

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF PENNSYLVANIA

In re:	:	Chapter 11
	:	
ACR MANAGEMENT, L.L.C.,	:	Case No. 04-27848-MBM
et al.,	:	
	:	Responses Due: June 14, 2005
	:	Hearing Date: June 21, 2005; 3:00 PM
	:	
Debtors.	:	(Jointly Administered)

RESPONSE OF GULF STATES, INC. TO DEBTORS'
NINTH OMNIBUS OBJECTION TO CERTAIN DISPUTED PROOFS OF CLAIM
AND MOTION TO ESTIMATE SUCH CLAIMS TO BE \$0.00

Gulf States, Inc. ("GSI") hereby responds to the Debtors' (I) Ninth Omnibus Objection to Certain Disputed Proofs of Claim Pursuant to 11 U.S.C. § 105(a), 502(b) and Fed. R. Bankr. P. 3007 and (II) Motion to Estimate Such Claims to be \$0.00 for the Purposes of Distribution Pursuant to 11 U.S.C. § 502(c)(1) and Plan Article VIII(A)(2) and states as follows:

Introduction.

1. Debtor Anthony Crane Rental, L.P. d/b/a Maxim's Crane Works ("Debtor") filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code on June 14, 2004.

2. Claimant GSI is a corporation with its principal place of business located at 6711 East Highway 332, Freeport, Texas. GSI is a wholly owned subsidiary of TIC – The Industrial Company ("TIC").

3. On or about December 23, 2004, Debtor filed its Second Amendment of Debtors' Schedules of Assets and Liabilities (the "Amended Schedules").

4. Schedule F of the Amended Schedules list "Javier Evan" (Vendor No. 3666) and "Valero Refinery c/o TIC – The Industrial Co" (Vendor No. 3921) as creditors holding

unsecured claims. GSI believes that these listings refer to claims that are associated with the Project described below that involved GSI.

5. Schedule F of the Amended Schedules does not contain any listing or reference to GSI.

6. On March 29, 2005, in accordance with the Notice Pursuant to Local Rule 3002-1(b) of Fixing of Supplemental Bar Date for the Filing of Certain Claims, GSI timely filed a proof of claim (Claim No. 1001)(the “Proof of Claim”) against Debtor. GSI’s Proof of Claim without exhibits is attached hereto as Exhibit A and is incorporated herein by reference.

7. GSI’s Proof of Claim relates to a construction project where GSI served as the general contractor regarding the performance of certain work at a petroleum refinery in California. During the course of the work, an accident occurred as a result of the acts and/or omissions of Debtor and its employees with respect to the operation of a crane. As a result of this accident, GSI has incurred a variety of damages, expenses and costs for which it is seeking payment in its Proof of Claim. By virtue of its contract with TIC, Debtor is responsible for all damages, costs and expenses associated with the accident and the other damages asserted in the Proof of Claim.

The Project.

8. GSI entered into a contract with Valero Refining Company (“Valero”) to perform certain work and provide certain services in connection with the construction of the Alkylation DeBottleneck Mechanical and Electrical Project at Valero’s petroleum refining facility located at 3400 East Second Street, Benicia, California (the “Project”). The contract between GSI and Valero is voluminous and, as a result, a copy has not been attached. GSI will provide a copy of the contract upon request by Debtor.

9. The contract between Valero and GSI provides, *inter alia*, that GSI indemnify Valero for certain damages and claims arising from the performance of the work associated with the Project.

10. GSI subsequently entered into a contract with TIC to perform certain work and provide certain services in connection with the Project.

11. TIC, in turn, entered into a contract with Debtor with an effective date as of December 30, 2003 (the "Contract") to provide crane and rigging services for the Project. A copy of the Contract is attached to GSI's Proof of Claim as Exhibit 1.

12. The Contract provides, *inter alia*, that Debtor will indemnify, defend and hold harmless all Indemnitees (as this term is defined by the Contract) from and against any and all Claims, Damages and Legal Costs (as these terms are defined by the Contract) arising from Debtor's conduct and/or inaction. *See* Contract at Section 8.

13. GSI is an Indemnatee under the terms of the Contract.

The Claims Against Debtor.

14. On or about February 5, 2004, Javier Evan, an employee of GSI, was injured during the course of the Project.

15. According to the complaint filed by Javier Evan and Lisa Rosell, Mr. Evan was injured when a crane owned and/or operated by Debtor lowered a tower onto Mr. Evan, severing three fingers and causing internal and external injuries. A copy of the amended complaint is attached to the Proof of Claim as Exhibit 2.

16. The alleged injuries suffered by Mr. Evan and Ms. Rosell were the result of acts and/or omissions of Debtor and/or its employees.

17. The statement of damages accompanying the complaint filed by Javier Evan and Lisa Rosell claims damages in the aggregate amount of \$41.45 million. *See* Exhibit 2 to Proof of Claim.

18. The complaint filed by Javier Evan and Lisa Rosell names Valero as a defendant.

19. By a letter dated July 28, 2004, Valero demanded indemnification and tendered the defense of the complaint filed by Javier Evan and Lisa Rosell. A copy of the July 28, 2004 letter is attached to GSI's Proof of Claim as Exhibit 3.

20. Pursuant to the terms of the contract with Valero, GSI has provided Valero with a defense with respect to the complaint filed by Javier Evan and Lisa Rosell.

21. On or about December 7, 2004, TIC was served with the amended complaint adding it as a defendant with respect to the claims asserted by Mr. Evan and Ms. Rosell.

22. Pursuant to the Contract, Debtor is obligated to indemnify and defend TIC and GSI as an Indemnitee (as this term is defined by the Contract) from and against the claims asserted by Javier Evan and Lisa Rosell.

23. As of the date of the Proof of Claim, GSI had suffered damages in connection with the claims asserted by Javier Evan and Lisa Rosell as follows:

a. payment of worker's compensation expenses to or on behalf of Mr. Evan estimated to be in the amount of \$61,780.44 (*See* Exhibit 4 to Proof of Claim); and

b. payment of costs of defense with respect to the Indemnitees (as this term is defined by the Contract), estimated to be in the amount of \$18,840.47 (*See* Exhibit 5 to Proof of Claim).

24. GSI expects that it will incur additional damages, expenses and costs in connection with the claims asserted by Javier Evan and Lisa Rosell.

25. In addition to the damages associated with the claims asserted by Javier Evan and Lisa Rosell, GSI incurred damages with respect to the completion of the Project.

26. As a result of the incident involving Mr. Evan, GSI experienced delays, additional expenses and other costs that occurred as a result of the acts and/or omissions of Debtor and/or its employees.

27. GSI has suffered damages with respect to the completion of the Project as a result of delays, additional expenses and other costs caused by the accident involving Mr. Evan in the approximate amount of \$153,971. *See* Exhibit 6 to Proof of Claim.

28. To date, GSI has not received payment from Debtor with respect to any of the costs, damages and expenses it has incurred in connection with the Project and the incident involving Mr. Evan.

29. As of the date of the Proof of Claim, GSI had a liquidated claim in the approximate amount of \$234,591.91, although this amount will increase as additional costs and expenses are incurred by GSI.

30. In addition, GSI has an unliquidated claim in connection with the claims asserted against it by Javier Evan and Lisa Rosell.

31. While GSI's claim regarding the claims asserted by Javier Evan and Lisa Rosell are unliquidated, the Debtor's direct liability is likely limited by an insurance policy that provides coverage for these claims.

32. Pursuant to the terms of the Contract, Debtor added TIC and its affiliates to Policy No. EGL-NY-078870-033 issued by LSI Corporation (the "Policy") as additional insureds. GSI is an affiliate of TIC and is an additional insured under the Policy.

33. GSI understands that the Policy is subject to a self-insured retention for indemnity of \$500,000 and a self-insured retention of \$500,000 for “Occurrence Expenses” (as this term is defined in the Policy).

34. As a result, while the total amount of the claims asserted by Javier Evan and Lisa Rosell is not known, the Debtor’s direct liability for those claims is defined by the self-insured retentions in the Policy.

The Ninth Omnibus Objection to Claims.

35. On May 10, 2005, the Debtors’ (I) Ninth Omnibus Objection to Certain Disputed Proofs of Claim Pursuant to 11 U.S.C. § 105(a), 502(b) and Fed. R. Bankr. P. 3007 and (II) Motion to Estimate Such Claims to be \$0.00 for the Purposes of Distribution Pursuant to 11 U.S.C. § 502(c)(1) and Plan Article VIII(A)(2) (the “Objection”) was filed with the Court.

36. Among the claims sought to be disallowed or effectively disallowed by estimating the value of such claims to be \$0.00 is GSI’s Proof of Claim.

37. The Objection argues that the listed claims should be disallowed because they “are not valid or supportable.” Objection at ¶ 14.

38. The Objection also argues in the alternative that the listed claims should be estimated at \$0.00 because allowance of or reserving for the listed claims would dilute or interfere with interim distributions to holders of Allowed Class 7 Claims. Objection at ¶¶ 28 – 30.

The Debtor’s Objection is Without Merit.

39. The Debtor’s Objection should be overruled insofar as it relates to GSI because the Objection fails to produce any evidence to overcome the *prima facie* validity of the claims asserted in GSI’s Proof of Claim.

40. Pursuant to § 502(a) of the Title 11 of the United States Code, 11 U.S.C. §§ 101, et seq., a proof of claim is deemed to be allowed unless a party in interest objects. 11 U.S.C. § 502(a). Thus, a proof of claim operates as prima facie evidence of such claim. See H.R. Rep. No. 95-595, 95th Cong., 1st Sess., at 352 (1977); S. Rep. No. 95-989, 95th Cong., 2d Sess., at 62 (1978).

41. The burden of proof for claims against a debtor rests on different parties at different stages of the proceedings. The claimant must initially allege facts sufficient to support its claim, but once this is done, the claim is prima facie valid. The burden of proof then shifts to the objecting party to produce sufficient evidence to negate the prima facie validity of the proof of claim by refuting at least one of the essential allegations of such claim. Only after the objecting party produces evidence equal in force to the prima facie claim does the burden revert to the claimant to prove the validity of its claim by a preponderance of the evidence. See *In re Allegheny Int'l. Inc.*, 954 F.2d 167, 173-74 (3d Cir. 1992); see also *Fullmer v. U.S.*, 962 F.2d 1463, 1466 (10th Cir. 1992) (“A properly filed proof of claim is prima facie evidence of the validity and amount of the claim. This evidentiary presumption remains in force even though an objection to the claim is filed by a party in interest. To overcome this prima facie effect, the objecting party must bring forward evidence equal in probative force to that underlying the proof of claim.”) (citations omitted).

42. The Debtor’s Objection fails to set forth any facts sufficient to overcome the prima facie validity of the claims asserted by GSI. Instead, the Objection simply states in a conclusory fashion that GSI’s claims should be disallowed because they “are not valid or supportable.” The Objection fails to provide any factual evidence to support this assertion. Indeed, Debtor offers no evidence whatsoever to counter the detailed facts and documentation that GSI provided to support its Proof of Claim.

43. Because the Objection fails to set forth any facts sufficient to overcome the prima facie validity of the claims asserted by GSI, the Objection must be overruled insofar as it relates to GSI.

There is No Basis to Estimate GSI's Claims at Zero.

44. In the alternative, the Objection asks the Court to estimate GSI's claims at zero, effectively disallowing them.

45. There is no basis for the Court to estimate GSI's claims at zero and effectively disallow such claims.

46. First, the damages suffered by GSI with respect to worker's compensation payments, costs of defense, and delays and additional expenses to complete the Project are not unliquidated or contingent.

47. The damages suffered by GSI are not contingent in that there is no future or extrinsic event that must occur before the debt becomes due and owing by the Debtor. *In re F.B.F. Industries, Inc.*, 165 B.R. 544 (Bankr. E.D. Pa. 1994); *In re Krupka*, 317 B.R. 432 (Bankr. D. Colo. 2004).

48. The damages suffered by GSI are not unliquidated because the amount of the debt is capable of being readily ascertained. *In re Mazzeo*, 131 F.3d 295 (2d Cir. 1997); *In re Krupka*, *supra*.

49. Because the damages suffered by GSI with respect to worker's compensation payments, costs of defense, and delays and additional expenses to complete the Project are not unliquidated or contingent, these damages are not subject to estimation.

50. Second, to the extent GSI's claims may be contingent or unliquidated, there is no basis to estimate such claims at zero.

51. Contingent or unliquidated claims are to be estimated to the extent that the fixing or liquidation of such claim would “unduly delay the administration of the case.” 11 U.S.C. § 502(c)(1).

52. The Objection makes the assertion that the fixing or liquidation GSI’s claim, along with the other claims that are the subject of the Objection, will unduly delay the administration of the case.

53. The Objection offers no proof or explanation to support the claim of undue delay.

54. Moreover, Debtor cannot now be heard to complain about any alleged delay in the fixing or liquidation of GSI’s claim. The record demonstrates that Debtor failed to send notice regarding the applicable bar dates to GSI. It was only as a result of TIC learning about the supplemental notice that alerted GSI to the need to file a proof of claim. Debtor’s failure to provide proper or timely notice cannot now be used as a basis to compel the estimation of GSI’s claim.

55. Third, the summary estimation procedure proposed by the Objection is improper and constitutes a denial of GSI’s due process rights.

56. While courts have estimated claims at zero, such a result occurs after the court has conducted an estimation hearing or other procedure to evaluate the merits of the claim. Indeed, two of the cases cited by Debtor as support for the proposition that a contingent or unliquidated claim can be estimated at zero, reached such a conclusion only after the court conducted a hearing regarding the value of the claims. *In re Kaplan*, 186 B.R. 871, 873 (Bankr. D. N.J. 1995); *Bunn v. Frontier Airlines, Inc. (In re Frontier Airlines, Inc.)*, 137 B.R. 811, 813 (D. Colo. 1992). The other case cited by Debtor, *In re Thompson McKinnon Securities, Inc.*, 143 B.R. 612 (Bankr. S.D.N.Y. 1992), did not involve the estimation of a claim under Section 502(c) of the Bankruptcy Code, 11 U.S.C. § 502(c).

57. Further, as even Debtor admits, a wide range of options have been employed by bankruptcy courts to estimate claims. *See* Objection at ¶ 32.

58. Despite the range of available options, Debtor seeks to preclude GSI and the other claimants from having any opportunity to present evidence and have their claims properly estimated. Instead, Debtors seeks to summarily have the claims estimated at zero, without the benefit of a hearing or other procedure regarding the merits of the proof of claim.

59. The summary procedure leading to an estimation of zero proposed by Debtor is improper. “It is manifest, of course, that the process of estimation will involve some examination of the claims.” *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1013 (4th Cir. 1986). Estimation “is a means by which the parties offer evidence from which the Court estimates the [c]laims without exactitude.” *In re Apex Oil Co.*, 92 B.R. 843, 844 (Bankr. E.D. Mo. 1988).

60. Debtor’s summary procedure would afford GSI and the other claimants no opportunity to present evidence regarding their claims and the Court would have no opportunity to examine the merits of those claims.

61. The only “alternative” offered by Debtor is the ability to seek reconsideration under Section 502(j) of the Bankruptcy Code, 11 U.S.C. § 502(j).

62. As has been recognized, “in certain circumstances, the distribution of assets in a case under a confirmed plan may make reconsideration moot.” *Collier on Bankruptcy* § 502.11[2]. Since Debtor plans to proceed to make distributions with respect to Allowed Class 7 Claims, it seems likely that reconsideration would be a futile exercise.

63. In addition, since reconsideration is granted upon a showing of cause, a claimant’s right to relief is not certain and it is even less clear what would constitute adequate cause considering the summary disallowance proposed by Debtor.

64. As a result, Debtor's motion to estimate GSI's Proof of Claim at zero should be denied.

WHEREFORE, GSI respectfully requests that the Court: (1) overrule Debtors' Ninth Omnibus Objection to Certain Disputed Proofs of Claim Pursuant to 11 U.S.C. § 105(a), 502(b) and Fed. R. Bankr. P. 3007 insofar as it relates to TIC; (2) deny the Motion to Estimate Such Claims to be \$0.00 for the Purposes of Distribution Pursuant to 11 U.S.C. § 502(c)(1) and Plan Article VIII(A)(2); and (3) grant such other relief as the Court deems appropriate.

Respectfully submitted,

Dated: June 14, 2005

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