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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	
	:	**Chapter 11**
WESTINGHOUSE ELECTRIC COMPANY LLC, *et al.*,	:	**Case No. 17-10751 (MEW)**
	:	
Debtors.[1]	:	**(Jointly Administered)**

OBJECTION OF DEBTORS TO MOTION OF GEORGIA POWER COMPANY FOR AN ORDER LIFTING THE AUTOMATIC STAY TO ALLOW IT TO TERMINATE REJECTED ENGINEERING, PROCUREMENT AND CONSTRUCTION AGREEMENT

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, if any, are: Westinghouse Electric Company LLC (0933), CE Nuclear Power International, Inc. (8833), Fauske and Associates LLC (8538), Field Services, LLC (2550), Nuclear Technology Solutions LLC (1921), PaR Nuclear Holding Co., Inc. (7944), PaR Nuclear, Inc. (6586), PCI Energy Services LLC (9100), Shaw Global Services, LLC (0436), Shaw Nuclear Services, Inc. (6250), Stone & Webster Asia Inc. (1348), Stone & Webster Construction Inc. (1673), Stone & Webster International Inc. (1586), Stone & Webster Services LLC (5448), Toshiba Nuclear Energy Holdings (UK) Limited (N/A), TSB Nuclear Energy Services Inc. (2348), WEC Carolina Energy Solutions, Inc. (8735), WEC Carolina Energy Solutions, LLC (2002), WEC Engineering Services Inc. (6759), WEC Equipment & Machining Solutions, LLC (3135), WEC Specialty LLC (N/A), WEC Welding and Machining, LLC (8771), WECTEC Contractors Inc. (4168), WECTEC Global Project Services Inc. (8572), WECTEC LLC (6222), WECTEC Staffing Services LLC (4135), Westinghouse Energy Systems LLC (0328), Westinghouse Industry Products International Company LLC (3909), Westinghouse International Technology LLC (N/A), and Westinghouse Technology Licensing Company LLC (5961) (the "Chapter 11 Cases"). The Debtors' principal offices are located at 1000 Westinghouse Drive, Cranberry Township, Pennsylvania 16066.

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TO THE HONORABLE MICHAEL E. WILES
UNITED STATES BANKRUPTCY JUDGE:

Westinghouse Electric Company LLC and certain of its affiliates, as debtors and debtors in possession in the above-captioned chapter 11 cases (collectively, the "**Debtors**" or "**Westinghouse**"), submit this objection to the motion of Georgia Power Company ("**GPC**"), on behalf of itself and as agent for Oglethorpe Power Corporation, the Municipal Electric Authority of Georgia, and the City of Dalton, as joint owners (collectively, the "**Vogtle Owners**") of the Vogtle Electric Generating Plant (the "**Vogtle Project**"), dated August 25, 2017, for relief from the automatic stay [ECF No. 1245] (the "**Motion**")[1] and respectfully represent as follows:

I. PRELIMINARY STATEMENT

1. As of the Petition Date, Westinghouse had a clear contractual right to limit its liability to the Vogtle Owners. This right, which remains undisturbed by subsequent events, is now property of the estates. The Vogtle Owners seek to terminate the EPC Agreement for the sole purpose of eliminating the estates' valuable contract right to try to double their rejection damages claim from $1.86 billion to $3.7 billion. If granted, the Motion will enable the Vogtle Owners to try to disproportionately increase their share of recovery from estate property to the detriment of all other creditors. "The difference," as the Vogtle Owners plainly admit, "is *significant*." Mot. ¶ 10 (emphasis added).

2. It is well established that an action that "*significantly* impacts the debtors' estate and creditors . . . by enhancing claims . . . is . . . the type of action that courts have routinely refused to permit under section 362(d)(1) of the Bankruptcy Code." *In re MPM*

[1] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Motion or in the EPC Agreement, as the context requires.

Silicones, LLC, No. 14-22503-rdd, 2014 WL 4436335, at *23 (Bankr. S.D.N.Y. Sept. 9, 2014) (Drain, J.) (emphasis added). For that reason, a creditor should not be entitled to lift the automatic stay to exercise a purported termination right under a contract when doing so would increase the size of its claim at the expense of similarly situated creditors. *See In re AMR Corp.*, 730 F.3d 88, 102-03, 112 (2d Cir. 2013) (holding that creditor's request to issue notice to decelerate maturity of loans was barred by the automatic stay and that its motion to lift the automatic stay was properly rejected by the Bankruptcy Court); *see also In re Solutia, Inc.*, 379 B.R. 473, 485 (Bankr. S.D.N.Y. 2007); *In re Texaco, Inc.*, 73 B.R. 960, 968 (Bankr. S.D.N.Y. 1987).

3. The Vogtle Owners cannot carry their burden to establish "cause" for relief from the automatic stay. Indeed, none can exist here, given the Vogtle Owners' extraordinary request to terminate a rejected contract solely to try to increase the size of their claim and to eliminate a valuable contract right of the Debtors' estates. Instead, both equity and precedent from the Second Circuit (including case law from this Court)—all ignored by the Vogtle Owners and wholly absent from the Motion—require denial of the Motion.

4. The Motion is not seeking a determination now that abandonment has occurred. While the Motion can be denied without such determination, if the Vogtle Owners are permitted to serve their notice, the Debtors will later demonstrate that abandonment has not occurred. The EPC Agreement contains a negotiated provision for damages for material breaches other than a complete abandonment of "Work" by Westinghouse. Even if there was a material breach of the EPC Agreement prepetition, which there was not, or if rejection of the contract constituted a postpetition material breach, there was, at no time, abandonment of the

"Work" by Westinghouse. Westinghouse continued "Work" prepetition and postpetition and continues it today.

II. RELEVANT BACKGROUND

5. A handful of admitted facts within the Motion's eight-page "factual background" are in and of themselves sufficient grounds to deny the Motion: (a) the EPC Agreement, by its terms, cannot be terminated unless the Vogtle Owners make an affirmative election to do so after the occurrence of a "Contractor Event of Default" (here, for abandonment) (Mot. ¶ 9); (b) the Vogtle Owners have never made such an election, and therefore the EPC Agreement has not been terminated (*id.* ¶ 14); (c) without termination for abandonment, the estates' liability is capped at 20% of the "Contract Price" as of the Petition Date, and will remain capped at 20% (*id.* ¶ 10); and (d) the sole reason the Vogtle Owners seek to terminate the rejected EPC Agreement is to increase the amount of their claim as it otherwise would be assessed as of the Petition Date (*id.* ¶ 19). Additional undisputed facts and the terms of unambiguous contract provisions, discussed below, further support denial of the Motion at the preliminary hearing.

6. The Vogtle Owners allege that, starting prior to the March 29, 2017 Petition Date, Westinghouse refused or failed to pay subcontractors and other third parties for "Work" they were performing and continued to perform on the Vogtle Project. *Id.* ¶ 12. "Work" is a defined term in the EPC Agreement describing, in substance, engineering, procurement, and construction activities specific to the Vogtle Project.[2] The alleged failure to pay for ongoing

[2] Section 3.1 of the EPC Agreement defines "Work" as follows: "Except as otherwise expressly set forth in Article 4 as being the responsibility of the Owners or in Owners' scope as specified in Table 1 of Exhibit A, Contractor will, in accordance with this Agreement, perform or provide or cause to be performed or provided the management, labor, Equipment, Services and Technical Support required in connection with the design, engineering, permitting, procurement, construction, assembly, installation, training for operation of, commissioning, Technical Support of start-up and testing and completion of the

Work is clearly a claim that Westinghouse breached material provisions of the EPC Agreement. Section 22.2(a)(i) (Contractor Event of Default for breach of a material provision of the EPC Agreement) specifically contemplates and governs breaches of material provisions of the EPC Agreement (e.g., the obligation to pay for ongoing Work). *See* Berezin Decl. ¶ 5. Damages for such a Contractor Event of Default for breach of material provisions is typically limited to 20% of the Contract Price. *Id.* ¶ 8 (EPC Agreement, Section 17.2(a)).

7. Notwithstanding their claims of alleged breaches of obligations to pay subcontractors and vendors, the Vogtle Owners do not (and cannot) dispute that engineering, procurement, and construction activities on the Vogtle Project (i.e., the Work) were occurring as of the Petition Date. Nonetheless, on March 24, 2017, GPC sent a notice citing Section 22.2(a)(ii) of the EPC Agreement, and declaring that Westinghouse had "abandoned" the Work by failing or refusing to pay Westinghouse's contract counterparties for ongoing engineering, procurement, and construction activities. Mot. ¶ 13; Ex. B to Motion. Section 22.2(a)(ii) is a separate and distinct provision which discusses a "Contractor Event of Default" for abandonment of the Work. *See* Berezin Decl. ¶ 6. Termination of the EPC Agreement on that basis would increase the estates' maximum liability to 40% of the Contract Price. *See id.* ¶ 8. Westinghouse responded promptly to GPC's notice, disputing GPC's assertions and denying that an alleged failure to pay subcontractors and vendors could constitute "abandonment" under the EPC Agreement. *See* Ex. C to Motion.

Facility (including without limitation the Standard Plant in accordance with the DCD) as specified in the Scope of Work and in the other provisions of this Agreement (all of the foregoing, collectively, the 'Work')." *See Declaration of Robert S. Berezin in Support of Objection of Debtors to Motion of Georgia Power Company for an Order Lifting the Automatic Stay to Allow It to Terminate Rejected Engineering, Procurement and Construction Agreement*, dated September 25, 2017 ("**Berezin Decl.**") ¶ 4.

8. Even assuming an abandonment of the Work occurred (which it did not), termination of the EPC Agreement for abandonment pursuant to Section 22.2(a)(ii) is not automatic, mandatory, or ministerial. First, Sections 22.2(a)(ii) and 22.2(b) provided an option for the Vogtle Owners to elect to terminate based on a "Contractor Event of Default" for abandonment—but only after two conditions were met: (i) the Owners provided written notice to Westinghouse that it had abandoned the Work and (ii) Westinghouse failed to cure within fourteen days of receipt of such written notice. *See* Berezin Decl. ¶¶ 6-7.

9. It is an undisputed fact that, when Westinghouse filed for bankruptcy on March 29, 2017, only five days of the 14-day cure period had run. Mot. ¶¶ 13-14 ("WEC's bankruptcy filing occurred before the conclusion of the 14-day cure period under Section 22.2(a)(ii) of the EPC Agreement, thereby preventing GPC from declaring a default based on abandonment and terminating the EPC Agreement."). Thus, regardless of whether abandonment had occurred as of the Petition Date, it is undisputed that the cure period did not elapse prior to the Petition Date. *Id.* ¶ 14. By the contract's express terms, then, there could not have been a Contractor Event of Default for abandonment of the Work as of the Petition Date. Even if a Contractor Event of Default for abandonment existed as of the Petition Date (which it did not), the 40% cap still would not apply because the Vogtle Owners did not send a notice to terminate the EPC Agreement. *Id.* ¶ 14. In sum, as of the Petition Date, Westinghouse undeniably had a contractual right to limit any damages arising under the EPC Agreement to 20% of the Contract Price, a right that became and remains property of the respective Debtors' estates.

10. The Vogtle Owners also allege that, after the Petition Date, Westinghouse continued to breach material provisions requiring Westinghouse to pay for the Work that continued on the Vogtle Project. *Id.* ¶ 16. Based on this alleged failure to pay, the Vogtle

Owners claim that the alleged abandonment of the Work by Westinghouse continued after the Petition Date. *Id*. ¶ 24. However, the Vogtle Owners did not seek to lift the automatic stay after the 14-day cure period ran to send a notice of termination for abandonment of the Work. Instead, prior to the Petition Date and *before the 14 day cure period ran*, the Vogtle Owners elected to sign the Interim Assessment Agreement with Westinghouse. This Interim Assessment Agreement was approved by this Court. *See* ECF No. 68 (as amended, *see* ECF Nos. 388, 464, 669, 691, 762, 800, and 957).

11. Under the Interim Assessment Agreement, the parties agreed that the Debtors would perform work "to the same extent as contemplated by the EPC" during the "Interim Assessment Period," which ran from March 29, 2017 to July 27, 2017. *See, e.g.,* ECF No. 68-2 ¶ 6; ECF No. 464 (Amendment No. 2) ¶ 2; ECF No. 957 at 4-5 (detailing dates of the amendments).

12. The Interim Assessment Agreement also expressly addressed how the costs of ongoing engineering, procurement, and construction activities (i.e., the Work) for the Vogtle Project would be treated under the EPC Agreement. For example, the Interim Assessment Agreement provided that "[a]ny payments made by the Vogtle Owners during the Interim Assessment Period "shall, in the sole discretion of GPC, be deemed an advance against any unpaid Milestone Payment *due under the EPC* and shall in all events be deemed to be properly part of the completion costs *that are not obligations of GPC under the EPC. Further, during the Interim Assessment Period any obligation to pay a Milestone payment to the Debtor under the EPC* ***shall be suspended.***" *See* ECF No. 68-2 ¶ 12 (emphasis added). In addition, the parties also contemplated that purchase orders, vendor contracts, and Subcontracts entered into under the EPC would continue during the Interim Assessment Period. *See* ECF No. 464 ¶ 2.

13. These unambiguous terms of the Interim Assessment Agreement show that the engineering, procurement, and construction activities and other "Work" that undisputedly occurred during the entire Interim Assessment Period were not performed exclusively under the Interim Assessment Agreement, but rather, were also performed under the EPC Agreement. These provisions are thus entirely inconsistent with the Vogtle Owners' current argument that an abandonment of the Work occurred during the Interim Assessment Period.

14. Consistent with the above, the parties also agreed that the EPC Agreement was and would remain *an executory contract* that Westinghouse could assume or reject: "The Debtors shall make a decision regarding disposition of the EPC under Section 365 of the Bankruptcy Code and file a motion seeking authorization to effect such disposition no later than the date of termination of this Agreement unless otherwise agreed by the Parties; provided however, that the Debtors shall not be required to make such a decision or file such a motion prior to April 28, 2017." *See* ECF No. 68-2 ¶ 16.

15. Indeed, Westinghouse continued to perform engineering, procurement, and construction activities during the Interim Assessment Period, *see supra* ¶ 11, after which time the Debtors rejected the EPC Agreement with Court approval, effective July 27, 2017. At that time, this Court relieved the Debtors of their duties to perform further under the EPC Agreement, and the Debtors assumed work on the Vogtle Project pursuant to a new agreement with the Vogtle Owners. Instead of an abandonment, rejection gave rise to a breach of the EPC Agreement deemed to have occurred as of the Petition Date. *See* 11 U.S.C. § 502(g) ("A claim rising from the rejection . . . of an executory contract . . . of the debtor that has not been assumed shall be determined . . . the same as if such claim had arisen before the date of the filing of the

petition."); *In re Enron Corp.*, No. 01 B 16034(AJG), 2006 WL 898033, at *4 (Bankr. S.D.N.Y. Mar. 24, 2006) ("The rejection of the lease or contract is deemed a breach of the lease or contract as of the date immediately preceding the bankruptcy filing."). In addition, the Vogtle Owners acknowledge that rejection of the EPC Agreement did not terminate the EPC Agreement. Mot. ¶ 25.

16. Therefore, the parties' agreement, the express terms of the Interim Assessment Agreement, and this Court's Order granting the Debtors' request to reject the EPC Agreement as of the last day of the Interim Assessment Period clearly refute the Vogtle Owners' current argument that the EPC Agreement lost its executory nature due to an alleged prepetition abandonment and failure to cure after the Petition Date.

III. ARGUMENT

A. The Vogtle Owners Have Not Met their Burden to Lift the Automatic Stay

17. The Vogtle Owners initially quote Bankruptcy Code section 362(d), including subsections (d)(1) and (d)(2). Mot. ¶ 21. In the first instance, Section 362(d)(2) is wholly inapplicable here. Section 362(d)(2) authorizes the Court to grant relief from the automatic stay only against property if, among other things, "the debtor does not have an equity in such property." 11 U.S.C. §362(d)(2). And it only applies to stays of acts against property "in which a creditor has an interest, such as a lien interest, as opposed to a right against a contract or to exercise a right under a contract." *In re MPM Silicones*, 2014 WL 4436335, at *22; *see also In re Paulino*, No. 14-11732 (ALG), 2014 WL 5358409, at *2 (Bankr. S.D.N.Y. Oct. 20, 2014) ("[Section 362(d)(2)] is invariably used by *secured* creditors who . . . have an interest in a debtor's property." (emphasis added)). The only interest that the Vogtle Owners claim here is contractually based. Moreover, it is undisputed that Westinghouse has a continuing, valuable

interest in its contractual right to limit damages arising under the EPC Agreement to 20% of the Contract Price.[3]

18. The Vogtle Owners next quote Bankruptcy Code section 362(g) and suggest it supports the proposition that "[i]n this case, the burden is on the Debtors to establish that the automatic stay should not be lifted." Mot. ¶ 22. But section 362(g) clearly does *not* support the Vogtle Owners' proposition. First, it provides that the Vogtle Owners, as "the party requesting . . . relief[,] [have] the burden of proof on the issue of the debtor's equity in property." 11 U.S.C. § 362(g). As set forth above, to the extent the Vogtle Owners are seeking relief under section 362(d)(2) (assuming it is even applicable), the Vogtle Owners have not satisfied and cannot satisfy their burden of proof under section 362(g) because the Debtors have a valuable interest in their contractual right to limit liability to the Vogtle Owners. Second, to the extent the Vogtle Owners are seeking relief under section 362(d)(1) for "cause," the Vogtle Owners failed to acknowledge or apply the applicable Second Circuit standard:

> The burden of proof on a motion to lift or modify the automatic stay is a shifting one. Section 362(d)(1) requires an initial showing of cause by the movant, while Section 362(g) places the burden of proof on the debtor for all issues other than "the debtor's equity in property," 11 U.S.C. § 362(g)(1). *See* 2 *Collier on Bankruptcy* ¶ 362.10, at 362-76. *If the movant fails to make an initial showing of cause, however, the court should deny relief without requiring any showing from the debtor that it is entitled to continued protection.*

In re Sonnax Indus., Inc., 907 F.2d 1280, 1285 (2d Cir. 1990) (emphasis added); *see also In re Residential Capital, LLC*, 501 B.R. 624, 643 (Bankr. S.D.N.Y. 2013) (finding that the movant failed to carry its initial burden of showing "cause" to lift the stay and noting that "[i]f the movant is an unsecured creditor, the policies of the automatic stay weigh against granting the relief requested . . . unless extraordinary circumstances are established to justify such relief."

[3] This right may very well be necessary to an effective reorganization of the Debtors.

(internal quotation marks omitted)). Here, as discussed below, the Vogtle Owners have failed to make an adequate initial showing of cause and thus failed to satisfy their burden. The Debtors are therefore entitled to the continued protection of the automatic stay without any showing on their part.

19. The Second Circuit has catalogued twelve specific factors to be considered and balanced when deciding whether relief from the automatic stay should be granted. *See In re Sonnax*, 907 F.2d at 1286. In fact, none of the *Sonnax* factors support a showing of "cause" to lift the stay.[4] Rather, several key factors—e.g., the "impact of the stay on the parties and the balance of harms"—mandates *maintaining* the automatic stay to preclude the Vogtle Owners from terminating the EPC Agreement for abandonment. *Id*.

20. The alleged harm that the Vogtle Owners assert is their inability to lay claim to a larger share of the Debtors' assets than they were entitled to as of the Petition Date. *See* Mot. ¶ 32. As this Court has found and the Second Circuit has upheld, this cannot be cognizable harm because the automatic stay was intended to prevent creditors from changing the status quo as of the petition date to the detriment of other creditors. *See In re AMR Corp.*, 730 F.3d at 112 (discussed in greater below). Contrary to the Vogtle Owners' assertions that termination for abandonment "will not impose *any* burden or hardship on the Debtors or their estates" (Mot. ¶ 31 (emphasis added)), the potential harm to the estate and other unsecured creditors is clear. The Vogtle Owners seek to eliminate the estates' contract right to limit liability to 20% of the Contract Price and expose the estates to additional potential liability of

[4] For example, relief will not result in a complete resolution of the Vogtle Owners' issues or claims. *See* Mot. ¶ 24 (acknowledging the limited nature of the requested relief and some of the many challenges that could be asserted before claims are ultimately allowed and entitled to distributions). In addition, the relief requested is connected directly with the bankruptcy case, doubling the size of what is already the largest claim already asserted. Further, claims disputes will be litigated before this Court, not another tribunal. Insurance proceeds will not be sufficient to satisfy the Vogtle Owners' increased claims.

approximately $1.84 billion on a claim (for abandonment) that did not exist as of the Petition Date.

21. The Vogtle Owners' desire to double their damages claim by terminating a contract is similar to the situation in *In re AMR Corp.*, where the court denied a creditor relief from the automatic stay solely to increase the size of its claim. 485 B.R. 279 (Bankr. S.D.N.Y. 2013). There, the debtors were party to prepetition indenture agreements with a lender, whereby, under one provision, an "event of default" was deemed to have occurred upon the filing of a voluntary bankruptcy and the debtors' loan obligations were automatically accelerated as a result. *See id.* at 284-85. Under another provision, the lender was entitled to a "Make-Whole Amount" if the debtors chose to voluntarily redeem the notes issued under the indentures; however, no such Make-Whole Amount would be due in the event of default due to, *inter alia*, filing for bankruptcy. *Id.* at 285. After the petition date, the debtors sought authority to repay the prepetition financing under the indentures; the lender argued that such actions constituted voluntarily redemption and thus it was entitled to the Make-Whole Amount. *See id.* at 286-87.

22. The debtors countered that they owed only the accelerated prepetition loan obligations resulting from the bankruptcy filing, excluding any Make-Whole Amount. *See id.* at 287. As a result, the lender sought to lift the automatic stay to exercise a contractual right to rescind the acceleration and decelerate the prepetition loan obligations necessary to collect the Make-Whole Amount. *See id.* The court denied the motion, finding that the lender had failed to demonstrate "cause" where deceleration would (1) "have the effect of assessing the Debtors with [an obligation] not currently owed under the Indentures, and thwart Debtors' reliance on the Indentures as written"; (2) "serve only to increase the size of [the lender's] claim"; and (3) "affect the Debtors' contractual rights, which are property of the estate, to the detriment of the

estate and the Debtors' other creditors and only for the benefit of [the lender]." *Id.* at 294-95. The Second Circuit affirmed, holding that it was not an abuse of discretion for the district court to have denied the motion, further noting that "[o]ne of the principal purposes of the automatic stay is to preserve the property of the debtor's estate for the benefit of all the creditors."[5] *In re AMR Corp.*, 730 F.3d at 102-03, 112. Notably, the appeals court found the lender's contractual right argument lacking:

> [S]uffice it to say that regardless whether [lender] may *theoretically* rescind the acceleration *pursuant to* Section 4.02(d) of the Indentures (or waive Events of Default *pursuant to* Section 4.05) the bankruptcy court did not err in concluding that ***any attempt to do so would be an attempt to modify contract rights*** . . . . We therefore agree with the bankruptcy court that any attempt by [lender] to rescind acceleration now—after the automatic stay has taken effect—is an effort to affect [Debtor's] contract rights, and thus the property of the estate.

See id. at 102-03 (emphasis added).

23. Similarly, in *In re MPM Silicones*, lenders sought relief from the automatic stay to send a rescission/deceleration notice and thereby gain a make-whole claim under the indentures at issue. *See In re MPM Silicones*, 2014 WL 4436335, at *23. Relying on the *In re AMR* case, the court denied the motion to lift the automatic stay, emphasizing that "the sending of a rescission[] or deceleration notice significantly impacts the debtors' estate and creditors—in this case by enhancing claims potentially by hundreds of millions of dollars" and therefore "[key] 'Sonnax factors' . . . strongly argue against granting such relief." *See id.* at *22-*23. The *In re MPM* court stated that actions that "significantly impact[] the debtors' estate and creditors . . . by enhancing claims" and "creat[ing] a *different* claim than existed on the

[5] The automatic stay also provides creditor protection because, "[w]ithout it, certain creditors . . . who acted first would obtain payment of the claims in preference to and to the detriment of other creditors." S. Rep. 95-989, at 49 (1978).

bankruptcy petition date" are precisely the types of actions that the automatic stay is implemented to prevent. *See id.* at *22-*23 (emphasis in original).

24. The Motion inexplicably ignores the foregoing cases as well as other precedent in which this Court has found that the automatic stay bars any postpetition action that would have the effect of increasing the amount of a creditor's claim. *See In re Solutia*, 379 B.R. at 485 (holding that deceleration of an indenture constitutes "a direct attempt to get more property from the debtor and the estate, either through a simple increase in the amount of a pro-rata plan distribution or through recovery of a greater amount of the collateral which secures the claim"); *In re Texaco*, 73 B.R. at 968 (declining to modify automatic stay to permit noteholders to issue acceleration notice that would have had the effect of increasing interest rate on notes during bankruptcy case).

25. The few, nonbinding cases cited by the Vogtle Owners (*see* Mot. ¶¶ 26-28) do not involve situations where a court permitted the automatic stay to be lifted to terminate an agreement for the sole purpose of permitting a creditor to enhance, perfect, or enlarge an existing rejection damages claim or to eliminate an existing contractual right of the estate. For this and other reasons, these cases are inapposite and do not support a finding of "cause" here.

26. For example, the Vogtle Owners cite *In re Deppe*, 110 B.R. 898 (Bankr. D. Minn. 1990) and *In re Quinones Ruiz*, 98 B.R. 636 (Bankr. D.P.R. 1988), for the propositions that (1) when a default that is incurable under non-bankruptcy law arises and (2) a debtor thus cannot assume the agreement, grounds exist to lift the automatic stay. Mot. ¶ 27. Specifically, in *In re Deppe*, the court in that individual chapter 7 case concluded that "[n]othing would be gained for creditors of the estate by preserving" the automatic stay based on the facts of that

case. *In re Deppe*, 110 B.R. at 907.[6] Likewise, *In re Quinones Ruiz*, the estate had no discernible remaining interest in the agreements when the court granted relief from the automatic stay to terminate the franchise agreements at issue. Further, in neither case did the creditor seek to lift the automatic stay for the purpose of increasing an existing rejection damages claim. That is admittedly the Vogtle Owners' sole purpose here.

27. The Vogtle Owners' selective citation to *dicta* from *In re El Paso Refinery, L.P.*, 220 B.R. 37 (Bankr. W.D. Tex. 1998), as support for the proposition that a party should be entitled to lift the automatic stay to terminate a rejected contract, is simply misleading. Mot. ¶ 26. The decision in *El Paso* does not concern whether the automatic stay should be lifted to permit a contract to be terminated after rejection has occurred; rather, the creditor in that case successfully lifted the stay to terminate the contract *prior* to any motion to reject or assume the contract. *El Paso*, 220 B.R. at 39-40. Indeed, in stark contrast to the situation here, the issue in *El Paso* turned on whether, *after the automatic stay had been lifted and termination of the contract had occurred*, a non-debtor should be permitted to have any damages claim against the estate arising from a post-petition breach by the debtor. *Id.* at 40.

28. To the limited extent *El Paso* is instructive, it strongly undercuts the Vogtle Owners' Motion. The court noted, for example, that a creditor that lifts the automatic stay to terminate an executory contract ordinarily has *no claim* against the estate upon termination. *Id.* at 48. Thus, although it may be proper to lift the automatic stay to permit a non-

[6] The court in *In re Deppe* essentially granted a comfort order, lifting the automatic stay "to the extent necessary" to (1) permit a contractual counterparty to enforce its right to possession of a real property lease that had been rejected but not yet vacated by the debtor, and (2) take actions necessary under state statute to consummate termination of a franchise agreement that had been rejected and would have had no value to the debtor if it hadn't been rejected (because the debtor's real property lease had been rejected and the agreement could not be used to operate a gas station at any other location). The court repeated its decision in the case regarding the automatic stay was "essentially mooted" and "probably moot[]." *In re Deppe*, 110 B.R. at 906-07.

debtor to terminate a contract where no claim in any amount would arise, the Vogtle Owners seek to lift the stay for the sole purpose of enlarging their rejection damages claim. Moreover, lifting the stay would eliminate other estate property in the form of the contractual right to limit damages to 20% of the Contract Price. As the court in *El Paso* recognized, "the estate succeeds to the property rights which the debtor held in the same contract, and those property rights must be preserved for the benefit of all creditors of the estate. Permitting a 'termination' of such contracts would effectively allow the elimination of a property interest of value to the estate." *Id.* at 45.

29. Likewise, the *El Paso* court held that, implicit in the order that had lifted the automatic stay to permit termination, the estate had—but lost—an opportunity to accept or reject the contract, and therefore, the contract was deemed rejected prior to termination. *Id.* at 50. In substance, the court permitted the non-debtor, which had previously lifted the automatic stay to terminate its contract, to have a rejection damages claim so it could merely be treated in the same manner as similarly situated counterparties to rejected contracts. That outcome in no way supports a motion to lift the automatic stay for the sole purpose of vastly increasing a pre-existing rejection damages claim to the detriment of similarly situated creditors.

30. The Vogtle Owners also cite *In re Hernandez*, 287 B.R. 795 (Bankr. D. Ariz. 2002), and *In the Matter of West Electronics, Inc.*, 852 F.2d 79 (3d Cir. 1988) for the proposition that cause to lift the stay arises when an agreement cannot be assumed by the debtor. Mot. ¶ 28. However, neither case provides any indication that the non-debtors there sought to enhance existing claims, that the debtors had attempted to reject the agreements, or that they retained or had any rights in the agreements that would be lost upon termination.

31. The Vogtle Owners' also repeatedly mischaracterize their request for relief as "ministerial," arguing that, because rejection damages claim should be determined under state law, termination for abandonment should be permitted so that they can maximize the size of their rejection damages claim notwithstanding the automatic stay. *See id.* ¶¶ 3, 33. However, as demonstrated above, the automatic stay should not be lifted to allow creditors to exercise state law rights, including to terminate a contract, for the sole purpose of enhancing their rejection damages claims.

B. The Initial Hearing to Consider the Motion

32. For the reasons described above, the Debtors believe that the Court can decide the Motion based on a handful of undisputed facts and unambiguous contract terms. For example, the Debtors contend that the Motion should be denied because the Vogtle Owners seek to terminate the EPC Agreement for the purpose of enlarging their rejection damages claim. This should be the case even under the false assumption that an abandonment occurred prior to the Petition Date and continued during the Interim Assessment Period, such that sending a notice of termination was the only remaining act necessary to increase Debtors' limitation of liability to 40% of the Contract Price. Even if it were necessary to consider, for example, whether the Vogtle Owners had a reasonable chance of prevailing with regard to whether an abandonment had occurred and continued through the cure period, the unambiguous terms of the Interim Assessment Agreement alone are more than sufficient to establish that the automatic stay should not be lifted.

33. In the event, however, that the Court determines that an additional record is necessary to decide the Motion, then the Debtors respectfully suggest that no party in interest should be prejudiced by being forced to waive rights or arguments at this early stage and without the opportunity to take pre-hearing discovery. (Before any such determination is made, however,

Debtors posit that it would be a waste of estate and judicial resources to undertake discovery efforts that would be appropriate in advance of any testimony by Mr. David McKinney, GPC's proffered witness.)

34. Therefore, in the event the Motion is not denied or the Court determines further evidence is required, then the Debtors respectfully request that a discovery schedule be established and dates set for further hearings on the Motion. The Court has already approved a stipulation among the Debtors and GPC that obviates the need for any rush to a hearing on the Motion. *See* ECF No. 954 ¶ 6. Far from ministerial, this will be the first—and possibly the most significant—contested matter to come before the Court in these cases.

35. Moreover, the Motion contains contradictory statements and flawed reasoning regarding the Vogtle Owners' view of the nature of an initial hearing to consider the Motion. It first states that "GPC does not contemplate presenting direct testimony on the issues addressed in the Declaration." Mot. ¶ 35. But it goes on to request that it be able to present direct testimony: "[GPC] respectfully requests that it be allowed to use the Declaration as evidence in any hearing on this Motion." *Id.* GPC qualified its ipse dixit that "allowing the Declaration to be used as evidence will not extend the time necessary to hear the Motion" with a critical caveat: "absent any cross or associated redirect." *Id.* The Debtors certainly do not object to the use of declarations for direct testimony, but do object, on behalf of all parties in interest, to commencing an evidentiary hearing before it is determined that one is necessary and before necessary discovery is identified and taken.

C. <u>Bankruptcy Rule 4001(a)(3) Should Not Be Waived if the Motion is Granted</u>

36. If this Court grants the Motion, which it should not, the Court should not waive the stay provided for the benefit of all parties in interest by Bankruptcy Rule 4001(a)(3).

37. Courts should only grant a request to waive Rule 4001(a)(3) where "there is a clear showing by the movant of equitable reasons that would warrant the waiver of the presumptive stay afforded to a debtor by the rule." *In re Henderson*, 395 B.R. 893, 904 (Bankr. D.S.C. 2008) (denying request of waiver of Rule 4001(a)(3) because it did not appear that the movant would be "irreparably injured by leaving the stay in place temporarily"); *contra Foster v. Wynne*, No. 6:12-cv-00024, 2012 WL 4458476, at *3 (W.D. Va. June 5, 2012) (finding the fact that the subject of the motion to lift the stay in bankruptcy court had already been extensively litigated in state court to be an "equitable reason" to waive the stay of Rule 4001(a)(3)).

38. The Motion offers no explanation for the Vogtle Owners' request of a waiver of the stay afforded by Bankruptcy Rule 4001(a)(3). After waiting almost five months after the commencement of these cases and more than four weeks after the rejection of the EPC Contract to file the present Motion, what actions do the Vogtle Owners now plan or need to take within fourteen days? The automatic stay will remain in place to prevent the exercise of other remedies that may have been available to the Vogtle Owners absent the pendency of the current chapter 11 cases (e.g., assumption of contracts or taking title to assets of the Debtors). Because the limited relief the Vogtle Owners seek is termination of an agreement that has been rejected, the Vogtle Owners will not suffer any harm if termination is delayed for an additional fourteen days.

39. Given the potential harm to both the estate and other unsecured creditors—including, ultimately, by a massive dilution of creditor recoveries and also by potentially providing an improper blocking vote in the context of solicitation of a chapter 11 plan—the Debtors must be given time to appeal the decision before any termination occurs. Courts may deny a request for waiver of Rule 4001(a)(3) if there is a high probability of an

appeal by the debtor—and particularly if the appeal would become moot if the stay is waived. *See, e.g.*, *In re Richter*, 525 B.R. 735, 759 (Bankr. C.D. Cal. 2015); *see also* 9-4001 Collier on Bankruptcy P 4001.05 (16th ed. 2017) ("The party obtaining relief from a stay may be able to convince the court to grant a shorter period of time for the losing party to seek a stay pending appeal or even to grant no time at all. However, it should be the *rare case* in which the latter course is chosen over the objection of any party who wishes to appeal, especially if the appeal may become moot without a stay." (emphasis added)).

IV. RESERVATION OF RIGHTS

40. According to the Motion, the Vogtle Owners are not seeking to prejudice Debtors' rights to challenge the amount of their claim, including on the grounds that abandonment did not occur. Mot. ¶ 34. Indeed, the ultimate allowance of any claim by GPC, even if timely filed, should not be determined by the Motion, and the Vogtle Owners bear the burden to establish damages. The Debtors reserve and retain all of their rights to object to or otherwise challenge any such claims asserted by the Vogtle Owners, including the amount of any such claims. Further, Toshiba's settlement to pay the Vogtle Owners notwithstanding the provisions of prepetition agreements is not binding on the Debtors, and the Debtors reserve and retain all of their rights to object to or otherwise challenge any subrogation claims that may be asserted by Toshiba. In addition, the Debtors expressly reserve the right to object to the factual allegations and conclusions of law set forth in the Motion, including any objections not set forth herein.

41. The Debtors do not concede, for example, that the Vogtle Owners are entitled to issue a notice of termination for abandonment under non-bankruptcy law. In that regard, even if the Motion is granted and a notice of termination for abandonment issues, Debtors expressly reserve their rights to demonstrate, in subsequent proceedings and if

necessary, that the Vogtle Owners nonetheless had (and have) no right to recover damages in excess of the 20% of the Contract Price (even if they could establish significant monetary damages, a burden they cannot satisfy). For example, no abandonment had occurred as of the date the Vogtle Owners sent their notice on March 24, 2017, nor did any abandonment occur during the Interim Assessment Period (i.e., March 29, 2017 to July 27, 2017). In addition, the Vogtle Owners waived any right to terminate the EPC Agreement based on an alleged material breach or anticipatory repudiation because they elected to affirm the EPC Agreement in and during the Interim Assessment Agreement period. *See Lucente v. Int'l Business Machines Corp.*, 310 F.3d 243, 258-59 (2d Cir. 2002) ("When confronted with an anticipatory repudiation, the non-repudiating party has two mutually exclusive options. [It] may (a) elect to treat the repudiation as an anticipatory breach and seek damages for breach of contract, thereby terminating the contractual relation between the parties, or (b) [it] it may continue to treat the contract as valid and await the designated time for performance before bringing suit. . . . Once a party has elected a remedy for a particular breach, his choice is binding with respect to that breach and cannot be changed."); *see also supra* ¶¶ 11-12 (setting forth provisions of the Interim Assessment Agreement that reflect continuation of the EPC Agreement during the Interim Assessment period).[7]

[7] Debtors also do not concede that the Vogtle Owners are entitled to any damages above the limitation of liability cap (whether 20% or 40%) set forth in Section 17.2(a) of the EPC Agreement. The Vogtle Owners attempt to claim "liquidated damages related to the WEC's guarantee of the minimum generating capacity of the new nuclear units (i.e., the Minimum Performance Guaranty)" (Mot. ¶ 10 fn. 4) because they are not subject to the limitation of liability cap in Section 17.2(a). Although it is true that Section 17.2(b) excludes the Minimum Performance Guarantee liquidated damages from the maximum liability amount, *see* Berezin Decl. ¶ 9, the Minimum Performance Guarantee is only applicable if and when the Units are complete and the appropriate performance testing can be done. Therefore, there are no additional damages above the liability cap that can be sought, and the Debtors reserve all rights and arguments against such claims by the Vogtle Owners.

V. CONCLUSION

42. For the foregoing reasons, the Vogtle Owners are not entitled to relief from the automatic stay to terminate the EPC Agreement and the Motion must be denied.

Dated: September 25, 2017
New York, New York

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