

Hearing Date: June 11, 2013 at 11:00 a.m.
Objection Deadline: May 30, 2013 at 12:00 p.m.

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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

_____)	CHAPTER 11
In re:)	
)	
ARCAPITA BANK B.S.C.(c), et al.,)	CASE NO. 12-11076 (SHL)
)	
Debtors.)	(Jointly Administered)
_____)	

**LIMITED OBJECTION AND RESERVATION OF RIGHTS
OF THE ACE COMPANIES TO SECOND AMENDED
JOINT PLAN OF REORGANIZATION OF ARCAPITA BANK B.S.C.(c) AND
RELATED DEBTORS UNDER CHAPTER 11 OF THE BANKRUPTCY CODE**

ACE American Insurance Company (“ACE”) and possibly one or more additional affiliates and/or subsidiaries (collectively with ACE, the “ACE Companies”), by and through their undersigned counsel, raise the following limited objection and reservation of rights to the Second Amended Joint Plan of Reorganization of Arcapita Bank B.S.C.(c) and Related Debtors

Under Chapter 11 of the Bankruptcy Code dated April 24, 2013 [Docket No. 1038] (the “**Plan**”)¹ filed by Arcapita Bank B.S.C.(c), Arcapita Investment Holdings Limited, Arcapita LT Holdings Limited, WindTurbine Holdings Limited, AEID Holdings Limited, RailInvest Holdings Limited and Falcon Gas Storage Company, Inc. (collectively, “**Debtors**”), and state as follows:

BACKGROUND

A. The Policies

1. On March 19, 2012, each of Debtors filed a voluntary petition for Chapter 11 relief in the United States Bankruptcy Court for the Southern District of New York (the “**Bankruptcy Court**”), except for Falcon Gas Storage Company, Inc. (“**Falcon**”), which filed on April 30, 2012 (together with March 19, 2012, the “**Petition Dates**”).

2. Prior to the Petition Dates, ACE issued certain gas storage tank insurance policies for various policy periods (the “**Policies**”) in connection with the insurance programs of Falcon (and possibly other named insureds).

3. One or more of the ACE Companies issued one or more bonds (the “**Bonds**”) to one or more Debtors and/or their respective non-debtor subsidiaries. One or more Debtors and/or their respective non-debtor subsidiaries are also parties to an Agreement of Indemnity (the “**Indemnity Agreement**”) and a Guarantee (the “**Guarantee**”), each dated August 1, 2011, which were entered into in connection with the Bonds.

4. Some of the ACE Companies may have also entered into one or more other agreements (collectively with the Policies, Bonds, Indemnity Agreement and Guarantee, the “**Agreements**”) with one or more of the Debtors in connection with the Policies and/or the Bonds.

¹ Capitalized terms not otherwise defined herein shall have the meanings ascribed in the Plan.

5. In connection with the Agreements, ACE has certain continuing rights (the “**Contractual Rights**”) and Debtors have certain continuing obligations (the “**Contractual Obligations**”). For example and without limitation, Debtors may be obligated to pay to ACE, among other things and without limitation, certain premium payments, deductibles, self-insured retentions, reimbursement obligations, fees, expenses, and related costs that may be or become due under the Agreements. ACE may also have certain rights of contribution and/or indemnification against Debtors under the Agreements, and may also hold claims that are presently contingent and unliquidated for any and all rights to payment, rights to receive performance, actions, defenses, setoffs and/or recoupments arising from, related to, or in connection with any and all of Debtors’ duties and obligations under the terms of the Agreements.

B. The Plan

6. On April 25, 2013, Debtors filed the Plan, which provides for all executory contracts to be deemed rejected as of the Effective Date, unless (a) previously assumed, rejected or renegotiated; (b) subject to a pending motion to assume or reject; (c) identified on the Assumed Executory Contract and Unexpired Lease List; or (d) assumed pursuant to the Plan or Confirmation Order. Plan § 6.1. On or about May 20, 2013, Debtors caused Notices of (I) Assumption and Possible Assignment of Executory Contracts and Unexpired Leases, (II) Cure Amounts, and (III) Deadline to Object to Cure Amounts and Assumption and Assignment (the “**Cure Notices**”) to be served, which indicate Debtors’ intention to include the Indemnity Agreement and the Guarantee on the Assumed Contract and Unexpired Lease List referenced in Plan § 6.1.

LIMITED OBJECTION

7. The Plan contains the following provision, which appears incompatible with Debtors' ongoing obligations in connection with the Agreements:

Except as otherwise expressly provided herein, none of the Released Parties, the New Holding Companies, or the Reorganized Debtors shall be determined to be successors to any of the Debtors with respect to any obligations for which the Debtors may be held legally responsible, by reason of any theory of law or equity, and none can be responsible for any successor or transferee liability of any kind or character. The Released Parties, the New Holding Companies, and the Reorganized Debtors do not agree to perform, pay or indemnify creditors or otherwise have any responsibilities for any liabilities or obligations of the Debtors, whether arising before, on or after the Confirmation Date, except as otherwise expressly provided in the Plan.

Plan § 9.3.

8. A bankruptcy court cannot alter or enlarge an insurer's state law contractual obligations. *See In re Coupon Clearing Serv., Inc.*, 113 F.3d 1091, 1099 (9th Cir. 1997) (“[T]he estate ha[s] no greater rights in property than those held by the debtor prior to bankruptcy.”); *Moody v. Amoco Oil Co.*, 734 F.2d 1200, 1213 (7th Cir. 1984), cert. denied, 469 U.S. 982 (1984) (the Bankruptcy Code is not intended to expand debtor's rights against others more than they exist at the commencement of the case). A debtor cannot assume the benefits of an executory contract without assuming the corresponding burdens imposed upon the debtor. Accordingly, in the event Debtors intend to assume the Agreements as executory contracts, they must be assumed *cum onere*. *AGV Productions, Inc. v. Metro-Goldwyn Mayer, Inc.*, 115 F. Supp. 2d 378 (S.D.N.Y. 2000) (holding that the Bankruptcy Code does not permit a debtor to assume and assign only a portion of a contract).

9. To the extent that the Agreements are deemed to be executory, Debtors must assume the Agreements as a condition of continuing the benefits provided under those

agreements. The rejection of the Agreements may leave the Reorganized Debtors without certain potentially important insurance coverage. *See In re CVA General Contractors, Inc.*, 267 B.R. 773, 778 (Bankr. W.D. Tex. 2001) (rejection of liability policy relieves insurer of obligation to provide post-petition coverage).

10. To the extent the Agreements are deemed to be non-executory, the Debtors' obligations thereunder "pass through" as a condition of receiving the benefits under the agreements. *See, e.g., In re Stewart Foods, Inc.*, 64 F.3d 141, 145 (4th Cir. 1995)(terms of non-executory contract binding); *Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1153 (3d Cir. 1989)(debtors bound by arbitration clause in non-executory contract). Accordingly, regardless of whether the Agreements are executory contracts under the Bankruptcy Code, the Debtors and/or Reorganized Debtors, cannot retain the benefits of the Agreements without satisfying the continuing obligations of the Debtors under the Agreements.

11. In recognition of the above principle, courts have held that, in order to be confirmable, a plan of reorganization must be "insurance neutral." *See, e.g., In re Combustion Engineering*, 391 F.3d 190 (3d Cir. 2005). To ensure that the Plan is insurance neutral, the ACE Companies propose adding the following language to the Confirmation Order:

Notwithstanding any other term or provision in the Plan (including without limitation Plan § 9.3) or this Order, nothing in the Plan or this Order (i) will prejudice any of the rights, claims or defenses of Debtors' insurers ("Insurers") and sureties ("Sureties") under any insurance policies under which Debtors or Reorganized Debtors seek coverage (the "Policies"), any surety bonds issued by Sureties at the request of the Debtors (the "Bonds"), and any agreements related to the Policies and/or Bonds, including but not limited to agreements of indemnity, guarantees and letters of credit (together, with the Policies and Bonds, the "Insurance Agreements"); (ii) will modify any of the terms, conditions, limitations and/or exclusions contained in the Insurance Agreements which shall remain in full force and effect; (iii) shall be deemed to create any insurance coverage that does not otherwise exist, if at all, under the

terms of the Insurance Agreements, or create any right of action against the Insurers and/or Sureties that does not otherwise exist under applicable non-bankruptcy law; (iv) shall be deemed to prejudice any of the Insurers' and/or Sureties' rights and/or defenses in any pending or subsequent litigation in which the Insurers, Sureties, Debtors or Reorganized Debtors may seek any declaration regarding the nature and/or extent of any insurance coverage under the Insurance Agreements; (v) shall be deemed to alter the continuing duties and obligations of any insured, principal and/or indemnitor under the Insurance Agreements (including the issuer of any letter of credit); or (vi) shall be construed as an acknowledgement that the Insurance Agreements cover or otherwise apply to any claims or that any claims are eligible for payment under any of the Insurance Agreements.

The inclusion of this provision in the Confirmation Order would resolve the ACE Companies' limited objection to confirmation of the Plan, ensure that the Plan is insurance neutral, and prevent potential future disputes concerning the Plan's impact (if any) on the Agreements.

Reservation of Rights

12. The ACE Companies expressly reserve the right to assert claims for any presently unliquidated amounts for any obligations due and owing under the Agreements. The ACE Companies reserve, and do not waive, all of their rights, defenses, limitations and/or exclusions in connection with the Agreements and/or applicable law. The ACE Companies further reserve all rights to assert any and all such rights, defenses, limitations and/or exclusions in any appropriate manner or forum whatsoever (including without limitation arbitration, the United States District Court, or any state court). Nothing contained in this Limited Objection shall be deemed to expand any coverage that may otherwise be available under any insurance policies, surety bonds, or agreements, or any rights to payment under any settlements.

13. The ACE Companies further reserve all of their rights to raise the issues contained in this Limited Objection and any other related issues in any procedurally-appropriate contested matter and/or adversary proceeding including, without limitation, a separate adversary

proceeding requesting any appropriate declaratory and/or injunctive relief with respect to any rights under the Agreements and applicable law that may be adversely affected by confirmation of the Plan.

14. The ACE Companies further reserve all of their rights to object to any claim for coverage under the Agreements and/or any claim for payment under any settlement agreements, and/or to seek declaratory and/or injunctive relief to the extent that treatment of their rights under the Agreements and/or confirmation of the Plan violates any terms or conditions of the Agreements and/or settlements or gives rise to any defenses on behalf of the ACE Companies.

15. Nothing in this Limited Objection shall be construed as an acknowledgment that any of the Agreements covers or otherwise applies to any claims, losses or damages on account of any claims or otherwise, or that any such claims or causes of action are eligible for payment.

16. The ACE Companies reserve the right to seek an adjudication that Debtors have waived or forfeited any available coverage under the Agreements.

17. Finally, the ACE Companies reserve their right to amend, modify or supplement this Limited Objection in response to, or as a result of, any discovery being conducted in connection with confirmation of the Plan and/or any submission in connection with the Plan or these Chapter 11 Cases filed by any party-in-interest, including without limitation the Plan Supplement. The ACE Companies also reserve the right to adopt any other objections to confirmation of the Plan filed by any other party.

Conclusion

For the reasons set forth above, without the inclusion of specific language in the Confirmation Order reserving all of the ACE Companies' contractual and other rights under the Agreements, the Plan could be construed in a way that impermissibly modifies the ACE

Companies' rights and cannot be confirmed.

Dated: New York, NY
May 30, 2013

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