

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

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In re: : **Chapter 11**
: **Case No. 12-51502-659**
Patriot Coal Corporation, et al., : **(Jointly Administered)**
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Debtors. : **Hearing Date:**
: **November 6, 2013 at 10:00 a.m.**
: **(prevailing Central time)**
:
: **Re: ECF Nos. 4763, 4798, 4869, 4870**
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LIMITED OBJECTION OF ALPHA NATURAL RESOURCES, INC. AND CERTAIN OF ITS SUBSIDIARIES TO DEBTORS’ MOTION FOR ENTRY OF ORDER (i) APPROVING DISCLOSURE STATEMENT; (ii) APPROVING SOLICITATION AND NOTICE MATERIALS; (iii) APPROVING FORMS OF BALLOTS; (iv) ESTABLISHING SOLICITATION AND VOTING PROCEDURES; (v) ESTABLISHING PROCEDURES FOR ALLOWING AND ESTIMATING CERTAIN CLAIMS FOR VOTING PURPOSES; (vi) SCHEDULING A CONFIRMATION HEARING AND (vii) ESTABLISHING NOTICE AND OBJECTION PROCEDURES

Alpha Natural Resources, Inc. and certain of its subsidiaries (collectively, “Alpha”) file this limited objection (the “Objection”) to the Debtors’ Motion for Entry of an Order (i) Approving Disclosure Statement; (ii) Approving Solicitation and Notice Materials; (iii) Approving Forms of Ballots; (iv) Establishing Solicitation and Voting Procedures; (v) Establishing Procedures for Allowing and Estimating Certain Claims for Voting Purposes; (vi) Scheduling a Confirmation Hearing and (vii) Establishing Notice and Objection Procedures (ECF No. 4798) (the “Disclosure Statement Motion”).¹ In support of the Objection, Alpha respectfully states as follows:

¹ Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Disclosure Statement Motion.

Preliminary Statement

1. The Disclosure Statement must be clarified to provide meaningful disclosure on the treatment of certain executory contracts and unexpired leases that are the subject of an Adversary Proceeding between the Debtors and the Alpha Entities.² That Adversary Proceeding concerns the Debtors' ability to independently assume a lease without assuming a suite of other agreements of even date addressing the same real property and related transactions. While the Disclosure Statement explains that such Alpha Agreements are carved out from the automatic rejection otherwise provided for in the Plan, it does not explain their treatment relative to the Court's determination of the Adversary Proceeding. While the Debtors have sought to assume the Boone Lease, there will not be a final determination on the integration of the Boone Lease with the other Alpha Agreements until after confirmation. As such, the Disclosure Statement must clarify that, in the event of a final determination that the Boone Lease is so integrated, the Debtors' decision to assume the Boone Lease applies with equal force to the integrated Alpha Agreements. If instead, the Debtors intend to preserve an option, based on the outcome of the Adversary Proceeding, to somehow reverse course and reject the Boone Lease post-confirmation, the Plan is contrary to the plain requirements of Section 365(d) and in this limited respect, is non-confirmable on its face.

Background

2. In 2005, in fulfillment of the terms of a settlement agreement (the "Settlement Agreement") between an Alpha affiliate and a Patriot affiliate, Debtor Eastern Royalty LLC ("ERC") entered into a coal lease (the "Boone Lease"), four assignments (the "Assignments"), and a payment agreement (the "Payment Agreement") with Alpha subsidiaries Boone East

² Initially capitalized terms not otherwise defined in this preliminary statement have the meanings assigned to them below.

Development Company (“Boone”), Performance Coal Company, and New River Energy Corporation (collectively, the “Alpha Entities”).

3. On July 9, 2012, the Debtors filed a Motion for an Order (i) Confirming the Massey Payment Agreement is Not an Executory Contract or, Alternatively, (ii) Approving Rejection of the Massey Payment Agreement (the “First Day Rejection Motion”) (ECF No. 24). After a status conference on July 26, 2012, the United States Bankruptcy Court for the Southern District of New York advised the Debtors and the Alpha Entities that the First Day Rejection Motion was not appropriate for disposition on motion, and must be determined by an adversary proceeding. Subsequently, the Debtors withdrew, without prejudice, the portion of the First Day Rejection Motion seeking an order that the payment agreement is a non-executory contract and adjourned the balance of the motion *sine die* (ECF No. 282).

4. On August 6, 2012, ERC commenced an adversary proceeding in the Bankruptcy Court, Eastern Royalty LLC v. Boone East Development Co., Adv. Pro. No. 12-04353-659 (the “Adversary Proceeding”). ERC sought a declaratory judgment that the Payment Agreement was non-executory and was not integrated with certain other agreements, including the Boone Lease, Assignments, and Settlement Agreement.

5. On September 21, 2012, ERC filed a motion for judgment on the pleadings in the Adversary Proceeding (the “Rule 12(c) Motion”). The Alpha Entities filed an opposition to the Motion on October 18, 2012, and ERC filed its reply on November 1, 2012. Oral argument was held before the Bankruptcy Court on February 26, 2013. No decision has been rendered. To the extent that the Court denies the Rule 12(c) Motion, the parties will proceed to discovery. To the extent that the Court grants the Rule 12(c) Motion, the Alpha Entities reserve their rights of appeal.

6. On January 15, 2013 the Debtors filed a Motion for Authorization to (i) Assume or (ii) Reject Unexpired Leases of Non-Residential Real Property (ECF No. 1995, the “NRRP Motion”), which again sought to assume the Boone Lease and certain other agreements with Alpha, without assuming the Payment Agreement or the Assignments. Thereafter, on January 24, 2013, the Debtors and Alpha entered into a Stipulation and Order Extending Time under 11 U.S.C. § 365(d)(4) for Leases of Non-Residential Real Property with Alpha Natural Resources, Inc. (ECF No. 2781, the “Alpha Stipulation”). The Alpha Stipulation extended the time for the Debtors to assume or reject the Boone Lease, as well as other agreements and non-residential real property leases to which Alpha was a party (collectively, the “Alpha Agreements”), through April 6, 2013. The Alpha Stipulation also provided that the NRRP Motion was withdrawn with respect to the Alpha Agreements. Alpha Stip. ¶ 3.

7. The Alpha Stipulation was extended from time to time until it expired on October 28, 2013. Thereafter, the Debtors filed a Renewed Motion for Authorization to Assume Unexpired Leases of Nonresidential Real Property (ECF No. 4882, the “Boone Lease Assumption Motion”) on October 28, 2013, which again sought to assume the Boone Lease but not the Payment Agreement. The Boone Lease Assumption Motion represents that the Boone Lease is “necessary to the Debtors’ business operations and essential to the Debtors’ restructuring efforts.” Boone Lease Assumption Mot. ¶ 27. Alpha intends to object to the Boone Lease Assumption Motion based on, *inter alia*, the pendency of the Adversary Proceeding and the integration issues addressed therein. The Plan and Disclosure Statement appear to define such an objection as a “Treatment Objection.” See Plan § 1.1.214.

8. On October 26, 2013, the Debtors filed their Disclosure Statement for Debtors’ Second Amended Joint Plan of Reorganization under Chapter 11 of the Bankruptcy Code (ECF

No. 4870) (the “Disclosure Statement”). Section 5.9(a) of the Disclosure Statement provides that “each executory contract and unexpired lease to which any Debtor is a party will be deemed automatically rejected” unless it is, *inter alia*, (i) the subject of a motion to assume or reject pending on the effective date (including the NRRP Motion), (ii) “the subject of an adversary proceeding pending on the Effective Date, including *Eastern Royalty LLC f/k/a Eastern Royalty Corp. v. Boone East Development Co., Performance Coal Co., and New River Energy Corp. ...*”, or (iii) the subject of the Alpha Stipulation.³

9. While it is almost certain that the Adversary Proceeding will not be finally resolved until well after the Effective Date, the Disclosure Statement does not address or clarify the treatment of the Boone Lease in the event a final order is entered finding that the Boone Lease is integrated with the Payment Agreement or other Alpha Agreements at issue in the Adversary Proceeding. Instead, the Disclosure Statement purports to reserve the Debtors’ rights to seek to reject an agreement that is the subject of a pending motion to assume or reject at any time prior to entry of a Final Order granting such motion – seemingly, even after the Plan’s Effective Date. Disclosure Statement § 5.9(e)(4) (“If a Treatment Objection is filed regarding any executory contract or unexpired lease sought to be assumed or rejected by any of the Reorganized Debtors, the Reorganized Debtors reserve the right (i) to seek to assume or reject such agreement *at any time* before the assumption, rejection or assignment of, or Cure for, such agreement is determined by Final Order”) (emphasis added).

³ Section 9.1 of the proposed plan of reorganization (the “Plan”), attached to the Disclosure Statement as Exhibit A, repeats the language of Section 5.9(a) of the Disclosure Statement.

Objection

A. The Disclosure Statement Must Be Clarified To Disclose the Debtor's Intentions as to Post-Effective Date Resolution of the Adversary Proceeding

10. While the Disclosure Statement provides that the Boone Lease, which is the subject of the Adversary Proceeding, will not be automatically rejected on the Effective Date, it fails to explain or address the treatment of the Boone Lease in the event it is finally determined that the Boone Lease is integrated with other Alpha Agreements. Specifically, the Boone Lease and the other Alpha Agreements are carved out from the Plan's automatic rejection provisions both because they are the subject of the Adversary Proceeding, are the subject of the Alpha Stipulation, and in certain cases are the subject of the pending Boone Lease Assumption Motion.

11. However, any assumption motion in respect of the Boone Lease cannot be decided until after a final decision on the declaratory relief sought in the Adversary Proceeding. Given the need for either discovery (if the Court denies the Rule 12(c) Motion) or a potential appeal (if the Court grants the Rule 12(c) Motion), there can be no final decision in the Adversary Proceeding (or on any assumption motion) until post-confirmation. In that event, the Disclosure Statement fails to provide disclosure on whether the Debtors intend to abide by their decision to assume the Boone Lease through the Boone Lease Assumption Motion, or somehow preserve the option to elect, after confirmation of the Plan, to instead seek to reject.

12. To address this omission, the following language should be added to Section 5.9(a) of the Disclosure Statement (as well as the corresponding Section 9.1 of the Plan):

Pursuant to sections 365 and 1123 of the Bankruptcy Code, each executory contract and unexpired lease to which any Debtor is a party will be deemed automatically rejected by the Debtors effective as of the Effective Date, except for any executory contract or unexpired lease that (i) has been assumed or rejected pursuant to an order of the Bankruptcy Court entered before the Effective Date, (ii) is the subject of a motion to assume or reject pending on the Effective Date, including the Debtors' Motion for Authorization to (i) Assume or (ii) Reject Unexpired Leases of Nonresidential Real

Property filed on January 15, 2013 [ECF No. 1995], (iii) is the subject of an adversary proceeding pending on the Effective Date, including Eastern Royalty LLC f/k/a Eastern Royalty Corp. v. Boone East Development Co., Performance Coal Co., and New River Energy Corp., Adv. Pro. No. 12-04353-659 and Robin Land Company, LLC v. STB Ventures, Inc., Adv. Pro. No. 12-04355-659, **provided, however, that any pending motion to assume any executory contract or unexpired lease at issue in such adversary proceeding (x) may not be withdrawn or amended after the Effective Date, and (y) shall apply with equal force to any other agreement or instrument that is determined by Final Order to be integrated therewith.** (iv) is subject to the Stipulation and Order Extending Time Under 11 U.S.C. § 365(d)(4) for Leases of Non-Residential Real Property with Alpha Natural Resources, Inc. dated February 8, 2013 [ECF No. 2781], as thereafter extended from time to time by written agreement of the parties, (v) is assumed, rejected or otherwise treated pursuant to Section 9.3 or Section 9.4 of the Plan, (vi) is listed on Schedule 9.2(a) or 9.2(b) of the Plan or (vii) as to which a Treatment Objection has been filed and properly served by the Treatment Objection Deadline. If an executory contract or unexpired lease either (x) has been assumed or rejected pursuant to an order of the Bankruptcy Court entered before the Effective Date or (y) is the subject of a motion to assume or reject pending on the Confirmation Date, then the listing of any such executory contract or unexpired lease on the aforementioned schedules will be of no effect.

13. Absent this clarification as to the Debtors' intentions with regard to the Boone Lease, the Disclosure Statement fails to provide adequate information from which a "hypothetical reasonable investor" could make an informed decision whether to accept the Plan. see also In re Monnier Bros., 755 F.2d 1336, 1342 (8th Cir. 1985) (stating that "the primary purpose of a disclosure statement is to give the creditors the information they need to decide whether to accept the plan"). At the very least, the Debtors should disclose to Alpha whether the Debtors plan to assume or reject the Agreements in two scenarios: a final decision in the Adversary Proceeding finding the Boone Lease integrated with the Alpha Agreements, and a final decision in the Adversary Proceeding finding no such integration. Without this bare minimum disclosure, Alpha cannot possibly evaluate the merits of the Plan as it relates to the Alpha Agreements.

B. Absent Clarification, the Plan is Facially Non-Confirmable

14. If instead, as Section 5.9(e)(4) of the Disclosure Statement suggests, the Debtors hope to remain silent on their intentions with respect to the Boone Lease to preserve an attempt to revisit the assumption decision after the Effective Date, that would render the Plan patently non-confirmable.

15. It is black letter law that a Debtor must assume or reject any executory contracts or unexpired leases before a plan of reorganization is confirmed. See, e.g., 11 U.S.C. § 365(d)(2) (“In a case under chapter 9, 11, 12 or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor *at any time before the confirmation of a plan*”) (emphasis added); United States v. Dewey Freight Sys., Inc., 31 F.3d 620, 623 (8th Cir. 1994) (stating that “a Chapter 11 debtor may assume or reject at any time prior to confirmation of a reorganization plan”); In re Dana Corp., 350 B.R. 144, 147 (Bankr. S.D.N.Y. 2006) (stating that the “clear policy of the Bankruptcy Code provide[s] the debtor with breathing space following the filing of a bankruptcy petition, continuing until the confirmation of a plan, in which to assume or reject an executory contract” such that the debtor is “only permit[ed] to make its decision as late as plan confirmation”).

16. Absent clarification, the Plan appears to preserve the Debtors’ ability to do precisely that. The Debtors have moved to assume the Boone Lease, but such motion cannot be decided until after a final decision in the Adversary Proceeding – a decision that will almost certainly happen post-Effective Date. Rather than truncate the adjudication of the Adversary Proceeding, the Alpha Entities simply seek to hold the Debtors to their decisions once a final order is entered in the Adversary Proceeding post-confirmation. The Debtors have chosen to assume the Boone Lease and represented that it is essential to their restructuring efforts; if it is

ultimately determined that the Boone Lease encompasses other Alpha Agreements, those too must be assumed. The Debtors cannot instead, as Section 5.9(e)(4) suggests, preserve the option to then elect to reject the Boone Lease post-confirmation, in contravention of Section 365(d)(2).

17. The Bankruptcy Court should not approve a disclosure statement when “the disclosure statement *on its face* relates to a plan that cannot be confirmed.” In re Dakota Rail, Inc., 104 B.R. 138, 143 (Bankr. D. Minn. 1989); see also In re American Capital Equipment, LLC, 688 F.3d 145, 154-55 (3d Cir. 2012) (holding that “a bankruptcy court may address the issue of plan confirmation where it is obvious at the disclosure statement stage ... that a later confirmation hearing would be futile”).

18. Without an amendment to the Plan providing for the assumption or rejection of the Agreements, the Debtors will impermissibly extend the period during which they may make the decision to assume or reject contracts until after the Plan is confirmed, to the detriment of the Alpha Entities that are counterparties to those agreements. Because the Plan cannot be confirmed without modification on this discrete point, the Court should not approve the Disclosure Statement until this facial defect in the Plan is cured.

19. For all the foregoing reasons, Alpha respectfully requests entry of an order (a) conditioning approval of the Disclosure Statement on the amendments set forth herein, or in the alternative (b) denying the Disclosure Statement Motion, and (c) granting such other and further relief as the Court may deem just and proper.

Dated: October 30, 2013

Respectfully Submitted,

/s/ David A. Sosne

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