

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO

In re:	:	
	:	Case No. 94-12794 CEM
SUNNYSIDE COAL COMPANY, a Utah	:	Chapter 11
corporation, #84-1102281,	:	
	:	MC No. JLS-18
Debtor.	:	

THE DIVISION OF OIL, GAS AND	:	
MINING OF THE STATE OF UTAH,	:	
AND THE UNITED STATES OF	:	
AMERICA, ACTING THROUGH THE	:	
OFFICE OF SURFACE MINING	:	
RECLAMATION AND ENFORCEMENT OF	:	
THE UNITED STATES DEPARTMENT	:	Adversary Proceeding
OF THE INTERIOR,	:	No:
	:	
Plaintiffs,	:	

-vs-

CLAY TUCKER, an individual;	:
DAN TUCKER, an individual;	:
CLAY TUCKER AND DAN TUCKER,	:
d/b/a THE TUCKER GROUP; AND	:
WHITMORE LLC,	:
Defendants.	:

COMPLAINT FOR BREACH OF CONTRACT

Plaintiffs, the Division of Oil, Gas & Mining of the State of Utah ("DOGM") and the United States of America, acting through the Office of Surface Mining Reclamation and Enforcement of the United States Department of the Interior ("OSM") complain of Defendants and allege as follows:

JURISDICTION AND VENUE

1. Jurisdiction over the subject matter of this adversary proceeding is conferred upon this Court by 28 U.S.C. §§ 151, 157(a) & (b), and 1334, § 105(a) of Title 11, United States Code ("the Bankruptcy Code"), the General Order of Reference of the United States District court for the District of Colorado ("the District Court"), Rule B-105(a) of the District Court Rules for Bankruptcy Practice and Procedure, and the inherent power of the above-entitled court to enforce its own final nonappeable order approving sale of assets of the Debtor made and entered on March 6, 1995, a copy of which is hereunto annexed, marked Exhibit "A" and by this reference made a part hereof ("the Court's Order"). Paragraph 10 thereof provides as follows:

This Court shall retain jurisdiction of this matter to resolve any disputes involving the Tucker Group, the Debtor, the Creditors' Committee, or any other party who had notice of this proceeding, to enforce and interpret the Amended Letter of Intent or this Order, and any matters related thereto.

2. This adversary proceeding is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (B), (L), (N) and (O) in that it:

(a) concerns the administration of the estate of the Debtor,

(b) concerns the allowance or disallowance of claims against the estate of the Debtor,

(c) concerns and affects the confirmation of the Plan of Reorganization of the Debtor,

(d) concerns and affects the order of the Court approving the sale of property to the Defendants, and

(e) affects the liquidation of the assets of the estate and the adjustment of Debtor-Creditor relationships.

3. Alternatively, this proceeding constitutes a non-core proceeding under § 28 U.S.C. 157(a) and (c), in that it is related to Debtor's bankruptcy case under Title 11 of the Bankruptcy Code.

4. Venue of this adversary proceeding is proper in the District of Colorado in accordance with 28 U.S.C. § 1409(a).

5. This proceeding is commenced under and pursuant to Bankruptcy Rules 7001 and 7065, Federal Rules of Bankruptcy Procedure and §105(a) of the Bankruptcy Code.

PARTIES

6. Plaintiffs are the Division of Oil, Gas, & Mining of the State of Utah ("DOGM") and the United States of America, acting through the Office of Surface Mining Reclamation and Enforcement of the United States Department of the Interior ("OSM").

7. The Plaintiffs are intended third-party beneficiaries of an agreement approved by this Court between the Defendants and the Debtor.

8. The Debtor is Sunnyside Coal Company, the Debtor in Possession.

9. The Defendants are Clay Tucker individually, Dan Tucker individually, Clay Tucker and Dan Tucker doing business as the Tucker Group, and Whitmore LLC.

GENERAL NATURE OF PLAINTIFFS' CLAIMS

10. This is an adversary proceeding to enforce the Court's Order approving the sale of Debtor's assets to the Defendants pursuant to § 363(b) of the Bankruptcy Code by requiring the Defendants to specifically perform under the terms of the Court's Order and their agreement with the Debtor, both of which were intended to directly benefit the Plaintiffs and, alternatively for the recovery of damages.

GENERAL AVERMENTS RELATING TO EACH CAUSE OF ACTION

11. The Debtor, Sunnyside Coal Company, commenced the above-entitled Chapter 11 case under the Bankruptcy Code ("Chapter 11 Case") by filing its petition for relief with the above-entitled Court on March 25, 1994 ("the filing date"), and continues as a debtor-in-possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code.

12. Prior to the filing date, the Debtor operated the Sunnyside Coal Mine located near Price, Utah. The Debtor had acquired and operated the mine because of the existence of a certain coal purchase contract, the terms of which enabled the Debtor to extract coal from the mine and sell it at a profit. When the coal purchase contract was terminated, no other economic market existed for the coal to be derived from the mine. Lacking

a market for the mine's coal, the Debtor shut down the mine, shut off the mine pumps, and allowed the mine to flood. There is no economically realistic possibility of the mine being pumped out and reopened, or that any coal mining operations could occur in the future. Debtor's remaining obligation with regard to the Sunnyside Coal Mine is to reclaim the mine site pursuant to state and federal law ("Reclamation Obligation").

13. After the Debtor ceased mining operations, it commenced its Chapter 11 Case for the purpose of conducting an orderly liquidation of its assets. The Debtor was not conducting mining operations on the filing date, and it is not now engaged in the business of mining or selling coal. It is engaged solely in the liquidation of its assets subject to the approval of the above-entitled Court. The sale which is the subject of this complaint was one step in that process. Plaintiffs as creditors of the Debtor hold the largest secured and unsecured claims against the estate.

14. The Debtor's most valuable assets consist of real property encumbered by liens and security interests held by and in favor of DOGM and the OSM to secure the Debtor's statutory Reclamation Obligation ("pledged assets"). Plaintiffs have duly filed their Amended Proof of Claim in the Chapter 11 Case asserting that the total Reclamation Obligation is \$8.6 million. A copy of plaintiff's Amended Claim is hereunto annexed, marked Exhibit "B" and by this reference made a part hereof.

15. Under applicable law, the Debtor cannot realize the value of its pledged assets until it fully complies with and completes its Reclamation Obligation, which will take the Debtor at least ten years.

16. Because of the uncertainty over the actual cost to the Debtor to perform the Reclamation Obligation, the Debtor is unable to determine whether funds will be available to distribute to creditors from the pledged assets if and when the Reclamation Obligation is fulfilled. The Debtor therefore sought to sell its pledged assets to a purchaser willing to assume the Reclamation Obligation, post an \$8.6 million bond to secure payment of the same, and make an immediate cash payment to the Debtor.

17. In a Letter of Intent dated January 7, 1995 ("Letter of Intent"), the Debtor agreed to sell designated assets of the bankruptcy estate (the "Assets") to Defendants Clay and Dan Tucker ("Tucker", or the "Tucker Group") free and clear of all liens, claims, and interests, in consideration for, among other things: (a) Tucker's posting of an \$8.6 million reclamation bond for the benefit of DOGM and OSM and in a form satisfactory to DOGM and OSM, and provisions for assumption of the Reclamation Obligation; (b) complete release by DOGM and OSM of the Debtor and its officers, directors, and employees from any liability for the Reclamation Obligation; (c) release of the Debtor's current reclamation bond; (d) reservation to the Debtor of title, possession, and the right to salvage certain other property of

the bankruptcy estate; and (e) Tucker's payment of \$140,000 in cash to the Debtor [this amount subsequently was increased by an amendment to the Letter of Intent as described below]. A copy of the Letter of Intent is hereunto annexed as Exhibit "C" and by this reference made a part hereof.

18. At the insistence of the Debtor and the official unsecured Creditors' Committee duly appointed in the Chapter 11 Case ("the Creditors' Committee"), the Letter of intent made provision for submission of competing bids for the Assets by other parties, subject to the condition that they meet certain qualifying requirements set forth in the Letter of Intent, the Motion to Sell, the Sale Procedure Order, and the Sale Notice. Copies of the Motion to Sell, the Sale Procedure Order and the Sale Notice are annexed hereto as Exhibits "D", "E" and "F" respectively, and by this reference each are made a part hereof.

19. The form of the Sale Notice was approved by the Court in the Sale Procedure Order.

20. Pursuant to the detailed bidding procedures and within the bidding period established by the Sale Procedure Order, the Debtor received one competing bid for purchase of the Assets and assumption of the Debtor's Reclamation Obligation, from the Siglarr Trust. The Debtor determined that the bid did not meet the qualifying requirements established by the Sale Procedure Order, most particularly in failing to tender a binding written

commitment from a bond company to provide DOGM with an acceptable reclamation bond in the amount of \$8.6 million.

21. At the March 2, 1995 hearing on the Debtor's Motion to Sell pursuant to the Sale Procedure Order, the Debtor informed the Court that the Siglarr Trust bid did not meet the qualifying requirements established by the Sale Procedure Order and that, accordingly, the competing bid would not be recommended. The Debtor then informed the Court that additional negotiations had been held with the Tucker Group, resulting in an agreement to modify the Letter of Intent to provide that the Tucker Group would make a closing cash payment to the Debtor of \$350,000.00, rather than \$140,000.00, in consideration for the Debtor's waiver of all rights under paragraph B.6. (actually consisting of three paragraphs addressing contingent additional payments by Tucker to the Debtor at closing) and paragraph E.3. (pertaining to the Debtor's underground salvage of personal property after closing) of the Letter of Intent. In addition, the Tucker Group agreed to pay the entire cost of title insurance for its purchase of the Assets. [The letter of Intent as so modified is hereinafter referred to as the "Amended Letter of Intent"]. The Debtor then requested the Court's approval of the sale of the Assets to the Tucker Group in accordance with the Amended Letter of Intent.

22. The offer presented by The Tucker Group was the product of extensive good-faith negotiations conducted at arms length

between and among the Debtor, the Creditors' Committee, The Tucker Group, and the Plaintiffs.

23. The Court's Order approving the sale found that the consideration to be provided by the Tucker Group for the Assets pursuant to the Amended Letter of Intent, including Tucker's provision for satisfying the Reclamation Obligation and commitment to post an acceptable reclamation bond, was fair to the Debtor and the Debtor's bankruptcy estate.

24. The approval of the Tucker offer and consummation of the proposed transaction are in the best interests of the Debtor's estate and its creditors. The proposed transaction allows immediate payment to creditors of the estate and avoids the uncertainty of an indefinite distribution at some point in the future which would depend on the actual costs of reclamation, if and when completed. Both the Debtor, the Creditors' Committee, and the Plaintiffs recommended to the Court that it approve the Debtor's acceptance of the Tucker offer as embodied in the Amended Letter of Intent.

25. The cities of Sunnyside and East Carbon, Utah, withdrew their objection to the Motion to Sell at the hearing.

26. On March 6, 1995, the above-entitled Court made and entered its Order, Exhibit "A" hereto (the "Court's Order"), approving the Tucker Group's Amended Letter of Intent, which set forth the terms of its purchase of the Assets.

27. The Court's Order provided that the Debtor shall accept the Tucker Group's Amended Letter of Intent, shall consummate and close the sale of the Assets to the Tucker Group on the terms and within the time for closing set forth therein, and shall receive the consideration to be paid and delivered by the Tucker Group. Likewise, the consideration to be paid by the Tucker Group to the Debtor shall be transferred and paid to the Debtor on the terms and within the time set forth in the Amended Letter of Intent.

28. The Defendants have failed and refused to perform under their Amended Letter of Intent and the Court's Order and have repudiated the same.

29. The Amended Letter of Intent as approved and encompassed by the Court's Order of March 6, 1995, is the complete and final integrated document under which Plaintiffs' third-party beneficiary claims arise.

FIRST CAUSE OF ACTION

(SPECIFIC PERFORMANCE)

30. The Plaintiffs re-allege and incorporate the preceding allegations as though set forth in full herein.

31. The Debtor owes Plaintiffs and is obligated to perform the Reclamation Obligation in an amount of at least \$8.6 million as set forth in Plaintiffs' Amended Proof of Claim, Exhibit "B" hereto. The Defendants assumed that obligation and agreed to post a reclamation bond in that amount acceptable to the Plaintiffs.

32. The Plaintiffs as intended Beneficiaries of the Amended Letter of Intent and the Court's Order are entitled to specific performance thereof.

33. The Plaintiffs as intended beneficiaries of the Amended Letter of Intent and the Court's Order are entitled to specific enforcement thereof pursuant to the provisions of § 105(a) of the Bankruptcy Code.

SECOND CAUSE OF ACTION

34. Plaintiffs reallege and incorporate the allegations of Paragraphs 1 through 31 as though set forth in full herein.

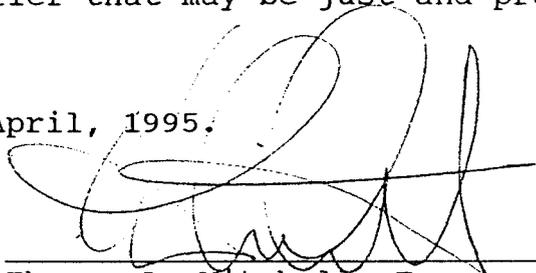
35. Plaintiffs, as the intended third-party beneficiaries of the Amended Letter of Intent and Court's Order, have been damaged by the Defendants' breach and repudiation thereof.

36. The Plaintiffs as intended beneficiaries of the Amended Letter of Intent and the Court's Order are entitled to enforcement thereof pursuant to the provisions of § 105(a) of the Bankruptcy Code.

WHEREFORE, Plaintiffs DOGM and OSM, as direct and intended third-party beneficiaries, demand judgment against Defendants for specific performance of the Court's Order or in the alternative, for damages in such amount as may be proved at trial, their costs

and such other and further relief that may be just and proper in the premises.

DATED this _____ day of April, 1995.



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CERTIFICATE OF SERVICE

I hereby certify that I am a member of and/or employed in the office of Henry L. Solano, United States Attorney for the District of Colorado, Denver, Colorado, and that in said capacity I caused to be mailed, in the United States Mails, postage prepaid, on this ____ day of April, 1995, a true and correct copy of the foregoing COMPLAINT FOR BREACH OF CONTRACT, to the following:

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