

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

In re:

Westmoreland Coal Company, et al.,

Debtors.

Chapter 11

Case No. 18-35672 (DRJ)

(Jointly Administered)

**DECLARATION OF GERALD A. TYWONIUK IN SUPPORT OF THE  
DEBTORS' EMERGENCY MOTION FOR ENTRY OF AN ORDER AUTHORIZING  
AND APPROVING INTERCOMPANY SETTLEMENT TERM SHEET**

I, Gerald A. Tywoniuk, hereby declare under penalty of perjury and pursuant to 28 U.S.C. § 1746 that the following is true and correct to the best of my knowledge and belief:

1. I am the Chairman of the Conflicts Committee (the "Conflicts Committee") of the Board of Directors of Debtor Westmoreland Resources GP, LLC ("WMGP"), the general partner of Debtor Westmoreland Resource Partners, LP ("WMLP").

2. I submit this declaration in support of the *Debtors' Emergency Motion for Entry of an Order Authorizing and Approving Intercompany Settlement Term Sheet* (Docket No. 1367) (the "Motion").<sup>1</sup> In particular, I submit this declaration to explain the reasons why the Conflicts Committee exercised its business judgment to authorize WMLP and its direct and indirect Debtor-subidiaries (collectively, the "WMLP Debtors") to enter into the Term Sheet.

3. Except as otherwise indicated, all statements set forth in this declaration are based on (a) my personal knowledge, (b) my review of relevant documents, (c) information provided to me by, or discussions with, the members of the Conflicts Committee or its advisors, and/or

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<sup>1</sup> Capitalized terms used but not otherwise defined herein have the meanings set forth in the term sheet (the "Term Sheet") attached to the Motion as Annex 1 to Exhibit A.

(d) information provided to me by, or discussions with, the management team of Westmoreland Coal Company ("WLB") and its affiliated debtors and debtors in possession (including the WMLP Debtors) (collectively, the "Debtors") or their advisors. If called to testify, I could and would testify to the facts set forth herein.

**Relationship Between The WLB Debtors And The WMLP Debtors**

4. WMLP is a publicly traded master limited partnership, which, as of February 12, 2019, had 1,284,840 outstanding common units representing limited partner interests in WMLP (the "Common Units"). Prior to the bankruptcy filing, the Common Units publicly traded on the New York Stock Exchange, and, since the bankruptcy filing, have publicly traded on the OTC Pink Marketplace. While WLB does not currently hold any Common Units, it directly or indirectly owns the majority of ownership interests in WMLP. WLB holds equity securities in WMLP that are convertible into Common Units in an amount that would constitute an approximately 94.4% beneficial limited partner interest in WMLP on an as converted basis. In addition, WLB wholly owns WMGP, which, in turn, owns 100% of the general partner interests of WMLP.

5. Both the WMLP Debtors and the WLB Debtors operate thermal coal mines in North America. However, the WMLP Debtors do not currently have, and historically have not had, any employees or the back-office support necessary to operate their mines.<sup>2</sup> Instead, the WLB Debtors have provided and continue to provide various services and support ("Shared Services") that enable the WMLP Debtors to operate their mines, including, without limitation: (a) management services consisting of, among other things, operating services and engineering

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<sup>2</sup> After the Oxford Sale closed on February 11, 2019, the WMLP Debtors only have one remaining mine, which is in Kemmerer, Wyoming.

services, including financial modelling services, sales and marketing (including contracts for the sale, storage and handling, and logistics and transportation of coal); and (b) back-office services consisting of general and administrative services, including, legal, accounting, treasury, insurance administration and claims processing, risk management, health, safety and environmental, information technology, human resources, credit, payroll, internal audit, and taxes. The WLB Debtors' provision of certain Shared Services to the WMLP Debtors is currently governed by that certain administrative and operational services agreement, by and between WMGP and WMLP, dated as of January 1, 2015 (as amended, restated, modified and supplemented from time to time in accordance with the terms thereof).

#### **The Conflicts Committee**

6. Since WMGP's affiliations with WLB and the WMLP Debtors may give rise to conflicts of interest (and has from time to time), WMGP's Board of Directors has a Conflicts Committee comprised solely of independent directors (currently numbering three). The Conflicts Committee's responsibilities include reviewing and assessing any conflicts of interest that may arise between WMGP and WMLP and ensuring that the resolution of any such conflicts of interest is fair and reasonable to WMLP. In connection with the Debtors' restructuring efforts, the Conflicts Committee and the WMLP Debtors in August 2017 retained separate advisors to, among other things, help the Conflicts Committee fulfill these duties. Those advisors include Lazard Frères & Co. LLC as investment banker to the Conflicts Committee and the WMLP Debtors and Jones Day as counsel to the Conflicts Committee and conflicts counsel to the WMLP Debtors.

### **The Intercompany Claims and Disputes**

7. In addition to the Shared Services, the filing of these cases brought several intercompany issues to the fore. They included, among others: the shared responsibility under applicable environmental law for reclamation obligations for the mines that the WMLP Debtors own and the WLB Debtors operate, the proper allocation of professional fees for professionals shared between the two sets of Debtors' estates, the resolution of labor, retiree benefit and tax matters respecting the Kemmerer mine, the resolution of other intercompany claims, and the means for the resolution of the WMLP Debtors' estates in light of the fact that the WLB Debtors are planning to exit chapter 11 before the WMLP Debtors will be able to do so.

8. With respect to the Shared Services, given that the WLB Debtors plan to exit chapter 11 before the WMLP Debtors can—and perhaps even before the sale of WMLP Debtors' Kemmerer mine can close—it was clear that the WMLP Debtors required the continuation of such services beyond the time that the WLB Debtors planned to exit chapter 11. The WLB Debtors' proposed plan of reorganization contemplates that a buyer will acquire substantially all of the WLB Debtors' assets (including certain back-office, information technology, and related systems and records that historically were used to provide services to the WMLP Debtors) and employ the WLB Debtors' executive management team no later than mid-March, 2019. Thus, absent an agreement from the WLB buyer to provide Shared Services to the WMLP Debtors after the buyer closes on its purchase of the WLB Debtors' assets, the WMLP Debtors would lack the resources necessary to run their business and administer their estates.

9. The WMLP Debtors also believed that, as part of their fiduciary duties to all stakeholders, they should act to protect the holders of the Common Units (the "Common Unit Holders") from an inequitable "double-loss." WMLP is a pass-through entity for federal income tax purposes. As a result, the Common Unit Holders could be subject to potentially significant

tax bills (triggered by the compromise of WMLP's debt in these cases, which will give rise to a cancellation of debt income unless the Kemmerer mine is sold for a price sufficient to cover its outstanding prepetition debt) in addition to the loss of all value in their Common Units. While the Conflicts Committee determined this result would be inequitable to the Common Unit Holders, particularly given that the vast majority of Common Unit Holders are individual, rather than institutional, investors, the WMLP Debtors lacked the tools to protect the Common Unit Holders from this result. Accordingly, as part of the Term Sheet, the WMLP Debtors bargained for the WLB Debtors to effect a tender for the Common Units at a *de minimis* cost to the WLB Debtors' estates.

#### **The Intercompany Settlement**

10. The Conflicts Committee, after consultation with its advisors, determined that resolving the various intercompany claims and disputes through litigation would be costly and that there were significant risks that some or all of the claims and disputes would not be resolved favorably for the WMLP Debtors. Accordingly, the Conflicts Committee determined that it was in the best interests of the WMLP Debtors' estates for the WMLP Debtors to seek a global resolution of the intercompany claims and disputes. Therefore, the Conflicts Committee instructed its advisors to attempt to negotiate with the WLB Debtors, the WLB Secured Lenders and the MLP Secured Lenders a global settlement of the intercompany claims and disputes.

11. After extensive arm's-length negotiations, many of which involved principals, including myself, the WMLP Debtors, the WLB Debtors, the WLB Secured Lenders and the MLP Secured Lenders entered into the Term Sheet, which, subject to Court approval, would resolve all claims and disputes between the WMLP Debtors' and the WLB Debtors' respective estates. After consultation with its advisors, the Conflicts Committee determined that the global settlement embodied in the Term Sheet is fair, equitable and in the best interests of the WMLP

Debtors' estates because, among other reasons: (a) it secures from the buyer of the WLB Debtors' assets the Shared Services necessary for the WMLP Debtors to complete their cases in an orderly fashion; (b) protects the Common Unit Holders from an inequitable "double-loss"; (c) equitably allocates disputed expenses and liabilities among the respective estates; and (d) avoids the risks and costs attendant to litigation.

Dated: February 20, 2019



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Gerald A. Tywoniuk  
Chairman, Conflicts Committee of the  
Board of Directors of Westmoreland  
Resources GP, LLC