

**EXHIBIT B -3 OF 3**

of the Court of Appeals for the Ninth Circuit in Pacific Gas & Electric Co. v. California, 350 F.3d 932, 934-935 (9th Cir. 2003).

The Certain Insurers also contend that the Bankruptcy Court erred in relying upon Section 1123(a)(5) of the Bankruptcy Code, because the transfer of estate property is only authorized by Section 363(1). However, Section 363(1) does not contain any provisions that override the contractual rights of the Certain Insurers to withhold their consent to an assignment. According to the Certain Insurers, Section 363 only preempts contracts or legal rights that are "conditioned on the insolvency or financial condition of the debtor." Because the anti-assignment clauses of the insurance policies are not triggered by the Reorganizing Debtors' insolvency or financial condition, the Certain Insurers contend that Section 363 does not provide for their assignment.

In addition, the Certain Insurers contend that modification of the insurance policies is not permitted under Section 365 of the Bankruptcy Code, because Section 365 of the Bankruptcy Code only authorizes the Bankruptcy Court to modify executory contracts. The insurance policies at issue, however, are non-executory contracts, and therefore, the Certain Insurers contend that the Bankruptcy Court is not permitted to modify or assign them.

In response to the preemption issue, the Reorganizing Debtors contend that Section 1123(a)(5) of the Bankruptcy Code expressly preempts the anti-assignment clauses in the applicable insurance policies, because those clauses might otherwise interfere with the implementation of the Reorganizing Debtors' Plan. The Reorganizing Debtors contend that Section 1123 is not as limited as the Certain Insurers contend. According to the Reorganizing Debtors, the preemption authorized by Section 1123 extends to private contracts and is not limited to laws "relating to the financial condition of the debtor." In support of their argument, the Reorganizing Debtors rely on the decision of the Court of Appeals for the Third Circuit in In re Combustion Engineering, Inc., 391 F.3d 190 (3d Cir. 2005). The Reorganizing Debtors recognize that Pacific Gas conflicts with Combustion Engineering, but contend that Pacific Gas was wrongly decided, because the Pacific Gas court violated the plain meaning rule of statutory interpretation by importing language from Section 1142 relating to the Reorganizing Debtors' financial condition into Section 1123.

The Reorganizing Debtors also contend that Section 363(1) and 365 of the Bankruptcy Code are not applicable. The Reorganizing Debtors contend that several courts have recognized that Section 1123(a)(5) authorizes the type of transfers contemplated in this case without resorting to Section 363(1).

In addition, the Reorganizing Debtors contend that several provisions of the Bankruptcy Code allow debtors to restructure their obligations under non-executory contracts. Thus, the Reorganizing Debtors maintain that the fact that Section 365 makes certain provisions for executory contracts does not mean that Congress did not intend preemption of an anti-assignment provision in a non-executory contract under Section 1123(a).<sup>3</sup>

## II. STANDARD OF REVIEW

An order confirming a Chapter 11 plan is considered a final, appealable order. Eastern Minerals & Chems. Co. v. Mahan, 225 F.3d 330, 336 (3d Cir. 2000). Thus, the Court has jurisdiction to hear this appeal pursuant to 28 U.S.C. § 158(a).

The issues presented by the parties to this appeal are only issues of law. Accordingly, the Court applies a plenary review to the Bankruptcy Court's legal conclusions. Donaldson v. Bernstein, 104 F.3d 547, 551 (3d Cir. 1997). The appellate responsibilities of the Court are further understood by the jurisdiction exercised by the Third Circuit, which focuses and reviews the Bankruptcy Court decision on a de novo basis in the first instance. In re Telegroup, 281 F.3d 133, 136 (3d Cir.

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<sup>3</sup> The Future Silica and CTPV Claimants' Representatives have also filed a Responsive Memorandum (D.I. 32) echoing the arguments of the Reorganizing Debtors and highlighting certain specific points, including the Third Circuit's decision in Combustion Engineering and the interaction of Sections 541, 363 and 1123 of the Bankruptcy Code.

2002).

To the extent that the Bankruptcy Court's rulings constitute recommendations or proposals to this Court, the parties also seek review of the Bankruptcy Court's decision under Bankruptcy Rule 9033. Pursuant to Rule 9033, the Court applies a de novo standard of review to the Bankruptcy Court's proposed findings of fact and conclusions of law. The Court may "accept, reject or modify the proposed findings of fact or conclusions of law, receive further evidence, or recommit the matter to the bankruptcy judge with instruction." Fed. R. Bankr. P. 9033(d). In conducting a de novo review, the Court must consider all of the Bankruptcy Court's findings and conclusions and afford them no presumption of validity.

### III. DISCUSSION

#### A. Whether The Bankruptcy Court Lacked Jurisdiction To Determine Whether The Debtors' Rights To Receive Insurance Proceeds Could Be Assigned

Section 541 of the Bankruptcy Code defines the property of the estate broadly to include "all legal or equitable interests of the debtor in property as of the commencement of the case," "proceeds . . . from the property of the estate," and "any interest in property that the estate acquires after the commencement of the case." 11 U.S.C. § 541(a)(1), (6) and (7). The Third Circuit has expressly concluded that an insurance policy is property of the estate within the meaning of Section

541, even though the policy has not matured, has no cash value, or is otherwise contingent. Estate of Lellock v. Prudential Ins. Co. of Am., 811 F.2d 186, 189 (3d Cir. 1987). The Third Circuit's conclusion is consistent with the conclusions reached by the majority of courts who have considered this issue. See e.g., Homsy v. Floyd (In re Vitek), 51 F.3d 530, 534 (5th Cir. 1995); Health Ctr. v. Ins. Co. of N. Am. (In re St. Clare's Hosp. & Health Ctr.), 934 F.2d 15, 18-19 (2d Cir. 1991); Nat'l Union Fire Ins. Co. v. Titan Energy, Inc. (In re Titan Energy, Inc.), 837 F.2d 325, 329 (8th Cir. 1988), Tringali v. Hathaway Mach. Co., 796 F.2d 553 (1st Cir. 1986).

Those insurers of the Certain Insurers who press the jurisdiction argument direct the Court to several cases to support their position that the Debtors' right to insurance proceeds are not property of the estate. The Court has reviewed those cases and finds them to be inapplicable to the circumstances here. Several of the cases raised by the insurers pertain to directors' and officers' liability policies. While there is a split among the courts regarding whether these policies are properly considered property of the estate, that division of authority is based on the issue of whether those policies truly benefit the estate, a debate which does not exist in the context of general or product liability insurance policies. The other cases either involve chapter 7 cases, the

obligations of the insurer to pay on policies, or lien priority and attachment issues, all of which are irrelevant to the circumstances here. Accordingly, the Court concludes that the insurance policies that are the subject of the instant dispute are properly considered property of the estate pursuant to Section 541 of the Bankruptcy Code, and therefore, the Bankruptcy Court had in rem subject matter jurisdiction to adjudicate the assignment issues related to these policies.

B. Whether The Bankruptcy Court Erred In Applying Section 1123(a)(5) Of The Bankruptcy Code To Preempt The Anti-Assignment Clauses In The Insurance Policies And Approving The Plan Which Provides For The Assignment Of Those Policies Without The Consent Of The Certain Insurers

Having concluded that the Bankruptcy Court had jurisdiction to adjudicate the assignment issues related to the insurance policies as property of the estate under Section 541 of the Bankruptcy Code, the Court must next determine whether the Bankruptcy Court erred in applying Section 1123(a)(5) to preempt the anti-assignment clauses in those contracts and allow the proceeds of those policies to be assigned to the Funding Vehicle Trust without the consent of the Certain Insurers. In pertinent part, Section 1123(a)(5)(B) of the Bankruptcy Code provides:

Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall . . . provide adequate means for the plan's implementation, such as . . . transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan . . .

11 U.S.C. § 1123(a)(5)(B) (emphasis added).

In Combustion Engineering, the Third Circuit discussed the same issue raised here, i.e. whether a plan of reorganization can provide for the assignment of insurance proceeds to a Section 524(g) trust, and concluded that Section 541(c)(1) and Section 1123(a)(5)(B) of the Bankruptcy Code expressly permits the assignment of a debtor's interest in insurance policies to a trust or other entity, even if the subject insurance policies contain a prohibition on assignment. In reaching this conclusion, the Third Circuit explained:

With respect to the anti-assignment provisions, we agree with the District Court that even if the subject insurance policies purported to prohibit assignment of Combustion Engineering's insurance proceeds, these provisions would not prevent the assignment of proceeds to the bankruptcy estate.

. . . Put simply, § 541 prohibits restrictions on the interests of the debtor, which includes the insurance policies held by Combustion Engineering.

Id. at 218-219. The Third Circuit went on to explain that Section 541(c)(1) preempts contractual provisions that purport to limit or restrict the rights of a debtor to transfer or assign its interests in bankruptcy, and pursuant to Section 1123(a)(5), the property of the estate can then be transferred to one or more entities organized before or after the confirmation of the plan.<sup>4</sup>

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<sup>4</sup> The Certain Insurers point out that the Combustion Engineering court discussed this issue in the larger context of determining whether the objecting insurers in that case had



Id. at n.27.

The Certain Insurers direct the Court to the Ninth Circuit's decision in Pacific Gas & Electric Co. v. California, 350 F.3d 932 (9th Cir. 2003). However, the Pacific Gas decision was issued a year before the Third Circuit's decision in Combustion Engineering, and in any event, is not binding on this Court.

In addition, the Certain Insurers rely on the Third Circuit's decision in Integrated Solutions, Inc. v. Service Support Specialties, Inc., 124 F.3d 487 (3d Cir. 1997), for the proposition that once property is included in the bankruptcy estate it is subject to the same limitations imposed on the debtor by applicable nonbankruptcy laws. While the Third Circuit's decision in Integrated Solutions also predates its decision in Combustion Engineering, the Court concludes that Integrated Solutions is consistent with Combustion Engineering.

In Integrated Solutions, the Third Circuit concluded that neither Section 363(b)(1) nor Section 704(1) of the Bankruptcy Code preempt state law restrictions on the transfer of property of the estate. In reaching this conclusion; however, the Third Circuit distinguished Sections 363 and 704 from Section 1123(a) of the Bankruptcy Code, which expressly provides for the

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standing. However, the Court is not persuaded that the general context of the Third Circuit's discussion alters the force of its conclusions on the more narrow issue of preemption of the anti-assignment clauses by the Bankruptcy Code.

preemption of nonbankruptcy law. Accordingly, the Court concludes that the Bankruptcy Court did not err in concluding that the anti-assignment clauses in the Reorganizing Debtors' insurance policies are preempted by the Bankruptcy Code.

#### **IV. CONCLUSION**

For the reasons discussed, the Court will affirm the Bankruptcy Court's February 6, 2006 Order Confirming the Reorganizing Debtors' Plan and adopt the Bankruptcy Court's accompanying Findings of Fact and Conclusions of Law.

An appropriate Order will be entered.

3. Multiple appeals of the District Court's ruling were filed by various primary and excess insurers of the Debtor, Basic and Lummus, as well as a separate appeal by the Certain Cancer Claimants ("the CCC"). On December 2, 2004, the Third Circuit issued a comprehensive opinion vacating the District Court's order and remanding the case for further proceedings. See *In re Combustion Engineering, Inc.*, 391 F.3d 190 (3d Cir. 2004).<sup>1</sup>

4. The Third Circuit held, *inter alia*, that bankruptcy "related to" jurisdiction did not exist over the independent non-derivative asbestos-related claims against Basic and Lummus, and the Bankruptcy Court's equitable jurisdiction could not be used to extend the channeling injunction to any claims against Basic and Lummus that were not derivative of any liability on the part of the Debtor. The Circuit also remanded the case for further factual findings on the issues of whether the pre-petition payments to certain participating asbestos claimants and the use of stub claims to secure plan confirmation violated the Bankruptcy Code ("the Code") and the "equality among creditors" principle underlying the Code. This Court was designated to handle the case on remand.

5. On remand, Bankruptcy Judge Judith Fitzgerald of the Bankruptcy Court for the Western District of Pennsylvania, also sitting by designation in the District of Delaware, conducted

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<sup>1</sup> An amended opinion was entered on February 23, 2005.

extensive proceedings on a proposed Modified Plan, which had been negotiated by the Debtor, the various proponents of the original Plan and the CCC. In her *Findings of Fact and Conclusions of Law Regarding Confirmation of Combustion Engineering, Inc.'s Plan of Reorganization, as Modified Through October 7, 2005*, Judge Fitzgerald concluded that confirmation of the Modified Plan was appropriate, and specifically found that it no longer addressed the non-derivative asbestos-related claims against Basic and Lummus and that changes were made in the amount and schedule of distributions to asbestos claimants so as to ensure greater parity among claimants.

6. On December 19, 2005, the Bankruptcy Court entered the Confirmation Order.

7. On February 8, 2006, this Court issued a *Notice of District Court Hearing on Entry and Affirmance of Confirmation Order* (the "Notice"). The Notice was electronically filed on both the Bankruptcy and District Court dockets, and was served on all parties who requested notice pursuant to Bankruptcy Rule 2002 and other interested parties. The Notice provided that any objections to the confirmation of the Modified Plan must be provided to this Court, in writing, by February 21, 2006, and that a hearing would be held on February 28, 2006. This Court has not received an objections, written or otherwise, to the confirmation of the Modified Plan.

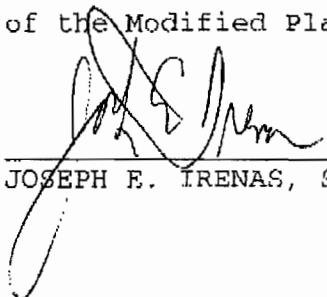
8. At the hearing on February 28, 2006, as provided in the Notice, no one appeared to oppose the Modified Plan. Having independently reviewed the opinion of the Third Circuit, the Confirmation Order and the materials related thereto, the Court concludes that confirmation of the Modified Plan is appropriate.

And for good cause shown,

**IT IS** on this **1st** of **March, 2006,**

**ORDERED THAT:**

The December 19, 2005, Confirmation Order is hereby **AFFIRMED**, including, but not limited to, the Asbestos Insurance Entity Injunction found in Paragraph 7.4 and the Channeling Injunction found in Paragraph 7.15 of the Modified Plan.

  
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JOSEPH E. IRENAS, S.U.S.D.J.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

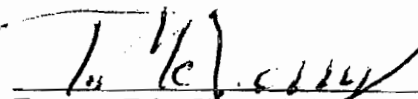
In re: ) Misc. No. 04-295  
 ) Bankruptcy No. 03-35592 - JKF  
Mid-Valley, Inc., et al. )

**ORDER AFFIRMING ORDER CONFIRMING PLAN OF REORGANIZATION**

**AND NOW**, this 26th day of July, 2004, it is **ORDERED** that pursuant to 11 U.S.C. § 524(g)(3)(A), the Amended Order Confirming Plan of Reorganization issued by the Bankruptcy Court and dated July 21, 2004, at Bankruptcy Docket No. 1716, is **AFFIRMED nunc pro tunc** to July 16, 2004.

It is further **ORDERED** that counsel for the Debtors shall serve a copy of this Order upon all parties in interest, including but not limited to the Service List in effect in this case.

BY THE COURT:

  
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Terrence F. McVerry, Judge  
United States District Court

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