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9 UNITED STATES BANKRUPTCY COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN FRANCISCO DIVISION

12 In re
13 PACIFIC GAS & ELECTRIC
14 COMPANY, a California Corporation,
15 Debtor.

CASE No. 01-30923 DM

Judge: Hon. Dennis Montali

16 **MEMORANDUM OF POINTS AND
17 AUTHORITIES IN SUPPORT OF
18 MOTION FOR RELIEF FROM
19 AUTOMATIC STAY**

Date: November 26, 2003
Time: 1:30 p.m.
Dept: 22

20 **INTRODUCTION**

21 Movants City of Oakland and Port of Oakland (hereinafter collectively "Oakland")
22 are defendants in a tort action for inverse condemnation, negligence and nuisance currently
23 pending in the Superior Court of California, County of Alameda, entitled Brotherhood of
24 Teamsters v. City of Oakland, et al., Case No. 2001-023981. Oakland recently cross-complained
25 against Pacific Gas & Electric Company ("PG&E") and served a cross-complaint upon PG&E on
26 October 9, 2003. PG&E responded by filing a Notice of Filing Voluntary petition and Imposition
27 of Automatic Stay in the state court action on October 16, 2003. Oakland now seeks relief from
28 the automatic stay provisions of 11 U.S.C. §362.

1 **FACTS AND PROCEDURAL BACKGROUND**

2 The plaintiff in the state court action currently pending is Brotherhood Of
3 Teamsters And Auto Truck Drivers Local No. 70 (the "Teamsters"). The Teamsters own
4 property located at 70 Hegenberger Road in Oakland, California. The property is adjacent to 98th
5 Avenue in the City of Oakland. In 1998, Oakland began the process of improving access to the
6 Oakland Airport. Part of the improvements was the widening of 98th Avenue.

7 The Teamsters allege that that they have suffered property damage and business
8 interruptions stemming from repeated utility, power and water service interruptions and
9 breakdown beginning in March of 2000 and continuing through June 21, 2000. They claim that
10 the alleged damage and business interruptions resulted from Oakland's construction project for
11 improvements to 98th Avenue. The Teamsters alleged that damage to their property occurred
12 when sewage spilled out of sewer systems and contaminated their property, rendering several
13 areas of the property including the building located thereon unusable.

14 On September 17, 2001, the Teamsters filed suit against Oakland. (Declaration of
15 Jennifer A. Becker, Exhibit A.)¹ The suit was served on Oakland on September 19, 2001.
16 (Exhibit B.)

17 Oakland has only recently been informed and believes that PG&E had easements
18 on the Teamsters' property and was performing work in the area at the time the damage and
19 business interruption alleged by the Teamsters occurred. Accordingly, on October 9, 2003,
20 Oakland filed a cross-complaint against PG&E seeking indemnity and declaratory relief for a
21 judicial determination of the rights and duties of Oakland and PG&E with respect to the damages
22 claimed by the Teamsters. (Exhibit C.) The cross-complaint was served on PG&E on October
23 10, 2003. (Exhibit D.) PG&E filed a Notice of Filing Voluntary Petition And Imposition of
24 Automatic Stay on October 16, 2003. (Exhibit E.)

25 **LAW AND ARGUMENT**

26 Movant Oakland now seeks relief from the automatic stay provisions of 11 U.S.C.
27

28 ¹ All further exhibit references are to the accompanying Declaration of Jennifer A. Becker.

1 § 362 so that it may pursue its cross-complaint against PG&E in state court.

2 Section 362(d) of the United States Bankruptcy Code allows a creditor to seek
3 relief from the automatic stay imposed by section 362(a). Relief may be granted for “cause.”
4 Cause is determined on a case-by-case basis, with the bankruptcy court having wide latitude in
5 crafting relief from the automatic stay. In re Kissinger, 72 F. 3d 107, 108-109 (9th Cir. 1995); In
6 re Tucson Estates, Inc., 912 F. 2d 1162, 1166 (9th Cir. 1990). Once cause is shown for the relief
7 from the stay, the burden shifts to the debtor to demonstrate that it is entitled to the stay. 11
8 U.S.C. § 362(g); In re Marine Power & Equipment Company, Inc., 71 B.R. 925, 928 (W.D.
9 Wash. 1987).

10 A. **The Automatic Stay Provision Of 11 U.S.C. § 362 Does not Apply To**
11 **Oakland’s Claim, Which Arose After PG&E Sought Bankruptcy Protection**

12 Claims arising subsequent to the filing of the petition are not included within the
13 bankruptcy estate and thus may be pursued by creditors. 11 U.S. § 362(A); Erman v. Lox
14 Equipment Co., 142 B.R. 905 (N.D. Cal. 1992). See, e.g., In re Tredinnick, 264 B.R. 573 (9th
15 Cir. 2001). A “claim” is defined under 11 U.S.C. § 101(5) as a “right to payment, whether or not
16 such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured,
17 unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.” Because Oakland’s
18 claim against PG&E did not accrue until the filing of the Teamsters’ complaint against it
19 (September 17, 2001) it had no “right of payment” against PG&E at the time of PG&E’s
20 bankruptcy filing (April 6, 2001) and therefore no cognizable claim under the Bankruptcy Code at
21 that time.

22 Section 362(a) prohibits the commencement or continuation of an action “that was
23 or could have been commenced before the commencement of the case under this title.” Because
24 Oakland’s action was not, and could not have been commenced until after September 17, 2001 its
25 state court cross-complaint is not subject to the automatic stay. See, In re Briarwood Hills
26 Associates, L.P., 237 B.R. 479 (W.D. Mo. 1999).

27 Nor did Oakland’s claim arise prior to PG&E’s bankruptcy of April 6, 2001. If a
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1 state court counterclaim arises post-petition, then it is not subject to the automatic stay and it is
2 the debtor's burden to show that the cause of action arose pre-petition. In re Turboff, 93 B.R.
3 523 (S.D. Tex. 1988) (citing Olaques v. Russoniello, 770 F. 2d 791 (9th Cir. 1985)). In Erman v.
4 Lox Equipment Co., 142 B.R. 905, the debtor transferred real property to a third party, post-
5 petition, and the property was later determined to be contaminated. The Northern District held
6 that the creditor's claim arose post-petition, and thus the automatic stay did not apply. 142 B.R.
7 at 907-08.

8 The same result should apply here. A complaint and a cross-complaint are, for
9 most purposes, treated as independent actions. McLellan v. McLellan, 28 Cal. App. 3d 343,
10 353, 100 Cal. Rptr. 258 (Cal. Ct. App. 1972). "Procedurally, a cross-complaint is a separate
11 pleading and represents a separate cause of action from that which may be stated in the
12 complaint." City of Cypress v. New Amsterdam Cas. Co., 259 Cal. App. 2d 219, 223, 66 Cal.
13 Rptr. 357 (Cal. Ct. App. 1968). Where there are both a complaint and a cross-complaint there are
14 actually two separate actions pending and the issues joined on the cross-complaint are completely
15 severable from the issues under the original complaint and answer. McDonald Candy Co. v.
16 Lashus, 200 Cal. App. 2d 63, 67, 19 Cal. Rptr. 137 (Cal. Ct. App. 1962); Shearer v. United
17 California Theatres, 133 Cal. App. 2d 720, 724, 284 P. 2d 934, (Cal. Ct. App. 1955).

18 Although the circumstances giving rise to the Teamsters' damages occurred before
19 April 6, 2001 Oakland's indemnity claim against PG&E did not arise until after that date.
20 Oakland was not injured or damaged by PG&E's conduct until the Teamsters brought suit against
21 it on September 17, 2001. It could not have brought any action against PG&E prior to that date.
22 Therefore, its claim arose post-petition, and is not subject to the automatic stay.

23 **B. PG&E'S Self-Insured Status Justifies Relief From The Stay**
24

25 Even if the Court deems Oakland's claim to be pre-petition, and thus ostensibly
26 subject to stay, relief is otherwise justified because of the availability of PG&E's insurance
27 proceeds to settle third party tort claims.
28

1 PG&E is "self-insured" up to \$10 million for tort, employment, and commercial
2 claims. (Exhibit F, ¶ 2). The courts have held that the automatic stay either does not apply or
3 should be lifted when the claim is made only against insurance proceeds.

4 In Matter of Fernstrom Storage and Van Company 938 F.2d 731, 735 (7th Cir.
5 1991), the court rejected the debtor's argument that the insurance proceeds were property of the
6 estate.

7 So it is, at least nominally. But cases like In re Turner, discussed
8 above, suggest that suspending the stay is appropriate where all the
9 plaintiff seeks is a declaration of liability with no monetary
10 consequences for the debtor, as opposed to its insurer. We reached
11 a similar conclusion In matter of Holtkamp, 669 F.2d 505, 508-09
(7th Cir. 1982) reasoning there that allowing a personal injury
12 action against the debtor to proceed did not harm the debtor where
13 the debtor's insurance company had "assumed the full financial
14 responsibility for defending that litigation."

15 In In re Turner, 55 B.R. 498 (Btcy. N.D. Ohio 1985), the court lifted the stay on a
16 liability action against the debtor because any prejudice to the debtor was ". . . obviated by this
17 court's order limited relief from stay for the sole purpose of obtaining a finding of liability, and
18 prohibiting any act of the banks to collect, recover, or offset any such debt as a personal liability
19 of the debtor, or from property of the debtor." Since the estate was not exposed to the claim, the
20 stay was no longer applicable.

21 A similar rule should apply here. PG&E operates its own claims department and
22 pays and average of \$31 million per year in settling over 15,000 claims per year. (Exhibit F, ¶¶
23 2, 3.) PG&E's claims handling and settlements are in PG&E's ordinary course of business.
24 PG&E has also been expressly authorized to settle post-petition third party claims in this
25 bankruptcy proceeding. (Exhibit G.)

26 Instead of paying insurance premiums in order to protect both its own assets and
27 the public, PG&E self-insures. PG&E operates as a publicly regulated utility in the State of
28 California. PG&E operates numerous trucks and vehicles on California roads which pose a risk
to the public if there is no fund available to pay claims of injured parties. PG&E operates
thousands of miles of high voltage power lines and gas lines throughout northern California.

1 When the electricity and gas escapes and injures people each year, PG&E has a self-insured fund
2 available to pay those claims.

3 There is no good reason not to allow the state court action to proceed. By allowing
4 the state court action to proceed, this Court will allow the liability issues in the case to be resolved
5 in the forum which is best equipped to make the state law liability decisions. There will not be
6 more than a *de minimis* effect, if that, on PG&E's estate. Good cause exists for relief from the
7 stay so that these issues may be resolved in the state forum.

8 **C. The Bankruptcy Court Should Abstain From Adjudication Of The State Law**
9 **Claim And Allow The Matter To Proceed In The California Courts**

10 Title 28 of the United States Codes, § 1334(c)(1) provides:

11
12 Nothing in this section prevents a district court in the interest of
13 justice, or in the interest of comity with State courts or respect for
14 State law, from abstaining from hearing a particular proceeding
15 arising under title 11 or arising in or related to a case under title 11.

16 The factors that a bankruptcy court should consider when deciding whether to
17 abstain have been described as follows:

- 18 (1) The effect or lack thereof on the efficient administration of the estate if a
19 Court recommends abstention,
- 20 (2) The extent to which state law issues predominate over bankruptcy issues,
- 21 (3) The difficulty or unsettled nature of the applicable law,
- 22 (4) The presence of a related proceeding commenced in state court or other
23 nonbankruptcy court,
- 24 (5) The jurisdictional basis, if any other than 28 U.S.C. § 1334,
- 25 (6) The degree of relatedness or remoteness of the proceeding to the main
26 bankruptcy case,
- 27 (7) The substance rather than form of an asserted "core" proceeding,
- 28 (8) The feasibility of severing state law claims from core bankruptcy matters to
allow judgments to be entered in state court with enforcement left to the

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bankruptcy court,

(9) The burden of [the bankruptcy court's] docket,

(10) The likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties,

(11) The existence of a right to a jury trial, and

(12) The presence in the proceeding of nondebtor parties.

In re Tucson Estate, Inc., *supra*, 912 F. 2d at p. 167, citing In re Republic Reader's Serv., Inc. 81 B.R. 422, 429 (Bankr. S.D. Tex. 1987).

Application of these factors to the Brotherhood of Teamsters v. City of Oakland case overwhelmingly supports abstention. PG&E was forced into bankruptcy by regulatory and market issues which had nothing to do with indemnity claims, especially that of Oakland which did not even arise until after the bankruptcy filing. Brotherhood of Teamsters v. City of Oakland obviously involves only state law tort issues. Abstaining from hearing Oakland's claim would further allow the state court or the parties to resolve the case rather than further burdening this court's docket. Next, Oakland's single indemnity claim represents a far less exposure to PG&E than those of the 1,250 claimants who alleged personal injury or wrongful death against PG&E by virtue of exposure to chromium six (hexavalent chromium) at facilities owned by PG&E, and even those were insufficient to defeat abstention. In re PG&E 279 B.R. 561, 570-572 (N.D. Cal. 2002). Finally, indemnity claims are matters which PG&E routinely handles and resolves. These are not matters that should clog the bankruptcy court docket.

In holding that the bankruptcy court should have abstained from adjudicating claims pending in a state court action, the court in In re Tucson Estate, Inc., found that "section 1334 supports the duality of allowing a claim to be adjudicated to final judgment in state court while preserving the issues of the status and enforceability of the claim to the bankruptcy court." In re Tucson Estate, Inc., *supra*, 912 F. 2d at p. 1167 (other citations omitted).


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D. Conclusion

It is respectfully submitted that Oakland's claim against PG&E arose post-petition and is therefore not subject to the automatic stay. Even if Oakland's claim is something which is ostensibly under the aegis of bankruptcy court, then Oakland's claim should nevertheless go forward in state court because of the insurance proceeds available to PG&E and the abstention doctrine.

Dated: October 23, 2003

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