

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

IN RE: )  
 )  
ESI ENVIRONMENTAL, INC., ) CASE NO. 10-14954-FJO-7A  
 )  
Debtor. )

**MOTION FOR LEAVE TO ASSUME EXECUTORY CONTRACT WITH  
WSP ENVIRONMENTAL & ENERGY**

Comes now Thomas A. Krudy in his capacity as Chapter 7 Trustee herein and files his “Motion for Leave to Assume Executory Contract with WSP Environmental & Energy” saying as follows:

1. On October 1, 2010, the Debtors, ESI Environmental, Inc. (“ESI”), Ecological Systems, Inc. (“Ecological Systems”), and Central Systems, Inc. (“Central Systems”) each filed separate voluntary Chapter 7 bankruptcy petitions in the U.S. Bankruptcy Court for the Southern District of Indiana, Indianapolis Division with this Court. For ease of reference, ESI, Ecological Systems, and Central Systems are sometimes hereinafter collectively referred to as the “Debtors”.

2. The Applicant, Thomas A. Krudy (“Trustee”), is the duly appointed and authorized Chapter 7 Trustee of the estate of each of the forenamed Debtors.

3. The Debtors all operate from the same address – 5232 West 79<sup>th</sup> Street, Indianapolis, Indiana 46268.

4. ESI is the 100% owner of all of the outstanding shares of Ecological Systems and Central Systems and the latter are ESI’s affiliates.

5. Per its Schedules, and aside from stockholdings in Ecological Systems and Central Systems, ESI owns only:

(a) a bank account in its name at Regions Bank; and

(b) three (3) pending lawsuits brought by ESI asserting claims against various insurers and an alleged polluter seeking monetary damages for, among other things, clean-up costs, and recoupment of expenses arising from environmental contamination located on a waste recycling and used oil processing facility owned by Ecological Systems located at 4910 West 86<sup>th</sup> Street, Indianapolis, Indiana 46268.

ESI's Schedules value the above assets at \$41,466.55. Its Schedules further reflect that these assets are encumbered by secured claims valued in ESI's Schedules at \$35,299,291.73. There are no Unsecured Priority Claims listed. There is one (1) Unsecured Claim listed in an "Unknown" amount.

6. Per its Schedules, Ecological Systems owns various assets in the form of bank accounts, security deposits, retainers with various law firms, accounts receivable, motor vehicles, office equipment, machinery and equipment, inventory, and certain standby letters of credit. Ecological Systems's Schedules value the above assets at \$2,682,064.89. The Schedules reflect that these assets are encumbered by secured claims valued in ESI's Schedules at \$35,584,646.88. The Schedules list Unsecured Priority Claims in the total amount of \$23,715.80 and Unsecured Claims in the total sum of \$1,324,586.40

7. Per its Schedules, Central Systems owns various assets in the form of bank accounts, security deposits, shares in certain wholly owned affiliate corporations (Ecological Services of America, Inc. and Environmental Resources, Inc. – entities which have not filed bankruptcy and listed of "Unknown" value in Central Systems' Schedules),

and certain motor vehicles, trailers, and related equipment. Ecological Systems's Schedules value the above assets at \$92,459.31. The Schedules reflect that these assets are encumbered by secured claims valued in ESI's Schedules at \$35,299,291.63. The Schedules list Unsecured Priority Claims in the total amount of \$500,000 and Unsecured Claims in the total sum of \$185,334.90.

8. The major secured creditors in each of the Debtors' separate bankruptcies are the same – Convergent Capital, ESI Environmental, Inc. Bridge Loan Fund, Medallion Capital, Inc. and Pacific Mezzanine Fund, LP who colle.

9. The Debtors' respective individual Chapter 7 bankruptcies are presently pending before three (3) separate judges in three (3) separate courtrooms in the Indianapolis Division, to wit:

(a) ESI's bankruptcy proceeding is presently pending as Case No. 10-14954-FJO-7A before the Hon. Frank J. Otte;

(b) Ecological System's bankruptcy proceeding is presently pending as Case No. 10-14958-JKC-7 before the Hon. James K. Coachys; and

(c) Central System's bankruptcy proceeding is presently pending as Case No. 10-14962-AJM-7.

10. Prior to the filing of ESI's bankruptcy petition, ESI operated a facility at 4910 West 86<sup>th</sup> Street in Indianapolis, Indiana which processed and sold to third-party customers used oil which ESI purchased from third-party generators and suppliers.

11. On or around July 18, 2007, ESI was advised by one of its customers, Permafix, that approximately 22 ppm of polychlorinated biphenyl ("PCBs") had been discovered in a used oil shipment that Permafix had received from ESI. Permafix

returned this contaminated shipment to ESI's Indianapolis facility, where it was thereafter segregated by ESI into a holding tank located on the facility. ESI later determined that the PCB-contaminated used oil had originally been received on July 6, 2007 and July 10, 2007 from Bee Environmental, a used oil broker.

12. By the time ESI learned of the presence of the PCBs at its site, contaminated shipments of used oil had already been processed by and through the ESI's plant. This processing resulted in the further contamination of ESI's equipment and in the contamination of other quantities of oil processed and stored at ESI's facility. ESI tracked and retrieved other outbound shipments of potentially contaminated oil and sequestered these shipments in holding tanks located on ESI's facility that were already contaminated with PCBs. ESI then ceased processing oil until it could identify the locations of contaminated portions of its processing system at its site. Additionally, ESI undertook remedial action of its own and reported the contamination incident to the Indiana Department of Environmental Management ("IDEM") and to the U.S. Environmental Protection Agency (the "EPA").

13. For the period between December 1, 2006 and December 1, 2007, ESI had insurance coverage in effect in the form of an environmental liability policy (Policy No. EG 1955725) and an umbrella liability policy (Policy No. EGU 1955726) issued by American International Specialty Lines Insurance Company n/k/a Chartis Specialty Lines Insurance Company ("AISLIC"). ESI provided AISLIC with notice of the PCB-contaminating event and then demanded coverage from AISLIC under the policies for damages ESI had incurred in connection with addressing the contamination and for the costs of any clean-up associated therewith.

14. AISLIC denied coverage of ESI's damage and clean-up claims and, as a result, ESI brought suit against AISLIC in the Marion County Superior Court. This action was thereafter removed by AISLIC to the U.S. District Court for the Southern District of Indiana (the "District Court"). Thereafter, ESI amended its Complaint and added its first party property insurer National Union Fire Insurance Company of Pittsburg, PA ("National Union") to the lawsuit. The lawsuit currently remains pending in the District Court as a matter captioned and styled as ESI Environmental, Inc. v. American International Specialty Lines Insurance Company, Civil Action No.: 1:07-cv-1182-DFH-DML. (the "AISLIC Lawsuit")

15. On January 29, 2008, shortly after the AISLIC Lawsuit was removed to the District Court, AISLIC issued a coverage position letter agreeing to provide coverage to ESI for the reasonable and necessary costs incurred incidental to the disposal of the PCBs at ESI's facility, maintaining, however, a full reservation of its rights. AISLIC then reimbursed ESI for certain costs and expenses that ESI had previously incurred in responding to the contaminating event and in taking action on its own to decontaminate portions of the PCBs located at ESI's facility. Additionally AISLIC worked with ESI to formulate and execute a decontamination plan that resulted in the removal of contaminated liquids from the holding tanks where it had been stored. Between July 2008 and November 2009, the decontamination of liquids at the site was completed by remediation contractors. However, thereafter, a dispute arose between ESI and AISLIC over the nature and scope of the decontamination process needed to address removal and decontamination of sludge that remained in holding Tanks 43, 44, and 51.

16. The dispute over the removal and decontamination of the sludge was ultimately resolved through the preparation of a plan by WSP Environmental & Energy (“WSP”) for decontamination of Tanks 43, 44, and 51. This plan, known as the “Proposed Draft Tank 51 Restoration Plan”, was consented to by both ESI and AISLIC and then submitted to the EPA on November 30, 2009. In response to the EPA’s comments, a revised plan (the “Revised Tank 51 Plan”) was submitted to the EPA on behalf of ESI on June 11, 2010. Pursuant to a letter dated September 30, 2010, the EPA approved the Revised Tank 51 Plan with minor revisions. By letter dated October 1, 2010, IDEM likewise approved the Revised Tank 51 Plan. Copies of the EPA and IDEM approval letters are appended hereto as Exhibits “A” and “B”, respectively.

17. Before the Revised Tank 51 Plan could be carried out, ESI filed its Chapter 7 bankruptcy.

18. On September 29, 2010, shortly before ESI’s bankruptcy filing, the EPA issued a unilateral Administrative Order authorizing the EPA to take over and decommission ESI’s facility.

19. Both the EPA and IDEM have recently indicated to WSP, AISLIC, and the Trustee that these agencies are anxious that WSP begin implementation of the Revised Tank 51 Plan “as soon as possible.”

20. The Trustee has been advised that WSP has selected a subcontractor (through a pre-petition bid process executed with the assistance of ESI) that is now prepared to immediately begin the decontamination process with respect to Tanks 43, 44, and 51 and carry out the Revised Tank 51 Plan.

21. AISLIC has advised the Trustee that it is incumbent that the remediation process with respect to the three tanks begins immediately so that it may be completed before the onset of freezing winter temperatures – which AISLIC advises may operate to retard or wholly prevent the planned clean-up at the ESI site.

22. AISLIC has requested the Trustee in writing, per a letter dated October 14, 2010 from its counsel, that the Trustee immediately authorize or otherwise permit WSP and its subcontractor(s) to work with EPA to carry out the decontamination process in accordance with the EPA's September 30, 2010 letter (see Exhibit "A" appended to this Motion) and the Revised Tank 51 Plan. A copy of AISLIC's October 14, 2010 letter to the Trustee to such effect is appended hereto as Exhibit "C".

23. Incidental to its request that ESI authorize the commencement of decontamination work on the storage tanks, AISLIC has indicated to the Trustee in its October 14, 2010 letter (see Exhibit "C") that AISLIC will pay the costs and expenses associated with the decontamination activities that are set forth in the Revised Tank 51 Plan. The Trustee has been further orally advised by AISLIC's counsel that such costs and associated expenses will include any necessary costs or charges for utilities needed to perform the Revised Tank 51 Plan and any costs or charges needed to provide site security at ESI's facility while the clean-up is underway.

24. To the extent that ESI's contract with WSP for the implementation of the Revised Tank 51 Plan may require ESI's ongoing oversight, cooperation, and payment to WSP (albeit with the commitment from AISLIC that it shall be ultimately liable for all costs incurred by WSP and its subcontractor(s) in performing the necessary work), such

contract is an executory contract requiring its formal assumption by ESI pursuant to 28 U.S.C. §365(a)

25. The Trustee is presently unaware of any defaults on the part of ESI with respect to its contract with WSP which would require, prior to assumption of its contract, any cure on the part of Trustee; which would require the Trustee to provide adequate assurance of future performance; or which would require the Trustee to compensate any party for pecuniary loss within the meaning of 11 U.S.C. §365(b), (c), or (d).

26. The Trustee believes that it is vital that ESI's assumption of its existing contract be promptly approved as, absent such assumption, the Trustee believes that:

(a) clean-up of the toxic PCB's at ESI's facility may be unduly stalled or delayed thereby detrimentally impacting the interests of the general public; and

(b) the time and expense already spent by ESI in connection with its negotiating its PCB remediation agreement with WSP would be rendered nugatory.

27. An emergency situation exists requiring expedited hearing of the Trustee's instant Motion.

28. Notice of the instant Motion has been supplied by the Trustee to AISLIC, WSP, National Union, the EPA, IDEM, and all creditors listed on the Creditor's Matrix. The Trustee submits such notice is adequate under the provisions of Rule 6006 (a) and (c).

WHEREFORE, Thomas A. Krudy, in his capacity as the Chapter 7 Trustee for the Debtor, ESI Environmental, Inc., prays the Court for relief in the form of an Order authorizing and providing for:

1. The bankruptcy estate's assumption of ESI's obligations under its PCB remediation agreement with WSP; and

2. All other relief necessary or proper in the premises.

Respectfully submitted,

/s/ Thomas A. Krudy  
Thomas A. Krudy, Trustee

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this pleading has been served upon the below listed parties by electronic mailing or by U.S. mail, postage prepaid on this 26th day of October, 2010:

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