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

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In re)	Chapter 11
)	
ALPHA NATURAL RESOURCES, INC., <i>et al.</i> ,)	Case No. 15-33896 (KRH)
)	
Debtors.)	Jointly Administered
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**THE WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL
PROTECTION’S OBJECTION TO THE DEBTORS’ OMNIBUS MOTION
FOR AN ORDER APPROVING THE SALE OF CERTAIN ASSETS
PURSUANT TO SECTION 363 OF THE BANKRUPTCY CODE**

The West Virginia Department of Environmental Protection (“DEP”) appears specially¹ for the limited purpose of objecting to the Debtors’ omnibus motion for order(s) approving the sale of certain assets and related relief [Doc 1464], and states:

1. Apparently thwarted in its effort to sell the mines it looked to shed as part of its chapter 11 reorganization, Alpha shifted gears and now moves for authority to sell the valuable assets it initially looked to retain and reorganize around pursuant to section 363 of the

¹ DEP continues to exercise police and regulatory authority over the Debtors and their surface mining and reclamation operations within the State of West Virginia in accordance with 11 U.S.C. § 362(b)(4) and 28 U.S.C. § 959. Neither this objection, nor DEP’s filing thereof, nor any other appearance, pleading, claim, or suit by DEP shall constitute or be deemed a waiver of DEP’s right to continue to regulate or enforce applicable laws, rules, or orders against the Debtors in any appropriate forum outside of this Court, the sovereign immunity of the State of West Virginia or DEP, or any other right, claim, cause of action, or defense, or the submission by the State of West Virginia or DEP to this Court’s jurisdiction for any purpose whatsoever.

Bankruptcy Code (*see* Doc 707 at ¶¶ 4-5) and an “auction” anchored, in part, by a “stalking horse purchaser” and a “stalking horse bid.”

2. The “stalking horse purchaser” will be an entity formed by a group of hedge funds that holds hundreds of millions of dollars in Alpha’s secured prepetition and postpetition debt obligations. *See* Doc 1464 at p. 8, n. 13. The existence and potential extent of that credit bid, particularly enhanced as contemplated in Alpha’s proposed “settlement” with the hedge funds, will, at a minimum, give the hedge funds a distinct competitive advantage over any competing cash bidders and undoubtedly allow them, should they so choose, to walk off with Alpha’s valuable assets for no cash consideration to Alpha.

3. Of particular importance to the people of the State of West Virginia, the hedge funds’ “stalking horse bid” excludes, among other mining operations in other States, virtually all of Alpha’s West Virginia mining operations and properties and the DEP-issued mining and water pollution permits relating to them.²

4. Although Alpha proposes to continue to try to auction off and separately sell these other remaining operations, properties, and permits, it recognizes, as it must considering its inability to market those assets over the past four months or longer, the very real possibility that no bidder will emerge for the overwhelming majority of those operations, properties, and permits and that instead Alpha will need to provide some sort of mechanism pursuant to a chapter 11 plan for dealing with those remaining operations, properties, and permits and, in particular, the enormous nondischargeable environmental obligations associated with them. Indeed, the term sheet setting forth “stalking horse bid” conditions consummation of the “stalking horse” sale

² The “stalking horse bid” includes only one (*see* Doc. 1464 at ¶ 8 (listing Alpha’s Nicholas County, West Virginia complex among the assets subject to the “stalking horse bid”)) of the twenty or so mining complexes Alpha currently operates in West Virginia. *See, e.g.*, Doc 1077 at Exhibit A (listing sixteen complexes included in Alpha’s prior efforts to sell its unwanted mines).

upon confirmation of a chapter 11 plan and even the absence of any permit blocks against the Debtors, blocks that would necessarily result from the Debtors' failure to provide for complete reclamation and water treatment in accordance with their remaining mining and water pollution permits and the surface mining laws and rules.

5. When Alpha (and its predecessors) entered the coal business and secured the necessary permits to mine coal, it assumed the obligation to clean up the mess left behind by its operations. It committed, as a condition to receiving those permits, to reclaim the land it "disturbed" to gain access to the coal. It committed to treat the polluted water left in the wake of its mining operations, water problems that in some cases persist literally forever. That commitment, made to each of the States in which it mines coal and the federal government, requires that Alpha restore the land and water to a condition that not only allows for other productive post-mining uses but also protects the public from the imminent risks to its health and safety that Congress and the States, in enacting the surface mining laws, specifically identified as being associated with unreclaimed mining sites. *See, e.g., Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 277-78 (1981) (quoting 30 U.S.C. §1201(c)); W. VA. CODE § 22-3-2(a).

6. Alpha cannot simply walk away from those obligations in connection with these chapter 11 cases. Its ongoing obligations to comply with the law cannot be discharged in bankruptcy. *See, e.g., United States v. Apex Oil Co.*, 579 F.3d 734 (7th Cir. 2009); *In re Torwico Electronics, Inc.*, 8 F.3d 146 (3d Cir. 1993); *In re Chateaugay Corp.*, 944 F.2d 997 (2d Cir. 1991). Moreover, "[b]ankruptcy does not insulate a debtor from environmental regulatory statutes." *United States v. Hansen*, 262 F.3d 1217, 1238 (11th Cir. 2001). Instead, the bankruptcy laws specifically require that Alpha comply with all regulatory laws in the

management and operation of its business during the pendency of its bankruptcy cases. *See* 11 U.S.C. § 362(b)(4); 11 U.S.C. § 959(b); *see generally Safety-Kleen, Inc. v. Wyche (In re Safety-Kleen, Inc.)*, 274 F.3d 846, 864 (4th Cir. 2001). The provisions of Section 1129 of the Bankruptcy Code require that any chapter 11 plan adequately provide for compliance with the law coming out of bankruptcy. *In re Manchester Oaks Homeowners Ass'n, Inc.*, No. 11-10179-BFK, 2014 WL 961167, at *1 (Bankr. E.D. Va. Mar. 12, 2014) (denying confirmation of a chapter 11 plan that had as its foundation a provision that violated applicable Virginia law). Even chapter 7 trustees must comply with the environmental laws in connection with the liquidation of a debtor's assets. *See, e.g., Midlantic Nat'l Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494, 505 (1986).

7. As presently structured, however, the “stalking horse” sale will leave Alpha with no hope of complying with its nondischargeable obligations under its remaining mining and water pollution permits and applicable law. It will be stripped of all its valuable assets and left with no cash, few marketable assets, no real financing alternatives, and operations that drain, rather than generate, cash flow. Indeed, Alpha may be left with insufficient assets to enable it to consummate the chapter 11 plan it intends to develop and pursue, to demonstrate the feasibility of any such proposed chapter 11 plan, or to comply with its immediate and ongoing legal obligations under applicable law to reclaim and treat water.

8. Nowhere does Alpha give even the vaguest hint as to how it will deal with its remaining mining operations, properties, and permits, whether or how it will have the necessary funding, operational resources, and personnel needed to reclaim and treat water on an ongoing basis after the “stalking horse sale,” or whether or how it can provide the necessary assurances to confirm a feasible chapter 11 plan for its remaining operations, properties, and permits. The only

statement in the 555 pages of its motion devoted to that subject states only that “[a]ny proceeds of Assets sold, and Assets that are not sold and any other value that may be contributed by the DIP Lenders or the Pre-Petition Lenders will form the basis of the reorganized debtors under the Chapter 11 Plan.” Doc 1464 at pp. 8-9, ¶ 9.

9. Yet, without even the vaguest hint of, and despite the indisputable impediments to, Alpha’s putative reorganization plan, Alpha proposes immediate approval of a section 363 sale of its most valuable assets on a full, if not enhanced, credit-bid basis.³

10. Particularly in light of Alpha’s failure to provide any information as to the terms or feasibility of its proposed plans with respect to complying, in full, with its legal obligations to the State of West Virginia, DEP expressly reserves its right to object to any proposed sale of the Debtors’ assets that fails to provide adequate assurance that the Debtors will have sufficient remaining resources with which to comply with their continuing, nondischargeable obligations under the West Virginia permits and West Virginia law and rules.

11. At this point in Alpha’s proposed sale process, however, this Court has other options available to it.

12. Perhaps most simply, this Court can, and DEP submits that it should, decline to consider approval of any proposed sale except in connection with confirmation of the chapter 11 plan Alpha proposes to file within days. Alpha’s motion nowhere explains the need to proceed with approval of the “stalking horse” (or any other) sale on any kind of expedited basis prior to confirmation of its anticipated plan. To the contrary, the “stalking horse purchaser” agreed to

³ DEP recognizes that the term sheet setting forth the “stalking horse” bid conditions the sale on confirmation of a plan. *See* Doc 1464 at Exhibit F at pp. 7-8 (setting forth the closing conditions of the “stalking horse bid”). That provision should, instead, condition the sale on consummation rather than confirmation, as perhaps the most immediate issue Alpha may face (as Patriot recently did) is how to fund the payments necessary to consummate a plan. But even that condition would not suffice. For after approval of the “stalking horse” sale transaction, Alpha would be left with no real restructuring options.

condition its acquisition upon confirmation (*see n. 3, supra*), thus expressly requiring the sale to await at least confirmation of a plan. DEP also notes that Patriot Coal, despite embarking on a similar parallel track with plan confirmation and a proposed stalking horse sale, wound up seeking and obtaining approval of its Section 363 sales as part of its confirmation order. *See Findings of Fact, Conclusions of Law, and Order Confirming Plan, In re Patriot Coal Corp.*, Case No. 15-32450 (Bankr. E.D. Va., Oct. 9, 2015) [Doc 1615].

13. Moreover, this Court has ample authority to restrict secured creditors' rights to credit bid, *see* 11 U.S.C. § 363(k) ("unless the court for cause orders otherwise the holder of [an allowed secured] claim may bid at such sale"), and, in particular, to require that the secured creditors' credit bid contain an adequate cash component to enable the debtor to satisfy its ongoing legal obligations. *See, e.g., In re Diebart Bancroft*, No. 92-3744, 1993 WL 21423, at *5 (E.D. La., Jan. 26, 1993) (requiring a secured creditor to bid sufficient cash to allow the debtor to pay the Internal Revenue Service depending upon the outcome of a lien priority dispute); *In re Charles Street African Methodist Episcopal Church of Boston*, 510 B.R. 453, 459 (Bankr. D. Mass. 2014) (requiring a secured creditor to bid sufficient cash to allow the debtor to pay the breakup fee of the debtor's proposed purchaser); *In re NJ Affordable Homes Corp.*, No. 05-60442 (DHS), 2006 WL 2128624, at *16 (Bankr. D.N.J., June 29, 2006) (allowing for credit bidding but requiring that the winning bidder pay a 10% premium over the bid price in cash to cover other liabilities of the estate). At a minimum, Alpha should be required, as a condition to obtaining approval of the requested credit bid provisions of the bidding procedures order, to provide evidence that, in the absence of any cash component of the "stalking horse" bid, Alpha will have the necessary resources, at a minimum, to comply with its ongoing and future legal obligations to reclaim the land and treat polluted water at its remaining mining operations.

WHEREFORE, DEP respectfully requests that, absent the provision of demonstrably sufficient resources to provide for its ongoing obligations, including the reclamation and water pollution treatment obligations related to any of Alpha's "orphaned" mining permits, the Court deny approval of Alpha's proposed bidding procedures and sale motion, and grant DEP such other and further relief as is just.

Dated: February 19, 2016

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CERTIFICATE OF SERVICE

I certify that on February 19, 2016, I caused to be filed the foregoing pleading by uploading it to this Court's CM/ECF system, which will send notification of such filing to all CM/ECF participants.

/s/ Kevin W. Barrett