

**UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF KENTUCKY**

IN RE:

**CAMBRIAN HOLDING COMPANY, INC.,
ET AL.,¹**

DEBTORS.

CHAPTER 11

CASE NO. 19-51200 (GRS)

JOINTLY ADMINISTERED

HON. GREGORY R. SCHAAF

**ENTERPRISE MINING COMPANY, LLC'S RESERVATION OF RIGHTS
REGARDING THE DEBTOR'S PROPOSED SALE OF SUBSTANTIALLY ALL OF
THEIR ASSET PURSUANT TO THIS COURT'S ORDER (A) ESTABLISHING
BIDDING AND SALE PROCEDURES, (B) AUTHORIZING ENTRY OF STALKING
HORSE AGREEMENT AND PROVISION OF STALKING HORSE PROTECTIONS, (C)
SCHEDULING AN AUCTION AND SALE HEARING AND APPROVING THE
FORM/MANNER OF NOTICE, AND (D) GRANTING RELATED RELIEF**

Enterprise Mining Company, LLC ("Enterprise"), through counsel, reserves its rights as follows regarding the Debtors' proposed sale of substantially all of their assets ("Sale") pursuant to the Court's *Order (A) Establishing Bidding and Sale Procedures, (B) Authorizing Entry Of Stalking Horse Agreement and Provision Of Stalking Horse Protections, (C) Scheduling an Auction and Sale Hearing and Approving The Form/Manner Of Notice, And (D) Granting Related Relief* [Doc. 339] ("Bidding Procedures Order").

JURISDICTION AND VENUE

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334(b) and 157. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(G).
2. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

¹ The Debtors in these Chapter 11 cases are (with the last four digits of their federal tax identification numbers in parentheses): Cambrian Holding Company, Inc. (8203), Cambrian Coal LLC (3394), Apex Energy, Inc. (3455), C.W. Augering, Inc. (2875), Marshall Resources, Inc. (9735), PLM Holding Company LLC (7427), Bear Branch Coal LLC (0674), Clintwood Elkhorn Mining LLC (6910), Gatliff Coal LLC (5768), Perry County Coal LLC (4382), Ray Coal LLC (0981), Whitaker Coal LLC (8270), Pike-Letcher Land LLC (8952), Premier Elkhorn Coal LLC (8951), Raven Rock Development LLC (1351), Rich Mountain Coal LLC (1974), S.T. & T. Leasing, Inc. (0340), T.C. Leasing, Inc. (7705), and Shelby Resources, LLC (5085) (collectively, "Debtors").

3. This Court has authority to grant the requested relief pursuant to 11 U.S.C. §§105 and 365.

BACKGROUND

4. Enterprise and PCC entered into an agreement on or about May 26, 2009, to assign six leases held by Enterprise, as lessee, to PCC (the “Agreement”), including a lease between ACIN LLC, as lessor, and Enterprise (the “ACIN Lease”).

5. Material to the Agreement and as part of the consideration for the assignment of the leases to PCC, PCC agreed to pay Enterprise an overriding royalty based on the Gross Sales Price, as defined in the ACIN Lease, received by PCC for the coal mined, removed, and sold from the premises leased under the ACIN Lease.

6. Pursuant to the Bidding Procedures Order, the Debtors filed the *Notice of (A) Potential Assumption and Assignment of Executory Contracts and Unexpired Leases and (B) Cure Amounts and Reservation of Rights* [Doc. 381] (“Notice”) on August 23, 2019, with an Exhibit 1 containing a list of certain leases and contracts between the Debtors and various counterparties which Debtors contemplate assuming and assigning to a potential purchaser of the Debtors Assets.

7. With respect to Enterprise, the Notice lists a “Royalty Agreement” between Enterprise and PCC as a potential agreement to be assumed and assigned and a proposed cure amount of \$305,839.30. (Not. Exhibit 1, Doc. 381-1, p. 58, Contact No. 546.)

8. Enterprise filed its objection to the Debtors’ proposed cure amounts on September 9, 2019 [Doc. 430] (“Cure Objection”), which is incorporated herein, objecting to the Debtors’ proposed cure amount and asserting other objections and reserving Enterprise’s rights. (Cure Objection, Doc. 430.)

9. Pursuant to the Bidding Procedures, the Debtors received bids for some or all of the Debtors' assets on or before September 11, 2019.

10. Upon request and pursuant to the Bidding Procedures, the Debtors provided information to Enterprise on September 12, 2019, which each bidder purported was evidence of its ability to perform in the future under the executory contracts and unexpired leases proposed in its bid to be assumed by the Debtors and assigned to the bidder. (Bidding Procedures, Doc. 339, Doc. p. 22–23 of 29, ¶ 5.(b)(2)(xii).) That information is deemed confidential and cannot be disclosed in this filing. Nevertheless, the information provided did not provide details regarding the bids or the executory contracts and unexpired leases proposed in each bid to be assumed by the Debtors and assigned to the bidder, nor did it provide adequate assurance of any bidder's ability to perform the Agreement in the future.

11. Enterprise filed an objection and reservation of rights regarding the assumption and assignment of the Agreement [Doc. 460] (“Assumption Objection”) pursuant to the Notice because Enterprise has not been provided with information providing adequate assurance that the Debtors or any potential bidder can comply with section 365 of the Bankruptcy Code. The Assumption Objection is incorporated herein.

12. The Debtors proceeded with an auction on September 18, 2019. Yet, the Debtors have not provided notice of their selection of a Successful Bid (as defined in the Bidding Procedures).

13. Objections to the Sale are due on September 20, 2019. (Bidding Procedures Order, ¶ 11.)

14. While Enterprise has not received notice that its Agreement will be assumed and assigned to any potential bidder, it is listed in the Notice as a contract that may be assumed and assigned, and Enterprise, therefore, asserts the following reservations of rights regarding the Sale.

RESERVATION OF RIGHTS

15. Enterprise reserves all rights under the Agreement.

16. Enterprise reserves all rights regarding any arguments regarding whether the Agreement is subject to rejection, assumption, or assignment, including the right to object based on any further bid information received from the Debtors about the bidder and the bid submitted, including any final winning bid or bidder.

17. If the Agreement is subject to Bankruptcy Code section 365, and if the Debtors or any bidders intend to assume and assign the ACIN Lease addressed in the Agreement, the Debtors and said bidder are obligated to assume and assign the Agreement. *In re Trinity Coal Corp.*, 514 B.R. 526, 530 (Bankr. E.D. Ky. 2014) (“Where multiple contracts are intended to comprise one agreement or transaction, a party may not sever them for purposes of assumption or rejection.”).

18. Further, if the Agreement is subject to Bankruptcy Code section 365, and if the Debtors intend to assume and assign the ACIN Lease and the Agreement, the Agreement must be assumed (or rejected) *cum onere*: with the burdens as well as the benefits. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 531–32 (1984); *see also In re Ralston*, 401 F.2d 293, 295 (6th Cir. 1968).

19. Prior to assuming the Agreement, the Debtors must cure any prior default and provide adequate assurance of future performance by PCC or any potential assignee. 11 U.S.C. 365(b)(1).

20. Until the Agreement is assigned or rejected, PCC is responsible for all of its obligations under the Agreement.

21. Enterprise reserves all rights to object to any term in any asset purchase agreement or other sale documentation between the Debtors and any court-approved assignee, and it reserves the right to object to the form of any sale order that is proposed to approve any contemplated Sale.

22. Any consent to assignment by Enterprise pursuant to Bankruptcy Code section 365 shall not be deemed consent to any further assignment of the Agreement.

23. Nothing in any sale documentation or sale order shall be deemed to alter the terms of the Agreement, including any consent rights Enterprise may have regarding future assignments of the Agreement.

24. Nothing in this Reservation of Rights is intended to be, or should be construed as, a waiver by Enterprise of its rights under the Agreement, the Bankruptcy Code, or applicable law. Enterprise hereby expressly reserves all rights under the Agreement, the Bankruptcy Code, and applicable law, including, but not limited to, the right to (a) object to any proposed cure amount and (b) assert any nonmonetary defaults under the Agreement.

25. Enterprise reserves the right to (a) amend, supplement, or otherwise modify this Reservation of Rights, and (b) assert or raise such other and further objections or responses to any Sale based on additional information received from the Debtors or other sources.

26. Enterprise reserves the right to request a hearing on this matter.

27. Enterprise files this reservation of rights to preserve its rights under the Agreement. By filing this reservation of rights, Enterprise does not waive (i) Enterprise's right to have final orders in non-core matters entered only after de novo review by a District Judge; (ii) Enterprise's right to trial by jury in any proceeding so triable in this case or any case, controversy or proceeding related to this case; (iii) Enterprise's right to have the District Court withdraw the reference in any matter subject to mandatory or discretionary withdrawal; or (iv) any other rights, claims, actions,

defenses, setoffs or recoupments to which Enterprise is or may be entitled under agreement, in law, in equity, or otherwise, all of which rights, claims, actions, defenses setoffs and recoupments Enterprise expressly reserves.

28. Enterprise, accordingly, reserves all rights and objections with respect to the Sale as set forth herein, and requests that (i) the Debtors be required to pay the full amount of the outstanding obligations under the Agreement as of the date of any assumption, including the cure amount listed in Exhibit 1 to the Cure Objection [Doc. 430-1], prior to any assumption of the Agreement; (ii) any assumption of the Agreement be conditioned upon the satisfaction of all cure obligations, liquidated or unliquidated, arising out of the Agreement; (iii) any bidder be required to provide adequate assurance of its ability to pay any and all associated amounts; (iv) the Debtors be required to assume and assign all of the benefits as well of the burdens of the Agreement to a single assignee; (v) there be a proper showing of adequate assurance of future performance by any such assignee, including the assignee's ability to perform under all of the terms, conditions, and other obligations of the Agreement; and (vi) the Court provide such other and further relief as it may deem just and proper.

Respectfully Submitted,

/s/ Chacey R. Malhouitre

Mary Elisabeth Naumann (KY Bar # 88328)

Chacey R. Malhouitre (KY Bar # 91019)

JACKSON KELLY PLLC

175 E. Main Street, Ste. 500

Lexington, KY 40507

Telephone: (859) 255-9500

mnaumann@jacksonkelly.com

chacey.malhouitre@jacksonkelly.com

Counsel for Enterprise Mining Company, LLC

CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2019, a copy of the foregoing was served electronically in accordance with the method established under this Court's CM/ECF Administrative Procedures upon all counsel appearing in this case via the Court's CM/ECF system, and on the Objection Notice Parties identified on the Master Service List found at <https://dm.epiq11.com/case/CDC/info> (as of 09/17/2019 06:00:31 and reviewed 9/20/2019) not receiving notice via the CM/ECF System as follows:

(i) To the following by email:

1st Trust Bank Inc., Attn. Vicki Fields: vfields@1sttrustbankinc.com
Brandies Machinery & Supply Company, Attn. Katie Deulina: katie_deulina@bramco.com
Chapman and Cutler LLP: halperin@chapman.com; appleby@chapman.com
Davis Polk & Wardwell, LLP: christopher.robertson@davispolk.com;
brian.resnick@davispolk.com
Latham & Watkins LLP, Attn. Christopher Plaut: christopher.plaut@lw.com
Pamela Dotson Tester: pdtester.pt@gmail.com
Robert J. Zik: bobzik50@icloud.com
Teco Diversified, Inc., Attn. Marshall Tucker: motucker@tecoenergy.com
West Virginia Department of Revenue: kathy.a.torlone@wv.gov

(ii) To the following via overnight delivery:

Fifth Third Bank
38 Fountain Square Plaza
MD 10904A
Cincinnati, OH 45263

Kentucky Department of Revenue, Legal
Branch - Bankruptcy Section
P.O. Box 5222
Frankfort, KY 40602

Internal Revenue Service
Centralized Insolvency Operation
P.O. Box 7346
Philadelphia, PA 19101-7346

Kentucky Department of Revenue Labor
Cabinet (Occupational Tax)
657 Chamberline Ave
Frankfort, KY 40601

Rudd Equipment Co.
4344 Poplar Level Rd.
Louisville, KY 40213

PNC Equipment Finance LLC
995 Dalton AVE
Cincinnati, OH 45203

Internal Revenue Service
1111 Constitution Ave NW
Washington, DC 20224-0001

Virginia Dept. of Taxation
1957 Westmoreland St., P.O. Box 115
Richmond, VA 23230

Kentucky Department of Revenue
501 High Street
Frankfort, KY 40601

Virginia Dept. of Taxation
600 E. Main St., #1100
Richmond, VA 23219

/s/ Chacey R. Malhouitre

Chacey R. Malhouitre (KY Bar # 91019)

JACKSON KELLY PLLC

175 E. Main Street, Ste. 500

Lexington, KY 40507

chacey.malhouitre@jacksonkelly.com

Counsel for Enterprise Mining Company, LLC