

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In Re	§	
	§	Chapter 11
	§	
TAYLOR - WHARTON	§	CASE NO. 09-14089 (BLS)
INTERNATIONAL LLC, <u>et. al.</u> ,	§	Jointly Administered
	§	
Debtors	§	

**TRIGO OBJECTION TO CONFIRMATION OF JOINT PLAN OF REORGANIZATION**

Stephen Trigo, a creditor and interested party, objects to the confirmation of the proposed Joint Plan of Reorganization in the above-captioned bankruptcy case.

*Statements of Jurisdiction and Statutory Authority for Relief*

1. The Court has jurisdiction to hear and determine all matters related to plan confirmation, including the objection, as a core proceeding pursuant to 28 U.S.C. §§1334 and 157(a)(b)(1)(2)(L).

2. Objection to confirmation of a proposed plan of reorganization is allowed under 11 U.S.C. §1128(b) and Fed. R. Bankr. P. 3020(b)(1).

*Relevant Procedural History*

3. Debtors filed the proposed Joint Plan of Reorganization (**Proposed Plan**) on December 4, 2009 [*Docket No. 77*].

4. On January 11, 2010, the Court entered an order approving the disclosure statement and setting the deadline for filing objections to confirmation of the Proposed Plan [*Docket No. 152*].

*Summary of Trigo Claim*

5. Objector asserts a claim against the bankruptcy estate arising from personal injuries and damages suffered on or about November 28, 2007 (**Claim**). The Claim is the subject

of a lawsuit pending in the 10<sup>th</sup> Judicial District Court of Galveston County, Texas, as Cause No. 08-CV-0992, styled *Stephen Trigo v. Calico Welding Supply Company, Luxfer Gas Cylinders, Sherwood Valve, LLC and Western Sales & Testing of Deer Park, Inc.* (**State Court Lawsuit**).

6. Objector filed a proof of claim asserting an unsecured and unliquidated claim against the bankruptcy estate [*Claim No. 146*].

*Proposed Plan Provisions Relevant to Objection*

7. Objector would be classified as a *Class 6 General Unsecured Claim* if the Proposed Plan is confirmed. *Proposed Plan, para. 3.9*. Based upon information that there is insurance coverage for Objector's claim, Objector would also be considered a *Potentially Insured Claim* under the Proposed Plan. *Proposed Plan, para. 1.2*.

8. The Proposed Plan provides a broad release by holders of claims and equity interests. *Proposed Plan, para. 5.3*. The provision includes a release and discharge of virtually all pre-petition claims, including Objector's claim. The only stated exceptions to the release and discharge are claims arising under ERISA, any claims or liabilities assumed by any Reorganized Debtor and any post-Effective Date obligations of any party under the Proposed Plan or any other plan document. There is no stated exception for a Potentially Insured Claim.

9. The discharge is also addressed as an effect of confirmation. *Proposed Plan, para 11.1*. The provision provides for the full release, discharge and satisfaction of a claim that is treated under the Proposed Plan. There are stated exceptions for pension plan claims and environmental claims. There is no stated exception for Potentially Insured Claims.

10. The Proposed Plan provides for an injunction to enforce the release and discharge. *Proposed Plan, para. 5.4*.

11. A creditor's vote to accept the Proposed Plan or the acceptance of a distribution under the Proposed Plan shall effect consent to the release and injunction provisions.

*Proposed Plan, para. 5.6.*

12. The Proposed Plan includes a specific provision addressing Potentially Insured Claims. *Proposed Plan, para 11.3.* Relevant parts of the provision are (a) the discharge shall not diminish or impair the enforceability of any Insurance Policy that may cover claims, *except as necessary to be consistent with the Plan*; (b) the Reorganized Debtors need only cooperate with the insurers in the defense and settlement of Potentially Insured Claims so long as it does not impose a significant cost or burden on the Reorganized Debtors and reserves the right of an insurer to disclaim coverage if the Reorganized Debtors fail to cooperate with the defense and settlement of a Potentially Insured Claim; (c) a claimant's receipt of a distribution under the Proposed Plan shall not be a basis upon which an insurer may disclaim coverage; (d) a claimant cannot proceed against any insurer on a claim that has been released or disallowed; (e) a claim that is allowed to proceed against an insurer shall first be required to commence an action in this Court against the insurer and the Debtor(s) in a nominal capacity; (f) limitations on the amounts to be paid by the insurers; and (g) this Court shall determine the forum for the claim to be determined.

13. Debtor may request this Court to estimate any contingent or unliquidated claim pursuant to 11 U.S.C. §502(c). *Proposed Plan, para 8.1.*

*Plan Confirmation Objection*

14. Objector objects to confirmation of the Proposed Plan. Certain provisions of the Proposed Plan do not comport with the provisions of the Bankruptcy Code and improperly expand the jurisdiction of this Court. The Proposed Plan impairs the ability of Objector to recover his claim in accordance with both bankruptcy law and applicable bankruptcy law. The Proposed Plan is ambiguous, confusing and contradictory with regard to Potentially Insured Claims.

15. Paragraphs 5.3 and 11.1 provide for the release and discharge of all Potentially Insured Claims. The discharge injunction precludes the recovery of Potentially Insured

Claims against non-debtor parties.

16. Paragraph 11.3 seemingly allows for Potentially Insured Claims to be asserted against insurance policies, except the provision also provides that the Potentially Insured Claim can only be asserted if it is consistent with the Proposed Plan and has not been released. The Proposed Plan provides for the release and discharge of all Potentially Insured Claims. There is no exception for Potentially Insured Claims. *Proposed Plan, paras. 5.3 and 11.1*. The release and discharge provisions improperly defeat and deny Potentially Insured Claims against non-debtor third parties in violation of the discharge provisions of the bankruptcy code. *11 U.S.C. §524(e)*.

17. The Proposed Plan is contradictory about the legal effect of the holder of a Potentially Insured Claim accepting a distribution. One provision of the Proposed Plan provides that the acceptance of a distribution is deemed consent to the release and injunction. *Proposed Plan, para. 5.6*. Paragraph 11.1 provides that the acceptance of a distribution cannot be the basis for an insurer to disclaim coverage. The same paragraph provides that an accepted distribution results in a release which precludes further assertion of a Potentially Insured Claim against an insurer.

18. Objector is a third-party beneficiary of any insurance contract which provides coverage for Objector's claim. The Proposed Plan improperly modifies the insurance contract and impairs the rights of Objector against the insurer with the provisions conditioning the requirement of the Reorganized Debtor(s) to cooperate in the defense and settlement of Potentially Insured Claims and limiting the amounts to be paid under the insurance contract.

19. The Proposed Plan improperly vests this Court with jurisdiction to decide the forum for personal injury claims to be determined. The Proposed Plan also improperly vests this Court with jurisdiction by requiring that actions for personal injury claims first be filed in this Court. The district court in which the bankruptcy case is pending is required to order that personal injury

tort and wrongful death claims be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose subject to applicable abstention doctrine. 28 U.S.C. §157(b)(5).

20. The Proposed Plan improperly vests this Court with jurisdiction to estimate unliquidated personal injury claims. This Court does not have jurisdiction to liquidate or estimate unliquidated personal injury claims for purposes of distribution. 28 U.S.C. §157(b)(2)(B).

*Proposed Resolution of Objection*

21. The release and discharge provisions of the Proposed Plan should be modified. While the Debtor can be discharged from personal liability for Objector's claim, the release language should be eliminated.

22. The discharge provision of the Proposed Plan should provide that the Debtor's discharge does not affect the liability of any other entity, including an insurer, or the property of any other entity, for the claim of Objector.

23. The proposed Plan should be modified to eliminate the provisions that acceptance of a distribution effects a release and discharge of Objector's claim. Objector should be allowed to recover both a distribution under the Proposed Plan and insurance proceeds if liability is established.

24. The proposed Plan should provide for (i) a modification of the discharge injunction to allow for the continued prosecution of the State Court Lawsuit, with Debtor as a nominal party or (ii) provide a mechanism for the District Court of Delaware to determine the venue for the trial of Objector's claim.

25. All provisions in the Proposed Plan which attempt to modify insurance contracts covering Objector's claim, including payment obligations and Debtor's obligations, should be eliminated. The Proposed Plan should specifically provide that the Reorganized Debtor shall

cooperate with insurers in the defense and settlement of personal injury lawsuits.

26. The provision in the Proposed Plan vesting this Court with jurisdiction to liquidate or estimate personal injury and wrongful death claims for the purpose of distribution should be eliminated.

*Prayer For Relief*

Objector requests that the Court sustain the objections; deny confirmation of the Proposed Plan; and grant such other and further appropriate relief.

Dated: February 8, 2010.  
Wilmington, Delaware

Respectfully submitted,

**BIFFERATO GENTILOTTI, LLC**

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**CERTIFICATE OF SERVICE**

Garvan F. McDaniel hereby certifies that on February 8, 2010, he caused a copy of the foregoing *Trigo Objection to Confirmation of Joint Plan of Reorganization* to be served by electronic notification through the CM/ECF System for the United States Bankruptcy Court for the District of Delaware on all parties registered in the case and on the following in the manner indicated:

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