UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND & LONDON DIVISIONS

IN RE:	CHAPTER 11
LICKING RIVER MINING, LLC, *et al.*,[1]	CASE NO. 14-10201
DEBTORS IN POSSESSION	JOINTLY ADMINISTERED

PRELIMINARY AND PROTECTIVE OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO THE DEBTORS' MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS PURSUANT TO 11 U.S.C. §§ 105, 361, 362, 363(c), 363(e), 364(c)(1), 364(c)(2), 364(c)(3), 364(d)(1), 364(e) AND 507 AND FED. R. BANKR. P. 2002, 4001 AND 9014 (I) AUTHORIZING USE OF CASH COLLATERAL PURSUANT TO SECTION 363 OF THE BANKRUPTCY CODE, (II) GRANTING LIENS AND SUPER-PRIORITY CLAIMS, (III) GRANTING ADEQUATE PROTECTION TO THE PREPETITION SECURED PARTIES AND (IV) SCHEDULING A FINAL HEARING PURSUANT TO FED. R. BANKR. P. 4001(b) AND (c)

The Official Committee of Unsecured Creditors (the "Committee") of Licking River Mining, LLC and its related debtors and debtors-in-possession in the above-captioned chapter 11 cases (collectively, the "Debtors"), hereby files this preliminary and protective objection to the Debtors' motion (the "Cash Collateral Motion") for entry of interim and final orders pursuant to 11 U.S.C. §§ 105, 361, 362, 363(c), 363(e), 364(c)(1), 364(c)(2), 364(c)(3), 364(d)(1), 364(e) and 507 and Fed. R. Bankr. P. 2002, 4001 and 9014 (i) authorizing use of cash collateral pursuant to section 363 of the Bankruptcy Code. (ii) granting liens and super-priority claims, (iii) granting adequate protection to the prepetition secured parties and (iv) scheduling a final hearing pursuant to Fed. R. Bankr. P. 4001(b) and (c). In support hereof, the Committee respectfully states as follows:

[1] The debtors in these chapter 11 cases, along with the last four digits of each debtor's federal tax identification number, are: Licking River Mining, LLC (6847), Licking River Resources, Inc. (3837), S. M. & J., Inc. (8437), Fox Knob Coal Co., Inc. (9910), J.A.D. Coal Company, Inc. (0145) and U.S. Coal Corporation (5761). The location of the debtors' corporate headquarters is 101 Helm Street, Suite 150, Lexington, Kentucky 40505.

BACKGROUND

The Chapter 11 Cases

On May 22, 2014, an involuntary petition for relief under chapter 11 of the Bankruptcy Code was filed against Debtor Licking River Mining, LLC. On May 23, 2014, involuntary petitions for relief under chapter 11 of the Bankruptcy Code were filed against Debtors Licking River Resources, Inc. and Fox Knob Coal Co., Inc. On June 3, 2014, an involuntary petition for relief under chapter 11 of the Bankruptcy Code was filed against Debtor S. M. & J., Inc. On June 4, 2014, an involuntary petition for relief under chapter 11 of the Bankruptcy Code was filed against J.A.D. Coal Company, Inc.

On June 12, 2014, this Court entered an order for relief in the Debtors' chapter 11 cases (the "Relief Date").[2] On June 18, 2014, the Office of the United States Trustee appointed the Committee. The Committee consists of the following members: Dyno Nobel Inc., Forge Group North America Asset Management, LLC, Whayne Supply Company, Kolmar Americas, Inc., Jones Oil Company, Inc., Machinery Sales & Services LLC and The Elk Horn Coal Company, LLC. Based on the Cash Collateral Motion, the aggregate trade claims against the Debtors' estates are approximately $28.6 million. See Cash Collateral Motion at ¶ 11.

The Cash Collateral Motion[3]

On June 9, 2014, the Debtors filed the Cash Collateral Motion. The Debtors' alleged secured debt covered by the Cash Collateral Motion does not arise from a traditional lending arrangement between commercial lenders and a borrower. Instead, the obligations described in the Cash Collateral Motion are part of a complex web of transactions between the

[2] The Debtors' parent, U.S. Coal Corp., is the subject of an involuntary petition in this Court, but an order for relief has not yet been entered. See Case No. 14-51461.

[3] Each statement in this Section is based upon the representations of the Debtors in pleadings filed with this Court. The Committee is not adopting such representations by referencing them herein.

Debtors, on the one hand, and (i) the individuals and entities that sold assets to the Debtors and received convertible secured notes in return, (ii) professional firms, and/or (iii) other insiders of the Debtors, on the other hand (collectively, the "Lenders").

The Cash Collateral Motion does not include a request to obtain debtor-in-possession financing from the Lenders. Rather, "[a]fter completing an extensive analysis of the Debtors' cashflow, it appeared that [the] Debtors could initially fund these cases solely through the use of Cash Collateral." Cash Collateral Motion at ¶ 47.

Despite the fact that the Debtors are not receiving any new money from the Lenders – and that certain Lenders are insiders – the proposed cash collateral facility (the "Cash Collateral Facility") contains numerous inappropriate and overreaching provisions. These provisions include (1) the Debtors stipulating to the validity and priority of the Lenders' liens and claims, (2) unreasonable operating covenants and termination provisions that cede control over the case to the Lenders, (3) the granting of "adequate protection" liens to the Lenders on unencumbered assets, (4) inappropriate deadlines and other restrictions on the Committee's rights to challenge the Lenders' liens and claims and advocate for unsecured creditors in the case.

On June 16, 2014, this Court entered an interim order approving the Cash Collateral Motion (the "Interim Cash Collateral Order"), Dkt. No. 133. The Debtors have agreed to continue the June 27, 2014 final hearing on the Cash Collateral Motion until July 11, 2014, with the objection deadline for the motion extended to July 8, 2014. Nevertheless, the Committee submits a summary of certain of its preliminary objections to the Cash Collateral Motion. The Committee will supplement these objections with a more detailed pleading should

it not be able to work out a consensual resolution of cash collateral issues prior to the continued objection deadline.[4]

SUMMARY OF CERTAIN PRELIMINARY OBJECTIONS

The Committee submits that, as proposed, the Cash Collateral Facility should not be approved for several reasons. First, the Lenders are only entitled to adequate protection liens due to an actual diminution in value of their collateral after the Relief Date. United Savings Ass'n v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365 (1988) (adequate protection is available only to protect against diminution in value of a lender's collateral); In re Barrett, 149 B.R. 494, 500 (Bankr. N.D. Ohio 1993) (refusing to grant adequate protection awarded where there was no post-petition decline in value of the secured creditor's collateral).

Here, the Lenders are receiving super-priority administrative expense claims as "adequate protection" without such claims being tied to any diminution in value of their collateral. (See Interim Cash Collateral Order at ¶ 11(a)). Moreover, the Cash Collateral Facility should not constitute a finding or admission that any particular event – such as the imposition of the automatic stay – qualifies as a basis for asserting a diminution in value of the Lenders' collateral. (Id. at ¶ 10).

Second, the Lenders should receive replacement liens as "adequate protection" only on the same type of collateral that is subject to the Lenders' pre-petition liens. As proposed, the Lenders are receiving "adequate protection" liens on virtually all assets of the Debtors' estates, including unencumbered assets, as well as a superpriority claim. (Id. at ¶ 11(a)-(b)). These provisions would inappropriately improve the Lenders' position, because estate assets that

[4] This summary does not contain each objection that the Committee would raise by the continued objection deadline.

are not subject to valid and unavoidable pre-petition liens would now become part of the Lenders' collateral base.

Third, the Debtors' stipulations as to the validity, extent and priority of the Lenders' liens and claims are inappropriate and should not be approved. (Id. at ¶ 7). The Lenders are not providing any new money to the Debtors. As such, there is no "quid pro quo" requiring the Debtors to agree to extensive stipulations before any investigation of the Lenders' liens has taken place. Moreover, as noted above, on information and belief, many of the Lenders are insiders of the Debtors, making stipulations even more inappropriate at this stage of the case.

Fourth, the Committee's right to challenge the Lenders' liens and claims and advocate for unsecured creditors in this case should not be diminished by the Cash Collateral Facility. The 90-day deadline for the Committee to file an action to challenge the Lenders' liens and claims is inappropriate – indeed, it is more onerous than most DIP financing order lien-challenge deadlines. (Id. at ¶ 19). Rather, there should be no preset deadline for challenging the Lenders' liens and claims.

Moreover, a $25,000 investigatory budget for the Committee is woefully deficient for reviewing and investigating what the Debtors' characterize as a "complex" structure of secured debt. (Id. at ¶¶ 9, 11(e); Cash Collateral Motion at ¶ 15 ("The structure of the Debtors' pre-petition secured debt is complex.")). Finally, the Committee's professional fees should not be capped on a monthly basis,[5] an inappropriate attempt to curtail the Committee's efforts for unsecured creditors in this case. (Id. at ¶ 9).

[5] The fees of the Debtors' professionals are not capped.

Fifth, various covenants and termination provisions contained in the Cash Collateral Facility should not be approved. For example, the Debtors' right to use cash collateral should not be terminated solely because the Debtors' receipts or disbursements vary more than 10% off of budgeted amounts. (Id. at ¶ 13(a)). Indeed, because the Debtors project a deficit (i.e., their cash position becomes negative) in Week 7 of their Budget, a material variance from budgeted amounts – and the attendant default under the Cash Collateral Facility – is virtually inevitable. In addition, the Debtors' right to use cash collateral should not terminate solely because a creditor obtains relief from the automatic stay on an asset worth more than $500,000. (Id. at ¶ 14(i)). These provisions only operate to serve as "tripwire" defaults that inappropriately cede all of the control in the chapter 11 case over to the Lenders.

Sixth, the Committee objects to the Cash Collateral Facility to the extent it leaves open the possibility that the Lenders may assert super-priority administrative claims to the proceeds of avoidance actions. (Id. at ¶ 11(a)). Because a super-priority administrative claim is senior to the claims of all unsecured and administrative creditors, making the avoidance actions available to satisfy such a claim would be tantamount to granting a lien on the avoidance actions in violation of the Interim Cash Collateral Order. (Id. at ¶ 29) ("Notwithstanding anything to the contrary herein, nothing in this Order shall be deemed to grant an encumbrance on any Avoidance Actions or the proceeds thereof.").

Seventh, the Cash Collateral Facility provides for automatic termination of the facility and the lifting of the automatic stay to allow the Lenders, without further order of Court, to exercise any rights and remedies that they may have upon an event of default. (Id. at ¶ 15). The Lenders may exercise such rights upon only three business days' notice to the Debtors and the Committee. Three business days' notice to seek a Court order is an unreasonably short

period of time to prevent the termination of the Cash Collateral Facility and corresponding loss of value to unsecured creditors and other stakeholders. To protect the rights of unsecured creditors, the Lenders should be required to seek a court order terminating the Debtors' right to use cash collateral, rather than requiring the Debtors to seek an emergency order solely due to the mere assertion of a default by the Lenders.

Finally, the loan documents underlying the Debtors' alleged secured obligations to the Lenders are not of record in this case. The Committee and other parties cannot analyze the propriety of the relief requested in the Cash Collateral Motion without being able to review those documents well in advance of the continued objection deadline to the entry of a final cash collateral order.

Dated: June 23, 2014

Respectfully submitted,
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/s/ Geoffrey S. Goodman

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CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing was served this 23rd day of June, 2014, electronically in accordance with the method established under this Court's CM/ECF Administrative Procedures and Standing Order dated July 25, 2002 upon all parties in the electronic filing system in his case.

/s/ Geoffrey S. Goodman, Esq.
PROPOSED COUNSEL FOR THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS