

50-295/323

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17 **UNITED SERVICES AUTOMOBILE ASSOCIATION**

18 UNITED STATES BANKRUPTCY COURT  
19 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
20 SAN FRANCISCO DIVISION

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CASE NO. 01-30923 DM  
Chapter 11 Case  
THE HONORABLE DENNIS MONTALI  
Date: September 11, 2001  
Time: 1:30 p.m.  
Place: 235 Pine Street, 22<sup>nd</sup> Floor  
Evidentiary Hearing Requested

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF UNITED SERVICES AUTOMOBILE ASSOCIATION'S MOTION PERMITTING MODIFICATION OR LIFTING OF THE AUTOMATIC STAY PURSUANT TO 11 U.S.C.**

UNITED SERVICES AUTOMOBILE ASSOCIATION's (hereinafter USAA) Motion is based upon the Notice of Motion and Motion filed concurrently herewith, the Declaration of Randy

-1- A001 Add: Rids Dgc Mail Center

1 W. Gimple filed concurrently herewith, this Memorandum of Points and Authorities, the record in this  
2 case, and any admissible evidence presented to the Court at or prior to the hearing on this Motion. By  
3 this Motion, USAA seeks entry of an order, pursuant to Section 11 U.S.C. 362(d)(1), lifting or  
4 modifying the automatic stay of Section 362 of the Bankruptcy Code in order to enable USAA to  
5 proceed with its Non-Bankruptcy action filed (USAA v. PG&E San Francisco Superior Court, Case No.  
6 316763) (herein "Non-Bankruptcy Action") in State Court, which action seeks a permanent injunction  
7 against PG&E for the repair and maintenance of certain hazardous conditions created by PG&E at  
8 USAA's property, which pose a safety risk to USAA's employees and business visitors, and for  
9 compensatory damages for expenses incurred by USAA for its past and ongoing remediation efforts.

### 10 JURISDICTION AND VENUE

11 On April 6, 2001, PG&E filed a voluntary petition for relief under Chapter 11 of the  
12 Bankruptcy Code in the United States Bankruptcy Court for the Northern District of California.  
13 Pursuant to Sections 1107 and 1108 of the Bankruptcy Code, PG&E is operating its businesses as a  
14 debtor in possession.

15 The Court has jurisdiction over this Motion pursuant to 28 U.S.C. Sections 1334 and  
16 157(a). Venue is proper under 28 U.S.C. 1409. This is a core matter within the meaning of 28 U.S.C.  
17 Section 157(b)(2)(G). The substantive basis for the relief requested is 11 U.S.C. Section 362(d)(1) of  
18 the Bankruptcy Code, Bankruptcy Rule 4001 and B.L.R. 4001-1.

### 19 FACTUAL BACKGROUND

20 USAA is a reciprocal inter-insurance exchange. Since 1922, USAA has sold insurance  
21 products and provided insurance services to military officers and their dependents. USAA owns an  
22 office campus consisting of multi-story office buildings open to the public, a child day-care center,  
23 employee medical clinic, cafeteria and associated facilities where over 1,000 USAA employees serve  
24 the company's policyholders. The campus is located at the intersection of Silica Avenue and Harvard  
25 Streets in Sacramento (hereinafter referred to as "the Site"). In 1996 employees began to complain of  
26 noxious odors emanating from then-unknown portions of one of the buildings. USAA acted quickly  
27 to attempt to determine whether any danger was present, including retention of a consultant to  
28 investigate and measure gases entering the Site, adjusting building ventilation and designing and

1 installing a monitoring system, as well as a system to exhaust these gases. During this effort, USAA  
2 discovered that combustible levels of gases were apparent in several areas of the building, most notably  
3 in electrical conduit and switchgear. When USAA first contacted PG&E, PG&E denied any leaks of  
4 natural gas in the vicinity and took the position that this was the County Sewer Department's problem.  
5 USAA investigated this aspect and discovered no sewer leaks. It was only after repeated calls to PG&E  
6 that PG&E agreed to come to the Site to investigate. PG&E discovered several lateral splits in a PG&E  
7 service main immediately adjacent to the Site. During the following several months, USAA continued  
8 to detect elevated levels of combustible gas at the Site.

9           After rebuffing many inquiries by USAA, in April of 1997 PG&E finally agreed to test  
10 the allegedly repaired gas mains. This testing revealed leaks in yet other portions of the same gas main.  
11 Also during this period, PG&E conducted tests of samples removed from inside USAA's building which  
12 PG&E itself acknowledged were consistent with the distinct chemical make-up of PG&E service gas.  
13 Even after PG&E reportedly repaired these new leaks, exploration conducted by USAA's consultant  
14 revealed that combustible, and apparently sustainable, gases remained in the soils at the Site.  
15 Throughout 1998, 1999 and early 2000, USAA shared with PG&E the results of further sampling and  
16 laboratory analysis which USAA claims consistently supported its position that PG&E was the source  
17 of gas infiltrating the Site. PG&E remained dogged in its position and refused to conduct any further  
18 studies or to assist USAA in its ongoing, albeit temporary, remediation efforts.

19           In the hope that time would again encourage PG&E to acknowledge its responsibility,  
20 in February of 1999, USAA agreed to enter into a tolling agreement with PG&E to attempt to resolve  
21 this problem short of litigation. With no resolution in sight, on May 11, 2000, USAA delivered to  
22 PG&E a written demand that PG&E remedy this situation. PG&E promised to respond on or before  
23 September 1, 2000. After repeated inquiries from USAA, PG&E finally responded in late October -  
24 by promising to respond at some point after November 6, 2000.

25           Having received no indication that PG&E was interested in resolving the matter  
26 informally, on November 16, 2000, USAA terminated the tolling agreement then filed a Complaint for  
27 Damages and for Injunctive Relief for Nuisance, Trespass, Strict Liability, and Negligence in San  
28 Francisco Superior Court, Case Number 316763. (*See Exhibit A to Gimple Decl.*) The Complaint

1 alleges causes of action which solely involve state law issues. The Complaint requests a jury trial. In  
2 addition to monetary damages, USAA seeks a permanent injunction requiring PG&E, at its own  
3 expense, to (a) conduct a complete and thorough investigation to determine the precise location of the  
4 leak or leaks causing natural gas to contaminate plaintiff's land and property; (b) permanently repair and  
5 correct all conditions causing any such leaks; (c) extract and remove from USAA's land, soil, buildings  
6 and other property all detectable natural gas or natural gas residue or by-products remaining therein; (d)  
7 perform detailed and thorough monitoring thereafter and for as long as the Court shall direct to confirm  
8 that natural gas contamination does not reoccur; and (e) reimburse USAA for all loss, damage and costs,  
9 whether direct, indirect, incidental, consequential or otherwise, resulting from PG&E's performance of  
10 such measures.

11           The Non-Bankruptcy Action proceeded through the initial phases of discovery and a  
12 status conference was set for April 20, 2001. (Gimple Decl., ¶s 8, 11.) In connection therewith, the  
13 parties also discussed and were working toward an abbreviated discovery plan, followed by private  
14 mediation. (Gimple Decl., ¶s 8-9.) To this end, counsel for the parties had exchanged position papers  
15 identifying the key points of USAA's claims and of PG&E's defenses. (Gimple Decl., ¶ 10.) After  
16 reviewing USAA's position paper, PG&E agreed to make certain factual and technical stipulations for  
17 purposes of mediation and discussions began to focus upon USAA's willingness to engage in private  
18 mediation, in light of PG&E's then-demonstrated commitment to attempt to resolve these issues  
19 informally. (Gimple Decl., ¶ 10.) Perhaps most significantly, counsel for PG&E and for USAA had  
20 discussed conducting certain additional tests to determine the extent to which gas remained in soils and  
21 buildings at the Site and to identify the source of any remaining gases. (Gimple Decl., ¶ 9.) These  
22 discussions included the proposal to develop a mutually acceptable testing protocol then to perform the  
23 testing jointly and with the parties equally sharing the costs. (*Id.*) USAA has, in fact, obtained from  
24 its consultant a detailed testing protocol and cost estimate. (*See* Exhibit B to Gimple Decl.) It appeared,  
25 then, that the parties were well on the way toward resolving this case in a fair and cost-effective manner.  
26 These efforts came to a screeching halt on April 6, 2001, when PG&E filed a voluntary petition for  
27 relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Northern  
28 District of California. A Notice of Filing Voluntary Petition and Imposition of Automatic Stay was

1 filed with the Court in the Non-Bankruptcy Action on April 17, 2001.

2 **LEGAL ARGUMENT**

3 **THE AUTOMATIC STAY SHOULD BE LIFTED OR MODIFIED PURSUANT TO**  
4 **BANKRUPTCY CODE SECTION 362(d)(1) TO PERMIT USAA TO PROCEED TO**  
5 **OBTAIN A PERMANENT INJUNCTION AGAINST PG&E TO REMEDIATE A**  
6 **HAZARDOUS CONDITION AND FOR COMPENSATORY DAMAGES.**

7 11 U.S.C. Section 362(d)(1) authorizes the bankruptcy court to lift the automatic stay  
8 for cause shown. Section 362(d)(1) states in pertinent part:

9 (d) On request of a party in interest after notice and hearing, the court shall grant relief  
10 from the stay provided under subsection (a) of this section, such as by terminating,  
11 (1) for cause, including the lack of adequate protection of an interest of property of such  
12 party in interest . . .

13 Because there is no clear definition of what constitutes "cause," relief from the automatic stay is  
14 discretionary and must necessarily be determined on a case-by-case basis. *In re MacDonald*, 755 F.2d  
15 715, 717 (9<sup>th</sup> Cir. 1985). However, certain factors that courts consider in deciding whether to lift the  
16 automatic stay include: (1) whether the issues in the pending litigation involve only state law, so the  
17 expertise of the bankruptcy court is unnecessary; (2) whether modifying the stay will promote judicial  
18 economy and result in less interference with the bankruptcy case; (3) whether the estate can be  
19 protected properly by a requirement that creditors seek enforcement of any judgment through the  
20 bankruptcy court; and (4) whether the potential prejudice to the bankruptcy debtor's estate is  
21 outweighed by the hardships that will be incurred by the claimant if relief is denied. *Robbins v.*  
22 *Robbins (In re Robbins)*, 964 F.2d 342, 345 (4<sup>th</sup> Cir. 1992) (collecting cases) (citing *In re Mac Donald*,  
23 755 F.2d at 717); *In re Blue*, 247 B.R. 748, 752 (Bankr. N.D. Ill. 2000).

24 Turning to the first factor, clearly the Non-Bankruptcy Action exclusively involves issues  
25 of state law, insofar as USAA pleaded counts for maintenance of a hazardous condition, strict liability,  
26 nuisance, trespass, and negligence. Indeed, there is no single element of USAA's case which would  
27 require application of anything but California State law. This undisputable fact clearly deserves  
28 significant weight. *In re Castlerock Properties*, 781 F.2d 159, 163 (9<sup>th</sup> Cir. 1986) ("A clear  
Congressional policy exists to give state law claimants a right to have claims heard in state court.")

As to the second factor, modifying the stay to allow this matter to proceed in state court  
will promote judicial economy because it will relieve the bankruptcy court of the need to hear and

1 decide a factually intensive, technically complex case. Were this matter to proceed in bankruptcy court,  
2 the resolution of this case would significantly interfere with resolution of the many other claims against  
3 PG&E. Moreover, while the action was pending in state court, the parties had engaged in discussions  
4 to streamline discovery and explore creative and cost-effective strategies to resolve this case. Perhaps  
5 most importantly, the parties were in the process of developing a mutual, bipartisan protocol to perform  
6 and share the cost of testing to resolve the critical question of whether a gas contamination problem  
7 continues to exist at the Site and, if so, the source for that gas. The pending stay now effectively  
8 undermines the parties' efforts to pursue this economical and pragmatic approach.

9           As to the third factor, there should be little doubt that the debtor's estate will be  
10 adequately protected by requiring enforcement of judgment, if any, in the bankruptcy court. In fact,  
11 enforcement through the bankruptcy court is peculiarly applicable to this particular case, because it  
12 would allow the bankruptcy court to accept or reject any settlement which may be reached and, further,  
13 would vest in the bankruptcy court the power to enforce – and, if necessary, monitor and modify – any  
14 injunctive relief plaintiff may be awarded.

15           As to the fourth factor, lifting the stay for this particular action poses far less  
16 prejudice to the estate than not lifting the stay. USAA's damages rise each day the situation remains  
17 unresolved, both in terms of direct monitoring and remediation costs as well as diminution in  
18 property value. In fact, to the extent there remains ongoing and continuing damage to USAA's  
19 property, this ongoing problem and the damages being caused by it obviously represent post-petition  
20 damages which PG&E can and should address.<sup>1</sup> These increasing damages potentially prejudice the  
21 value of the estate and the security of the creditors. Clearly, a delay necessitated by the court's  
22 handling of more significant matters relating to the pending energy crisis only increases the total  
23 dollar damage for which PG&E may ultimately be found liable. Indeed, lifting the stay is arguably  
24 more beneficial to the estate than is maintaining the stay. Balanced against the potential harm  
25 threatening USAA's property, as well as USAA's ever mounting damages, any prejudice caused  
26 PG&E by lifting the stay is clearly negligible at best.

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28 <sup>1</sup> USAA acknowledges, of course, that to the extent USAA sustained damage pre-petition, USAA's claim for those damages will be paid through the Chapter 11 process.

1           As a general factor underlying all others, courts have held relief from the automatic stay  
2 is appropriate "when equitable considerations weigh heavily in favor of the creditor and the debtor bears  
3 some responsibility for creating the problems." *Mathews v. Rosene*, 739 F.2d 249, 251 (7<sup>th</sup> Cir. 1984)  
4 (allowing relief from the automatic stay in accordance with provisions of the Bankruptcy Act). This  
5 case falls squarely within that principle. As should be clear from the factual discussion above, USAA  
6 not only suspects PG&E is the source of the combustible gases contaminating the Site, USAA has  
7 already performed the technical work needed to prove it. While PG&E will no doubt dispute the  
8 evidence USAA will offer, even PG&E must concede that it was responsible at least for the gas  
9 escaping from the first leak in the main, the second series of leaks discovered after the main was  
10 allegedly repaired and for the gas PG&E itself identified as its own in samples removed from USAA's  
11 building. Thus, even without full-scale litigation, it is apparent that here the debtor bears some  
12 responsibility for what has happened to USAA. Furthermore, with respect to USAA's claims for  
13 equitable relief, USAA asks only that PG&E investigate a potential gas leak and work with its customer  
14 to conduct critical testing and effect a reasonable remedy. After all, were this leak discovered after  
15 PG&E filed its petition, this would simply be a matter of PG&E's ongoing business as a supplier of  
16 natural gas and the stay would likely not prevent PG&E from resolving the situation. Furthermore, to  
17 the extent there remain leaks from PG&E lines at the Site, PG&E nonetheless has a post-petition  
18 obligation to investigate and remediate those conditions. The mere fact that this situation was  
19 discovered nearly five years ago and that PG&E was able to delay a resolution up to the point it filed  
20 a petition for bankruptcy does not suddenly shift the balance of equities otherwise favoring PG&E's  
21 customer, USAA.

22           In sum, because equitable considerations weigh heavily in favor of USAA and it  
23 would be in the interest of judicial economy, restraint, and deference, cause exists to terminate or  
24 modify the automatic stay pursuant to 11 U.S.C. Section 362(d)(1), so that USAA and PG&E may  
25 proceed with the pre-petition plan they had developed to resolve these issues.

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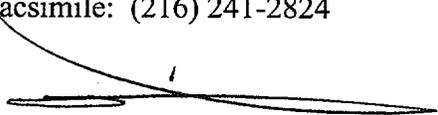
**CONCLUSION**

For the reasons set forth above, USAA respectfully requests that the Court grant its Motion Permitting Modification or Lifting of the Automatic Stay Pursuant to 11 U.S.C. Section 362(d)(1).

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