UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION

IN RE:	)	
	)	
CAMBRIAN HOLDING COMPANY, INC., et al.,	)	CHAPTER 11
	)	
Debtor	)	Case No. 19-51200

OBJECTION OF THE COMMONWEALTH OF KENTUCKY, ENERGY AND ENVIRONMENT CABINET TO THE AGREED ORDER MEMORIALIZING WAIVER OF SIMULTANEOUS PERMIT ISSUANCE AGREEMENT IN CONFIRMATION ORDER WITH RESPECT TO MYRA RESOURCES, LLC PERMIT TRANSFERS [DOC. NO. 2250]

Comes now the Commonwealth of Kentucky, Energy and Environment Cabinet (hereinafter the "Cabinet") and for its objection to the Agreed Order Memorializing Waiver of Simultaneous Permit Issuance Agreement in Confirmation Order with Respect to Myra Resources, LLC Permit Transfers [Doc. No. 2250](hereinafter the "Agreed Order"), hereby states as follows:

On April 7, 2023, Continental Heritage Insurance Company ("Continental"), the Liquidating Trustee of the Cambrian Liquidating Trust (the "Trustee"), Pristine Clean Energy, LLC ("Pristine"), Virgie Clean Mining, LLC ("Virgie"), Myra Resources, LLC ("Myra"), Pike Elkhorn Land Company, LLC ("Pike Elkhorn"), and Pallas Plant A ("Pallas," and together with Pristine, Virgie, Myra and Pike Elkhorn, the "Pristine Parties") filed their Agreed Order proposing to significantly alter and or/remove completely, certain permit transfer terms as required by this Court's *Findings of Fact, Conclusions of Law, and Order Confirming the Third Amended Joint Plan of Orderly Liquidation* [Doc. No. 1542] (hereinafter the "Confirmation Order").

The Agreed Order seeks to eliminate the requirement that the permit transfers occur simultaneously as required by paragraph 27(b) of the Confirmation Order. Furthermore, the

Agreed Order seeks to undermine the discretion granted to "the Cabinet or any Governmental Unit" in "withhold[ing] issuance of final approval of the transfer of any Purchased Permit such that final approval of the application for the transfer of each Purchaser's remaining Purchased Permits occurs simultaneously".

The Parties are Barred from Modifying the Confirmation Order – The Confirmation Order Was Entered Over Two Years Ago

The Pristine Parties filed a Proposed Agreed Order which seeks to amend the Confirmation Order - a final order of this Court. Since the Court's Order was entered over 2 years ago, the Pristine Parties are time barred from bringing a motion to alter, amend or vacate under Fed. R. Bank. P. 9023, which applies Fed. R. Civ. Pro. 59(e)[1] to cases under the Bankruptcy Code. Subject to certain exceptions that do not apply here, motions to alter a judgment under Rule 9023 must be filed no later than 14 days after entry of judgment. Thus, at this stage in litigation, the Pristine Parties must seek relief under Fed. R. Bank. P. 9024, which makes Fed. R. Civ. Pro. 60 applicable to cases under the Bankruptcy Code. However, the Pristine Parties have not satisfied any of the criteria for relief under any relevant subpart of Fed. R. Civ. Pro. 60 and therefore this Court should refuse to enter the Proposed Agreed Order or otherwise modify the Confirmation Order as requested by the Pristine Parties.

Rule 60(a) allows parties to correct clerical mistakes in a final order or judgment and applies to "errors of transcription, copying, or calculation[2]." Courts are permitted to address these errors at any time *sua sponte* or upon motion of any party[3]. However, the Pristine Parties have made no assertion that any provision of the Confirmation Order constitutes an error. The Agreed

[1] FRCP Rule 59(e)
[2] Olle v. Henry & Wright Corp., 910 F.2d 357, 364–65 (6th Cir. 1990) citing Bershad v. McDonough, 469 F.2d 1333, 1336 (7th Cir.1972).
[3] Id. at 363.

Order seeks to circumvent protections that were included in the Confirmation Order after lengthy discussions between the Cabinet and the parties to the Bankruptcy proceeding. There is no colorable argument for relief pursuant to Rule 60(a).

Rule 60(c)(1) states that motions based on Rule 60(b)(1), (b)(2), and (b)(3) must be brought "no more than one year after the entry of the judgment or order or the date of the proceeding." The Pristine Parties are well outside this one-year statute and are therefore time barred from seeking relief under the enumerated subparts of Rule 60. Therefore, the Pristine Parties are limited to the relief contemplated in subparts (b)(4), (b)(5), and (b)(6) of Rule 60.

Rule 60(b)(4) and (b)(5) respectively state that a party may be relieved from a final judgment if the judgment is void or if the judgment is "no longer equitable that the judgment should have prospective application." In the present matter, the Pristine Parties have provided no basis to show that the Order in question is void and thus cannot rely on Rule 60(b)(4) as the basis for entry of the Proposed Agreed Order. As determined by the Eighth Circuit Court of Appeals, "caution, substantial change, unforeseenness, oppressive hardship, and a clear showing" are required to prevail under Rule 60(b)(5)[4]. The parties to the Agreed Order have made no showing of any of these factors and therefore cannot rely on Rule 60(b)(5) as the basis for the Proposed Agreed Order.

Finally, Rule 60(b)(6) provides relief from a judgement "for any other reason justifying relief…" This provision should only be applied in "exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the Rule[5]." The parties to the Agreed

[4] Humble Oil v. American Oil Co., 405 F.2d 803, 813 (8th Cir.)
[5] Hopper v. Euclid Manor Nursing Home, Inc., 867 F.2d 291, 294 (6th Cir.1989) (citing Pierce v. United Mine Workers, 770 F.2d 449, 451 (6th Cir.1985), cert. denied, 474 U.S. 1104, 106 S.Ct. 890, 88 L.Ed.2d 925 (1986))

Order have failed to demonstrate or even assert any "exceptional or extraordinary circumstances" which would justify such a material change to the Confirmation Order.

Additional Parties in Interest Relied on the Terms of the Confirmation Order as Binding – The Confirmation Order Provides Benefits and Protections to All Other Parties in Interest

As the Court is aware, the Cabinet has been involved in every step of the Debtors' bankruptcy proceedings in an attempt to protect the interests of the Commonwealth. The Cabinet attended the auction and sale proceedings to provide information and assistance to Debtors' counsel pertaining to the viability of contemplated purchasers. The Cabinet continued to advise parties and the Court as to the status of permit transfers, status of purchasers' ability to transfer permits, and the conditions of all Debtors' permits.

The Cabinet fought to be included in the mediation that gave rise to the various agreements in Paragraph 27 of the Confirmation Order. The Cabinet stated that its participation in the mediation was imperative in large part to advocate for and ensure that the protections as provided by paragraph 27 (and others similar) were understood and agreed to by all parties. In its *Limited Objection of The Commonwealth of Kentucky, Energy and Environment Cabinet to the Joint Motion for Mediation by the Liquidating Trustee, Continental Heritage Insurance Co., Pristine Clean Energy, LLC and Virgie Clean Mining, LLC [DOCKET No. 2010]*, [Doc. No. 2011] the Cabinet made this abundantly clear stating:

> 7. Moreover, the language proposed to be the subject of the mediation, including Paragraph 27 of the Confirmation Order, is the same language that the Cabinet revised and proposed suggestions to during negotiations to resolve the Cabinet's objection to the Plan. Additionally, the Cabinet also participated in the mediation prior to confirmation which resulted in some of the very concepts now subject to this proposed mediation, and from which the Cabinet received certain guarantees and assurances it now desires to protect.

Releasing the Parties of the Obligations Contained in the Confirmation Order Poses a Significant Risk

Without the requirement of simultaneous transfer, the Cabinet is concerned that all of the purchased permits will not transfer out of the estate. The elimination of the simultaneous transfer requirement would allow the purchasers to fulfil the requirements to transfer selective permits and elect not pursue the transfer of those that are less desirable (those with significant violations, deteriorating conditions, large reclamation costs, potential imminent dangers, etc.). If the Pristine Parties are unwilling to comply with all non-bankruptcy requirements necessary to complete the transfer of all of the permits, then a new purchaser should be found that is willing to comply with all such requirements and complete the transfer of all the permits. The value of these permits for all parties is maximized by keeping the permits together. Finding another purchaser to assume the permits will be more difficult if the Pristine Parties are allowed to seek the transfer of only the valuable permits.

Any permits that the purchasers choose not to seek to transfer will ultimately remain in Debtors' estate thus potentially increasing future liability for the estate. The Cabinet may have no other option than to pursue its Administrative Claim against Debtors' estate for all outstanding reclamation costs on any permits that are not fully reclaimed by the Pristine Parties. *See, e.g., In re Appalachian Fuels, LLC,* 521 B.R. 779 (Bankr. E.D. Ky. 2014). Realistically, if the purchasers are given the option to seek to transfer some permits and not others, it will not be the valuable permits that will be left behind for Debtors' estates to deal with. The permits that will be left in the estate will be those in poor condition with substantial reclamation costs and outstanding violations that could pose a risk to the environment and human health.

There is a reason that Debtors' counsel worked hard to ensure that ALL permits were sold – "NO PERMIT LEFT BEHIND". There is a reason that the protective language contained in

Paragraph 27 was negotiated and included in the Confirmation Order. To allow this provision to be stricken by an agreement reached between a select few of the parties in interest would undermine the lengthy negotiations and deliberate language that went into the Confirmation Order. Allowing the parties to the Agreed Order to eliminate the simultaneous permit transfer provision would allow for the Pristine Parties to leave less desirable permits in the estate as a potential liability for both the estate and the Commonwealth.

The Simultaneity Agreement in the Confirmation Order is Not Hindering the Transfer of the Permits to the Pristine Parties

The requirement for simultaneous transfer is ***not*** what is preventing the Pristine Parties from completing the transfer of these permits. As the Cabinet explained in its Status Report for Permit Transfers to Pristine Parties [Doc. No. 2219], since the Pristine Parties purchased the Premier and Cambrian Permits in 2019, the number of state regulatory violations has increased dramatically. Recent Cabinet inspections have revealed that the Pristine Parties do not have the equipment necessary to maintain compliance with the Kentucky Surface Mining Laws on all permits purchased from Debtors' estate. The Cabinet has encountered significant and persistent compliance issues with the Pristine Parties, including ownership and control issues with Virgie, Myra, Pallas Plant A, LLC, and Pike Elkhorn Land Company, LLC. Additionally, the Cabinet's Division of Mine Permits has encountered delays in the transfer application process, specifically in receiving responses to withdrawal letters and requests for further information and documentation.

At this time, regulatory violations listed on the Applicant/Violator System are precluding final approval of the permit transfer applications. Final approval of the permit transfer applications is also precluded by legal right to mine issues, which need to be addressed by the Pristine Parties before many of these applications can be approved. There are also unpaid fees to the state

precluding transfer of Debtors' Permits to the Pristine Parties. The Kentucky Reclamation Guaranty Fund ("KRGF") is a revolving, interest-bearing account that provides financial assistance to the Cabinet in the event that a permit-specific reclamation bond is insufficient to complete reclamation on a mine site. Participation in the fund is mandatory unless a permittee elects to provide a full-cost bond in accordance with specific calculation methods. (*See* KRS 350.500 – 350.521). In total, as of the end of March 2023, Premier and Cambrian (Debtors) owed Four Hundred Forty Thousand Two Hundred Sixty-Four Dollars and Eighty-Four Cents ($440,264.84) in unpaid fees, for 34 Permits. Each permit with unpaid fees is currently suspended and not eligible for transfer or surface coal mining activities.

If the end goal really is to effectuate the transfer of ALL purchased permits, removing the simultaneous transfer provision makes this goal ***less*** likely to occur. The removal of this provision would enable the Pristine Parties to pursue transfer of the few permits that it wishes to mine and cease efforts to transfer all other purchased permits.

Respectfully submitted,

ENERGY AND ENVIRONMENT CABINET

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CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2023 a true and accurate copy of the foregoing OBJECTION was electronically filed with the clerk of court using the CM/ECF system which caused electronic service on all persons receiving notice in this case.

/s/ Lena K. Nash
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COUNSEL FOR THE CABINET