IN THE UNITED STATES DISTRICT 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**

OBJECTION OF THE ACE COMPANIES TO THE DISCLOSURE STATEMENT TO ACCOMPANY THE JOINT CHAPTER 11 PLAN OF THE DEBTORS AND THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS

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 Object (the "Objection") to the Disclosure Statement (the "Disclosure Statement") to Accompany the Joint Chapter 11 Plan of the Debtors and the Official Committee of Unsecured Creditors (the "Plan"),[2] and in support of the Objection, 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 (the "Bankruptcy Code") in the United States Bankruptcy Court for the Southern District of Mississippi (the "Court").

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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."

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

2. 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").

3. On or about February 20, 2015, the Court entered an order approving certain bidding procedures in connection with the Sale Motion.

4. On or about February 20, 2015, the Debtors filed 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").

5. On or about March 16, 2015, the ACE Companies filed a reservation of rights to the Cure Amount Motion, noting that neither the Sale Motion nor the Cure Amount Motion clearly established how the ACE Insurance Program (as defined below) was to be treated in connection with the Debtors' proposed sale.

6. On or about July 24, 2015, the Court entered that certain *Order Granting 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) Amended Order (A) Approving the Amended 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) Amended 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 "Amended Sales and Bidding Procedures").

7. On July 25, 2015, the Debtors filed that certain Notice of No Qualified Bids Submitted by Bid Deadline and Notice of No Auction Being Conducted apprising the Court and parties in interest that the Debtors did not receive any offer from a Qualified Bidder by the Bid Deadline and, consequently, that no Auction would be held.

8. Pursuant to the Amended Sales and Bidding Procedures, in the event that no bid was received by the Debtors, the DIP Agent, for and on behalf of the DIP Lenders, and the Agent, for and on behalf of the Pre-Petition Lenders, shall be deemed to have submitted a Bid for the Liquidation Trust Acquired Assets and the Debtors are required to immediately implement and close the Alternative Transaction.

9. To effectuate the Alternative Transaction, the Debtors proposed that the Liquidation Trust Asset Purchase Agreement (the "APA") be approved by the Court.

10. On or about August 18, 2015, 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 An Order (A) Approving The Liquidation Trust Asset Purchase Agreement, (B) Authorizing Sale Free and Clear of All Liens, Claims Encumbrances, and Other Interests, and (C) Granting Related Relief* (the "APA Motion"), seeking approval of the APA (as defined therein), and the transfer of their remaining assets to the Liquidation Trust.

11. On or about September 11, 2015 the ACE Companies filed the *Limited Objection of the ACE Companies to the Motion of Debtors to Approve Liquidation Trust Asset Purchase Agreement* [Doc. No. 1011] (the "ACE Objection").

12. In the ACE Objection, the ACE Companies asserted that the proposed APA was not clear in its proposed treatment of the ACE Insurance Program.

13. In order to resolve the ACE Objection, the following language was included in the Order granting the APA Motion [Doc. No. 1050] (the "Sale Order"), pursuant to which, the ACE Insurance Program was specifically excluded from those assets transferred to the Liquidation Trust:

> **Resolution of ACE Objection.** Notwithstanding anything to the contrary in the Motion, the APA, or this Order (including, without limitation, Recital R and Paragraphs 21 and 27 hereof), (i) all of the Insurance Policies issued by ACE American Insurance Company, ACE Property and Casualty Insurance Company, or Westchester Fire Insurance Company, including, but not limited to, those that are reflected on Exhibit B to the Proofs of Claim filed by ACE American Insurance Company [Claim # 132], Westchester Fire Insurance Company [Claim # 133], and ACE Property and Casualty Insurance Company [Claim #134] and those that are reflected as stricken on revised Schedule 2.1(f) attached to this Order, and any agreements related thereto, are deleted from the definition of Purchased Assets; (ii) all of the Insurance Policies and any related agreements issued by ACE American Insurance Company, ACE Property and Casualty Insurance Company, or Westchester Fire Insurance Company, including, but not limited to, those that are reflected on Exhibit B to the Proofs of Claim filed by ACE American Insurance Company [Claim # 132], Westchester Fire Insurance Company [Claim # 133], and ACE Property and Casualty Insurance Company [Claim #134], and those that are reflected as stricken on revised Schedule 2.1(f) attached to this Order, shall be Excluded Assets; and (iii) to the extent that the APA and any related agreements, documents, or other instruments is sought to be amended pursuant to Paragraph 25 hereof and such amendment will alter this Paragraph or otherwise affect the ACE Companies, the written consent of the ACE Companies must be sought and received.

14. On or about April 29, 2016, the Debtors and the Official Committee of Unsecured Creditors (the "Committee") filed the Plan and the Disclosure Statement.

THE ACE INSURANCE PROGRAM

15. 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.

16. 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").

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

SUMMARY OF THE OBJECTION

18. The ACE Companies object to the Disclosure Statement because it lacks adequate information that would enable creditors including, but not limited to, the ACE Companies and claimants under the ACE Insurance Program, to ascertain how their respective claims will be

[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.

classified and treated, or to make an informed decision about the Plan. The ACE Companies also have concerns that the Plan may not be confirmable as drafted.

OBJECTION

19. Section 1125 of the Bankruptcy Code provides that a plan proponent may not solicit acceptance or rejection of a plan unless, before such solicitation, the plan proponent transmits to the parties to be solicited, the plan and a disclosure statement, containing "adequate information," as defined in § 1125(a) of the Bankruptcy Code, which has been approved by the Bankruptcy Court, after notice and a hearing. *See* 11 U.S.C. § 1125(b).

20. A disclosure statement contains "adequate information" if it provides information concerning the proposed plan of a kind and in sufficient detail that would enable a hypothetical reasonable investor typical of the holders of claims or interests of the relevant class to make an informed judgment about the plan. *See* 11 U.S. C. § 1125(a).[4]

21. Bankruptcy courts consistently refuse to approve disclosure statements which lack the information that a "hypothetical reasonable investor" would require to make an informed decision about the proposed plan. *See, e.g.*, *In re Main St. AC, Inc.*, 234 B.R. 771, 775 (Bankr.

[4] 11 U.S.C. § 1125(a)(1) provides in pertinent part:

> (a) In this section –
>
> (1) "adequate information" means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan . . . .

N.D. Cal. 1999) ("The lack of meaningful financial information … hinders an informed judgment by the hypothetical reasonable investor, rendering the disclosure statement inadequate."); *In re Applegate Prop., Ltd.*, 133 B.R. 827, 831 (Bankr. W.D. Tex. 1991) ("A court's legitimate concern under Section 1125 is assuring that hypothetical reasonable investors receive such information as will enable them to evaluate for *themselves* what impact the information might have on their claims and on the outcome of the case, and to decide for themselves what course of action to take.") (emphasis in original); *In re Batten*, 141 B.R. 899, 909 (Bankr. W.D. La. 1992) (denying approval of disclosure statement that included inadequate disclosures); *In re Olive St. Invs.*, 117 B.R. 488, 490 (Bankr. E.D. Mo. 1990) (denying approval of disclosure statement where "The Debtor's Disclosure Statement does not contain information sufficient to enable a hypothetical reasonable investor, as defined in 11 U.S.C. § 1125 (a) (2), to make an informed judgment about the Plan of Reorganization as required by 11 U.S.C. § 1125(a) (1)").

22. Additionally, a disclosure statement should not be approved where the related plan is unconfirmable. *In re Am. Capital Equip., LLC*, 688 F.3d 145, 154 (3d Cir. 2012) (where "it appears there is a defect that makes a plan inherently or patently unconfirmable, the Court may consider and resolve that issue at the disclosure stage before requiring the parties to proceed with solicitation of acceptances and rejections and a contested confirmation hearing") (quotations omitted); *In re Sanders*, No. 14-02271, 2015 Bankr. LEXIS 3987, at *16 (Bankr. S.D. Miss. Nov. 23, 2015) ("[I]t is well settled that a bankruptcy court may disapprove a disclosure statement, even if it contains adequate information, if there is a defect that renders a proposed plan 'inherently or patently unconfirmable.'"); *In re Beyond.com*, 289 B.R. 138, 140 (Bankr. N.D. Cal. 2003) (denying approval of disclosure statement where plan could not be

confirmed); *In re United States Brass Corp.*, 194 B.R. 420, 428 (Bankr. E.D. Tex. 1996) ("Disapproval of the adequacy of a disclosure statement may sometimes be appropriate where it describes a plan of reorganization which is so fatally flawed that confirmation is impossible.").

A. The Disclosure Statement Does not Contain Adequate Disclosures About The ACE Insurance Program.

23. While the Disclosure Statement does include a reference to the ACE Objection, and the fact that it was resolved, neither the Plan nor the Disclosure Statement addresses the fact that the ACE Insurance Program was not a Liquidation Trust Acquired Asset pursuant to the Sale Order, and neither document addresses any treatment of the ACE Insurance Program under the Debtors' Plan.

24. Indeed, neither the Plan nor the Disclosure Statement substantively addresses the treatment of insurance at all.

25. The Plan includes defined terms for "Insurer," "Environmental Insurance Policies" and "Insurance Policy" but these terms are never again used substantively in the Plan.[5]

26. The Plan also defines the term "D&O Insurance Policies," but then only uses (a slightly modified version of) this term once in the Plan related to the retention of potential causes of action. *See* Plan at § 5.13.

27. Both the Plan and the Disclosure Statement are silent on the ACE Insurance Program, which was not transferred to the Liquidation Trust, and therefore was retained by the Debtors.

[5] To the extent that the Disclosure Statement or Plan are amended to use these terms, the ACE Companies reserves all of their rights, including the right to further object to the Disclosure Statement, with respect to such revisions.

28. Both the Plan and the Disclosure Statement should be revised to provide that the ACE Insurance Program is not a Liquidation Trust Acquired Asset, and that nothing alters the ACE Companies' and the Debtors' rights and obligations under the ACE Insurance Program or modifies the coverage provided thereunder.

B. The Disclosure Statement Should Not Be Approved Because the Plan May Not Be Confirmable.

29. First, the Plan may not be confirmable as written, because it is not consistent with the Disclosure Statement.

30. By way of example, and not limitation, the Disclosure Statement provides for certain third-party releases (Disclosure Statement at VIII.I.iii), that are simply absent from the Plan (Plan at § 14.3 (this Plan section includes exculpation provisions, but not the release provision included in the Disclosure Statement)).

31. These third party releases cannot be authorized simply through approval of the Disclosure Statement. If the Debtors and the Committee seek to include these releases in the Plan, they must actually appear therein.

32. Additionally, to the extent that the Debtors seek to confirm a plan that includes these or other releases, the ACE Companies should be excepted therefrom.

33. To the extent that the Debtors continue to receive the benefits of the ACE Insurance Program, the Debtors should not be able to use any release provisions contained in the Plan to avoid remaining responsible for their Obligations under the ACE Insurance Program.

34. It is well-established that debtors cannot seek to 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."); *Tompkins ex. rel. A.T. v. Troy Sch. Dist.*, 199 Fed. Appx. 463, 468 (6th Cir. 2006) (holding that it is a basic principle of contract law that a party to an agreement is constrained to accept the burdens as well as the benefits of the agreement); *St. Paul Fire & Marine Ins. Co. v. Compaq Computer Corp.*, 457 F.3d 766, 773 (8th Cir. 2006) (finding that a party who accepts the benefit of a contract must also assume its burdens).

35. Accordingly, the Disclosure Statement (and the Plan) need to clarify that nothing in the Disclosure Statement, Plan or Confirmation Order, including, but not limited to, the release provision that currently appears in the Disclosure Statement, shall modify, alter or impair the ACE Insurance Program.

36. Second, the treatment of rejection damages claims as proposed in the Disclosure Statement and Plan is improper.

37. Both the Plan and the Disclosure Statement contemplate a bar date for rejection damages claims related to the rejection of executory contracts or unexpired leases *pursuant to the Plan* that falls "on or before ten (10) days after the date first set for hearing on the approval of the Disclosure Statement." *See* Disclosure Statement at VII.C; Plan at § 12.3.

38. While the Debtors and the Committee improperly trigger the events of rejection with the approval of the Disclosure Statement rather than the confirmation of the Plan (*See* Disclosure Statement at VII.B; Plan at § 12.2), even more problematically, the Debtors require that rejection damages claims be filed possibly well before any approval of the Disclosure Statement, let alone the effectiveness or even confirmation of the Plan.

39. If the hearing on the Disclosure Statement is postponed even two weeks, these provisions of the Plan and Disclosure Statement will require contract counterparties who do not yet know the status of their contracts to nevertheless file rejection damages claims in order to meet the imposed deadline.

40. Such a structure is improper, and the ACE Companies specifically reserve all of their rights and defenses with respect to the provisions regarding rejection, including the setting of rejection bar dates.

41. As drafted, the Plan and the Disclosure Statement are inconsistent and improper, and therefore, and for these reasons, as well, the Disclosure Statement should not be approved as drafted.

C. Proposed Resolution of Objection.

42. To resolve the Objection, the ACE Companies request that the following language be added to the Plan (collectively, the "Proposed Language"):

43. New Plan Definitions:

> "ACE Companies" means, collectively, ACE American Insurance Company, ACE Property and Casualty Insurance Company, and Westchester Fire Insurance Company, together with their affiliates and successors; provided however that the ACE Companies shall not include any "Insurer" of the Debtor, as defined herein.
>
> "ACE Insurance Program" means all of the insurance policies (and any related agreements) issued by any of the ACE Companies to or providing coverage to any of the Debtors at any time prior to the Effective Date; provided however that the ACE Insurance Program does not include D&O Insurance Policies, Environmental Insurance Policies, or Insurance Policy, each as defined herein.

44. New Plan Section:

> No Impairment of Rights Under the ACE Insurance Program. The ACE Insurance Program is not a Liquidation Trust Acquired Asset pursuant to the Sale Order. Nothing in the Disclosure Statement,

> the Plan, the Confirmation Order, any other document related to any of the foregoing, or any other order of this Court (including, without limitation, any provision that purports to be preemptory or supervening or grants an injunction or release, or requires a party to submit a ballot): (i) alters the rights and obligations of the Debtors and the ACE Companies under the ACE Insurance Program; or (ii) modifies the coverage provided under the ACE Insurance Program or the terms and conditions thereof except that on and after the Effective Date, the MPC Plan Trustee shall become and remain liable in full for all of the Debtors' obligations under the ACE Insurance Program regardless of whether such obligations arise before or after the Effective Date without the requirement or need for the ACE Companies to file a proof of claim, a rejection damages claim, or an Administrative Expense Claim. Any such rights and obligations under the ACE Insurance Program shall be determined under the ACE Insurance Program and applicable non-bankruptcy law, including that the ACE Insurance Program shall not be sold, assigned, or otherwise transferred without the ACE Companies' prior written consent.

WHEREFORE, the ACE Companies request that the Court (a) either (i) condition any approval of the Disclosure Statement on inclusion of the Proposed Language in the Plan, or (ii) deny the request for approval of the Disclosure Statement as it does not contain the adequate information required by 11 U.S.C. § 1125; and (b) grant such other relief as the Court deems appropriate.

Dated: June 10, 2016

Respectfully Submitted,

By: */s/Sheryl Bey*

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CERTIFICATE OF SERVICE

I, Sheryl Bey, do hereby certify that on this day the foregoing document 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, with a copy sent by U.S. Mail to the following parties:

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This, the 10th day of June, 2016

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