

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re: : Chapter 11
: :
COBALT INTERNATIONAL ENERGY, INC., : Case No. 17-36709 (MI)
et al., :
: :
Debtors.¹ : Re: Docket No. 561
: :

**LIMITED OBJECTION AND RESERVATION OF RIGHTS OF ALLIED WORLD
NATIONAL ASSURANCE COMPANY TO FOURTH AMENDED JOINT PLAN OF
COBALT INTERNATIONAL ENERGY, INC. AND ITS DEBTOR AFFILIATES**

Allied World National Assurance Company (“**Allied World**”), by its undersigned attorneys, hereby asserts this limited objection and reservation of rights to the Fourth Amended Joint Plan of Cobalt International Energy, Inc. and its Debtor Affiliates [Docket No. 561] (the “**Plan**”)² as follows:

Background

1. Cobalt International Energy, Inc. and certain affiliates (collectively, “**Debtors**”) filed voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code on December 14, 2017 (the “**Petition Date**”). Since the Petition Date, the Debtors have continued to operate as debtors-in-possession.

2. Prior to the Petition Date, Allied World issued various insurance policies under which one of more of the Debtors has asserted a right to insurance coverage (collectively, the

¹ The Debtors in these Chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, are: Cobalt International Energy, Inc. (1169); Cobalt International Energy GP, LLC (7374); Cobalt International Energy, L.P. (2411); Cobalt GOM LLC (7188); Cobalt GOM #1 LLC (7262); and Cobalt GOM #2 LLC (7316). The Debtors’ service address is: 920 Memorial Way, Suite 100, Houston, Texas 77024.

² All capitalized terms not otherwise defined herein shall have the meanings ascribed to such terms in the Plan.



“Policies”), including without limitation:

- a claims-made “Excess Directors and Officers Liability Insurance Following Form Policy,” policy number 0305-1595, effective December 15, 2010 to December 15, 2011 (the **“2010-2011 Allied World Policy”**);
- a claims-made “Excess Directors and Officers Liability Insurance Following Form Policy,” policy no. 0305-1595, effective December 15, 2011 through December 15, 2012 (the **“2011-2012 Allied World Policy”**);
- a claims-made “Excess Directors and Officers Liability Insurance Following Form Policy,” policy no. 0305-1595, for the December 15, 2012 to December 15, 2013 policy period (the **“2012-2013 Allied World Policy”**); and
- a claims-made “Excess Directors and Officers Liability Insurance Following Form Policy,” policy no. 0305-1595, effective December 15, 2013 to December 15, 2014 (the **“2013-2014 Allied World Policy”** and collectively with the 2010-2011 Allied World Policy, the 2011-2012 Allied World Policy and the 2012-2013 Allied World Policy, the **“Excess Policies”**).

Upon information and belief, the Debtors seek coverage under the Excess Policies for certain claims arising out of events that took place between 2010 and 2014, including a Foreign Corrupt Practices Act Investigation, public misrepresentations made by the company, and certain securities class actions, shareholder derivative demands and shareholder derivative actions. Allied World and one or more of the Debtors may also be parties to one or more other agreements relating to such insurance coverage provided in connection with such insurance programs (collectively, the **“Agreements”**).

3. To the extent it is determined that Allied World has coverage obligations under the Excess Policies or any other Policies or Agreements, Allied World is entitled under applicable non-bankruptcy law to enforce its rights (the **“Contractual Rights”**) and the insured’s reciprocal obligations (the **“Contractual Obligations”**) under such Policies and Agreements as conditions precedent to providing coverage, including, but not limited to:

- (a) the right to consent to any settlement offer or settlement of any otherwise

covered claims;

(b) the right to require the insured to provide all information, assistance and cooperation that Allied World reasonably requests with respect to otherwise covered claims;

(c) the right to require the insured to preserve any rights of contribution, indemnity and subrogation;

(d) the right to assert set-off and/or recoupment against amounts recoverable under the Policies;

(e) the right to pay otherwise covered claims only as they become due as the result of a valid judgment or a settlement agreement entered into with Allied World's consent; and

(f) the right to require the satisfaction of any applicable deductible or self-insured retention or the exhaustion of any underlying coverage prior to submission of claims to Allied World.

4. The Plan expressly defines "D&O Liability Insurance Policies" as "all insurance policies (including any runoff or 'tail' policy) that has been issued at any time to or provides coverage to any of the Debtors for current or former directors', managers', and officers' liability." *See* Plan § I.A.45. The Excess Policies are "D&O Liability Insurance Policies as that term is defined in the Plan.

5. The Plan provides that:

The Debtors shall be deemed to have assumed all of the Debtors' D&O Liability Insurance Policies pursuant to section 365(a) of the Bankruptcy Code effective as of the Effective Date, and coverage for defense and indemnity under any of the D&O Liability Insurance Policies shall remain available to all individuals within the definition of "Insured" in any of the D&O Liability Insurance Policies. Entry of the Confirmation Order will constitute the Bankruptcy Court's approval of the

Debtors' foregoing assumption of each of the unexpired D&O Liability Insurance Policies. Notwithstanding anything to the contrary contained in the Plan, and except as otherwise may be provided in an Order from the Bankruptcy Court, Confirmation of the Plan shall not discharge, impair, or otherwise modify any indemnity obligations assumed by the foregoing assumption of the D&O Liability Insurance Policies, and each such indemnity obligation will be deemed and treated as an Executory Contract that has been assumed by the Debtors under the Plan as to which no Proof of Claim need be filed. Provided, however, that the holder(s) of a Claim for an indemnity obligation will look only to the D&O Liability Insurance Policies for recovery and not the Estates.

Plan § IV.N. The Plan further provides that:

[n]othing contained in the Plan shall constitute or be deemed a waiver of any Cause of Action that the Debtors or any Entity may hold against any other Entity, including insurers under any insurance policy, nor shall anything contained herein constitute or be deemed a waiver by such insurers of any defenses, including coverage defenses, held by such insurers.

Plan § VI.I.3.

6. The Plan further contemplates that a Plan Administrator will step into the Debtors' shoes for certain purposes, including for purposes of "resolving Disputed Claims" and "pursuing or otherwise commencing and litigating any causes of action," Plan § IV.D.1, but "shall not be deemed a successor in interest of the Debtors for any purpose other than as specifically set forth herein," Plan § IV.D.2. On the Effective Date, the Plan Administrator Assets³ "shall vest automatically in the Plan Administrator free and clear of all Liens, claims encumbrances, and other interests." Plan § IV.D.2. "The Plan Administrator shall dissolve all of the Debtors, which dissolution shall be effectuated at a time following the Effective Date determined by the Plan Administrator." Plan § IV.J.

Limited Objection

7. The Debtors and/or the Plan Administrator cannot retain or receive the benefits of

³ The "Plan Administrator Assets" are broadly defined to include "all assets of the Estates, including interests in non-Debtor subsidiaries...." See § I.A.93.

the Policies and Agreements without satisfying the continuing obligations of the insureds thereunder. A bankruptcy court cannot alter or enlarge an insurer's state law contractual obligations. *See In re Coupon Clearing Serv., Inc.*, 113 F.3d 1091, 1099 (9th Cir. 1997) (“[T]he estate ha[s] no greater rights in property than those held by the debtor prior to bankruptcy.”); *Moody v. Amoco Oil Co.*, 734 F.2d 1200, 1213 (7th Cir. 1984), cert. denied, 469 U.S. 982 (1984) (the Bankruptcy Code is not intended to expand debtor's rights against others more than they exist at the commencement of the case). A debtor cannot assume the benefits of a contract (whether executory or non-executory) without assuming the corresponding burdens imposed upon the debtor. *AGV Productions, Inc. v. Metro-Goldwyn Mayer, Inc.*, 115 F. Supp. 2d 378 (S.D.N.Y. 2000) (holding that the Bankruptcy Code does not permit a debtor to assume and assign only a portion of a contract); *In re Stewart Foods, Inc.*, 64 F.3d 141, 145 (4th Cir. 1995)(terms of non-executory contract binding); *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1153 (3d Cir. 1989)(debtors bound by arbitration clause in non-executory contract).

8. Here, the Plan provides for the assumption of all D&O Liability Insurance Policies (including the Excess Policies) and thereby commits the Debtors to fulfill continuing Contractual Obligations of the insured thereunder, which are conditions to coverage. *See* Plan § IV.N. However, whether the Debtors will be capable of performing the Contractual Obligations – especially once the Debtors are dissolved as contemplated by Plan § IV.J. – is questionable. The Plan ought to specifically authorize the Plan Administrator to fulfill the Debtors' Contractual Obligations as a condition to the assumption of the D&O Liability Insurance Policies (including the Excess Policies) to the extent those policies are among the Plan Administrator

Assets that will vest in the Plan Administrator on the Effective Date, since the performance of the Contractual Obligations is a condition precedent to coverage.

9. Moreover, the Plan contains certain provisions that could potentially be construed as inconsistent with the Contractual Rights and Contractual Obligations. For example, the Plan gives the Plan Administrator responsibility for “resolving Disputed Claims” and “pursuing or otherwise commencing and litigating any causes of action.” *See* Plan § IV.D.1. While it does not appear to *exclusively* reserve these powers to the Plan Administrator, the Plan ought to make clear that neither Plan § IV.D.1 nor any other Plan provision is intended to alter the insurers’ Contractual Rights or the insured’s Contractual Obligations in a way that could potentially vitiate coverage.

10. Courts have held that, in order to be confirmable, a plan of reorganization must be “insurance neutral.” *See In re Combustion Engineering, Inc.*, 391 F.3d 190 (3d Cir. 2005). The Plan contains an insurance neutrality provision of sorts. *See* Plan § VI.I.3 (“Nothing contained in the Plan shall constitute or be deemed a waiver of any Cause of Action that the Debtors or any Entity may hold against any other Entity, including insurers under any insurance policy, nor shall anything contained herein constitute or be deemed a waiver by such insurers of any defenses, including coverage defenses, held by such insurers.”). While this provision is a step in the right direction and suggests that the Plan is intended to be insurance neutral, a broader insurance neutrality provision is needed to protect not only “defenses, including coverage defenses” but rather the full scope of insurers’ Contractual Rights and insured’s Contractual Obligations.

11. Allied World proposes adding the following language to the Confirmation Order:

Notwithstanding any other term or provision in the Plan or this Order, nothing in the Plan, this Order, any other document related to any of the foregoing or any

other order of the Bankruptcy Court (including, without limitation, any other provision that purports to be preemptory or supervening or grants an injunction or release): (i) will prejudice any of the rights, claims or defenses of Debtors' insurers ("Insurers") under any insurance policies issued to one or more Debtors under which the Debtors, the Estates, the Plan Administrator, and/or any other insured seeks coverage (the "Policies") or any agreements related to such Policies (together, with the Policies, the "Insurance Agreements"); (ii) will modify any of the terms, conditions, limitations and/or exclusions contained in the Insurance Agreements, which terms, conditions, limitations and exclusions shall remain in full force and effect; (iii) shall be deemed to create any insurance coverage that does not otherwise exist, if at all, under the terms of the Insurance Agreements, or create any right of action against the Insurers that does not otherwise exist under applicable non-bankruptcy law; (iv) shall be deemed to prejudice any of the Insurers' rights and/or defenses in any pending or subsequent litigation in which the Insurers or the Debtors, the Estates, the Plan Administrator, and/or any other insured may seek any declaration regarding the nature and/or extent of any insurance coverage under the Insurance Agreements; (v) shall be deemed to alter the continuing duties and obligations of any insured under the Insurance Agreements; or (vi) shall be construed as an acknowledgement that the Insurance Agreements cover or otherwise apply to any claims or that any claims are eligible for payment under any of the Insurance Agreements. The Plan Administrator is specifically authorized to perform the continuing duties and obligations of the Debtors under the Insurance Agreements.

The inclusion of this provision in the Confirmation Order would resolve Allied World's concerns by ensuring the Plan is truly insurance neutral, and prevent potential future disputes concerning the Plan's impact (if any) on the Policies and Agreements.

Reservation of Rights

12. Allied World expressly reserves the right to assert claims for any presently unliquidated amounts for any obligations due and owing under the Policies and/or Agreements. Allied World reserves, and does not waive, all of its rights, remedies, defenses, limitations and/or exclusions in connection with the Policies, Agreements and/or applicable law. Allied World further reserves all rights to assert any and all such rights, remedies, defenses, limitations and/or exclusions in any appropriate manner or forum whatsoever (including without limitation arbitration, the United States District Court, or any state court). Nothing contained in this

Objection shall be deemed to expand any coverage that may otherwise be available under the Policies and/or Agreements, or any rights to payment under any settlements.

13. Allied World further reserves all of its rights to raise the issues contained in this Objection and any other related issues in any procedurally-appropriate contested matter and/or adversary proceeding including, without limitation, a separate adversary proceeding requesting any appropriate declaratory and/or injunctive relief with respect to any rights under the Policies and/or Agreements and applicable law that may be adversely affected by confirmation of the Plan.

14. Allied World furthers reserve all of its rights to object to any claim for coverage under the Policies and/or Agreements and/or any claim for payment under any settlement agreements, and/or to seek declaratory and/or injunctive relief to the extent that treatment of their rights under the Policies and/or Agreements and/or confirmation of the Plan violates any terms or conditions of the Policies and/or Agreements or gives rise to any defenses on behalf of Allied World.

15. Nothing in this Objection shall be construed as an acknowledgment that any of the Excess Policies (and/or any other Policies or Agreements) covers or otherwise applies to any claims, losses, damages or causes of action, or that any such claims, losses, damages or causes of action are eligible for payment. Allied World reserves the right to seek an adjudication that Debtors have waived or forfeited any available coverage under the Policies and Agreements.

16. Finally, Allied World reserves the right to amend, modify or supplement this Objection in response to, or as a result of, any discovery being conducted in connection with confirmation of the Plan and/or any submission in connection with the Plan or this Chapter 11

Case filed by any party-in-interest, including without limitation any Plan Supplement. Allied World also reserves the right to adopt any other objections to confirmation of the Plan filed by any other party.

Conclusion

For the reasons set forth above, without the inclusion of specific language in the Confirmation Order reserving all of Allied World's contractual and other rights under the Policies and Agreements (including the Excess Policies), the Plan could be construed in a way that impermissibly modifies Allied World's rights and cannot be confirmed.

Dated: March 27, 2018

Respectfully submitted,

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