 571, 574 (Ind. 2007); *Eli Lilly and Co. v. Home Ins. Co.*, 482 N.E.2d 467, 470 (Ind. 1985). Courts "must construe the insurance policy as a whole, rather than considering individual words, phrases or paragraphs," *Wright*, 765 N.E.2d at 692-93, and "must accept an interpretation of the contract language that

harmonizes the provisions, rather than one that supports conflicting versions of the provisions." *Thomson Inc. v. Ins. Co. of N. Am.*, 11 N.E.3d 982, 994 (Ind. Ct. App. 2014). Nothing in Indiana law permits the Court to rewrite the insurance contracts or "extend insurance coverage beyond that provided by the unambiguous language in the contract." *See Sheehan Const. Co., Inc. v. Continental Cas. Co.*, 935 N.E.2d 160, 169 (Ind. 2010); *Gillespie v. GEICO Gen. Ins. Co.*, 850 N.E.2d 913, 917 (Ind. Ct. App. 2006). Courts "may not extend coverage beyond that provided in the contract," and "may not interpret the policy to mean something that it clearly does not or was not intended to mean," even if doing so "limits the insurer's liability." *Rice v. Meridian Ins. Co.*, 751 N.E.2d 685, 689 (Ind. Ct. App. 2001).

B. THE GL POLICIES

The GL Insurers issued commercial general liability primary policies to USAG over roughly a thirty year period from 1986 to 2018 ("GL Policies"). The GL Policies contain substantially similar material terms, including their insuring agreements, supplementary and voluntary payments provisions that delineate the GL Insurers' right and duty to defend suits against USAG:[3]

> 1. INSURING AGREEMENT
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" ... to which this insurance applies. **We will have the right and duty to defend the insured against any "suit" seeking those damages.** However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" ... to which this insurance does not apply.
>
> b. This insurance applies to "bodily injury" only if:
>
> (1) The "bodily injury" is caused by an "occurrence" that takes place in the "coverage territory"; and
>
> (2) The "bodily injury" occurs during the policy period. [Bolding added.]

[3] A policy containing the language at issue here can be found at Adv. Dkt 19-50012 #2-9, p.609 of 1011.

The GL Policies define the term "suit" to mean a "civil proceeding in which damages because of 'bodily injury' ... to which this insurance applies are alleged." The GL Policies' "supplementary payments" provision states:

> 1. We will pay, with respect to any claim we investigate or settle, **or any "suit" against an insured we defend**:
>
> a. All expenses **we incur**.
>
> * * *
>
> d. All reasonable expenses incurred by the insured **at our request** to assist us in the investigation or defense of the claim or "suit". [Bolding added.]

The GL Policies' "no voluntary payments" provision states:

> d. No insured will, except at the insured's own cost, **voluntarily** make a payment, assume any obligation or incur any expense, other than for first aid, **without our consent**. [Bolding added.]

Finally, the GL Policies' "bankruptcy conditions" provision states:

> 1. Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations under this Coverage Part.

C. THE LIU POLICY

LIU issued a D & O policy covering the period from May 16, 2016 to May 16, 2017. [4] The Insuring Agreement provided that LIU:

> shall pay on behalf of the **Insureds** all **Loss** which they shall become legally obligated to pay as a result of a **Claim** first made during the **Policy Period** or **Discovery Period**, if applicable, against the **Insureds** for a **Wrongful Act** which takes place before or during the **Policy Period**."

The policy defined "claim": as

> (a) a written demand for monetary or non-monetary relief *against an **Insured***;
> (b) the commencement of a civil or criminal judicial proceeding or arbitration *against an **Insured***; [or]
> (c) the commencement of a formal criminal, administrative or regulatory proceeding or formal investigation *against an **Insured***...."

[4] The LIU Policy can be found at Adv. Dkt. 19-50012 #501-2, page 3 of 29.

"Wrongful Act" was defined as "any actual or alleged error, misstatement, misleading statement, act, omission, neglect, or breach of duty...committed or attempted...by the **Insured Organization**." The LIU Policy defined "**Defense Costs**" to mean "reasonable and necessary fees (including attorneys' fees and experts' fees) and expenses incurred *in the defense of a* ***Claim*** and cost of attachment or similar bonds, but shall not include the wages, salaries, benefits or expenses of any directors, officers or employees of the **Insured Organization**." Further, the LIU Policy provides that "[t]he **Insureds** shall not incur any **Defense Costs**...with respect to any **Claim** without the Insurer's prior written consent, which shall not be unreasonably withheld," and LIU "shall not be liable for any **Defense Costs** incurred...without the Insurer's prior written consent."

The LIU Policy also provides:

> If any **Loss** arising from any **Claim** is insured by other valid and collectible insurance, then this Policy shall apply only in excess of the amount of any deductibles, retentions and limits of liability under such other policy or policies, whether such other policy or policies are stated to be primary, contributory, excess, contingent or otherwise, unless such other insurance is written specifically excess of this Policy by reference in such other policy to this Policy's Policy Number.

The GL Policies define "suit" as "a civil proceeding in which damages because of 'bodily injury' . . . to which this insurance applies are alleged." The LIU Policy uses the term "Claim," which is broadly defined to even cover "a written demand for monetary relief" but such demand must be "against the Insured". No one disputes that the sexual-abuse lawsuits against USAG are "claims" or "suits" *under the relevant policies*, but is the chapter 11 bankruptcy itself a "claim" or a "suit" under the policies?

IV. ANALYSIS

A. Motive For Filing Bankruptcy Irrelevant

The parties give a fair amount of discussion to USAG's motive in filing the chapter 11. The Insurers note that defense of the sexual abuse lawsuits by Miller Johnson and other defense counsel was operating smoothly and it was not until the USOPC filed its decertification action that USAG decided to file a chapter 11 case. USAG argues that the purpose of the filing was to resolve the claims related to the sexual abuse lawsuits in one convenient forum. This Court, in the course of various hearings, has commented that this case is "about" resolution of the sexual abuse claims. USAG further argues that it had already proposed to the USOPC the possibility of filing a chapter 11 case before the decertification complaint was filed.

Most chapter 11 reorganization cases have reputation rehabilitation as a goal. Without post-bankruptcy support from customers, members, or clients, most businesses would ultimately fail; USAG is no exception. Restructuring the leadership of USAG and developing Safe Sport[5] policies are analogous to actions taken by other for-profit and not-for-profit debtors to improve their chances for a successful exit from bankruptcy. Likewise, restructuring the leadership and developing Safe Sport policies are consistent with actions done in a civil settlement to satisfy constituents and enhance settlement possibilities.

USAG's motive for filing was multi-faceted and the chapter 11 most likely was filed for all the reasons mentioned above. The overwhelming number of pleadings, issues, efforts, and time in this case has been related to resolution of insurance coverage issues (both in pleadings and court rulings as well as in mediations) and resolution of the survivors' claims. Staying decertification was considered by USAG but has not been an issue or even addressed in this case. USOPC has not requested the stay be lifted and has not indicated any intent to proceed with decertification. There has been no pleading nor ruling by the Court, other than the statutory automatic stay, entered in this case. In fact, USOPC is a

[5] Protecting Young Victims From Sexual Abuse and Safe Sport Authorization Act of 2017 (the "Safe Sport Act") Pub. L. No. 115-126, 132 Stat 318 (Feb 14, 2018).

co-defendant in some or most of the pending sex abuse lawsuits and it is logical that USOPC is similarly situated with USAG in the arena of public opinion and may be aligned with USAG in its filing. Determination of coverage is controlled by the policy language and motive for filing is irrelevant to the issue of insurance coverage for this bankruptcy, just as it is in any coverage matter. Therefore, the court puts no weight in the debtor's motivations or concerns about its reputation.

B. The Bankruptcy Case Is Not A 'Suit' Under The GL Policies

Indiana case law broadly defines "defense costs" as expenses incurred to minimize liability and resolve claims. *Thomson*, 11 N.E.3d at 1026-27. USAG makes three major arguments why the bankruptcy fees are covered under the GL Policies: (1) these costs fit within Indiana's broad concept of defense costs and a policyholder's right to a "complete defense"; (2) the use of a chapter 11 bankruptcy is the way modern mass torts are most efficiently and effectively defended; and (3) insurers have routinely paid these costs or arranged for their payment as part of the resolution of just this kind of chapter 11 mass tort. While these points have merit, it is the policy language that controls.

The GL Policies define a "suit" as a "civil proceeding" that alleges damages for "bodily injury" to which the insurance coverage applies. A bankruptcy case is a "civil proceeding", but for the duty to defend to be triggered, the "suit" has to be a civil proceeding in which damages for bodily injury are alleged. Coverage under the GL Policies, then, necessarily involves costs incurred in defending a claim for bodily injury alleged by another against USAG. This is the plain and commonly understood definition of "suit": B is the insured and A sues B for damages for something B did to A. Indeed, Black's Law Dictionary defines "suit" as "a generic term, of comprehensive signification, referring to any proceeding by one person or persons *against* another or others in a court of law in which the plaintiff pursues the remedy that the law affords for the redress of an injury or the enforcement of a right, whether at law or in equity." (emphasis added). Black's Law Dictionary, 1434 (6th ed. 1990). A "bankruptcy" is

defined as "a statutory procedure by which a ...debtor obtains financial relief and undergoes a judicially supervised reorganization or liquidation of the debtor's assets for the benefit of creditors..." Black's Law Dictionary, 180 (11th ed. 2019). These definitions demonstrate the difference between a "suit" involving a plaintiff and specific defendants, and a "bankruptcy" involving a debtor and its collective body of creditors.

1. A Bankruptcy Discharge Does Not Minimize or Eliminate Liability, But Merely Bars Collection of the Debt

A civil suit seeking damages against a policyholder, such as a lawsuit alleging sexual abuse, necessarily possesses an adversarial tenor and requires that the parties litigate the defendant's liability and the plaintiff's damages through discovery, motion practice and, if necessary, trial. The purpose of expending defense costs is to minimize those liabilities and damages. The insurer and its policyholder have a shared interest to minimize liability and defense costs to further that common purpose. The very nature of a bankruptcy proceeding alters that shared interest.

The debtor in a chapter 11 reorganization is not concerned with trying to minimize or dismiss tort liabilities, but rather with obtaining a discharge and emerging as an operating entity. The resulting discharge does not eliminate or lessen liability on claims against the debtor; it merely bars collection of that debt from the debtor. *See Matter of Shondel*, 950 F.2d 1301, 1306 (7th Cir. 1991) ("[A] discharge under Section 524 does not prevent the establishment of liability for the purpose of recovery from an insurer."); *In re Coho Resources, Inc.*, 345 F.3d 338, 343 (5th Cir. 2003) ("[C]ourts are in 'near unanimous agreement' that § 524(e) 'permits a creditor to bring, and proceed in, an action nominally directed against a discharged debtor for the sole purpose of proving liability on its part as a prerequisite to recovering from its insurer.'"); *Green v. Welsh*, 956 F.2d 30, 33–34, 36 (2nd Cir. 1992) ("In sum, we find that the discharge injunction under §§ 524(a) and 524(e) permits Green to continue her suit against the Welshes, without requiring her to obtain a modification of the injunction, but only to prove liability as a prerequisite to recovery from the Welshes' liability insurer.").

The litigation option under USAG's proposed chapter 11 plan does not calculate, eliminate, or lessen USAG's liability for the sexual abuse claims: it merely bars collecting on that debt from the debtor. That option permits the pre-petition sexual abuse lawsuits to resume, and new sexual abuse claims to be filed. All such lawsuits would be litigated in court, presumably defended by USAG's insurers, and be paid (if at all) only from USAG's insurance. Nor does the settlement option resolve claims. Under this option, a trust would be established and the sexual abuse claims would be channeled to that trust for eventual resolution. The pending proposed plan does not evaluate nor classify the value of survivors' claims by the usual defensive criteria, such as statute of limitations, degree of physical harm both short term and permanent, pain and suffering, pecuniary loss, medical or psychological treatment, or culpability of USAG. Nothing in the proposed plan or pleadings filed by USAG indicate that the bankruptcy case would be used to adjudicate the claims against USAG or attempt to reduce its liability.

2. USAG's Claims Objections Were Not Filed to Determine USAG's Liability

A proof of claim filed in a bankruptcy case is deemed allowed unless objected to. *See* 11 U.S.C. § 502(a). A "contested proceeding" arises upon the filing of an objection and at that point, there may be discovery taken and arguments may be made about the validity and amount of the claim. *See IRS v. Taylor (In re Taylor)*, 132 F.3d 256, 260 (5th Cir. 1998) ("An objection to a proof of claim serves to initiate a contested matter."); *In re WorldCom, Inc.*, 372 B.R. 159, 164 (Bankr. S.D.N.Y. 2007) ("the filing of an objection to a proof of claim commences a contested matter"). Because the objection process commences a contested matter bearing many similarities to civil litigation, USAG might have had an argument that it is entitled to recover "defense" costs for pursuing claim objections. But,the claims objections pursued here, combined with the language of the GL Policies, deem otherwise. First, the language of the GL Policies is not broad enough to require a defense for "any claim"; it is limited to a

"suit" in which damages for bodily injury are alleged. *See Amatex Corp. v. Aetna Cas. & Surety Co. (In re Amatex Corp.)*, 107 B.R. 856, 869-70 (Bankr. E.D. Pa. 1989). (where the bankruptcy court held that an insurer was required to defend proof of claim proceedings against the debtor where the policy expressly required a defense for "any claim" against the insured). Second, while the claims may have alleged bodily injury, USAG's objections had nothing to do with disputing its liability for the bodily injury allegedly caused. Out of more than 500 unique sexual abuse claims filed in this case, USAG has objected to only a few claims, most of which were simply duplicate claims, along with one class claim that USAG objected to on procedural grounds. The objections did not contest USAG's liability on the underlying merits of the claim. USAG has not conducted discovery nor raised any defenses with respect to the sexual abuse claims and the objections it filed do not seek to lessen USAG's liability on those claims.

3. USAG's Fiduciary Duties Alter the "Unity of Interests" With Its Insurers

A debtor in possession's fiduciary duties further illustrate how a bankruptcy alters the relationship between an insured and its insurer. As the debtor in possession of the bankruptcy estate, the debtor owes a fiduciary obligation to creditors and necessarily cannot act only in its own interest. *See, e.g., In re Scott*, 172 F.3d 959, 967 (7th Cir. 1999) ("[t]he debtor-in-possession owes a fiduciary duty to his creditors"); *In re Mack Industries*, 606 B.R. 313, 320 (Bankr. N.D. Ill. 2019); 11 U.S.C. § 1107(a). This includes, in appropriate circumstances, duties of care and to maximize estate assets and distributions to creditors—the same persons that held opposing interests prior to the petition. *See Fulton State Bank v. Schipper (In re Schipper)*, 933 F.2d 513, 515 (7th Cir. 1991). A chapter 11 debtor no longer has the same unity of interests with its insurer and, in some cases, has interests that may be diametrically opposed. In a chapter 11 case filed to deal with asbestos personal injury lawsuits, a bankruptcy court likened insurance coverage to a "pie" where the debtor, claimants, and the future claimants' representative in that case had a common

interest (adverse to the insurers) in maximizing the size of the pie, even if they have conflicting interests in how to divide the pie amongst themselves. *In re Leslie Controls, Inc.*, 437 B.R. 493, 500 (Bankr. D. Del. 2010). At a minimum, USAG's focus in the bankruptcy is not to challenge or defeat claimants' allegations but to marshal insurance coverage for the claimant's benefit. The chapter 11 is a procedural vehicle by which USAG can gather, maximize and then divvy up insurance proceeds in resolution of the sexual abuse lawsuits. This objective is far different than the duty to defend objective of minimizing an insured's liability.

4. There is No Legal Precedent That Extends an Insurer's Duty to Defend to Payment of Bankruptcy Costs.

Neither USAG nor the Insurers have directed this Court to a case where payment of a debtor's bankruptcy costs fell under a duty to defend. USAG puts much stock in the *Thomson* case to support its argument that the bankruptcy costs here fall under the general notion of "defense costs". *Thomson* is neither analogous nor supportive of USAG's arguments.

Thomson was not a debtor in bankruptcy . Rather, the issue there was whether the insurer (which had previously been found to have a duty to defend) was obligated to pay the costs of prosecuting a third-party indemnity claim as a "reasonable" defense cost. The underlying suit against Thomson was brought in Taiwan by plaintiffs and estates of those who allegedly were injured or died due to exposure to organic solvents. Thomson sought a defense and indemnity from its general liability insurers, which asserted various coverage defenses and resulted in coverage litigation. Thomson later moved for summary judgment to recover fees as defense costs, including fees incurred in prosecuting a third party indemnity claim. The insurer's expert testified that the time spent pursuing indemnity claims against third parties should be excluded from the insured's "reasonable and necessary costs." 11 N.E. 3d at 1025-1026. The *Thomson* court rejected this notion

and cited in footnote 26 to an Illinois case which held that a duty to defend extends to "all litigation by the insured which could defeat its liability...." The ruling in *Thomson* simply reflected that the setoff from the indemnity litigation would reduce the policyholder's liability and, as a consequence, the insurer's obligation to pay on account of it. The *Thomson* case may indicate that an insured's claims and actions for indemnity and contribution (which reduce or defeat the insured's liability) fall under an insured's duty to defend, but nothing in *Thomson* analyzed the relevant policy language or the scope of the duty to defend because that issue had already been decided in a prior ruling that was not the subject of the appeal.

USAG aptly points to a number of other bankruptcies where insurers have agreed, in the context of settlements resolving coverage and effecting plan confirmation, to allow insurance proceeds to be used to pay administrative costs. It is likely true that insurance companies have agreed to fund other bankruptcy cases of their insureds for the reasons USAG cites in its papers. In a mass tort context, bankruptcy is an efficient venue to resolve mass tort claims by bringing them together in one venue, mediating all claims in any flexible manner a court should order or the parties agree, banding similar claims together for efficiency and consistency, ending potential future claims, and generally being very cost-effective. These cases reflect that insurers contributed to settlements involving substantial benefits to the insurers, including policy release, injunctive relief and protection against extra contractual claims, as part of a global deal. While the economic, logistical and systemic advantages of the bankruptcy forum may be a reason for insurers to voluntarily fund an insured's bankruptcy, it is not a reason for this Court to stretch or rewrite the contractual coverage obligation. This Court declines to rewrite the policy language, especially in light of other courts that have denied coverage for similar costs. See, *Milwaukee Notions, Inc. v. Erie Ins. Exch. (In re Milwaukee Notions, Inc.)*, Adv. No. 07-2292, 2009 WL 1351101, at *6-7 (Bankr. E.D. Wis. May 11, 2009) (bankruptcy court held that expenses incurred in responding to Rule 2004 examinations which may have aided the debtor's defense in underlying litigation, the

preparation of schedules and the filing of a cash use motion were not covered defense costs).

On the contrary, courts consistently hold that the plain language of insurance contracts similar to those at issue here dictate that the duty to defend does not extend to an insured's affirmative claims for relief or causes of action (*e.g.*, counterclaims or claims asserted in altogether different lawsuit). *See, e.g., Global Caravan Techs., Inc. v. Cincinnati Ins. Co.*, 135 N.E.3d 584 (Ind. Ct. App. 2019) (affirming trial court's summary judgment ruling that insured's voluntary intervention in pending litigation in which no claim for damages was asserted against it was not a "suit" under the language of its insurance contract).

In *Global Caravan*, the named insured intervened in a lawsuit pending against certain other insureds (who were being defended by the insurer). The named insured sought coverage for "defense" of that action from the insurer, which then sought a declaration that it had no such duty to the named insured in that action. The policy's definition of "suit" was identical to the definition of "suit" in the GL Policies here. The trial court granted summary judgment to the insurer on the basis that the named insured's intervention was not a "suit" against the named insured seeking damages, even if the named insured's intervention had the purpose of preventing recovery from its assets. *Id.* at 588. The trial court characterized the insured's argument as an "invitation ... to ignore well-settled Indiana law and the ... Policy language to impose a duty to defend upon [the insurer] in the absence of a 'suit' against [the named insured]." *Id.* at 590. The trial court declined that invitation. The Court of Appeals affirmed, agreeing that the case was not a "suit" against the named insured seeking damages.

USAG's further contention that the "policies do not exclude bankruptcy as a defense cost" is of no merit. The fact that the policies do not expressly exclude bankruptcy costs as covered costs is not the standard under which coverage is determined. USAG bears the initial burden of showing that expenses fall within the policies' insuring agreements. *PSI Energy, Inc.*, 801 N.E.2d at 726-27. The

bankruptcy clause in the policy is further unavailing. It provides that bankruptcy of the insured will not relieve the Insurers of their obligations "under this Coverage part", meaning the coverage terms of the policy. This simply means that the GL Insurers' duty to defend and pay the defense costs of Miller Johnson and other approved defense counsel continues even though USAG has filed a bankruptcy case.

5. The Bankruptcy is not a Defense Strategy

USAG argues that because the GL Insurers are providing a defense of the Sexual Abuse Lawsuits under a reservation of rights, USAG has the right to control its defense and its chapter 11 case is its defense strategy. The case USAG cites for support—*Armstrong Cleaners Inc. v. Erie Ins. Exch.*, 364 F. Supp. 2d 797, 806-07 (S.D. Ind. 2005) (holding that in this situation, the insurer faces an "insurmountable conflict of interest" and loses the right to control the defense)—provides none. It simply decided whether an insured being defended under a reservation of rights was entitled to select its own counsel to defend it based on the particular facts in that case. Here, USAG has chosen its own defense counsel—Miller Johnson. There is no basis for extrapolating that the rule that an insured is entitled to independent defense counsel in certain circumstances means that the GL Insurers must pay the $6.2 million bill for this bankruptcy.

This chapter 11 case is a means by which USAG can rehabilitate its brand and move forward without the weight of litigating hundreds of sexual abuse claims. By all means, this proposed order does not reach the issue of whether an Insurer would have a contractual obligation to defend contested matters in a bankruptcy context where the debtor was actively denying liability and putting forth a defense to each survivor. But based on what is before the court, the bankruptcy is not a "defense" strategy. It is not a lawsuit brought by one or many persons against the insured. This bankruptcy case was brought by the insured, and not against anyone else. No sexual abuse party in this mass tort bankruptcy can obtain enforcement of their rights; it must be consensual. A bankruptcy forum is typically where agreements can be reached in a mass tort case because the alternative venue,

district and state trial courts where enforcement is achieved, is frequently slower, more expensive, and unpredictable. USAG's aim is to reorganize and discharge its debts and to rehabilitate its tarnished image. The bankruptcy is neither in form nor substance a "suit" against USAG that is "seeking [covered] damages." The supplementary payments and other no voluntary payments policy provisions confirm that the defense obligation provides for the insurer to protect the parties' shared interest in minimizing liability. The bankruptcy is not a "suit" and the GL Insurers are not obligated under the terms of the policies to pay the bankruptcy costs as part of their duty to defend.

C. THE BANKRUPTCY CASE IS NOT A "CLAIM AGAINST" THE INSURED UNDER THE LIU POLICY

The LIU Policy provides coverage of "claims against the insureds". "Claim" is broadly defined under the policy to include "a written demand for monetary or non-monetary relief against an Insured" and thus is not limited to "suits" as is found in the GL Policies. However, the qualifying language that such written demand must be "against" the insured nonetheless dictates the same result of no duty to defend. This bankruptcy, initiated by USAG, is not a proceeding "against" USAG. The bankruptcy is not a claim for a "wrongful act" which is defined under the policy as "any actual or alleged error, misstatement, misleading statement, act, omission, neglect, or breach of duty...committed or attempted...by the **Insured Organization**." The discussion above pertaining to no contractual obligation by the GL Insurers to pay bankruptcy costs under their duty to defend applies equally here. LIU's duty to defend does not extend to payment of bankruptcy costs.

The language of the insurance policies is unambiguous. Its plain meaning dictates that the bankruptcy is neither a "suit" nor a "claim" that triggers the Insurers' duty to defend. USAG is not entitled to summary judgment on this issue.

V. PROPOSED RELIEF

The Court recommends that the district court DENY USAG's Motion for Partial Summary Judgment on Bankruptcy Costs .

# # #

Faculty

Gregory M. Gotwald is a partner with Plews Shadley Racher & Braun LLP in Indianapolis and focuses his litigation practice on insurance-coverage law. He co-leads the firm's COVID-19 insurance recovery work, helping businesses recovery lost income from the coronavirus pandemic. Mr. Gotwald has experience with various types of insurance policies, including commercial general liability (CGL), first-party property (including business income/business interruption), product liability, director and officer (D&O), errors and omissions (E&O), fidelity, crime and pollution-liability policies. He works on high-stakes cases with hundreds of millions of dollars at issue, as well as small individual cases. He advises corporate clients on potential gaps in their coverage programs, and also has experience with broker-liability claims. In recognition of this work, he has been named a Fellow of the American College of Coverage Counsel. Additionally, Mr. Gotwald handles environmental cases, involving the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Resource Conservation and Recovery Act (RCRA), the National Environmental Policy Act (NEPA), Indiana's Environmental Liability Act (ELA), and other statutory and common-law claims. He also has litigated various other complex matters involving construction defects, breach of contract and other business-related matters. He served as the firm's managing partner and on its management committee for multiple years. Mr. Gotwald has been listed in *The Best Lawyers in America* for Insurance Law each year since 2020 and has been listed in *Indiana Super Lawyers* for Insurance Coverage annually since 2018. He received his B.S. in chemical engineering in 2001 from the Rose-Hulman Institute of Technology and his J.D. *cum laude* in 2004 from Vermont Law School.

Robert P. Handler, CTP is a managing member of Commercial Recovery Associates, LLC in Chicago and has more than 30 years of professional experience in commercial financial transactions, with most of his involvement in managing turnaround situations and other financially and operationally distressed businesses. He has handled business reorganizations, acquisitions and mergers, and has acted in several fiduciary capacities such as independent director, federal and state court-appointed receiver, bankruptcy trustee, trustee/assignee for the benefit of creditors and CRO across the country, in various parts of the world, and in a wide variety of industries. As a founding member and general counsel to the specialty commercial lending divisions of each of Bank of America and The CIT Group, Mr. Handler was responsible for the growth and success of each company's commercial loan portfolio. In this role, he was charged with his company's initiation, structuring, documentation and administration of all loans to financially distressed companies. Mr. Handler also previously practiced law in a commercial litigation firm, where he was engaged in all aspects of bankruptcy litigation on behalf of secured creditors, creditors' committees and debtor clients. He is a subchapter V trustee and a member of ABI, the Turnaround Management Association and the Chicago Bar Association. Mr. Handler actively participates in and/or chairs various panel discussions nationwide concerning current issues in receiverships, turnarounds, bankruptcy and commercial financial transactions. He is also a regular contributor to the annual editions of *Strategic Alternatives For and Against Distressed Businesses*, published by Thomson Reuters, which discusses assignments for the benefit of creditors in Illinois. Mr. Handler received his B.A. from Grinnell College and his J.D. from the University of Iowa College of Law.

Hon. Robyn L. Moberly is a U.S. Bankruptcy Judge for the Southern District of Indiana in Indianapolis and served a seven-year term as Chief Judge. She served on the superior court bench in Indianapolis from January 1997 until her appointment to the bankruptcy court. In state court, she presided over major felony court for four years and civil court for 12 years. Prior to her judicial service, Judge Moberly was a general practitioner for 17 years. She served as president of the IU McKinney School of Law Alumni Association and of the Indiana Judges Association, as president and board member of the Indianapolis Bar Association, as board member of the Indiana Judicial Conference, and as associate presiding judge of the Marion Superior Court. Judge Moberly has been recognized for her contributions to our community by receiving the Indianapolis Bar Association's President's Award, the Board of Directors Award and the Indianapolis Bar Association's *Pro Bono* Award. She also received the 2016 *Indianapolis Business Journal*'s Women of Influence award, the Distinguished Barrister award by the *Indiana Lawyer* newspaper, the Woman of Achievement award by Ball State University, and the Woman for All Seasons by the St. Thomas Moore Society. She also received the Silver Gavel in 2022. Judge Moberly received her J.D. *cum laude* in 1978 from the Indiana University McKinney School of Law.

Peter J. Roberts is a member of Cozen O'Connor in Chicago and represents clients in all matters of commercial insolvency, including bankruptcies, workouts, receiverships, assignments for the benefit of creditors, UCC Article 9 sales and related litigation. He develops workout strategies for debtors and creditors, formulates and executes plans of reorganization, navigates asset sales in distressed situations, and litigates cases in state and federal courts. In addition, he has extensive trial and appellate experience, including several appeals before the Seventh Circuit Court of Appeals. Mr. Roberts typically works with debtors, creditors' committees, trustees, equity receivers, assignees for the benefit of creditors, prospective buyers of distressed assets, financial institutions, equipment lessors, landlords and trade creditors. His clients come from a range of industries, including construction, health care, lending, manufacturing, real estate, retailing, wholesaling, collectibles, jewelry, furniture, trucking and biotechnology. Mr. Roberts has been recognized by *Chambers & Partners USA*, *Super Lawyers* and *The Best Lawyers in America*. He is AV-rated by Martindale-Hubble and has been named an Illinois Leading Lawyer by the Law Bulletin Publishing Company. Mr. Roberts received his A.B. in history *cum laude* from Boston College in 1987 and his J.D. from Duke University School of Law.

Melissa M. Root is a partner with Jenner & Block in Chicago and is a member of the firm's Restructuring and Bankruptcy, Bankruptcy Litigation, Energy and ERISA Litigation practices. In addition, she is the co-chair of the firm's Hiring Executive Committee and a member of its Diversity and Inclusion Committee. Ms. Root's experience representing creditors, committees, debtors, examiners and trustees in complex financial restructuring matters and high-stakes bankruptcy litigation. She currently serves as counsel to USA Gymnastics in its chapter 11 case, and a significant part of her practice includes representing committees of retired employees. She currently represents the official committee of government retirees in the Commonwealth of Puerto Rico's Title III case, and she previously represented retiree committees in the Budd Co., American Airlines and Walter Energy cases. Ms. Root also frequently represents parties in bankruptcy-related appellate matters. She served as counsel for the prevailing petitioners before the U.S. Supreme Court in *Wellness International Network, Limited v. Sharif*, and also served as counsel for the American Bar Association in connection with its *amicus curiae* brief in *Executive Benefits Insurance Agency v. Arkinson*, and as counsel for the National Association of Bankruptcy Trustees in connection with its *amicus curiae* brief filed in the U.S. Supreme Court in *Baker Botts L.L.P.* and *Jordan, Hyden, Womble, Culbreth & Hozer, P.C. v.*

Asarco LLC. Ms. Root devotes significant time to *pro bono* work and currently represents a class of former students in the ITT Technical Institute bankruptcy case. She is active in ABI, for which she serves on the advisory committee for several conferences, and she was honored as one of ABI's "40 Under 40" in its 2017 inaugural class. Ms. Root received her B.A. *magna cum laude* in 2000 from Bowling Green State University and her J.D. *cum laude* in 2003 from the University of Michigan Law School.