

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:)	
)	Chapter 11
WESTMORELAND COAL COMPANY, <i>et al.</i> , ¹)	
)	Case No.: 18-35672 (DRJ)
Debtors.)	
)	(Jointly Administered)
_____)	Related to Dkt. Nos.: 1287, 1295

OBJECTION OF MONSANTO COMPANY TO PROPOSED ASSUMPTION OF CERTAIN EXECUTORY CONTRACTS

Monsanto Company’s (“Monsanto”), by and through counsel, hereby files this Objection (the “Objection”) to Debtor’s proposed assumption of certain executory contracts between Debtors and Monsanto pursuant to this Court’s *Order (A) Establishing Bidding and Sale Procedures with Respect to the Sale of the Kemmerer Mine and Substantially all Assets Related Thereto, (B) Authorizing the Entry into a Stalking Horse Agreement and the Provision of Stalking Horse Protections, (C) Scheduling an Auction Sale Hearing and Approving the Form and Manner of Notice Thereof, and (D) Granting Related Relief* (the “Bidding Procedures Order”) and Debtor’s *Notice to Contract Parties to Potentially Assumed Executory Contracts and Unexpired Leases* (the “Cure Notice”), and states as follows:

1. On October 9, 2018 (the “Petition Date”), Westmoreland Coal Company, and certain affiliates² (collectively, the “Debtors”) filed Voluntary Petitions for relief under Chapter

¹ Due to the large number of debtors in these chapter 11 cases, which are jointly administered, a complete list of the debtors and the last four digits of their tax identification, registration, or like numbers is not provided herein. A complete list of such information may be obtained on the website of the Debtors’ proposed claims and noticing agent in these chapter 11 cases at www.donlinrecano.com/westmoreland. Westmoreland Coal Company’s service address for the purposes of these chapter 11 cases is 9540 South Maroon Circle, Suite 300, Englewood, Colorado 80112.

² The term “WLB Debtors” does not include Westmoreland Resource Partners, LP, or their subsidiaries (collectively with the WLB Debtors, the “Debtors”).

11 of the Bankruptcy Code before the United States Bankruptcy Court for the District of Delaware (the “Bankruptcy Court”).

2. The Debtors have continued to operate their business and manage their properties as debtor’s-in-possession pursuant to 11 U.S.C. §§ 1107(a) and 1108.³

3. On January 18, 2019, the WMLP Debtors filed their *Expedited Motion of Westmoreland Resource Partners, LP and Its Subsidiaries for Entry of (I) An Order (A) Establishing Bidding and Sale Procedures with Respect to the Sale of the Kemmerer Mine and Substantially All Assets Related Thereto, (B) Authorizing the Entry Into a Stalking Horse Agreement and the Provision of Stalking Horse Protections, (C) Scheduling an Auction and Sale Hearing and Approving the Form and Manner of Notice Thereof and (D) Granting Related Relief; and (II) an Order Approving the Sale of such Assets and Granting Related Relief* (the “Sale Motion”) [Docket No. 1101].

4. On February 4, 2019, the Court entered the Bidding Procedure Order [Docket No. 1287].

5. Pursuant to the Bidding Procedures Order, the WMLP Debtors are seeking to sell (a) the mining properties of WMLP Debtor Westmoreland Kemmerer, LLC and WMLP Debtor Westmoreland Kemmerer Fee Coal Holdings, LLC, including certain executory contracts and unexpired leases (the “Kemmerer Assets”). The Bidding Procedures Order contemplates that the sale of the Kemmerer Assets will take place via an auction (the “Auction”).

6. The proposed sale hearing for approval of any sale of the Kemmer Assets pursuant to the Auction is set for February 28, 2019 (the “Sale Hearing”). See Bidding Procedures Order ¶ 7.

³ Unless otherwise specified, all statutory references to “Section” are to 11 U.S.C. §§ 101 et seq. (the “Bankruptcy Code”).

7. On February 5, 2019, WMLP Debtors filed the Cure Notice [Docket No. 1295].

8. The Cure Notice lists two alleged executory contracts (the “Monsanto Contracts”)

for which Monsanto is the counterparty, more specifically defined as follows:

<i>Debtor</i>	<i>Contract</i>
Westmoreland Kemmerer, LLC	Sales Order and Amendments
Westmoreland Kemmerer, LLC	Coal Purchase Order

OBJECTION TO PROPOSED ASSUMPTION OF MONSANTO CONTRACTS

9. Monsanto objects to any attempt by WMLP Debtors to assume the Monsanto Contracts.

10. As a threshold issue, Monsanto’s books and records show that it is the counterparty to Westmoreland Kemmerer, LLC pursuant to only one executory contract: the *Coal Purchase Order*. The *Coal Purchase Order* is attached hereto as **Exhibit A** and incorporated herein by reference.

11. Monsanto is not a party to any alleged “Sales Order and Amendments” executory contract as referenced by WMLP Debtors in the Cure Notice.

12. Further, the *Coal Purchase Order* expires under its own terms on February 28, 2019 – the date of the Sale Hearing. As such, any proposed assumption and assignment of the *Coal Purchase Order* would be as to an expired contact.

13. It is axiomatic that Debtors cannot assume a contract that is expired – or one that never existed. As such, this Court should deny any attempt by WMLP Debtors to assume and assign the Monsanto Contracts.

RESERVATION OF RIGHTS

14. Monsanto hereby reserves its rights to make such other and further objections as may be appropriate to Monsanto.

CONCLUSION

WHEREFORE, For the reasons set forth above, Monsanto respectfully requests that this Court (i) sustain this Objection and enter an order providing that the Monsanto Contracts are not executory contracts that can be assumed or assigned by WMLP Debtors; and (ii) grant Monsanto such further relief as it deems proper.

Date: February 19, 2019
Houston, Texas

HUSCH BLACKWELL LLP

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ATTORNEYS FOR MONSANTO COMPANY

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 19, 2019, a true and correct copy of the *OBJECTION OF MONSANTO COMPANY TO PROPOSED ASSUMPTION OF CERTAIN EXECUTORY CONTRACTS* was served on all counsel of record via ECF and via first class mail to the following parties:

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due 2020 and the WLB Debtors' 8.75% senior
secured notes due 2022

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Attn: Joseph E. Bain

/s/ *Buffey Klein*
Buffey E. Klein

EXHIBIT A

COAL PURCHASE ORDER

THIS COAL PURCHASE ORDER ("Order") dated May 14, 2018 confirms the purchase of coal by Westmoreland Kemmerer, LLC ("Buyer") for use at Buyer's customer, Tata Chemicals' plant located near Green River, WY ("Consumer") from Monsanto Company ("Seller") at the Monsanto Plant in Rock Springs, WY ("Plant") pursuant to the following terms and conditions.

TERM: July 1, 2018 through February 28, 2019 (the "term")

SOURCE: The source of the coal to be delivered hereunder shall be the Plant located near Rock Springs, Wyoming.

QUALITY: Typical coal quality specifications are set forth below. Buyer acknowledges that the quality of actual coal deliveries may vary from the typical specifications below. All qualities below are on an As-Received basis.

<u>Quality</u>	<u>Typical</u>
BTU / lb	11,000 – 12,000
Ash	11% - 13%
Moisture	7% - 9%
Sulfur	0.4% - 0.7%

The Coal shall be substantially free of foreign material and impurities and shall be sized to a nominal half inch minus (.5") top size.

THE Coal IS PROVIDED AS IS AND ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING ANY WARRANTY OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE ARE HEREBY DISCLAIMED. IN NO EVENT SHALL SELLER BE LIABLE FOR ANY INCIDENTAL, INDIRECT, PUNITIVE, SPECIAL, CONSEQUENTIAL, OR OTHER DAMAGES, AND BUYER EXPRESSLY WAIVES ANY AND ALL CLAIMS TO SUCH DAMAGES.

Both Buyer and Seller agree to comply with all state and federal requirements regarding the purchase and sale of coal.

QUANTITY: The quantity of coal to be delivered hereunder shall be 15,000 tons. Seller agrees to stockpile and maintain 15,000 tons that shall be made available to Buyer? at any time during the Term of this agreement. Seller will invoice Buyer for the entire 15,000 tons upon the execution of this agreement.

In addition to the quantity listed above, Buyer will purchase up to an additional 15,000 tons. Delivery of these additional tons will begin immediately and according to a mutually agreed upon delivery schedule.

Said coal shall be delivered in accordance with a mutually agreed upon delivery schedule between Buyer, Seller and Consumer. Consumer will test coal to ensure that the coal is suitable for use at Consumers facility. If at any point the Consumer discontinues its use of coal for any reason, Buyer shall have the right to immediately terminate this Order. If Seller requires coal under this Order for use at Monsanto facilities, Seller shall have the right upon written notice to Buyer and Consumer to: (1) terminate this Order; or, (2) suspend deliveries

to Consumer until further notice. For purposes of this Order, a "ton" shall mean 2,000 pounds avoirdupois.

POINT OF DELIVERY: The Point of Delivery for coal sold hereunder shall be F.O.B. loaded into the truck at the Plant. All title and risk of loss shall transfer to Consumer upon loading into the truck.

PRICE: \$25.00/ton FOB loaded into the truck at the Plant.

BILLING: Seller will invoice Buyer for coal on a bi-weekly basis. Invoices will be sent to the physical or email address shown below unless Buyer otherwise advises Seller in writing of a different address to which invoices should be sent:

Westmoreland Kemmerer, LLC
6520 Elk County Rd 304
Kemmerer, WY 83101

Attn: Cole Ferrin
Copy to: Michelle Pollard

Email: cferrin@westmoreland.com
Email: mpollard@westmoreland.com

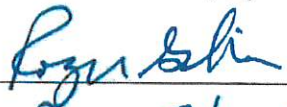
PAYMENT: Buyer shall pay invoices within fifteen (15) days after the date of the invoice. If payment of an invoice is not made within fifteen (15) days of the invoice date, the unpaid balance will be assessed a 2% late-payment fee. An additional 2% late-payment fee will be assessed against the original outstanding balance for each 30-day period thereafter until the invoice is paid in full.

WEIGHTS: The weight of the coal shall be determined by Seller at the Plant using the Monsanto certified scale.

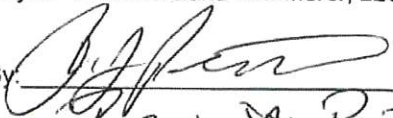
TRANSPORTATION: Consumer shall arrange, at its sole cost, for trucks suitable for Seller's facility to take coal in a timely manner. Delivery of the coal shall be made in accordance with a mutually-agreed upon schedule. Seller will only be obligated to load trucks Monday through Friday, excluding Plant holidays. The actual delivery schedule will be coordinated between Buyer's, Seller's and Consumer's personnel.

IN WITNESS WHEREOF, the parties hereto have caused this Order to be executed in duplicate by their duly authorized representatives as of the day and year first above written.

Seller: Monsanto Company

By: 
Name: Roger Gibson
Title: Plant Mgr

Buyer: Westmoreland Kemmerer, LLC

By: 
Name: ROBIN JAY PIPPA
Title: PRES. + G.M.