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 12 INSURANCE COMPANY OF PITTSBURGH, PA

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

11 In re	)	Case No. 01-30923 DM
12 PACIFIC GAS AND ELECTRIC COMPANY,	)	Chapter 11
13 a California Corporation	)	
14 (I.D. No. 94-07426-40)	)	OPPOSITION BY CREDITOR
15 Debtor.	)	NATIONAL UNION TO
	)	CREDITORS EMERY'S AND
	)	CALDEWEY'S MOTION FOR
	)	<u>RELIEF FROM AUTOMATIC STAY</u>
	)	
	)	Date: September 11, 2001
	)	Time: 1:30 p.m.
	)	Place: 235 Pine Street 22 <sup>nd</sup> Floor
	)	San Francisco, California

19 OBJECTION TO HEARING DATE AND LACK OF NOTICE; REQUEST TO CONTINUE

20 National Union objects that it was not served with this motion despite being both (1) on  
 21 the "Special Notice" list; and (2) a party affected by the motion. The September 11, 2001 hearing  
 22 date conflicts with a pre-existing commitment (appellate argument) for counsel. National Union  
 23 requests that any hearing on this matter be continued to a future date.

24 OPPOSITION TO MOTION FOR STAY RELIEF

25 The Emery and Caldewey claimants (hereinafter the "Fire Claimants") premise their stay  
 26 relief motion on a simple, but faulty, assertion: that PG&E's liability to them for the July 31,  
 27 1996 Cavedale Fire is covered by insurance (National Union) such that their claims will not  
 28 adversely affect the assets of PG&E. In fact, National Union and PG&E hotly dispute coverage

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1 for the loss. If National Union prevails (its coverage suit has been stayed), PG&E will be  
2 responsible for *all* Cavedale Fire-related defense payments, settlement payments and judgments,  
3 whether or not any sum was initially funded by National Union. Therefore, the Fire Claimants'  
4 judgment or settlement against PG&E can, and likely will, affect the debtor's assets.

5 National Union has reserved its rights against PG&E, including its right to *reimbursement*  
6 of all defense and indemnity payments, in the event non-coverage is later established. Indeed,  
7 National Union has itself filed a claim in excess of \$18 million against PG&E in this bankruptcy,  
8 reflecting National Union's request for reimbursement of its defense and settlement payments on  
9 Cavedale Fire claims so far. (Prough Decl., Exh. A.) Of that \$18 million, some \$16.4 million  
10 has been advanced to settle 26 such Cavedale Fire claims already. *Id.*

11 In addition to (1) the pending coverage dispute over whether the compensatory damage  
12 claims the Fire Claimants have against PG&E are covered, at all, it is also clear that (2) any  
13 punitive damages are not covered, and (3) the four remaining Cavedale Fire claims in aggregate  
14 may well exceed the \$3.6 million remaining on National Union's \$20 million policy anyway,  
15 leaving PG&E potentially responsible for the excess exposure *even if* there were otherwise  
16 coverage. The Emery and Caldewey "proof of claims" submitted with their motion, alone,  
17 exceed \$4.8 million (thus exceed remaining limits). Two other large claims are also pending.

18 In sum, the Fire Claimant's claims against PG&E are uninsured (at a minimum coverage  
19 is disputed), and their unsupported assertion that any judgment or settlement against PG&E will  
20 ultimately be borne by National Union rather than PG&E is incorrect. Any judgment or  
21 settlement may, and likely will, ultimately be the sole responsibility of PG&E.

22 For those reasons, relief from stay should not be granted on the basis of the movants'  
23 contention that the Fire Claimant's claims will impact only National Union and not PG&E. It  
24 must be recognized that any defense costs, settlement or judgment may be borne by PG&E.

#### 25 STATEMENT OF FACTS

##### 26 A. The Excess Insurance Contract

27 National Union entered into an excess liability insurance contract with Davey Tree Expert  
28 Company, bearing policy number BE 309 61 60. That insurance contract had policy limits of

1 \$20 million, and was effective between September 1, 1995 and September 1, 1998. PG&E  
2 claims to be an "additional insured" under the terms of the insurance contract for purposes of the  
3 Cavedale Fire. Whether that is right or wrong depends in part on the actual cause of the fire.

4 B. Claims And Suits Arising From The Cavedale Fire

5 On July 31, 1996, a large fire occurred in Sonoma County, California. The fire started in  
6 a remote area and quickly spread to damage substantial third-party property. The fire came to be  
7 known as the "Cavedale Fire." The fire started at or near a PG&E power line pole, and PG&E  
8 publicly acknowledged liability to the fire victims the next day.

9 National Union and PG&E dispute both the actual cause of the fire and the related  
10 question of whether there is coverage for PG&E under the terms of the liability insurance  
11 contract National Union entered into with Davey Tree. That dispute is in litigation.

12 While that coverage dispute is being resolved, National Union agreed to participate in the  
13 defense and settlement of the Cavedale Fire claims and suits against PG&E, up to its \$20 million  
14 limits (excepting any punitive damage claims), and subject to a complete reservation of rights  
15 including its right to full reimbursement *from PG&E* with respect to *all* amounts expended.

16 After PG&E admitted liability for the fire, approximately thirty individuals and business  
17 entities, including the Fire Claimants who are moving parties herein, brought claims and suits  
18 against PG&E. National Union has paid \$1,670,858 in legal fees and costs to defend PG&E, and  
19 another \$16,415,842 to settle twenty-six claims and suits so far. In addition, National Union has  
20 also paid for the defense of four remaining, pending claims, including Emery and Caldewey.  
21 (See Drake Declaration ¶¶ 5-6.) National Union seeks reimbursement of all such sums.

22 C. National Union's Lawsuit Against PG&E In Sonoma County Superior Court

23 To resolve the coverage dispute, National Union filed an action for reimbursement and  
24 for declaratory relief against PG&E on July 7, 1998 in the Sonoma County Superior Court,  
25 captioned National Union Fire Insurance Company of Pittsburgh, PA v. Pacific Gas and Electric  
26 Company, Case No. 219514. On June 1, 1999, however, the Sonoma County Superior Court  
27 granted a motion by PG&E and stayed National Union's coverage action, pending the resolution  
28 of all third-party claims by the alleged fire victims.

1 ARGUMENT

2 The Fire Claimants premise their motion on the incorrect assertion that any judgment or  
3 settlement they obtain against PG&E will necessarily be covered, so that granting relief from the  
4 stay will not affect the assets of the bankrupt debtor's estate. But that is not so. First, National  
5 Union disputes coverage for *all* damages sought against PG&E and seeks reimbursement of all  
6 sums it pays to resolve the claims against PG&E. Second, the Fire Claimants raise punitive  
7 damage claims that are not and cannot be covered. Third, the stated value of the remaining  
8 claims against PG&E arising from the Cavedale Fire exceed National Union's remaining policy  
9 limits in any event (even assuming coverage).

10 I. NATIONAL UNION HAS RESERVED ITS REIMBURSEMENT RIGHTS

11 National Union has agreed to defend and indemnify PG&E for the Cavedale Fire claims  
12 (except of course for punitive damages), up to its \$20 million policy limits, subject to a complete  
13 reservation of all rights including the right to reimbursement from PG&E of all sums expended.  
14 Under California law, a liability insurer that disputes its duty to defend a third-party claim or suit  
15 against the insured may provide the defense on behalf of the insured under a reservation of rights,  
16 including the right to obtain reimbursement of all sums spent on the defense of claims not  
17 potentially covered under the insurance contract. Buss v. Superior Court, 16 Cal.4th 35, 50-52  
18 (1998). A liability insurer that disputes its duty to indemnify may also provide funds to settle a  
19 third-party claim or suit against the insured under a reservation of rights, including the right to  
20 obtain reimbursement of all sums spent on the settlement of claims that are not in fact covered  
21 under the insurance contract. Blue Ridge Insurance Co. v. Jacobsen, 25 Cal.4th 489, 502-03  
22 (2001); Johansen v. CSAA, 15 Cal.3d 9, 15 (1975). National Union is doing both.

23 Thus, if National Union prevails in the coverage action, PG&E will be solely responsible  
24 for *all* sums spent by National Union on the defense and settlement of the Cavedale Fire claims.

25 II. PUNITIVE DAMAGE CLAIMS ARE UNINSURED AND UNINSURABLE

26 The Fire Claimants have also sued PG&E for punitive damages. Punitive damages are not  
27 insurable under California law. See Cal. Ins. Code § 533; PPG Industries, Inc. v. Transamerica  
28 Insurance Company, 20 Cal.4th 310, 317 (1999). Thus, any verdict for punitive damages (or any

1 settlement reflecting such claims) will necessarily be funded by PG&E, if at all.

2 III. REMAINING CLAIMS MAY EXCEED NATIONAL UNION'S REMAINING LIMITS

3 The Fire Claimants also contend, erroneously, that there is enough "insurance in place to  
4 pay Plaintiffs' claim." National Union has expended \$16,415,842 to settle twenty-six claims and  
5 suits brought by other victims of the Cavedale Fire (under a reservation of rights). That leaves  
6 less than \$3.6 million in remaining limits on the National Union policy. The four remaining  
7 claims, at their stated value, may well exceed those remaining limits and would therefore not be  
8 the responsibility of National Union *even if* there were coverage. For example, the Emery and  
9 Caldewey claimants, alone, have submitted in this bankruptcy proceeding "proofs of claim"  
10 exceeding \$4.8 million. The other two remaining claimants (Hanna Vineyard and Dr. Roberts)  
11 also have asserted substantial alleged claims. To the extent those claims diminish or deplete the  
12 remaining limits, the Emery and Caldewey claims would fall even more squarely on PG&E.

13 IV. THE FIRE CLAIMANTS' CLAIMS WILL AFFECT PG&E'S ASSETS

14 For each of those reasons, the Fire Claimants' claims can and likely will affect the assets  
15 of PG&E. As noted above, National Union has already submitted its own proof of claim in this  
16 bankruptcy in the amount of \$18,086,700. That amount reflects the defense and settlement  
17 payments made by National Union on the earlier-resolved claims and suits. To the extent that  
18 National Union were to pay any additional sums to settle any of the remaining Cavedale Fire  
19 claims, if at all, those sums would then be sought back against PG&E and would serve to  
20 increase the size of National Union's own claim against PG&E.

21 CONCLUSION

22 For the foregoing reasons, the Court should deny the motion for relief from stay.

23 Dated: September 5, 2001

Respectfully submitted,

24 MORISON-KNOX HOLDEN MELENDEZ  
25 & PROUGH, LLP

26 By: 

Michael D. Prough

27 Attorneys for NATIONAL  
28 UNION FIRE INSURANCE  
COMPANY OF PITTSBURGH, PA

1 **PROOF OF SERVICE**

2 I am a citizen of the United States and employed in the County of Contra Costa. I am  
3 over the age of eighteen years and not a party to the within action. My business address is  
4 MORISON-KNOX HOLDEN MELENDEZ & PROUGH, LLP, 500 Ygnacio Valley Road,  
5 Suite 450, Walnut Creek, California 94596.

6 I am readily familiar with this firm's practice for collection and processing of  
7 correspondence for mailing. Such correspondence is deposited with the United States Postal  
8 Service on that same day in the ordinary course of business.

9 On September 6, 2001, I served by U.S. Mail the attached document(s):

- 10 • **OPPOSITION BY CREDITOR NATIONAL UNION TO CREDITORS EMERY'S**  
11 **AND CALDEWEY'S MOTION FOR RELIEF FROM AUTOMATIC STAY**  
12 • **DECLARATION OF MICHAEL D. PROUGH SUPPORTING NATIONAL**  
13 **UNION'S RESPONSE TO CREDITORS EMERY'S AND CALDEWEY'S**  
14 **MOTION FOR RELIEF FROM AUTOMATIC STAY**

15 on the party to the within action by placing true and correct copies thereof in sealed envelopes,  
16 postage paid, and placing them for collection and mailing, according to ordinary business  
17 practices, addressed as follows:

18 **SEE ATTACHED SPECIAL NOTICE SERVICE LIST**

19 and by facsimile as follows:

20 James L. Lopes  
21 Howard, Rice, Nemerovski, Canady,  
22 Falk & Rabkin, A Professional Corp.  
23 Three Embarcadero Center, 7th Floor  
24 San Francisco, CA 94111  
25 Facsimile: (415) 217-5910

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Barri Kaplan Bonapart, Esq.  
Bonapart & Associates  
300 Tamal Plaza Drive, Suite 250  
Corte Madera, CA 94925  
Facsimile: (415) 945-0705

26 I declare under penalty of perjury under the laws of the State of California that the  
27 foregoing is true and correct. Executed on September 6, 2001 at Walnut Creek, California.

28  
\_\_\_\_\_  
Sandra D. Holmes