

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

In re:

Westmoreland Coal Company, et al.,¹

Debtors.

Chapter 11

Case No. 18-35672 (DRJ)

(Jointly Administered)

**OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED
CREDITORS TO THE EMERGENCY MOTION OF THE MLP
LENDERS FOR ADEQUATE PROTECTION**

The Official Committee of Unsecured Creditors (the “Committee”) of Westmoreland Coal Company and its affiliated debtors and debtors in possession (collectively, the “Debtors”) hereby submits this objection (the “Objection”) to the *Emergency Motion of the MLP Lenders for Adequate Protection* [Docket No. 1202] (the “Motion”).² In support of this Objection, the Committee respectfully states as follows:

OBJECTION

1. On January 29, 2019, the MLP Lenders filed the Motion, which purports to request additional adequate protection related to the disposition of their Equipment Collateral in connection with the proposed Oxford Sale. Specifically, the MLP Lenders request additional adequate protection in the form of: (a) a cash payment from WLB to the MLP Lenders equal to 50% of the value of Equipment Collateral, which they assert is appropriate because the Oxford Sellers and WLB are jointly and severally liable for environmental reclamation costs and

¹ A complete list of the Debtors and the last four digits of their tax identification, registration, or like numbers may be obtained on the website of the Debtors’ claims and noticing agent in these chapter 11 cases at www.donlinrecano.com/westmoreland.

² Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Motion or the *Final Order (I) Authorizing the MLP Debtors to Use Cash Collateral Pursuant to 11 U.S.C. § 363, (II) Granting Certain Protections to Prepetition Lenders Pursuant to 11 U.S.C. §§ 105, 361, 362, 363, and 507, (III) Modifying the Automatic Stay and (IV) Granting Related Relief* (as amended, modified or supplemented from time to time in accordance with the terms thereof) [Docket No. 521] (the “MLP CCO”), as applicable.

liabilities related to the mines (the “Oxford ARO”); and (b) an adequate protection lien equal to 50% of the value of the Equipment Collateral against the assets of the WMLP Debtors that is equal in priority to the Adequate Protection Liens granted to the MLP Agent (on behalf of and for the benefit of the MLP Secured Parties) under the MLP CCO.

2. The MLP Lenders requested that the Motion be heard on less than a week’s notice in conjunction with the February 4, 2019 hearing to approve the Oxford Sale. The Committee understands that the Debtors and the MLP Lenders have agreed to proceed with argument on the Motion on that date, limited to the following issues:

- Whether the MLP Lenders are entitled to seek adequate protection in a sale of their collateral to which they consent; and
- Whether the MLP Lenders can seek adequate protection from the WLB Debtors.

3. For the reasons set forth below, the Committee submits that the MLP Lenders are *not* entitled to seek adequate protection in a sale of their collateral to which they unequivocally consent, or to obtain that protection from WLB, a non-obligor under their loan documents. Moreover, notwithstanding the agreement of the Debtors and MLP Lenders to limit argument to the two narrow issues outlined above, the Committee believes that the Court can and should address two additional threshold issues regarding the Motion. First, the relief sought in the Motion is unnecessary because it is duplicative of relief already granted under the MLP CCO. Second, the Motion should be denied because it is a procedurally improper attempt to obtain entry of an order fixing the amount of adequate protection claims in favor of the MLP Lenders without requiring them to first prove an aggregate diminution in the value of their Prepetition Collateral.

A. The MLP Lenders Are Not Entitled to Additional Adequate Protection in Connection with the Consensual Sale of Their Collateral

4. Section 363(e) of the Bankruptcy Code authorizes the Court to “prohibit or condition” a sale of property on the provision of adequate protection upon request by a party that has an interest in that property. The MLP Lenders have not objected to the Oxford Sale, nor have they requested that the Oxford Sale be conditioned on the relief they seek in the Motion. That is unsurprising because the sale is plainly in their best interest. Indeed, the MLP Lenders acknowledge that the Oxford Sale will maximize the value of their collateral in the aggregate. Motion at ¶ 1 (“[T]he MLP Lenders support the sale of the Oxford Assets because the Stalking Horse Bidder has agreed to assume the costs and liabilities for reclamation of the Oxford Sellers’ mines . . .”). As a result, the MLP Lenders have not argued, and cannot show, that additional adequate protection is necessary to protect their interests in the Prepetition Collateral being sold. Because the MLP Lenders are not requesting that the Oxford Sale be conditioned on the additional adequate protection, section 363(e) of the Bankruptcy Code does not require the Court to grant their request in order to approve the Oxford Sale.

B. The MLP Lenders Are Not Entitled to Adequate Protection from WLB

5. The Court should deny the MLP Lenders’ request for “adequate protection” in the form of a cash payment from WLB because they have not established any legal entitlement to such relief. WLB is neither a borrower nor a guarantor under the MLP Lenders’ loan documents. The MLP Lenders admit that it is “unusual” for a lender to assert an adequate protection claim against a debtor that is a non-obligor under the relevant loan documents. Motion at ¶ 9. Their sole argument for why such a claim should be granted is that the MLP Debtors and WLB Debtors are jointly and severally liable for the Oxford ARO liabilities that are being assumed as part of the Oxford Sale. The MLP Lenders assert that, in light of this joint liability, WLB will

receive “an inequitable windfall” if it is allowed to benefit from the assumption of that liability at no cost to itself. Motion at ¶ 7. The equitable remedy the MLP Lenders seek is not necessary because there is already a legal mechanism available to ensure that liabilities that are shared between the MLP and WLB Debtors’ respective estates are fairly allocated—i.e., the assertion of intercompany claims. Indeed, the MLP Debtors have filed an *Application of the WMLP Debtors for Allowance of Administrative Expenses* [Docket No. 1199] (the “Administrative Claim Application”) seeking exactly that relief. The Administrative Claim Application repeats the MLP Lenders’ argument that the MLP Debtors hold an administrative claim against WLB on account of the Oxford ARO and seeks payment from WLB on account of that claim as an administrative expense entitled to priority under sections 503 and 507 of the Bankruptcy Code. Because the “inequity” the MLP Lenders’ complain of is being addressed through the MLP Debtors’ Administrative Claim Application, the MLP Lenders are not entitled to duplicative relief in the form of an adequate protection payment from WLB, and their request should be denied.

C. The MLP Lenders Already Have Been Granted the Adequate Protection Requested with Respect to the MLP Debtors

6. Even if MLP Lenders would otherwise be entitled to adequate protection in connection with a sale to which they consent, the relief sought by the MLP Lenders with respect to the MLP Debtors is either unnecessary or procedurally improper. Somewhat confusingly, the Motion requests “an adequate protection lien equal to 50% of the value of the Equipment Collateral.” This request appears to muddle the concept of claims and liens, as liens are not granted in specific amounts. Rather, liens are granted against the full value of designated collateral to secure claims, and a secured party is only entitled to recover against the value of that collateral up to the amount of its secured claim. Thus, despite the Motion’s repeated request for

an adequate protection lien in a certain amount, it appears that what the MLP Lenders are actually seeking is the Court's approval of an adequate protection *claim* in an amount equal to 50% of the value of the Equipment Collateral that is secured by a *lien* on the assets of the MLP Debtors. To the extent that interpretation of the Motion is not correct and the MLP Lenders are indeed only seeking an adequate protection lien secured by the MLP Debtors' assets for any diminution in the value of their collateral resulting from the Oxford Sale, the Court has already granted that relief in the MLP CCO.

7. Paragraph 4 of the MLP CCO provides in relevant part that:

[T]he MLP Secured Parties are entitled, pursuant to sections 361, 362, 363 and 507 of the Bankruptcy Code, to adequate protection of their interests in the Prepetition Collateral, including Cash Collateral, to the extent of the aggregate postpetition diminution in value of such MLP Secured Party's interest in the Prepetition Collateral, including the Cash Collateral, *including any diminution in value resulting from (a) the sale, lease or use of the Prepetition Collateral, including the Cash Collateral*'

MLP CCO ¶ 4 (emphasis added).

8. Paragraph 5 of the MLP CCO grants the MLP Secured Parties Adequate Protection Superpriority Claims as follows:

Subject and subordinate only to the Carve Out, the MLP Agent, on behalf and for the benefit of the MLP Secured Parties, were granted under the Interim Order and hereby continue to be granted under this Final Order, in each case, effective as of the Petition Date, an allowed superpriority administrative expense claim against each of the MLP Debtors and their estates on a joint and several basis as provided in section 507(b) of the Bankruptcy Code, with priority in payment over any and all unsecured claims and administrative expense claims against the MLP Debtors, whether now existing or hereafter arising, including, without limitation, all claims of the kind specified in, or ordered pursuant to, sections 503(b) and 507(b) of the Bankruptcy Code (the "Adequate Protection Superpriority Claim"), which Adequate Protection Superpriority Claim shall have recourse to and be payable

from all prepetition and postpetition property of the MLP Debtors, excluding the Carve Out.

MLP CCO ¶ 5.

9. Finally, paragraph 6 of the MLP CCO grants the MLP Secured Parties adequate protection superpriority liens as follows:

Subject and subordinate only to the Carve Out and the Permitted Prior Liens, the MLP Agent, on behalf and for the benefit of the MLP Secured Parties, were granted under the Interim Order and hereby continue to be granted under this Final Order, in each case, effective as of the Petition Date, . . . valid, binding, continuing, enforceable, fully-perfected, non-avoidable first priority additional and replacement liens on, and security interest in, all of the prepetition and postpetition property, assets, and interests in property or assets, of each of the MLP Debtors and their respective estates of any kind or nature whatsoever, whether real or personal, tangible, intangible or mixed, whether now existing or hereafter acquired, arising or created, and wherever located

MLP CCO ¶ 6.

10. Because the MLP CCO already grants the MLP Lenders adequate protection claims and liens that cover any proven diminution in the aggregate value of their Prepetition Collateral (including the Equipment Collateral) that may result from the Oxford Sale, the Court need not grant such relief a second time and the relief requested with respect to the MLP Debtors is moot.

D. The MLP Lenders Are Not Entitled to Allowance of a Fixed Adequate Protection Claim at This Time

11. Notably, nowhere does the Motion explicitly request allowance of adequate protection claims against either the MLP Debtors or WLB. Compensation for the diminution in value of a portion of the MLP Lenders' Prepetition Collateral (the Equipment Collateral) is, however, precisely what MLP Lenders are seeking. Payment of such compensation is appropriate only after the amount of the MLP Lenders' adequate protection claims have been

liquidated and fixed by an order of the Court. Under the MLP CCO and applicable case law, the process of liquidating those claims requires the MLP Lenders to prove that there has been an aggregate diminution in the value of their Prepetition Collateral during the chapter 11 cases. The Motion's opaque and convoluted wording appears to be an intentional backdoor attempt by the MLP Lenders to evade that process. To the extent the MLP Lenders are indeed requesting that the Court allow an adequate protection claim against either the MLP Debtors or the WLB Debtors in a fixed amount (i.e., 50% of the value of the Equipment Collateral) at this time, that request should be denied on the basis that it is procedurally improper and premature.

12. As noted above, under the MLP CCO, the MLP Agent, on behalf of and for the benefit of the MLP Secured Parties, received "adequate protection of their interests in the Prepetition Collateral, including Cash Collateral, *to the extent of the aggregate postpetition diminution in value of such MLP Secured Party's interest in the Prepetition Collateral. . . .*" MLP CCO ¶ 4 (emphasis added). Courts have held that the lender bears the burden to show an aggregate diminution in the value of their collateral in order to establish a claim under section 507(b) of the Bankruptcy Code. *See Official Committee of Unsecured Creditors v. UMB Bank, N.A. (In re Residential Capital, LLC)*, 501 B.R. 549, 592 (Bankr. S.D.N.Y. 2013) (stating that the burden of establishing an adequate protection claim "remains squarely with the secured creditor"); *Qmect, Inc. v. Burlingame Capital Partners II, L.P.*, 373 B.R. 682, 690 (N.D. Cal. 2007) (secured creditors are not entitled to foreclose on replacement liens absent proof that collateral has diminished in value as a result of the automatic stay or the collateral's use during the pendency of a bankruptcy petition).

13. The MLP Lenders cannot circumvent the requirements of the MLP CCO and their burden of proof to obtain allowance of, and payment on, adequate protection claims by simply

avoiding using language that accurately describes the relief they are actually seeking. In the absence of any showing by the MLP Lenders that would satisfy their burden of proof with respect to the aggregate value of the Prepetition Collateral, the MLP Lenders are not entitled to payment on account of their existing contingent and unliquidated adequate protection claims against the MLP Debtors, much less against WLB. To the extent the Motion includes a request by the MLP Lenders for either allowance or payment of adequate protection claims in a fixed amount, that request is both inappropriate and untimely, and should be denied.

RESERVATION OF RIGHTS

14. The Committee reserves all rights with respect to the Motion, including the right to supplement this Objection and to raise additional arguments at or before any further hearings on the Motion.

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Dated: February 3, 2019

Respectfully submitted,

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