

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

In re:

VERTEX ENERGY, INC., et al.¹

Debtors.

Chapter 11

Case No. 24-90507 (CML)

Objection Deadline:
November 11, 2024

**GLOBAL AEROSPACE, INC., AS INSURANCE POOL MANAGER FOR AMERICAN
ALTERNATIVE INSURANCE CORPORATION, AMERICAN COMMERCE
INSURANCE COMPANY, NATIONAL INDEMNITY COMPANY, AND TOKIO
MARINE AMERICA INSURANCE COMPANY' S
LIMITED OBJECTION TO POTENTIAL ASSUMPTION AND
ASSIGNMENT OF ITS INSURANCE POLICY**

[Relates to Dkt. No. 158]

Global Aerospace, Inc., as Insurance Pool Manager for American Alternative Insurance Corporation, American Commerce Insurance Company, National Indemnity Company, and Tokio Marine America Insurance Company (“Global”), by and through its undersigned counsel, hereby files this limited objection (the “Limited Objection”) to the Notice of Cure Costs and Potential Assumption and Assignment of Executory Contracts and Unexpired Leases in Connection with Sale [Dkt. No. 158] (the “Cure Notice”) and in support of the Limited Objection, Global respectfully states as follows:

¹ A complete list of each of the Debtors in these chapter 11 cases may be obtained on the website of the Debtors’ proposed claims and noticing agent at <https://www.veritaglobal.net/vertex>. The location of Debtor Vertex Energy, Inc.’s corporate headquarters and the Debtors’ service address in these chapter 11 cases is 1331 Gemini Street, Suite 250, Houston, Texas 77058.



BACKGROUND

The Bankruptcy Case

1. On September 24, 2024 (the “Petition Date”), the Debtors filed voluntary petitions for 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 Texas. The Debtors’ cases are being jointly administered under Case No. 24-90507 (CML).

The Insurance Policy

2. Prior to the Petition Date, Global issued a certain Aviation Insurance Policy for Unmanned Aircraft Systems identified as Policy No. 9032529 (as may be renewed, amended, modified, endorsed, or supplemented from time-to-time, collectively, the “Policy”)² to debtor Vertex Refining Alabama, LLC as an insured (the “Insured”).

3. Pursuant to the Policy, Global provides, *inter alia*, certain liability and physical damage coverage for certain scheduled unmanned aircraft weighing up to 55lbs that are owned and operated by the named insured for a specified policy period subject to certain limits, deductibles, retentions, exclusions, terms, and conditions, as more particularly described therein and the insured is required to pay to Global certain amounts and perform certain actions in furtherance of the terms of the Policy (collectively, the “Policy Obligations”).

4. The Insured’s payment obligations under the Policy have been satisfied as of the date of this Limited Objection for the current policy period, but additional sums may be incurred between this date and the date of any potential assumption and assignment and such amounts remain subject to future audits and adjustments and the potential for retrospective premiums.

² The full policy is voluminous and in the possession of the Debtors. Global reserves the right to submit the Policy to the Court to the extent that there is any disagreement over its stated terms.

5. On September 24, 2024, the Debtors filed their Emergency Motion for Entry of an Order (I) Approving the Bidding Procedures and Auction, (II) Scheduling Bid Deadlines, an Auction, Objection Deadlines, and a Sale Hearing, (III) Approving The Assumption and Assignment Procedures, (IV) Approving the Form and Manner of Notice of a Sale Transaction, the Auction, the Sale Hearings, and Assumption and Assignment Procedures, and (V) Granting Related Relief [Dkt. No. 5] (the “Sale Motion”).

6. On September 25, 2024, the Court entered the Order (I) Approving the Bidding Procedures and Auction, (II) Scheduling Bid Deadlines, and Auction, Objection Deadlines, and a Sale Hearing, (III) Approving The Assumption and Assignment Procedures, (IV) Approving the Form and Manner of Notice of a Sale Transaction, the Auction, the Sale Hearings, and Assumption and Assignment Procedures, and (V) Granting Related Relief [Dkt. No. 55] (the “Bid Procedures Order”) establishing an auction and sale process to sell some or substantially all of Debtors’ assets to one or more buyers.

7. On October 9, 2024, the Debtors filed the Cure Notice and served the notice on Global via electronic mail and U.S. Mail. The Cure Notice lists the Policy as an executory contract between the Insured and Global subject to potential assumption and assignment to an unknown buyer for a cure amount of “\$0.00”.

8. On October 21, 2024, Global filed a Limited Objection to Cure Notice [Dkt. No. 218](the “Global Cure Objection”) that remains unresolved as of this date. Global incorporates the Global Cure Objection by reference herein at length.

9. On November 5, 2024, the Debtors filed a Notice of Acceptable Indications of Interest [Dkt. No. 384], which indicates that the Debtors have “received at least one acceptable

non-binding written indication of interest” but it does not clearly inform contract counterparties if the Debtors intend to proceed with a credit bid sale or an auction process.

10. To date, Global has not been provided with any adequate assurance of future performance under the Policy by the Debtors or any proposed assignee of the Policy.

LIMITED OBJECTION

11. Global files this Limited Objection to the proposed assumption and assignment of the Policy on the basis that (A) the insurance coverage under the Policy cannot be split between Insured and a buyer and may not be split between multiple buyers of the Debtors’ assets unrelated to the buyer; (B) the Policy must be assumed and assigned, if at all, as a whole, and in order to be entitled to any of the benefits of the Policy, the buyer must remain liable for the Policy Obligations thereunder; (C) to the extent that the Debtors seek to assume and assign or otherwise transfer the Policy, the Policy cannot be assigned or otherwise transferred without the consent of Global, and such consent has not been sought or given; and (D), as Global has not been definitively advised as to whether a buyer intends to seek assignment of the Policy and has not been provided with any risk, underwriting, and other relevant financial information concerning such buyer, Global therefore lacks adequate assurance of future performance of the Policy by the buyer.

A. It is Improper to Split The Coverage Under the Insurance Programs Between Unrelated Entities.

12. With respect to the Policy, it would be improper and not contemplated by the terms of the Policy to allow the sale process to require Global to insure the Insured and a buyer or for the Policy to be assumed and assigned to more than one buyer. It is unclear exactly what Debtor entities or assets are being sold or whether the Policy will follow the unmanned aircraft scheduled by the Insured under the Policy (presumably all to one buyer). As discussed below, insurers cannot

be compelled to provide insurance coverage, and to put Global in the position of potentially insuring more than one entity on account of the same Policy which only applies now to one of the Debtors. To do so would be to put Global in an untenable and unequitable position which should not be permitted.

13. Accordingly, Global objects to the Sale Motion to the extent it contemplates requiring the Policy to insure more than one entity.

B. The Insurance Policy and the Obligations Thereunder are Indivisible.

14. It is well-established that section 365(f) requires a debtor to assume a contract subject to the benefits and burdens thereunder. *E.g. In re Fleming Cos.*, 499 F.3d 300, 308 (3d Cir. 2007) (“The [debtor] . . . may not blow hot and cold. If he accepts the contract he accepts it cum onere. If he receives the benefits he must adopt the burdens. He cannot accept one and reject the other.”) (internal citations and quotations omitted) (alterations in original).

15. Furthermore, courts cannot alter terms of contracts, and must instead enforce them as written. *See, e.g., Wilson v. Career Educ. Corp.*, 729 F.3d 665, 679 (7th Cir. 2013) (“A court may not rewrite a contract to suit one of the parties but must enforce the terms as written.”) (citation omitted); *In re Lloyd E. Mitchell, Inc.*, 06-13250- NVA, 2012 Bankr. LEXIS 5531 (Bankr. D. Md. Nov. 29, 2012) (noting that “insurance contracts cannot be re-written by th[e] Court”).

16. Under this well-established caselaw, in order to be entitled to any of the benefits of the Policy, a buyer must also remain liable for all of the Policy Obligations thereunder.

17. Accordingly, any assumption and assignment or other transfer of the Policy must be in its entirety, and Global therefore objects to the assumption and assignment or other transfer of the Policy to a buyer to the extent that the sale transaction contemplates an improper split of the Policy and its coverage from the Policy Obligations.

C. The Policy Cannot be Assigned or Otherwise Transferred Without the Prior Written Consent of Global, Which has not Been Sought or Given.

18. To the extent that the Debtors seek to assign or otherwise transfer the Policy to a buyer, such assignment cannot occur without the express written consent of Global.

19. Pursuant to section 365(c) of the Bankruptcy Code, a debtor may not assume or assign an executory contract if applicable law excuses the counterparty from accepting performance from or rendering performance to an entity other than the debtor and such party does not consent to the assumption or assignment. *See* 11 U.S.C. § 365(c)(1)(A) and (B).

20. Applicable non-bankruptcy law does, in fact, prohibit the assignment of insurance policies without the insurer's consent. *See, e.g., Banco Popular v. Kanning*, No. 1-13-CV-200, 2015 U.S. Dist. LEXIS 175647, at *25 (W.D. Tex.)(rev. on other grounds)(finding that a purported assignment of an insurance policy that did not comply with the express terms of the insurance policy was not enforceable); *Rotella v. Cutting*, 2011 Tex. App. LEXIS 7116, Tex. App.—Fort Worth 2011, no pet.) (where an insurer's express written consent to any transfer of rights under an insurance policy is required by the terms of the policy, failure to evidence the insurer's express written consent renders any purported transfer invalid); *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") (citations omitted); *Allied Corp. v. Frola*, 1992 U.S. Dist. LEXIS 15778 * 15 (D. N.J.) (holding that a "policy of insurance is a contract of indemnity, personal to the party to whom it is issued . . . it cannot be

transferred to a third person so as to be valid in his hands against the insurer, without the insurer's consent."').³

21. Similarly, insurers cannot be compelled to provide insurance coverage to any entity. *See Atwood v. Progressive Ins. Co.*, No. 950051089S, 1997 Conn. Super. LEXIS 2450, at *18 (Conn. Super. Ct. Sept. 3, 1997) (stating that "[i]nsurers should not, for example, be forced to assume coverage for a risk which at the time a policy was written was not fairly in its and the insured's contemplation"); *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."').

22. Accordingly, because Global has not consented to any proposed assignment of the Policy, Global objects to any and all such proposed assignments or transfers of the same.

D. The Buyer Must Provide Adequate Assurance of Future Performance.

23. Debtors have failed to clearly identify whether they intend to transfer the Policy to a proposed bidder via an auction or to a proposed credit bid purchaser. As such, Global has not yet been definitively advised as to whether a specific buyer intends to seek assignment of the

³ Some courts have found that insurance policies may be assigned to a trust created under section 524(g) of the Bankruptcy Code pursuant to a plan under section 1123 of the Bankruptcy Code without the consent of the insurer. *See, e.g., In re Federal-Mogul Global*, 684 F.3d 355, 382 (3d Cir. 2012) (holding that anti-assignment provisions in insurance policies were preempted by § 1123(a)(5)(B) of the Bankruptcy Code to the extent they prohibit transfer to a § 524(g) trust); *In re W.R. Grace & Co.*, 475 B.R. 34, 198-199 (D. Del. 2012) (holding that anti-assignment provisions in insurance policies were preempted by section 1123(a)(5)(B) of the Bankruptcy Code in the context of the establishment of a section 524(g) trust). The present case does not involve an assignment to a trust created pursuant to section 524(g) of the Bankruptcy Code or an assignment under a plan.

Policy, let alone been provided with risk, claim, and other financial information about any specific buyer to determine if adequate assurance of future performance by such buyer exists at this time.

24. Pursuant to section 365(f)(2) of the Bankruptcy Code, any assignee of a contract must provide adequate assurance of future performance.

25. Global does not have, and the Debtors have not supplied, any information, much less sufficient information, or a reasonable amount of time to determine if the buyer would be ready, willing, and able to provide adequate assurance of future performance and whether the buyer would satisfy Global's credit and underwriting criteria. Accordingly, Global is unable, at this time, to assess whether the buyer would satisfy those criteria and be able to perform all required Policy Obligations.

26. Further, as a condition precedent for any assignment of the Policy to the buyer, in addition to written consent, the Policy would need to be amended by an endorsement issued on Global's behalf by the Policy Issuing Office set forth in the Declarations section to the Policy. Such an endorsement has not been requested by the Debtors, let alone negotiated and issued for this Policy.

27. Accordingly, Global further objects on the basis that Debtors have not provided Global with adequate assurance as required by section 365(f)(2) of the Bankruptcy Code.

RESERVATION OF RIGHTS

28. Global specifically reserves all of its rights with respect to the Policy and its right to assert additional objections to the proposed sale, the assumption and assignment of executory contracts, or cure amounts or any documents relating to any of the foregoing.

WHEREFORE, Global objects to the Cure Notice and the proposed sale transaction(s) on the grounds set forth herein and reserves its rights to assert any additional objections to the

proposed sale transaction, any list or schedule of assumed contracts, assumed and assigned contracts, or cure amounts or any documents relating to any of the foregoing and/or the sale transaction, and to the assignment of the Policy.

Dated: November 11, 2024

MEHAFFY WEBER, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on this the 11th day of November 2024, the foregoing document is to be served as provided under the Court's CM/ECF system.

/s/ Holly C. Hamm

Holly C. Hamm