

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:)	
)	Chapter 11
PES HOLDINGS, LLC, <i>et al.</i> , ¹)	
)	Case No. 19-11626 (KG)
Debtors.)	(Jointly Administered)
)	
)	

**UNITED STATES’ OBJECTION TO DEBTORS’ MOTION FOR ENTRY OF AN ORDER
(I) APPROVING THE ADEQUACY OF INFORMATION IN THE DISCLOSURE
STATEMENT, (II) APPROVING THE SOLICITATION AND NOTICE PROCEDURES, (III)
APPROVING THE FORMS OF BALLOTS AND NOTICES IN CONNECTION
THEREWITH, (IV) SCHEDULING CERTAIN DATES WITH RESPECT THERETO, AND
(V) GRANTING RELATED RELIEF (D.E. 464, “Motion”).**

The United States of America, on behalf of the Environmental Protection Agency (EPA), hereby files this objection to entry of the proposed Order granting the Debtors’ motion (Motion) for entry of an order approving the adequacy of information in the disclosure statement.

1. The Debtors are currently in violation of a Consent Decree and Environmental Settlement Agreement entered by this Court in the Debtors’ prior bankruptcy case. See In re PES Holdings, LLC, No. 18-10122 (KG), Docket Nos. 244, 347, 510 (the “Consent Decree”). The Consent Decree involved the Clean Air Act’s Renewable Fuel Standard (the “RFS”) program’s requirement that refiners either blend renewable fuels into gasoline or diesel fuel or obtain and retire Renewable Identification Numbers (“RINs”) to meet yearly Renewable Volume Obligations (“RVOs”). In particular, and among other things, the Consent Decree requires that

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number, are: PES Holdings, LLC (8157); North Yard GP, LLC (5458); North Yard Logistics, L.P. (5952); PES Administrative Services, LLC (3022); PES Energy Inc. (0661); PES Intermediate, LLC (0074); PES Ultimate Holdings, LLC (6061); and Philadelphia Energy Solutions Refining and Marketing LLC (9574). The Debtors’ service address is: 1735 Market Street, Philadelphia, Pennsylvania 19103.

Debtors retire RINs on a semi-annual basis for their prior post-effective date RVOs through 2022.

2. Debtors have not complied with the Consent Decree which this Court entered as a final judgment and ordered “shall be implemented in accordance with its terms.” Docket No. 376, ¶¶ 3, 6. On September 30, 2019, Debtors failed to retire a significant number of RINs to satisfy their RVOs for the period of January 1, 2019 through June 30, 2019. The September 30, 2019 RIN retirement deadlines set forth in the Consent Decree are an acceleration of the Debtors’ requirement under the CAA to retire these RINs by March 31, 2020. 40 C.F.R. § 80.1451(a)(1).

3. Bankruptcy is not an avenue for noncompliance with the law or a safe haven for lawbreakers, and Debtors must comply with their obligations under environmental law and the Consent Decree. While in bankruptcy, a debtor must comply with all federal and state environmental laws in managing or operating its property. 11 U.S.C. §§ 362(b)(4) (police and regulatory exception to automatic stay); 28 U.S.C. § 959(b) (debtors in possession must manage and operate their property in accordance with applicable non-bankruptcy law); Ohio v. Kovacs, 469 U.S. 274, 285 (1985); In re H.L.S. Energy Co., 151 F.3d 434, 438 (5th Cir. 1998); In re Wall Tube & Metal Prods. Co., 831 F.2d 118, 121-22 (6th Cir. 1987); In re Gollnitz, 456 B.R. 733 (Bankr. W.D.N.Y. 2011); Wilner Wood Prods. v. Maine, 128 B.R. 1, 2-3 (D. Me. 1991); In re American Coastal Energy Inc., 399 B.R. 805, 810 (Bankr. S.D. Tex. 2009); In re Grace Coal Co., 155 B.R. 5, 6 (Bankr. E.D. Ky. 1993); In re Becker Indus. Corp., 57 B.R. 611, 624 (Bankr. S.D.N.Y. 1986); In re Laurinburg Oil Co., 49 B.R. 652, 653-54 (Bankr. M.D.N.C. 1984). In enacting the regulatory exception, Congress wanted “[t]o combat the risk that the bankruptcy court would become a sanctuary for environmental wrongdoers.” United States v. Nicolet, Inc., 857 F.2d 202, 207 (3d Cir. 1988). In re Nortel Networks, Inc., 669 F.3d 128, 137 (3d Cir. 2011);

S.E.C. v. Brennan, 230 F.3d 65, 71 (2d Cir.2000); In re Commonwealth Cos., Inc., 913 F.2d 518, 527 (8th Cir. 1990); City of New York v. Exxon Corp., 932 F.2d 1020, 1024 (2d Cir. 1991); CFTC v. Co Petro Mktg. Grp., Inc., 700 F.2d 1279, 1283 (9th Cir.1983); Commodity Futures Trading Commission, 700 F.2d 1279, 1283 (9th Cir. 1983); United States v. ILCO, Inc., 48 B.R. 1016, 1023 (N.D. Ala. 1985).

4. The Debtors' Corrected Disclosure Statement, Docket No. 465 (the "Disclosure Statement"), currently fails to discuss the treatment of the Consent Decree or Debtors' RIN retirement obligations.

5. The United States and Debtors are negotiating to include language that adequately describes Debtors' proposed treatment of RINs retirement obligations.

6. United States and Debtors have agreed at a minimum on the following language for insertion into the Disclosure Statement setting forth their arguments and proposing a toggle mechanism for the treatment of Debtors' liabilities for RIN retirement obligations under the Consent Decree:

The United States on behalf of the United States Environmental Protection Agency (the "EPA") believes that the Debtors are currently in violation of a Consent Decree and Environmental Settlement Agreement entered by this Court in the Debtors' prior bankruptcy case. *See In re PES Holdings, LLC*, No. 18-10122 (KG), Docket Nos. 244, 347, 510 (the "Consent Decree"). The Consent Decree involved the Clean Air Act's Renewable Fuel Standard (the "RFS") program's requirement that refiners either blend renewable fuels into gasoline or diesel fuel or obtain and retire Renewable Identification Numbers ("RINs") to meet yearly Renewable Volume Obligations ("RVOs"). In particular, and among other things, the Consent Decree requires that Debtors retire RINs on a semi-annual basis for their Prior post-effective date RVOs through 2022. On September 30, 2019, Debtors failed to retire approximately [redacted] RINs to satisfy their RVOs for the period of January 1, 2019 through June 30, 2019. The September 30, 2019 RIN retirement deadline set forth in the Consent Decree are an acceleration of the Debtors' requirement under the CAA to retire these RINs by March 31, 2020. 40 C.F.R. § 80.1451(a)(1).

The United States on behalf of the EPA believes that bankruptcy is not a shield from compliance obligations under environmental law or the Consent Decree. The EPA believes that the Debtors' RIN retirement requirement is an obligation to comply with the law which does not fall within the Bankruptcy Code's definitions of a dischargeable "debt" and "claim." 11 U.S.C. §§ 101(5), (12). Indeed, the EPA believes that the Debtors can only comply with applicable law by obtaining

RINs on the open market from third parties, and that no payments would or could be made to the United States. Accordingly, the EPA believes that the Debtors' RIN retirement liability is an injunctive compliance obligation that is not subject to discharge, and that the Debtors' Plan must provide for compliance with this obligation. The EPA believes that if the Plan fails to provide for such compliance, it is proposing something that is "forbidden by law," and cannot be confirmed. *See* 11 U.S.C. § 1129(a)(3). The EPA also believes that, in such case, the Plan would not provide adequate means for its implementation and compliance with applicable legal requirements, *see* 11 U.S.C. §§ 1123(a)(5), 1129(a)(11), and thus would not be feasible. The United States on behalf of EPA therefore believes that the Plan must be modified to provide for compliance with the law and is otherwise patently unconfirmable.

The Debtors believe that, among other things, any failure to comply with the Consent Decree and the Debtors' related RIN retirement requirement does fall within the Bankruptcy Code's definitions of a dischargeable "debt" and "claim." 11 U.S.C. §§ 101(5), (12). Under the Bankruptcy Code, "[e]xcept as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan—(A) discharges the debtor from any debt that arose before the date of such confirmation[.]" 11 U.S.C. § 1141(d)(1)(A). "Debt" means liability on a claim. 11 U.S.C. § 101(12). "Claim" means a right to payment, or a right to an equitable remedy for breach of performance if such breach gives rise to a right to payment. 11 U.S.C. § 101(5). Thus, civil penalties or injunctive relief resulting from the Debtors' violation of the Consent Decree that are or give rise to, a right to payment, constitute a "claim" that is dischargeable under the Bankruptcy Code. If the United States seeks civil penalties (whether stipulated or otherwise) against the Debtors for violating the Consent Decree, such penalties amount to a "right to payment" of the United States. The Consent Decree provides language requiring the Debtors to pay the United States for any stipulated penalties imposed for violations of the Consent Decree. Consent Decree ¶¶ 15, 17-19, 22. Similarly, under the fuels section of the Clean Air Act, any person who violates the RFS "shall be liable to the United States for a civil penalty[.]" 42 U.S.C. § 7545(d)(1). Because any such penalties amount to a "right to payment" of the United States, the Debtors assert that these are "claims" that are dischargeable under the Bankruptcy Code.

In light of this dispute, the Plan provides for a toggle mechanism for the treatment of Debtors' liabilities for RIN retirement liabilities under the Consent Decree. Specifically, the Plan provides that the Court shall determine, after the submission of briefs in accordance with a schedule for briefing of this issue, at any time prior to or following the Confirmation Hearing, whether such liabilities constitute injunctive compliance obligations or are a dischargeable "debt" and/or a "claim" under the Bankruptcy Code. If it is determined by the Court (a) that the Debtors have liabilities under the Consent Decree which are an injunctive compliance obligation, then (i) such liabilities shall not be classified as "claims" within the meaning of section 101(5) of the Bankruptcy Code; (ii) the RIN retirement liabilities shall be complied with under the Plan; and (iii) nothing in the Plan or Confirmation Order shall discharge, release, exculpate, impair, or otherwise preclude compliance with any such liabilities (b) that the Debtors have liabilities under the Consent Decree which constitute dischargeable "debt" and/or a "claim" pursuant to the Bankruptcy Code, then such liabilities shall constitute Class 5 General Unsecured Claims and the EPA shall receive pro rata distributions accordingly, or (c) that an alternative treatment is warranted, then the treatment shall be as provided by order of the Court.

7. The purpose of a disclosure statement is to provide parties-in-interest and creditors with adequate information as to how a plan will deal with their interests. 11 U.S.C. §§ 1125(a)(1), 1125(b). The Code imposes on debtors “an affirmative duty of full disclosure.” In re Kane, 628 F.3d 631, 636 (3d Cir. 2010). This duty includes the requirement that debtors file declarations “adequately, honestly, and in good faith.” Id. “Because creditors and the bankruptcy court rely heavily on the debtor’s disclosure statement in determining whether to approve a proposed reorganization plan, the importance of full and honest disclosure cannot be overstated.” Id. (citing Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 417-18 (3d Cir. 1988)). Indeed, candid disclosure is “the pivotal concept in reorganization procedure under the Code.” Oneida, 848 F.2d at 417 (citation omitted).

8. While the above agreed-upon language for insertion into the disclosure statement is a step forward in describing how RINs retirement liabilities shall be handled under the Plan, it is nonetheless insufficient because it fails to describe any mechanism by which Debtors will comply with their RIN retirement obligations if the Court so requires. For example, Debtors may choose to provide for a RINs retirement reserve to meet their obligations. However, without such information, the Disclosure Statement is inadequate in describing how EPA’s interests will be protected.

CONCLUSION

For all of the above reasons, the United States respectfully requests that the Motion be denied unless additional language is provided in the disclosure statement.

Respectfully submitted,

FOR UNITED STATES ON BEHALF OF

U.S. ENVIRONMENTAL PROTECTION
AGENCY:

/s/ John Broderick

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 6, 2019, 2019, I electronically filed the foregoing UNITED STATES' OBJECTION TO DEBTORS' MOTION FOR ENTRY OF AN ORDER (I) APPROVING THE ADEQUACY OF INFORMATION IN THE DISCLOSURE STATEMENT, (II) APPROVING THE SOLICITATION AND NOTICE PROCEDURES, (III) APPROVING THE FORMS OF BALLOTS AND NOTICES IN CONNECTION THEREWITH, (IV) SCHEDULING CERTAIN DATES WITH RESPECT THERETO, AND (V) GRANTING RELATED RELIEF (D.E. 464, "Motion") with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all CM/ECF participants.

/s John Broderick
JOHN BRODERICK
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice