UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

IN RE:	)	
	)	
STOLLINGS TRUCKING COMPANY, INC.	)	**CASE NO. 15-20624**
	)	
	)	**CHAPTER 11**
Debtor.	)	
	)	

OBJECTION OF LYNDON PROPERTY INSURANCE COMPANY TO THE DISCLOSURE STATEMENT OF STOLLINGS TRUCKING COMPANY, INC.

Lyndon Property Insurance Company, Inc. ("Lyndon"), by and through its undersigned counsel, hereby objects (the "Objection") to the Disclosure Statement of Stollings Trucking Company, Inc. (the "Disclosure Statement"). In support of its Objection, Lyndon respectfully states as follows:

INTRODUCTION

1. Lyndon has issued $1,458,284.00 of reclamation surety bonds on behalf of the Debtor. Lyndon is committed to working with the Debtor, and the applicable regulatory agencies, to appropriately address the Debtor's reclamation liabilities and to resolve Lyndon's claim against the estate in a consensual manner. Lyndon has had initial discussions with the Debtor in this regard and is hopeful that, if these discussions are allowed to continue, the Debtor will be able to propose a confirmable plan that will have the support of Lyndon. Lyndon is filing this Objection solely to preserve its rights in the event that the Court does not grant the Debtor's motion, which Lyndon supports, to continue the Disclosure Statement hearing and the associated objection deadline.

2. The Debtor's Plan and Disclosure Statement, as currently drafted, fail to address Lyndon's claim in any material way and omit critical information regarding the Debtor's reclamation obligations, and their potential effect on the estate. As such, in its current form, the Debtor's Disclosure Statement cannot be approved because it does not contain "adequate information."

RELEVANT BACKGROUND

A. Procedural Background

3. On December 7, 2015 (the "Petition Date"), Stollings Trucking Company, Inc. ("Stollings" or the "Debtor") filed a petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") commencing the above captioned chapter 11 case.

4. The Debtor is continuing in possession of its property and in the management of its business as a debtor-in-possession, pursuant to sections 1107 and 1108 of the Bankruptcy Code. An official committee of unsecured creditors was appointed on January 11, 2016 [Docket No. 39].

5. On July 20, 2017, the Debtor filed its Disclosure Statement [Docket No. 346] and its Chapter 11 Plan of Liquidation filed by Debtor, Stollings Trucking Company, Inc. [Docket No. 347] (the "Plan").

6. On August 2, 2017, the Bankruptcy Court entered its Order Setting Time to Object to Disclosure Statement filed by Debtors; Hearing on Approval of Disclosure Statement (the "Disclosure Statement Order"), which set a deadline of September 6, 2017 for the filing of objections to the Disclosure Statement [Docket No. 352].

7. On August 23, 2017, the Debtor filed a motion to continue the Disclosure Statement hearing and the associated objection deadline [Docket Nos. 392-394, 396-398] (the "Motion to Continue"). As of the time of this Objection, the Court has not yet ruled on the Motion to Continue.

B. Mining Permits and Reclamation

8. Stollings was, prior to the Petition Date, engaged in surface and underground coal mining activities in Logan County, West Virginia. In order to conduct these activities, Stollings was required to obtain mining permits from the West Virginia Department of Environmental Protection ("WVDEP"). W. Va. Code § 22-3-8. According to the WVDEP's records, Stollings is the permittee on seven (7) active permits.

9. A permittee, such as Stollings, is required by West Virginia and Federal law to 'reclaim' and restore all land disturbed by its mining operations. *See In re Appalachian Fuels, LLC*, 521 B.R. 779, 781 (Bankr. E.D. Ky. 2014) (quoting *Cat Run Coal Co. v. Babbitt*, 932 F. Supp. 772, 774 n. 3 (S.D. W. Va. 1996) ("In general, reclamation . . . requires the surface of the land to be restored to its approximate original contour and water polluted by the mining operations be properly treated before leaving the mine site.").

10. In order to obtain a mining permit in the first instance, a prospective permittee is required to post financial assurance to secure "faithful performance" of its reclamation obligations. W. Va. Code § 22-3-11(a). This assurance may take the form of, among other things, cash bonds or surety bonds. W. Va. Code § 22-3-11(c)(1). A permittee's liability is not capped at the bond amount, but rather, a permittee is liable for the full costs of reclamation. W. Va. Code St. R. § 38-2-12.4(d), (e).

C. Bonding and Lyndon

11. According to the Disclosure Statement, the Debtor has posted cash bonds with the WVDEP in the amount of $1,800,000.00.[1] The Disclosure Statements also references the existence of surety bonds, but does not specify the amount, or the issuer, of such bonds. Lyndon has, in fact, posted surety bonds on behalf of the Debtor in the amount of $1,458,284.00 in favor of WVDEP. These bonds (the "Surety Bonds") are broken down as follows:

Bond No.	**Permit No.**[2]	**Bond Amt.**
L-092001-O-5-84	O-000584	$100,000
L-0691-O-5016-99	O-501699	$29,000
L-102002-S-5005-02	S-5005-02	$506,900
L-0601-S-5014-99	S-5014-99	$600,880
L-102002-S5014-99-IBR1	S-5014-99	$12,000
L-102002-S5014-99-IBR2	S-5014-99	$15,000
L-022003-S5014-99-IBR3	S-5014-99	$15,000
L-0601-S-5024-95	S-5024-95	$89,984
L-0601-U-5015-99	U-5015-99	$73,200
L-082001-U-5015-99	U-5015-99	$7,320
L-122002-U-5015-99	U-5015-99	$9,000

12. As more fully set forth in its proof of claim [P.O.C. No. 19], Lyndon issued the Surety Bonds in accordance with that certain Agreement for Bond (including all riders and amendments, the "Bond Agreement"). Pursuant to the Bond Agreement and common law, the Debtor is required to indemnify Lyndon from any and all losses suffered by Lyndon related to

[1] Lyndon does not have any information regarding the specifics of the Debtor's cash bonds.

[2] Multiple bonds may be associated with the same permit number because certain permits may be bonded in multiple "increments." W. Va. Code § 22-3-11(a). In fact, based on the publicly available information, it would appear that there are both cash bonds and surety bonds securing reclamation liabilities on different increments of the same permits.

the Surety Bonds. [Bond Agreement, ¶¶ 9-10].[3] In addition, the Debtor has caused Logan Bank & Trust to issue letters of credit in the amount of $510,399.00 (the "LCs") to secure its indemnity and other obligations to Lyndon.

OBJECTION

I. The Disclosure Statement Does Not Provide "Adequate Information"

13. Under section 1125(b) of the Bankruptcy Code, a disclosure statement must contain "adequate information" before the debtor may solicit acceptance of a plan of reorganization. 11 U.S.C. § 1125(b). Adequate information is defined as:

> information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records . . . that would enable such a hypothetical investor . . . to make an informed judgment about the plan . . .

11 U.S.C. § 1125(a)(1). Whether a disclosure statement contains adequate information is determined on a case-by-case basis. *See In re Bermuda Bay, LLC*, 2009 WL 5218071, at *4 (Bankr. E.D. Va. Dec. 31, 2009) (quoting *Menard Sanford v. Mabey (In re A.H. Robins Co.)*, 880 F.2d 694, 696 (4th Cir. 1989)). Although "[a] debtor cannot be expected to unerringly predict the future," it is required to "provide information on all factors known to [it] at the time that bear upon the success or failure of the proposals set forth in the plan." *In re Walker*, 198 B.R. 476, 479-480 (Bankr. E.D. Va. 1996). Accordingly, a disclosure statement must contain "all information that is reasonably necessary to permit creditors and parties-in-interest to fairly and

[3] The Debtor is also required to pay annual bond premiums to Lyndon of 1.75% of the face amount of the Surety Bonds. [Bond Agreement, ¶ 3]. The Debtor is current on its bond premiums. Lyndon expressly reserves the right to assert an administrative expense claim for any unpaid post-petition premiums and/or to draw on the LCs for that same purpose [Bond Agreement ¶ 9[i]].

effectively evaluate the plan." *In re Robert's Plumbing & Heating, LLC*, 2011 WL 2972092, at *2 (Bankr. D. Md. July 20, 2011).

A. The Disclosure Statement does not describe, classify or provide any treatment of Lyndon's claim, the Bonds or discuss the effect of forfeiture of the Bonds

14. As set forth in its proof of claim, Lyndon has a claim against the Debtor in the amount of $1,458,284.00. This claim is secured, in part, by the LCs. The Disclosure Statement, despite listing Lyndon as a secured creditor in the amount of $510,399.00 on Exhibit G, does not otherwise identify Lyndon, its claim, or the collateral securing that claim in any other way and, in fact, even the Plan itself does not classify or provide any proposed treatment for Lyndon's claim.[4] The failure to mention or provide any treatment for a claim in excess of a million dollars is surely a *per se* lack of "adequate information" regarding that claim.

15. Because the Disclosure Statement does not reference Lyndon's claim, it also fails to provide "adequate information" regarding the potential effect of Lyndon's claim on the bankruptcy estate. In the event that some or all of the Surety Bonds are forfeited to WVDEP, Lyndon will necessarily draw on the LCs. *See Graham v. State of West Virginia (In re War Eagle Const. Co.)*, 283 B.R. 193, 201 (S.D. W. Va. 2002) ("It is well established that a letter of credit and the proceeds therefrom are not property of the debtor's estate . . ."). To the extent that the LCs are secured by estate property (i.e. certificates of deposit or restricted cash) in an equivalent amount, the Debtor's estate will be diminished by the full amount of the LCs.[5]

[4] Per Exhibit F of the Disclosure Statement, Lyndon is not listed as having an unsecured claim and, therefore, no portion of its claim is included in "Class U" of the Plan.

[5] Lyndon believes, but cannot independently verify, that the LCs are secured by certificates of deposit in an amount not less than $510,399.00.

16. In addition, in the event of bond forfeiture, Lyndon will seek to enforce its indemnity claim against the Debtor and, as a result of its payment of the Surety Bond amounts to WVDEP, it will be subrogated to the claim of WVDEP.[6] *See e.g. Grubbs v. Slater*, 266 S.W.2d 85, 86 (Ky. 1953) (describing surety's equitable and statutory right of subrogation under Kentucky law).[7] Because WVDEP would be entitled to an administrative expense priority claim against the estate, *see Appalachian Fuels*, 521 B.R. 793-795 (WVDEP entitled to administrative expense claim for cost of reclamation and post-petition fines and penalties), Lyndon, as the subrogee of WVDEP, would be entitled to that same priority. *See e.g. In re Wingspread Corp.*, 116 B.R. 915, 931-932 (Bankr. S.D.N.Y. 199) (administrative expense claim priority transferred to subrogee). Thus, in the event of bond forfeiture, Lyndon will possess an administrative priority claim in an amount not less than $947,885.00.[8] Further, in the event the Debtor's reclamation liability exceeds the amount of the Surety Bonds, WVDEP itself would also have an administrative expense claim for the amount of any excess liability. Neither the Plan nor the Disclosure Statement appear to contemplate these administrative liabilities, notwithstanding their contemplation of the potential for forfeiture of the Debtor's bonds.

[6] The foregoing description of the outcome of a bond forfeiture is for illustrative purposes only. Lyndon expressly reserves all rights to contest any bond forfeiture and/or to exercise any and all rights granted to Lyndon pursuant to the Bond Agreement and applicable law.

[7] Pursuant to § 16 of the Bond Agreement, the Bond Agreement is governed by Kentucky law. To the extent that West Virginia law, rather than Kentucky or federal (11 U.S.C. § 509(a)) law, is deemed to apply to Lyndon's equitable subrogation rights, the result would be the same. *See e.g. Ray v. Donohew*, 352 S.E.2d 729, 737-738 (W. Va. 1986) (recognizing surety's right of equitable subrogation under West Virginia law).

[8] To the extent Lyndon draws on the LCs to pay bond premiums, inspection fees, attorney fees', or other expenses permitted by the Bond Agreement, the amount of Lyndon's administrative expenses claim will exceed the amount stated above.

B. The Disclosure Statement does not adequately describe how the Debtor or the Liquidating Trust will conduct reclamation and what assets and liabilities are to be transferred to the Liquidating Trust.

17. The Debtor, in its Disclosure Statement and Plan, appears to recognize that reclamation is the primary obligation of the Debtor and that the Debtor is ultimately responsible for reclaiming its permits to the standards required by WVDEP. [Disclosure Statement, pg. 7; Plan, pg. 11]. *See e.g.* Restatement (Third) of Suretyship & Guarantee § 21, cmt. (1996) ("[T]he [surety] is entitled to the principal obligor's performance, not merely a cause of action for its failure to perform."); *Buck Run Baptist Church v. Cumberland Sur. Ins. Co.*, 983 S.W.2d 501, 504 (Ky. 1998) ("A contract of suretyship is not a contract of insurance."). The Disclosure Statement is less clear, however, regarding how this reclamation will be conducted, who will do it, how much it will cost, and how long it will take. This information is required for creditors and parties-in-interest to evaluate the propriety and feasibility of the Plan.

18. There is language in the Disclosure Statement from which one could surmise that the Debtor is the party that will conduct, and/or pay for, any required reclamation. [Disclosure Statement, pg. 7]. This supposition, however, appears to be contradicted by the fact that (i) the Debtor is in the process of disposing of all or substantially all of the equipment it would need to perform reclamation, *see e.g.* Docket Nos. 362, 400, 403, 405, 407, 409; and (ii) the Plan appears to contemplate the transfer of all of the assets and liabilities of the Debtor to a liquidating trust. [Disclosure Statement, pg. 7].

19. If a liquidating trust, rather than the Debtor, is the entity that is intended to perform, or contract for, the required reclamation, this arrangement raises its own "adequate information" concerns. First, the Disclosure Statement provides no information regarding the

structure of the liquidating trust or the identity of any liquidating trustee. Second, if, in fact, all of the Debtor's assets and liabilities are to be transferred to a trust, the Disclosure Statement does not explain how the Debtor intends to transfer its mining permits to the trust without the approval of WVDEP, *see* W. Va. Code § 22-3-8 (permits cannot be transferred without approval of WVDEP), how the Debtor can transfer its Bonds to the trust without the approval of Lyndon, *see e.g. In re Edwards Mobile Home Sales, Inc.*, 119 B.R. 857, 859 (Bankr. M.D. Fla. 1990) ("[S]urety bonds[s] [are] financial accommodation[s] which cannot be assumed pursuant to section 365(c)(2)"), nor does it provide any proposed procedure for parties to object to the assignment of assets and contracts to the trust. Finally, the Disclosure Statement does not explain how the transfer of all of the Debtor's assets, which by the Debtor's own admission may be insufficient to complete the necessary reclamation [Disclosure Statement, pg. 7], coupled with a purported discharge of the Debtor [Disclosure Statement, pg. 10],[9] does not constitute a *de facto* abandonment of the Debtor's environmental liabilities in contravention of *Midlantic* and its progeny. *See Midlantic Nat'l Bank v. N.J. Dep't of Envt'l Prot.*, 474 U.S. 494, 506-507 (1986) (holding that a trustee may not abandon property in contravention of state laws designed to protect the public health); *In re Eagle-Pitcher Holdings, Inc.*, 348 B.R. 860 (Bankr. S.D. Ohio 2006) (plan that transfers property burdened by environmental liabilities to trust without adequate funding is forbidden by *Midlantic*).

[9] The Plan purports to discharge the Debtor to the extent specified in § 1141(d)(1) of the Bankruptcy Code. Section 1141(d)(3), however, which is not referenced in the Plan or Disclosure Statement, prohibits the Debtor from receiving a discharge, if, among other factors, "the plan," as in this case, "provides for the liquidation of all or substantially all of the property of the estate." 11 U.S.C. § 1141(d)(3). Furthermore, it is unclear if the Debtor's obligation to perform reclamation in conformity with state law is even a "claim" subject to discharge. *See e.g. In re Torwico Electronics, Inc.*, 8 F.3d 146, 148-151 (3d Cir. 1993).

20. In sum, the Debtor's Disclosure Statement fails to provide "adequate information" regarding Lyndon's claim, the Surety Bonds, the LCs, the Debtor's reclamation obligations and the claims arising from any failure to perform those obligations, the Debtor's financial condition and projections, and the structure and operation of the proposed liquidating trust. As such, the Disclosure Statement, as currently drafted, cannot be approved as it does not provide the information required for creditors and parties-in-interest to determine whether to vote in favor or against the Plan. Lyndon reaffirms its commitment, however, to work with the Debtor to propose a confirmable plan and hereby requests that the Court grant the Debtor additional time to formulate such a plan.

II. RESERVATION OF RIGHTS

21. Lyndon expressly reserves its right to assert the objections set forth herein, and any additional objections, to any amended Disclosure Statement filed by the Debtor, and to assert any and all available objections to confirmation of the Plan, or any amended Plan. Lyndon further reserves its right to assert all claims, defenses, and rights granted to it pursuant to the Bond Agreement and applicable law in any contested matter or adversary proceeding.

WHEREFORE, Lyndon respectfully requests that the Court deny approval of the Disclosure Statement and grant such other and further relief as the Court deems just and proper.

Respectfully submitted,

BARTH & THOMPSON

/s/ Stephen L. Thompson

Stephen L. Thompson (WV 3751)
BARTH & THOMPSON
P.O. Box 129
Charleston, West Virginia 25321
Telephone: (304) 342-7111
Facsimile: (304) 342-6215
E-mail: sthompson@barth-thompson.com

and

Daniel I. Waxman (KY 92736)
WYATT, TARRANT & COMBS, LLP
250 West Main Street, Suite 1600
Lexington, Kentucky 40507
Telephone: (859) 233-2012
Facsimile: (859) 259-0649
E-mail: Lexbankruptcy@wyattfirm.com

COUNSEL FOR LYNDON PROPERTY INSURANCE COMPANY, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Objection of Lyndon Property Insurance Company to the Disclosure Statement of Stollings Trucking Company, Inc. has been served electronically via the Court's CM/ECF system upon all parties designated to received electronic service on this 6th day of September, 2010.

/s/ Stephen L. Thompson
Stephen L. Thompson (W.Va. State Bar #3751)

61664566.2