**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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March 14, 2016

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| DANIEL B. LOWE,<br>Complainant,<br><br>v.<br><br>VERIS GOLD USA, INC.,<br><br>and<br><br>JERRITT CANYON GOLD, LLC,<br>Respondents. | DISCRIMINATION PROCEEDING<br><br>Docket No. WEST 2014-614-DM<br>WE-MD 14-04<br><br>Mine: Jerritt Canyon Mill<br>Mine ID: 26-01621 |

**ORDER ON COMPLAINANT'S MOTION TO AMEND**

Before: Judge Moran

Complainant Daniel Lowe has filed a motion to amend the complaint in this matter, brought under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"), to add Jerritt Canyon Gold, LLC, ("JCG") as an alleged successor. JCG then filed its Special Limited Appearance on Behalf of Jerritt Canyon Gold, LLC to Contest Jurisdiction in Response to ALJ's Order Regarding Secretary's Motion for Reconsideration and Complainant's Motion to Amend ("Response").[1] For the reasons that follow, the Court grants Complainant's Motion to Amend, allowing the addition of JCG as an alleged successor in interest to Veris Gold USA, Inc. ("Veris Gold").[2]

JCG's Special Limited Appearance challenges whether this Court has "jurisdiction over and can attach liability for alleged claims of discrimination by Veris Gold USA, Inc. ('Veris Gold') to [JCG], a newly formed entity that purchased certain assets of the former Veris Gold under a bankruptcy court order and approved sale." JCG Resp. 1.

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[1] Mr. Lowe filed a response to the JCG filing, which was also considered by the Court.

[2] This Order parallels the March 4, 2016, Order issued by this Court in Matthew Varady's discrimination complaint against Veris, WEST 2014-307-DM. Lowe and Varady, both non-attorneys, with each presently proceeding *pro se,* have assisted one another in their respective filings. In this instance their motions to amend, seeking to add Jarrett Canyon Gold as a party were nearly identical submissions. Accordingly, except for minor adjustments, this Order tracks the substance of Varady Order.

The Response begins with serious inaccuracy by characterizing the Mine Act discrimination action brought by Lowe as "*alleged* claims of discrimination by Veris Gold USA, Inc." *Id.* (emphasis added). This Court, after a hearing held in Elko, Nevada, on June 18, 2015, found in a decision issued on October 15, 2015, that Veris Gold engaged in acts of discrimination against Complainant Lowe. *See Lowe v. Veris Gold USA, Inc.*, 37 FMSHRC 2337 (Oct. 2015) (ALJ). Therefore, far from mere allegations, this Court made findings of fact and conclusions of law regarding that discrimination claim.

The Response then queries whether JCG, "a newly formed entity that purchased certain assets of the former Veris Gold under a bankruptcy court order and approved sale" can be liable for Veris Gold's acts of discrimination. JCG Resp. 1. The Response does acknowledge that the issue is whether JCG can be added to the complaint as an "alleged successor in interest to Veris Gold." *Id.*

It is JCG's position that the final orders of the bankruptcy court are not subject to collateral attack, as that court "declared the sale of Veris Gold assets to JCG 'free and clear' of claims and encumbrances pursuant to Federal Bankruptcy Code, 11 U.S.C. § 363(f)." JCG Resp. 2. Again characterizing Lowe's Complaint as an allegation of Veris Gold's discrimination, JCG asserts that "efforts to impose a penalty on JCG [based on Lowe's discrimination complaint] tramples on powerful and persuasive precedent as well as policies that derive from the fundamental 'equitable distribution to creditors' policy underlying bankruptcy law." *Id.* at 2. On that basis, the Response contends that this Court has no jurisdiction over JCG and therefore it should deny the Complainant's Motion to Amend. *Id.*

In the "Background" section, the Response asserts "JCG is a newly formed limited liability company funded by *new investors* [which is] not affiliated *in any way* with the former operations of Veris Gold." *Id.* (emphasis added).

The Response acknowledges that Mr. Lowe brought his own "private" discrimination action under section 105(c)(3) of the Mine Act.[3] The Response then notes that "[o]n June 4, 2015, the U.S. Bankruptcy Court entered an order approving the sale of Veris Gol[d]'s assets,

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[3] Though it acknowledges that Lowe brought his own discrimination action under section 105(c)(3) of the Mine Act, the Response cannot help but insert irrelevancies into its argument by noting that MSHA declined to file a discrimination action on Lowe's behalf and that MSHA's decision was "based upon its investigation, staffing, resources and priorities." JCG Resp. 3 & n.2. Such references are not merely historical, but, as with the Response's characterization of the action as "alleged claims of discrimination," are obvious attempts to indirectly diminish the merits of Lowe's 105(c)(3) action as if it were a stepchild claim. Congress did not impute under the Mine Act that such private claims were of inferior standing. Since JCG has raised the vehicle employed for Lowe's claim, it is fair to note that his action was one of a bevy of discrimination complaints filed against Veris Gold, some brought by the Secretary of Labor and others, as with Lowe, on their own. *See Sec'y of Labor on behalf of Garcia v. Veris Gold USA, Inc.*, 36 FMSHRC 1883 (July 2014) (ALJ); *Varady v. Veris Gold USA, Inc.*, 37 FMSHRC 2037 (Sept. 2015) (ALJ).

including the Jerritt Canyon mine and mill, free and clear of all liens, claims and interests pursuant to Section 363 of the Bankruptcy Code, (11 U.S.C. § 363). Docket No. 318." *Id.* at 3. JCG takes particular note that

> the Sale Order specifically provided that the Assets would be sold free and clear of: 'rights or claims on any successor or transferee liability and any enforcement action or enforcement history….and… all contractual rights and claims and labor, employment and pension claims, in each case, whether known or unknown, choate or inchoate, filed or unfiled, scheduled or unscheduled, noticed or unnoticed, recorded or unrecorded, perfected or unperfected, allowed or disallowed, contingent or non-contingent, liquidated or unliquidated, matured or un-matured, material or non-material, disputed or undisputed, whether arising prior to or subsequent to the commencement of these Chapter 15 Cases...'

JCG Resp. 3-4 (quoting Sale Order at 6-7, *In re Veris Gold Corp.*, No. 14-51015-gwz (Bankr. D. Nev. June 4, 2015), ECF No. 318).

The Response then notes that Lowe received notice of the bankruptcy action, that on June 19, 2015, Lowe filed a motion to stay the bankruptcy court's Sale Order, and that the bankruptcy court denied the motion stating that there was no legal or factual basis for the relief Lowe sought. *Id.* at 4. The denial of the motion occurred *on the same day* Lowe filed his motion seeking a stay.[4]

The Response asserts that this Court "lacks jurisdiction to amend the complaint and adjudicate the Section 105(c)(3) complaint against JCG." JCG Resp. 5. Apart from the unusual and temerarious assertion that this Court, as part of the Federal Mine Safety and Health Review Commission ("the Commission"), in a lawful section 105(c)(3) action under the Mine Act, lacks jurisdiction to allow Lowe to amend his complaint and to adjudicate such amended complaint against JCG, the Response makes the fundamental error of conflating bankruptcy court decisional authority with that of the Commission. The Commission has the authority to adjudicate section 105(c) complaints of all stripes, and such authority includes determinations of motions to amend such complaints.[5] As Commissioner Cohen has noted in this case, "the

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[4] The Response notes that Lowe, a non-attorney, *pro se* complainant, did not attempt to appeal the bankruptcy court's denial of his motion and "thus failed to exhaust his remedies." JCG Resp. 4. This is somewhat disingenuous if meant to suggest that a different outcome was at all possible.

[5] *See, e.g., McDonald v. TMK Enterprises,* 37 FMSHRC 2239 (Oct. 2015); *Black Beauty Coal Co*., 34 FMSHRC 1733 (Aug. 2012); *Wyo. Fuel Co*., 14 FMSHRC 1282 (Aug. 1992). The Procedural Rules provide that the Commission's judges shall be guided by the Federal Rules of Civil Procedure "[o]n any procedural question not regulated by Act, these Procedural Rules, or the Administrative Procedure Act." 29 C.F.R. § 2700.1(b). Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend a complaint shall be "freely given when justice so requires." Fed. R. Civ. P. 15(a); *see also Foman v. Davis*, 371 U.S. 178, 182 (1962). The Commission has taken a liberal view when it comes to amending complaints, "especially when . . . they do not prejudice a party in preparing its defenses." *Brannon v. Panther Mining, LLC*, 31

Complainant may file a motion to amend the complaint to add as parties the entities which now have a successor interest in the mine formerly owned by Veris Gold." *Lowe v. Veris Gold USA, Inc.*, No. WEST 2014-614-DM, 2016 WL 197500, at *2 n.4 (FMSHRC Jan. 12, 2016) (citing *Tolbert v. Chaney Creek Coal Corp.*, 12 FMSHRC 615 (Apr. 1990)). Commissioner Cohen continued:

> Moreover, the Federal Rules of Civil Procedure may present several potential avenues of relief for the Complainant. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"). For instance, under Rule 21, a Judge may *sua sponte* grant a post-hearing joinder of a new party. Fed. R. Civ. P. 21 ("the court may at any time, on just terms, add or drop a party"). In addition, Federal Rule of Civil Procedure 15 permits a party, with the court's leave, to amend a complaint more than 21 days after the pleading is served "when justice so requires." Fed. R. Civ. P. 15(a)(2)."

*Id.*

## I. <u>Jerritt Canyon Gold's Arguments</u>

In support of its claim that this Court does not have jurisdiction to adjudicate a Mine Act section 105(c)(3) discrimination complaint, the Response advances four contentions:

> I. The automatic stay provisions of the Bankruptcy Code preclude ancillary proceedings by private individuals and any such proceedings are void. . . . II. The Bankruptcy Court's Adjudication and sale of Veris Gold assets were "free and clear" of liens, claims and interests as provided for under Section 363(f) of the Bankruptcy Code. The Bankruptcy Courts' [sic] Adjudication resulted in the buyer of assets of Veris Gold taking title to those assets free from all claims against Veris Gold, including the claims in this private proceeding. . . . III. Complainant is barred under principles of res judicata and collateral estoppel from bringing a claim against Veris Gold and JCG where Complainant made an appearance, sought relief from, and made objections to actions in the Bankruptcy Court's denial of the relief sought by Complainant and the ordering of the sale free and clear to JCG. . . . IV. Any action of the ALJ would violate important policies and the fundamental framework of the Bankruptcy Code which requires equitable treatment of all creditors.

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FMSHRC 1277, 1279 (Sept. 2009) (ALJ); *see also Cyprus Empire Corp.*, 12 FMSHRC 911, 916 (May 1990); *El Paso Rock Quarries, Inc.*, 3 FMSHRC 35, 38 (Jan. 1981); *Bob Bak Constr.*, No. CENT 2005-139-M et al., 2006 WL 2927263, at *6 (FMSHRC Sept. 11, 2006) (ALJ). Provided adequate notice is given and there is no prejudice to the opposing party, administrative pleadings are to be liberally construed and easily amended. *CDK Contracting Co.*, 23 FMSHRC 783, 784 (July 2001) (ALJ). The grant or denial of a motion for leave to amend is within the sound discretion of the court and will be reversed only for an abuse of discretion. *Jim Walter Res.*, No. SE 2010-351, 2013 WL 3865345, at *4 (FMSHRC June 12, 2013) (ALJ) (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971)).

JCG Resp. 5, 7, 9, 11 (footnote omitted).

### A. The Contention that the Automatic Stay Provisions of the Bankruptcy Code Preclude Ancillary Proceedings by Private Individuals and Any Such Proceedings Are Void

Noting that Veris Gold sought bankruptcy protection under Chapter 15 of the Bankruptcy Code, JCG asserts that the petition filing brought about an "automatic stay" *the same day* and triggered 11 U.S.C. § 362(a)(1). The Response states that the stay served as an injunction to

> the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title.

JCG Resp. 5 (quoting 11 U.S.C. § 362(a)(1)).

The Response acknowledges that, despite the broad language employed, "cases commenced or continued by a 'governmental unit' may be exempt from the automatic stay" provision, per 11 U.S.C. § 362 (b)(4). However, the Response effectively asserts that any action other than one brought by a governmental unit is *void ab initio*. *Id.* at 6 (citing *In re Dunbar*, 245 F.3d 1058, 1063 (9th Cir. 2001)). It then contends that, since the *pro se*, *non-attorney* Complainant failed to seek relief from the automatic stay, any actions taken by other judicial or administrative authorities are void as infringing upon the bankruptcy court's jurisdiction. *Id.*. The concern is that if the bankruptcy court's injunction could be modified, it would strip the court of "its ability to distribute the debtor's assets equitably, or to allow the debtor to reorganize [its] financial affairs." *Id.* at 6 (quoting *In re Gruntz*, 202 F.3d 1074, 1083-84 (9th Cir. 2000)).[6] Thus, the Response maintains that this Court has no jurisdiction because the bankruptcy court's stay enjoined "proceedings brought by *creditors of a debtor* outside of the bankruptcy case." *Id.* at 7 (emphasis added). The response to this contention is addressed *infra.*

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[6] In *In re Gruntz,* the Ninth Circuit, in the context of determining whether a bankruptcy court's automatic stay enjoined a state criminal proceeding for failing to pay child support, held that because that proceeding fell within one of the exceptions to an automatic stay, it did not so operate, but that, generally, federal courts are not bound by state court modifications of the automatic stay.

### B. The Contention that the Bankruptcy Court's Adjudication and Sale of Veris Gold Assets Were "Free and Clear" of Liens, Claims, and Interests as Provided for Under § 363(f) of the Bankruptcy Code, Resulting in JCG, as the Buyer of the Assets of Veris Gold, Taking Title to Those Assets Free from All Claims Against Veris Gold, Including the Discrimination Action Brought by Lowe Under the Mine Safety and Health Act

Noting that § 363(f)[7] provides that the trustee may sell property free and clear of any interest in such property other than the estate only upon meeting certain conditions, JCG observes that the term "interest" has been broadly interpreted by courts and, citing *In re Trans World Airlines, Inc.*, 322 F.3d 283, 289-90 (3rd Cir. 2003) ("*TWA*"), that being free and clear of such "interest" insulates a successor from claims of discrimination against the predecessor. JCG Resp. 7. JCG also points to *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 585 (4th Cir. 1996), for the proposition that the bankruptcy court may extinguish Coal Act successor liability pursuant to 11 U.S.C. § 363(f)(5) and therefore that Court did not need to determine if the purchaser was a successor in interest. JCG Resp. 7. JCG contends that, per *TWA*, "interest in property" applies to obligations that are connected to, or arise from, property being sold, and are not limited to *in rem* interests. *Id.* at 8 (citing *TWA*, 322 F.3d at 289-90). JCG adds that as the bankruptcy court's Sale Order provided that the purchaser will not be liable for claims based on any successor or transferee liability and any enforcement action or enforcement history or employment and pension claims, such order applies to Lowe's claim. *Id.* JCG also maintains that Lowe moved to stay the Sale Order, and that his motion was denied and he made no appeal from that order. *Id.* at 9.

It is true that, while not in the Ninth Circuit, the applicable circuit for this case, the Third Circuit did hold in *TWA* that the various airline workers' employment discrimination claims, as well as claims by flight attendants under a travel voucher program that the debtor-airline had established in settlement of sex discrimination actions, both qualified as "interests in property" under the bankruptcy statute provision that provided for sale of assets of estates free and clear of interests in property. However, this Court believes the case is distinguishable.

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[7] 11 U.S.C. § 363(f) provides:

> The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if—
> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
> (2) such entity consents;
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
> (4) such interest is in bona fide dispute; or
> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

First, it would appear that American Airlines was an arms-length successor to TWA. In addition, the court of appeals concluded that in the § 363(f) sale permitting the sale of property "free and clear" of an "interest in such property," the claims against TWA were connected to or arose from the assets sold, a determination which this Court has yet to make. An additional and important distinction, the bankruptcy court determined there was no basis for successor liability only after conducting an evidentiary hearing. *TWA*, 322 F.3d at 286.

Apart from the procedural protection of an evidentiary hearing, as noted, part of that determination was the bankruptcy court's determination that the claims against TWA were interests in property under § 363(f). In construing the term "interest in such property," the appeals court acknowledged that Congress did not define that phrase and that some courts have limited its application to *in rem* interests in property.[1] The appeals court also referenced the Fourth Circuit's decision in *Leckie* in which that court concluded "that the *employer-sponsored benefit plans* had interests in the property of the debtors which had been transferred under section 363(f) in the sense that there was a relationship between their right to demand premium payments from the debtors and the use to which the debtors had put their assets." *TWA*, 322 F.3d at 289 (citing *Leckie*, 99 F.3d at 582). The Third Circuit obviously struggled with its conclusion, so much so that it felt the need to offer a supporting rationale had it concluded that the claims were not interests in property. It noted that one of the discrimination claims went to trial and damages were awarded, while in the other suit no determination of liability had been made at the time of the bankruptcy filing. It then looked to the reasoning in other cases that such claimants should not be allowed "to seek a recovery from the successor entity while creditors which were accorded higher priority by the Bankruptcy Code obtained their recovery from the limited assets of the bankruptcy estate [as that] would 'subvert the specific priorities which define Congressional policy for bankruptcy distribution to creditors.'" *TWA*, 322 F.3d at 292 (quoting *In re New England Fish Co.,* 19 B.R. 323, 329 (Bankr. W.D. Wash. 1982)).

However, the Third Circuit also took special note of the importance of discrimination claims, stating it recognized "that the claims of the EEOC and the Knox-Schillinger class of plaintiffs are based on congressional enactments addressing employment discrimination and are, therefore, not to be extinguished *absent a compelling justification*." *Id.* (emphasis added). Despite that admission, that court continued to adhere to its view that allowing "the claimants to assert successor liability claims against American while limiting other creditors' recourse to the proceeds of the asset sale would be inconsistent with the Bankruptcy Code's priority scheme." *Id.*

It is clear, at least to this Court, that the Third Circuit's holding was impacted by the particular facts and that it was not a broad-based pronouncement. Among those facts was the anticipated disastrous outcome if the claimants' interests were recognized, as it noted:

> The Bankruptcy Court found that, in the absence of a sale of TWA's assets to American, "the EEOC will be relegated to holding an unsecured claim in what will very likely be a piece-meal liquidation of TWA. In that context, such claims are likely to have little if any value." *In re Trans World Airlines, Inc.*, et al., No. 01-00056, slip op. at 23, 2001 WL 1820326 (Bankr. D. Del. Mar.27, 2001). The same is true for claims asserted pursuant to the Travel Voucher Program, as they would be reduced to a dollar amount and would receive the same treatment as the

> unsecured claims of the EEOC. Given the strong likelihood of a liquidation absent the asset sale to American, a fact which appellants do not dispute, we agree with the Bankruptcy Court that a sale of the assets of TWA at the expense of preserving successor liability claims was necessary in order to preserve some 20,000 jobs, including those of Knox-Schillinger and the EEOC claimants still employed by TWA, and to provide funding for employee-related liabilities, including retirement benefits.

*TWA*, 322 F.3d at 293.

### C. The Contention that Complainant Is Barred Under Principles of *Res Judicata* and Collateral Estoppel from Bringing a Claim Against Veris Gold and JCG Where Complainant Made an Appearance, Sought Relief from, and Made Objections to Actions in the Bankruptcy Court and Thereafter Failed to Seek Relief from or Appeal the Bankruptcy Court's Denial of the Relief Sought by Complainant and the Court's Ordering of the Sale Free and Clear to JCG

JCG argues that since the § 363 sale order is an *in rem* proceeding, *res judicata* applies to that sales transfer of property rights and that those property rights are good against the world. JCG Resp. 9. Since the property in the bankruptcy court's Sale Order was sold free and clear of any interests in that property, Complainant cannot make any claims against that property. *Id.* JCG adds that collateral estoppel also applies on the basis that Complainant "had notice and participated in the Bankruptcy Court action, the matter was actually litigated, and Complainant had the incentive to litigate and prevail." JCG Resp. 10. Repeating its earlier remarks about this, JCG asserts that Lowe had his chance, as he sought to stay the bankruptcy sales order. When the bankruptcy court ruled against his motion, Lowe failed to appeal that ruling and now must live with the consequences of that failure. *Id.* at 10.

This contention is an echo of JCG's other arguments and is addressed within this Order.

### D. The Contention that Any Action by the ALJ Would Violate Important Policies and the Fundamental Framework of the Bankruptcy Code which Requires Equitable Treatment of all Creditors.

Unabashedly, JCG invokes its concern for the "equitable treatment of creditors" and the Bankruptcy Code's purpose of ensuring "that all substantially similar claims of creditors are treated equitably[, with c]laims [being] classified and paid according to priority as set forth in 11 U.S.C. § 507." JCG Resp. 11. That sounds high-minded, but if the Court correctly interprets JCG's next remark that Veris Gold shifted from a "going concern" restructuring to a liquidation and only secured claims would be paid, in plain English this means that no matter what Lowe did in terms of appeals from the bankruptcy court rulings, he could never prevail. Thus, happily for Veris, and by extension for JCG, under the bankruptcy proceeding, both were able to walk away from all unsecured pre-filing claims. Mr. Lowe, JCG asserts, should not be entitled to any "preferential" treatment. Rather, he should be entitled to the same equitable treatment dispensed to all the other unsecured creditors. As an example of this "equitable treatment," JCG points to *the settlement agreement* Veris had with Jennifer Morreale, another person alleging

discrimination by Veris, under which, by the Veris bankruptcy action she was paid nothing with her claim being discharged. JCG seeks the same fair and equitable treatment for Lowe.

## II. Discussion

The Court takes a step back to take note of the basics of the bankruptcy process:

> A fundamental goal of the federal bankruptcy laws enacted by Congress is to give debtors a financial 'fresh start' from burdensome debts. The Supreme Court made this point about the purpose of the bankruptcy law in a 1934 decision: '[I]t gives *to the honest* but unfortunate debtor…a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.' *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934). This goal is accomplished through the bankruptcy discharge, which releases debtors from personal liability from specific debts and prohibits creditors from ever taking any action against the debtor to collect those debts.

Administrative Office of the U.S. Courts, *Process – Bankruptcy Basics*, http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/process-bankruptcy-basics (last visited March 3, 2016) (emphasis added).The same source advises that

> [n]ot all debts are discharged. The debts discharged vary under each chapter of the Bankruptcy Code. Section 523(a) of the Code specifically excepts various categories of debts from the discharge granted to individual debtors. Therefore, the debtor must still repay those debts after bankruptcy. Congress has determined that these types of debts are not dischargeable for *public policy reasons* (based either on the nature of the debt ***or the fact that the debts were incurred due to improper behavior of the debtor***, such as the debtor's drunken driving).

*Id.* (emphasis added).

Accordingly, it is noted that bankruptcy law is aimed at debts owed creditors, not at relief for wrongdoers, such as those that engage in discrimination in violation of the Mine Act. Depending on the outcome of the determination of JCG's possible status as a successor and what it knew about the Lowe proceeding, holding JCG responsible may be an appropriate outcome.

Moreover, as noted above, per the Commission's prior opinion in this case, one Commissioner expressed that it was not so clear that the bankruptcy proceeding filed by Veris Gold is effective against Lowe.[8] *See Lowe v. Veris Gold USA, Inc.*, No. WEST 2014-614-DM,

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[8] The same Commissioner also expressed:

> The Mine Act provides a Judge broad remedial powers to address instances of discrimination as may be appropriate. 30 U.S.C. § 815(c)(3) (providing that if a Judge sustains charges of discrimination he may grant "such relief as [he] deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner of his former position with back pay and interest or

2016 WL 197500, at *2 n.4 (FMSHRC Jan. 12, 2016). That Commissioner further expressed that

> [i]t appears that in filing its bankruptcy petition, Veris Gold may not have given Lowe proper notice of the filing. Indeed, Lowe – together with other former employees of Veris Gold who have discrimination complaints before the Commission under section 105(c) of the Mine Act – filed a motion in the U.S. Bankruptcy Court for the District of Nevada in Case No. 14-51015 gwz in which they made this allegation.

*Lowe*, 2016 WL 197500, at *2 n.4.

The same Commissioner also stated:

> Even if the bankruptcy filing was effective against Lowe, this fact does not necessarily foreclose the Commission from providing relief against the successors in interest of Veris Gold. In *International Technical Products Corp*., 249 NLRB 1301 (Jun. 1980), the NLRB held that a company which purchased all of the assets of a predecessor company 'free and clear of all liens, claims and encumbrances' pursuant to an order of a bankruptcy court could be held responsible for the predecessor's backpay liability under federal labor law. In 2010, the Board reaffirmed the *International Technical Products Corp*. holding in *Leiferman Enterprises, LLC*, 355 NLRB 364 (Aug. 2010), incorporating by reference 354 NLRB 872 (Oct. 2009), *aff'd sub nom. NLRB v. Leiferman Enterprises, LLC*, 649 F.3d 873 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 1741 (2012).

*Id.*

As the Commissioner noted, the National Labor Relations Board, in *International Technical Products*, held that a successor was liable for backpay, despite the successor's assertion that the assets were purchased "free and clear of all liens" pursuant to an order and judgment of the United States District Court. The NLRB stated that the sole issue presented was

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> such remedy as may be appropriate"). Accordingly, [that Commissioner noted] that the Commission has been granted more discretion in fashioning an appropriate remedy by the Mine Act than [this Court] initially recognized [when it] concluded that reinstatement of a miner to a successor in interest is not possible under the Mine Act. . . . However, the remedy of reinstatement may be imposed on an operator's successor in interest. *Sec'y of Labor on behalf of Corbin v. Sugartree Corp*., 9 FMSHRC 394 (Mar. 1987), aff'd sub nom., *Terco v. Fed. Coal Mine Safety & Health Review Comm'n*, 839 F.2d 236 (6th Cir. 1987), cert. denied, 488 U.S. 818 (1988); *Simpson v. Kenta Energy*, 11 FMSHRC 770, 778 (May 1989).

*Lowe*, 2016 WL 197500, at *2 n.4.

whether “a judicial sale, free and clear of all liens, pursuant to the authority of a bankruptcy court, extinguishes any backpay liability imposed upon a successor-employer for the unfair labor practices committed by its predecessor-employer.” *International Technical Products*, 249 NLRB at 1302. The successor asserted that as it purchased the predecessor’s assets free and clear of all liens, claims, and encumbrances, this would include the Board’s claim for backpay. Citing its decision in *Perma Vinyl Corp.*, 164 NLRB 968 (1967), and the Supreme Court’s decision in *Golden State Bottling Company, Inc. v. N.L.R.B.*, 414 U.S. 168 (1973), the Board noted its holding in *Perma Vinyl*

> that ‘one who acquires and operates a business of an employer found guilty of unfair labor practices in basically unchanged form under circumstances which charge him with notice of unfair labor practice charges against his predecessor should be held responsible for remedying his predecessor’s unlawful conduct.’ In *Golden State Bottling Company, Inc.*, the Supreme Court sustained the Board’s *Perma Vinyl* doctrine and held that a successor-employer which acquires a business with knowledge of an outstanding Board order requiring its predecessor to reinstate with backpay an unlawfully discharged employee may properly be required to assume the reinstatement obligation and to share jointly and severally with the predecessor the backpay liability.

*International Technical Products*, 249 NLRB at 1303 (footnote omitted).

The Board did not accept the contention that the successor’s liability was extinguished by the bankruptcy court’s order allowing the successor to purchase the assets “free and clear of all liens, claims, and encumbrances. Rather, it noted that

> while a bankruptcy court may have the authority to assign a certain priority to the Board’s claim for backpay, the authority to modify or set aside the order upon which the claim is based rests exclusively with the Board and the appropriate reviewing Federal courts, and not the bankruptcy courts. Indeed, the significance of a Board order has long been recognized by the Supreme Court. Thus, in *N.L.R.B. v. J. H. Rutter Rex Manufacturing Co, Inc.*, 396 U.S. 258, 263 (1969), the Supreme Court, citing *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344 (1953), stated that ‘as with the Board’s other remedies, the power to order back pay is for the Board to wield, not for the courts.’ Moreover, the Court emphasized that ‘when the Board, in the exercise of its informed discretion, makes an order of restoration by way of back pay, the order should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.’

*Id.*

The Board concluded that

> the bankruptcy court’s order allowing [the successor] to purchase [the] assets free of all liens, claims, and encumbrances cannot affect the Board’s Order . . . requir[ing] . . . the ultimate successor [to] make the discriminate[e] whole for the

> remaining portion of the backpay due and owing them. To find otherwise would . . . be tantamount to a relinquishment by the Board of its statutory obligation to remedy unfair labor practices and also its authority . . . to proceed against a successor employer in furtherance of that obligation. Indeed, such a finding would, of necessity, imply that, by merely ordering the judicial sale of a bankrupt employer's assets to a nonbankrupt successor employer 'free and clear of all liens, claims, and encumbrances,' a bankruptcy court can effectively nullify a Board order requiring that the nonbankrupt successor employer remedy the unfair labor practices committed by its predecessor.

*Id.*

Speaking to the purpose of the Board's order, it added:

> To insure that the adverse effects of a wrongdoer's unlawful conduct are eliminated and that the public right is vindicated, it is essential that there be full compliance with the Board's order requiring that the employer comply with the order's remedial provisions. . . . Thus it cannot be classified or treated simply as a "lien, claim, or encumberance" within the common usage of those terms and, consequently, any liability arising therefrom cannot be extinguished or modified . . . through the purchase of a bankrupt's assets "free and clear of all liens, claims and encumbrances" at a judicial sale.

*Id.*

In *Chicago Truck Drivers, Helpers, and Warehouse Union (Independent) Pension Fund v. Tasemkin, Inc.,* 59 F.3d 48, 49 (7th Cir. 1995), a multi-employer pension fund brought an action against a Chapter 7 debtor's successor in interest. Although the district court held there could not be successor liability, the appeals court held that the pension fund's unsuccessful participation in the predecessor employer's bankruptcy did not preclude it from a successor liability claim. The facts in *Tasemkin* may yet echo those in this matter. Tasemkin "went belly-up" allegedly owing some $300,000 in delinquent pension funds. *Id.* While the Pension Fund attempted to recover those funds in the Chapter 7 bankruptcy, Tasemkin Furniture ("Old Tasemkin") made a debt compromise agreement with its secured lender and turned over its interest to a new company, Tasemkin, Inc., ("New Tasemkin") which then foreclosed on the collateral, leaving nothing for anyone else, including the Pension Fund. *Id.* Thereafter, the Pension Fund sued Tasemkin, Inc., on a successor liability theory. *Id.* The Seventh Circuit provided clarity about successorship *vis-à-vis* bankruptcy and the general rule that a purchaser of assets does not acquire the seller's liabilities:

> Most states have adopted exceptions to the general no-liability rule that allow creditors to pursue the successor if the "sale" is merely a merger or some other type of corporate reorganization that leaves real ownership unchanged. . . . Successor liability under federal common law is broader still: in order to protect federal rights or effectuate federal policies, this theory allows lawsuits against even a genuinely distinct purchaser of a business if (1) the successor had notice of the claim before the acquisition; and (2) there was "substantial continuity in the

> operation of the business before and after the sale." *E.E.O.C. v. G-K-G, Inc.*, 39 F.3d 740, 748 (7th Cir.1994). Successor liability is an equitable doctrine, not an inflexible command, and "in light of the difficulty of the successorship question, the myriad factual circumstances and legal contexts in which it can arise, and the absence of congressional guidance as to its resolution, emphasis on the facts of each case as it arises is especially appropriate." *Howard Johnson Co., Inc. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 256, 94 S.Ct. 2236, 2240, 41 L.Ed.2d 46 (1974); see also *Steinbach v. Hubbard*, 51 F.3d 843, 846 (9th Cir.1995).

*Tasemkin*, 59 F.3d at 49.

Noting that the district court had found that allowing the Pension Fund to proceed against New Tasemkin on a successor liability theory would frustrate the primacy of the Bankruptcy Code, and on that basis dismissed its claim, the Seventh Circuit acknowledged there were cases adopting that approach but it rejected the notion that it is an ironclad or simplistically applied rule. *Id.* at 50. The Seventh Circuit took note of the reasoning in support of protecting successors,

> that it is desirable, perhaps even necessary, to shield purchasers of failing businesses from liability incurred by the predecessors . . . as a means of encouraging market growth and the fluidity of corporate capital. Fear of successor liability, this argument runs, would "chill" sales in bankruptcy and as a result harm employees of the failed concern who might have retained jobs with the successor business . . . [and that] companies may have trouble selling their assets for a decent price because "successors will be unwilling to assume a business involved in substantial time-consuming and expensive litigation when the assets themselves lack substantial value"

*Id.* (quoting *Musikiwamba v. ESSI, Inc.*, 760 F.2d 740, 751 (7th Cir.1985)).

Again, the Seventh Circuit's point, that a blanket rule is insufficiently analytical, is well taken, as it noted that

> there is no reason to accord the purchasers of formally bankrupt entities some special measure of insulation from liability that is unavailable to ailing but not yet defunct entities[, and that] it is neither certain nor clear that the chilling effect need give [that Court] pause [as] purchasers can demand a lower price to account for pending liabilities of which they are aware, and [furthermore] under federal successorship principles [purchasers] will not be held responsible for liabilities of which they had no notice.

*Id.* at 50-51.

The Seventh Circuit then quickly dispatched the second argument — that allowing application of "the successorship doctrine [would] frustrate[] the orderly scheme of the Bankruptcy Code by allowing some unsecured creditors to leapfrog over others." *Id.* at 51. The circuit court observed that "once a bankruptcy proceeding is completed and its books closed, the bankrupt has ceased to exist and the priorities by which its creditors have been ordered lose their

force." *Id.* Although the circuit court acknowledged that imposing successorship liability "would be a second opportunity for a creditor to recover on liabilities after coming away from the bankruptcy proceeding empty-handed," it noted that "a second chance is precisely the point of successor liability, and it is not clear why an intervening bankruptcy proceeding, in particular, should have a per se preclusive effect on the creditor's chances." *Id.* The circuit court clearly thought a successorship theory should be permitted where the opposite approach, one which had the effect of "frustrating unsecured creditors while resurrecting virtually the identical enterprise," should not. *Id.*[9]

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[9] A number of law review commentators have criticized the view that the power of a bankruptcy court under § 363(f) is without boundaries. George W. Kuney, *Misinterpreting Bankruptcy Code Section 363(f) and Undermining the Chapter 11 Process*, 76 Am. Bankr. L.J. (2002). The author notes that § 363(f) of the bankruptcy code authorizes sales free of "*any interests*," whereas § 1141(c) authorizes post-sale vesting of property free and clear of all "*claims and interests*," pointing out that the distinction is important because the latter is a plan process whereas the former is a quick-sale process, which affords little opportunity to object. Despite the narrower statutory language, in applying § 363(f), bankruptcy courts have been affording the debtor or trustee the same power to sell claims and interests. As applied to successors, the author points out that although it has been asserted that "[s]tate and federal decisions holding a bankruptcy purchaser liable as a successor of the debtor are directly at odds with Congressional intent to allow a debtor to sell its assets free and clear of all claims and interests therein," this view is problematic. *Id.* at 258. This is because "[s]uccessor liability arises out of the actions of the purchaser, not the property itself." *Id.* at 261. Thus, where

> a de facto merger is found, or mere continuation of an enterprise justifies imposing successor liability, it is the purchaser's postsale conduct (in continuing the business in substantially the same form and manner) that gives rise to liability. The same is true for successor liability founded upon fraudulent transfer and continued manufacture of a product line. All these successor liability doctrines are grounded upon acts or implications from acts of the purchaser, not the property.

*Id.* Thus, successor liability is *in personam* in nature, not *in rem*.

Other commenters have similarly opined that successor liability claims should be viewed as outside of "interests in property" under § 363(f) of the Bankruptcy Act. Rachel P. Corcoran, *Why Successor Liability Claims are not 'Interests in Property' under Section 363(f)*, 18 Am. Bankr. Inst. L. Rev. 697 (2010). As noted, that section permits the sale of property of the estate outside the ordinary course of business "free and clear of any interest in such property." The article examines what constitutes an "interest in property" in the context of § 363(f)'s "free and clear" sale provision, noting that its construction is important for successor liability claimants suing those who have purchased under it. While acknowledging that the great majority of courts have interpreted the provision to include successor claims, the author contends that state law should guide "the analysis of whether a particular claim or right constitutes 'property' or an 'interest in property' in the bankruptcy context, unless some identifiable federal interest requires otherwise," and that Supreme Court precedent supports her view. *Id.* at 699. The author also observes that if a successor liability claim is an interest in property, then such claimant is entitled

to adequate protection per § 363(e). This author also notes that § 363(f) only refers to "interests in property," and does not include the term "claims." *Id.* at 705. "Successor liability claims do not fall within any one of the section 507 priorities, and therefore, are general unsecured claims entitled to a pro rata share of whatever remains after secured and priority claims are paid." *Id.* at 707. The author also cites to *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973), stating that the Supreme Court

> held 'that a bona fide purchaser, acquiring, with knowledge that the wrong remains unremedied, the employing enterprise which was the locus of the unfair labor practice, may be considered in privity with its predecessor for purposes of Rule 65(d)[,]' that is, with respect to injunctions and restraining orders resulting from unfair labor practices. The Court reasoned, '[a]voidance of labor strife, prevention of a deterrent effect on the exercise of rights guaranteed employees . . . and protection for the victimized employee-- all important policies subserved by the National Labor Relations Act, are achieved at a relatively minimal cost to the bona fide successor.' . . . [T]he imposition of successor liability in Golden State was not due to the transfer of property alone, but rather, federal policy concerns and the successor's knowledge at the time of purchase.

*Id*. at 727 (quoting *Golden State Bottling*, 414 U.S. at 180, 185) (footnotes omitted).

Another commentator reached a similar analytical outcome. *See* Patrick M. Birney, *Section 363 Sale Orders: May Sales be made Free and Clear of Successor Liability Claims?*, 22 J. Bankr. L. & Prac. 4 Art. 4 (2013). The author asserts that § 363 cannot provide insulation from successor liability claims, and that such claims against a § 363 purchaser under a successor liability theory should be evaluated under state successor liability law. Speaking to the language employed in § 363, that such sales are made "free and clear of any interest in such property," the author acknowledges that in *In re Leckie Smokeless Coal Co*., 99 F.3d 573 (4th Cir. 1996), the court suggests that the "any interest" language "refer[s] to obligations that are connected to, or arise from, the property being sold," and, in a similar vein, that *In re Trans World Airlines, Inc.,* 322 F.3d 283 (3d Cir. 2003), also points to the proposition that "any interest" should include interests "that could potentially travel with the property being sold." Birney, *supra*, at 3. However, as with the other commentators cited in this footnote, the author notes that, although courts have read the word "claims" into § 363(f), it is absent. In contrast, the word does appear in § 1141(c) proceedings, an inclusion which makes sense because that section provides claimants with procedural rights that do not exist in § 363 sale. Because "successor liability claimants are general unsecured creditors, who have no specific interest in the property that is being sold . . . there is no nexus between a successor liability claimant and specific debtor property outside of bankruptcy." *Id.* at 4. These are in personam, not in rem, actions, which is significant because a judgment against a successor does not constitute an interest in the debtor's property. *Id.* If in personam claims are included within a § 363 sale order, that would constitute "a nondebtor release of the asset purchaser from the successor liability claim" but such releases are very limited under the Bankruptcy Code. *Id*. at 5. In that regard the author notes that *In re Lowenschuss*, 67 F.3d 1394, 1401 (9th Cir. 1995), held that, except for asbestos matters, nondebtor releases are prohibited. Birney, *supra*, at 6. Thus, the author contends that as "third-

JCG has acknowledged that if MSHA itself brought the discrimination claim under section 105(c)(2) such a claim would be in a different category, but in this Court's estimation there is nothing about a section 105(c)(3) claim which mandates that it should have inferior status. Congress included the provision as a failsafe protection mechanism for those miners alleging discrimination where, as in this case, the agency, though acting in good faith, simply gets it wrong.

The Mine Act is a distinct creation of Congress. It operates independently of the Bankruptcy Act in, among other matters, making determinations of discrimination, appropriate parties to be included in its proceedings, and findings on the issue of successorship. There is nothing in the Mine Act that relegates it to a status as an appendage of bankruptcy law and therefore there is nothing which prohibits this Court, should the facts so warrant, from making the legal determination of whether JCG is a successor entity under the Mine Act. Should the Court find that JCG is a successor to Veris Gold, it also has the authority to award damages against that entity. However, should Lowe prevail, the issue of whether JCG will ultimately be held financially liable as a successor for the damages flowing from Mr. Lowe's discrimination claim is unpredictable and a distinct matter from this Court's ability to make the determination of whether JCG is properly designated as a successor and to make findings as to the established, and appropriate, damages.

Other observations need to be made. It is unclear whether, in the high speed route under § 363(f) of the Bankruptcy Act, Mr. Lowe received fair treatment. Though beyond this Court's purview, it would seem that he did not, in part because the § 363 procedure avoids the due process hearing found in § 1141(c) proceedings. The Court is under the impression that the bankruptcy court relies heavily upon those moving that procedure along, in particular, the monitor, to ensure that they are treating those who may have claims appropriately, especially where a *pro se*, non-attorney is seeking fair treatment. This Court is also persuaded that, in line with the law review commentators cited above, at least in the type of claim brought by Mr. Lowe, the tendency of many courts to read interests *and claims* into 363 actions may work injustice.

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party releases are permitted (if at all) only in limited circumstances and only in the context of a confirmed plan of reorganization, the Bankruptcy Code, and in particular section 363, simply cannot authorize the insulation of an asset purchaser from successor liability claims." *Id*. Advocating that state law should not be supplanted in the context of bankruptcy, unless Congress expressly so declares such a preemption, the author points out that the "Supreme Court has noted that, absent a "clear and manifest" purpose to the contrary, "the Bankruptcy Code will be construed to adopt, rather than to displace . . . state law." To that point, § 363 does not contain an express congressional mandate empowering bankruptcy courts to sell debtor assets free and clear of in personam claims, including successor liability claims. Instead, the courts have inserted that broad interpretation. *Id*. at 6-7. Perhaps most importantly, the author observes that successor liability claims are born from the conduct of the asset purchaser, and not the asset. *Id.*

This Court fully appreciates that law journal assessments are not, in any fashion, precedent. However, the persuasiveness of such arguments is noted.

In this connection it is noted that while the bankruptcy action was proceeding, Veris was still actively defending the section 105(c)(3) claims brought by Mr. Lowe. JCG at least had knowledge of this. It was not until the evidence at that hearing clearly demonstrated Veris' discriminatory behavior against Lowe that, at the conclusion of the hearing, Veris then acted to back out. That option, not taken earlier, was available.

Accordingly, Lowe's complaint is amended to add JCG as a respondent.[10] The next step in the proceeding will be to determine the appropriateness of designating JCG as a successor. The final stage will then be for the Court to determine the appropriate damages to be awarded, a determination made apart from whether such damages as may be awarded will be enforceable in another federal, or possibly a state, forum.

**Within two weeks from the date of this Order, JCG is directed to advise the Court whether it intends to participate in the successorship and damages proceedings and determinations.**

**So ordered.**

William B. Moran
William B. Moran
Administrative Law Judge

[10] A separate order will be forthcoming regarding the issue of whether the Whitebox Entities may appropriately be added as a respondent in this proceeding for the purpose of determining successor liability.

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