

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

IN RE: COOPER COAL, INC.)	CHAPTER 11
Debtor.)	
)	CASE NO. 09-70520

MEMORANDUM DECISION AND ORDER

The matter before the Court is the requested confirmation of the Plan of Reorganization of the Debtor. This Plan was heard before the Court on July 1, 2009. Although the Plan has been supported by more than 80%, both in number and amount of claims, of the general unsecured creditors, none of which has filed any objection to confirmation, the United States Trustee has filed an Objection questioning the good faith of the Debtor in the proposal of the Plan as well as whether the creditors will receive more under it than they would likely receive in a chapter 7 liquidation. The United States Trustee also questions whether the Debtor at the confirmation hearing produced sufficient evidence to establish that the Plan satisfied the general confirmation requirements set forth in 11 U.S.C. § 1129. Neither the United States Trustee nor any creditor has filed any motion either to dismiss the case or convert it to chapter 7.

The Plan contemplates the liquidation of all of the Debtor's assets and distribution of the net proceeds first to the administrative and other priority creditors and then to general unsecured creditors. It proposes that the Debtor's accountant, Mr. Claude Crigger,¹ be appointed as Estate Representative to collect funds owing to the Debtor and liquidate its few remaining other assets and claims and then distribute the proceeds to the entitled creditors. The Plan does

¹ Mr. Crigger did not appear at the confirmation hearing. Accordingly, neither the United States Trustee nor the Court could question him about his fitness for, and full understanding of, the responsibilities of Estate Representative.

not provide for Mr. Crigger to be bonded, although Debtor's counsel expressed at the conclusion of the confirmation hearing an intent to amend the Plan to add such a provision. He further indicated a willingness to investigate promptly and advise the Court concerning the projected expense to provide a bond with surety to protect the creditors from any defalcation or malfeasance by the Estate Representative. The Plan also provides that the Estate Representative will make "interim distributions" to allowed general unsecured claims "the earlier of (i) six months after the Effective Date, or (ii) when funds equal to \$200,000.00 or more are available for distribution[.]" Plan ¶ 4.10(1)(B). "Final distributions" with respect to such claims "will occur only after" the priority and administrative claims have been paid in full. Plan ¶ 4.10(2)(B). The Plan does not provide any other time table for distributions to creditors although it does provide for status reports to be provided to creditors every six months. Plan ¶ 4.11. Another provision of the Plan which the Court wishes to highlight is ¶ 12.3, which provides:

Pursuant to § 1141 of the Bankruptcy Code, the Confirmation Order herein shall discharge any claims against the Debtor, except as provided for in the Plan. Except in the event of default hereunder, no creditor of the Debtor may receive any payment from, or seek recourse against, any assets which are to be distributed under the Plan, except from those distributions expressly provided for in the Plan.

The Plan contemplates a continuing existence of the Debtor because there is no provision for the latter's liquidation and it further directs that if the position of Estate Representative should become vacant for any reason, "the Debtor shall nominate a successor Estate Representative and request the Bankruptcy Court to approve such suggestion." Plan ¶ 4.3. For his services the Estate Representative is to be compensated at a rate of \$60 per hour plus "usual and ordinary out of pocket expenses." Plan ¶ 4.2.

The Court finds that the Plan has been proposed in good faith and is not by any

means forbidden by law. The Court does not find that the distributions to general unsecured creditors under the Plan are at least as much as such creditors would expect to receive in a chapter 7 liquidation. Neither does it find that such distributions are likely to be less than what such creditors might expect in such a liquidation. It simply notes that the Debtor did not attempt to offer evidence on such point, appearing to believe that it was not obliged to do so in light of the acceptance of the Plan by more than 80% of such creditors in both number and percentage of claims. The Court further finds that the Plan does not at present require that the Estate Representative be bonded with surety, which protection would be assured in a chapter 7 liquidation. Neither does it explicitly set forth a schedule when distributions to creditors having an aggregate value of less than \$200,000, other than the initial interim distribution, will occur. Finally, the Court finds that the Plan does not unambiguously state that the Debtor does not qualify for a discharge if the provisions of 11 U.S.C. § 1141(d)(3) are applicable.

This Court has jurisdiction of this proceeding by virtue of the provisions of 28 U.S.C. §§ 1334(a) and 157(a) and the delegation made to this Court by Order from the District Court on July 24, 1984. A determination of whether a chapter 11 plan of reorganization or liquidation ought to be confirmed is a “core” bankruptcy matter pursuant to 28 U.S.C. § 157(b)(2)(L).

The Court concludes that the United States Trustee is correct that the Debtor does have the burden of establishing that those creditors having claims which are unsecured and impaired under the terms of a plan of reorganization or liquidation and who have not expressly accepted such plan will receive under the plan “property of a value, as of the effective date of the plan, that is not less than the amount such holder[s] would so receive or retain if the debtor were liquidated under chapter 7 . . . on such date[.]” 11 U.S.C. § 1129(a)(7)(A)(ii). *See generally In*

re PPI Enters. (U.S.), Inc., 324 F.3d 197 (3d Cir. 2003); Russell, Bankruptcy Evidence Manual § 301.76 at 1042 (2008-2009 ed.). Accordingly, based on the evidence introduced so far, the Plan should not be confirmed. The Court observes that in addition to the lack of proof that the chapter 7 liquidation test has been met, the evidence does not indicate whether there may be accumulated losses from business operations which might be available to the Debtor for income tax purposes to shield future profits, should it resume business activities following confirmation of the Plan, to the potential benefit of the Debtor's owner but for which he has provided no compensating value to the general creditors. The Court further concludes that the Plan fails to specify whether the Debtor will liquidate or attempt to continue in business and therefore does not demonstrate whether or not it may or may not qualify for a discharge pursuant to § 1141(d)(3).²

On the basis of the foregoing reasons the Court concludes that the Objection to confirmation filed by the United States Trustee is well taken and therefore ought to be sustained. This ruling is without prejudice to the Debtor filing an amended Plan offering greater protection to the creditors. Counsel for the Debtor is directed to confer with counsel for the United States Trustee concerning further proceedings herein and provide a status report to the Court within

² 11 U.S.C. § 1141(d)(3) provides:

The confirmation of a plan does not discharge a debtor if–

(A) the plan provides for the liquidation of all or substantially all of the property of the estate;

(B) the debtor does not engage in business after consummation of the plan; and

(C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

fifteen (15) days of the date below. It is SO ORDERED.

The Clerk is directed to provide either electronic notice or mail notice of this Memorandum Decision and Order to the Debtor, Debtor's counsel, counsel for the United States Trustee, and to all other parties in interest listed on the current mailing matrix for this case.

ENTER this the 7th day of July, 2009.

The seal of the United States Bankruptcy Court is visible in the background, featuring an eagle with spread wings, the words "UNITED STATES BANKRUPTCY COURT" around the perimeter, and "SEAL" at the bottom with a star below it.
William F. Stone, Jr.
UNITED STATES BANKRUPTCY JUDGE