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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

In re:	)	Chapter 11
	)	
ALPHA NATURAL RESOURCES, INC., *et al.*,	)	Case No. 15-33896 (KRH)
	)	
Debtors.	)	(Jointly Administered)

UNITED STATES' OBJECTION TO DEBTORS' AMENDED DISCLOSURE STATEMENT DATED MAY 14, 2016

Comes now, the United States of America ("United States"), on behalf of the U.S. Department of the Interior ("DOI") and its Office of Surface Mining Reclamation and Enforcement ("OSMRE"), and its Bureau of Land Management ("BLM"), the United States Environmental Protection Agency ("EPA"), and the U.S. Army Corps of Engineers ("USACE"), by and through undersigned counsel, and hereby files this Objection to Debtors' Amended

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Disclosure Statement with Respect to Amended Joint Plan of Reorganization of Debtors and Debtors in Possession (the "Amended Disclosure Statement") [Docket No. 2422].[1]

INTRODUCTION

1. On Saturday, May 14th, the Debtors Filed an Amended Disclosure Statement and an Amended Plan. The Amended Disclosure Statement and Amended Plan contemplate the creation of a new entity ("NewCo") and a reorganized entity ("ReorgCo").

2. As set forth below the United States contends that the Debtors' Amended Disclosure Statement fails to contain "adequate information" and therefore the Court should reject the Debtors' Amended Disclosure Statement or require the Debtors to provide additional information in a Second Amended Disclosure Statement.

LEGAL FRAMEWORK

3. The Objection filed by the United States Trustee's Office to the Debtors' Amended Disclosure Statement [Docket No. 2466] ("U.S. Trustee's Objection") accurately sets forth the legal framework for the role of the Disclosure Statement in the bankruptcy process, as well as what a disclosure statement should contain. Undersigned Counsel for the United States adopts the Legal Framework discussion of the United States Trustee's Objection as if set forth in full herein. Undersigned Counsel for the United States also joins in the arguments made by the United States Trustees Office as to the inadequacy of the Amended Disclosure Statement.[2]

[1] The United States received a one day extension of time from Debtors counsel, through Friday, May 20th.

[2] As pointed out by the U.S. Trustee, among the flaws in the Amended Disclosure Statement are as follows: Inadequate notice and process was provided with respect to the Amended Disclosure Statement; the Amended Disclosure Statement lacks a Liquidation Analysis and Financial Projections; Debtors have failed to provide support for the Releases and Exculpatory Clauses in the Amended Disclosure Statement; the exculpation provisions are impermissibly broad; the Amended Disclosure Statement and Plan fail to provide for exceptions to the Exculpation and Release clauses for Governmental Claims and causes of action; and the Amended Disclosure Statement fails to provide adequate information regarding leases requiring governmental consent to Assumption and Assignment (this last point is explained in greater detail *infra* at pp. 7-9).

4. As noted in the U.S. Trustee's Objection, there are certain items that are to be routinely included in a Disclosure Statement in order to provide adequate information to allow a creditor to make an informed judgment about the merits of a plan.

5. These are critical and include: 1) the anticipated future income of the Debtors; 2) a liquidation analysis; 3) the condition and performance of the Debtors while in Chapter 11; 4) a description of the accounting and valuation methods used to produce the financial information; and 5) any financial information, valuations or pro forma projections that would be relevant to the Creditors' determination of whether to accept or reject the plan.

6. The Amended Disclosure Statement is inadequate as to all of these types of information and the Court could easily refuse to approve the Debtors' Amended Disclosure Statement on this basis alone.

7. In addition, the Debtors indicate they received nine final bids for the Reserve Price Assets. *See*, Amended Disclosure Statement at Section I.A. Other than a one sentence explanation, the Debtors fail to indicate why they rejected the bids, and of particular interest to the United States, whether any of the bids provide for their continued compliance with environmental regulatory obligations.

The Amended Disclosure Statement

8. As noted in the Amended Disclosure Statement, as of the commencement of the Chapter 11 cases the Debtors were among the largest domestic producers of coal by volume in the United States, conducting mining operations primarily in Kentucky, Pennsylvania, Virginia, West Virginia and Wyoming. [Amended Disclosure Statement at Section II.A.]. The Debtors collectively own and or operate hundreds of mines throughout the above-referenced states, as

well as in Tennessee (which is not mentioned in the Amended Disclosure Statement). As the Debtors note in the Amended Disclosure Statement, the coal industry is heavily regulated by federal, state and local authorities with respect to, among other things, permitting and licensing requirements, financial assurance, performance standards, air emissions, discharges to water, remediation of contaminated soil, protection of surface and groundwater, and reclamation of property. [Amended Disclosure Statement at Section II.C.8.].

9. The United States, through OSMRE, EPA, DOI, and USACE, is charged with the police and regulatory responsibility to protect public health and the environment under several statutes, including the Surface Mining Control and Reclamation Act ("SMCRA"), 30 U.S.C. §§ 1201 *et seq.*, the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 *et seq.*, and the Safe Drinking Water Act ("SDWA"), 42 U.S.C. §§ 300f *et seq.*[3]

10. These statutes are designed, inter alia, to ensure that persons that own or operate facilities in the United States take necessary steps to protect public health, the environment and natural resources and to protect the public from serious environmental dangers regardless of whether a hazardous condition originated with the Debtors.

11. The Amended Disclosure Statement is almost entirely devoid of information regarding the size and composition of the Debtors' environmental compliance obligations overall, and how the obligations will be complied with by NewCo and ReorgCo. Perhaps most

[3] OSMRE retains substantial enforcement authority over coal mining permittees even in States with approved regulatory programs ('primacy states") that authorize those primacy states to take the lead in administering SMCRA in their States ("primacy states"). 30 U.S.C. § 1271(a)(1); 30 C.F.R. §§ 842.11(b)(1), 843.12(a)(2); *Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 294 (4th Cir. 2001) ("SMCRA . . . manifest[s] an ongoing federal interest in assuring that minimum national standards for surface coal mining are enforced."); *National Mining Ass'n v. United States Dep't of the Interior*, 70 F.3d 1345, 1347 (D.C. Cir. 1995) ("Department retains oversight and back-up enforcement authority including the power to issue a notice of violation (NOV) to a mine operator who, although not posing an imminent danger to the environment or to the health or safety of the public, is not satisfying a permit condition or a requirement of SMCRA. 30 U.S.C. § 1271(a)(3) (1986)."). Additionally, there being no state regulatory authority in Tennessee, OSMRE is the sole enforcer of SMCRA in that state, where Alpha has fifteen permits that need to be reclaimed.

importantly, the Amended Disclosure Statement is wholly lacking any financial analysis as to the projected costs of continued compliance with existing and future environmental and reclamation obligations. As noted by the United States Trustee, Exhibits C (Liquidation Analysis) and Exhibit D (Prospective Financial Information) have not been provided. Furthermore, the Amended Disclosure Statement should clearly specify that the Debtors' obligations under SMCRA, and the CWA, and any Consent Decrees, will, as they must, be complied with by the Debtors, any Reorganized Debtor, or any other future owner or operator of property formerly owned by the Debtors. Also, the financial costs to meet those obligations must be clearly described and an explanation of how those obligations will be met and funded by NewCo and ReorgCo must be provided.

Obligations

12. In Section II.C. 5 of their Amended Disclosure Statement the Debtors have just over a page describing their reclamation obligations under SMCRA. Debtors' obligations include posting adequate financial assurances to meet State and Federal requirements established by the regulatory authorities for the completion of reclamation. The Amended Disclosure Statement fails to provide any information indicating how NewCo or ReorgCo will post adequate financial assurance for its substantial reclamation obligations. Without this information it is near impossible for any interested party to analyze the feasibility of the Debtors' proposed Amended Plan.

13. The Amended Disclosure Statement seeks to avoid providing any such required information by suggesting that there will be a "Reclamation Settlement." *See* Section IV.E. of the Amended Disclosure Statement. While the Debtors are engaged in discussions with certain States and the United States regarding their reclamation compliance requirements, reaching

settlement is far from a foregone conclusion. Therefore, the Debtors' Amended Disclosure Statement should, for example, set forth the current bonding requirements with respect to each of their mines, as well as indicate which entity (NewCo or ReorgCo) will be responsible for the bonding requirement, as well as information as to how each bond will be funded.

14. Not only does the Amended Disclosure Statement fail to explain how these sites will comply with SMCRA, it fails to explain how it will comply with the two Stipulations entered into between Debtors and Wyoming and West Virginia in this bankruptcy. In particular, the Amended Disclosure Statement needs to provide further information/detail as to how Newco will replace the approximate $411,000,000[4] in self-bonding for Wyoming mines with compliant bonding prior to the Effective Date, as required by Stipulation between the Debtors and Wyoming [Docket No. 628]. Similarly, the Amended Disclosure Statement needs to provide further information/detail as to how NewCo will replace the approximate $244,000,000[5] self-bonding for the West Virginia mines with compliant bonding prior to the Effective Date, as required by the Stipulation between the Debtors and West Virginia [Docket No. 1158]

15. The Debtors also appear to suggest, at Section V.I.4. of the Amended Disclosure Statement that if the settlement discussions to resolve the Reclamation Obligations are not resolved consensually, they may be imposed by Order of the Court. The United States disagrees. To the extent that resolution means resolved and settled, that requires actual agreement. To the extent that resolution means an adverse order of some kind, the Bankruptcy Court does not have authority to excuse the Debtors from compliance with legal requirements or authorize violation

[4] *See* Amended Disclosure Statement at Section III.H.1.

[5] *See* Amended Disclosure Statement at Section III.H.2.

of applicable law.[6] The statement should be withdrawn, or it should be noted that the United States disagrees and asserts that the Bankruptcy Court does not have authority to excuse the Debtors from compliance with legal requirements or authorize the violation of applicable law.

Debtors' Obligations as a Lessee of Federal Lands

16. Debtors' Amended Disclosure Statement fails to inform creditors about the United States' right, through the BLM, to withhold its consent with respect to the Debtors' proposed assumption and assignment of the United States' eight federal coal leases,[7] administered by the BLM, with the Debtors, pursuant to §187 of the Mineral Lands Leasing Act of 1920, as amended, 30 U.S.C. §187, and the Anti-Assignment Act, 41 U.S.C. §6305. Without the United States' consent, the Debtors may not assume and assign these coal leases pursuant to 11 U.S.C. §365 and thus the proposed chapter 11 plan may not be confirmable.[8]

17. Section 365(c)(1) of the Bankruptcy Code prohibits the Debtors from assuming or assigning any executory contract or unexpired lease of the Debtors,

> if . . . applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession . . . and such party does not consent to such assumption or assignment.

11 U.S.C. §365(c)(1).

18. In short, Section 365 does not permit a Debtor to assume or assign any contract or lease subject to Section 365 absent consent of the counterparty if "applicable law" excuses the

[6] *See, e.g, In re Baker & Drake*, 35 F.3d 1348, 1354-55 (9th Cir. 1994); *Montgomery County, MD v. Barwood Inc.*, 422 B.R. 40, 47 (D. Md. 2009) (bankruptcy code does not preempt otherwise applicable laws directed at protecting public health safety and welfare).

[7] At present, there is in excess of $4 million in royalties owing to the United States pursuant to some of these leases.

[8] In addition to the 8 coal leases, there is a grazing lease, 2 rights of way, and 2 sales contracts which are the subject of the Debtors' assumption and assignment motions, and to which the United States has not consented to transfer.

counterparty from accepting or rendering performance to another party (other than the debtor party).[9]

19. To that end, various federal courts, including the Fourth Circuit, have confirmed that, at a minimum, where any law prohibits assignment without consent, such law is "applicable law" under section 365. *See, e.g., In re Sunterra Corp.*, 361 F.3d 257, 265-72 (4th Cir. 2004); *In re West Electronics, Inc.*, 852 F.2d 79, 83 (3rd Cir. 1988) ("[Section 365(c)(1)'s prohibition against] assumption of contracts is applicable to any contract subject to a legal prohibition against assignment"); *In re Doctors Health, Inc.*, 335 B.R. 95, 114 (D. Md. 2005); *In re TechDyn Systems Corp.*, 235 B.R. 857, 861 (Bankr. E.D. Va. 1999).

20. Two separate federal statutes prohibit assignment of the federal coal leases without the United States' consent. Any federal coal lease is subject to the transfer prohibition set forth in 30 U.S.C. §187: "No lease issued under the authority of this Act shall be assigned or sublet, except with the consent of the Secretary of the Interior." *Id.* While the applicable regulations describe certain preconditions that *must* be satisfied before an assignment or transfer can be approved, DOI, through the BLM, maintains all discretion under the governing federal statutes in determining whether to approve an assignment or transfer request, even upon the satisfaction of all preconditions. *See* 43 C.F.R. §§3453.3-1 and 3453.3-2.

21. In addition to the specific prohibition of 30 U.S.C. §187. The Assignment of Contracts Act[10] prohibits the transfer of any contract with the United States absent consent. The Act provides:

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[9] The United States notes that its current deadline for objecting to the proposed assumption and assignment of the leases is May 31st.

[10] The Assignment of Contracts Act and its analog, the Assignment of Claims Act, 31 U.S.C. §3727, are collectively known as the federal Anti-Assignment Acts. *See Vermont Yankee Nuclear Power Corp. v. United States*, 73 Fed. Cl. 236, 240 (Fed. Cl. 2006).

> *The party to whom the Federal Government gives a contract or order may not transfer the contract or order, or any interest in the contract or order, to another party.* A purported transfer in violation of their subsection annuls the contract or order so far as the Federal Government is concerned, except that all rights of action for breach of contract are reserved to the Federal Government.

41 U.S.C. §6305 (emphasis added); *see also In re Lile*, 103 B.R. 830, 839 (Bankr. S.D. Tex. 1989) (citing *Pennsylvania Peer Review Org. v. United States*, 50 B.R. 640 (Bankr. M.D. Pa. 1985) for the proposition that assignment of a government contract is barred by the Assignment of Contracts Act).

22. Considering the two independent statutory prohibitions against any assignment of federal leases without DOI's consent, section 365(c)(1) precludes the Debtors' ability to assign any federal coal lease absent DOI's consent. *See* 11 U.S.C. §365(c)(1).

23. The Amended Disclosure Statement fails to provide adequate information to creditors sufficient for them to make an informed judgement about how to vote on the plan insofar as it fails to explain that, without the Government's consent to the assumption and assignment of the federal coal leases, the plan may not be confirmable.

Debtors' Consent Decree Obligations

24. The Debtors' mining properties in Kentucky, Pennsylvania, Tennessee, Virginia, and West Virginia are subject to compliance obligations under the Consent Decree entered by the United States District Court for the Southern District of West Virginia in United States, *et al.* v. Alpha Natural Resources, Inc. *et al.*, No. 2:14-11609 (S.D W. Va.) (Dkt. No. 11) ("Consent Decree"). While the Debtors' Amended Disclosure Statement includes a summary of the Consent Decree at Section II.A.8, the Amended Disclosure Statement fails to indicate how the

substantial and ongoing obligations imposed by the above statutes and Consent Decree will be complied with by NewCo and ReorgCo.[11]

Other Regulatory Obligations

25. Other than the above referenced sweeping reference to its regulatory obligations noted above, the Amended Disclosure Statement fails to set forth other important environmental regulatory obligations with which it must comply.

26. The Amended Disclosure Statement is silent as to the affirmative mitigation requirements Debtors are subject to under almost 200 Clean Water Act (CWA) permits issued by the U.S. Army Corps of Engineers pursuant to Section 404 of the CWA. These permit mitigation obligations require the Debtors to create or restore wetlands, as well as tens of thousands of linear feet of stream. These permits also require compliance with other general and special permit conditions, such as long-term monitoring to determine the success or failure of such mitigation and the provision of long term legal protection to the aquatic resources created or restored. These mitigation obligations are separate and distinct from the reclamation obligations owed under SMCRA or equivalent state mining laws.

27. The Debtors are also subject to certain requirements pursuant to certain permits they hold issued pursuant to the National Pollutant Discharge Elimination System permit section, Section 402, of the CWA. These obligations include, among other things, extensive and ongoing sampling and reporting requirements, operation and maintenance tasks, and information storage and submission requirements, as well as obligations to ensure that all current and future

[11] Compliance obligations are not dischargeable in bankruptcy. *See, e.g., United States v. Apex Oil Co.*, 579 F.3d 734 (7th Cir. 2009) (Request for injunction requiring groundwater cleanup not dischargeable because discharge of equitable remedies limited to where breach gives rise to right to payment.); *In re Torwico Electronics, Inc.*, 8 F.3d 146 (3d Cir. 1993) (Injunctive obligation to remedy pollution not a claim where there is an ongoing threat.); *In re Chateaugay Corp.*, 944 F.2d 997 (2d Cir. 1991) ("[A] cleanup order that accomplishes the dual objectives of removing accumulated wastes and stopping or ameliorating ongoing pollution emanating from such wastes is not a dischargeable claim."); *In re Mark IV Indus., Inc.*, 438 B.R. 460 (Bankr. S.D.N.Y. 2010).

discharges are adequately characterized and that treatment systems are installed and fully functional.

Reservation of Rights

28. The deficiencies described above are not exhaustive. The United States reserves the right to object to other provisions, or missing provisions, at any hearing on the Amended Disclosure Statement or any future amended disclosure statements.

CONCLUSION

The Amended Disclosure Statement fails to contain adequate information as required by the Bankruptcy Code. Therefore, the Court should not approve the Amended Disclosure Statement.

Dated: May 20, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2016, I caused a copy of the foregoing to be served by electronic mail upon all parties receiving notice through the Court's CM/ECF Noticing System. In addition, the parties listed on the attached Service List were served with a copy by electronic mail at the e-mail addresses listed thereon.

s/Karl Fingerhood

In re Alpha Natural Resources, Bankr. No. 15-33896 (KRH)

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