UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

IN RE:	)	Chapter 11
FIBRANT, LLC, *et al.*,[1]	)	Case No. 18-10274 (SDB)
Debtors.	)	(Jointly Administered)

AMENDED JOINT OBJECTION OF CERTAIN INSURERS TO CONFIRMATION OF DEBTORS' AMENDED AND RESTATED PLAN OF LIQUIDATION (Dkt. No. 600)

Objecting Insurers[2] hereby assert this Objection to the Amended and Restated Chapter 11

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Fibrant, LLC (6694); Evergreen Nylon Recycling, LLC (7625); Fibrant South Center, LLC (8270); and Georgia Monomers Company, LLC (0042)

[2] The Objecting Insurers are ACE Property & Casualty Insurance Company, formerly known as CIGNA Property and Casualty Insurance Company, formerly known as Aetna Insurance Company; United States Fire Insurance Company (with respect to policies GLA 284022 and GLA 540 079751 7); Century Indemnity Company, as successor to CIGNA Specialty Insurance Company, formerly known as California Union Insurance Company, and as successor to CCI Insurance Company, as successor to Insurance Company of North America (collectively, the "Chubb Insurers"); together with Admiral Insurance Company, United States Fire Insurance Company (with respect to policy no. 5401893627); Mt. McKinley Insurance Company; Columbia Casualty Company; Continental Casualty Company; The Continental Insurance Company as successor to certain interests of Harbor Insurance Company; Certain Underwriters at Lloyd's, London; Certain London Market Companies (The Edinburgh Assurance Company; World Auxiliary Insurance Company Limited; Accident & Casualty Insurance Company of Winterthur (No. 2A/C); Accident & Casualty Insurance Company of Winterthur (No. 3A/C); New London Reinsurance Company Limited; and The Scottish Lion Insurance Company Limited); Starr Indemnity & Liability Company, formerly known as Republic Insurance Company; Berkshire Hathaway Specialty Insurance Company, formerly known as Stonewall Insurance Company; and First State Insurance Company, incorrectly scheduled by Debtors as "Hartford."

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Plan of Liquidation for Fibrant, LLC (the "Plan")[3] as follows:

I. BACKGROUND

A. The Policies

1. Fibrant, LLC and affiliated debtors ("Debtors") filed petitions under Chapter 11 of Title 11 of the United States Code on February 23, 2018 (the "Petition Date"). Debtors are operating as a Debtor-in-Possession in this Chapter 11 bankruptcy case (the "Case").

2. The Objecting Insurers issued (or allegedly issued) certain primary or excess commercial liability insurance policies at various times between approximately 1965 and 1985 to Columbia Nitrogen Corporation, Columbia Nipro Corp., and/or Nipro, Inc. (collectively, the "Policies").[4]

3. In connection with the Policies, the Objecting Insurers and the policy holder may have entered into one or more related agreements (collectively, with the Policies, the "Agreements").

4. It appears that Debtors allege that they are the successors in interest to Columbia Nitrogen Corporation, Columbia Nipro Corp. and/or Nipro, Inc., or otherwise have rights as an insured under the Policies.

5. Objecting Insurers further believe that Debtors contend or will in the future contend that the Policies may provide coverage to the Debtors for losses or liabilities relating to

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

[4] Other insurers affiliated with or related to the Objecting Insurers may have issued other policies to alleged predecessors of the Debtor. Objecting Insurers reserve the right to amend or supplement this Objection to the extent that Debtor seeks coverage under such other policies for any Claim, or the Plan purports to assume and assign any such policies or any rights thereunder..

environmental releases or contamination with respect to the Environmental Remediation Property and that, therefore, the Policies constitute "Applicable Insurance" as defined in Section 1.1.7 of the Plan.

6. Under applicable non-bankruptcy law, the Objecting Insurers are entitled to enforce their rights (the "Contractual Rights") and the insured's reciprocal obligations (the "Contractual Obligations") under the Agreements as conditions precedent to providing coverage, including, but not limited to:

(a) whether the Policies' terms, conditions, limitations, exclusions, and/or endorsements apply to provide coverage to the insured;

(b) whether an entity claiming coverage under any of the Policies is a proper insured or additional insured thereunder;

(c) the duty of the insured to promptly give written notice of an occurrence, claim or suit;

(d) the right to control or associate in the defense, negotiation and settlement of any otherwise covered claims;

(e) the right to require the insured to cooperate in the defense of otherwise covered claims;

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

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

(h) 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 the Objecting Insurers' consent; and

(i) 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 the Objecting Insurers.

7. As set forth below, the Plan purports to reserve and assign to third parties claims and rights of action against Objecting Insurers, and contains provisions that affect the rights of Objecting Insurers. Accordingly, Objecting Insurers are parties in interest having standing to object to confirmation of the Plan. *E.g., In re Congoleum Corp.*, 2005 Bankr. LEXIS 556, *8 (Bankr.D.N.J. March 24, 2005) (the possibility that the plan would affect coverage defenses was sufficient to convey standing on impacted insurers).

B. The Debtors' Environmental Liabilities, Prepetition Events and Proposed Settlements and Releases

8. The principal asset of the Debtors is a former chemical manufacturing plant in Augusta, Georgia (the "Site") that had been in operation since at least 1963.

9. Debtors have long known of concerns about environmental contamination at the Site which had drawn the attention of regulatory authorities. For example, the Disclosure Statement refers to releases of hazardous wastes being known since at least 1994, and further states that Fibrant has operated two systems to remedy plumes of groundwater contamination since 1996.

10. In addition to the meager information set forth in the Disclosure Statement, the

report of the DSM Arbitration Tribunal, dated May 2, 2018,[5] states it was "undisputed" that "there was a problem regarding soil and groundwater contamination prior to [ChemicaInvest's acquisition of Fibrant]," including releases of benzene and chromium into soil and groundwater. DSM Arbitration Tribunal Report at ¶ 26. Furthermore, "the Augusta Plant's Environmental Permit dated September 30, 2011 required corrective actions and monitoring by the EPD," and by letter dated June 25, 2015, the Georgia Department of Natural Resources, Environmental Protection Division, Land Protection Branch ("DNR") "notified [Fibrant] of certain revised requirements regarding investigation, delineation, management and remediation regarding the contamination referred to above." (*Id.* at ¶¶ 26-27).

11. Fibrant and ChemicaInvest also contended in the DSM Arbitration that "there are statutory and regulatory obligations under Georgian [sic] and federal US law to inspect, monitor and remedy the contaminations at the Augusta plant and to regularly report to the EPD and implement any required remedial measures. They have emphasized that the continued presence of benzene and other chemicals contaminating the Augusta site and the adjacent Savannah river will cause or is likely to cause harm or is hazardous to human health and the environment. They have concluded that the Augusta plant contamination constitutes an existing environmental contamination under the SPA as the continued presence of dangerous substances at the Augusta site gives rise or is likely to give rise to a breach of environmental laws which will require them to carry out investigations and remediation measures in relation to these dangerous substances under environmental law." (*Id.* at ¶ 34).

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[5] The report of the DSM Arbitration Tribunal is attached to DSM's Objection to Debtor's Motion to Reject the DSM Proceeds Agreement (Docket No. 339).

12. ChemicaInvest acquired Fibrant knowing of the potential environmental liability relating to the Site. Indeed, that is why ChemicaInvest negotiated a significant (up to €80 million for environmental indemnities) indemnification provision in the SPA, and why ChemicaInvest and Fibrant aggressively pursued recovery from DSM in the DSM Arbitration.

13. Contrary to the Debtors' representation in the Disclosure Statement that "[t]he scope of the environmental issues has not been defined," Debtor and ChemicaInvest presented expert evidence in the DSM arbitration in the form of a Conceptual Correction Action Work Plan prepared by Fibrant's consultant Ramboll Environ US Corporation ("Ramboll"), estimating costs of remediation between $36 million and $47 million.[6] ChemicaInvest and Fibrant alleged "that these corrective measures are required and noncompliance is likely to give rise to a breach of environmental laws." *See* DSM Arbitration Tribunal Report at ¶ 35.

14. ChemicaInvest and Fibrant contended jointly in the DSM Arbitration that they "were faced with a heavily polluted site with a history of contamination causing harm or likely to cause harm to the environment and human health and under continuing obligations towards the [DNR] to investigate and monitor the health and safety situation at the site." DSM Arbitration Tribunal Report at ¶ 93.

15. Within a few months after ChemicaInvest's October 2015 acquisition of Fibrant, ChemicaInvest and Fibrant initiated plans to shut down and decommission the plant. At the same time, in May, 2016, ChemicaInvest and Fibrant initiated the DSM Arbitration.

16. ChemicaInvest and Fibrant invested substantial sums in pursuing the DSM

[6] DSM's consultant estimated the costs to be between $10 million and $18 million.

Arbitration over a period of almost two years. They allegedly incurred costs of €708,358.59, $258,837.09 and £7,797.04 (DSM Arbitration Tribunal Report at ¶ 99).

17. In addition to the DSM Arbitration, Fibrant and ChemicaInvest entered into other prepetition settlements relating to the Site in which (according to the Disclosure Statement) broad releases were given:

a. ChemicaInvest funded a $30 million escrow in July 6, 2016, used at least in part to support the shutdown and decommissioning of the Site, in exchange for "general releases of claims" by Fibrant.

b. ChemicaInvest, Fibrant and Shaw entered into a settlement in November, 2016 in which Shaw paid $15 million in exchange for "general releases of claims" from the Debtors.

18. Debtors contend in their brief filed March 29, 2019 ("Debtors' Confirmation Brief") that the proposed releases of ChemicaInvest under the Plan are simply a "bring down" of the prepetition "blanket" release of ChemicaInvest.

19. The Plan seeks to implement transactions which in effect are further settlements of (or concessions regarding) Debtors' environmental liabilities, while reserving the right to demand that Objecting Insurers fund or reimburse those settlements. Pursuant to Section 5.5 of the Plan, Debtors propose to "assume" the Policies (which Objecting Insurers understand Debtor contends are "Applicable Insurance" as defined in the Plan), and to assign in part to ChemicaInvest and in part to ELT "any and all claims, actions, causes of action, suits, choses in action and rights to payment of the Debtors and their Estates arising with respect to the Applicable Insurance." *See* Sections 1.1.5 and 1.1.6 of the Plan.

C. No Notice or Tender to Objecting Insurers

20. Notwithstanding the lengthy record of extensive activity surrounding the environmental contamination issues at the Site, no claims have ever been asserted against any of the Objecting Insurers relating to the Site.

21. Neither Fibrant nor anyone else purporting to have rights under the Objecting Insurers' policies notified any of the Objecting Insurers of an alleged occurrence, or of any claim or potential claim relating to the Site.

22. At no time prepetition did Fibrant or any other Debtors request any of the Objecting Insurers to defend or indemnify Fibrant against any claim of liability for environmental harm or environmental remediation costs at the Site.

23. Debtors did not provide the Objecting Insurers with advance notice of the prepetition settlements with ChemicaInvest and Shaw, or request the Objecting Insurers to consent to those settlements and the releases contained therein.

24. Debtors did not provide the Objecting Insurers with any opportunity to participate in the development of or consent to the proposed transactions with ELT and ChemicaInvest that underlie the Plan.

25. In addition to the lack of prompt notice of any fact, claim or alleged occurrence at all relating to the Site, Debtors also failed to provide timely notice of the Baxley asbestos personal injury claim and of the indemnification claim against Fibrant relating thereto. Although Fibrant was served with the Baxley state court suit on or about June 17, 2017, it does not appear

that any notice was given to insurers[7] until January 16, 2019. The claimant is now asserting that Fibrant defaulted in the Baxley suit prepetition by failing to answer or appear, and that the case is ready for trial.

26. Those pre-petition failures, together with the terms, conditions, exclusions, limitations and/or endorsements, of the policies subject to the proposed assignment, give rise to significant doubt as to whether any party is entitled to coverage under the policies in connection with the Site or the Baxley claim.

II. OBJECTIONS TO CONFIRMATION OF THE PLAN

Although the Objecting Insurers do not seek to stand in the way of the business deal struck in the proposed Plan, the Plan may not be used as a device to impair Objecting Insurers' rights or to create rights to coverage where none existed previously. Multiple provisions in the Plan, however, purport to relieve the Debtors of any consequence of its failures to meet the terms, conditions, exclusions, limitations and/or endorsements of historical insurance policies and to similarly relieve third parties of any obligation to satisfy those terms, conditions, exclusions, limitations and/or endorsements moving forward. If the Debtors intentionally sought to use the Plan to gain such an improper litigation advantage, the Plan likely was filed in bad faith. But even if the potential impact of the Plan's provisions on its alleged legacy insurance were unintentional, those provisions are impermissible. Objecting Insurers have proposed language that would cure the defects in the Plan as proposed. Absent the requested changes to the Plan, however, the Court should refuse to confirm the Plan.

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[7] Debtors sought coverage for the Baxley claim from certain of the Chubb Insurers, Admiral, and CNA.

A. The Insurance Neutrality Principle

27. The Plan may not impair the carriers' or insureds' rights under the Policies issued by the Objecting Insurers, including with respect to coverage. The rights and obligations of the carriers must be dictated by the Policies. Claims and coverage defenses and issues must be preserved. *See, e.g., In re T H Agric. & Nutrition, L.L.C.*, No. 08-14692, 2009 Bankr. LEXIS 4673, 2009 WL 7193573, at *28 (Bankr. S.D.N.Y. May 28, 2009). Stated another way, neither Debtors nor this Court can unilaterally rewrite the terms of the Policies. *In re Ames Dept. Stores, Inc.*, No. 93 Civ. 4014, 1995 U.S. Dist. LEXIS 6704, 1995 WL 311764 (S.D.N.Y. May 18, 1995) (bankruptcy court does not have the authority to rewrite the terms of an insurance policy and impose requirements upon the insurer which were not part of the parties' bargains).

28. Furthermore, neither the Debtors nor ChemicaInvest and/or ELT can retain the benefits of the Policies 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).

29. In recognition of the foregoing principles, 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).

30. A plan that does not impair the rights or obligations under the insurance policies

between insurers and insureds are considered "insurance neutral." *See In re Metro Affiliates, Inc.*, No. 13-13591, 2016 WL 427338, at *2, 2016 Bankr. LEXIS 324 (Bankr. S.D.N.Y. Feb. 3, 2016). A plan is "insurance neutral" when it preserves any and all coverage issues for resolution in a non-bankruptcy proceeding, using applicable non-bankruptcy law. *See In re Pittsburgh Corning Corp.*, No. 00-22876, 2013 WL 2299620, at *1, 2013 Bankr. LEXIS 2124 (Bankr. W.D.Pa. May 24, 2013), *clarified on denial of reconsideration*, 2013 WL 5994979, 2013 Bankr. LEXIS 4782 (Bankr. W.D.Pa. Nov. 12, 2013), and *aff'd and adopted sub nom. Mt. McKinley Ins. Co. v. Pittsburgh Corning Corp.*, 518 B.R. 307 (W.D. Pa. 2014).

B. The Plan Impermissibly Alters And Limits The Rights of Objecting Insurers

31. Debtors have not even attempted to make the Plan insurance neutral. Without express protections of their rights, Objecting Insurers must object; they cannot wait, guess, hope and pray that the Debtors, ChemicaInvest and ELT will choose not to enforce Plan language that appears to impair Objecting Insurers' rights.

32. The Objecting Insurers cannot look to Fibrant for compliance with the continuing Contractual Obligations of the insured which are conditions to coverage under the Policies, because the Plan provides that Fibrant will cease to exist. As to the purported successors and/or assignees of the Debtors, nothing in the Plan requires ChemicaInvest or ELT to comply with the continuing Contractual Obligations of the insured which are conditions to coverage under the Policies.

33. More generally, nothing in the Plan confirms and provides that the Plan will not be construed as impairing any of the terms, conditions, exclusions, limitations and/or endorsements of the Policies, or as waiving, releasing or limiting any coverage defense, right of

subrogation or other recovery, or as waiving or releasing any past, present or future non-compliance with the duties and obligations of the insured under the Policies.

34. To the contrary, the Plan contains a number of provisions that are inconsistent with Debtor's Contractual Obligations or otherwise impair the rights of Objecting Insurers, as set forth in further detail herein.

1. Effect of Assumption and Assignment of Policies (Plan Section 5.2).

35. The Plan violates Bankruptcy Code Section 1129(a)(1) and (a)(2) because it purports to rely on assignments of insurance policies that violate Sections 363 and 365 of the Code.

36. The Plan proposes to assume the Policies and assign the Debtor's rights thereunder to ELT and ChemicaInvest. Section 5.2 provides that such assignment "shall result in the full release and satisfaction of any Claims or defaults, whether monetary or nonmonetary, . . . arising . . . at any time prior to the effective date of assumption. . . ."

37. The Policies are subject to nonmonetary defaults by the insured arising from events that occurred in the past (*i.e.*, prior to the proposed date of assumption and assignment), including but not limited to defaults arising from the insured's failure to give prompt notice of alleged occurrences and claims, the insured's failure to cooperate, and the insured's entering into settlements and waiving rights of recovery against third parties without Objecting Insurers' consent. Because these defaults arise from events that occurred in the past, they may not be subject to cure.

38. The Court should not make rulings, in the context of Plan confirmation, as to whether defaults or breaches in conditions to coverage have occurred. It is premature to litigate

whether policy defaults have occurred when no specific claim under the Policies has yet been asserted. To avoid litigation right now as to whether the insureds have irretrievably defaulted under the Policies with respect to any claim relating to the Site, the Objecting Insurers' rights must be expressly preserved, not apparently extinguished.

39. Objecting Insurers dispute whether the long-expired Policies are in fact executory contracts subject to the assumption and assignment provisions of Section 365. *See, e.g., Westchester Surplus Lines Ins. Co. v. Surfside Resort & Suites, Inc. (In re Surfside Resort & Suites, Inc.)*, 344 B.R. 179, (Bankr. M.D. Fla. 2006); *In re Transit Group*, No. 01-12820, 2002 Bankr. LEXIS 1389 (Bankr. M.D.Fla. Nov. 25, 2002). Objecting Insurers also dispute whether the proposed assignments in the Plan violate anti-assignment provisions of the Policies. With respect to those issues, Objecting Insurers incorporate by reference their Joint Objection of Certain Insurers to Debtors' Notice of Proposed Cure Amounts, also being filed today. In any event, it is not necessary to debate those legal issues if the Plan is modified to provide that any assignment of rights under the Policies to ChemicaInvest and ELT is subject to all the terms, conditions, exclusions, limitations and/or endorsements of the Policies, and subject to Objecting Insurers' rights to assert any defense or default arising from either the pre-assignment conduct of the insured or the post-assignment conduct of the purported assignees.

2. Third-Party Release Applicable to Objecting Insurers (Plan Section 10.4)

40. Section 10.4 of the Plan provides that the "Releasing Parties" will be deemed to have released the "Creditor Released Parties " from any and all "causes of action and any other claims, debts, **obligations, rights**, suits, damages, actions, **remedies** and liabilities whatsoever . .

. which any Releasing Party has, **based in whole or in part upon any act or omission, event, transaction, or other occurrence or circumstances existing or taking place prior to or on the Effective Date**. . ." (emphasis added). The Releasing Parties include "all parties-in-interest in these Bankruptcy Cases" and therefore presumptively include Objecting Insurers. The "Creditor Released Parties" include the ChemicaInvest Parties and the ChemicaInvest Affiliated Parties.

41. By its terms, therefore, Section 10.4 of the Plan can be construed as releasing ChemicaInvest from (among other things) any "rights" and "remedies" that Objecting Insurers may have arising from any breach of the insured's obligations under the Policies (such as failure to give notice, cooperate in the defense of claims, and obtain the insurers' consent to settlements and waivers of rights of recovery) that took place before the Effective Date. Similarly, the release could be construed to release ChemicaInvest from any "obligations" that ChemicaInvest would have to give notice or cooperate or seek consent to settle (for example, but without limitation) based on events that took place before the Effective Date. Or, put very simply, the release can be construed to allow ChemicaInvest to pursue the Objecting Insurers for coverage while completely immunizing them from the consequences of any pre-confirmation breach of the insured's duties by either ChemicaInvest or the Debtors.

42. The Plan is contrary to law and should not be confirmed, to the extent it seeks to wipe away coverage defenses based on pre-confirmation conduct.

43. Objecting Insurers therefore object to confirmation of the Plan unless the Plan is amended to provide that no insurer is deemed a Releasing Party for purposes of Section 10.4 of the Plan.

3. Exculpation and Limitation of Liability Applicable to Objecting Insurers (Plan Section 10.7)

44. Section 10.7 of the Plan provides that the Debtors and their "successors and assigns" (among other parties) "shall not have or incur, and are hereby released from, any claim, obligation, cause of action or liability to . . . **any . . . party-in-interest** . . . for any act or omission in connection with, relating to, or arising out of the Bankruptcy Cases, . . . the negotiation, formulation, preparation, . . . [and] **implementation . . . of the Plan**, . . . or the **administration of this Plan, the Estates, the property to be distributed under this Plan**, . . . or any other contract, instrument, release, or other agreements or documents created or entered into in connection with this Plan, except for their willful misconduct or gross negligence . . ." (emphasis added).

45. Because Section 10.7 refers both to the preparation and negotiation of the Plan and to the "implementation" and "administration" of the Plan, it operates prospectively as well as retrospectively. Indeed, in the context of this liquidating case, it is difficult to think of any post-confirmation event that someone would not be able to contend is part of "administration" or "implementation" of the Plan.

46. By its terms, therefore, Section 10.7 can be construed as restricting the ability of the Objecting Insurers to enforce the insured's duties and obligations under the Policies against the Debtors, or ChemicaInvest, or ELT, as to either past or future conduct -- at a minimum, subjecting any such enforcement to a gross negligence/willful misconduct standard that is contrary to the language of the Policies and to law.

47. The Plan is contrary to law and should not be confirmed, to the extent it seeks to

restrict Objecting Insurers' coverage defenses based on pre and/or post-confirmation conduct of the Debtors and/or their purported assignees.

48. Objecting Insurers therefore object to confirmation of the Plan unless the Plan is amended to provide that no insurer shall be deemed to have exculpated any person under Section 10.7 of the Plan with respect to any liability under or the performance of any obligation under any of the Policies.

4. Injunction (Plan Section 10.8)

49. Section 10.8 of the Plan enjoins "all Persons who have held, hold, or may hold Claims against . . . any of the Debtors or CIH Released Parties" are enjoined from (among other things) "commencing or continuing in any manner any action or other proceeding of any kind against the Debtors or CIH Released Parties with respect to any such Claim . . ."

50. To the extent that Objecting Insurers' rights under the Policies, including without limitation their rights to enforce, and obtain relief for, any existing and future defaults by Debtors or their alleged assignees under the Policies are deemed to constitute a "Claim" (such as, for example and without limitation, any as-yet unmatured right to recoup amounts advanced, or any equitable remedy for breach of performance within the meaning of Section 101(5)(B) of the Bankruptcy Code), Section 10.8 of the Plan impermissibly abridges the Objecting Insurers' rights to enforce the Policies.

51. Objecting Insurers therefore object to confirmation of the Plan unless the Plan is amended to provide that nothing in Section 10.8 of the Plan shall enjoin any insurer from enforcing any provision of the Policies or from instituting an action in a court of competent jurisdiction to determine coverage, or limits the relief available or changes the burden or

standard of proof.

5. Settlement of Claims (Plan Section 9.4)

52. Section 9.4 of the Plan provides that on and after the Effective Date, the Liquidating Agent and the Creditor Trustee shall have the right to compromise, settle, otherwise resolve, or withdraw any objections to Claims without approval of the Bankruptcy Court. Section 9.4 does not preserve Objecting Insurers' rights to control the defense and settlement of claims.

53. As a matter of applicable non-bankruptcy law, the Liquidating Agent's and/or Creditor Trustee's use of these provisions to exercise unilateral control over the settlement or allowance of any Claims covered by the Policies constitutes a violation of the insured's Contractual Obligations that may excuse the Objecting Insurers from any obligations to provide coverage. *See* 14 Couch on Ins. § 199:13 (2003).

54. The Plan is therefore contrary to law to the extent that under Section 9.4 the Liquidating Agent and Creditor Trustee are empowered to usurp the Objecting Insurers' rights to control defense and settlement of claims covered under the Policies.

6. Treatment of Insured Claims (Plan Section 9.6)

55. Section 9.6 of the Plan ("Procedures for Treating and Resolving Disputed Claims") provides as follows:

> 9.6 *Distributions On Insured Claims.* Except as provided in any order of the Bankruptcy Court, if any Holder has asserted an Allowed Claim that is covered as to liability, in whole or in part, by an insurance policy that is assumed or otherwise remains in effect pursuant to the terms of this Plan, such Holder will have an Allowed Claim entitled to a Distribution under this Plan only to the extent of any deductible or self-insured retention under the applicable insurance policy that was unpaid or otherwise unexhausted as of the Filing Date. Notwithstanding the foregoing, the Holder shall be

> entitled to pursue recovery of any amount in excess of such unpaid deductible or self-insured retention from the applicable insurance carrier (up to the full amount of such Allowed Claim) and, in connection therewith, notwithstanding the discharge of the balance of such Claim provided pursuant to this Plan, such Holder may continue to pursue the balance of such Claim against the Debtors solely for the purposes of liquidating such Claim and obtaining payment of the balance of such liquidated Allowed Claim from any otherwise applicable policy of insurance. Except as otherwise provided in the applicable insurance policy, the applicable insurance carrier may, at its expense, employ counsel, direct the defense, and determine whether and on what terms to settle any Disputed Claim for the purposes of determining the amount of insurance proceeds that will be paid on account of such Claim. Except as provided in any order of the Bankruptcy Court, if after liquidation of an Allowed Claim pursuant to this Section 9.6, it is determined that there are insufficient insurance proceeds available to satisfy the amount of such Claim that is in excess of any unpaid deductible or self-insured retention, then the Holder of such Allowed Claim shall have a Claim in the amount of such insufficiency. Notwithstanding any other provision of this Plan, after the Effective Date the Bankruptcy Court shall be authorized to enter one or more orders in the Bankruptcy Cases modifying and amending the provisions of this Section 9.6, provided that any such modifications shall not be material and adverse to the interests of Holders of insured Claims.

56. The Objecting Insurers' plan objections under Section 9.6 pertain to the first three sentences in the section. The first sentence in Section 9.6 states that a Holder asserting an Allowed Claim "that is covered" by insurance will be entitled to a Distribution to the extent of any deductible or self-insured retention. In the second sentence, the Holder is "entitled to pursue" the Insurer. The third sentence in the Plan section states that the Insurers may direct the defense and determine settlement terms, and that proceeds "will be paid." The net result appears to be that at least as to Allowed Claims, they are fixed for purposes of pursuing applicable insurance at the amount allowed, less any deductible.

57. Based on the Plan section's own language, coverage determinations will be needed for entitlement to plan Distributions. Where insurance payments are sought, coverage decisions are needed regardless of bankruptcy distributions. However, the Plan cannot impair or adjudicate the parties' rights and obligations under the policies, including on coverage matters,

and all claims and coverage defenses, positions and issues must be preserved.

58. While Section 9.6 purports to preserve insurers' rights to defend Disputed Claims, it (together with Section 9.4) leaves it to the Debtors (and their designated successors under the Plan) to decide whether a claim is a Disputed Claim or not. Under Section 502(a) of the Bankruptcy Code, a proof of claim is deemed allowed unless a party in interest objects. Thus, Debtors can create an Allowed Claim simply by not objecting. This problem already exists with respect to the Baxley claim, which was filed at the sum certain of $500,000 even though it relates to an unliquidated tort claim. Certain of the Objecting Insurers were forced to interpose their own objection to prevent the Baxley claim from being deemed allowed by the Debtors simply withdrawing its objection.

59. The Objecting Insurers object to the extent allowances of bankruptcy claims, occurring as a result of claim objections not being filed by or being compromised by Debtors without proceedings on the merits of the claims[8], when considered together with Plan Section 9.6, purport to fix liability and/or amounts for claimants to recover from Insurers. [9]

60. The Plan, and claim allowance through and other procedures in its Section 9.6,

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[8] Insurers should not be precluded or bound based on any such claim allowances that may occur. For example, deemed allowed proofs of claim are not "judgments" and therefore do not constitute "losses" under an insurance policy. *See, e.g., In re One World Adoption Servs., Inc.*, 571 B.R. 474, 486 (Bankr. N.D.Ga. 2017).

[9] Currently, there are claim objections by Insurers that are pending before the Court, *e.g.*, Docket Nos. 707, 734, filed when Debtors indicated they may withdraw claim objections or may consent to certain claims tied to personal injury claims. Carriers have objected to allowance of such claims on jurisdictional, timing, non-cooperation, and other grounds, and all of such positions are reserved.

cannot adjudicate or fix liability or damages against the Insurers for coverage purposes.[10]

61. The Insurers object to the Plan to the extent the Plan purports to: adversely impact coverage matters; require Insurers to pay any claims and/or amounts; add to or enhance rights of insureds and/or third party claimants, or increase obligations of the Insurers, beyond the rights and obligations under the policies and non-bankruptcy law.

62. Objecting Insurers therefore request that confirmation of the Plan be denied unless Section 9.6 is modified to provide that the treatment of any Claim or portion of a Claim as an "Allowed Claim" under Section 9.6 of the Plan shall not constitute a settlement or adjudication of the claim (as to liability or damages) for any purpose other than distribution from the estate, and shall not be offered or admitted into evidence for any purpose in any other proceeding to determine the amount of the claim for the purpose of recovering against coverage, or in any action to establish coverage.

C. <u>The Proposed Third-Party Releases Fail to Meet Applicable Legal Standards</u>

63. In addition to not being "insurance neutral," the third-party releases contemplated by Section 10.4 of the Plan fail to comply with applicable legal standards in this Circuit defining the limited circumstances when non-consensual third party releases may be approved. Indeed, the third-party releases purport to grant relief that is beyond this Court's jurisdiction to award. Moreover, the Plan is not confirmable pursuant to Section 1129(a)(3) because it was not proposed in good faith and does not comply with the relevant provisions of the Bankruptcy

[10] To the extent Debtors might make a voluntary payment to the holder of a claim, such a payment is not binding on the Objecting Insurers. The policies issued by Objecting Insurers provide that the insured will not, except at the insured's own cost, voluntarily make a payment, assume any obligation, or incur an expense, absent the applicable Insurer's consent.

Code. The primary purpose of the plan is to provide impermissible third-party releases to the Debtors' corporate parent and affiliates and not to provide a vehicle for the Debtors' reorganization or to maximize recovery to creditors.

64. In their Confirmation Brief, the Debtors acknowledge that *Seaside Engineering & Surveying, Inc.*, 780 F.3d 1070 (11th Cir. 2015) provides the controlling law and standards on the issue of "non-consensual third-party releases." Debtors' Confirmation Br. at 4. In *Seaside*, the Eleventh Circuit acknowledged that nonconsensual third-party releases and bar orders "ought not to be issued lightly, and should be reserved for those unusual cases in which such an order is necessary for the success of reorganization." *In Re Seaside Engineering & Surveying, Inc.*, 780 F.3d at 1078. This reasoning comes from the Sixth Circuit's decision in *Dow Corning Corp.*, 280 F.3d 648 (6th Cir. 2002), which provides a multi-factor analysis to be used when third-party, nondebtor releases are included in a proposed bankruptcy plan. *Dow* provides that the granting of nonconsensual third-party releases "is a dramatic measure to be used cautiously." *Id.* at 658. A decision from the Middle District of Florida interpreting both *Seaside* and *Dow* determined that blanket third-party, nondebtor releases and bar orders are forms of "extraordinary relief." *In re HWA Properties. Inc.*, 544 B.R. 231, 239 (M.D. Fla. 2016).

65. Debtors here allege that this is an "extraordinary" case because it has involved "more than two years of pre-petition and post-petition planning and negotiations among the Debtors, their creditors, state and federal environmental authorities, the Creditors' Committee, the ChemicaInvest Parties and experts in environmental remediation" and has resulted in a Plan that "provides the best possible outcome for the Debtors' stakeholders." Debtors' Confirmation Br. at 2-3. This case, however, does not present an "extraordinary" circumstance as

contemplated by *Seaside* or its progeny. As the court found in *HWA Properties*, the Plan here "does not propose a true reorganization," and "instead, the Plan is a restructuring of various obligations in an effort to obtain releases for [the ultimate parent entities of the Debtors]." 544 B.R. at 243. That "is not fair and equitable." *Id.*

66. The decision in *HWA Properties* highlights the hesitancy courts have in granting nonconsensual third-party releases in the context of a liquidating Chapter 11 plan rather than a Chapter 11 reorganization plan, since the debtor cannot satisfy the third *Dow* factor. That factor provides that the debtor must demonstrate that the releases are "essential to the reorganization.". *See In re SL Liquidating, Inc.*, 428 B.R. 799, 803 (Bankr. S.D. Ohio 2010) (denying the third-party releases because the liquidating debtor could not demonstrate that the nonconsensual releases were "essential to the reorganization" and that "[t]o hold otherwise may be to encourage the filing of liquidating chapter 11 cases where the driving purpose is to obtain non-consensual third-party releases"); *In re Berwick Black Cattle Co.*, 394 B.R. 448, 461 (Bankr. C.D. Ill. 2008) ("The rationale for granting third-party releases is far less compelling, if it exists at all, in a liquidation than in a reorganization.").

67. In addition to the fact that the third-party non-debtor releases here are not in compliance with *Seaside*, *Munford*, and *Dow*, they are also beyond this Court's jurisdiction. In order for this Court to release and enjoin claims against third-party non-debtors it must first have subject matter jurisdiction over the liabilities as well as the Constitutional authority to enter an order extinguishing the claims. It has neither. The Court does not have subject matter jurisdiction under 18 U.S.C. § 1334 because the matters at issue do not "arise under" the Bankruptcy Code, do not "arise in" a bankruptcy case, and are not "related to" a bankruptcy

case. *See, e.g., In re Midway Gold US, Inc.*, 575 B.R. 475, 518 (Bankr. D. Colo. 2017); *In re Berwick Black Cattle Co.*, 394 B.R. 448, 462 (Bankr. C.D. Ill. 2007); *In re Zale Corp.*, 62 F.3d 746, 753-54 (2d Cir. 1995) ("Shared facts between the third-party action and a debtor-creditor conflict do not in and of themselves suffice to make the third-party action 'related to' the bankruptcy."); *In re Johns-Manville Corp.*, 517 F.3d 52 (2d Cir. 2008) (court lacked jurisdiction to enjoin claims that were not derivative of the debtor's own conduct). Here, the third-party released claims are not derivative of the Debtors' liabilities, but are instead based on the released parties' own misconduct. Finally, even if the Court should conclude that it has jurisdiction because the clams are "related to" the bankruptcy case, it lacks the Constitutional basis to enter an order extinguishing the claims in light of the Supreme Court's decision in *Stern v. Marshall*, 564 U.S. 462 (2011). *See Opt-Out Lenders v. Millennium Lab Holdings II, LLC (In re Millennium Lab Holdings II LLC*, 242 F. Supp. 3d 322 339 (D. Del. 2017).

68. Objecting Insurers therefore object to confirmation of the Plan unless the Plan is amended to provide that no insurer is deemed a Releasing Party for purposes of Section 10.4 of the Plan.

D. Confirmation Should Be Conditioned on Broad Protection of the Rights of Insurers

69. Objecting Insurers are potentially subject to substantial claims in the future if the Plan is confirmed. Objecting Insurers also have substantial coverage defenses. Those issues should be litigated, if necessary, in an appropriate forum at a later date

70. In order for that to be possible, in a manner that comports with law, the Plan must clearly protect the rights of insurers and not just maybe, hopefully, or by implication protect

them.

71. Objecting Insurers therefore object to confirmation unless both the Plan and the Confirmation Order contain comprehensive insurance neutrality provisions confirming that all successors to, alleged assignees of, or parties claiming to stand in the shoes of an insured are bound by all terms, conditions, limitations and exclusions of the Policies as determined by applicable state law. That language should further provide that nothing in the Plan, any Order of the Court, or any documents relating thereto (including, without limitation, any other provision that purports to be preemptory or supervening or grants an injunction, exculpation or release):

> (i) will prejudice any of the rights, claims or defenses of Debtors' insurers ("Insurers") under any insurance policies under which the Debtors, the Litigation Trust, CIH, ELT, or any other alleged successor to or assignee of the Debtors seeks coverage (the "Policies") or any agreements related to the Policies (together, with the Policies, the "Insurance Agreements");
>
> (ii) will modify any of the terms, conditions, exclusions, limitations and/or endorsements contained in the Insurance Agreements, which terms, conditions, exclusions, limitations and/or endorsements 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 alter, limit or prejudice any of the Insurers' rights and/or defenses in any pending or subsequent litigation in which the Insurers, the

Debtors, the Litigation Trust, CIH, ELT, or any other alleged successor to or assignee of the Debtors 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 (or any alleged successor to or assignee of any insured) under the Insurance Agreements;

(vi) shall be deemed to release or exculpate any insured, or any alleged successor to or assignee of any insured, from any past, present, ongoing or future breach of any of the duties and obligations of any insured under the Insurance Agreements;

(vii) shall be construed as a waiver of Insurers' right to claim any prepetition transaction or plan transaction violates a policy condition; or

(viii) 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.

D. Objecting Insurers' Reservation of Rights

72. The Objecting Insurers expressly reserve the right to assert claims for any presently unliquidated amounts for any obligations due and owing under the Agreements. The Objecting Insurers reserve, and do not waive, all of their rights, remedies, defenses, limitations and/or exclusions in connection with the Agreements and/or applicable law. The Objecting Insurers further reserve 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 any insurance policies or agreements, or any rights to payment under any settlements.

73. The Objecting Insurers further reserve all of their 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 Agreements and applicable law that may be adversely affected by confirmation of the Plan.

74. The Objecting Insurers further reserve all of their rights to object to any claim for coverage under the 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 Agreements and/or confirmation of the Plan violates any terms or conditions of the Agreements and/or settlements or gives rise to any defenses on behalf of the Objecting Insurers.

75. Nothing in this Objection shall be construed as an acknowledgment that any of the Agreements covers or otherwise applies to any claims, losses or damages on account of any Claims or otherwise, or that any such claims or causes of action are eligible for payment.

76. The Objecting Insurers reserve the right to seek an adjudication that Debtor has waived or forfeited any available coverage under the Agreements.

77. Finally, the Objecting Insurers reserve their 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. The

Objecting Insurers also reserve the right to adopt any other objections to confirmation of the Plan filed by any other party.

IV. CONCLUSION

For the reasons set forth above, without the amendments to the Plan described above and the inclusion of specific language in the Confirmation Order reserving all of the Objecting Insurers' contractual and other rights under the Agreements, the Plan should not be confirmed.

Respectfully submitted,

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