

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:

VWS Holdco, Inc. *et al.*

Debtors.¹

Chapter 11

Case No. 25-10979 (JKS)

Jointly Administered

**EVERGREEN NATIONAL INDEMNITY CO.'S OBJECTION TO
NOTICE OF POTENTIAL ASSUMPTION OF EXECUTORY CONTRACTS
OR UNEXPIRED LEASES AND CURE AMOUNTS**

Evergreen National Indemnity Co. (“Evergreen”), the surety and a secured creditor in this matter, files this limited objection (“Objection”) to Notice of Potential Assumption of Executory Contracts or Unexpired Leases and Cure Amounts [Doc. 152] (“Motion”). In support of the Objection, Evergreen states as follows:

I. INTRODUCTION

Debtor, Shoosmith Bros., Inc. (“Shoosmith”) owns and operates a sanitary landfill approximately three miles from the Town of Chester, Virginia (the “Landfill”). In order to obtain a permit to operate such a facility, the owner/operator must first provide adequate financial assurance to guarantee that the facility will be closed and then managed post-closure to protect human health and the environment. Evergreen is a commercial surety company that has issued commercial surety bonds that allow Shoosmith to meet that regulatory requirement. The basis of this Objection relies on established law that surety bonds are financial accommodations that may not be assumed and assigned by a debtor without the consent of the surety.

¹ Debtor VWS Holdco, Inc., and Debtor Shoosmith Bros., Inc. (collectively, “Debtors”) in these Chapter 11 Cases, along with the last four digits of each Debtor’s federal tax identification numbers are as follows: VWS Holdco, Inc. (5412) and Shoosmith Bros., Inc. (6914). The Debtors’ mailing address is P.O. Box 2770, Chesterfield, VA 23832..



A. The Debtors' Legal Obligations

The Landfill (and other solid waste disposal facilities) is regulated pursuant to the Virginia Waste Management Act, particularly Chapter 14, §§ 10.1-1400 to 10.1-1413.1 and implementing regulations as Virginia Administrative Code, Title 9, Chapter 81 (9 VAC Chapter 81). The laws and regulations of the Commonwealth of Virginia must conform to the federal Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901, *et seq.* and Title 40 C.F.R. Parts 239 through 282. As a sanitary landfill that does not accept hazardous wastes, the Landfill is subject to RCRA, Subtitle D, 42 U.S.C. § 6943 and 40 C.F.R. Part 258.² Therefore, the Landfill operates in a complex regulatory environment of state and federal law intended to protect human health and the environment.

The financial assurance required by law assures that owners and operators of waste management facilities "are financially responsible for the closure, post-closure care and corrective action at their facilities"³ "Closure" is defined as the "act of securing a solid waste management facility pursuant to the requirements of this chapter and any other applicable solid waste management standards."⁴ "Post-closure care" refers to "the requirements placed upon an owner or operator of a solid waste disposal facility after closure to ensure environmental and public health and safety are protected for a specified number of years after closure."⁵ Virginia regulations list detailed requirements of closure and post-closure in 9 VAC 20-81 160 and 9 VAC 20-81 170, respectively. The Landfill is also subject to ongoing operating requirements.⁶ Particularly relevant to this case, the regulations demand control of gases formed by decomposition of the wastes

² The term "solid waste" is an inclusive, broad, and complex term defined by federal and state law. *See, e.g.*, 9 VAC 20-81-95.

³ 9 VAC 20-70-30 A.

⁴ 9 VAC 20-70-10.

⁵ *Id.*

⁶ *See, e.g.*, 9 VAC 20-81 140.

(landfill gas)⁷ and of the leachate⁸ from the landfill, both of which are discussed in more detail in the following section. Continued compliance with these leachate and landfill gas control obligations is required by both closure and post-closure regulations.

B. The Shoosmith Sanitary Landfill

The Landfill has operated for almost 50 years. It was first permitted in 1976 under Permit No. 211, and now under Permit No. 587 (the “Permit”). The waste operation itself is within about 370 acres of the total 506 acres of the available 536 acre site.⁹ The Landfill served the Richmond, Virginia area and accepted approximately 2,500 to 3,270 tons of municipal solid waste per day.¹⁰

The Permit includes modules that address management of both leachate and landfill gas.¹¹ An inspection by the Virginia Department of Environmental Quality (“DEQ”) resulted in a Warning Letter issued March 4, 2024, that identified compliance issues for hazard and nuisance control and leachate control.¹² Landfill gas, composed primarily of methane and carbon dioxide, is produced by the ongoing decomposition of the contents of the Landfill, and that continuing production depends to a great extent on the components and conditions of the Landfill.¹³

⁷ 9 VAC 20-81 200. Landfill gas is defined as follows:

"Landfill gas" means gas generated as a byproduct of the decomposition of organic materials in a landfill. Landfill gas consists primarily of methane and carbon dioxide.

9 VAC 20-81-10.

⁸ 9 VAC 20-81 210. Leachate is defined as follows:

"Leachate" means a liquid that has passed through or emerged from solid waste and contains soluble, suspended, or miscible materials from such waste. Leachate and any material with which it is mixed is solid waste; except that leachate that is pumped from a collection tank for transportation to disposal in an offsite facility is regulated as septage, leachate discharged into a waste water collection system is regulated as industrial waste water, and leachate that has contaminated groundwater is regulated as contaminated groundwater.

9 VAC 20-81-10.

⁹ See, e.g., Solid Waste Facility Permit Number 587, minor modification 22, September 7, 2018. Permit documents available at <https://www.chesterfield.gov/5622/Privately-Operated-Landfills>.

¹⁰ See, e.g., <https://bondoro.com/shoosmith-landfill/>.

¹¹ See, e.g., Permit Module III, Conditions of Operation, Sections II.I and II.K respectively. See also Permit Module IX, Landfill Gas Plan.

¹² Inspection Report, available at <https://www.chesterfield.gov/5622/Privately-Operated-Landfills>.

¹³ See, e.g., ATSDR 2008. Chapter 2: Landfill Gas Basics. In Landfill Gas Primer - An Overview for Environmental Health Professionals. Available at https://www.atsdr.cdc.gov/HAC/landfill/PDFs/Landfill_2001_ch2mod.pdf

C. Surety Bonds

A surety bond is a contractual agreement among three distinct parties: (1) the Principal (Permittee) which is the primary obligor; (2) the Obligee which is the party to whom the principal and surety owe a duty (Regulatory Agency); and (3) the Surety (Bonding Company), which is secondarily liable to the Regulatory Agency.¹⁴ “Suretyship” is an ancient principle and is the subject of its own unique area of law.¹⁵ In addition to the laws of suretyship, when surety bonds are issued to comply with statutory requirements, such as in this case, the bond is interpreted in light of the statute under which it is required.¹⁶

A surety bond is fundamentally different from an insurance policy, and surety bonds are not risk-shifting instruments.¹⁷ In keeping with this distinction, suretyship has been characterized as a credit transaction as follows:

Suretyship is a credit transaction in which a surety, in providing bonds on behalf of its principal, is extending the surety’s credit to the principal in order for the principal to enter into a contract with an obligee In the event that the surety incurs a loss, the surety expects to be reimbursed for its loss by its principal and any third-party indemnitors.¹⁸

Therefore, a significant difference between a surety bond and an insurance policy is that the surety relationship allows the surety to be indemnified, to seek reimbursement from the

¹⁴ See, e.g., RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTEE §§ 1 and 2.

¹⁵ See, e.g., RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTEE.

¹⁶ See, e.g., *American Casualty Co. of Reading v. Irvin*, 426 F.2d 647, 650 (5th Cir. 1970) (“A statutory bond will be reviewed in the light of the statute creating the duty to give security.”); *United States v. De Visser*, 10 F. 642, 648 (S.D. N.Y. 1882) (“The bond cannot in fact be understood or applied without reference to these laws.”); *American Casualty Co. v. Department of Environmental Resources*, 65 Pa. Commw. 223, 230, 441 A.2d 1383, 1387 (1982) (“[S]tatutory bonds are construed in the light of the statute creating the obligation secured and the purposes for which the bond is required, as expressed in the statute.”).

¹⁷ *Pearlman v. Reliance Ins. Co.*, 371 U.S. 132, 139 n.19, 83 S. Ct. 232, 9 L.Ed.2d 190 (1962) (“Suretyship is not insurance.”); *Meyer v. Building & Realty Service Co.*, 196 N.E. 250, 254 (Ind. 1935) (“We are clearly of the opinion that the contract here in question is a contract of suretyship and not an insurance policy.”). *Buck Run Baptist Church, Inc. v. Cumberland Sur. Ins. Co., Inc.*, 983 S.W.2d 501, 504 (Ky. 1998) (“A contract of suretyship is not a contract of insurance.”).

¹⁸ *Ground Improvement Techniques, Inc. v. Merchants Bonding Co.*, 63 F. Supp. 2d 1272, 1275 (D. Colo. 1999).

principal and others, once the surety has paid the price due to the principal's default. The surety expects the bonded principal to fulfill its obligations or, if the principal defaults, then the surety expects to be indemnified. The Debtor is part of a three-party contractual relationship of surety bonds.

A surety bond is only one method of satisfying Debtors' obligation to provide the necessary financial assurance. Alternatives include trust funds, letters of credit, certificates of deposit, insurance, corporate guarantee, or combinations of these.¹⁹ The Debtors could have used any one or more of these alternative methods, but the result would have obligated their cash or other property reserves. Instead, the Debtors chose to use commercial surety bonds issued by Evergreen. A permittee such as Shoosmith that fails to comply with the law is subject to enforcement actions,²⁰ and the financial assurance posted to guarantee that compliance is subject to forfeiture.²¹ Even if the Regulatory Agency forfeits the financial assurance, the permittee is still responsible for full compliance with law.²²

II. ANALYSIS

Evergreen is the commercial surety company that has entered into indemnity agreements with Debtors for the purpose of issuing closure and post closure bonds, and their respective riders. The indemnity agreements, bonds, and riders collectively form the surety agreements ("Surety Agreements") in support of the Debtors' obligations under federal, state and local laws in connection with the operation of the Landfill. Evergreen has posted with the applicable regulatory agencies approximately \$19 million in surety bonds for closure and post-closure obligations of the

¹⁹ See, e.g., 9 VAC 20-70-140, *et seq.*

²⁰ 9 VAC 20-70-60.

²¹ 9 VAC 20-70-75.

²² 9 VAC 20-70-75 states, in pertinent part, as follows: "Forfeiture of any financial obligation imposed pursuant to this chapter shall not relieve any owner or operator of a solid waste management facility from any obligations to comply with the provisions of the Solid Waste Management Regulations"

Debtors to the Landfill. The collateral supporting the surety bonds is a Morgan Stanley account totaling \$14.7 million in restricted cash, which Debtors correctly note is not bankruptcy estate property.

Debtors seek to potentially assume and assign the Surety Agreements with Evergreen and the local and state regulatory agencies (“Regulatory Agencies”) overseeing the Landfill. In order for the Surety Agreements to be executory contracts under 11 U.S.C. § 365, the obligations of both Evergreen and Debtors must be “so far unperformed that the failure of either to complete performance would constitute a material breach excusing performance of the other.”²³ Unless both Debtors and Evergreen “have unperformed obligations” under the Surety Agreements “that would constitute a material breach if not performed” the contract cannot be executory under Section 365.²⁴ The *Weinstein* decision from the Third Circuit succinctly describes the definition of an executory contract as proposed by Professor Vern Countryman²⁵, and adopted by the Fifth²⁶, Sixth²⁷, Seventh²⁸, Eighth²⁹, Ninth³⁰, and Tenth³¹ Circuits. Because both parties do not have “unperformed obligations that would constitute a material breach if not performed”, the Surety

²³ *Spyglass Media Group, LLC v. Bruce Cohen Productions (In re Weinstein Company Holdings, LLC)*, 997 F.3d 497, 504 (3d Cir. 2021).

²⁴ *Id.*

²⁵ Vern Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 Minn. L. Rev. 439, 460 (1973).

²⁶ *See, Argonaut Ins. Co. v. Falcon V, LLC (In the matter of Falcon V, LLC)*, 44 F.4th 348 (5th Cir. 2022),

²⁷ *See, Terrell v. Albaugh (In re Albaugh)*, 892 F.2d 469 (6th Cir. 1989).

²⁸ *See, In re Crippin*, 877 F.2d 594, 596 (7th Cir. 1989).

²⁹ *See, Northwest Airlines, Inc. v. Klinger, In re Knutson*, 563 F.2d 916 (8th Cir. 2010).

³⁰ *See, Unsecured Creditors' Comm. v. Southmark Corp. (In re Helms Constr.)*, 139 F.3d 702 (9th Cir. 1998).

³¹ *See, Olah v. Baird (In re Baird)*, 567 F.3d 1207 (10th Cir. 2009).

Agreement is not an executory contract to be assumed and assigned under Section 365.³² Evergreen's position is further supported by a host of other courts around the country.³³

In the event the Court finds that the Surety Agreements are executory contracts, the Surety Agreements remain unassignable under 11 U.S.C. § 365(c)(2) because they are financial accommodations. Although the Bankruptcy Code does not define "financial accommodation", courts have interpreted this phrase to mean an "obligation to pay money on the obligation of another."³⁴ Courts have determined that surety bonds are financial accommodations for reasons that include a surety is obligated to pay the obligee if the principal defaults. In *Wegner Farms*, the bankruptcy court held that Merchants Bonding Company's surety bond was a financial accommodation to the debtor under Section 365(c)(2).³⁵ In order to deal grain, Iowa licensing laws required Wegner Farms to obtain a surety bond.³⁶ The surety bond was a financial accommodation because Merchants Bonding Company was obligated to pay Wegner Farms' third party obligations if Wegner Farms failed to do so.³⁷

Similarly, the surety bond issued by Ohio Casualty to Edwards Mobile Homes, a debtor in the retail mobile home sales business, was a financial accommodation under Section 365(c)(2)

³² *Weinstein*, 997 F.3d at 504.

³³ *See, In re Chateaugay Corporation*, 102 B.R. 335, 345 (Bankr. S.D.N.Y. 1989)(citing *In re THC Fin. Corp.*, 686 F.2d 799, 804 (9th Cir. 1982)("Indemnity agreement is not executory because the only obligation due is the payment of money."); *Riverwood International Corporation v. Olin Corporation*, 225 B.R. 862, 867 (Bankr. S.D.N.Y. 1998)("Indemnity agreements are intended to establish contingent future obligations immediately upon execution. Whether a future event triggers such obligation is a function of the scope of the agreement as governed by the intent of the parties when entering into such agreement."); (*Waldschmidt v. Metropolitan Lincoln-Mercury, Inc. (In re Preston)*, 53 B.R. 589, 592 (Bankr. M.D. Tenn. 1985)("An indemnity agreement would not be considered an executory contract where the indemnitee has fully performed under the contract, leaving the indemnitor's promise as the only remaining obligation."))

³⁴ *Edwards Mobile Home Sales, Inc. v. Ohio Cas. Ins. Co., (In re Edwards Mobile Home Sales, Inc.)*, 119 B.R. 857, 859 (Bankr. M.D. Fla. 1990); *see also, Wegner Farms Co. v. Merchants Bonding Co., (In re Wegner Farms Co.)*, 49 B.R. 440, 444 (Bankr. N.D. Iowa 1985); *Gov't Nat'l Mort. Corp. v. Adana Mort. Bankers, Inc.*, 12 B.R. 977, 987 (Bankr. N.D. Ga. 1980).

³⁵ *See Wegner Farms*, 49 B.R. 440 at 446.

³⁶ *Id.* at 441.

³⁷ *Id.* at 442-44.

because the terms of the surety agreement required Ohio Casualty to pay certain liabilities of Edwards Mobile Homes if the debtor failed to do so.³⁸ Without the surety bond required by state statute, Edwards Mobile Homes could not operate its business. If Edwards Mobile Homes did not pay those certain obligations, Ohio Casualty was required to do so, thereby qualifying the surety bond as a financial accommodation subject to Section 365(c)(2).³⁹

In reaching this conclusion, the bankruptcy court in *Edwards Mobile Home* also applied the holding in *Adana Mort. Bankers* in which the court determined that a guaranty agreement was a financial accommodation under Section 365(c)(2) because GNMA was obligated to pay securities holders if the debtor failed to do so, the guaranty was a form of financial protection for the debtor, and was necessary to the marketing of the debtor's securities which allowed it to obtain credit from the purchasers of those securities.⁴⁰ These facts rendered the guaranty agreements to be financial accommodations for the benefit of Adana Mortgage Bankers, and prohibited Adana Mortgage Bankers from assuming the guaranty agreements without GNMA's consent.⁴¹

Furthermore, *In re Thomas B. Hamilton Co., Inc.* recognizes that "our courts have held that loan commitments, guaranty and surety contracts and other contracts" are entered into for "the purpose of...extend[ing] financing or guarantee[ing] the financial obligations of the debtor".⁴²

III. CONCLUSION

The Surety Agreements do not meet the accepted definition of an executory contract by the Third Circuit and the majority of its sister circuits. A payment obligation alone is not sufficient to

³⁸ *Edwards Mobile Homes*, 119 B.R. at 858-59.

³⁹ *Id.* at 859-60 (applying *Wegner*, 49 B.R. at 444).

⁴⁰ *Adna Mort. Bankers*, 12 B.R. at 987.

⁴¹ *Id.*; see also, *In re Primce, Inc.*, 15 B.R. 216, 218 (Bankr. W.D. Mo. 1981)(citing *Adna Mort. Bankers* for the principle that Section 365(c)(2) prohibits assumption of a debt financing arrangement without creditor's consent.)

⁴² See *Citizens and Sou. Nat'l Bank v. Thomas B. Hamilton Co., Inc. (In re Thomas B. Hamilton Company, Inc.)*, 969 F.2d 1013, 1019-20 (11th Cir. 1992).

render the surety's performance executory. But more importantly, even if the Surety Agreements, are deemed executory, section 365(c)(2) expressly provides they cannot be assumed and assigned if they provide a financial accommodation to the debtor. And the sole purpose of the Surety Agreements is to extend credit as a financial accommodation to the Debtor, i.e. Evergreen's promise to pay the Regulatory Agencies upon default by the Debtor.

Evergreen's position on the assignability of the Surety Agreements does not mean Evergreen is unwilling to work with a potential purchaser of Debtors' assets. Evergreen believes it can work in tandem with the Debtors towards successful reorganization with the mutual understanding that all parties comply with their respective obligations under the Surety Agreements. These obligations include the requirements that the related indemnity agreements remain intact unless otherwise agreed by Debtors and Evergreen, the indemnity agreements are not deemed executory contracts which may be rejected by Debtors, and Debtors do not limit future collateral or the value of current collateral if additional bonds are needed. Any order sought by Debtors which threatens the Landfill's Surety Agreements results in threats to reorganization. For these reasons, Evergreen objects to entry of any order under the Motion which is inconsistent with this Objection.

Dated: July 21, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served this the 21 day of July, 2025 electronically in accordance with the method established under this Court's CM/ECF Administrative Procedures upon all parties in the electronic filing system in this case.

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