SO ORDERED

Judge Katharine M. Samson
United States Bankruptcy Judge
Date Signed: July 23, 2015

The Order of the Court is set forth below. The docket reflects the date entered.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:	)	
	)	
MISSISSIPPI PHOSPHATES	)	**CASE NO. 14-51667-KMS**
CORPORATION, *et al.*[1]	)	**CHAPTER 11**
	)	
DEBTORS	)	**Jointly Administered**
	)	

ORDER APPROVING DEBTORS' MOTIONS FOR APPROVAL OF SALE MOTION (Dkt. No. 819), COMMITTEE SETTLEMENT (Dkt. No. 501), GOVERNMENT SETTLEMENT (Dkt. No. 818), AND DOJ SETTLEMENT (Dkt. No. 870)

THIS MATTER came on for hearing on July 21, 2015 ("Hearing"), on four separate but related motions filed by the Debtors or MPC[2] that were combined into one evidentiary hearing and taken under advisement by the Court: (1) the *Motion of the Debtors, Pursuant to Bankruptcy Code Sections 105(a), 363, 365, 503, and 507, and Bankruptcy Rules 2002, 3007, 6004, 6006, 9007, and 9014, for entry of: (1) Amended Order (A) Approving the Amended Sales and Bidding and Procedures in Connection with Sale of Assets of the Debtors, (B) Approving Form and*

[1] On October 29, 2014 an Order Granting Motion of the Debtor for Order Directing Joint Administration of Affiliated Cases Pursuant to Bankruptcy Rule 1015(B) was entered directing the joint administration of the Chapter 11 bankruptcy cases of the affiliated debtors, Ammonia Tank Subsidiary, Inc. ("ATS"), Sulfuric Acid Tanks Subsidiary, Inc. ("SATS"), and Mississippi Phosphates Corporation ("MPC") (collectively, the "Debtors"). (Dkt. No. 62). The Debtors are operating as debtors-in-possession pursuant to authority granted under §§ 1107(a) and 1108.

[2] Three of the four motions were filed by the joint debtors, MPC, ATS, and SATS. (Dkt. 501, 818, 819). The Motion to approve settlement with the U.S. Department of Justice was filed by MPC. (Dkt. No. 870).

Manner of Notice, (C) Scheduling Auction and Sale Hearing, (D) Authorizing Procedures Governing Assumption and Assignment of Certain Executory Contracts and Unexpired Leases, and (E) Granting Related Relief; and (II) Amended Order (A) Approving Purchase Agreement, (B) Authorizing Sale Free and Clear of all Liens, Claims, Encumbrances, and Other Interests, and (C) Granting Related Relief ("Sale Motion") (Dkt. No. 819), filed by the Debtors; (2) the *Motion of the Debtors Pursuant to §§ 105 and 363 of the Bankruptcy Code and Bankruptcy Rule 9019 for an Order Approving Settlement Among the Debtors, the Committee, the Lender Parties, and PHI* ("Committee Settlement") (Dkt. No. 501), filed by the Debtors; (3) the *Motion of the Debtors Pursuant to §§ 105 and 363 of the Bankruptcy Code and Federal Rule of Bankruptcy Procedure 9019 for an Order Approving Settlement among the Debtors, Phosphate Holdings, Inc., the Lender Parties and the Environmental Agencies* ("Government Settlement") (Dkt. No. 818), filed by the Debtors; and (4) the *Motion of Mississippi Phosphates Corporation for Entry of an Order Approving Settlement with the United States Department of Justice and for Authority to Enter into and Perform Pursuant to Proposed Plea Agreement* ("DOJ Settlement") (Dkt. No. 870), filed by MPC.

The Lenders[3] filed a response in support of both the Committee Settlement and the Government Settlement. (Dkt. No. 882). The United States of America, on behalf of the Environmental Protection Agency ("EPA") and the Mississippi Department of Environmental Quality ("MDEQ") (collectively, the "Environmental Agencies" or "Governments") filed a joinder in the Government Settlement. (Dkt. No. 906). The Official Committee of Unsecured Creditors ("Committee") filed a limited objection to the Government Settlement. (Dkt. No. 881). The Chemours Company, LLC, successor-in-interest to E.I. du Pont de Nemours and Company

[3] STUW LLC is administrative agent ("Agent") on behalf of the post-petition lenders ("DIP Lenders") and pre-petition lenders ("Pre-Petition Lenders") (Agent and Lenders collectively, "Lenders") to the Debtors in the Chapter 11 cases.

("Chemours") filed objections and/or reservation of rights to the four motions. (Dkt. Nos. 880, 596, 912). The Lenders filed a response in opposition to Chemours' objection. (Dkt. No. 901). The Debtors joined in the Lenders' response. (Dkt. No. 907). The Governments filed a response to Chemours' objection to the Government Settlement and the Debtors joined in the Governments' response. (Dkt. Nos. 905, 907). A Memorandum of Supplemental Authorities relating to the DOJ Settlement was filed by the Department of Justice ("DOJ"). (Dkt. No. 927). Having considered the pleadings, the evidence and testimony presented at the Hearing, arguments of counsel and applicable law, the Court finds that the Motions should be GRANTED in accordance with the following.

I. JURISDICTION

The Court has jurisdiction of the parties to and the subject matter of this proceeding pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

Prior to filing bankruptcy, Debtors produced and marketed diammonium phosphate ("DAP"), a type of fertilizer. (Dkt. No. 818 at 9).[4] Debtors' manufacturing facility is located on a deep-water channel in Pascagoula, Mississippi and consists of two sulfuric acid plants, a phosphoric acid plant, and a DAP granulation plant. (*Id.*). Debtors' manufacturing operations generate two waste streams of "great environmental significance." Affidavit of Richard J. Sumrall ("Sumrall Aff."), Dkt. No. 174-1 at 4.

> First, the material left after the phosphorous has been removed from the ore contains many heavy metals and must be disposed of in an on site landfill [East

[4] *See also* Dec. of David N. Phelps ("Phelps Dec."), Dkt. No. 13at 5-6.

> and West Gyp Stacks]. Furthermore, any precipitation which falls and contacts this material must be captured and managed onsite. Regulations prohibit discharge of treated wastewater except under certain catastrophic or chronic rainfall events. Second, wastewater generated from phosphoric acid production has a very low pH and high concentrations of phosphorous, ammonia and flourides. This wastewater is also prohibited from discharge and is managed onsite with contaminated stormwater runoff.

Id. Failure of a levee system within a Gyp Stack in 2005 resulted in a large fish kill in Bayou Casotte and Bangs Lake. Other releases in 2012 and 2013 have resulted in smaller fish kills. *Id.* There are also both short term and long term "significant environmental concerns" associated with the facility. *Id.* at 5.

Because of the nature of the business, Debtors are "subject to state and federal environmental, health, and safety statutes and regulations." (Dkt. No. 818 at 13). In fact, Debtors are parties to various agreed orders with the EPA. Pursuant to a Solid Waste Management Permit with the State of Mississippi, Debtors are also required to provide financial assurance to MDEQ for "payment of the closure, post-closure care and related water treatment costs of the East Gypsum Stack." (*Id.*)*; see* Phelps Dec., Dkt. No. 13 at 10; *see also* Sumrall Aff., Dkt. No. 174-1 (summarizing certain environmental issues related to East and West Gyp Stacks). Water treatment costs are approximately $225,000.00 per month and the MDEQ permit requires financial assurance payments of approximately $200,000.00 per quarter. (Dkt. No. 900 at 6). The costs for closure and related care of the East Gyp Stack are estimated to be approximately $120,000,000.00. (Dkt. No. 818 at 14). The financial assurance trust currently holds about $11,000,000.00. (Dkt. No. 845 at 2).

As of the Petition Date, Debtors owed approximately $58.2 million to the Lenders. According to Debtors and the Lenders, this debt is secured by a first priority lien on all assets of the Debtors except the East and West Gyp Stacks. Lenders assert that their security interest

includes a lien on a Business Economic Loss Claim for damages related to the Deepwater Horizon Incident (the "BP Claim").[5] (Dkt. No. 818 at 15-22).

Debtors contend that the cumulative effects of several factors resulted in the filing of the Petition. Phelps Dec., Dkt. No. 13 at 10-13. These factors include "natural disasters, market fluctuations, deferred capital expenditures and maintenance, unplanned shutdowns of the production facilities, and unsuccessful planned turnarounds." *Id.* at 10. Prior to filing, Debtors retained an investment banking firm to try to bring in additional capital or identify a partner or buyer. *Id.* at 12. A potential purchaser was located but withdrew from the process shortly before the petition date. *Id.* Consequently, on October 27, 2014, Debtors filed for relief under Chapter 11 of Title 11of the United States Code ("Bankruptcy Code").[6] Both before and after the filing date, Debtors did not have sufficient income to finance their day-to-day operations and address environmental issues. *Id.* at 12, 16. The Debtors were unable to obtain unsecured post-petition financing; and because of the Lenders' liens on substantially all of Debtors' assets, Debtors were unable to obtain secured post-petition financing from a third party. *Id.* at 15.

However, the Lenders agreed to allow the use of their cash collateral and provide up to $6 million in post-petition financing. Consequently, Debtors have been operating under an interim debtor-in-possession financing and cash collateral arrangement since October of 2014. (Dkt. No. 66). The interim financing order has been extended on several occasions while the

[5] On February 18, 2015, the Lenders filed a declaratory judgment action against Debtors in which they ask the Court to find the following:

> That the allowed amount of the Lenders pre-petition claim is $58,197,393.00; That the Lenders liens in all of the Debtors' real and personal property, excluding the gyp stacks, are valid; and That the Lenders liens are senior in priority to all other liens, claims and interests.

STUW LLC v. Miss. Phosphates Co., No. 15-06005, at Dkt. No. 1 (Bankr. S.D. Miss. Feb. 18, 2015).

[6] "Bankruptcy Code" or "Code" refers to the Bankruptcy Code located at Title 11 of the United States Code. All Code sections hereinafter will refer to the Bankruptcy Code unless specifically noted otherwise.

parties have been negotiating various issues. No final order has been entered. Without use of the Lenders' cash collateral and the DIP proceeds, Debtors cannot pay operating expenses and environmental costs. Absent the settlement agreements pending before the Court, the Debtors have no ability to confirm a plan.

On December 19, 2014, the Court authorized the employment of Sandler O'Neill & Partners, L.P. to, among other things, assist Debtors in identifying a buyer for Debtors' assets.[7] (Dkt. No. 326). Debtors have been actively engaged in locating a purchaser for the assets. At the Hearing, Jon Nash ("Nash"), Debtors' Chief Restructuring Officer ("CRO"),[8] testified that there have been quite a number of prospective bidders as a result of Sandler O'Neill's actions. (Dkt. No. 931 at 57). Nash further testified that:

> We've talked to –well, we talked to any party that was interested in coming to the site, that was interested in asking questions about the information that was available in the data room and we've been willing to talk to a number of parties who were entertaining the idea of providing a bid but still were in a speculative stage. So we've done our utmost to keep every party in interest – every party interested in this as a potential buyer, we've done our best to keep them interested and provide them with the information that they needed in order to bring us a qualifying bid.

Id. Pursuant to the proposed amended bidding procedures, bids must be received by Friday, July 24, 2015, at 5:00 p.m. C.S.T. (Dkt. No. 819 at 5).

B. Procedural History

The Debtors filed their voluntary petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of Mississippi on October 27, 2014. The Debtors are operating as debtors-in-possession pursuant to the authority granted

[7] This is the same firm that was assisting the Debtors pre-petition. (Dkt. No. 13 at 12).

[8] Also in December, the Court authorized the employment of Nash of Deloitte Transactions and Business Analytics LLP to serve as the CRO. (Dkt. No. 318).

under §§ 1107(a) and 1108. This Order addresses the Debtors' Sale Motion, the Committee Settlement, the Government Settlement, and the DOJ Settlement.

1. Sale Motion

i. Prior Sale Motion

On November 12, 2014, the Debtors filed their initial sales and bidding procedures motion. (Dkt. No. 155). The motion was noticed to all parties. (Dkt. Nos. 182, 194, 211). Objections or responses were filed by Chemours[9] (Dkt. No. 320), Brock Services, LLC (Dkt. Nos. 353, 362), McCain Engineering Co., Inc. (Dkt. No. 354), and Mississippi Power Company (Dkt. No. 410). An agreed order approving the sales and bidding procedures and assumption procedures was entered on February 20, 2015. (Dkt. No. 509). The order approved the sales and bidding procedures "without prejudice" to any objections the United States, MDEQ, the Committee or the objecting creditors may assert with respect to any proposed sale order, and further provided that any issues regarding the rights to the proceeds of any sale would be addressed in any proposed sale order or other further order of the Court. (*Id.* at 3). An amended order that maintained these reservations was approved and entered on March 16, 2015. (Dkt. No. 597).

A hearing to approve the sale was scheduled for May 22, 2015. (Dkt. No. 598). An order resetting the sale hearing was entered on May 19, 2015. (Dkt. No. 761). That order set a new bid deadline of July 24, 2015, an auction date of July 31, 2015, and a sale hearing for August 6, 2015. (*Id.*). The order also set a deadline of June 1, 2015 for the submission of amended sales and bidding procedures to the Court to reflect the procedures approved by the Debtors, the Committee, the EPA, the MDEQ, and the Agent. That date was extended to June 22, 2015 by order entered June 8, 2015. (Dkt. No. 790).

[9] The motion was filed by the predecessor of Chemours, E.I. Du Pont de Nemours and Company. (Dkt. No. 320).

ii. The Sale Motion

On June 22, 2015, the Debtors filed the Sale Motion. (Dkt. No. 819). The Debtors request an order, substantially in the form attached to the motion, approving the amended sales and bidding procedures to govern the sale of all or substantially all assets of the Debtors. The Debtors further request approval of the form and manner of the notice given of the proposed sale, amended sales and bidding procedures, the auction and the sale hearing. (Dkt. No. 819 at 2). With respect to the sale of assets, the Debtors request an order authorizing the sale of assets and assumption and assignment of assigned contracts to the prevailing purchaser at the auction free and clear of all liens, claims, encumbrances and other interests other than the liens permitted by the purchase agreement. (*Id.* at 2-3). The Debtors aver that the proposed amended sales and bidding procedures[10] have been established in consultation with the Governments, the Committee and the Lenders, to ensure the highest or otherwise best offer is received.

Chemours filed an objection to the Sale Motion, which is discussed below.[11] (Dkt. No. 880). STUW filed a response in opposition to the Chemours' objection. (Dkt. No. 901). The Debtors joined in STUW's response. (Dkt. No. 907).

2. The Committee Settlement

On February 18, 2015, the Debtors filed the Committee Settlement Motion seeking approval of a comprehensive settlement among the Debtors, the Committee, the Agent for the Lenders, and Phosphate Holdings, Inc. ("PHI" or "Guarantor"). (Dkt. No. 501). A hearing on the motion was set for April 30, 2015. (Dkt. No. 609). The hearing was reset three times: first to

[10] The amended sales and bidding procedures incorporate key provisions of the settlement agreements, including a minimum bid of $15 million in cash consideration, payment of post-petition financing, closing no later than September 1, 2015 and an alternative transaction in the form of an Agent Bid. (Dkt. No. 819 at 43, 48).

[11] *See infra* at 13-15.

May 14, 2015, then to July 2, 2015, and finally to July 21, 2015. (Dkt. Nos. 706, 741, 872). The motion avers that the Committee Settlement "resolves the largest secured claim against the Bankruptcy Estates held by the Agent … resolves contentious and expensive litigation … and provides funding of administrative expenses necessary for the Debtors to continue to process waste water and to market assets of the Bankruptcy Estates." (*Id.* at 3). Pursuant to the settlement, the parties agree that:

> (a) the Pre-Petition Indebtedness owing to the Lender Parties is allowed in full; (b) the DIP Obligations are secured by valid, properly perfected, enforceable, first-priority pre-petition and post-petition liens on and security interests in substantially all of the assets of the Debtors and the Guarantor, including, without limitation, the BP Claim …; (c) after repayment of the DIP Obligations in full, the Lender Parties will make a settlement payment (the "Estate Settlement Payment") of thirty-three percent (33%) of any BP Proceeds actually received by the respective Lenders up to an aggregate amount of $7,375,000 to the Bankruptcy Estates for the benefit of holders of administrative, priority and general unsecured claims; (d) the Lender Parties will agree to the retention and the increased funding of professionals for the Committee; (e) the Parties will consent to the terms of the proposed Agreed Final DIP Order attached as Exhibit A to the Settlement Agreement, under which the DIP Lenders have agreed to fund $6,000,000 of DIP Financing; (f) the Pre-Petition Lenders will waive any deficiency claim that they may have; (g) PHI's claims against the Bankruptcy Estates shall be subordinated to general unsecured creditors; and (h) the Parties will consent to a process to market and sell the assets of the Bankruptcy Estates in accordance with the applicable provisions of the Bankruptcy Code and Agreed Bid Procedures Order.

(Dkt. No. 501 at 2–3). Further, the Committee and Debtors stipulated "that the Debtors were indebted to the Pre-Petition Lenders in the amount of $58,197,393, plus fees, costs and expenses … and the Lenders shall be entitled to credit bid this amount." (Dkt. No. 901 at 6). And "[t]he Lenders agreed to not seek payment of their Adequate Protection Claims except from sale proceeds (if any) of the environmentally contaminated Gyp Stacks." (*Id.*). "The Debtors submit that the terms of the Settlement Agreement have a sound business purpose and represent the exercise of sound business judgment," and should therefore be approved. (Dkt. No. 501 at 20).

Chemours[12] filed an objection to the Committee Settlement. (Dkt. No. 596). STUW filed a response in support of both the Committee and Government Settlements, as well as a response in opposition to the Chemours objection. (Dkt. Nos. 882, 901)

3. The Government Settlement

On June 22, 2015, the Debtors filed their Motion seeking approval of the Government Settlement pursuant to 11 U.S.C. §§ 105, 363(b), and Federal Rule of Bankruptcy Procedure ("Rule") 9019(a). (Dkt. No. 818). The motion summarizes the terms contained in the Stipulation and Settlement Agreement—which was also attached to the motion—as follows:

> The proposed Settlement Agreement, in general terms, provides: (a) either (i) a sales process for all or substantially all of the assets of the bankruptcy estates including but not limited to the phosphogypsum stacks and related process water management system (the *"Gyp Stacks"*) to a qualified buyer whose bid includes a component providing for at least $15,000,000 cash consideration to be paid to the Lender Parties for their collateral in addition to any other consideration or liabilities assumed or paid by the proposed purchaser, as well as the assumption of environmental liabilities to the Environmental Agencies related to the Debtors' assets, including without limitation, the Gyp Stacks, and satisfaction of the financial assurance requirements of the Environmental Agencies under non-bankruptcy law including, but not limited to, the financial assurance requirements in RCRA Subtitle C, all of which shall be subject to the approval of the Environmental Agencies, or, (ii) in the alternative, an "Alternative Transaction" providing for a transfer of the assets of the bankruptcy estates to two trusts (the Liquidation Trust and Environmental Trust) one of which, the Liquidation Trust, receives substantially all assets other than the Gyp Stacks to market for sale with a distribution structure for sales proceeds for payment of the claims of the Lenders, for funding Environmental Actions taken by the Environmental Trust (which takes ownership of the Gyp Stacks), and for distribution to the bankruptcy estates; (b) up to $6,000,000 in DIP/Exit Obligations by the Post-Petition Lenders for the Debtors' operations and waste water processing through the Sale Deadline or Closing Date, as applicable; (c) a distribution structure for the proceeds of the BP Claim or Protective Claim to the Lenders, the Environmental Trust and the bankruptcy estates; and (d) a covenant not to sue or assert any civil claims or causes of actions or to take administrative action against the Lender Parties, and PHI, as well as certain officers, directors and employees of the Debtors.

[12] The objection was filed by the predecessor of Chemours, E.I. Du Pont de Nemours and Company. (Dkt. No. 596).

(Dkt. No. 818 at 2-3). The agreement provides that the Lenders will not be entitled to credit bid in an all asset sale as long as the minimum $15 million cash consideration bid is to be paid to the Lenders for their collateral. (*Id.* at 4). Pursuant to the agreement, if the sale does not close by the proposed sale deadline of September 1, 2015, the Debtors will close and consummate the Alternative Transaction. (*Id.*). The numerous other specific terms are detailed in the comprehensive 77-page Stipulation and Settlement Agreement attached to the motion and the Form of Trust Agreements Under Stipulation and Settlement Agreements, filed on July 15, 2015. (Dkt. Nos. 818-1, 886). The Debtors assert that the Government Settlement is fair and equitable under applicable standards and that it represents the exercise of sound business judgment and should be approved. (Dkt. No. 818 at 25-31).

Chemours filed an objection to the Government Settlement. (Dkt. No. 880). The Committee filed a limited objection to the Government Settlement, seeking an order prohibiting the Debtors from transferring, selling, or altering the D&O Policies and from attempting to place the policies out of the reach of general unsecured creditors. (Dkt. No. 881). STUW filed a response in support of both the Committee and Government Settlements, as well as a response in opposition to the Chemours objection. (Dkt. Nos. 882, 901). The Governments joined in the Debtors' motion for approval of the Government Settlement. (Dkt. No. 906).

4. The DOJ Settlement

On July 13, 2015, MPC filed its motion to approve a settlement with the DOJ and for authority to enter into a proposed plea agreement, which would resolve the DOJ investigation and any criminal liability arising from that investigation.[13] (Dkt. No. 870). At the Hearing, Nash

[13] MPC does not state whether any criminal charges have been brought against it, and the motion indicates that the plea agreement would resolve the DOJ investigation, not any specific criminal charges that have been filed. Pursuant to the plea agreement, the DOJ agrees not to pursue any of MPC's current or former officers, employees, or directors. (Dkt. No. 870 at 4, ¶ 12). The DOJ also agrees not to pursue MPC's parent company, PHI; either of its

testified that the pending criminal charges against MPC relate to pre-petition events. (Dkt. No. 931 at 83, lines 14–15). The terms of the plea agreement require MPC to "plead guilty to one felony violation of the Clean Water Act," for specifically "knowingly having discharged pollutants from its fertilizer manufacturing plant into Bayou Casotte . . . in violation of 33 U.S.C. §§ 1311(a)[14] and 1319(c)(2)(A)."[15] (Dkt. No. 870 at 3, ¶ 8). The plea agreement further provides that, "as just and appropriate punishment for the crimes set forth in the Information to which MPC has agreed to plead guilty,"

> (a) MPC would deed in fee simple all title and interest unencumbered in the 320-acre parcel adjacent to its MPC facility in Jackson County, Mississippi, to the Mississippi Department of Marine Resources to become part of the Grand Bay National Estuarine Research Reserve, … as shown on the property listing of the Jackson County, Mississippi Tax Assessor's Office, which is further identified as a rectangular parcel (shown in red on the attached color map, see Appendix A to the Plea Agreement), lying to the southeast of MPC's east gypsum stacks; and (b) MPC would pay a special assessment of $400.00 per count as required in 18 U.S.C. § 3013(a)(2)(B), for a total of $400.00, which payment would be made to the United States District Court, at the Clerk's Office, 2012 15th Street, Suite 403, Gulfport, MS 39501.

(*Id.* at ¶ 10). In its motion, MPC seeks an order that authorizes it to enter into the plea agreement[16] and approves the terms of the proposed plea agreement. (*Id.* at 5, ¶ 14). MPC states

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wholly-owned subsidiary companies, ATS and SATS; or any of the current or former officers, employees, or directors of PHI, ATS, OR SATS. *Id.*

[14] Section 1311(a) provides that "[e]xcept as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a).

[15] Section 1319(c)(2)(A) provides that "[a]ny person who [] knowingly violates section . . . 1312 . . .if this title . . . shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $100,000 per day of violation, or by imprisonment of not more than 6 years, or by both." 33 U.S.C. § 1319(c)(2)(A).

[16] The Court's consideration of the DOJ Settlement and the parties' proposed transfer of estate property is in exercise of its jurisdiction over the property of the bankruptcy estate. Entry of the criminal plea or determination of any other criminal matters relating to the settlement must be and are contemplated by the settlement to be dealt with in the District Court having jurisdiction over those matters.

that the statutory bases for its request include 11 U.S.C. §§ 105(a) and 363(b) as well as Rule 9019 of the Federal Rules of Bankruptcy Procedure. (*Id.* at 1, ¶ 2).

Chemours filed a response and reservation of rights to the DOJ Settlement noting that it objects for the reasons set forth in its objection to the Sale Motion and the settlement motions (discussed below). (Dkt. No. 912). The DOJ filed a brief in support of the motion. (Dkt. No. 927).

5. Chemours' Objections to the Motions

Chemours holds an administrative expense claim pursuant 11 U.S.C. § 503(b)(9) for goods delivered to MPC prior to the commencement of the bankruptcy. (Dkt. No. 867, 880). Prior to the bankruptcy filing, "MPC routinely ordered and purchased sulfuric acid in the ordinary course of business from Chemours, and Chemours regularly sold and delivered sulfuric acid to MPC." (Dkt. No. 880 at 9). Within twenty (20) days preceding the commencement of the case, MPC received from Chemours sulfuric acid with a total value of $699,981.12. (*Id.*). Chemours[17] filed a motion for allowance and payment of an administrative expense claim pursuant to 11 U.S.C. § 503(b)(9) and § 507(a)(2). (Dkt. No. 522). An order agreed to by the Debtors was entered on July 13, 2015, allowing the administrative expense claim "in the amount of $699,981.12 for the full value of goods delivered by DuPont to MPC during the 503(b)(9) Period." (Dkt. No. 867 at 3).

Chemours filed a comprehensive objection and reservation of rights regarding the settlement motions and the Sale Motion.[18] The crux of the objection is that the motions together

[17] The motion was filed by the predecessor of Chemours, E.I. Du Pont de Nemours and Company. (Dkt. No. 522).

[18] Chemours references a prior objection it filed to the Committee Settlement "raising concerns about the speculative nature of the Estate Settlement Payment and the risk of administrative insolvency should the Court approve the Committee Settlement Motion before the outcome of the sales process is known, absent … a carve-out from the sale proceeds sufficient to provide for the full payment of all administrative expenses of the bankruptcy estates." (Dkt. No. 880 at 7, Dkt. No. 596). Chemours also notes that it filed an objection to the initial sales and bidding procedures

combine to constitute a *sub rosa* plan that fails to comply with the requirements of 11 U.S.C. §1129. Chemours contends the following:

> This bankruptcy case is nothing more than an elaborate scheme to implement a structure that will allow the Lenders to insulate themselves from environmental and other liabilities and to pay claims of certain creditors (and avoid the payment of others) in contradiction of the Bankruptcy Code. Unfortunately, the complicated and convoluted series of motions that make up this elaborate scheme (the Amended Sales and Bidding Procedures, the Committee Settlement Motion and the Gov't Motion, …) together constitute a *sub rosa* plan that fails to comply with section 1129 of the Bankruptcy Code and violates the absolute priority rule that is at the core of chapter 11. Moreover, by pursuing this scheme through motions practice, and not by a properly noticed plan and disclosure statement, the creditors are deprived of due process and the fundamental right to vote on acceptance or rejection of a plan.

(Dkt. No. 880 at 2). Chemours argues that, although the Government Settlement may maximize the value of the assets by ensuring that the environmental issues are properly addressed, the Government Settlement and Sale Motion seek to direct sales proceeds from the Debtors' assets and establish a distribution scheme via trusts or otherwise to certain creditor classes in a manner that would be impermissible under the Bankruptcy Code structure through a plan of reorganization or liquidation. (*Id.* at 3). Chemours objects that the "Amended Sales and Bidding Procedures also does not provide for any mechanism to pay section 503(b)(9) claims or any other administrative claims of the Debtors post-closing." (*Id.* at 5). Chemours states that "the Amended Sale and Gov't Motions cannot be approved in their current form unless modified so as to treat all creditors of these estates fairly, including funding sufficient to pay all administrative expenses and a wind down budget from the sale proceeds." (*Id*. at 14). Chemours makes the argument that "[t]he Fifth Circuit has articulated the standard for denying … [a *sub*

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motion in December of 2014 contending that the Chapter 11 is being run solely to preserve and dispose of collateral of Lenders at the expense of administrative, priority and unsecured creditors and that the Amended Sales and Bidding Procedures should not be approved unless administrative solvency of the estates is provided as part of an order approving the motion. (Dkt. No. 320 at 2,11; Dkt. No. 880 at 5-6). The order entered on the prior motion reserved issues as to a proposed sale order and to proceeds of a sale. (Dkt. No. 509).

rosa] transaction where it would have 'the practical effect of dictating some of the terms of any future reorganization plan' and thus would allow the debtor to 'short circuit the requirements of chapter 11 for confirmation of a reorganization plan.'" (Dkt. No. 880 at 10-11) (*citing Pension Benefit Guar. Corp. v. Braniff Airways, Inc. (In re Braniff),* 700 F. 2d 935, 940 (5th Cir. 1983)).

The Agent on behalf of the Lenders filed a response to Chemours' objection arguing that Chemours' "[b]road generalizations challenging the Settlements in the Objection are simply not correct" and that "[t]he Settlements, and the transactions contemplated therein, do not violate *Braniff*." (Dkt. No. 901 at 2). The Agent further argues that "Chemours employs the holding in *Braniff* as an excuse to lodge its real complaint, the fact that Settlements and sale process do not provide for Chemours to be paid on the date of the closing on its Section 503(b)(9) claim, which itself may be a *Braniff* violation, as it requires payment outside of a plan process." (*Id.* at 3). The Debtors filed a joinder to the Agent's response, as noted above. (Dkt. No. 907).

The Environmental Agencies also filed a response to the Chemours' objection contending that the "Chemours' objection does not challenge the Environmental Settlement on the basis that it is not fair, equitable, or in the public interest. Rather, Chemours' grounds for objecting to the settlement is solely grounded on its claim that the Environmental Settlement is a *sub rosa* or *de facto* plan in violation of [*Braniff*]." (Dkt. No. 905 at 2). The agencies argue that the objection is "misplaced." (*Id.*). The Debtors joined the Environmental Agencies' response to the Chemours' objection. (Dkt. No. 907). These arguments are addressed below.

III. ANALYSIS

A. Whether the Sale Motion and Settlements Constitute a Sub Rosa Plan

Chemours objects to the Sale Motion, Committee Settlement, Government Settlement and the DOJ Settlement, asserting that they constitute an "elaborate" and "convoluted" series of

motions which form a *sub rosa* plan and must be denied under *Braniff*. (Dkt. No. 880 at 2, 912 at 2). Chemours' main concern is that neither the Motion nor the settlements provide for payment of its § 503(b)(9) administrative expense claim as would be required for plan confirmation. *See* 11 U.S.C. § 1129(a)(9) (plan cannot be confirmed unless administrative claims for professional fees are paid in full or claimant agrees to different treatment of such claim). (Dkt. No. 880 at 5).

In *Braniff*, the United States Court of Appeals for the Fifth Circuit addressed the proposed sale of the debtor's assets under 11 U.S.C. § 363(b), finding that a proposed sale that disposed of all claims against the debtor restricted creditors' rights to vote for or against a plan or dictated the terms of a plan must be denied. *Braniff*, 700 F. 2d at 939-40. However, *Braniff* does not hold that a debtor is prohibited from selling all of its assets pursuant to § 363(b) prior to seeking confirmation of a plan. *Id.* at 939. ("We need not express an opinion on this controversy ….") In fact, there is no such prohibition. *In re Gulf Coast Oil Corp.*, 404 B.R. 407, 422 (Bankr. S.D. Tex. 2009) (no *per se* prohibition of § 363 sale that purports to sell virtually all assets of estate); *Inst. Creditors of Continental Airlines, Inc. v. Continental Airlines, Inc. (In re Continental Airlines, Inc).*, 780 F. 2d 1223, 1227 (5th Cir. 1986) (section 363(b) sale may be necessary and hearing on such should not "become a mini-hearing on plan confirmation"); *Comm. of Equity Sec. Holders v. Lionel Corp., (In re Lionel Corp.)*, 722 F. 2d 1063, 1071 (2d Cir. 1983) (every § 363 sale does not side-step Chapter 11); *see also Fla. Dept. of Revenue v. Piccadilly Cafeterias, Inc.*, 544 U.S. 33, 37 n.2 (2008) (recognizing that some debtors sell all assets under § 363(b) before seeking plan confirmation); *see generally* 2 Norton Bankr. L. & Prac. 3d § 44.17. Applying the *Braniff* factors to the instant case, neither the Sale Motion nor the related settlements require a release of all claims by individual creditors against the Debtors and

Lenders, dictate how creditors should vote or dictate the terms of a plan of reorganization. Under a strict interpretation of *Braniff*, the settlements and Sale Motion do not constitute a *sub rosa* plan.

Since *Braniff*, the Fifth Circuit has continued to address the issue of § 363(b) sales pre-confirmation. *See Gulf Coast*, 404 B.R. at 415-17. After analyzing existing Fifth Circuit precedent regarding pre-confirmation asset sales, the *Gulf Coast* court developed several factors to be considered when determining whether to approve a § 363(b) sale prior to confirmation. *Id.* at 422-27. These factors are:

1. Is there evidence of a need for speed?
2. What is the business justification?
3. Is the case sufficiently mature to assure due process?
4. Is the proposed APA sufficiently straightforward to facilitate competitive bids or is the purchaser the only potential interested party?
5. Have the assets been aggressively marketed in an active market?
6. Are the fiduciaries that control the debtor truly disinterested?
7. Does the proposed sale include all of the debtor's assets and does it include the "crown jewel"?
8. What extraordinary protections does the purchaser want?
9. How burdensome would it be to propose the sale as part of confirmation of a chapter 11 plan?
10. Who will benefit from the sale?
11. Are special adequate protection measures necessary and possible?
12. Was the hearing a true adversary presentation/ Is the integrity of the bankruptcy process protected?

Id.

Applying the *Gulf Coast* factors to the instant case, there is clearly a need for speed. Debtors have been in bankruptcy for nine months, surviving on dwindling cash collateral and DIP loan proceeds. According to the budget, Debtors have approximately two months of funds remaining assuming that Debtors do not default under the terms of the interim DIP obligation.[19] (Dkt. No. 900 at 6). However, as noted above, required and ongoing wastewater treatment and environmental management fees are approximately $225,000.00 per month and quarterly payments into the MDEQ trust pursuant to the Solid Waste Management Permit are approximately $200,000.00 per quarter. Failure to maintain the wastewater treatment will result in imminent and immediate danger to health, welfare and the environment. *See generally* Sumrall Aff. (Dkt. No. 174-1). Since money is running out, time is of the essence.[20]

The Debtors have asserted a business justification for the Sale Motion and the settlements. (Dkt. No. 931 at 11-16) (Nash testimony regarding the business justification and benefits of the Sale Motion and settlements). The Government Settlement allows the Debtors to address their environmental obligations and resolve potential litigation with the Government parties. Under the agreement, if there is no qualified purchaser at the sale,[21] the contaminated

[19] *See* Dkt. No. 14-1 at 2-4 (termination events).

[20] At the hearing, Chemours asserted that the Debtors had the information to put together a disclosure statement and plan capable of being disseminated, voted on and heard before Debtors' money runs out, i.e. by the end of September. Even if this could happen, which the Court finds doubtful, this solution misses the point as the Debtors have acknowledged that absent the settlements and the sale as contemplated in the Sale Motion, they would be unable to confirm a plan because they cannot pay administrative expenses. Alternatively, if the settlements and the Sale Motion were incorporated into a plan it would not solve Chemours objection since the payment to the estate from the Lenders' collateral comes from the proceeds of the BP Claim if and when a settlement is reached thus making Debtors ability to fund administrative expenses at confirmation dependent on the outcome and timing of a settlement with BP. It should also be noted that in the event there is no settlement with BP, all of stakeholders will suffer, not just the administrative claims holders.

[21] A qualified purchaser would be one who will undertake the ongoing environmental obligations related to the assets.

assets, MDEQ trust fund and related wastewater treatment facility[22] will be separated from the productive assets and placed into an environmental trust to be overseen by the EPA. The productive assets, all of which are collateral of the Lenders, will be placed in a liquidation trust that will make payments to the environmental trust and the Lenders from sale proceeds. The only unencumbered assets involved in this settlement are the contaminated Gyp Stacks whose attendant environmental liability greatly exceeds any purported value. Absent a third party sale or the settlement, Debtors do not have the ability to fund environmental obligations or abandon the contaminated property. *See Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Prot.*, 474 U.S. 494, 507 (1986) (estate may not abandon contaminated property "without formulating conditions that will adequately protect public's health and safety").

The Committee Settlement resolved disputes among the Lenders, the Committee and PHI regarding the extent and priority of the Lenders' liens, particularly the lien on the BP Claim.[23] As part of the settlement, the Lenders agreed to turn over 33% or up to $7,375,000.00 of the proceeds of the BP Claim to the estate to fund a plan of reorganization. This settlement, among other things, provides money to the estate in the event the BP Claim is settled.[24]

The DOJ Settlement allows MPC to settle its alleged criminal liability for environmental contamination using the Lenders' collateral and DIP financing proceeds. The Sale Motion allows the Debtors to sell what is essentially the "white elephant"[25] and get out from under

[22] The wastewater treatment facility is collateral of the Lenders.

[23] Although the Lenders have provided documentation of their lien rights and perfection, neither the Committee nor the Government has articulated to the Court the basis for any assertion that the liens are not valid or properly perfected. *See* Dkt. No. 818 at 15-22.

[24] *See TNB Fin., Inc. v. Parker Interests (In re Grimland, Inc.)*, 243 F. 3d 228, 232-33 (5th Cir. 2001) (estate, not secured creditor, has obligation to pay administrative expenses).

[25] This is not the first time that these facilities have been in bankruptcy. In 1990, MPC was formed as the wholly owned subsidiary of Mississippi Chemical Corporation to acquire the facilities from Mississippi Chemical's

significant and ongoing environmental liability. *See Official Comm. Of Unsecured Creditors v. Cajun Elec. Power Co-op, Inc. (In re Cajun Elec. Power Co-op, Inc.),* 119 F. 3d 349, 355 (5th Cir. 1997).

As noted above, the Debtors have been attempting to market their assets since before the Petition date. Phelps Dec., Dkt. No. 13 at 12. Debtors' CRO, Jon Nash, testified at the Hearing about the Debtors post-petition marketing efforts. *See supra* p. 6. He further testified that the limit on Lenders' right to credit bid, which is part of the Government Settlement, "gave our potential buyers certainty that if they bid in excess of $15 million, they will not be facing a credit bid from the lenders that could effectively take the assets out from under them for no new cash and chill the bidding." (Dkt. No. 931 at 35-36). According to Nash, this issue was raised by most of the serious potential bidders. *Id.* at 36. Additionally, with regard to the timing of the proposed sale, this bankruptcy has been going on for almost nine months and the Committee and other interests have had sufficient time to mobilize and determine "whether (and how) to participate in the case." *Gulf Coast,* 404 B.R. at 423.

With regard to the disinterestedness of the fiduciaries, early in the case, the Court authorized the employment of an independent CRO. (Dkt. No. 318). His testimony throughout these proceedings establishes that Nash has been actively involved in the activities of the Debtors as well as the negotiations regarding the Sale Motion and settlements. Marc Solomon, counsel for the Committee represented that the Committee Settlement "was the result of a lot of long negotiations over a variety of months and the committee ultimately believes that it was fair, equitable and in the best interest of creditors." (Dkt. No. 931 at 106). Roy Furrh, counsel for the MDEQ, represented that the Government Settlement took four months and, although it is not

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borrower Nu-South, Inc., a debtor in bankruptcy. Phelps Dec. at 4. In 2003, Mississippi Chemical and its subsidiary MPC filed Chapter 11 petitions in this Court. *Id*.

"everything in the world that we wanted," it was hard fought. *Id.* at 117. Addressing the Government Settlement, Nash testified that it allowed for distribution of proceeds in a way "that everyone believes is I think it's fair to say painful, but acceptable. I don't believe anybody's happy with the outcome, but I think everybody's equally unhappy." *Id.* at 34. Nash also testified that the DOJ Settlement was negotiated over several months. *Id.* at 64. Clearly, the testimony established that the settlements were the result of arms-length negotiating. In addition, the Sale Motion has been vetted and agreed to by the Committee, Governments, Lenders and Debtors. There is no evidence of any collusive action on the part of the participating parties.

The Sale Motion provides that the sale of the Debtors' assets will be free and clear of liens and interests pursuant to § 363(f). It has long been recognized that the bankruptcy court may sell property free and clear of liens. 2 Norton Bankr. L. & Prac. 3d § 44.24. A purchaser at the sale is getting what is allowed under § 363. Consequently, there are no extraordinary protections being offered to the purchaser. And, as noted by the Lenders, all of the stakeholders benefit from the sale and the settlements.

> The Environmental Agencies will have a mechanism to ensure their legislatively enacted roles are fulfilled. The Lenders and [sic] will resolve their disputes with the Environmental Agencies including those surrounding the Gyp Stacks. The Committee Settlement ensures that the Debtors' estates receive up to $7.375 million of BP Proceeds. The Debtors benefit by having significant liabilities against their estates resolved. Even Section 503(b)(9) creditors like Chemours benefit by having access to money created by the Committee Settlement.

(Dkt. No. 901 at 13-14).

With regard to the last two factors advocated by *Gulf Coast*, the Court does not find that the protections of the confirmation process have been denied in this case. The Sale Motion and settlements do not address the unencumbered assets — avoidance actions and D & O claims. Nor do they release the settling parties from claims by individual creditors. They offer a

mechanism by which the Lenders have agreed to provide certain of their collateral to the estate for the benefit of the creditors. No party disputes that the Lenders are under-secured. And, as a result of the settlement and the Sale Motion, the Lenders will receive less than they would otherwise be entitled to. There is no requirement that the Lenders fund an administratively solvent estate before the Court can approve a § 363(b) sale. *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 5 (2000) ("Administrative expenses … do not have priority over secured claims"). Additionally, the Transcript of the Hearing reflects that there was a true adversary presentation with vigorous cross-examination by Chemours' counsel. *See* Dkt. No. 931.

After analysis of the *Gulf Coast* factors, the Court finds that the transactions contemplated by the Sale Motion and the settlements do not constitute a *sub rosa* plan.

B. Whether Midlantic *Can be Reconciled with* Braniff *and its Progeny Under the Facts of this Case*

Even assuming that the requirements of *Braniff* prevented approval of the Sale Motion and/or the settlements, there is tension between *Braniff* and *Midlantic* which must be resolved. *See In re ATP Oil & Gas Corp.*, Case No. 12-36187-MPI, Dkt. No. 2015 (transcript) (Bankr. S.D. Tex.), *appeal dismissed, sub nom Fortune Nat. Resources Corp. v. ATP Oil & Gas Corp.*, No. H-13-3218 (S.D. Tex., Feb. 19, 2015), *appeal pending*, Case No. 15-20151 (5th Cir.).

In *Midlantic*, the Supreme Court addressed the duties of a trustee regarding environmentally impacted property. *Midlantic*, 474 U.S. at 502. The Court noted the obligation of anyone in possession of a contaminated site, including a bankruptcy trustee, to comply with the state environmental laws; and further recognized that "Congress has expressly provided that the efforts of the trustee to marshal and distribute the assets of the estate must yield to governmental interest in public health and safety." *Id.* (*citing Ohio v. Kovacs*, 469 U.S. 274, 285

(1985)). Consequently, the Court held that a trustee could not abandon property in violation of state statutes reasonably designed to protect public health and safety from imminent and identifiable hazards. *Midlantic*, 474 U.S. at 507.

Clearly, a debtor is not relieved from its obligations under environmental laws on the filing of a petition. *See* 11 U.S.C. § 362(b)(4) (enforcement by governmental unit of police or regulatory power does not operate as stay); *United States v. Hansen*, 262 F.3d 1217, 1238 (11th Cir. 2001) ("Bankruptcy does not insulate a debtor from environmental regulatory statutes."); *U.S. v. Nicolet, Inc.*, 857 F.2d 202, 207 (1988) (to combat risk that bankruptcy court would become sanctuary for environmental wrongdoers Congress enacted police and regulatory exception to automatic stay). In fact, a debtor-in-possession "shall manage and operate the property in his possession … according to the requirements of the valid laws of the State in which the property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof." 28 U.S.C. § 959(b); *Midlantic*, 474 U.S. at 502 (debtor cannot operate estate in violation of environmental law); *In re Amer. Coastal Energy, Inc.*, 399 B.R. 805, 810 (Bankr. S.D. Tex. 2009).[26] However, as noted above, Debtors have been unable to maintain environmental controls or operate the business without post-petition financing from the Lenders; and if Debtors' default under the interim DIP order or exhaust the funds from the DIP financing (which is imminent), the estate has no method of satisfying its environmental obligations.

In this case, the Governments have agreed to a settlement that will resolve the ongoing environmental obligations of the Debtors. This settlement is entitled to deference. *In re*

[26] *See also Safety-Kleen, Inc. (Pinewood) v. Wyche*, 274 F.3d 846, 856-57, 866 (4th Cir. 2001) (court upheld state's right to shut down debtor's operations in the absence of financial assurance); *In re Mattiace Indus., Inc.*, 76 B.R. 44 (Bankr. E.D.N.Y. 1987) (court dismissed case for, among other things, failure to comply with environmental laws); *see also In re Commonwealth Oil Ref. Co., Inc.*, 805 F. 2d 1175, 1186 (5th Cir. 1986) (automatic stay did not apply to EPA enforcement action).

ASARCO LLC, No. 05-21207, 2009 WL 8176641, at *37 (Bankr. S.D. Tex. 2009). This settlement allows Debtors to comply with their obligations under § 959(b). In light of the immediate harm to the public and the environment if the Debtors lose their remaining DIP funding and/or do not have the funds to maintain their environmental obligations, the Court finds that the requirements of § 959 and *Midlantic*, which are met if the intertwined settlements are allowed, trump the requirements of *Braniff* under the facts of this case. *See ATP*¸ Dkt. 2015 at 396-98.

C. Whether the Settlements are Fair and Equitable and in the Best Interests of the Estates

Bankruptcy Rule 9019(a) provides that "[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct." Fed. R. Bankr. P. 9019(a). The Debtors seek approval of the Committee and Government Settlements and MPC seeks approval of the DOJ Settlement.

For a bankruptcy court to approve a settlement, it must find that the settlement is fair, reasonable, and in the best interests of the debtor's estate. *Myers v. Martin (In re Martin),* 91 F.3d 389, 394 (3d Cir. 1996); *In re Aleris Int'l, Inc.*, No. 09-10478 (BLS), 2010 WL 3492664, at*18 (Bankr. D. Del. 2010). "The settlement need not be the best that the debtor could have obtained." *In re Adelphia Commc'ns. Corp.,* 327 B.R. 143, 159 (Bankr. S.D.N.Y. 2005) (citations omitted). Instead, the settlement need only fall "'within the reasonable range of litigation possibilities.'" *Id.* (*quoting In re Penn Cent. Transp. Co*., 596 F.2d 1102, 1114 (3d Cir. 1979)). And a settlement must be fair and equitable in order for the court to find that the settlement is in the best interests of the estate. *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414 (1968) ("*TMT"*); *United States v. AWECO, Inc. (In*

re AWECO, Inc.), 725 F.2d 293, 298 (5th Cir. 1984). The Supreme Court set forth the factors for determining whether a settlement is "fair and equitable" in *TMT,* which include: (1)"the probabilities of ultimate success should the claim be litigated"; (2) "[a]n educated estimate of the complexity, expense, and likely duration of . . . litigation"; (3) "the possible difficulties of collecting on any judgment which might be obtained"; and (4) "all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise." *TMT,* 390 U.S. at 424–25. The Court considers each factor with respect to each of the three proposed settlement agreements.

1. The Committee Settlement

The Committee Settlement resolves disputes amongst the parties concerning the extent and priority of the Lenders' liens generally, and the Lenders' lien on the BP claim specifically. As noted above,[27] the Lenders have provided documentation evidencing their lien rights and perfection, and neither the Committee nor the Government has articulated any basis for the assertion that the liens are not valid or not properly perfected. (*See* Dkt. No. 818 at 15–22). Thus, it appears that the probability of success were litigation to proceed is small. Further, were the claims to proceed to trial, Debtors predict that one week of trial time—and the necessary discovery and motion practice related to such a lengthy trial—would be necessary to resolve all of the claims. (Dkt. No. 501 at 18, ¶ 31). Thus, were the Committee's claims to proceed, they would likely result in complex, lengthy, and expensive litigation, with little likelihood of success. In contrast, the settlement resolves the Committees' outstanding claims and ensures a fixed percentage recovery for the estate of any BP proceeds up to $7,375,000.00. Finally, the settlement ensures that DIP funding will be available through completion of the sale process. Absent this funding, the Debtors would not be able to meet their environmental obligations.

[27] *See* discussion *supra* at 19 n.23.

Accordingly, the Committee Settlement is in the best interests of the estate and should be approved.

2. *The Government Settlement*

The Government Settlement permits the Debtors to address their ongoing environmental obligations and resolves any potential litigation with the Governments. The Debtors are bound by specific environmental obligations, which carry the potential for fines and even criminal liability if not complied with. Absent the Governmental Settlement, which provides for DIP funding to allow the Debtors to meet these obligations, the Debtors would be unable to comply with these obligations and would thus be subject to the claims of the Governments. The likelihood of the Debtors' successfully defending litigation arising out of their environmental liabilities is dismal because the obligations are statutory. And the expense associated with such litigation would be great. The third *TMT* factor—the possible difficulties of collecting on any judgment which might be obtained—is not relevant in this case because the Debtors are seeking to settle a claim against them rather than a claim they have against another entity. *E.g. In re Batt*, 488 B.R. 341, 352 (Bankr. W.D. Ky. 2013) ("the Court must consider what, if any, difficulties the Trustee would face in collecting any judgment the bankruptcy estate might obtain"). Further, the Government Settlement operates to enhance bidding at the proposed sale of assets by limiting the Lenders' credit bid if there is a qualified bid. Moreover, the Government Settlement provides an alternative route for the Debtors to surrender the property and allow the continued maintenance of the Gyp Stacks. Absent this ability to surrender the property, the Debtors would continue to be saddled with property that poses an environmental risk, without the ability to fund ongoing treatment and maintenance. As discussed above, the Debtors' facility poses the threat of

immediate and irreparable harm to the public interests if not properly maintained. Accordingly, the Court finds that the Government Settlement is in the best interests of the Debtors.

3. The DOJ Settlement

i. *Liens and Encumbrances on the Property*

As noted by MPC in its motion, because the DOJ Settlement requires the transfer of title to the 320-acre tract in fee simple, free and clear of encumbrances, MPC will be unable to proceed with the DOJ Settlement unless the Lenders are willing to release their liens on the 320-acre tract of land and allow the use of approximately $10,000.00 of its cash collateral to pay outstanding ad valorem taxes. (Dkt No. 870 at 9, ¶ 31). At the Hearing, counsel for the Lenders represented that the Lenders are willing to agree to release their liens and provide for the payment of the outstanding ad valorem taxes in the DIP financing budget. (Dkt. No. 931 at 102, lines 10–14). Accordingly, the Court presumes that MPC will be able to go forward with the DOJ Settlement for the purposes of its analysis under Rule 9019. The third factor—the possible difficulties of collecting on any judgment which might be obtained—is not relevant in this case because MPC is not seeking to settle its claim against an entity, which would result in a judgment in its favor.

ii. The TMT Factors

Entry into the DOJ Settlement would resolve the DOJ's ongoing investigation and prevent any potential future criminal indictments against the Debtors or their current and former employees, officers, and directors arising from this investigation. MPC does not opine on the probability of its success should the DOJ seek an indictment, but its willingness to plead guilty to one felony violation of the Clean Water Act is telling. Further, a criminal indictment could constitute an event of default under the DIP financing agreement, which would allow the

Lenders to accelerate repayment. (*See* Dkt. No. 14-1 at 3, ¶ l) (listing as a termination event "any action (including, without limitation, any regulatory or other enforcement action) by any federal or state governmental or regulatory agency or authority that has a material adverse effect on the Debtors' operations in the DIP Agent's and DIP Lenders' sole discretion"). And if MPC were indicted and found guilty, it would be faced with significantly increased fines.[28] Specifically, if convicted of a felony, MPC could be fined the greater of $500,000.00, up to $50,000.00 per day of the violation, or twice the gross gain resulting from any pecuniary gain it enjoyed as a result of the violation or twice the gross loss caused by the violation. 18 U.S.C. § 3571(c), (d). Moreover, criminal litigation involving a governmental entity is necessarily lengthy and complex. And it does not appear that any indictments are currently pending against MPC or its subsidiaries, thus the DOJ would have to continue and conclude its investigation before seeking any indictments. Allowing MPC to pursue the DOJ Settlement would provide certainty regarding the amount of the judgment against it as well as the source of payment from Lenders' collateral.

Moreover, allowing MPC to pursue the DOJ Settlement is in the best interests of its creditors because if MPC were assessed a larger criminal fine or penalty, the unsecured creditors would bear those costs in the form of decreased distributions.

Finally, though MPC did not opine as to the value of the 320-acre tract, Nash testified at the Hearing that the property is wetlands and is within the boundaries of the Grand Bay National Reserve. (Dkt. No. 931 at 65, lines 17–19). This property is also located in close proximity to the East Gyp Stack. (*See* Dkt. No. 929, Ex. 7). Nash also testified that the tract "is not productive

[28] Section 1319(c)(2)(A) provides that the penalty for violation of § 1312 is a fine of not less than $5,000.00 and not more than $50,000.00 per day of the violation. 33 U.S.C. § 1319(c)(2)(A). 18 U.S.C. § 3571(c) sets forth penalties for criminal offenses, stating that organizations "may be fined not more than the *greatest* of (1) the amount specified in the law setting forth the offense; the applicable amount under subsection (d) of this section ; (3) for a felony, not more than $500,000 . . . ." 18 U.S.C. § 3571(c) (emphasis added).

for the debtor in any way." (*Id.* at 65, line 20). The DOJ also asserts that the tract has "significant ecological value but little commercial worth." (Dkt. No. 927 at 2). And, if the property was not transferred to the DOJ in satisfaction of the DOJ Settlement, the tract is subject to liens in favor of the Lenders, which hold pre-petition claims approximating $58 million. (Dkt. No. 931 at 66, lines 1–4). Thus the property does not appear to be of much value to either MPC or its creditors. Accordingly, the Court finds that approval of the settlement with the DOJ is fair, reasonable, and in the best interests of MPC's estate.

iii. The Chemours Objection

Chemours filed a response to the DOJ Settlement on July 20, 2015. (Dkt. No. 912). Chemours does not specifically object to the provisions of the DOJ Settlement, nor does it specifically object to the transfer of estate property as contemplated in the DOJ Settlement; rather, it characterizes the motion as "yet another example of the Lender's election to pay only those creditors that will insulate itself and its collateral from environmental claims in violation of the priority scheme that is at the core of section 1129 of the Bakruptcy Code." (Dkt. No. 912 at 2, ¶ 2). Chemours further states that the motion "would be better approved under a plan so that all creditors are given due process and the fundamental right to vote on acceptance or rejection of the plan." (*Id.*). Chemours did not cite any authority for its position, nor did it object to the terms of the plea agreement. Instead, Chemours argues that the plea agreement should only be approved under a plan. The Court disagrees and therefore overrules the Chemours objection. No other responses or objections to the DOJ Settlement were filed.[29]

[29] The DOJ filed a brief in support of the motion on July 22, 2015. (Dkt. No. 927). It argues that criminal restitution awards "may be enforced in the manner provided by 18 U.S.C. 3613(a)," which provides that "[n]otwithstanding any other Federal law . . . a *judgment* imposing a fine may be enforced against all property or rights to property of the person fined." (Dkt. No. 927) (emphasis added). The DOJ further asserts that § 3613(a) prohibits a discharge under title 11 from voiding "a lien filed as prescribed by this section . . ." (*Id.*) (*quoting* 18 U.S.C. § 3613(e)). The DOJ also argues that "§ 3613 supersedes the automatic stay and allows the government to enforce restitution *orders* against property included in the bankruptcy." (*Id.*at 1–2) (*citing In re Robinson*, 764 F.3d 554, 557 (6th Cir. 2014))

D. Whether the Sale Motion and Settlements were Properly Noticed

The Court next addresses whether the motions were properly noticed.[30] Generally, notice of the proposed sale of property and of hearings on the approval of a compromise or settlement is governed by Federal Rule of Bankruptcy Procedure 2002. Twenty-one (21) days' notice to all creditors is required except as stated under the Rule:

> **(a) Twenty-One-Day Notices to Parties in Interest.**
>
> Except as provided in subdivisions (h), (i), (l), (p), and (q) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees at least 21 days' notice by mail of:
>
> . . .
>
> **(2)** a proposed use, sale, or lease of property of the estate other than in the ordinary course of business, *unless the court for cause shown shortens the time or directs another method of giving notice;*
>
> **(3)** the hearing on approval of a compromise or settlement of a controversy other than approval of an agreement pursuant to Rule 4001(d), *unless the court for cause shown directs that notice not be sent;*

Fed. R. Bankr. P. 2002(a)(2), (a)(3) (emphasis added). Rule 2002(a)(2)[31] is therefore applicable, to the Debtors' Sale Motion as a proposed sale of property other than in the ordinary course of business pursuant to 11 U.S.C. § 363. The Sale Motion was filed on June 22, 2015. (Dkt. No. 819). On June 23, 2015, the Court's Notice of Hearing and Deadlines that set the Sale Motion

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(emphasis added). While the DOJ may be correct in asserting that the automatic stay does not preclude the enforcement of a criminal restitution order or judgment imposing a fine; and that discharge in bankruptcy does not void a lien pursuant to § 3613(a), no restitution order or judgment imposing a fine has been entered, and no lien or fine has been levied against MPC. Thus, the issue is not whether the automatic stay prohibits the initiation or continuation of criminal proceedings against MPC or the enforcement of an existing criminal restitution order or judgment imposing a fine; rather, the issue is whether the Court should approve the transfer of the 320-acre tract, which is property of the estate, as required by the proposed DOJ Settlement. This determination appears to be governed by Federal Rule of Bankruptcy Procedure 9019(a).

[30] Chemours has argued that notice may not have been served on all parties, specifically referencing the settlement motions. (*See* Dkt. No. 880 at 2).

[31] The content of the notice for a proposed use, sale or lease of property is governed by Rule 2002(c). The service given satisfies the content of notice requirement. The Sale Motion sets out a proposed deadline for bids of July 24, 2015, an auction date of July 31, 2015 if more than one qualified bid is made, and a sale hearing of August 6, 2015. (Dkt. No. 819 at 5).

for hearing on July 21, 2015 was noticed to a limited service list. (Dkt. No. 822). On June 24, 2015, an Affidavit of Service was filed by BMC Group, Inc., the Noticing and Claims Agent for the Debtors, declaring that Dkt. No. 818 (the Sale Motion) and Dkt. No. 822 (the Court's Notice of Hearing) were served on the Creditor Matrix Parties Address List on June 23, 2015. (Dkt. No. 824). The service list attached designated the mode of service as U.S. Mail (1st Class). (*Id.*). The service list of 1,032 parties is attached to the Affidavit. (*Id.*). On July 23, 2015, a Declaration was filed by the BMC Group, Inc. expressly stating that the Exhibit to the Certificate of Service on the Dkt. No. 824 Sale Motion was, in fact, the complete Creditor Matrix in the bankruptcy cases as it existed on June 23, 2015, the date of service. (Dkt. No. 935). The Court finds that more than twenty-one (21) days' notice of the July 21, 2015 hearing on the Sale Motion was given to all creditors as required by Rule 2002(a)(2) and that notice was proper.

The settlement motions fall under the provisions of Rule 2002(a)(3) that require a twenty-one (21) day notice to all creditors unless the court for cause shown directs that notice not be sent. The Committee Settlement Motion was filed on February 18, 2015. (Dkt. No. 501). More than twenty-one (21) days' notice for the filing of objections or responses to the Committee Settlement Motion was given by the Debtors as per the filed Notices and Affidavit of Service referencing the motion. (Dkt. No. 502, 504, 506).[32] The Court finds that all parties were initially noticed with an opportunity to object to the Committee Settlement and that notice was proper.[33]

On January 16, 2015, the Court entered its Order Approving Motion of the Debtors to Establish Limited Service List, after notice of the motion had been given to all creditors on the

[32] The Court allows "negative notice," which warns that the court may grant relief without hearing unless a party objects.

[33] Subsequent notices of hearing dates for objecting parties or reset notices for the hearing that may have been sent to an established limited matrix list do not negate the prior notice to all creditors. Even if notice had not been given to all creditors, the Court would find, as it does with the other settlement motions, that notice to the limited service list is proper.

matrix. (Dkt. Nos. 425, 345, 346, 349). The order provided that, due to the large and complex nature of the Chapter 11 proceedings, noticing would be extremely costly for the bankruptcy estates absent provisions for alternate noticing arrangements. (Dkt. No. 425). A limited service list was authorized that includes counsel for the Committee, creditors or parties in interest that request to be added to the list, and those persons required to be noticed under Miss. Bankr. L.R. 2002-1. Debtors were directed to update the limited service list monthly. (*Id.*).

Notices of the hearing on approval of the Government Settlement (Dkt. No. 818), filed on June 22, 2015, and the DOJ Settlement (Dkt. No. 870), filed on July 13, 2015, were noticed to a limited matrix. (Dkt. Nos. 821, 827, 878, 884, 891, 898). An order was entered authorizing shortened time for notice of the hearing on the DOJ Settlement, which was filed a week before the other hearings were already scheduled. (Dkt. Nos. 871, 876, 897). The Court finds that notice of the settlement motions was properly given to the limited service list established by the Court's prior order, noting the authorization in Rule 2002(a)(3) that the Court may direct that notice not be sent.

Further, the limited matrix provides notice to all represented bodies, including the unsecured creditors. Additionally, as pointed out by the parties in the motions and in arguments before the Court, the settlement motions represent agreements among the particular parties to the settlements and any releases given pursuant to the settlements are only as between the parties therein. Moreover, the terms of the Government Settlement are largely embodied in the Sale Motion, which provides significant detail regarding the negotiated bidding procedures, auction and alternative transaction provisions. The Court finds that the notice of the motions was proper and that parties have not been denied rights of due process or the protection of their interests by the notice given, but that, in fact, their interests have been represented and protected. *See* 3

Norton Bankr. L. & Prac. 3d § 48:11 ("Given the expense of noticing all creditors, most courts limit notice, or dispense with notice entirely, unless the proposed settlement is likely to have a material impact[34] on the estate and the amount of funds available to creditors. Also, since many settlements occur late in a case, a court may decide to limit notice if there has been a general lack of creditor interest in the case, especially if there has been a lack of interest in matters of a comparable nature."); *Korngold v. Loyd (In re S. Med. Arts Cos., Inc.)*, 343 B.R. 250, 255 (B.A.P. 10th Cir. 2006) (notice of proposed compromise satisfied where notice went to matrix established in jointly administered case pursuant to order limiting notice); *In re Bombay*, No. 07-44084-rfn-11, 2007 WL 2826071, at *4 (Bankr. W.D. Tex. Sept. 26, 2007) (court found that any party claiming lack of notice and opportunity to be heard that is able to show interests not adequately represented may raise issue at hearing on sale approval).

For the reasons stated above, the Court finds that notice of the motions was proper.

IV. CONCLUSION

IT IS THEREFORE ORDERED AND ADJUDGED that the Chemours' objections are **OVERRULED;**

IT IS FURTHER ORDERED AND ADJUDGED that the Sale Motion if **GRANTED**;

IT IS FURTHER ORDERED AND ADJUDGED that the Committee Settlement is **GRANTED**;

IT IS FURTHER ORDERED AND AJUDGED that the Government Settlement is **GRANTED**; and,

IT IS FURTHER ORDERED AND AJUDGED that the DOJ Settlement is **GRANTED**.

##END OF ORDER##

[34] The material impact, if any, on the creditors is that the settlements may actually provide a means of distribution where there would likely be no possibility of such in the absence of the settlement agreements.