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Counsel for the Chubb Companies

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re: Chapter 11
ERICKSON INCORPORATED, et al.,¹ Case No. 16-34393-hdh
Debtors. Jointly Administered

**OBJECTION OF THE CHUBB COMPANIES TO THE
SECOND AMENDED JOINT PLAN OF REORGANIZATION OF
ERICKSON INCORPORATED, ET AL. PURSUANT TO CHAPTER 11
OF THE BANKRUPTCY CODE AND THE RELATED CURE NOTICE**

¹ The Debtors in these Chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, include: Erickson Incorporated (7561); EAC Acquisition Corporation (3733); Erickson Helicopters, Inc. (5052); Erickson Transport, Inc. (9162); Evergreen Helicopters International, Inc. (1311); Evergreen Equity, Inc. (9209); and Evergreen Unmanned Systems, Inc. (3961). The location of the Debtors’ service address is 5550 SW Macadam Avenue, Suite 200, Portland, OR 97239.



Vigilant Insurance Company, Federal Insurance Company, Pacific Indemnity Company, Chubb Custom Insurance Company, ACE American Insurance Company, ACE Fire Underwriters Insurance Company, ACE Property and Casualty Insurance Company, Bankers Standard Insurance Company, Indemnity Insurance Company of North America and Westchester Surplus Lines Insurance Company (collectively with each of their affiliates and successors, the “Chubb Companies”), by and through their undersigned counsel, hereby file this Objection (the “Objection”) to the Second Amended Joint Plan of Reorganization of Erickson Incorporated, *et al.*, Pursuant to Chapter 11 of the Bankruptcy Code [Docket No. 381] (the “Plan”)² and the Related Cure Notice (as defined herein), and in support of the Objection, the Chubb Companies respectfully state as follows:

BACKGROUND

1. On November 8, 2016 (the “Petition Date”), the Debtors filed their respective voluntary petitions for bankruptcy relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) in the United States Bankruptcy Court for the Northern District of Texas, Dallas Division (the “Court”).
2. On February 3, 2017, the Debtors filed the Plan.
3. Concurrently with the Plan, the Debtors filed their Second Amended Disclosure Statement in Support of the Second Amended Joint Plan of Reorganization of Erickson Incorporated *et al.* Pursuant to Chapter 11 of the Bankruptcy Code [Docket No. 382] (the “Disclosure Statement”).
4. On February 6, 2017, the Court entered an order approving the Disclosure Statement [Docket No. 388].

² Capitalized terms used herein and not defined herein shall have the meaning given such terms in the Plan.

5. On February 15, 2017, the Debtors filed their Notice of Cure Procedures [Docket No. 411] (the “Cure Notice”)

6. On March 8, 2017, the Debtors filed the Plan Supplement for the Second Amended Joint Plan of Reorganization [Docket No. 493] (the “Plan Supplement”).

7. Prior to the Petition Date, the Chubb Companies issued certain insurance policies (as renewed, amended, modified, endorsed or supplemented from time to time, collectively, the “Policies”) to the Debtors as named insureds.

8. Pursuant to the Policies and any agreements related thereto (collectively, the “Chubb Insurance Program”), the Chubb Companies provide, inter alia, certain exporters package portfolio, excess directors’ and officers’, general liability, aviation, first party, workers’ compensation, environmental and pollution insurance, and certain other insurance for specified policy periods subject to certain limits, deductibles, retentions, exclusions, terms and conditions, as more particularly described therein; and the insureds, including one or more of the Debtors, are required to pay to the Chubb Companies certain amounts including, but not limited to, insurance premiums (including audit premiums), deductibles, funded deductibles, expenses, taxes, assessments and surcharges, as more particularly described in the Chubb Insurance Program (the “Obligations”).

9. The Plan provides:

Each of the Debtors’ insurance policies and any agreements, documents, or instruments relating thereto, are treated as Executory Contracts under the Plan. Unless otherwise provided in the Plan, on the Effective Date, (1) the Debtors shall be deemed to have assumed all insurance policies and any agreements, documents, and instruments relating to coverage of all insured Claims and (2) such insurance policies and any agreements, documents, or instruments relating thereto shall revert in the Reorganized Debtors.

Plan, Article V.F. (emphasis added).

10. In both the Cure Notice and the Plan Supplement, the Debtors list the following policies, each with a cure amount of \$0: Vigilant Insurance Company Workers' Compensation Insurance Policy #9915-2138, Pacific Indemnity Company Workers' Compensation Insurance Policy #9915-2137, Chubb Custom Insurance Company Contractors' Pollution Policy #3731-0893, Chubb Custom Insurance Company Environmental Policy #3731-0894 and Federal Insurance Company Commercial Property Policy #3601-1904 (collectively, and as a subset of the Chubb Insurance Program, the "Identified Policies").³

11. The Plan further provides:

Assumption of any Executory Contract or Unexpired Lease pursuant to the Plan or otherwise shall result in the full release and satisfaction of any Claims or defaults, whether monetary or nonmonetary, including defaults of provisions restricting the change in control or ownership interest composition or other bankruptcy-related defaults, arising under any assumed Executory Contract or Unexpired Lease at any time prior to the effective date of assumption. Any Proofs of Claim Filed with respect to an Executory Contract or Unexpired Lease that has been assumed shall be deemed disallowed and expunged, without further notice to or action, order, or approval of the Bankruptcy Court.

Plan, Article V.D. (emphasis added).

OBJECTION

12. The Chubb Companies object to the Plan to the extent that the Plan (A) does not clearly provide that the Reorganized Debtors cannot assume the Policies without remaining liable for all of the Debtors' obligations under the Chubb Insurance Program, (B) improperly addresses the cure amount for the Policies under the Chubb Insurance Program, (C) is inconsistent with the Cure Notice and Plan Supplement and (D) otherwise improperly releases Claims.

³ The Debtors list the Identified Policies multiple times but omit other Policies issued by the Chubb Companies.

A. The Reorganized Debtors' Cannot Continue To Receive The Benefits Of The Chubb Insurance Program Without Remaining Liable For The Debtors' Obligations Thereunder

13. The Plan appears to indicate that the Reorganized Debtors seek to continue to receive the benefits of the Chubb Insurance Program. *See, e.g.*, Article V.F. of the Plan (“the Debtors shall be deemed to have assumed *all* insurance policies and any agreements, documents, and instruments relating to coverage of all insured Claims”) (emphasis added).

14. The Plan further provides for any assumption of Executory Contracts to result in a release and satisfaction of any Claims thereunder. *See* Article V.D of the Plan.

15. However, it is well-established that a party cannot receive benefits of a contract without being liable for obligations thereunder. *See Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1311 (5th Cir. 1985) (“Thus, the often-repeated statement that the debtor must accept the contract as a whole means only that the debtor cannot choose to accept the benefits of the contract and reject its burdens to the detriment of the other party to the agreement.”); *see also In re Texas Rangers Baseball Partners*, 521 B.R. 134, 180 (Bankr. N.D. Tex. 2014) (“A debtor may not merely accept the benefits of a contract and reject the burdens to the detriment of the other party.”); *In re Aneco Elec. Constr.*, 326 B.R. 197, 202 (Bankr. M.D. Fla. 2005) (“It is black letter law that an executory contract must be either assumed in its entirety, *cum onere*, or completely rejected.”) (internal citations omitted); *In re Morande Enters.*, 335 B.R. 188, 192 (Bankr. M.D. Fla. 2005) (stating that the “law is clear that an executory contract may not be assumed in part and rejected in part”) (citation omitted).⁴

⁴ The Chubb Insurance Companies reserve the right to assert that the Chubb Insurance Program is an integrated insurance program that must be read, interpreted, and enforced together. *See Physiotherapy Holdings*, 2015 U.S. Dist. LEXIS 90367, at *17-18, 538 B.R. 225 (D. Del. 2015) (finding that separately drafted agreements dated at different times but relating to the same subject constitute one cohesive agreement); *Dunkin' Donuts Franchising LLC v. CDDC Acquisition Co. LLC (In re FPSDA I, LLC)*, 470 B.R. 257, 269 (E.D.N.Y. 2012) (holding that “two agreements [were] so interrelated, [that] they form[ed] a single overarching executory

16. Accordingly, the Reorganized Debtors cannot receive the benefits of the Chubb Insurance Program without remaining liable for the obligations thereunder.

17. Further, the assumption of the Chubb Insurance Program should not be deemed a full release and satisfaction of Claims arising under the Policies.

18. The Chubb Companies therefore object to the Plan to the extent that it seeks to limit or discharge the Debtors' continuing obligations under the Chubb Insurance Program.

B. Objection to the Cure Amount for the Chubb Insurance Program

19. The Debtors currently state that there is no cure amount due to the Chubb Companies on account of the Identified Policies. *See* Cure Notice, Exhibit 1.

20. However, it is important to note that, as more particularly described in the Chubb Insurance Program, the Debtors are required to pay the Obligations, regardless of when the underlying insured claim arose and regardless of when the amounts related thereto became liquidated, due or paid.

21. As such, the Chubb Companies may have contingent, unliquidated claims against the Debtors for the Obligations. By way of example and not limitation, additional premiums may be payable at audit under the terms of the Chubb Insurance Program, based upon factors as they exist throughout the coverage period. Therefore, the Chubb Companies may have contingent, unliquidated claims against the Debtors for any additional premium that may become due upon completion of audit(s).

22. Section 365(b)(1) of the Bankruptcy Code requires only that "defaults" be cured as a condition to assumption. Moreover, the Plan defines "Cure Claim" to mean "a Claim based

contract"); *In re Karfakis*, 162 B.R. 719 (Bankr. E.D. Pa. 1993) (stating "two contracts which are essentially inseparable can be, and should be, viewed as a single, indivisible agreement between the parties"); *In re Aneco Elec. Constr.*, 326 B.R. at 202.

upon the Debtors' defaults on an Executory Contract or Unexpired Lease at the time such contract or lease is assumed by the Debtors pursuant to Bankruptcy Code section 365." See Plan Exhibit A.

23. However, the Plan separately provides that "[a]ssumption of any Executory Contract or Unexpired Lease pursuant to the Plan or otherwise shall result in the full release and satisfaction of any Claims or defaults, whether monetary or nonmonetary...[.]" Plan, Article V.D.

24. The Debtors have continuing obligations under their Executory Contracts and the Chubb Insurance Program even though the Debtors may not currently be in "default" with respect to those obligations.

25. The Chubb Companies therefore object to the Plan to the extent that it seeks to limit or discharge the Debtors' continuing obligations under any part of the Chubb Insurance Program (including the Identified Policies) as assumed.

C. **The Plan Is Inconsistent In Its Proposal For Assumption Of Insurance Policies**

26. The Debtors submit a Plan that proposes to assume *all* insurance policies.

Specifically, the Plan provides:

Each of the Debtors' insurance policies and any agreements, documents, or instruments relating thereto, are treated as Executory Contracts under the Plan. Unless otherwise provided in the Plan, on the Effective Date, (1) the Debtors shall be deemed to have assumed all insurance policies and any agreements, documents, and instruments relating to coverage of all insured Claims and (2) such insurance policies and any agreements, documents, or instruments relating thereto shall revert in the Reorganized Debtors.

Plan, Article V.F. (emphasis added).

27. However, in their Cure Notice and Plan Supplement, the Debtors specifically list each insurance policy that the Reorganized Debtor is to assume. *See* Exhibit 1 to the Cure Notice and Exhibit 4 to the Plan Supplement.

28. Those policies listed in the Cure Notice and Plan Supplement do not capture the entirety of the Chubb Insurance Program, but rather, only the Identified Policies.

29. As more specifically described in the Chubb Insurance Program, however, the Debtors remain liable for the obligations (including the Obligations) of the entire Chubb Insurance Program, not only those obligations and related liabilities under the Identified Policies.

30. The Cure Notice and Plan Supplement are therefore inconsistent with the Debtors' prior filings to the extent the Plan asserts that the Reorganized Debtors will assume *all* insurance policies.

31. The Plan further presents uncertainty as to the Chubb Companies' rights to payment and the Debtors' related performance under the entirety of the Chubb Insurance Program.

32. Accordingly, the Chubb Companies object to the extent this inconsistency remains unaddressed and their rights to the Reorganized Debtors' performance under the Chubb Insurance Program remain uncertain.

D. The Plan Improperly Releases Claims

33. The Debtors submit a Plan and ballots related to the voting thereof that requires certain holders of Claims to "opt out" of Releases under Article VIII.D of the Plan.

34. The Plan provides:

As of the Effective Date, each Releasing Party is deemed to have released and discharged each Debtor, Reorganized Debtor, and Released Party from any and all Causes of Action, whether known or unknown, including any derivative

claims, asserted on behalf of the Debtors, that such Entity would have been legally entitled to assert...[.]

Plan, Article VIII.D.

35. Without “opting out” of this release through the voting procedure, certain holders of Claims may be deemed a Releasing Party.

36. The Plan defines Releasing Party as (i) the holders of all Claims or Interests who vote to accept the Plan; (ii) the holders of Claims or Interests that are Unimpaired under the Plan; (iii) the holders of Claims or Interests whose vote to accept or reject the Plan is solicited but who do not vote either to accept or to reject the Plan; and (iv) the holders of Claims or Interests who vote to reject the Plan but do not opt out of granting the releases set forth herein. *See* Plan, Exhibit A.

37. Further, the Plan proposes a voting procedure whereby only those Creditors who had submitted Claims prior to February 15, 2017 (the “Voting Record Date”), are to be considered holders of Claims and Interests entitled to receive Solicitation Materials and Creditors entitled to vote to accept or reject the Plan. *See* Article III.C of the Disclosure Statement.

38. The Proof of Claim Bar Date in this matter, however, does not occur until March 20, 2017 (the “Claims Bar Date”).

39. The Debtors therefore propose a plan that releases certain Claims and the Interests without knowing the full extent or amount of those actually holding such Claims and Interests.

40. Instead, only those that had submitted Claims over a month before the Claims Bar Date are known to the Debtors under this procedure.⁵

⁵ The Chubb Companies have not received ballots and believe this is consistent with Article V.F. of the Plan providing for assumption of *all* insurance policies and related agreements. However, the Chubb Companies reserve all rights with respect to voting, opting out and releases given the inconsistencies of the Plan with the Cure Notice and Plan Supplement.

41. Accordingly, by potentially releasing Claims of those holders who had not submitted their Claims by the Voting Record Date and by proposing a plan without knowing the full extent or amount of holders of such Claims, the Debtors' Plan therefore proposes to improperly release certain Claims.

WHEREFORE the Chubb Companies respectfully request this Court deny confirmation of the Plan or make the requested revisions to the Plan as proposed by the Chubb Companies in Exhibit "A," attached hereto.

Dated: March 13, 2017

Respectfully submitted,
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Counsel for the Chubb Companies

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of March 2017, a true and correct copy of the foregoing was served via the Court's CM/ECF electronic notification system upon all parties requesting service via same, and via United States Mail, postage prepaid upon the parties listed below:

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EXHIBIT A
Chubb Companies Proposed Revisions

Changes to V.F of Plan

Notwithstanding anything to the contrary in the Disclosure Statement, the Plan, the Confirmation Order, the Plan Documents, the Plan Supplement, any Ballot, the Exit Financing Documents, notice of cure procedures, or any other document related to any of the foregoing, or any other order of the Bankruptcy Court (including, without limitation, any provision that purports to be preemptory or supervening, grants an injunction or release or requires an insurer to vote or opt out of releases), eEach of the ~~Debtors'~~ insurance policies issued to or providing coverage at any time to the Debtors (or any of their predecessors) and any agreements, documents, or instruments relating thereto, are treated as Executory Contracts under the Plan and shall be. ~~Unless otherwise provided in the Plan, on the Effective Date, (1) the Debtors shall be deemed to have assumed all insurance policies and any agreements, documents, and instruments relating to coverage of all insured Claims by the Debtors -and (2) such insurance policies and any agreements, documents, or instruments relating thereto shall revert in the Reorganized Debtors and shall continue in full force and effect thereafter in accordance with their respective terms and applicable non-bankruptcy law and (ii) the Reorganized Debtors shall remain liable for all obligations thereunder to be satisfied in the ordinary course regardless of when they arise without the need or requirement for any insurer to file or serve a Claim or object to or assert a Cure Claim or cure amount.~~