

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

In re:

B & L EXCAVATING CO., INC.

Case No. 16-50068

THE DISCLOSURE STATEMENT OF B & L EXCAVATING CO., INC.

**ARTICLE I
INTRODUCTION**

This is the disclosure statement (the “Disclosure Statement”) in the small business Chapter 11 case of Fireball Enterprises, Inc. (the “Debtor”). This Disclosure Statement contains information about the Debtor and describes the Plan of Reorganization (the “Plan”) filed by the Debtor. A full copy of the Plan is attached to this Disclosure Statement as an Exhibit. *Your rights may be affected. You should read the Plan and this Disclosure Statement carefully and discuss them with your attorney. If you do not have an attorney, you may wish to consult one.*

The proposed distributions under the Plan are discussed at pages 3 through 4 of this Disclosure Statement.

A. Purpose of this Document

This Disclosure Statement describes:

- The Debtor and significant events during the bankruptcy case.
- How the Plan proposes to treat claims or equity interests of the type you hold (i.e., what you will receive on your claim or equity interest if the plan is confirmed).
- Who can vote on or object to the Plan.
- What factors the Bankruptcy Court (the “Court”) will consider when deciding whether to confirm the Plan.
- Why [the Proponent] believes the Plan is feasible, and how the treatment of your claim under the Plan compares to what you would receive on your claim in liquidation, and
- The effect of confirmation of the Plan.

Be sure to read the Plan, as well as the Disclosure Statement. This Disclosure Statement describes the Plan, but it is the Plan itself that will, if confirmed, establish your rights.

B. Deadlines for Voting and Objecting; Date of Plan Confirmation Hearing

The Court has not yet confirmed the Plan described in this Disclosure Statement. This section describes the procedures pursuant to which the Plan will or will not be confirmed.

1. *Time and Place of the Hearing to [Finally Approve This Disclosure State and] Confirm the Plan*

The hearing at which the Court will determine whether to [finally approve this Disclosure Statement and] confirm the Plan will take place on [insert date], at [insert time], in the United States

Bankruptcy Court, Robert C. Byrd U.S. Courthouse, 300 Virginia Street, East, Room 3200, Charleston, West Virginia.

2. *Deadline For Voting to Accept or Reject the Plan*

If you are entitled to vote to accept or reject the plan, vote on the enclosed ballot and return the ballot in the enclosed envelope to Joseph W. Caldwell, P.O. Box 4427, Charleston, West Virginia 25304.

Your ballot must be received by _____ or it will not be counted.

3. *Deadline for Objecting to the Adequacy of Disclosure and Confirmation of the Plan*

Objections to this Disclosure Statement or to the confirmation of the Plan must be filed with the Court and served upon Joseph W. Caldwell, P.O. Box 4427, Charleston, West Virginia 25304, by [insert date].

4. *Identity of Person to Contact for More Information*

If you want additional information about the Plan, you should contact Joseph W. Caldwell, Caldwell & Riffe, P.O. Box 4427, Charleston, West Virginia 25364.

C. **Disclaimer**

The Court has approved this Disclosure Statement as containing adequate information to enable parties affected by the Plan to make an informed judgment about its terms. The Court has not yet determined whether the Plan meets the legal requirements for confirmation, and the fact that the Court has approved this Disclosure Statement does not constitute an endorsement of the Plan by the Court, or a recommendation that it be accepted [The Court's approval of this Disclosure Statement is subject to final approval at the hearing on confirmation of the Plan. Objections to the adequacy of this Disclosure Statement may be filed until _____.]

II. **BACKGROUND**

A. B & L Excavating Co., Inc. conducts several operations - transporting heavy equipment for third parties. The business has conducted several operations - transporting heavy equipment for third parties; cutting logging roads; cutting surface mine benches; hauling coal; hauling gravel; and excavation work. The business has always been based in Wyoming County, West Virginia. Over the past five years particularly, the gross revenues of the business declined because of the decline in coal mining and related activity in southern West Virginia. Also, certain key customers of the business failed to pay invoices. In 2014, B & L Excavating Co., Inc. purchased a 2013 Western Star coal truck through Mercedes Benz Finance. The truck has had operational problems since the time of purchase. Even though the truck has been under an express warranty, repairs were unable to allow the unit to operate without breakdowns. The Debtor has now entered into a proposed settlement agreement with Cummins, Inc., the manufacturer of the engine. Cummins, Inc. will provide a replacement engine and the labor to install the new engine in the Western Star Coal Truck.

III. SIGNIFICANT EVENTS

During the pendency of this case, the Debtor has acquired a coal hauling job through Masons Transport. The Debtor is a subcontractor on a surface mining job operated by Blackhawk Mining at Bolt Mountain. The haul is approximately 14 miles which allows the Debtor to make more than one haul per day. The Debtor receives \$4.00 per ton and grosses approximately \$1,200 per day.

The Debtor has also entered into a settlement agreement with Cummins, Inc. on the coal truck which in the past has experienced several engine malfunctions. A replacement engine is to be installed.

THIS PLAN IS CONTINGENT UPON THE SUCCESSFUL SALE OF CERTAIN PIECES OF EQUIPMENT. THE EQUIPMENT TO BE SOLD WILL BE SOLD FREE AND CLEAR OF LIENS WITH LIENS TO ATTACH TO THE PROCEEDS. BEFORE ANY SALE, CREDITORS WILL BE NOTIFIED AND GIVEN THE OPPORTUNITY TO OBJECT AND REQUEST A COURT HEARING. THE DEBTOR OWNS SUFFICIENT ASSETS TO PAY ITS DEBT, BUT BECAUSE OF FLUCTUATIONS IN DISPOSABLE INCOME, FEASIBILITY FOR THE PLAN IS DEPENDENT UPON THE SALE OF SURPLUS EQUIPMENT. THE GOAL WILL BE TO SELL ONE PIECE OF EQUIPMENT EACH CALENDAR QUARTER.

IV. SUMMARY OF THE PLAN OF REORGANIZATION AND TREATMENT OF CLAIMS AND EQUITY INTERESTS

A. What is the Purpose of the Plan of Reorganization

As required by the Code, the Plan places claims and equity interests in various classes and describes the treatment each class will receive. The Plan also states whether each class of claims or equity interests is impaired or unimpaired. If the Plan is confirmed, your recovery will be limited to the amount provided by the Plan.

B. Unclassified Claims

Certain types of claims are automatically entitled to specific treatment under the Code. They are not considered impaired, and holders of such claims do not vote on the Plan. They may, however, object if, in their view, their treatment under the Plan does not comply with that required by the Code. As such, the Plan Proponent has *not* placed the following claims in any class:

1. *Administrative Expenses*

Administrative expenses are costs or expenses of administering the Debtor’s chapter 11 case which are allowed under § 507(a)(2) of the Code. Administrative expenses also include the value of any goods sold to the Debtor in the ordinary course of business and received within 20 days before the date of the bankruptcy petition. The Code requires that all administrative expenses be paid on the effective date of the Plan, unless a particular claimant agrees to a different treatment.

The following chart lists the Debtor’s estimated administrative expenses, and their proposed treatment under the Plan:

<u>Type</u>	<u>Estimated Amount Owed</u>	<u>Proposed Treatment</u>
Expenses Arising in the Ordinary Course of Business After the Petition Date	\$30,000 - Mercedes Benz Financial	Paid at \$1,000 per month.
The Value of Goods Received in the Ordinary Course of Business Within 20 Days Before the Petition Date	\$ 0	
Professional Fees, as approved by the Court	\$2,500	To be filed with the Court.
Clerk’s Office Fees	\$ 0	
Office of the U.S. Trustee Fees	\$1,950	Paid when due.
TOTAL		

2. *Priority Tax Claims*

The Debtor did incur priority tax claims prior to the filing of this case. Those claims are as follows:

<u>Class</u>	<u>Impairment</u>	<u>Treatment</u>
<u>Class 1 - Priority Claims</u>	Yes	\$39,704
Pre-petition claim of the Internal Revenue Service		\$34,866 - priority - \$1,500 per quarter \$ 4,838 - Class U - unsecured

West Virginia State Tax Department	Yes	\$9,435 - priority - \$565 per quarter unsecured - \$2,407 - Class U
Work Force West Virginia	Yes	\$293 - priority

Class 2 - Secured Claims - Allowed secured claims are claims secured by property of the Debtor's bankruptcy estate to the extent allowed as secured under Section 506 of the Bankruptcy Code. The following identifies all classes contained in Debtor's pre-petition secured claims and their proposed treatment under the Plan.

2.1 CATERPILLAR TRACTOR

Caterpillar Tractor is secured by a 2012 Trail King Lowbody Trailer which is fully secured. The balance owed is approximately \$38,000. The Debtor will make payments on this unit at the rate of \$1,641.56 per month.

2.2 MERCEDES BENZ FINANCIAL

Class S-2 is the secured claim of Daimler / Mercedes Benz Financial. This claim is secured by a 2013 Western Star coal truck. The Debtor previously filed an adversary proceeding against Cummins, Inc., the manufacturer of the engine for defective engine parts. That case has been settled and a replacement engine will be installed in the vehicle.

Daimler / Mercedes Benz Financial has filed a secured claim in the amount of \$74,225. The Debtor will pay \$74,225 to Mercedes Benz Financial with interest at 5% per annum. Payments shall be made at the rate of \$1,200 per month for 60 months.

The Debtor suffered consequential damages as a result of the down time from use of the vehicle. The Debtor estimates its consequential damages and annoyance and inconvenience to total at least the sum of \$72,000.

The Debtor will satisfy its damages for consequential damages by an offset against the unsecured claim of Mercedes / Benz Financial. The Debtor asserts that any limitation on warranties should be invalidated under the provisions of 46-2-302 on the grounds of unconscionability. The Debtor also asserts that 46-2-316 does not preclude the general policing provisions of the Uniform Commercial Code.

2.3 **FORD MOTOR CREDIT.**

Ford Motor Credit holds a lien on a 2011 Ford F-250 Pickup Truck. The Debtor acknowledges that this collateral is fully secured. The Debtor will make payments on this unit at the rate of \$721.99 per month. This claim is impaired.

3. *Unsecured Creditors*

Class U consists of non-insider unsecured creditors. Claims in this class total the sum or \$155,072. Creditors in this class shall receive a dividend of 100% based upon 26 quarterly payments, without interest. Payments shall be made at the rate of \$6,000 per quarter. This class is impaired.

4. *Class of Equity Interest Holders*

Terry St. Clair and Craig St. Clair will continue to hold the ownership interest in the Debtor.

D. Means of Implementing the Plan

This Chapter 11 Plan is based upon the Debtor's belief that payments to creditors as provided herein will return more to the creditor body than they would receive under a liquidation by a Chapter 7 Trustee. The Plan will be funded by cash flow generated from future operations based upon a going concern. The Debtor reserves the right to sell certain unencumbered equipment with the proceeds to be paid over to priority creditors and unsecured creditors. The sale of any surplus equipment will allow a quicker payback under the Plan. A sale will also be necessary to make the Plan feasible.

Upon the effective date, all property of the estate, wherever situated, shall be vested in the Debtor, free and clear of all liens, claims and interests except as may otherwise be provided by the Plan.

E. Risk Factors

The primary risk is that the Debtor will not generate sufficient business to make Plan payments. The Debtor services coal companies and heavy equipment companies in Southern West Virginia. Southern West Virginia has experienced a significant decline in economic activity. The Debtor also hauls coal as a subcontractor for Masons Transport. That agreement is subject to termination upon 30 days notice. Other risks are that the Debtor will not be able to obtain loans, when necessary, to replace operating equipment or that the Debtor's key customers will suffer economic adverse consequences.

F. Executory Contracts

The Debtor is a party to an executory contract with Masons Transport. The Debtor hauls coal at the rate of \$4.00 per ton. Masons Transport hauls coal for Blackhawk Mining. Because of the uncertainty in coal production in southern West Virginia, transporters of coal are subject to termination of working agreements upon short term notice.

The Debtor is a party to an insurance finance agreement with IPFS Corporation. Under the terms of the Agreement, the Debtor is to pay IPFS in nine monthly installments of \$6,531.60 each. IPFS holds a security interest on unearned premiums. This insurance is essential for business operations and this Agreement will be assumed.

G. Tax Consequences of the Plan

The Debtor may be able to capture pre-petition net operating loss carry overs and other tax attributes. However, the Plan is not premised upon tax considerations.

Pursuant to the provisions of 11 U.S.C. § 1125, the Debtor states that the Plan will not have any material federal tax consequences upon the Debtor. Payments received by secured creditors will have the same tax effect as if the Debtor were not a party to a Chapter 11 case. Payments received by unsecured creditors are impaired to the extent that a claim is not paid in full.

V. CONFIRMATION REQUIREMENTS AND PROCEDURES

To be confirmable, the Plan must meet the requirements listed in §§ 1129(a) or (b) of the Code. These include the requirements that: the Plan must be proposed in good faith; at least one impaired class of claims must accept the Plan, without counting votes of insiders; the Plan must distribute to each creditor and equity interest holder at least as much as the creditor or equity interest holder would receive in a chapter 7 liquidation case, unless the creditor or equity interest holder votes to accept the Plan; and the Plan must be feasible. These requirements are not the only requirements listed in § 1129, and they are not the only requirements for confirmation.

A. Who May Vote or Object

Any party in interest may object to the confirmation of the Plan if the party believes that the requirements for confirmation are not met. All creditors are entitled to vote on the Plan.

In this case, the Plan Proponent believes that all classes are impaired other than the holders of administrative expense claims. Holders of impaired claims have the right to accept or reject the Plan.

1. What Is an Allowed Claim or an Allowed Equity Interest?

Only a creditor or equity interest holder with an allowed claim or an allowed equity interest has the right to vote on the Plan. Generally, a claim or equity interest is allowed if either (1) the Debtor has scheduled the claim on the Debtor's schedules, unless the claim has been scheduled as disputed, contingent or unliquidated, or (2) the creditor has filed a proof of claim or equity interest, unless an objection has been filed to such proof of claim or equity interest.

2. What Is an Impaired Claim or Impaired Equity Interest?

As noted above, the holder of an allowed claim or equity interest has the right to vote only if it is in a class that is *impaired* under the Plan. As provided in § 1124 of the Code, a class is considered impaired if the Plan alters the legal, equitable, or contractual rights of the members of that class.

3. *Who is **Not** Entitled to Vote*

The holders of the following five types of claims and equity interests are *not* entitled to vote:

- holders of claims and equity interests that have been disallowed by an order of the Court.
- holders of other claims or equity interests that are not “allowed claims” or “allowed equity interests” (as discussed above), unless they have been “allowed” for voting purposes.
- holders of claims or equity interests in unimpaired classes;
- holders of claims entitled to priority pursuant to §§ 507(a)(2), (a)(3), and (a)(8) of the Code; and
- holders of claims or equity interests in classes that do not receive or retain any value under the Plan;
- administrative expenses.

B Votes Necessary to Confirm the Plan

If impaired classes exist, the Court cannot confirm the Plan unless (1) at least one impaired class of creditors has accepted the Plan without counting the votes of any insiders within that class, and (2) all impaired classes have voted to accept the Plan, unless the Plan is eligible to be confirmed by “cram down” on non-accepting classes, as discussed later in Section [B.2].

1. *Votes Necessary for a Class to Accept the Plan*

A class of claims accepts the Plan if both of the following occur: (1) the holders of more than one-half ($\frac{1}{2}$) of the allowed claims in the class, who vote, cast their votes to accept the Plan, and (2) the holders of at least two-thirds ($\frac{2}{3}$) in dollar amount of the allowed claims in the class, who vote, cast their votes to accept the Plan.

2. *Treatment of Nonaccepting Classes*

Even if one or more impaired classes reject the Plan, the Court may nonetheless confirm the Plan if the nonaccepting classes are treated in the manner prescribed by § 1129(b) of the Code. A plan that binds nonaccepting classes is commonly referred to as a “cram down” plan. The Code allows the Plan to bind nonaccepting classes of claims if it meets all the requirements for consensual confirmation except the voting requirements of § 1129(a)(8) of the Code, does not “discriminate unfairly,” and is “fair and equitable” toward each impaired class that has not voted to accept the Plan.

C. Liquidation Analysis

To confirm this Plan, the Court must find that all creditors who do not accept the Plan

will receive at least as much under the Plan as such claim would receive in a Chapter 7 liquidation. A liquidation analysis is attached to this Disclosure Statement. B & L Excavating Co., Inc. does have assets which could be liquidated by a Chapter 7 Trustee. The Plan provides for a 100% payback to unsecured creditors. Although it may be difficult to transfer the assets on a going concern basis, the Debtor believes that it can generate sufficient funds to make Plan payments.

D. Feasibility

In order to achieve confirmation of the Plan, the Court must determine that the Plan is not likely to be followed by liquidation. As noted, because of the current state of the economy in southern West Virginia, it is not possible to determine with a reasonable degree of certainty future revenues of any business linked to the coal industry or the construction industry. Most work is of a short term nature and there is no assurance of a level of business 12 to 24 months into the future. Past performance may no longer be a guide to future expectations. Nevertheless, B & L Excavating Co., Inc. does have sufficient equipment to perform work and some of its key competitors have already gone out of business. It is anticipated, regardless of the decline in actual coal production, that there will be reclamation work, whether performed through environmental groups or as a contractor recognized by the DEP of the State of West Virginia. An uptick in timbering activity would also be beneficial to B & L Excavating Co., Inc. When timbering increases, B & L Excavating Co., Inc. is involved in transporting heavy equipment; cutting logging roads; and participating in restoring properties under best management practices.

1. *Ability to Initially Fund Plan*

The Plan Proponent believes that the Debtor will have enough cash on hand within 60 days after the effective date of the Plan to pay all the claims and expenses that are entitled to be paid.

2. *Ability to Make Future Plan Payments And Operate Without Further Reorganization*

The Plan Proponent must also show that it will have enough cash over the life of the Plan to make the required Plan payments. The Debtors' cash flow has improved over the past five months.

The Plan Proponent has provided financial projections which are listed as Exhibit _____. The Debtor's financial projections shows that the Debtor will have an aggregate cash flow to support the Plan.

VI. EFFECT OF CONFIRMATION OF PLAN

A. Discharge of Debtor

On the effective date the Plan, the Debtor shall be discharged from any debt that arose before confirmation of the Plan, subject to the occurrence of the effective date, to the extent specified in §1141(d)(1)(A) of the Code, except that the Debtor shall not be discharged of any debt imposed by Plan, of a kind specified in §1141(d)(6)(A) if a timely complaint was filed in accordance with Rule 4007(c) of

the Federal Rules of Bankruptcy Procedure, or (iii) of a kind specified in §1141(d)(6)(B). After the effective date of the Plan, claims against the Debtor will be limited to the debts described above.

B. Modification of Plan

The Plan Proponent may modify the Plan at any time before confirmation but the Court may require a new Disclosure Statement if the modifications are significant.

VII. DEFAULT

In the event that the Debtor would default under the terms of the Plan, then secured creditors would have the option to take collection action to repossess their collateral. It is highly likely that a repossession sale would result in unsecured deficiency claims. Further, the Debtor does owe some obligations to priority tax creditors. The Debtor does not believe that there would be any dividend to unsecured creditors in the event of cessation of business.

VIII. FINAL DECREE

Once the estate has been fully administered, as provided in Rule 3022 of the Federal Rules of Bankruptcy Procedure, the Plan proponent, or such other party as the Court shall designate in the Plan Confirmation Order, shall file a motion with the Court to obtain a final decree to close the case. Alternatively, the Court may enter such a final decree on its own motion.

VIX. OTHER PLAN PROVISIONS

Miscellaneous

1. Governing Law. Except to the extent that the Bankruptcy Code is applicable, the rights and obligations arising under the Plan shall be governed by and construed and enforce in accordance with the laws of the State of West Virginia.

2. Severability. Should any provision in the Plan be determined to be unenforceable, such determination shall in no way limit or affect the enforceability and operative effect of any and all other provisions of the Plan.

B & L EXCAVATING CO., INC.

By Counsel

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