

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

In re:	:	Chapter 11
	:	
FM COAL, LLC, <i>et al.</i> , ¹	:	Case No. 20-02783 (TOM)
	:	
Debtors.	:	Jointly Administered
	:	

SOLICITATION AND VOTING PROCEDURES

PLEASE TAKE NOTICE THAT on December 1, 2020, the United States Bankruptcy Court for the Northern District of Alabama (the “Court”) entered an order (the “Disclosure Statement Order”): (a) authorizing the above-captioned debtors and debtors in possession (collectively, the “Debtors”),² to solicit votes on the *Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code* (as modified, amended, or supplemented from time to time, the “Plan”); (b) approving the *Disclosure Statement for the Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code* (the “Disclosure Statement”) as containing “adequate information” pursuant to section 1125 of the Bankruptcy Code; (c) approving the solicitation materials and documents to be included in the solicitation packages (the “Solicitation Packages”); and (d) approving procedures for soliciting, receiving, and tabulating votes on the Plan and for filing objections to the Plan.

A. The Voting Record Date.

The Court has established **November 30, 2020**, as the record date for purposes of determining which holders of Claims in Class 3 (Credit Agreement Secured Claims) and Class 4 (General Unsecured Claims) are entitled to vote on the Plan (the “Voting Record Date”). Accordingly, only Holders of Credit Agreement Secured Claims and General Unsecured Claims as of such date are entitled to vote on the Plan.

B. The Voting Deadline.

The Court has established **January 5, 2021, at 5:00 p.m., prevailing Central Time**, as the voting deadline (the “Voting Deadline”) for the Plan. The Debtors may extend the Voting Deadline without further order of the Court. To be counted as votes to accept or reject the Plan,

¹ The Debtors in these cases, along with the last four digits of each Debtor’s federal tax identification number, are: FM Coal, LLC (1768); Cane Creek, LLC (3207); M. S. & R. Equipment Co., Inc. (3487); Cedar Lake Mining, Inc. (6132); Best Coal, Inc. (2487); and Xinergy of Alabama, Inc. (3009).

² Capitalized terms not otherwise defined herein shall have the same meaning as set forth in the Plan, the Disclosure Statement, or the Disclosure Statement Order.

all ballots (the “Ballots”)³ must be properly executed, completed, and delivered by: (1) first class mail (using the reply envelope provided in the Solicitation Package or otherwise); (2) overnight courier; (3) personal delivery; or (4) via electronic mail so that they are *actually received* by the Notice and Claims Agent, in any case, no later than the Voting Deadline. The Ballots will clearly indicate the appropriate return address.

C. Form, Content, and Manner of Notices.

1. The Solicitation Package.

The following materials shall constitute the solicitation package (the “Solicitation Package”):

- a. a copy of these Solicitation and Voting Procedures;
- b. a Ballot, together with detailed voting instructions and a pre-addressed, postage prepaid return envelope;
- c. the Cover Letter;
- d. the Disclosure Statement (and exhibits thereto, including the Plan);
- e. the Solicitation Procedures Order (without exhibits except the Solicitation and Voting Procedures, as set forth above);
- f. the Confirmation Hearing Notice; and
- g. any other materials the Court approves as part of the Solicitation Package, which may include a letter from the Official Committee of Unsecured Creditors.

2. Distribution of the Solicitation Package.

The Solicitation Package shall provide the Plan, the Disclosure Statement, and the Solicitation Procedures Order (without exhibits except the Solicitation and Voting Procedures) in electronic format (i.e., CD-ROM or flash drive format), and all other contents of the Solicitation Package, including Ballots, shall be provided in paper format. Any party that receives the materials in electronic format, but would prefer paper format may contact Donlin, Recano & Company, Inc. (the “Notice and Claims Agent”) by: (a) calling the Notice and Claims Agent at (866) 627-2494; (b) visiting the Debtors’ restructuring website at: <https://www.donlinrecano.com/Clients/fm/Index>; (c) writing to the Notice and Claims Agent at Donlin, Recano & Company, Inc., Re: FM Coal, LLC, P.O. Box 199043, Blythebourne Station, Brooklyn, NY 11219; or (d) emailing fminfo@donlinrecano.com and requesting paper copies of

³ For the avoidance of doubt, the defined term Ballots includes the Credit Agreement Secured Claim ballots (the “Credit Agreement Secured Claim Ballots”) and the General Unsecured Claim ballots (the “General Unsecured Claim Ballots”).

the corresponding materials previously received in electronic format (to be provided at the Debtors' expense).

The Debtors shall serve or cause to be served all of the materials in the Solicitation Package (excluding the Ballots) on the Bankruptcy Administrator and all parties who have requested service of papers in this case pursuant to Bankruptcy Rule 2002 as of the Voting Record Date. In addition, the Debtors shall mail or cause to be mailed the Solicitation Package to all holders of Claims in the Voting Classes who are entitled to vote as described in Section D below, on or before five business days after the entry of the Solicitation Procedures Order.

To avoid duplication, the Debtors will use commercially reasonable efforts to ensure that any holder of a Claim who has filed or purchased duplicative Claims against a Debtor (whether against the same or multiple Debtors) that are classified under the Plan in the same Voting Class receives no more than one Solicitation Package (and, therefore, one Ballot) on account of such Claim and with respect to that Class as against that Debtor.

3. Resolution of Disputed Claims for Voting Purposes; Resolution Event.

- a. Absent a further order of the Court, the holder of a Claim that is in a Voting Class and is the subject of a pending objection on a “reduce and allow” basis shall be entitled to vote such Claim in the reduced amount contained in such objection.
- b. If a Claim in a Voting Class is subject to an objection other than a “reduce and allow” objection that is filed with the Court on or prior to seven (7) days before the Voting Deadline:
 - (i) the Debtors shall cause the applicable holder to be served with a Non-Voting Status Notice to each Holder of a Disputed Claim, substantially in the form annexed as Schedule 6 to the Solicitation Procedures Order (which notice shall be served together with such objection); such notice will instruct these holders as to how they may obtain copies of the documents contained in the Solicitation Package (excluding Ballots), as well as how they may opt out of the third-party releases set forth in Article IX.C of the Plan (the “Third Party Releases”);
 - (ii) the Debtors shall cause the applicable holder to be served with an *Opt Out Form for Disputed Claim Holders*, substantially in the form annexed as Exhibit A to the Notice of Non-Voting Status to Disputed Claim Holders; and
 - (iii) the applicable holder shall not be entitled to vote to accept or reject the Plan on account of such claim unless a Resolution Event (as defined herein) occurs as provided herein.
- c. If a Claim in a Voting Class is subject to an objection other than a “reduce and allow” objection that is filed with the Court less than seven (7) days

prior to the Voting Deadline, the applicable Claim shall be deemed temporarily allowed for voting purposes only, without further action by the holder of such Claim and without further order of the Court, unless the Court orders otherwise.

- d. A “Resolution Event” means the occurrence of one or more of the following events no later than two (2) business days prior to the Voting Deadline:
 - i. an order of the Court is entered allowing such Claim pursuant to section 502(b) of the Bankruptcy Code, after notice and a hearing;
 - ii. an order of the Court is entered temporarily allowing such Claim for voting purposes only pursuant to Bankruptcy Rule 3018(a), after notice and a hearing;
 - iii. a stipulation or other agreement is executed between the holder of such Claim and the Debtors resolving the objection and allowing such Claim in an agreed upon amount; or
 - iv. the pending objection is voluntarily withdrawn by the objecting party.
- e. No later than one (1) business day following the occurrence of a Resolution Event, the Debtors shall cause the Notice and Claims Agent to distribute via email, hand delivery, or overnight courier service a Solicitation Package and a pre-addressed, postage pre-paid envelope to the relevant holder to the extent such holder has not already received a Solicitation Package containing a Ballot.

4. Non-Voting Status Notices for Unimpaired Classes and Classes Deemed to Reject the Plan.

Certain holders of Claims that are not classified in accordance with section 1123(a)(1) of the Bankruptcy Code or who are not entitled to vote because they are Unimpaired or otherwise presumed to accept the Plan under section 1126(f) of the Bankruptcy Code will receive the *Notice of Non-Voting Status to Holders of Unimpaired Claims Conclusively Presumed to Accept the Plan*, substantially in the form annexed as **Schedule 4** to the Solicitation Procedures Order. Such notice will instruct these holders as to how they may obtain copies of the documents contained in the Solicitation Package (excluding Ballots).

Certain holders of Claims and Equity Interests who are not entitled to vote because they are deemed to reject the Plan under section 1126(g) of the Bankruptcy Code will receive the *Notice of Non-Voting Status to Holders of Impaired Claims and Equity Interests Deemed to Reject the Plan*, substantially in the form annexed as **Schedule 5** to the Solicitation Procedures Order. Such notice will instruct these holders as to how they may obtain copies of the documents contained in the Solicitation Package (excluding Ballots), as well as how they may opt out of the Third Party Releases provided by the Plan. The holders of such Claims and Equity Interests will

also receive an *Opt-Out Form for Holders of Impaired Claims and Equity Interests Deemed to Reject the Plan*, substantially in the form annexed as **Exhibit A** to **Schedule 5**. In addition, holders of Claims and Equity Interests in the classes deemed to reject the Plan will also receive the Disclosure Statement (together with the Plan attached as **Exhibit A** thereto).

5. Notices in Assumption of Executory Contracts and Unexpired Leases.

Counterparties to executory contracts and unexpired leases that receive a notice of potential assumption, substantially in the form attached as **Exhibit A** to the Plan Supplement Notice, respectively, may file an objection to the Debtors' proposed assumption or assumption and assignment, as applicable. Such objections must be *actually received* as set forth in the notice of assumption.

D. Voting and Tabulation Procedures.

1. Holders of Claims Entitled to Vote.

Only the following holders of Claims in the Voting Classes shall be entitled to vote with regard to such Claims:

- a. Holders of Claims who, on or before the Voting Record Date, have timely filed a Proof of Claim that (i) has not been expunged, disallowed, disqualified, withdrawn, or superseded prior to the Voting Record Date, and (ii) is not the subject of a pending objection, other than a "reduce and allow" objection, filed with the Court at least seven days prior to the Voting Deadline, pending a Resolution Event as provided herein; *provided* that a holder of a Claim that is the subject of a pending objection on a "reduce and allow" basis shall receive a Solicitation Package and be entitled to vote such Claim in the reduced amount contained in such objection absent a further order of the Court;
- b. Holders of Claims who, pursuant to the Bar Date Order, are exempt from any requirement to file a Proof(s) of Claim on or before the applicable Bar Date or have filed a single, master proof of claim by the relevant Bar Date with respect to all claims under an applicable facility, loan document, or indenture;
- c. Holders of Claims that are listed in the Schedules; *provided* that Claims that are scheduled as contingent, unliquidated, or disputed (excluding such scheduled disputed, contingent, or unliquidated Claims that have been paid or superseded by a timely filed Proof of Claim) shall be allowed to vote only in the amounts set forth in Section D.2(d) of these Solicitation and Voting Procedures;
- d. Holders whose Claims arise (i) pursuant to an agreement or settlement with the Debtors, as reflected in a document filed with the Court, (ii) in an order entered by the Court, or (iii) in a document executed by the Debtors

pursuant to authority granted by the Court, in each case regardless of whether a Proof of Claim has been filed;

- e. Holders of any Disputed Claim that has been temporarily allowed to vote on the Plan pursuant to Bankruptcy Rule 3018;
- f. the assignee of any Claim that was transferred on or before the Voting Record Date by any Entity described in subparagraphs (a) through (d) above; *provided* that such transfer or assignment has been fully effectuated pursuant to the procedures set forth in Bankruptcy Rule 3001(e) and such transfer is reflected on the claims register on the Voting Record Date;
- g. any holders of Claims who have filed or purchased duplicate Claims within the same Voting Class shall be provided with only one Solicitation Package and one ballot for voting a single Claim in such Class, regardless of whether the Debtors have objected to such duplicate Claims; and
- h. holders of Claims filed in an amount of \$0.00 are not entitled to vote.

2. Establishing Claim Amounts for Voting Purposes.

Class 3 Claims. The Claims amount of Class 3 Claims is based on Claims on account the portion of Credit Agreement Claims that are secured by a valid, perfected, and enforceable lien on property of the Debtors' estates pursuant to applicable law or by reason of a Bankruptcy Court order, or that is subject to setoff pursuant to section 553 of the Bankruptcy Code, to the extent of the value of Lenders' interest in the Debtors' estates' interest in such property or to the extent of the amount subject to setoff, as determined pursuant to section 506(a) of the Bankruptcy Code.

Class 4 Claims. The Claims amount of Class 4 Claims is based on General Unsecured Claims for voting purposes only will be established based on the amount of the applicable positions held by such Class 4 Claim holder as of the Voting Record Date, as evidenced by (a) the Debtors' applicable books and records, and (b) the claims register maintained in the chapter 11 cases.

Filed and Scheduled Claims. The Claim amount established herein shall control for voting purposes only and shall not constitute the Allowed amount of any Claim. Moreover, any amounts filled in on Ballots by the Debtors through the Notice and Claims Agent, as applicable, are not binding for purposes of allowance and distribution. In tabulating votes, the following hierarchy shall be used to determine the amount of the Claim associated with each claimant's vote:

- a. the Claim amount (i) settled and/or agreed upon by the Debtors, as reflected in a document filed with the Court, including the Plan, (ii) set forth in an order of the Court, or (iii) set forth in a document executed by the Debtors pursuant to authority granted by the Court;

- b. the Claim amount Allowed (temporarily or otherwise) pursuant to a Resolution Event pursuant to these Solicitation and Voting Procedures;
- c. the Claim amount contained in a Proof of Claim that has been timely filed by the applicable Bar Date (or deemed timely filed by the Court under applicable law), except for any amounts asserted on account of any interest accrued after the Petition Date; *provided, however*, that any Ballot cast by a holder of a Claim who timely files a Proof of Claim in respect of (i) a contingent Claim or a Claim in a wholly-unliquidated or unknown amount (based on a reasonable review by the Debtors and/or the Notice and Claims Agent) that is not the subject of an objection will count toward satisfying the numerosity requirement of section 1126(c) of the Bankruptcy Code and will count as a Ballot for a Claim in the amount of \$1.00 solely for the purposes of satisfying the dollar amount provisions of section 1126(c) of the Bankruptcy Code, and (ii) a partially liquidated and partially unliquidated Claim, which Claim will be Allowed for voting purposes only in the liquidated amount; *provided further, however*, that to the extent the Claim amount contained in the Proof of Claim is different from the Claim amount set forth in a document filed with the Court as referenced in subparagraph (a) above, the Claim amount in the document filed with the Court shall supersede the Claim amount set forth on the respective Proof of Claim for voting purposes;
- d. the Claim amount listed in the Schedules (to the extent such Claim is not superseded by a timely filed Proof of Claim); *provided* that such Claim is not scheduled as contingent, disputed, or unliquidated and/or has not been paid; *provided, however*, that if the applicable Bar Date has not expired prior to the Voting Record Date, a Claim listed in the Schedules as contingent, disputed, or unliquidated shall vote at \$1.00; and
- e. in the absence of any of the foregoing, such Claim shall be disallowed for voting purposes.

3. Voting and Ballot Tabulation Procedures.

The following voting procedures and standard assumptions shall be used in tabulating Ballots, subject to the Debtors' right to waive any of the below specified requirements for completion and submission of Ballots, so long as such requirement is not otherwise required by the Bankruptcy Code, Bankruptcy Rules, or Local Rules:

- a. except as otherwise provided in the Solicitation and Voting Procedures, unless the Ballot being furnished is timely submitted on or prior to the Voting Deadline (as the same may be extended by the Debtors), the Debtors shall reject such Ballot as invalid and, therefore, shall not count it in connection with confirmation of the Plan;

- b. the Notice and Claims Agent will file with the Court by no later than one week before the Confirmation Hearing, a voting report (the “Voting Report”). The Voting Report shall, among other things, delineate every Ballot that does not conform to the Solicitation and Voting Procedures or that contains any form of irregularity including, but not limited to, those Ballots that are late or (in whole or in material part) illegible, unidentifiable, lacking signatures or lacking necessary information, received via facsimile or damaged (collectively, in each case, the “Irregular Ballots”). The Voting Report shall indicate the Debtors’ decision with regard to each Irregular Ballot;
- c. the method of delivery of Ballots to be sent to the Notice and Claims Agent is at the election and risk of each holder, and except as otherwise provided, a Ballot will be deemed delivered only when the Notice and Claims Agent actually receives the executed Ballot;
- d. an executed Ballot is required to be submitted by the Entity submitting such Ballot. Delivery of a Ballot to the Notice and Claims Agent by facsimile or any electronic means other than as expressly approved by the Solicitation Procedures Order or these Solicitation and Voting Procedures will not be valid;⁴
- e. no Ballot should be sent to the Debtors, the Debtors’ agents (other than the Notice and Claims Agent), or the Debtors’ financial or legal advisors, and, if so sent, will not be counted;
- f. if multiple Ballots are received from the same holder with respect to the same Claim prior to the Voting Deadline, the last properly executed Ballot timely received will be deemed to reflect that voter’s intent and will supersede and revoke any prior received Ballot;
- g. Holders must vote all of their Claims within a particular Class either to accept or reject the Plan and may not split any votes. Accordingly, a Ballot that partially rejects and partially accepts the Plan will not be counted. Further, to the extent there are multiple Claims within the same Class, the applicable Debtor may, in its discretion, aggregate the Claims of any particular holder within a Class for the purpose of counting votes;
- h. a person signing a Ballot in its capacity as a trustee, executor, administrator, guardian, attorney in fact, officer of a corporation, or otherwise acting in a fiduciary or representative capacity of a holder of Claims must indicate such capacity when signing;

⁴ For the avoidance of doubt, a Ballot may be submitted via electronic mail to the Notice and Claims Agent at DRCVote@donlinrecano.com. For any Ballot cast via electronic mail, the format of the attachment must be found in the common workplace and industry standard format (i.e., industry-standard PDF file) and the received date and time in the Notice and Claims Agent’s inbox will be used as the timestamp for receipt.

- i. the Debtors, subject to a contrary order of the Court, may waive any defects or irregularities as to any particular Irregular Ballot at any time, either before or after the close of voting, and any such waivers will be documented in the Voting Report;
- j. neither the Debtors nor any other Entity will be under any duty to provide notification of defects or irregularities with respect to delivered Ballots other than as provided in the Voting Report nor will any of them incur any liability for failure to provide such notification;
- k. unless waived or as ordered by the Court, any defects or irregularities in connection with deliveries of Ballots must be cured prior to the Voting Deadline or such Ballots will not be counted;
- l. in the event a designation of lack of good faith is requested by a party in interest under section 1126(e) of the Bankruptcy Code, the Court will determine whether any vote to accept and/or reject the Plan cast with respect to that Claim will be counted for purposes of determining whether the Plan has been accepted and/or rejected;
- m. subject to any order of the Court, the Debtors reserve the right to reject any and all Ballots not in proper form, the acceptance of which, in the opinion of the Debtors, would not be in accordance with the provisions of the Bankruptcy Code or the Bankruptcy Rules; *provided* that any such rejections will be documented in the Voting Report;
- n. if a Claim has been estimated or otherwise Allowed only for voting purposes by order of the Court, such Claim shall be temporarily Allowed in the amount so estimated or Allowed by the Court for voting purposes only, and not for purposes of allowance or distribution;
- o. if an objection to a Claim is filed, such Claim shall be treated in accordance with the procedures set forth herein;
- p. the following Ballots shall not be counted in determining the acceptance or rejection of the Plan: (i) any Ballot that is illegible or contains insufficient information to permit the identification of the holder of such Claim; (ii) any Ballot cast by any Entity that does not hold a Claim in a Voting Class; (iii) any Ballot cast for a Claim scheduled as unliquidated, contingent, or disputed for which no Proof of Claim was timely filed by the Voting Record Date (unless the applicable bar date has not yet passed, in which case such Claim shall be entitled to vote in the amount of \$1.00); (iv) any unsigned Ballot or Ballot lacking an original signature; (v) any Ballot not marked to accept or reject the Plan or marked both to accept and reject the Plan; and (vi) any Ballot submitted by any Entity not entitled to vote pursuant to the procedures described herein;

- q. after the Voting Deadline, no Ballot may be withdrawn or modified without the prior written consent of the Debtors;
- r. the Debtors are authorized to enter into stipulations with the holder of any Claim agreeing to the amount of a Claim for voting purposes; and
- s. where any portion of a single Claim has been transferred to a transferee, all holders of any portion of such single Claim will be (a) treated as a single creditor for purposes of the numerosity requirements in section 1126(c) of the Bankruptcy Code (and for the other solicitation and voting procedures set forth herein), and (b) required to vote every portion of such Claim collectively to accept or reject the Plan. In the event that (a) a Ballot, (b) a group of Ballots within a Voting Class received from a single creditor, or (c) a group of Ballots received from the various holders of multiple portions of a single Claim partially reject and partially accept the Plan, such Ballots shall not be counted.

E. Amendments to the Plan and Solicitation and Voting Procedures.

The Debtors reserve the right to make non-substantive or immaterial changes to the Disclosure Statement, Plan, Ballots, Confirmation Hearing Notice, and related documents without further order of the Court, including, without limitation, changes to correct typographical and grammatical errors, if any, and to make conforming changes among the Disclosure Statement, the Plan, and any other materials in the Solicitation Package before their distribution.

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