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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

In re: HOPEMAN BROTHERS, INC., Debtor.	Chapter 11 Case No. 24-32428 (KLP)

PROVISIONAL OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO THE DEBTOR'S INSURANCE SETTLEMENT PROCEDURES MOTION

The Official Committee of Unsecured Creditors ("**Committee**") of Hopeman Brothers, Inc. ("**Debtor**"), by and through its undersigned counsel, hereby submits this provisional objection to the *Motion of the Debtor for Entry of an Order (I) Establishing Procedures to Schedule Hearings to Consider the Insurer Settlement Motions; (II) Approving the Form and Manner of Notice Thereof; and (III) Granting Related Relief* (Docket No. 54) ("**Procedures Motion**" or "**Mot.**"). The grounds supporting this provisional objection are as follows.

PRELIMINARY STATEMENT AND RESERVATION OF RIGHTS

1. On August 26, 2024, the Committee filed its *Motion of the Official Committee of Unsecured Creditors to Extend the Response Deadline and Continue the Hearing on the Debtor's Insurance Settlement Procedures Motion* [Docket No. 120] ("**Motion for Continuance**"). The Motion for Continuance seeks to continue the hearing on the Debtor's Procedures Motion, which is currently set for September 10, 2024, to the October omnibus hearing date (October 8, 2024), and to extend the Committee's deadline for objecting to the Procedures Motion from August 30, 2024, to and including October 1, 2024.

2. As explained more fully in the Motion for Continuance, hearing the Procedures Motion on September 10 would be premature because, before it can engage with the Debtor over procedures, the Committee needs to understand and take a position on the substance of the proposed insurance settlements, including as to whether settlements are even appropriate at this time given the direct rights that asbestos claimants have to access the Debtor's liability insurance policies. The Procedures Motion pertains to proposed insurance settlements that purport to (improperly) cap the Debtor's liability insurance coverage and interfere with the claimants' direct rights to access the coverage. Indeed, state law prohibits the extinguishment or alteration of liability insurance policies by a bilateral agreement between the insured and its insurer without the consent of injured claimants. *See, e.g.*, *Sales v. U.S. Underwriters Ins. Co.*, No. 93 CIV. 7580 (CSH), 1995 WL 144783, at *9 (S.D.N.Y. Apr. 3, 1995) (stating that "plaintiffs' right of action under [New York Insurance Law] Section 3420(a)(2) accrued at the time of the injury, and that any subsequent settlement or release effectuated by . . . [the tortfeasor] and . . . [insurance company] is not determinative of plaintiffs' rights"); *Storm v. Nationwide Mut. Ins. Co.*, 97 S.E.2d 759, 764 (Va. 1957) (noting that "rights and interests" of an injured person under a liability insurance policy cannot be "defeated" between the actions of the insured and the insurer under

"what the statutes make a tri-party contract"). More needs to be understood about the Debtor's insurance program and these proposed settlements before procedures and forms of notice can be addressed, and the Committee should not be prematurely forced into a litigation posture over these proposed settlements and procedures.

3. Nevertheless, since the Court may not have the opportunity to extend the Committee's deadline to object to the Procedures Motion before its current deadline of August 30, the Committee, in an abundance of caution, submits this provisional objection to highlight two objectionable features of the Procedures Motion. The Committee reserves the right to supplement the objections raised herein and to raise other objections to the Procedures Motion at a later time.[1]

ARGUMENT

I. The Debtor's Proposed Procedures Cannot "Deem" Non-Objecting Asbestos Claimants to Have Consented to the Proposed Insurance Settlements for Purposes of § 363(f) of the Bankruptcy Code

4. The proposed insurance settlements are, *inter alia*, structured as a sale of the Debtor's insurance coverage back to the relevant insurers free and clear of claims and interests, in accordance with § 363(f) of the Bankruptcy Code.[2] Section 363(f) permits free-and-clear sales of estate property if, *inter alia*, the affected "entity consents." 11 U.S.C. § 363(f)(2). Through the Procedures Motion, the Debtor seeks to have such consent "deemed" if asbestos claimants and other creditors fail to timely object to the proposed insurance settlements. Specifically, the

[1] The Committee acknowledges that section VI(H) of the Court's complex case procedures provides that, if a motion to extend time is filed before the expiration of the applicable period, "the time for taking the action is automatically extended until the Court rules on the motion."

[2] *See* Debtor's Mot. for Order (I) Approving Settlement Agreement and Release Between Debtor and Chubb Insurers; (II) Approving Assumption of Settlement Agreement and Release Between Debtor and Chubb Insurers; (III) Approving Sale of Certain Insurance Policies; (IV) Issuing Inj. Pursuant to Sale of Certain Insurance Policies; and (V) Granting Related Relief ¶¶ 36-42, Docket No. 9; Debtor's Mot. for Order (I) Approving Settlement Agreement and Release Between Debtor and Certain Settling Insurers; (II) Approving Sale of Certain Insurance Policies; (IV) [*sic*] Issuing Inj. Pursuant to Sale of Certain Insurance Policies; and (V) [*sic*] Granting Related Relief ¶¶ 33-39, Docket No. 53 (collectively, "**Insurance Settlement Motions**").

Procedures Motion proposes that "[a]ny objection not properly and timely filed and served shall be *deemed* to be waived and *to be a consent to the entry of an order approving the Insurer Settlement Motion[s]*." Mot. ¶ 14(b), at 7 (emphasis added). This is improper.

5. Courts in this district have consistently recognized that silence is not consent when it comes to § 363(f)(2). *In re DeCelis*, 349 B.R. 465, 468, 474 (Bankr. E.D. Va. 2006) (finding that a failure to oppose a motion to sell free and clear does not equate to consent under § 363(f)(2) and distinguishing cases that find otherwise) ("Unless there is a duty to speak, silence signifies nothing. . . . The trustee's motion to sell free and clear will be denied because Chevez has not consented to the sale and there is no bona fide dispute as to his ownership interest in the property. Chevez' silence is not consent."); *see also In re Russell*, 458 B.R. 731, 739 (Bankr. E.D. Va. 2010) (finding that "a creditor's failure to respond to a motion is not the equivalent of actual consent"); *In re Takeout Taxi Holdings, Inc.*, 307 B.R. 525, 534-35 (Bankr. E.D. Va. 2004) ("The failure of a secured creditor to respond to a motion to sell free and clear is not consent. . . . Generally, silence is not consent sufficient to permit a sale under § 363(f)(2).").

6. The *DeCelis* court relied heavily on the reasoning of *In re Roberts*, 249 B.R. 152 (Bankr. W.D. Mich. 2000), where the court determined that silence could not be deemed consent under § 363(f)(2) after examining both the definition of consent and the statute's legislative history. *DeCelis*, 349 B.R. at 467-69. The *DeCelis* court found "no indication within Section 363 itself or its underlying legislative history that Congress intended 'consents' to have any meaning other than that which it is commonly understood to have. 'Consent,' when used as a verb, means 'to give assent or approval.' Webster's Third New International Dictionary (unabridged) (1986)." *DeCelis*, 349 B.R. at 467 (quoting *Roberts*, 249 B.R. at 155). The court also rejected the trustee's argument that "consents" and "fails to object" are synonymous, explaining that "[w]hen a person

consents to a particular action, that person has unequivocally manifested his or her affirmation of the proposed action through some discernable statement or act." *Id.* (quoting *Roberts*, 249 B.R. at 155). At bottom, the *DeCelis* court concluded that "consent" is "an act affirmatively approving the proposed action. Had Congress intended silence to be consent in § 363(f)(2), it knew how to say so. It did not." *Id*. at 469.

7. Accordingly, the Procedures Motion is improper because it asks this Court to "deem" the consent of non-objecting creditors for purposes of § 363(f)(2). For this Court to find consent, a creditor must expressly make its consent known on the record or affirmatively opt into the proposed settlement. A claimant's silence (or even late-filed objection) is not enough to find consent under § 363(f)(2). The Court should deny the Procedures Motion on this basis.[3]

II. The Debtor's Proposed Notice and Briefing Deadlines Are Unreasonably Accelerated for a Proposed Settlement of Insurance Assets

8. The Debtor proposes to mail its "Insurer Settlement Notice" to the "Notice Parties" not less than twenty-one (21) days before the hearing on a given Insurance Settlement Motion. Mot. ¶¶ 17, 19. In addition, the Debtor proposes to cause its Insurer Settlement Notice to be published not less than twenty-one (21) and again not less than fourteen (14) days before the hearing on a given Insurance Settlement Motion. *Id.* ¶ 21. These proposed noticing procedures are inconsistent with the Debtor's own suggestion that this Court hold a hearing within as little as "fourteen (14) days following the date the Debtor provides notice required by these procedures[.]" *Id.* ¶ 14(a).

9. Moreover, the Procedures Motion contemplates parties objecting to a given Insurance Settlement Motion within as little as seven (7) days before the hearing and for the Debtor and applicable settling insurers filing their replies less than a day before the hearing. *Id.* ¶ 14(b)-

[3] The Debtor's "silence is consent" proposal also runs afoul of state law as discussed above in paragraph 2.

(c). This accelerated timetable would make it difficult for the Committee, other parties-in-interest, and, most importantly, this Court to

> look under the hood of the settlement vehicle, for "[t]here can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated." *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968) (further opining that "[t]he fact that courts do not ordinarily scrutinize the merits of compromises involved in suits between individual litigants cannot affect the duty of a bankruptcy court to determine that a proposed compromise forming part of a reorganization plan is fair and equitable").

MarkWest Liberty Midstream & Res., LLC v. Meridien Energy, LLC, No. 3:23CV593 (DJN), 2024 WL 3345342, at *17 (E.D. Va. July 9, 2024).

10. If and when settlement procedures are to be considered (and the Committee does not believe the Procedures Motion should be considered and approved at this time given the case's current posture), this Court should ensure that parties-in-interest are afforded sufficient time to evaluate any proposed insurance settlements and that a reasonable briefing schedule be put in place. Because the Procedures Motion does not propose sufficient time or a reasonable briefing schedule, it should be denied.

CONCLUSION

As explained above, this Court should continue the hearing on the Procedures Motion to October 8, 2024, and extend the Committee's deadline to file a more developed objection to and including October 1, 2024. In the absence of a continuance or extension, the Court should deny the Procedures Motion for the reasons explained herein.

Respectfully submitted,

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Dated: August 30, 2024