UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:	Chapter 11
WALTER ENERGY, INC., *et al.*,[1]	Case No. 15-02741-TOM11
Debtors.	Jointly Administered

OBJECTION OF THE ACE COMPANIES TO THE DEBTORS' NOTICE OF POTENTIAL ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES AND PROPOSED CURE AMOUNTS

ACE American Insurance Company, Westchester Surplus Lines Insurance Company, Westchester Fire Insurance Company, Indemnity Insurance Company of North America, Insurance Company of North America, Illinois Union Insurance Company, and ACE Property and Casualty Insurance Company (collectively and together with their affiliates, the "ACE Companies"), by and through their undersigned attorneys, hereby file this Objection (the "Assumption and Cure Objection") to the Debtors' *Notice of Potential Assumption and Assignment of Certain Executory Contracts and Unexpired Leases and Proposed Cure Amounts* (the "Cure Notice") and in support of the Objection, respectfully state as follows:

[1] The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are: Walter Energy, Inc. (9953); Atlantic Development and Capital, LLC (8121); Atlantic Leaseco, LLC (5308); Blue Creek Coal Sales, Inc. (6986); Blue Creek Energy, Inc. (0986); J.W. Walter, Inc. (0648); Jefferson Warrior Railroad Company, Inc. (3200); Jim Walter Homes, LLC (4589); Jim Walter Resources, Inc. (1186); Maple Coal Co., LLC (6791); Sloss-Sheffield Steel & Iron Company (4884); SP Machine, Inc. (9945); Taft Coal Sales & Associates, Inc. (8731); Tuscaloosa Resources, Inc. (4869); V Manufacturing Company (9790); Walter Black Warrior Basin LLC (5973); Walter Coke, Inc. (9791); Walter Energy Holdings, LLC (1596); Walter Exploration & Production LLC (5786); Walter Home Improvement, Inc. (1633); Walter Land Company (7709); Walter Minerals, Inc. (9714); and Walter Natural Gas, LLC (1198). The location of the Debtors' corporate headquarters is 3000 Riverchase Galleria, Suite 1700, Birmingham, Alabama 35244-2359.

I. BACKGROUND

A. The bankruptcy case.

1. On July 15, 2015 (the "Petition Date"), Walter Energy, Inc. and certain of its affiliates (collectively, the "Debtors") filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Northern District of Alabama (the "Court").

2. On information and belief, the Debtors have continued in possession of their assets and operation of their businesses pursuant to §§ 1107(a) and 1108 of the Bankruptcy Code.

3. On November 5, 2015, the Debtors filed their *Motion for (A) an Order (I) Establishing Bidding Procedures for the Sale(s) of All, or Substantially All, of the Debtors' Assets; (II) Approving Bid Protections; (III) Establishing Procedures Relating to the Assumption and Assignment of Executory Contracts and Unexpired Leases; (IV) Approving Form and Manner of the Sale, Cure and Other Notices; and (V) Scheduling an Auction and a Hearing to Consider the Approval of the Sale(s); (B) Order(s) (I) Approving the Sale(s) of the Debtors' Assets Free and Clear of Claims, Liens and Encumbrances; and (II) Approving the Assumption and Assignment of Executory Contracts and Unexpired Leases; and (C) Certain Related Relief* [D.I. 993] (the "Sale Motion").

4. On November 17, 2015, the ACE Companies filed an objection to the Sale Motion (the "Objection") [D.I. 1048], asserting certain objections to the proposed Sale, to the extent it impacted the ACE Insurance Program (as defined herein).

5. On November 25, 2015, the Court entered the Bidding Procedures Order [D.I. 1119][2] in connection with the proposed Sale, as contemplated by the Sale Motion.

[2] Any terms not defined herein shall have the meanings attributed to them in the Bidding Procedures Order.

6. By agreement with the Debtors, and as noted in the Bidding Procedures Order, the Objection has been preserved, and was not overruled by the Bidding Procedures Order, and accordingly, the Objection will be considered at the Sale Hearing if it is not resolved in advance thereof.

7. In accordance with the Sale Motion and the Bidding Procedures Order, the ACE Companies were provided with the Cure Notice, which lists four insurance policies and one agreement that the Debtors seek to assume and assign to the Stalking Horse Purchaser in connection with the Sale.

B. <u>The ACE Insurance Program</u>.

8. Prior to the Petition Date, the ACE Companies issued certain insurance policies (as renewed, amended, modified, endorsed or supplemented from time to time, collectively, the "Policies") to certain Debtors as named insureds.

9. Prior to the Petition Date, the ACE Companies and the Debtors also entered into certain written agreements in connection with the Policies (as renewed, amended, modified, endorsed or supplemented from time to time, and including any exhibit or addenda thereto, collectively, the "Insurance Agreements").

10. Pursuant to the Policies and Insurance Agreements (the "ACE Insurance Program"), the ACE Companies provide, *inter alia*, certain workers' compensation, automobile liability, international casualty, environmental, directors and officers, property, primary fire and certain other insurance for specified policy periods subject to certain limits, deductibles, retentions, exclusions, terms and conditions, as more particularly described therein; and the insureds, including one or more of the Debtors, are required to pay to the ACE Companies certain amounts including, but not limited to, insurance premiums (including audit premiums), deductibles, funded

deductibles, expenses, taxes, assessments and surcharges, as more particularly described in the ACE Insurance Program (the "Obligations").

11. The Obligations are payable over an extended period of time and are subject to future audits and adjustments.

12. As of the date hereof, the Obligations are secured by a letter(s) of credit (as amended, confirmed, supplemented or replaced, and together with the proceeds thereof, the "Letter of Credit") and may, now or in the future, be secured by certain cash collateral or other collateral or security (collectively with the Letter of Credit, the "Collateral").

II. ASSUMPTION AND CURE OBJECTION[3]

13. The ACE Companies renew their preserved Objection and further object to the Cure Notice on the basis that (i) the ACE Insurance Program must be assumed and assigned, if at all, as a whole, and not piecemeal; and (ii) to the extent that the Debtors seek to assume and assign the ACE Insurance Program, the ACE Insurance Program cannot be assigned without the consent of the ACE Companies, which consent has not been sought or given; (iii) the cure amount must be evaluated at the time of assumption; and (iv) the ACE Companies have not been provided with adequate assurance of the Stalking Horse Purchaser's future performance under the ACE Insurance Program.

A. <u>The ACE Insurance Program and the obligations thereunder are indivisible</u>.

14. The Cure Notice provides that the Debtors intend to assume only four policies and one agreement in order to assign them to the Stalking Horse Purchaser.

[3] The ACE Companies hope to negotiate a resolution of this Assumption and Cure Objection with the Debtors. However, the ACE Companies file this Assumption and Cure Objection in an abundance of caution and to preserve their objection on the record.

15. The ACE Insurance Program, however, is made up of many more policies and agreements, and given that they have not been listed in the Cure Notice, the Debtor presumably intends to retain these other parts of the ACE Insurance Program.

16. However, the ACE Insurance Program, which is an integrated insurance program, must be read, interpreted and enforced together. *See Physiotherapy Holdings*, 2015 U.S. Dist. LEXIS 90367, at *17-18, 538 B.R. 225 (D. Del. 2015) (finding that separately drafted agreements dated at different times but relating to the same subject constitute one cohesive agreement); *Dunkin' Donuts Franchising LLC v. CDDC Acquisition Co. LLC (In re FPSDA I, LLC)*, 470 B.R. 257, 269 (E.D.N.Y. 2012) (holding that "two agreements [were] so interrelated, [that] they form[ed] a single overarching executory contract"); *In re Karfakis*, 162 B.R. 719 (Bankr. E.D. Pa. 1993) (stating "two contracts which are essentially inseparable can be, and should be, viewed as a single, indivisible agreement between the parties"); *In re Aneco Elec. Constr.*, 326 B.R. at 202.

17. The Cure Notice has confirmed that the Debtors do not intent to treat the ACE Insurance Program as an integrated contract, and rather that the Debtors seek to assume and assign only a small portion of the ACE Insurance Program. This should not be permitted.

18. Additionally, it is well-established that a party cannot receive benefits of a contract without being liable for obligations thereunder. *See Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1311 (5th Cir. 1985) ("Thus, the often-repeated statement that the debtor must accept the contract as a whole means only that the debtor cannot choose to accept the benefits of the contract and reject its burdens to the detriment of the other party to the agreement."); *see also In re Texas Rangers Baseball Partners*, 521 B.R. 134, 180 (Bankr. N.D. Tex. 2014) ("A debtor may not merely accept the benefits of a contract and reject the burdens to the detriment of the other party."); *In re Aneco Elec. Constr.*, 326 B.R. 197, 202 (Bankr. M.D. Fla. 2005) ("It is black letter

law that an executory contract must be either assumed in its entirety, *cum onere*, or completely rejected.") (internal citations omitted); *In re Morande Enters.*, 335 B.R. 188, 192 (Bankr. M.D. Fla. 2005) (stating that the "law is clear that an executory contract may not be assumed in part and rejected in part") (citation omitted).

19. Accordingly, to the extent that the ACE Insurance Program is transferred to the Stalking Horse Purchaser, the Stalking Horse Purchaser cannot receive the benefits of the ACE Insurance Program without remaining liable for the Obligations thereunder.

20. Specifically, the Stalking Horse Purchaser should not be permitted to receive the proceeds of the ACE Insurance Program, while simultaneously not being liable for the Obligations thereunder.

21. This is particularly important where as to a current policy, the assumption and assignment would require the ACE Companies to provide insurance coverage to a completely different entity than the entity for which the policy was underwritten and issued.

22. Under these circumstances, it is of paramount importance that, to the extent that the ACE Insurance Program is assumed, the assignee remain liable for all of the Obligations thereunder.

B. The ACE Insurance Program cannot be assigned without the prior written consent of the ACE Companies, which has not been given.

23. To the extent that the Debtors seek to assign the ACE Insurance Program, such assignment cannot occur without the express written consent of the ACE Companies.

24. Pursuant to 11 U.S.C. § 365(c), a debtor may not assume or assign an executory contract if applicable law excuses the counterparty from accepting performance from or rendering performance to an entity other than the debtor and such party does not consent to the assumption or assignment. 11 U.S.C. § 365(c)(1)(A) and (B).

25. Applicable non-bankruptcy law does, in fact, prohibit the assignment of insurance policies without the insurer's consent. *See, e.g.*, *Allied Corp. v. Frola*, No. 87-462, 1992 U.S. Dist. LEXIS 15778 (D.N.J. Oct. 6, 1992) (holding that insurance policies are not assignable without the consent of the insurers); *Touchet v. Guidry*, 550 So. 2d 308, 313 (La. App. 1989) (holding that an insurance policy is a personal contract between the insurer and the named insured; and that, ". . . coverage terminates when the contract is assigned or transferred without the consent, permission, and approval of both contracting parties") (citations omitted); *Shadid v. Am. Druggist Fire Ins. Co.*, 386 P.2d 311 (Okla. 1963) (noting the importance of an insurer's consent to an assignment of an insurance policy, and holding that the policy does not pass to the purchaser simply by a sale of the insured property).[4]

26. Similarly, insurers cannot be compelled to provide insurance coverage to any entity. *See Atwood v. Progressive Ins. Co.*, No. 950051089S, 1997 Conn. Super. LEXIS 2450, at *18 (Conn. Super. Ct. Sept. 3, 1997) (stating that "[i]nsurers should not, for example, be forced to assume coverage for a risk which at the time a policy was written was not fairly in its and the insured's contemplation"); *King v. Meese*, 43 Cal. 3d 1217, 1222 (Cal. 1987) (noting that "an insurer may refuse to insure based on any permissible classification"); *Cummins v. Nat'l Fire Ins. Co.*, 81 Mo. App. 291, 296 (Mo. Ct. App. 1899) ("An insurance company may well refuse to insure some persons. They, like any other entity, have a right of choice as to who they will contract with and they can no more be forced to a change of the assured than the assured could be forced to

[4] Some courts have found that insurance policies may be assigned to a trust created under § 524(a) pursuant to a plan under § 1123 without the consent of the insurer. *See, e.g.*, *In re Federal-Mogul Global*, 684 F.3d 355, 382 (3d Cir. 2012) (holding that anti-assignment provisions in insurance policies were preempted by § 1123(a)(5)(B) [of the Bankruptcy Code] to the extent they prohibit transfer to a § 524(g) trust"); *In re W.R. Grace & Co.*, 475 B.R. 34, 198-99 (D. Del. 2012) (holding that anti-assignment provisions in insurance policies were preempted by § 1123(a)(5)(B) in the context of the establishment of a § 524(g) trust). The present case involves neither an assignment to a trust created pursuant to § 524(a) nor an assignment under a plan.

accept insurance from some other company (in which he may have no confidence) than the one contracted with."). Therefore, the ACE Insurance Program cannot be assigned without the consent of the ACE Companies.

27. As noted above, this is especially important where as to a current policy, the assignment thereof would require the substitution of a new insured for which the policy was not underwritten.

28. Furthermore, as of the filing hereof, the Auction has not occurred and accordingly, it is unknown if the Stalking Horse Purchaser or another successful Bidder at the Auction will be the ultimate purchaser.

29. Despite their request, the ACE Companies have not been provided with any information regarding the Stalking Horse Purchaser in order to be able to assess whether it would satisfy the ACE Companies' credit and underwriting criteria. Accordingly, the ACE Companies are unable, at this time, to assess whether even the Stalking Horse Purchaser – let alone any other Bidders or the ultimate purchaser – would satisfy those criteria.

30. As a condition precedent for any consent that may be given by the ACE Companies to an assignment of the ACE Insurance Program, the Debtors and the assignee will be required to execute an assumption agreement, in form and substance acceptable to the ACE Companies, and, depending on the underwriting analysis, may be required to provide the ACE Companies with additional collateral to secure the Obligations. As the ultimate assignee is not yet known, this agreement has not yet been negotiated, let alone executed.

31. Therefore, because the ACE Companies have not consented to any proposed assignment of the ACE Insurance Program, the ACE Companies object to any and all such assignments at this time.

C. Objection to the cure amount for the ACE Insurance Program.

32. The Debtors currently state that there is no cure amount due to the ACE Companies on account of the four policies and one agreement that the Debtors seek to assume and assign in connection with the Sale.

33. However, it is important to note that as more particularly described in the ACE Insurance Program, the Debtors are required to pay the Obligations, and to the extent that the entire ACE Insurance Program is ultimately assumed, amounts may become due and owing under the ACE Insurance Program either prior to or after the assumption thereof.

34. The ACE Companies may also have contingent, unliquidated claims against the Debtors for the Obligations, given the nature of the ACE Insurance Program and the Obligations. By way of example and not limitation, additional premiums may be payable at audit under the terms of the ACE Insurance Program, based upon factors as they exist throughout the coverage period. Therefore, the ACE Companies have contingent, unliquidated claims against the Debtors for any additional premium that may become due upon completion of audit(s).

35. Accordingly, as a condition for the assignment of the ACE Insurance Program, the assignee must remain liable for all of the Debtors' obligations and liabilities (including the Obligations), whether now existing or hereafter arising, under the ACE Insurance Program including, without limitation, paying Obligations as they become due.

36. In connection with this Assumption and Cure Objection, the ACE Companies therefore request that the Court enter an Order directing the Debtors to pay any liquidated amount due in full at the time of any assignment and providing that the assignee will remain liable for all of the Debtors' monetary and non-monetary obligations (including the Obligations) under the ACE Insurance Program regardless of when they arise or become due.

D. The Purchaser must provide adequate assurance of future performance.

37. Pursuant to § 365(f)(2) of the Bankruptcy Code, the assignee must provide adequate assurance of future performance.

38. Pursuant to the Bidding Procedures Order, the Debtors are required to provide counterparties to Available Contracts information regarding the Stalking Horse Purchaser's adequate assurance of future performance under any contracts sought to be assumed and assigned to the Stalking Horse Purchaser.

39. However, as of the filing hereof, despite their request for adequate assurance information, the ACE Companies do not have sufficient information to determine if the Stalking Horse Purchaser (or a successful bidder at the Auction) would be capable of providing adequate assurance of future performance.

40. Accordingly, the ACE Companies further object herein to any assignment of the ACE Insurance Program on the basis that the ACE Companies do not have adequate assurance of future performance as required by § 365(f)(2) of the Bankruptcy Code.

E. Reservation of rights.

The ACE Companies reserve their rights to assert additional objections to the Sale Motion, the Cure Notice and any purported assignment of the ACE Insurance Program, including, but not limited to, the right to assert that the ACE Insurance Program must be assumed pursuant to § 365 of the Bankruptcy Code and the right to payment of any cure claim as of the closing date of the sale.

WHEREFORE, the ACE Companies request that as a condition precedent for the assignment of the ACE Insurance Program, this Court enter an order: (a) requiring that the Debtors, on or before the closing of the Sale receive the express written consent of the ACE Companies to the assignment of the ACE Insurance Program and satisfy any conditions for such consent;

(b) requiring that the assignee be liable for all of the Debtors' obligations and liabilities, whether now existing or hereafter arising, under the ACE Insurance Program; (c) requiring that the assignee provide adequate assurance of future performance to the ACE Companies; (d) providing that any assignment of the ACE Insurance Program in no way limits, diminishes, or otherwise alters or impairs the Debtors', the assignee's and/or the ACE Companies' defenses, claims, causes of action, or other rights under applicable non-bankruptcy law with respect to the ACE Insurance Program; and (e) granting such other relief as is just and proper.

Dated: December 22, 2015

By: /s/ David B. Anderson

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served by the Court's electronic filing system or via email, on this the 22nd of December, 2015, upon the following parties attached hereto:

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