

UNITED STATES BANKRUPTCY COURT
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)
)	

**WLB DEBTORS' EMERGENCY
MOTION FOR ENTRY OF AN ORDER
AUTHORIZING AND APPROVING SETTLEMENT TERM SHEET
BETWEEN THE WLB DEBTORS AND THE COAL ACT RETIREES COMMITTEE**

THIS MOTION SEEKS AN ORDER THAT MAY ADVERSELY AFFECT YOU. IF YOU OPPOSE THE MOTION, YOU SHOULD IMMEDIATELY CONTACT THE MOVING PARTY TO RESOLVE THE DISPUTE. IF YOU AND THE MOVING PARTY CANNOT AGREE, YOU MUST FILE A RESPONSE AND SEND A COPY TO THE MOVING PARTY. YOUR RESPONSE MUST STATE WHY THE MOTION SHOULD NOT BE GRANTED. IF YOU DO NOT FILE A TIMELY RESPONSE, THE RELIEF MAY BE GRANTED WITHOUT FURTHER NOTICE TO YOU. IF YOU OPPOSE THE MOTION AND HAVE NOT REACHED AN AGREEMENT, YOU MUST ATTEND THE HEARING. UNLESS THE PARTIES AGREE OTHERWISE, THE COURT MAY CONSIDER EVIDENCE AT THE HEARING AND MAY DECIDE THE MOTION AT THE HEARING.

EMERGENCY RELIEF HAS BEEN REQUESTED. IF THE COURT CONSIDERS THE MOTION ON AN EMERGENCY BASIS, THEN YOU WILL HAVE LESS THAN 21 DAYS TO ANSWER. IF YOU OBJECT TO THE REQUESTED RELIEF OR IF YOU BELIEVE THAT THE EMERGENCY CONSIDERATION IS NOT WARRANTED, YOU SHOULD FILE AN IMMEDIATE RESPONSE.

A HEARING WILL BE HELD ON THIS MATTER ON FEBRUARY 26, 2019, AT 1:00 P.M. (CT) BEFORE THE HONORABLE DAVID R. JONES, 515 RUSK STREET, COURTROOM 400, HOUSTON, TEXAS 77002.

REPRESENTED PARTIES SHOULD ACT THROUGH THEIR ATTORNEY.

¹ Due to the large number of debtors in these chapter 11 cases, for which joint administration has been granted, 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' 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.

The above-captioned debtors and debtors-in-possession (collectively, the “Debtors”)² respectfully state the following in support of this motion (this “Motion”).³

Preliminary Statement

1. The WLB Debtors have negotiated for weeks with the Coal Act Retirees Committee regarding a consensual resolution to the Debtors’ 1113/1114 Motion (as defined herein) with respect to the Coal Act Retirees. The Coal Act Retirees Committee has been focused on ensuring that no Coal Act Retiree is harmed by the transition of health benefits from the WLB Debtors to the Coal Act Funds—a goal the WLB Debtors share. Now, following these good-faith, arm’s-length negotiations, the Debtors and the Coal Act Retirees Committee have agreed, subject to Court approval, to resolve all outstanding matters related to the WLB Debtors’ Coal Act obligations (the “Settlement”) on the terms set forth in the term sheet attached hereto as **Annex 1** (the “Term Sheet”) to **Exhibit A**. Therefore, the WLB Debtors respectfully request that the Court approve the Settlement and authorize the WLB Debtors to incorporate the provisions of the Term Sheet into the Debtors’ Plan, and authorize the Term Sheet as part of the Confirmation Order, as part of the request to be heard during the WLB Debtors’ forthcoming confirmation hearing, which is scheduled to commence at 1:00 p.m. (Central Time) on February 26, 2019.

² “WLB Debtors” means all Debtors except for Westmoreland Resources GP, LLC, Westmoreland Resource Partners, LP (“WMLP”), and WMLP’s subsidiaries (collectively with WMLP, the “WMLP Debtors”). The “Debtors” includes both the WLB Debtors and the WMLP Debtors.

³ A detailed description of the Debtors’ businesses and the reasons for commencing the chapter 11 cases is set forth in the *Declaration of Jeffrey S. Stein, Chief Restructuring Officer of Westmoreland Coal Company, in Support of Chapter 11 Petitions and First Day Pleadings* [Docket No. 54] (the “First Day Declaration”). Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Term Sheet.

⁴ Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Term Sheet.

Relief Requested

2. The WLB Debtors seek entry of an order, substantially in the form attached hereto as **Exhibit A** (the “Order”), authorizing the WLB Debtors’ entry into the Term Sheet and approving the Settlement, conditioned on entry of a Confirmation Order embodying its terms.

Jurisdiction, Venue and Procedural Background

3. The United States Bankruptcy Court for the Southern District of Texas (the “Court”) has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and the *Amended Standing Order of Reference from the United States District Court for the Southern District of Texas*, dated May 24, 2012. The Debtors confirm their consent, pursuant to rule 7008 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), to the entry of a final order by the Court in connection with this Motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

4. The bases for the relief requested herein are sections 105(a), 363(b), and 1114 of title 11 of the United States Code, 11 U.S.C. §§ 101–1532 (the “Bankruptcy Code”), and Bankruptcy Rules 2002 and 9019.

5. On October 9, 2018 (the “Petition Date”), each Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. The Debtors are operating their businesses and managing their properties as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No request for the appointment of a trustee or examiner has been made in these chapter 11 cases. On October 18, 2018, the United States Trustee for the Southern District of Texas appointed an official committee of unsecured creditors pursuant to section 1102 of the Bankruptcy Code [Docket No. 206] (the “Committee”).

Background Relevant to this Motion

6. As the Debtors disclosed since the outset of these chapter 11 cases, significant modifications to the Debtors' retiree obligations are required for their businesses to survive as a going concern.

7. On October 23, 2018, the WLB Debtors made a proposal to the United Mine Workers of America (the "UMWA") pursuant to sections 1113 and 1114 of the Bankruptcy Code. In that October 23, 2018, proposal, the WLB Debtors proposed, among other things, to terminate their obligations to make retiree medical payments and premium contributions pursuant to the Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act").

8. The WLB Debtors have four types of obligations related to the Coal Act: (a) the obligation to maintain an Individual Employer Plan (or "IEP") for certain former employees and their eligible beneficiaries; (b) the obligation to pay premiums to the UMWA 1992 Benefit Fund on account of certain other former employees and their beneficiaries (the "1992 Premiums"); (c) the obligation to pay premiums to the UMWA Combined Benefit Fund on account of certain other former employees contributions (the "CBF Premiums"); and (d) the obligation to post security, in the form of surety bonds, in the name of the 1992 Fund (the "Surety Bonds"). The Debtors are current on all such obligations but could not emerge from chapter 11 protection with any of them, so the Debtors proposed that they be terminated.

9. On October 23, 2018, the trustees of the UMWA 1992 Benefit Plan and the UMWA Combined Benefit Fund (the "Coal Act Funds") initiated an adversary proceeding, claiming that Coal Act obligations cannot be modified. *See* Case No. 18- 35672, Adv. Proceeding No. 18-3300 (Bankr. S.D. Tex.). The Coal Act Funds also moved for appointment of an official retiree committee pursuant to 11 U.S.C. § 1114(b). *See Coal Act Funds' Motion in the Alternative to Appoint Official Retiree Committee Pursuant to 11 U.S.C. § 1114* [Docket No. 248].

10. On November 16, 2018, the Court issued an order directing the United States Trustee for the Southern District of Texas, Houston Division (the “UST”) to appoint an official retiree committee to serve as the authorized representative of affected Coal Act Retirees, their spouses, and their eligible dependents, pursuant to Section 1114 of the Bankruptcy Code. *See Order Directing Appointment of Committee of Retired Employees Pursuant to 11 U.S.C. § 1114* [Docket No. 526].

11. Despite the UST’s and the Debtors’ diligent efforts to solicit Coal Act Retirees to serve on a Section 1114 committee, no Coal Act-eligible retiree was willing to serve on such a committee. There are two main reasons that no Coal Act-eligible retiree was located who was willing to serve. *First*, the Coal Act retiree population consists entirely of people who retired prior to 1993. Given the age of the population and the fact that the Coal Act Retirees worked for the WLB Debtors either in Appalachia or in Colorado, the Debtors are not aware of people falling within this category who are located near the Houston, Texas area, where this bankruptcy case is being handled. *Second*, the Coal Act retiree population is protected by the Coal Act, such that even if the Debtors’ obligations to make contributions on account of Coal Act retirees or maintain the IEP are terminated, the Coal Act Retirees **will continue to receive their benefits from the Coal Act Funds**, which are ultimately backstopped by the federal government.

12. After the United States Trustee, the Debtors, and the Coal Act Funds were all unable to locate any Coal Act retiree willing to serve on a section 1114 committee, the Debtors moved the Court to appoint an independent fiduciary to represent the interests of the Coal Act Retirees in the section 1114 process. *See Debtors’ Emergency Motion to Appoint Allison D. Byman as the Authorized Representative of all Retirees, Spouses, and Their Eligible Dependents Receiving Coal Act Benefits* [Docket No. 886].

13. On January 2, 2019, the Court held a hearing on the Debtors' emergency motion and appointed three independent representatives for the Coal Act Retirees to facilitate negotiations. *See Order Granting Emergency Motion* [Docket No. 1023]. The representatives chosen by the Court were Allison Byman, Hon. Leif Clark, and Sylvia Mayer (together, the "Coal Act Retirees Committee").

14. The Coal Act Funds have contended that the "Court lacked authority under Bankruptcy Code section 105(a) to appoint the Coal Act Retiree Representatives in lieu of a committee of retirees."⁵ The Coal Act Funds made this same objection when the Court appointed the Coal Act Retirees' Committee and the Court rejected it. 1-3-19 Hr'g Tr. at 37-38.

15. Despite the Coal Act Funds' position, the Court's decision to appoint a committee for Coal Act Retirees is well-grounded in fact and law. Section 105(a) grants bankruptcy judges "broad authority ... to take any action that is necessary or appropriate 'to prevent an abuse of process.'" *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 375 (2007). Section 105(a) is "interpret[ed] liberally," so long as action taken pursuant to § 105(a) is "consistent with the rest of the Bankruptcy Code." *In re Zale Corp.*, 62 F.3d 746, 760 (5th Cir. 1995).

16. Appointing a committee of independent fiduciaries to represent the interests of Coal Act beneficiaries in the section 1114 process where neither the UMWA nor any affected retiree would agree to serve in that role is plainly consistent with section 1114 in particular and the Bankruptcy Code in general.⁶ Congress did not intend to allow a union and affected retirees to unilaterally prevent section 1114 relief, no matter how necessary or fair such relief may be, simply by refusing to serve as the "authorized representative" for section 1114 purposes.

⁵ See Dkt. 1213, Coal Act Funds' Objection to Section 1113/1114 Motion.

⁶ This Court rejected the Coal Act Funds' position on section 1114 and held that Coal Act obligations can in fact be rejected through the section 1114 process. *See In re Westmoreland Coal Co.*, No. 18-35672, 2018 WL 6920227, at *8 (Bankr. S.D. Tex. Dec. 29, 2018).

17. If the Coal Act Funds' position were adopted, unions and retirees would always refuse to serve as authorized representatives, rendering section 1114 a nullity. Accordingly, the Coal Act Funds cite no authority to support their assertions, and the Debtors are aware of none. In light of the controlling case law interpreting section 105, the express language and policies of section 1114, and the facts of this case, the Court properly appointed the Coal Act Retirees' Committee.

18. Following appointment of the Coal Act Retirees Committee, the Debtors met with the members of the committee and provided substantial diligence. During those conferences, the Debtors discussed their proposal pursuant to section 1114 to the Coal Act Retirees Committee.⁷ The Debtors made several other proposals, as did the Coal Act Retirees Committee.

19. In general, the parties' proposals addressed four topics: (a) maintenance of the Debtors' IEP for a discrete period of time so that Coal Act Retirees in the IEP would not have any gap in coverage; (b) ensuring that people were available to provide transition services and information to retirees who asked questions about their coverage; (c) termination (or maintenance for a discrete period of time) of the Debtors' obligations to make premium contributions to the 1992 Fund and/or the CBF; and (d) permitting the 1992 Fund access to the Surety Bonds that had been posted by the Debtors. The Debtors lacked the funds to pay these obligations, and the Coal Act Retirees Committee was focused on making sure that the retirees would be protected.

20. The Debtors also provided substantial diligence to the Coal Act Retirees Committee so that the Coal Act Retirees Committee could evaluate the Debtors' proposal, and the parties had extensive, good faith, arms' length negotiations concerning the path forward.

⁷ See ECF 886, ¶ 18 ("The WLB Debtors' Section 1114 proposal, as it relates to the Coal Act retirees, is very straightforward. The WLB Debtors propose to pay in full all of their Coal Act obligations through the effective date of a chapter 11 plan for the WLB Debtors (the 'Effective Date'). On the Effective Date, all of the Debtors' Coal Act obligations would terminate, and the responsibility for payment of those Coal Act obligations would be transferred to the Coal Act Funds.")

21. On January 16, 2019, the Debtors filed the *Debtors' Motion Pursuant to 11 U.S.C. §§ 105, 1113 and 1114 for an Order Authorizing (But Not Directing) the Debtors to (A) Reject Certain Collective Bargaining Agreements, (B) Implement the Debtors' Proposal, and (C) Modify Certain Retiree Benefits* [Docket No. 1091] (the "1113/1114 Motion"), seeking to, among other things, modify retiree benefits under the Coal Act. The Debtors asked that the Court grant them authority to, among other things, modify all Coal Act obligations and to impose the terms of the Debtors' proposals with respect thereto.

22. As the Debtors described in the 1113/1114 Motion, their obligations related to the Coal Act are substantial. Specifically, the net present value of the Debtors' obligations to support their Individual Employer Plan ("IEP") is \$98.1 million, separate and independent from the Debtors' obligations to pay premiums to the Coal Act Funds. The Debtors do not have the funds to continue making these payments, and the Debtors have no choice but to sell their assets. Not surprisingly, no buyer is willing to acquire the Debtors' assets subject to any Coal Act obligations, meaning that the Debtors need to rid themselves of those obligations to reorganize.

23. The Coal Act Funds objected to the 1113/1114 Motion,⁸ and the Coal Act Retirees Committee subsequently filed a response and joinder to the Coal Act Funds' objection.⁹ In the Committee Objection, the Coal Act Retirees Committee contested the necessity of the relief sought by the Debtors, the alleged lack of fairness of the relief sought by the Debtors, and the Debtors' request for retroactive application of the proposed modifications. *See* Committee Objection ¶ 6.

⁸ *See Coal Act Funds' Objection to Debtors' Motion Pursuant to 11 U.S.C. §§ 105, 1113 and 1114 for an Order Authorizing (But Not Directing) the Debtors to (A) Reject Certain Collective Bargaining Agreements, (B) Implement the Debtors' Proposal, and (C) Modify Certain Retiree Benefits* [Docket No. 1213].

⁹ *Response of the Coal Act Retirees' Committee to Debtors' Motion Pursuant to 11 U.S.C. §§ 105, 1113 and 1114 for an Order Authorizing (But Not Directing) the Debtors to (A) Reject Certain Collective Bargaining Agreements, (B) Implement the Debtors' Proposal, and (C) Modify Certain Retiree Benefits, and 2) Establishing Response Deadline* [Docket No. 1236] (the "Committee Objection").

Further, the Coal Act Retirees Committee argued that “the Debtors must remain obligated to facilitate the transition of Coal Act Retirees from the IEP to the 1992 Plan so as to assure that there is no gap in benefit coverage and a smooth process.” *See* Committee Objection ¶ 8.

24. Following the filing of the 1113/1114 Motion, the WLB Debtors and the Coal Act Retirees Committee continued discussions in the hopes of reaching a consensual agreement. Ultimately, the WLB Debtors and the Coal Act Retirees Committee were able to reach the Settlement. Pursuant to the Settlement, the WLB Debtors have agreed to provide an orderly transition for their individual employer plan (“IEP”) beneficiaries to move from the WLB Debtors to the Coal Act Funds and ensure that no Coal Act Retiree experiences a “gap in benefit coverage” as a result of said transition. The WLB Debtors will maintain their IEP for 90 days, and will cover claims related to services rendered during that 90 day period. The Coal Act Funds will be able to access the Surety Bonds. For the avoidance of doubt, all other Coal Act obligations will be terminated when the WLB Debtors’ assets are sold. The Settlement is memorialized in the Term Sheet and summarized in further detail below.

Summary of the Material Terms of the Settlement

25. The following summary is provided for illustrative purposes only and is qualified in its entirety by reference to the Term Sheet. In the event of any inconsistency between this summary and the Term Sheet, the Term Sheet controls in all respects.

- ***The Core Asset Sale.*** The Stalking Horse will be deemed to qualify under the safe harbor set forth in section 9701(c)(8) of the Coal Act and therefore will not be a “successor in interest” nor a successor to any “signatory operator” or related person (as those terms are used in the Coal Act and federal labor law).
- ***The IEP.*** Subject to the transition period discussed below, the WLB Debtors shall continue to comply with section 9711 of the Coal Act by providing Retiree Benefits (as defined in section 1114 of the Bankruptcy Code) to the Coal Act Retirees through the IEP until the earlier of (a) the closing of the sale of the Core Assets to the Stalking Horse (or substantially any other purchaser under

substantially the same terms) or (b) conversion of all of the WLB cases to chapter 7 (the “CDB Date”).

- ***Surety Bonds.*** The Confirmation Order (as defined below) shall authorize and approve a draw, for the benefit of the UMWA 1992 Plan, as of the CDB Date, on (a) the surety bonds for the benefit of the UMWA 1992 Plan in the amount of \$8,750,000 (Zurich bond #90038828) and \$318,000 (Travelers bond #104059215). The Debtors and the Stalking Horse shall be deemed to have waived defenses or objections to such a draw and any right to claw back any funds drawn on such surety bonds. Such waiver shall be binding on any successors in interest of such parties, including any chapter 7 trustee or chapter 11 trustee, and any plan administrator or liquidating trustee created under the Plan.
- ***Premium Obligations.*** The WLB Debtors shall comply with the premium obligations set forth in sections 9704 and 9712 of the Coal Act until the CDB Date. After the CDB Date, the WLB Debtors shall have no obligations to pay any premiums to either of the Coal Act Funds.
- ***Temporary Continuation of IEP Coverage.*** The WLB Debtors shall facilitate the transition of Coal Act Retirees from the Debtors’ IEP to the UMWA 1992 Plan so as to assure there is no gap in benefit coverage and a smooth process. To this end, at a minimum, the WLB Debtors shall provide the following transition services:
 - As soon as practicable following entry of a confirmation order confirming the proposed chapter 11 plan and authorizing termination of the Coal Act Retirees’ benefits consistent with the agreement set forth in the Term Sheet (the “Confirmation Order”) and to the extent not previously provided, the Debtors shall transmit to the Coal Act Funds the requisite information to facilitate an orderly transition;
 - The Confirmation Order shall direct the UMWA 1992 Plan to select an enrollment date (the “Enrollment Date”) for its coverage of the transferred beneficiaries to begin, *provided, however*, that such Enrollment Date shall occur within 90 days after the CDB Date. Prior to the Enrollment Date, the transferred beneficiaries shall continue to be covered by the IEP. On and after the Enrollment Date, the transferred beneficiaries shall be covered by the UMWA 1992 Plan.
 - Westmoreland Coal Company (“WLB”) and its carrier and pharmacy benefits manager shall be directed to send the required Medicare written notice to the beneficiaries and to Medicare, to the effect that WLB is terminating coverage and the UMWA 1992 Plan is enrolling the beneficiaries for coverage to transition on the Enrollment Date.

- The Confirmation Order shall direct the UMWA 1992 Plan to send enrollment/information packets and insurance cards to the beneficiaries, and enroll the eligible beneficiaries so that their coverage begins at 12:01 a.m. on the Enrollment Date. WLB will terminate its coverage of the beneficiaries effective midnight before the Enrollment Date.
- Claims for covered benefits received after the Enrollment Date for dates of service prior to the Enrollment Date will be paid by WLB.
- **Bar on Further Modification.** The Debtors shall be barred from (a) seeking any additional relief under section 1114 of the Bankruptcy Code regarding the Coal Act Retirees' benefits, and (b) further modifying, changing or terminating the retiree benefits for the Coal Act Retirees prior to the applicable CDB Dates.
- **Non-Coal Act Retirees.** The settlement contained herein shall **not** be used in any way to reduce any amounts previously offered to the UMWA to address retiree benefits for retirees not protected by the Coal Act.
- **Plan Support.** Provided that the settlement is incorporated into the WLB Debtors' chapter 11 plan and Confirmation Order, then the Coal Act Retirees Committee shall (a) withdraw their objection to the 1113/1114 Motion and (b) support confirmation of the WLB Debtors' chapter 11 plan.
- **Successors.** This agreement shall be binding on (a) any successor or to assignee of the Debtors, (b) the Stalking Horse or any other purchaser of the Core Assets, and (c) chapter 7 trustee, chapter 11 trustee, chapter 11 plan administrator, or a liquidating trustee created under a confirmed chapter 11 plan.

26. The Settlement is in the best interest of the WLB Debtors' estates and the best interests of the Coal Act Retirees. The Stalking Horse has agreed to pay the costs of this Settlement, which are estimated at \$1.5 million (not including the Surety Bonds, which are an additional approximately \$9 million in consideration going directly to the Coal Act Funds).

27. Absent a Settlement, the WLB Debtors would have no choice but to pursue their Section 1113/1114 Motion and ask that all of their Coal Act-related obligations to be terminated immediately. With or without the settlement, the ultimate outcome for the Coal Act Retirees is the same – the Coal Act Retirees will be covered by plans paid for by the Coal Act Funds. However, the settlement insures that none of the Coal Act Retirees experience any lapse in coverage and provides for a smooth and orderly transition of coverage for approximately 698 Coal

Act Retirees from IEP coverage to UMWA 1992 Plan coverage. The Stalking Horse has agreed to contribute the funds necessary to pay for this transition.

Basis for Relief

28. Bankruptcy Rule 9019(a) provides, in relevant part: “On motion by the [debtor in possession] and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, . . . and indenture trustee as provided in Rule 2002 and to any other entity as the court may direct.” Fed. R. Bankr. P. 9019(a).

29. “To minimize litigation and expedite the administration of a bankruptcy estate, compromises are favored in bankruptcy.” *Myers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3d Cir. 1996) (internal quotations omitted). Settlements are considered a “normal part of the process of reorganization” and a “desirable and wise method[s] of bringing to a close proceedings otherwise lengthy, complicated, and costly.” *Rivercity v. Herpel (In re Jackson Brewing Co.)*, 624 F.2d 599, 602 (5th Cir. 1980) (citations omitted) (decided under the Bankruptcy Act).

30. Pursuant to Bankruptcy Rule 9019(a), a bankruptcy court may, after appropriate notice and a hearing, approve a compromise or settlement so long as the proposed settlement is fair, equitable, and in the best interest of the estate. *See In re Age Ref. Inc.*, 801 F.3d 530, 540 (5th Cir. 2015). Ultimately, approval of a compromise is within the “sound discretion” of the bankruptcy court. *See, e.g., United States v. AWECO, Inc. (In re AWECO, Inc.)*, 725 F.2d 293, 297 (5th Cir. 1984); *Jackson Brewing Co.*, 624 F.2d 599, 602-603 (same). Generally, the role of the bankruptcy court is not to decide the issues in dispute when evaluating a settlement. *Watts v. Williams*, 154 B.R. 56, 59 (S.D. Tex. 1993). Instead, the court should determine whether the settlement as a whole is fair and equitable. *Protective Comm. for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968).

31. The Fifth Circuit has established a three-factor balancing test under which bankruptcy courts are to analyze proposed settlements. The factors a court must consider in determining whether a compromise is “fair, equitable, and within the best interest of the estate are: ‘(1) the probability of success in litigating the claim subject to settlement, with due consideration for the uncertainty in fact and law; (2) the complexity and likely duration of litigation and any attendant expense, inconvenience, and delay; and (3) all other factors bearing on the wisdom of the compromise.’” *In re Roqumore*, 393 B.R. 474, 479 (Bankr. S.D. Tex. 2008) (citing the factors set forth by the court in *Jackson Brewing*); *see also Age Ref. Inc.*, 801 F.3d at 540 (same).

32. The Fifth Circuit has specified two additional factors that bear on the decision to approve a proposed settlement. **First**, the court should consider “the paramount interest of creditors with proper deference to their reasonable views.” *Conn. Gen. Life Ins. Co. v. United Cos. Fin. Corp. (In re Foster Mortg. Corp.)*, 68 F.3d 914, 917 (5th Cir. 1995); *see also Age Ref. Inc.*, 801 F.3d at 540 (noting the *Foster Mortgage* factors). “While the desires of the creditors are not binding, a court ‘should carefully consider the wishes of the majority of the creditors.’” *Foster Mortgage*, 68 F.3d at 917 (quoting *In re Transcontinental Energy Corp.*, 764 F.2d 1296, 1299 (9th Cir. 1985)). **Second**, the court should consider the “extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion.” *Age Ref. Inc.*, 801 F.3d at 540; *Foster Mortg. Corp.*, 68 F.3d at 918 (citations omitted).

33. Sections 1113 and 1114 of the Bankruptcy Code, like Bankruptcy Rule 9019, are designed to encourage settlements. In fact, the underlying rationale of both sections is to foster negotiations and modifications of a Debtor’s collective bargaining agreements and retiree benefit obligations *by agreement*. *See, e.g., In re Walter Energy, Inc.*, 542 B.R. 859, 876 (Bankr. N.D. Ala. 2015) (“Section 1113 thereby encourages the debtor-employer and the union to reach a

negotiated settlement. *See* Collier on Bankruptcy ¶ 1113.01 (citing the language and history of section 1113.); *In re Nw. Airlines Corp.*, 346 B.R. 307, 325 (Bankr. S.D.N.Y. 2006) (“the purpose of § 1113” . . . “is to encourage continued negotiation between the parties”).

34. Here, the Debtors believe that they can establish two things clearly: (a) they reached a deal with authorized representatives of Coal Act Retirees pursuant to 11 U.S.C. § 1114 after extensive, good faith negotiations concerning the Debtors’ proposal to terminate all Coal Act obligations effective on the sale of the WLB Debtors’ assets; and (b) that, absent an agreement, they would have no funding for Coal Act-related obligations at all, and would need to terminate all of them immediately. The Settlement also addresses a potential objection to confirmation from the Coal Act Retiree Representatives and will permit the WLB Debtors to streamline the confirmation hearing. Accordingly, this Settlement is the best possible outcome for everyone: it clarifies the Debtors’ obligations with respect to the Coal Act, facilitates the going concern sale of the WLB Debtors’ assets, and uses funding that the Stalking Horse has agreed to provide for the most logical purpose—to ensure a smooth transition for the Coal Act retirees.

35. The Debtors respectfully submit that the Settlement satisfies the standards for approval pursuant to Bankruptcy Rule 9019 and section 363 of the Bankruptcy Code, and that the Court should therefore approve the Settlement as part of the Plan and the Confirmation Order. The Settlement, which is the product of extensive good-faith, arm’s-length discussions between the Debtors and the Coal Act Retirees Committee, resolves the Coal Act Retirees Committee’s objection to the 1113/1114 Motion and ensures that no Coal Act Retiree shall be harmed by the transition of benefits from the WLB Debtors to the Coal Act Funds. Accordingly, the Debtors respectfully request that the Court approve the Settlement and authorize the Debtors to incorporate the Term Sheet into the proposed Plan.

Waiver of Bankruptcy Rule 6004(a) and 6004(h)

36. To implement the foregoing successfully, the Debtors request that the Court enter an order providing that notice of the relief requested herein satisfies Bankruptcy Rule 6004(a) and that the Debtors have established cause to exclude such relief from the 14-day stay period under Bankruptcy Rule 6004(h).

Emergency Consideration

37. Pursuant to Bankruptcy Local Rule 9013-1(i), the Debtors respectfully request emergency consideration of this Motion at the hearing to consideration confirmation of the WLB Debtors' plan that is scheduled to commence at 1:00 p.m. (Central Time) on February 26, 2019. More specifically, the Term Sheet requires the WLB Debtors to incorporate the terms thereof into the WLB Debtors' chapter 11 plan and confirmation order. Furthermore, the WLB Debtors announced their intention to set this matter for hearing on February 26, 2019, in open court during the hearing on the Section 1113/1114 Motion. Finally, the Debtors expect all of their stakeholders to attend the confirmation hearing. Accordingly, the Debtors respectfully request that the Court consider the relief requested in this Motion on an emergency basis so the Settlement may be heard concurrently with the proposed confirmation of the WLB Debtors' chapter 11 plan.

Notice

38. The Debtors will provide notice of this Motion to the following parties or their respective counsel: (a) the Office of the United States Trustee for the Southern District of Texas; (b) the Official Committee of Unsecured Creditors; (c) the indenture trustee under the WLB Debtors' 8.75% senior secured notes due 2022; (d) the ad hoc group of lenders under the WLB Debtors' prepetition term loan facility due 2020 and the WLB Debtors' 8.75% senior secured notes due 2022; (e) the administrative agent under the WLB Debtors' prepetition term loan facility due 2020; (f) the administrative agent under the WMLP Debtors' term loan facility

due 2018; (g) the ad hoc committee of certain lenders under the WMLP Debtors' term loan facility due 2018; (h) the administrative agent under the WLB Debtors' debtor-in-possession financing facility; (i) the lenders under the WLB Debtors' debtor-in-possession financing facility; (j) any statutory committee appointed in these cases; (k) the United States Attorney's Office for the Southern District of Texas; (l) the Internal Revenue Service; (m) the Environmental Protection Agency and similar state environmental agencies for states in which the Debtors conduct business; (n) the offices of the attorneys general for the states in which the Debtors operate; (o) the Securities and Exchange Commission; (p) the Coal Act Funds; (q) the Coal Act Retiree Committee; (r) the UMWA; and (s) any other party that has requested notice pursuant to Bankruptcy Rule 2002. The Debtors submit that, in light of the nature of the relief requested, no other or further notice need be given.

WHEREFORE, the Debtors respectfully request that the Court enter the Order, granting the relief requested herein and such other relief as the Court deems appropriate under the circumstances.

Houston, Texas
February 22, 2019

/s/ Patricia B. Tomasco

Patricia B. Tomasco (Bar No. 01797600)
Matthew D. Cavanaugh (Bar No. 24062656)
JACKSON WALKER L.L.P.
1401 McKinney Street, Suite 1900
Houston, Texas 77010
Telephone: (713) 752-4200
Facsimile: (713) 752-4221
Email: ptomasco@jw.com
mcavanaugh@jw.com

James H.M. Sprayregen, P.C.
Michael B. Slade (Bar No. 24013521)
Gregory F. Pesce (admitted *pro hac vice*)
KIRKLAND & ELLIS LLP
KIRKLAND & ELLIS INTERNATIONAL LLP
300 North LaSalle
Chicago, Illinois 60654
Telephone: (312) 862-2000
Facsimile: (312) 862-2200
Email: james.sprayregen@kirkland.com
michael.slade@kirkland.com
gregory.pesce@kirkland.com

-and-

Edward O. Sassower, P.C.
Stephen E. Hessler, P.C. (admitted *pro hac vice*)
KIRKLAND & ELLIS LLP
KIRKLAND & ELLIS INTERNATIONAL LLP
601 Lexington Avenue
New York, New York 10022
Telephone: (212) 446-4800
Facsimile: (212) 446-4900
Email: edward.sassower@kirkland.com
stephen.hessler@kirkland.com

Counsel to the Debtors

Certificate of Service

I certify that on February 22, 2019, I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas.

/s/ Patricia B. Tomasco
Patricia B. Tomasco

Exhibit A

Proposed Order

**UNITED STATES BANKRUPTCY COURT
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)
)	
)	Re: Docket No. __

**ORDER AUTHORIZING AND APPROVING SETTLEMENT TERM SHEET
BETWEEN THE WLB DEBTORS AND THE COAL ACT RETIREES COMMITTEE**

Upon the motion (the “Motion”)² of the above-captioned Debtors for entry of this Order, approving a settlement consistent with the Term Sheet (the “Settlement”) attached hereto as **Annex 1**, by and among the WLB Debtors and the Coal Act Retirees Committee, all as more fully set forth in the Motion; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. § 1334; and that this Court may enter a final order consistent with Article III of the United States Constitution; and this Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and this Court having found that the parties negotiated the terms and conditions of the Settlement in good faith, at arm’s length, and free of any collusion; and this Court having found that the terms and conditions of the Settlement are fair, equitable, reasonable and in the best interests of the Debtors, their respective estates, creditors and equity holders, and is a valid and sound exercise of the business judgment of the

¹ Due to the large number of debtors in these chapter 11 cases, for which joint administration has been granted, 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’ 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 Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Motion.

Debtors and should be approved; and this Court having found that the Debtors' notice of the Motion and opportunity for a hearing on the Motion were appropriate under the circumstances and no other notice need be provided; and this Court having found that there is good cause for waiving the stay referred to in Bankruptcy Rule 6004(h), to the extent it is applicable; and this Court having reviewed the Motion and having heard the statements in support of the relief requested therein at a hearing before this Court (the "Hearing"); and this Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor, it is HEREBY ORDERED THAT.

1. The Motion is granted as provided herein.
2. The terms of the Settlement attached hereto as **Annex 1** are approved.
3. The Debtors are hereby authorized and directed to effectuate the Settlement consistent with the Term Sheet, and the Debtors are authorized to enter into, perform, execute, and deliver all documents, and take all actions, necessary to immediately continue and fully implement the Settlement in accordance with the terms and conditions set forth in the Term Sheet, all of which are hereby approved.
4. Upon the Debtors' entry into the Settlement, it shall be binding on them, their estates, and any trustee appointed in these cases.
5. Notwithstanding Bankruptcy Rule 6004(h), the terms and conditions of this Order are immediately effective and enforceable upon its entry.
6. All time periods set forth in this Order shall be calculated in accordance with Bankruptcy Rule 9006(a).

7. This Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Order.

Dated: _____, 2019
Houston, Texas

DAVID R. JONES
UNITED STATES BANKRUPTCY JUDGE

Annex 1
Term Sheet

Term Sheet For Settlement Between The WLB Debtors,¹ The Section 1114 Coal Act Retirees Committee,² And The Stalking Horse,³ Regarding The WLB Debtors' Liabilities Under The Coal Act⁴

Westmoreland Coal Company and its subsidiary Basin Resources, Inc. (collectively, "**WCC**") provide retiree medical benefits to employees (or their eligible dependents) previously affiliated with the United Mine Workers of America ("**UMWA**") with respect to WCC's former "Heritage" operations in North Carolina and Virginia (collectively, "**Heritage Retirees**"), including benefits articulated in the Coal Act. Under the Coal Act, the WLB Debtors are currently obligated to pay premiums to the UMWA 1992 Benefit Plan ("**1992 Plan**") and the UMWA Combined Benefit Fund ("**Combined Fund**") and, collectively with the 1992 Plan, "**Coal Act Funds**"). In addition, under the Coal Act, the WLB Debtors are obligated to provide health benefits coverage to certain Heritage Retirees. Of the Heritage Retirees, those who are protected by the Coal Act are referred to herein as "**Coal Act Retirees**" and those who are not protected by the Coal Act are referred to herein as "**Non-Coal Act Retirees.**"

The WLB Debtors shall file a motion pursuant to Federal Rule of Bankruptcy Procedure 9019 seeking approval, as part of a modified Plan and Confirmation Order,⁵ of this Term Sheet, reflecting agreement between the Debtors, the Coal Act Retirees Committee, and the Stalking Horse, to settle and resolve the WLB Debtors' obligations under the Coal Act and with respect to the Coal Act Retirees, and to settle and resolve the Debtors' motion, filed at Docket 1091 ("**1114 Motion**"), as it relates to the Coal Act and the Coal Act Retirees, with the terms listed below.

1. **Safe Harbor.** Following consummation of the proposed sale of the **Core Assets** (as that term is defined in the 1114 Motion) to the Stalking Horse, the Stalking Horse will be deemed to qualify under the safe harbor set forth in Section 9701(c)(8) of the Coal Act and therefore will not be a "successor in interest" nor a successor to any "signatory operator" or related person as those terms are used in the Coal Act and federal labor law.

¹ The "**WLB Debtors**" includes Westmoreland Coal Company and its Debtor affiliates, including all successors-in-interest (but for the avoidance of doubt, excluding the Stalking Horse), with the exception of Westmoreland Resources Partners, LP ("**WMLP**") and WMLP's subsidiaries.

² Refer to the January 10, 2019 order, filed at Docket No. 1023, appointing the representatives to this committee to serve as representatives on behalf of Coal Act Retirees (defined below) in connection with the bankruptcy cases of the WLB Debtors. This Committee is referred to herein as the "**Coal Act Retirees Committee**".

³ The "**Stalking Horse**" refers to the ad hoc group of approximately 87% of WLB Debtors' first lien holders who are acquiring the Core Assets pursuant to the WLB Debtors' chapter 11 plan.

⁴ Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. § 9701, *et seq.* ("**Coal Act**").

⁵ The Joint Chapter 11 Plan of Westmoreland Coal Company and Certain Debtor Affiliates [Docket No. 788] (as further modified, amended, or supplemented in accordance with the terms thereof, the "**Plan**") and the order confirming the WLB Debtors' Plan ("**Confirmation Order**"), as modified to, among other things, incorporate this Term Sheet.

2. The IEP: Subject to Paragraph 5(b) below, the WLB Debtors shall continue to comply with Section 9711 of the Coal Act by providing Retiree Benefits as defined in Section 1114 of the Bankruptcy Code to the Coal Act Retirees through an individual employer plan until the earlier of (a) the closing of the sale of the Core Assets to the Stalking Horse (or any other purchaser under substantially the same terms) or (b) conversion of all of the WLB Debtors' cases to chapter 7 (the "**CDB Date**").
3. Surety Bonds: The Confirmation Order shall authorize and approve a draw, for benefit of the 1992 Plan, as of the CDB Date on (a) the surety bond issued for the benefit of the 1992 Plan in the amount of \$8,750,000 (Zurich bond #90038828), and (b) the surety bond issued for the benefit of the 1992 Plan in the amount of \$318,000 (Traveler's bond #104059215). The Debtors and the Stalking Horse shall be deemed to have waived defenses or objections to such a draw and any right to claw back any funds drawn on such surety bonds. Such waiver shall be binding on any successors of such parties, including any chapter 7 or chapter 11 trustee, or any plan administrator or liquidating trustee created under the Plan.
4. Premium Obligations: The WLB Debtors shall comply with the premium obligations set forth in Section 9704 and Section 9712 of the Coal Act until the CDB Date. This date shall be referred to herein as the "**Premium End Date**." The WLB Debtors shall have no obligations to make premium contributions to the Coal Act Funds at any time following the Premium End Date.
5. Temporary Continuation of IEP Coverage: The WLB Debtors shall facilitate the transition of Coal Act Retirees from the IEP to the 1992 Plan so as to assure that there is no gap in benefit coverage and a smooth process. To this end, at a minimum, the WLB Debtors shall provide the following transition services:
 - a. As soon as practicable, to the extent not previously provided, the Debtors shall transmit to the Coal Act Funds: (i) a roster of all beneficiaries with date of birth, social security number and current contact information; (ii) a copy of its benefit plan(s); (iii) designated liaisons from WCC's internal benefits staff, pharmacy benefits manager, and claims administrator/carrier, together with authorization to immediately begin coordination with the 1992 Plan and (iv) such other information as may be requested by the 1992 Plan as reasonably necessary to facilitate the transition of process;
 - b. The Confirmation Order shall direct the 1992 Plan to select an enrollment date ("**Enrollment Date**") for its coverage of the transferred beneficiaries to begin, provided, however, that such Enrollment Date shall occur within 90 days after the CDB Date. Notwithstanding Paragraph 2 above, prior to the Enrollment Date, the transferred beneficiaries shall continue to be covered by the IEP. On and after the Enrollment Date, the transferred beneficiaries shall be covered by the 1992 Plan.
 - c. WCC and its carrier and pharmacy benefits manager shall be directed to send the required Medicare written notice to the beneficiaries and to Medicare, to the

effect that WCC is terminating coverage and the 1992 Plan is enrolling the beneficiaries for coverage to transition on the Enrollment Date.

- d. The Confirmation Order shall direct the 1992 Plan to send enrollment/information packets and insurance cards to the beneficiaries, and enroll the eligible beneficiaries so that their coverage begins at 12:01 a.m. on the Enrollment Date. WCC will terminate its coverage of the beneficiaries effective midnight of the night before the Enrollment Date.
 - e. Claims for covered benefits received after the Enrollment Date for dates of service prior to the Enrollment Date will be paid by WCC.
 - f. Any communications to the Coal Act Retirees from the Coal Act Retirees Committee regarding participation in the IEP or termination thereof or necessary to communicate this settlement shall first be provided to the WLB Debtors and the Stalking Horse with a reasonable opportunity to review and comment to assure that such communications do not alter or vary the terms of this settlement. The parties shall resolve any differences promptly and in good faith.
6. Bar on Further Modifications: The Debtors shall be barred from (a) seeking any additional relief under Section 1114 regarding the Coal Act Retirees' benefits, and (b) further modifying, changing or terminating the Retiree Benefits for the Coal Act Retirees prior to the applicable CDB Date.
 7. Non-Coal Act Retirees: The settlement contained herein shall **not** be used in any way to reduce any amounts previously offered to the UMWA in the 1114 Motion, including, but not limited to, the proposal set forth in Exhibit 2 to the 1114 Motion.
 8. Plan Support: The Coal Act Retirees Committee shall (a) withdraw their objection to the 1114 Motion and (b) support confirmation of the Plan.
 9. Successors: This agreement shall be binding on (a) any successor to or assignee of the Debtors, (b) the Stalking Horse or any other purchaser of the Core Assets, and (c) Chapter 7 trustee, Chapter 11 trustee, chapter 11 plan administrator, or a liquidating trustee created under a confirmed Ch. 11 Plan.

Section 1114 Coal Act Retirees Committee

By: <u>/s/ Allison Byman</u> Allison Byman, Esq. adb@bymanlaw.com	By: <u>/s/ Leif Clark</u> Hon. Leif Clark (Ret.) lmclark@leifmclark.com	By: <u>/s/ Sylvia Mayer</u> Sylvia Mayer, Esq. smayer@smayerlaw.com
---	---	---

WLB Debtors

By: <u>/s/ Michael B. Slade</u> Michael B. Slade michael.slade@kirkland.com	By: <u>/s/ Gregory Pesce</u> Gregory Pesce gregory.pesce@kirkland.com	By: <u>/s/ Greg Ossi</u> Gregory Ossi greg.ossi@dbr.com
---	---	--

Stalking Horse

By: <u>/s/ Thomas Mayer</u> Thomas Mayer tmayer@kramerlevin.com	By: <u>/s/ Philip Bentley</u> Philip Bentley pbentley@kramerlevin.com	By: <u>/s/ John Higgins</u> John Higgins jhiggins@porterhedges.com
---	---	---