

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION**

In re:)	
)	
MISSISSIPPI PHOSPHATES CORPORATION, et al.¹)	CASE NO. 14-51667-KMS
)	Chapter 11
)	
Debtors)	Jointly Administered

**RESERVATION OF RIGHTS OF THE ACE COMPANIES TO MOTION OF DEBTORS
TO DETERMINE CURE AMOUNTS FOR EXECUTORY CONTRACTS AND
UNEXPIRED LEASES THAT MAY BE ASSUMED AND ASSIGNED AS PART OF
THE SALES MOTION**

ACE American Insurance Company, ACE Property and Casualty Insurance Company, and Westchester Fire Insurance Company (together with each of their respective affiliates, the “ACE Companies”), by and through their undersigned counsel, hereby file this Reservation of Rights (the “Reservation”) in relation to the Motion of Debtors to Determine Cure Amounts for Executory Contracts and Unexpired Leases That May Be Assumed and Assigned As Part Of The Sales Motion (the “Cure Amount Motion”), and in support of the Reservation of Rights, respectfully state as follows:

BANKRUPTCY CASE

1. On October 27, 2014 (the “Petition Date”), the Debtors filed their respective voluntary petitions for bankruptcy relief under chapter 11 of title 11 of the United States Code

¹ The chapter 11 cases of the following affiliated Debtors have been administratively consolidated for joint administration pursuant to that certain *Order Granting Motion of the Debtor for Order Directing Joint Administration of Affiliated Cases Pursuant to Bankruptcy Rule 1015(b)*, dated October 29, 2014 [Dkt. # 62]: Mississippi Phosphates Corporation (“MPC”), Case No. 14-51667, Ammonia Tank Subsidiary, Inc. (“ATS”), Case No. 14-51668 and Sulfuric Acid Tanks Subsidiary, Inc. (“SATS”), Case No. 14-51671. These chapter 11 cases are sometimes referred to herein as the “Bankruptcy Cases.”

(the “Bankruptcy Code”) in the United States Bankruptcy Court for the Southern District of Mississippi (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 or about November 12, 2014, the Debtors filed the Motion of Debtors, Pursuant to Bankruptcy Code Sections 105(a), 363, 365, 503, and 507, and Bankruptcy Rules 2002, 3007, 6004, 6006, 9007, and 9014 for Entry of: (I) Order (A) Approving Sales and Bidding Procedures in Connection with Sale of Assets of the Debtors, (B) Approving Form and Manner of Notice, (C) Scheduling Auction and Sale Hearing, (D) Authorizing Procedures Governing Assumption and Assignment of Certain Executory Contracts and Unexpired Leases, and (E) Granting Related Relief; and (II) Order (A) Approving Purchase Agreement, (B) Authorizing Sale Free and Clear of All Liens, Claims, Encumbrances, and Other Interests, and (C) Granting Related Relief (the “Sale Motion”).

4. On or about February 20, 2015, the Court entered an order approving certain bidding procedures in connection with the proposed sale (the “Sales Procedures Order”).

5. On or about February 20, 2015, the Debtors filed a Prototype Asset Purchase Agreement (the “Prototype APA”).

6. Pursuant to the Sale Motion, the Debtors seek to sell the Sellers Assets² and assumption and assignment of the Assigned Contracts to the Prevailing Purchaser.

² Capitalized terms used herein but not defined herein shall have the meanings given such terms in the Sale Motion.

7. On or about February 20, 2015, the Debtors filed the Cure Amount Motion.

BACKGROUND

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. Pursuant to the Policies and any agreements related thereto (collectively, the “ACE Insurance Program”)³, the ACE Companies provide, *inter alia*, certain property, commercial, casualty, umbrella excess, professional risk, D&O 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”).

SUMMARY OF THE RESERVATION OF RIGHTS

10. Based on the Sale Motion and the Prototype APA, the ACE Companies cannot determine how the Debtors propose to treat the ACE Insurance Program in connection with the proposed Sale to the Prevailing Purchase but as explained below, it appears that the Prevailing Purchaser may seek to continue to receive the benefits of an undetermined portion of the ACE Insurance Program. However, the ACE Insurance Program is not listed on the Cure Amount

³ The description of the ACE Insurance Program set forth herein is not intended to, and shall not be deemed to, amend, modify or waive any of the terms or conditions of the ACE Insurance Program. Reference is made to the ACE Insurance Program for a complete description of their terms and conditions.

Motion. Accordingly, the ACE Companies file this Reservation of Rights in order to preserve their right to object to any cure amount should the Debtors seek to assume and assign the ACE Insurance Program and/or the Prevailing Purchaser seeks to receive some of the benefits of the ACE Insurance Program.

RESERVATION OF RIGHTS

A. The ACE Companies Cannot Determine How the Debtors Propose to Treat the ACE Insurance Program.

11. Section 2.1(e) of the Prototype APA provides that “Purchased Assets” shall include “[t]o the extent assignable or transferable in accordance with applicable Law or the Sale Approval Order, all rights and benefits under all Casualty Insurance Policies insuring the Purchased Assets listed on Schedule 2.1(e).” *See* Section 2.1(e) of the Prototype APA.

12. Section 2.2(c) of the Prototype APA provides that “Excluded Assets” shall include “[a]ny of Sellers’ director and officer insurance policies, fiduciary policies and employment practices policies and any excess coverage policies applicable thereto (in each case of the foregoing, including any tail policies or coverage thereon) and any of Sellers’ rights, claims, demands, proceedings, credits, causes of action or rights of set off thereunder.” *See* Section 2.2(c) of the Prototype APA.

13. The ACE Insurance Program is not listed on the Cure Amount Motion.

14. Based on the ambiguity of the foregoing provisions of the Prototype APA especially in light of the omission of the ACE Insurance Program from the Cure Amount Motion, the ACE Companies cannot determine with any certainty how the Debtors and the Prevailing Purchaser propose to treat the ACE Insurance Program in connection with the proposed Sale.

B. The Prevailing Purchaser Cannot Receive The Benefits Of The ACE Insurance Program Without Remaining Liable For The Obligations Thereunder.

15. The Sale Motion and the Prototype APA appear to indicate that the Prevailing Purchaser seeks to continue to receive the benefits of an undetermined portion of the ACE Insurance Program. *See, e.g.*, Section 2.1(e) of the Prototype APA.

16. However, 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.”); *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.”).

17. Accordingly, the Prevailing Purchaser cannot receive the benefits of the ACE Insurance Program without remaining liable for the obligations thereunder.

C. The Cure Amount For The ACE Insurance Program.

18. In addition to any amount due at the time of any assumption and assignment (which, as noted above, is not identified on the Cure Amount Motion), the ACE Companies may also have contingent, unliquidated claims (the “Contingent Claims”) against the Debtors for the Obligations, given the nature of the ACE Insurance Program and the Obligations.

19. 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.

D. Further Reservation of Rights And Objections Regarding Sale

20. The ACE Companies specifically reserve the right to further object on or prior to the objection deadline in relation to the Sale Hearing to the provision of adequate assurance of future performance, the assumption and assignment of the ACE Insurance Program and the Sale in general including, but not limited to, the right to assert that:

- the ACE Insurance Program, which is an integrated insurance program, must be read, interpreted and enforced together and that any assumption and assignment of the ACE Insurance Program and the obligations thereunder must be in its entirety (*see 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 Texstone Venture, Ltd.*, 54 B.R. 54, 55 (Bankr. S.D. Tex. 1985) (multiple documents for note, deed of trust, and option to purchase agreement were all part of single loan transaction and debtor could not reject burdensome parts thereof simply because they were separately executed contracts)); and
- 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 yet been sought or given (*see* 11 U.S.C. § 365(c)(1)(A) and (B); *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”); *see also 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 accept insurance from some other company (in which he may have no confidence) than the one contracted with.”)).

21. Additionally, the ACE Companies have not been provided with any information regarding the Prevailing Purchaser and thus, do not have adequate assurance of future performance as required by § 365(f)(2) of the Bankruptcy Code and further, have not been able to assess whether the Prevailing Purchaser would satisfy the ACE Companies’ credit and underwriting criteria.

22. The ACE Companies also reserve the right to require that as a condition precedent for an assignment of the ACE Insurance Program, the Debtors and the assignee be required to execute an assumption agreement, in form and substance acceptable to the ACE Companies. .

WHEREFORE, the ACE Companies specifically reserve all rights in relation to the proposed Sale including, but not limited to, their right to object to any cure amount should the Debtors seek to assume and assign the ACE Insurance Program and/or the Prevailing Purchaser seeks to receive some of the benefits of the ACE Insurance Program.

Dated: March 16, 2015

Respectfully Submitted,

By: /s/ Sheryl W. Bey
SHERYL W. BEY

Sheryl W. Bey (MS Bar # 9484)
BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, PC
Meadowbrook Office Park
4268 I-55 North
Jackson, MS 39211
Post Office Box 14167
Jackson, MS 39236
Telephone: (601) 351-2400
Facsimile: (601) 351-2424

-and-

Wendy M. Simkulak, Esquire
Duane Morris LLP
30 South 17th Street
Philadelphia, PA 19103-4196
Telephone: (215) 979-1000
Facsimile: (215) 979-1020

Counsel for the ACE Companies

CERTIFICATE OF SERVICE

I, Sheryl W. Bey, do hereby certify that on this day the foregoing paper was filed electronically with the Clerk of the Court using the Court's ECF system, which served a true and correct copy of such paper electronically on all parties enlisted to receive service electronically as of the date hereof, including the following:

Attorneys for the Debtors:

Stephen W. Rosenblatt
Christopher R. Maddux
Paul S. Murphy
J. Mitchell Carrington
Thomas M. Hewitt
BUTLER SNOW LLP
Post Office Box 6010
Ridgeland, MS 39158-6010
Email: steve.rosenblatt@butlersnow.com
chris.maddux@butlersnow.com
paul.murphy@butlersnow.com
mitch.carrington@butlersnow.com
thomas.hewitt@butlersnow.com

Attorneys for Official Committee of Unsecured Creditors:

Kasee Sparks Heisterhagen
Bess M. Parrish Creswell
BURR & FORMAN LLP
Post Office Box 2287
Mobile, AL 36652-2287
Email: ksparks@burr.com
bcreswell@burr.com

Derek M. Meek
Marc P. Solomon
BURR & FORMAN LLP
420 North 20th Street
Birmingham, AL 35203
Email: dmeek@burr.com
msolomon@burr.com

U.S. Trustee:

Christopher James Steiskal, Sr.
OFFICE OF THE UNITED STATES TRUSTEE
United States Courthouse
501 East Court Street, Suite 6-430
Jackson, MS 39201

Email: Christopher.J.Steiskal@usdoj.gov
USTPRegion05.AB.ECT@usdoj.gov

Attorneys for the DIP Agent:

Robert A. Byrd
BYRD & WISER
Attorneys at Law
145 Main Street
P.O. Box 1939
Biloxi, MS 39533
Email: rab@byrdwiser.com

Lenard M. Parkins
Karl D. Burrer
HAYNES AND BOONE, LLP
1221 McKinney Street, Suite 2100
Houston, TX 77010
Email: lenard.parkins@haynesboone.com
karl.burrer@haynesboone.com

This, the 16th day of March, 2015.

By: /s/ Sheryl W. Bey
SHERYL W. BEY

Sheryl W. Bey (MS Bar # 9484)
BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, PC
Meadowbrook Office Park
4268 I-55 North
Jackson, MS 39211
Post Office Box 14167
Jackson, MS 39236
Telephone: (601) 351-2400
Facsimile: (601) 351-2424

-and-

Wendy M. Simkulak, Esquire
Duane Morris LLP
30 South 17th Street
Philadelphia, PA 19103-4196
Telephone: (215) 979-1000
Facsimile: (215) 979-1020
Counsel for the ACE Companies