

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

	§	Chapter 11
IN RE	§	
IEH Auto Parts Holdings, LLC., <i>et al.</i> , ¹	§	Case No. 23-90054 (CML)
Debtors.	§	(Jointly Administered)
	§	
	§	Related Docket Nos. 96, 208, 466, 471, 475, 527
	§	Extended Objection Deadline by Agreement: June 16, 2023
	§	

OBJECTION AND RESERVATION OF RIGHTS OF FIDELITY AND DEPOSIT COMPANY OF MARYLAND TO (I) DEBTOR’S FIRST AMENDED COMBINED DISCLOSURE STATEMENT AND JOINT LIQUIDATING PLAN OF IEH AUTO PARTS HOLDING, LLC AND ITS DEBTOR AFFILIATES AND (II) TO THE ASSUMPTION AND/OR ASSIGNMENT OF ANY EXECUTORY CONTRACT

Fidelity and Deposit Company of Maryland, together with its affiliates (“F&D”), files this *Objection and Reservation of Rights to (I) Debtor’s First Amended Combined Disclosure Statement and Joint Liquidating Plan of IEH Auto Parts Holdings, LLC and Its Debtor Affiliates and (II) the Assumption and/or Assignment of any Executory Contracts* (the “F&D Objection” or the “Objection”) filed in connection with the proposed sale of certain of the Debtors’ assets. In support of this objection, F&D states as follows:

I.
BACKGROUND

1. On January 31, 2023, the Debtors filed for relief under Chapter 11 of the United States Bankruptcy Code. The Debtors continue to operate their businesses and manage their property as debtors-in-possession pursuant to §§ 1107(a) and 1108 of the Bankruptcy Code. The Court subsequently entered an order that the bankruptcy cases be jointly administered.

¹ The Debtor entities in these chapter 11 cases are: IEH Auto Parts Holding LLC; AP Acquisition Company Clark LLC; AP Acquisition Company Gordon LLC; AP Acquisition Company Massachusetts LLC; AP Acquisition Company Missouri LLC; AP Acquisition Company New York LLC; AP Acquisition Company North Carolina LLC; AP Acquisition Company Washington LLC; Auto Plus Auto Sales LLC; IEH AIM LLC; IEH Auto Parts LLC; IEH Auto Parts Puerto Rico, Inc.; and IEH BA LLC.



2. On February 10, 2023, the Debtors filed their *Motion for Entry of an Order (I) Approving the Bid Procedures, (II) Approving the Sale of the Debtors' Assets Free and Clear, and (III) Granting Related Relief* (the “**Sale Motion**”) [Dkt. 96].

3. On March 10, 2023, the Court approved the bidding procedures and entered the *Order Approving the Bid Procedures and Granting Related Relief* (the “**Bid Procedures Order**”) [Dkt. 208].

4. On April 25, 2023 and May 5, 2023, respectively, Debtors filed their *Initial Cure Notice for Executory Contracts and Unexpired Leases Subject to Possible Assumption and Assignment* [Dkt No. 361] and *First Supplemental Cure Notice of Executory Contracts and Unexpired Leases Subject to Possible Assumption and Assignment* [Dkt No. 475] (collectively, “**Assumption Notices**”), as contemplated by the Bid Procedures Order. The Assumption Notices are schedules of all contracts that could be assumed by the Debtors and/or assigned to a Winning Bidder or Back-up Bidder listing the counterparties to such contracts and the amount of any proposed cure amount. On May 13, 2023, the Debtors filed numerous notices of winning bids and back-up bids.

5. On June 9, 2023, the Debtors filed the Plan Supplement listed additional Retained Contracts.

6. F&D has an executory contract with Debtor IEH Auto Parts Holdings, LLC, as more particularly described below, but that contract was not listed on the Assumption Notices or any notice of winning bid.

7. On May 2, 2023, Debtors filed an emergency motion related to their *First Amended Combined Disclosure Statement and Joint Liquidating Plan of IEH Auto Parts Holdings, LLC and Its Debtor Affiliates* (“**Plan**”) [Dkt No. 466]. On May 2, 2023, the

Bankruptcy Court conditionally approved the Disclosure Statement and set forth deadlines for solicitation of the Plan and a hearing date. [Dkt No. 471] (“**Order Approving Disclosure Statement**”). Pursuant to the Order Approving Disclosure Statement, the initial deadline to object to the Plan was May 26, 2023. The Debtors provided F&D an extended deadline to object to the Plan until June 16, 2023, while the parties were engaged in discussion to informally resolve F&D’s concerns. The parties remain engaged in discussions until the eve of the confirmation hearing, and as a precaution F&D files this Objection.

8. Under Article III.C of the Plan, all executory contracts were to be deemed rejected unless already assumed, there was a pending motion to assume, or Debtors filed a supplemental list of Retained Contracts.

9. At the time of the filing of this F&D Objection, the Debtors have not listed F&D as a Retained Contract.

II. **F&D’S SURETY INTERESTS AND CLAIM**

10. On August 26, 2020, F&D issued surety bond #9353499 (the “**F&D Bond**”) in favor of IAP, Inc. and IAP-West, Inc. in the total penal sum of \$2,000,000.00 on behalf of Debtor IEH Auto Parts, LLC (“**Auto Parts**”)². See *Exhibit 1*. The total penal limit was later amended to be \$3,000,000.00. See *Exhibit 2*. As a condition to the issuance of any bond, including the F&D Bond, F&D and its affiliates required the execution of a *General Agreement of Indemnity* dated November 20, 2018 (the “**F&D GAI**”). See *Exhibit 3*. Debtor Auto Parts is also liable to F&D for indemnity under applicable non-bankruptcy law. Non-Debtor parent companies of Auto Parts, Ichan Automotive Group, LLC (“**IAG**”) and American Entertainment Properties, LLC (“**AEP**”), were signatories and listed as an Indemnitors under the F&D GAI.

² Pepboys Auto, The Pep Boys – Manny, Moe & Jack were also principals on the F&D Bond.

11. As collateral for the liability of Auto Parts, IAG and AEP under the F&D GAI, AEP, AEP as applicant caused a letter of credit to be issued by Citibank, NA dated July 23, 2021 in favor of F&D in the amount of \$2,636,439.50. The F&D Bond, F&D GAI and all related collateral agreements are referred to as the “**F&D Agreements.**”

12. After the petition date, on February 21, 2023, F&D has received a bond claim from IAP, Inc. and IAP West, Inc. in the amount of \$2,033,290.17 (“**F&D Bond Claim**”). On May 1, 2023, F&D filed proof of claim no. 230501 in the amount of \$3,000,000.00 as both a contingent and non-contingent claim. Upon information and belief, F&D was told by counsel for Debtors that the F&D Bond Claim was paid by either Debtors, IAG or AEP, but this payment has not been confirmed.

III. **OBJECTION**

13. F&D objects to confirmation of the Plan and to any potential assumption and/or assignment of the F&D Agreements on the following grounds:

- a. The Plan is vague as to the treatment of F&D. Article III.C relates to “Insurance Agreements,” but the suretyship relationship is not one of insurance and this section does not apply.³ The Plan does not state whether it intends to keep the relationship with its bonded vendors – IAP, Inc. and IAP-West, Inc. – and whether it wants the F&D Agreements to “pass through” unaffected by the bankruptcy, Plan, and Confirmation Order. To the extent that the Debtors want to retain the F&D Agreements, F&D requires appropriate language to address a number of issues, including payment of premiums, releases, preservation of all

³ The United States Supreme Court has held that “suretyship is not insurance.” *Pearlman v. Reliance Ins. Co.*, 371 U.S. 132, 140 n. 19 (1962). Suretyship differs from insurance in that a surety bond is a three-party contract involving a surety, principal and obligee while an insurance policy is a two-party contract between the insured and the insurer. A bond is issued by a surety for the benefit of the obligee only after the character, ability and financial worth of the principal is confirmed by the surety. This tripartite relationship is always present in a surety contract, while an insurance contract in itself never creates a tripartite relationship analogous to the surety relationship. *See Associated Indem. Corp. v. CAT Contracting, Inc.*, 964 S.W.2d 276 (Tex. 1998); *Great Am. Ins. Co.*, 908 S.W.2d at 418-19; *Meyer v. Building and Realty Serv. Co.*, 196 N.E. 250 (Ind. 1935). “Unlike a liability insurance contract, in which the obligation of the insurer to the insured is the *primary* obligation of indemnity to the insured for loss, the obligation of a surety to a bond obligee is *secondary* to the obligation owed by its principal.” *Great Am. Ins. Co.*, 908 S.W.2d at 418-19. *See Wright Way Constr. Co. v. Harlingen Mall Co.*, 799 S.W.2d 415, 426 (Tex. App.--Corpus Christi 1990, writ denied) (“The liability of a surety is derivative in nature.”) (emphasis added).

collateral, and preservation of rights against third parties. Furthermore, if Debtors are truly liquidating, there should be no need for the F&D Bond, as Debtors will no longer be purchasing goods from IAP, Inc. and IAP, West. If the IAP, Inc. and IAP West vendors contracts are to be assumed under the Bid Procedure Order or any Sale Order, the purchaser must understand that the F&D Bond only relates to the bonded principal only, Debtor Auto Parts, and not any third party. The F&D Agreements cannot be assumed and assigned to any purchaser. The L/C with Citibank, NA also cannot be altered as to F&D unless and until the F&D Bond is released. The Plan is also unclear as to the status of the Citibank L/C. While the Plan cannot alter the agreement between F&D and Citibank, the Plan does contain releases of liens, which may harm Citibank. F&D objects to anything in the Plan affecting its rights as to the Citibank L/C.

b. Assumption and Assignment. The Plan and Assumption Notices are unclear as to the treatment of the F&D Agreements under § 365 of the Code. Since Debtors may amend any assumption notices until confirmation, this objection is filed out of an abundance of caution. In addition, F&D also objects to the assumption and assignment of the F&D Agreements unless further arrangements are made between F&D, any Winning Bidder and Debtor, which include, but are not limited to, cure of all arrearages under the F&D Agreements. Regardless of Debtors' intent in this regard, the change in control provisions of the F&D GAI prevent the transfer of the bond rights and obligations, as well as a change in the bond principal. Furthermore, as a financial accommodation, the F&D Agreements cannot be assumed and assigned under §365(c)(1).

c. Releases and Opt Out. F&D objects to the releases and exculpations set forth in the Plan. Non-Debtors AIG and AEP are separately and contractually obligated to indemnify F&D for any liability and losses under the F&D Bond and the F&D GAI. The Plan impermissibly seeks to grant third parties releases, which are prohibited under §524 of the Code and case law related to third party releases, unless consent of some type is granted. F&D does not consent to any third-party releases of any non-Debtor affiliates or any party that may be liable to F&D under applicable non-bankruptcy law. To the extent an Opt Out is required by the Plan, F&D Opt Out of such releases.

14. Debtors must state their intention as to the F&D Bond, the F&D GAI and Debtor's expected future relationship with its bonded vendors, IAP, Inc. and IAP-West, Inc. If the bonds are no longer needed, then should be cancelled and released. F&D's objection can be resolved by the inclusion of the language below in any assumption order and/or sale order:

Nothing in this order shall be construed to authorize or permit: (i) the transfer of any contracts, rights or obligations by Fidelity and Deposit Company of Maryland, ("F&D") or (ii) the assumption and/or assignment of any agreement and/or supplemental agreements between F&D, and any

Debtor, which assumption and/or assignment, if any, is subject to subsequent court order after notice to F&D and an opportunity to respond and with all rights of all parties preserved.

15. Reservation of Rights. F&D reserves the right to contest the assumption, assignment or rejection of the F&D Agreements on any basis, including the proposed cure amount, and to supplement the legal authority cited herein. F&D further reserves the right to prosecute a motion for allowance and payment of an administrative expense for that portion of F&D's claim that may be subject to an administrative priority claim.

WHEREFORE, F&D respectfully requests that this Court sustain the Objection and for such other and further relief to which it may show itself to be justly entitled.

Dated: June 16, 2023

Respectfully submitted,

/s/ Duane J. Brescia

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**FIDELITY AND DEPOSIT COMPANY OF
MARYLAND**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing limited objection was sent electronically via this Court's CM/ECF System upon all registered users on this 16th day of June 2023.

/s/ Duane J. Brescia _____

Duane J. Brescia