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

In re:	)	Case No. 18-09108-RLM-11
	)	
USA GYMNASTICS,	)	Chapter 11
	)	**Hon. Robyn L. Moberly, Chief Judge**
Debtor.	)	
	)	

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.'S LIMITED OBJECTION TO THE JOINT MOTION REQUESTING THE COURT TO CONDUCT A SETTLEMENT CONFERENCE AND OTHER RELIEF

National Union Fire Insurance Company of Pittsburgh, Pa., on behalf of itself and its affiliates (collectively "National Union"), by and through the undersigned attorneys, hereby brings this limited objection to the *Joint Motion Requesting the Court to Conduct a Settlement Conference and Other Relief* (Dkt. 1230, the "Joint Motion") which was jointly brought by USA Gymnastics ("USAG" or the "Debtor") and the Additional Tort Claimants Committee of Sexual Abuse Survivors (the "Survivors' Committee"). In support of its limited objection, National Union submits the *Declaration of Kevin J. Larner In Support Of National Union Fire Insurance Company of Pittsburgh, Pa.'s Limited Objection to the Joint Motion Requesting the Court to Conduct a Settlement Conference and Other Relief*, attached hereto as Exhibit A, and states as follows:

PRELIMINARY STATEMENT

In their Joint Motion, the Debtor and the Survivors' Committee attempt to enlist the Court to inappropriately influence the parties into a unilateral settlement based on terms that only USAG and/or the Survivors' Committee deem appropriate. Over the course of the last year, National Union has actively participated in good faith in six separate mediation sessions, attending each time with fully informed corporate representatives vested with full authority to resolve the claims

asserted against the Debtor that fall within National Union's policy period. Despite this record of good faith active engagement in settlement discussions, the Debtor and the Survivors' Committee baselessly assert in their Joint Motion that "the carriers have acted in bad faith," and contend therefore that the insurance carriers' chief executive officers should be required by the Court to personally attend their requested settlement conference. That request in the Joint Motion is legally and factually unsupported and should be denied.

First, particularly in light of National Union's active participation in settlement efforts, there is no basis here for the Court to enter an order that requires a specific senior corporate representative, such as National Union's CEO, to attend a future settlement conference, and courts around the country have been notably reluctant to order such relief in the absence of egregious misconduct. Second, the wholly unsupported allegations of bad faith made by the Debtor and the Survivors' Committee as to National Union's participation in mediation are not well founded and therefore cannot support the relief they seek. National Union has participated in mediation with demonstrated good faith and indeed has repeatedly sought to directly engage with the parties, without meaningful reciprocation. Third, the attendance of National Union's CEO would not add sufficient additional value to a settlement conference, as National Union's CEO lacks any unique knowledge about the claims at issue, would bring the same settlement authority as National Union's other corporate representatives, and would be advised by the same counsel as to the propriety of any settlement offers.

Further, while National Union supports continued settlement efforts – including through mediation or a settlement conference – National Union respectfully submits that this Court should not conduct these efforts. The Court is currently presiding over a pending insurance coverage adversary proceeding, the resolution of which directly relates to the Debtor's and the insurers'

settlement positions. This Court also oversees the Debtor's ongoing reorganization proceeding, which also bears on the settlement discussions. Due to these pending proceedings, National Union respectfully submits that this Court should continue to entrust the facilitation of settlement discussions to Judge Zive and Mr. Van Osselaer, or to another neutral mediator should it so choose.

BACKGROUND

1. The Debtor asserts that National Union issued a general liability policy to the Debtor (the "Policy"). National Union is uniquely situated as its Policy (1) does not directly or indirectly insure the United States Olympic and Paralympic Committee, (2) has the fewest number of claims that allege abuse during its Policy period, and (3) none of the claims allege abuse perpetrated by Larry Nassar. Various issues related to the scope and extent of coverage under the Policy are pending before the Court in the Adversary Proceeding styled USA Gymnastics v. ACE American Insurance Company, et al, Adv. No. 19-50012 (the "Adversary Proceeding")."

2. On May 17, 2019, the Court entered the *Order Granting Debtor's Motion to Refer Sexual Abuse Claims and Insurance Coverage Disputes to Mediation and to Appoint the Honorable Gregg W. Zive as Mediator* (Dkt. 514, the "Mediation Order"). The Mediation Order appointed Judge Gregg W. Zive to mediate certain disputes in this bankruptcy case. A subsequent order authorized Paul Van Osselaer (together with Judge Gregg W. Zive, the "Mediators") to be a second mediator concerning insurance disputes. Dkt. 798. The Mediation Order also provided that "[a]ll communications, information, and evidence exchanged within the mediation shall be treated confidentially by all parties and shall remain confidential following the mediation's conclusion." Mediation Order ¶ 5.

3. Since the entry of the Mediation Order, the Mediators have conducted six mediation sessions, with the latest occurring on August 11-12, 2020. National Union, through counsel and

through corporate representatives vested with requisite settlement authority, has actively participated in good faith in each of these mediation sessions. In fact, there can be no dispute that National Union's fulsome engagement in mediation has included meaningful and constructive settlement offers, including most recently at the August 2020 mediation. By contrast, during the entirety of the ongoing mediation, both the Debtor and the Survivors' Committee have consistently rebuffed National Union's attempts to directly and meaningfully engage, with the lone exception of a brief discussion between Debtor's counsel and National Union's counsel toward the close of the January 2020 mediation session.[1]

4. Nonetheless, in their Joint Motion the Debtor and the Survivors' Committee contend that "the insurance carriers," presumably including National Union, have disregarded this Court's orders and acted in bad faith. Motion ¶ 5, ¶ 9. The Joint Motion's accusations of bad faith are made in broad brushstrokes with absolutely no factual support. Such accusations are entirely disingenuous given National Union's good faith participation in all mediation sessions and the Debtor's and the Survivors' Committee's failure to engage directly with National Union.

5. The Debtor and the Survivors' Committee through their Joint Motion request that the Court (1) personally conduct a future settlement conference, (2) require the insurers' respective chief executive officers ("CEOs") to appear at the settlement conference, and (3) extend the deadline for USAG to file an amended plan and disclosure statement.

6. National Union has always been committed to pursuing a mutually beneficial settlement in this matter, and as such, supports further settlement negotiations and discussions, and does not object to an extension of USAG's plan-related deadlines.

[1] Cognizant of the confidentiality provisions in the Mediation Order, National Union does not believe it is appropriate to disclose details regarding the parties' settlement offers at this time.

7. However, National Union brings this limited objection because the Joint Motion seeks the extraordinary and unnecessary relief of requiring attendance at a settlement conference of National Union's CEO. Such a requirement is not supported by the applicable caselaw and appears designed instead to harass and unnecessarily burden National Union so that the Debtor and the Survivors' Committee may obtain a tactical advantage in ongoing negotiations. Further, for the reasons stated below, National Union objects to the request in the Joint Motion that the future settlement conference be conducted by the Court itself, rather than by Judge Zive, Mr. Van Osselaer or another mediator.

NATIONAL UNION'S CEO SHOULD NOT BE REQUIRED TO PERSONALLY ATTEND A SETTLEMENT CONFERENCE

8. In their Joint Motion, the Debtor and the Survivors' Committee request that "the insurance carriers be ordered to bring their chief executive officers" to a settlement conference. They argue that 11 U.S.C. § 105(a) provides the Court with the requisite authority to compel such attendance.

9. As the Seventh Circuit has stated, however, "section 105(a) does not give the bankruptcy court carte blanche – the court cannot, for example, take an action prohibited by another provision of the Bankruptcy Code[.]" *In re Caesars Entm't Operating Co., Inc.*, 808 F.3d 1186, 1188 (7th Cir. 2015) (citing *Law v. Siegel*, 571 U.S. 415, 420 (2014); *In re Kmart Corp*., 359 F.3d 866, 871 (7th Cir.2004)). Instead, section 105(a) only "grants the extensive equitable powers that bankruptcy courts need in order to be able to perform their *statutory duties*." *Id* (emphasis added).

10. Fed. R. Civ. P. 16 provides that "[i]f appropriate, the court may require that a party or its representative be present or reasonably availably by other means to consider possible settlement." Nothing in the rule mandates the participation of a corporate representative,

particularly not an apex official. Indeed, to the extent that a representative is required to attend in specific circumstances, then "[t]he selection of the appropriate representative should ordinarily be left to the party and its counsel." *See* Notes of Advisory Committee on Rules—1993 Amendment.[2]

11. Requiring the attendance of a party's CEO is clearly outside the norm of regular mediation practice under Rule 16. *See, e.g.*, *G. Heileman Brewing Co. v. Joseph Oat Corp*., 871 F.2d 648 (7th Cir. 1989) (requiring attendance of a corporate representative with authority to settle, not the CEO); *Neal v. Target Corp*., No. 13 C 5907, 2016 WL 3365432 (N.D. Ill. June 15, 2016) (same); *Logan v. Illinois Cent. R. Co.*, No. 3:05-CV-902 DRH, 2007 WL 171863 (S.D. Ill. Jan. 18, 2007) (same); *Lockhart v. Patel*, 115 F.R.D. 44 (E.D. Ky. 1987) (same). The Debtor and the Survivors' Committee have failed to provide any basis to depart from regular practice here.

12. Rather, to support their request that the insurers "be ordered to bring their chief executive officers," the Debtor and the Survivors' Committee rely on *ARAC Roof It Forward v. Nationwide Mut. Ins. Co. of Am.*, No. 17-CV-4468, 2019 U.S. Dist. LEXIS 94077 (S.D. Ind. June 5, 2019). *ARAC* is plainly distinguishable from the situation here. In *ARAC*, the Magistrate Judge ordered the defendant's CEO to attend a second settlement conference after the defendant's original corporate representative refused to make *any* settlement offer at the first settlement conference despite a recognition that summary judgment would not completely dispose of the matter and because of the representative's unwillingness to consider the risks of a jury trial. *Id.* at *3. Here, where the parties have engaged in six mediation sessions, with National Union fully participating in good faith, the Debtor and the Survivors' Committee cannot show anything approaching the egregious conduct justifying the extraordinary relief detailed in *ARAC*.

[2] National Union has had corporate representatives with appropriate settlement authority appear in person at *all* mediation sessions held to date.

13. Further, the presumption set forth in Fed. R. Civ. P. 16 that a party and its counsel should be able to choose a responsible corporate representative other than an apex executive to attend a settlement conference is analogous to a party's ability, recognized by courts in the Seventh Circuit, to shield high-level executives from unnecessary depositions. When "apex" depositions of high-level executives are sought, "courts may protect [them] from being deposed when any of four circumstances exist: (1) the official has 'no unique personal knowledge of the matter in dispute'; (2) the information can be garnered from other witnesses or (3) other discovery methods; and (4) sitting for the deposition would impose a hardship in light of the officer's other duties." *Little v. JB Pritzker for Governor*, No. 18 C 6954, 2020 WL 868528, at *1 (N.D. Ill. Feb. 21, 2020) (citations omitted). *See also Todd v. Ocwen Loan Servicing, Inc.*, No. 2:19-CV-00085-JMS-DLP, 2019 WL 8272621, at *2 (S.D. Ind. Dec. 13, 2019) (citing *In re Bridgestone/Firestone Inc. Tires Prods. Liab. Litig.*, 205 F.R.D. 535, 536 (S.D. Ind. 2002)) ("Because 'high level executives are vulnerable to numerous, repetitive, harassing, and abusive depositions, and therefore need some measure of protection from the courts,' courts often bar depositions of them even absent the required showing.'").

14. A settlement conference here is best facilitated by the participation of the responsible corporate representatives with particularized knowledge of this matter that have attended the prior mediations conducted to date. The only purpose for requiring National Union's CEO to attend would be to harass and burden National Union for perceived tactical advantage. Indeed, though National Union fully recognizes the importance to the Debtor of a successful reorganization and the gravity of the claims asserted by the claimants represented by the Survivors' Committee, National Union's CEO (i) has no unique knowledge of the claims asserted against National Union's policy in this matter, (ii) would bring the same settlement authority as any other

authorized corporate representative, including the corporate representatives who have attended each of the mediations, and (iii) would be advised by the same counsel regarding the advisability of any settlement offer.

15. In short, requiring National Union's CEO to attend any settlement conference or any further settlement negotiation is unauthorized, unnecessary, and overly burdensome. National Union has always been committed to obtaining a resolution of this case, and has attended each mediation session with corporate representatives authorized to negotiate to attain that goal. The attendance of the CEO is simply not necessary when there is no evidence of bad faith, and appropriate corporate representatives are available, familiar with the facts of the case, and have the authority to settle.

THIS COURT SHOULD NOT PRESIDE OVER ANY SETTLEMENT CONFERENCE

16. The Joint Motion contends further that "it is in everyone's best interest" for the Court itself to conduct the requested settlement conference. The Debtor and the Survivors' Committee argue that the Court is uniquely situated to conduct such a conference because it will not be required to adjudicate the claimants' personal injury claims due to 28 U.S.C. § 157(b)(5). Motion ¶ 5.

17. While the Court may not be able to adjudicate the claimants' personal injury claims, it is still presiding over and will continue to preside over other matters in this bankruptcy case that are inextricably intertwined with the personal injury claims and are central to the parties' ongoing mediation and settlement efforts.

18. For example, the insurers and the Debtor dispute the extent of available insurance coverage for the personal injury claims. Those insurance coverage issues are the subject of the Adversary Proceeding presently before this Court, for which the reference has not been withdrawn.

Even beyond the Adversary Proceeding, there still remains the issue of plan confirmation that this Court will preside over.

19. The parties ongoing settlement efforts involve resolution not only of the issues raised in claimants' personal injury claims, but related issues that are the subject of the Adversary Proceeding and ultimately of the Debtors ongoing Chapter 11 reorganization. As such, National Union respectfully submits that it would not be appropriate for the Court to conduct a settlement conference directly related to issues that remain before it in the Adversary Proceeding and the bankruptcy case, particularly where the Court has already appointed two able Mediators to oversee settlement discussions.

20. As such, while National Union does not oppose the settlement conference, it requests that another neutral party, either the current Mediators, a different mediator, or another judicial official such as a federal magistrate judge, preside over the conference.

RESERVATION OF RIGHTS

21. The Motion was brought on shortened notice and concurrently with the *Joint Motion to Shorten Notice on Joint Motion Requesting the Court to Conduct a Settlement Conference and For Other Relief* (Dkt. 1231, the "Shorten Notice Motion"). While no order approving the Shorten Notice Motion has been entered, National Union nonetheless is filing this limited objection pursuant to the deadline's proposed by USAG and the Committee in the Shorten Notice Motion. Importantly, the deadline of August 24, 2020 is only five days from the August 20, 2020 filing of the Motion,[3] and only two business days therefrom. As such, National Union reserves all rights to supplement this limited objection.

[3] As the motion was filed at 9:48 PM on August 20, there were only four days between the Motion filing and the response deadline.

WHEREFORE, for the reasons stated above, to the extent the Court grants the other relief requested in the Motion, National Union respectfully requests that the Court (1) deny the Motion's request for the attendance of National Union's CEO, (2) appoint a separate neutral to preside over the settlement conference, and (3) grant such further relief that is just and equitable.

DATED: August 24, 2020

FORAN GLENNON PALANDECH PONZI & RUDLOFF P.C.

By: /s/ Susan N.K. Gummow

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EXHIBIT A

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

In re:	)	
	)	Case No.: 18-09108-RLM-11
USA GYMNASTICS,	)	
	)	Chapter 11
Debtor.	)	**Hon. Robyn L. Moberly, Chief Judge**
	)	

DECLARATION OF KEVIN J. LARNER IN SUPPORT OF NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.'S LIMITED OBJECTION TO THE JOINT MOTION REQUESTING THE COURT TO CONDUCT A SETTLEMENT CONFERENCE AND OTHER RELIEF

1. My name is Kevin J. Larner and I am employed as an Associate General Counsel at American International Group, Inc., the ultimate parent company of National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union"). I am National Union's duly authorized agent for the purposes of making this Declaration.

2. Unless stated otherwise, I have personal knowledge of the matters set forth in this Declaration, and I would testify in accordance with this Declaration if called to do so.

3. I have been personally involved with overseeing National Union's participation in USA Gymnastics' ("USAG") bankruptcy case, accompanying adversary proceeding, as well as the various mediation sessions that have been scheduled in this bankruptcy case. I was and continue to be closely involved with National Union's planning, strategy, and settlement negotiations both before, during, and after each mediation that has been held in this case. I also attended the last three mediation sessions in November 2019, January 2020 and August 2020.

4. I understand that the mediations are subject to a confidentiality order which bars disclosure of any communications, information, and evidence that was exchanged during mediations. As such, while I am unable to discuss the specific offers and discussions that were had

at the mediations, I can attest that National Union appeared and participated at each mediation in good faith and with the full intention to amicably resolve this matter.

5. At each mediation session, either myself or a colleague of mine was present as National Union's corporate representative and held the requisite authority to negotiate and settle on behalf of National Union.

6. I understand that either prior to or during each mediation session, National Union, through counsel, had requested to speak with USAG in an effort to resolve this dispute. I further understand that these requests were made either to USAG's counsel or through the mediators appointed in this case. To my knowledge, USAG has only once formally met and negotiated with National Union during any of the mediation sessions. This occurred toward the end of the January 2020 mediation.

7. To my knowledge, no representative of the Additional Tort Claimants Committee of Sexual Abuse Survivors (the "Survivors' Committee") has ever attempted to engage with National Union, despite National Union's presence at each mediation.

8. At the last mediation that occurred on August 11-12, 2020, two of my colleagues and I were present along with our counsel to discuss settlement with USAG. At all times, we had the requisite authority to negotiate and settle on behalf of National Union.

9. In preparing this Declaration, I reviewed USAG's and the Survivors' Committee's *Joint Motion Requesting the Court to Conduct a Settlement Conference and Other Relief* (the "Joint Motion") and its request to schedule a settlement conference that would require the attendance of National Union's chief executive officer ("CEO").

10. While National Union will continue to negotiate in good faith, the attendance of the CEO at any mediation or settlement conference is entirely unnecessary and overly burdensome.

11. The CEO is tasked with overseeing and managing National Union as a whole. Day-to-day oversight of particular insurance claims and litigation are delegated to other personnel such as myself and my colleagues.

12. Moreover, National Union's corporate representative would have the same authority to settle, regardless of whether that representative is myself, a colleague of mine, or the CEO.

13. As noted above, National Union has attended each mediation session in good faith and with a corporate representative that had authority to settle. I note that the Joint Motion provides no evidentiary support for USAG's and the Survivors' Committee's allegations that National Union has acted in bad faith. To the extent there are further mediation sessions scheduled or settlement conferences ordered, National Union will again appear and participate in good faith and with a corporate representative with requisite authority to settle.

Pursuant to 28 U.S.C. § 1746, I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Executed on: August 24, 2020 By: 

Kevin J. Larner

Certificate of Service

I hereby certify that on August 24, 2020, a copy of *National Union Fire Insurance Company of Pittsburgh, Pa.'s Limited Objection to Joint Motion Requesting the Court to Conduct a Settlement Conference and Other Relief* was served on all parties registered to receive such notice by operation of the Court's Electronic Case Filing system. Parties may access this filing through the Court's system.

Respectfully Submitted,

DATED: August 24, 2020

FORAN GLENNON PALANDECH PONZI & RUDLOFF P.C.

By: /s/ Susan N.K. Gummow

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