UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	)	Chapter 11
WESTMORELAND COAL COMPANY, *et al.*,[1]	)	Case No. 18-35672 (DRJ)
Debtors.	)	(Jointly Administered)

WLB DEBTORS' (I) MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION OF AMENDED JOINT CHAPTER 11 PLAN OF WESTMORELAND COAL COMPANY AND CERTAIN OF ITS DEBTOR AFFILIATES AND (II) RESPONSE TO CERTAIN OBJECTIONS THERETO

[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.

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Certain of the above-captioned debtors and debtors in possession (collectively, the "WLB Debtors")[2] file this memorandum of law (this "Memorandum"), and respectfully state as follows, in support of confirmation of the *Amended Joint Chapter 11 Plan of Westmoreland Coal Company and Certain of Its Debtor Affiliates* [Docket No. 1457] (as further modified, amended, or supplemented from time to time in accordance with the terms thereof, the "Plan"):[3]

Preliminary Statement

1. The WLB Debtors stand poised to confirm a nearly fully consensual plan of reorganization containing value-maximizing transactions that preserve their businesses as a going concern. Both prior to and throughout the Chapter 11 Cases, the WLB Debtors engaged in good faith, hard-fought negotiations with their key constituents on the terms of their restructuring. The Plan is a culmination of those robust discussions and embodies a global resolution of issues between the WLB Debtors and all of their major stakeholders: the Consenting Stakeholders (who include both prepetition secured creditors and DIP lenders); the WMLP Debtors; the MLP Secured Lenders; the Committee; the PBGC; the Coal Act Retirees Committee; and the International Union of Operating Engineers, among others. Accordingly, the Plan, which satisfies all of the necessary requirements to confirmation, should be confirmed.

2. The Plan is the product of arm's-length and good faith negotiations among the WLB Debtors and their key stakeholders, the terms of which are set forth in an interlocking web of settlement agreements. And while discussions with certain constituents remain ongoing, the WLB Debtors are optimistic that they will reach a consensual resolution with the relevant parties prior

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[2] The WLB Debtors are those Debtors except for Westmoreland Resources GP, LLC, Westmoreland Resource Partners, LP, and their subsidiaries (collectively, the "WMLP Debtors").

[3] Capitalized terms used but not defined herein have the meanings ascribed to them in the Plan.

to the confirmation hearing. More specifically, the WLB Debtors have reached an agreement in principle with Talen Montana, LLC and certain other parties pursuant to which the WLB Debtors intend to assume the coal supply agreements for their Colstrip, Montana mine. Additionally, the WLB Debtors are engaged in discussions with the Committee regarding its objection to certain aspects of the inter-estate settlement with the WMLP Debtors and the MLP Secured Lenders. While those discussions remain ongoing, the WLB Debtors, as fiduciaries for all of their stakeholders, are working to forge consensus regarding this important settlement.

3. Therefore, at this time, there remain only a handful of unresolved objections to confirmation of the Plan that the WLB Debtors expect to address on the merits at next week's hearing: (a) the objections filed by the Office of the United States Trustee (the "U.S. Trustee") and the Securities & Exchange Commission (the "SEC"), which object to aspects of the Plan's release, exculpation, and injunction provisions; (b) the Coal Act Funds' objection to the WLB Debtors' settlement with the Coal Act Retiree Committee, the terms of which were announced at the section 1113/1114 hearing; and (c) the UMWA's objection to the Plan, which makes the same arguments that were overruled at the section 1113/1114 hearing.[4] As set forth below, the remaining objections lack any basis in fact or law, and the WLB Debtors respectfully request that the Court overrule them. Accordingly, the WLB Debtors respectfully request that the Court confirm the Plan.

[4] Additionally, PacifiCorp, a creditor of the WMLP Debtors' Kemmerer mine, filed a reservation of rights that the WLB Debtors and the Purchaser must demonstrate that they can continue to provide services to the Kemmerer mine. Given that the Intercompany Settlement (as defined below) contemplates that the WLB Debtors and the Purchaser shall provide transition services to the Kemmerer mine in exchange for higher payments from the WMLP Debtors than they were required to pay under the prior Shared Services Agreement, PacifiCorp's suggestion is meritless.

Background

I. Restructuring Transactions, Sale Transactions, and Committee Settlement.

4. Prior to the Petition Date, the WLB Debtors suffered substantially decreased profit margins and cash flows due to, among other things, the precipitous decline in the coal market, lack of growth in energy demand generally, and a stricter regulatory environment. In an attempt to maintain their viability, the WLB Debtors took several steps to effectuate a restructuring in a holistic manner. After over six months of extensive negotiations with the Consenting Stakeholders, the WLB Debtors obtained a framework to achieve this objective: a $110 million bridge loan facility provided by an ad hoc group of approximately 87 percent of the WLB Debtors' existing first lien debt (collectively, the "Ad Hoc Group") funded the WLB Debtors' restructuring, giving the WLB Debtors the necessary liquidity to remain out of bankruptcy for several months and provided the runway to negotiate the terms of a holistic, consensual restructuring, which ultimately led to the RSA, the Stalking Horse Purchase Agreement,[5] and the Plan.

A. The Bridge Loan and RSA.

5. In April 2018, the WLB Debtors determined that additional liquidity was required on an expedited basis to avoid a liquidation. The WLB Debtors engaged in countless negotiations and worked tirelessly to secure additional financing, including extended negotiations with the WLB Debtors' existing stakeholders. The WLB Debtors engaged extensively with the Ad Hoc Group and Canadian Imperial Bank of Commerce ("CIBC"), the administrative agent under the WLB Debtors' then-existing revolving credit facility. In addition, with the assistance of

[5] The Stalking Horse Purchase Agreement is attached to the *Order (I) Approving the Adequacy of the Disclosure Statement, (II) Approving the Solicitation and Notice Procedures with Respect to Confirmation of the Joint Chapter 11 Plan of Westmoreland Coal Company and Certain of Its Debtor Affiliates, (III) Approving the Forms of Ballots and Notices in Connection Therewith, and (IV) Scheduling Certain Dates with Respect Thereto* [Docket No. 841] as **Exhibit B** to **Schedule 1**.

Centerview Partners LLC ("Centerview"), the WLB Debtors reached out to a number of third-party financial institutions regarding providing DIP financing. Unfortunately, no prospective third-party lender would participate, underwrite, or arrange an adequate postpetition financing facility (even on a priming basis).

6. As a result, the WLB Debtors and their advisors engaged with the Ad Hoc Group and CIBC regarding the terms of postpetition financing. This highly competitive process—which resulted in multiple proposals being exchanged with each party as well as a combined proposal involving both parties that did not come to fruition, but ultimately the WLB Debtors entered into the $110 million Bridge Loan provided only by the Ad Hoc Group on May 21, 2018.

7. The Bridge Loan provided the WLB Debtors with significant benefits: (a) it provided the WLB Debtors with $90 million in immediate liquidity, thereby allowing the WLB Debtors to remain out of chapter 11 for four months, which provided the WLB Debtors with runway to engage with the Ad Hoc Group regarding the terms of a holistic, consensual restructuring and avoid a free-fall chapter 11 filing; (b) it required the Ad Hoc Group to forbear from exercising remedies with respect to over $20 million of debt service payments in June and July; (c) it refinanced in full in cash the WLB Debtors' prior revolving credit facility from CIBC and prior San Juan term loan facility, releasing collateral to secure the new Bridge Loan and allowing the WLB Debtors access to a sizable cash balance that was previously restricted; and (d) it obligated the members of the Ad Hoc Group to provide an additional $20 million in liquidity on a delayed draw basis.

8. Thereafter, the WLB Debtors utilized their runway to negotiate a consensual restructuring transaction with the Ad Hoc Group. Those efforts culminated in the RSA, which the WLB Debtors and the Ad Hoc Group entered into on October 9, 2018.

9. The RSA contemplated a holistic restructuring supported by the Ad Hoc Group that serves as the basis for the WLB Debtors' Plan, which contemplates the transfer of substantially all of the WLB Debtors' assets and operations to the Stalking Horse Purchaser, a new entity created by the Ad Hoc Group, preserving the WLB Debtors' remaining assets and operations and over a thousand jobs. Specifically, pursuant to the RSA, the Stalking Horse Purchaser submitted a credit bid for the WLB Debtors' Core Assets and agreed to accept any of the Non-Core Assets to the extent a third party had not agreed, prior to the Plan Effective Date, to acquire such Non-Core Assets (the "Stalking Horse Bid"). This ensured that all of the WLB Debtors' mines have an operator and party responsible to address all asset retirement obligations ("ARO") associated with such mines. Indeed, certain of these mines are no longer active and instead have only ARO that the Purchaser is obligating itself to satisfy. Additionally, pursuant to the RSA, the Ad Hoc Group agreed that the Stalking Horse Purchaser and/or the underlying secured creditors would: (a) vote to support the Plan; (b) satisfy certain Funded Liabilities; (c) assume two pension plans covered by the Pension Benefit Guaranty Corporation (as frozen);[6] (d) pay tens of millions of dollars in critical vendor payments; (e) support the Debtors' efforts to secure agreed-upon modifications to collective bargaining agreements and retiree medical benefits with the International Union of Operating Engineers; and (f) propose to fund a retiree medical settlement for retirees of the Heritage, Kemmerer, and Beulah mines (for which the Ad Hoc Group has agreed to support a $6 million payment by the Debtors).

[6] Subsequent to the execution of the RSA, the Ad Hoc Group agreed that the Purchaser would assume a third pension plan (as frozen).

B. Commencement of the Chapter 11 Cases.

10. As discussed, following months of good-faith, arm's-length discussions with their secured creditors, the WLB Debtors commenced these chapter 11 cases to effectuate a restructuring with the support of the Consenting Stakeholders on the terms set forth in the RSA.

i. Postpetition Marketing Process.

a. The WLB Debtors' Sale Transaction.

11. In the RSA, the Consenting Stakeholders agreed to provide the Stalking Horse Bid for certain of the WLB Debtors' assets, in the form of a credit bid of a portion of the WLB Debtors' first lien secured debt, as contemplated in the Stalking Horse Purchase Agreement. The proposed Sale Transaction would preserve the WLB Debtors' operations and over a thousand jobs and transfer all mines and associated ARO to the Purchaser. Importantly, the Stalking Horse Purchaser also committed to acquiring the Non-Core Assets, unless such assets are sold to a third party prior to the closing of the Sale Transaction. The WLB Debtors determined, in the exercise of their business judgment, to maximize stakeholder value by market-testing the Stalking Horse Bid through an auction process and seeking to expeditiously sell the assets to the highest or otherwise best bidder pursuant to the Plan.

12. On November 15, 2018, the Court entered the Bidding Procedures Order, which established (a) dates and deadlines for the submission of bids and the auction of substantially all assets of the WLB Debtors except for any Non-Core Assets sold prior to the Auction, and (b) requirements for bids to be "Qualified Bids" that would be considered at the Auction (if one was necessary). Pursuant to the Bidding Procedures Order, the final bid deadline for the Core Assets was January 15, 2019 at 4:00 p.m., prevailing Central Time, and the Auction for all or substantially all of the WLB Debtors' assets was scheduled for January 22, 2019, at 10:00 a.m., prevailing Eastern Time, if any other Qualified Bids were received.

13. Because no Qualified Bids were received for the WLB Debtors' Core Assets outside of the Stalking Horse Bid, on January 21, 2019, the WLB Debtors announced the cancellation of the Auction and the designation of the Stalking Horse Purchaser as the Successful Bidder for the Core Assets [Docket No. 1112].

14. As contemplated by the Sale Transaction, the WLB Debtors will sell all of the WLB Debtors' mines (with the exception of the Buckingham Mine, which was sold separately, as discussed further below) to the Purchaser "free and clear" of claims, liens, encumbrances, and other interests pursuant to sections 363(f) and 1123 of the Bankruptcy Code. As noted above, the Purchaser will also assume all ARO associated with the acquired WLB Debtors' mines.

b. The Buckingham Mine Sale Transaction.

15. In December 2018, following months of conducting a marketing process for the sale of the Buckingham Mine, an active thermal coal mine located in Perry County, Ohio and a Non-Core Asset, the WLB Debtors determined that a bid made by CCU Coal and Construction LLC, an entity affiliated with a former director of Westmoreland Resource Partners, LP and the former president of Oxford Mining Company, LLC, Charles C. Ungurean (such entity, the "Original Buckingham Purchaser"), was the highest, the best—and the only—viable proposal to acquire the Buckingham Mine that included cash consideration. Given the amount of consideration being offered, and the nature of the marketing process to date, on December 21, 2018, the WLB Debtors filed their *Motion for Entry of an Order Approving the Sale of the Buckingham Mine to CCU Coal and Construction LLC Free and Clear of Liens, Claims, Encumbrances, and Interests* [Docket No. 875] (the "Initial Buckingham Sale Motion"), which sought Court approval of a private sale of the Buckingham Mine to the Original Buckingham Purchaser. At the time of filing of the Initial Buckingham Sale Motion, the WLB Debtors thought

it unlikely that a competing bidder would emerge to make a higher or better offer for the Buckingham Mine.

16. However, in response to the Initial Buckingham Sale Motion, the WLB Debtors subsequently received several bids for the Buckingham Mine, including one from certain affiliates of Merida Natural Resources, LLC (together, "Merida"), who indicated a desire to submit a bid for not only the Buckingham Mine, but the WMLP Debtors' mines in Ohio and Kentucky as well. Such bid from Merida would provide greater overall value to each of the WLB Debtors' and the WMLP Debtors' estates than they were to receive under the sale contemplated by the Initial Buckingham Sale Motion. Following several rounds of competing proposals by Merida and the Original Buckingham Purchaser, the Debtors selected Merida's bid as the highest and best offer. Consequently, on January 22, 2019, the Debtors filed the Buckingham and Oxford Sale Motion seeking approval of such sale to Merida.

17. At an auction on February 1, 2019, the Debtors selected a revised bid submitted by the Original Buckingham Purchaser as the highest and best offer for the Buckingham Mine and the Oxford Assets (as defined in the Buckingham and Oxford Sale Motion). Accordingly, the Debtors sought Court approval of the sale of the Buckingham Mine and Oxford Assets under this revised proposal, and at a hearing on February 4, 2019, the Court approved the Buckingham and Oxford Sale Motion.[7] The closing occurred on February 11, 2019.[8]

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[7] *See Order Approving Joint Expedited Motion of the WLB Debtors and the WMLP Debtors for Entry of an Order (I) Approving the Sale of (A) Substantially All of the Assets of Oxford Mining Company, LLC, and Certain of Its Subsidiaries and (B) the Buckingham Mine, (II) Authorizing the Assumption and Assignment of Executory Contracts and Unexpired Leases in Connection Therewith, and (III) Granting Related Relief, Including Approval of the Related Sale Process* [Docket No. 1289].

[8] *See Notice of Occurrence of Closing of Sales of the Buckingham Mine and the Oxford Assets* [Docket No. 1351].

ii. The Committee's Investigation and the Committee Settlement.

18. On October 18, 2018, the U.S. Trustee appointed the Committee. Thereafter, the Committee commenced an investigation into the prepetition liens of Holders of First Lien Claims. The Committee specifically investigated several categories of assets of uncertain value that they asserted were unencumbered, and identified potential claims arising in connection with various prepetition transactions entered into by the WLB Debtors. Over the course of the next two months, and in response to multiple Bankruptcy Rule 2004 discovery requests from the Committee, the WLB Debtors produced more than 22,000 documents and hundreds of the WLB Debtors' coal leases. On January 4, 2019, the Committee deposed corporate representatives of the WLB Debtors and the Consenting Stakeholders.

19. Following weeks of extensive negotiations between the WLB Debtors, the Consenting Stakeholders, and the Committee, the WLB Debtors and the Committee ultimately reached a settlement on January 22, 2019 (the "Committee Settlement").[9] More specifically, as the result of the Committee Settlement, the Plan was amended to provide for:[10]

- $3.25 million to fund the General Unsecured Claims Amount and the payment of all compensation, fees and expenses of the Claims Administrator and its professionals;
- the waiver of any distribution on account of the First Lien Deficiency Claims;
- the assumption by the Purchaser of the Westmoreland Elkol-Sorenson Mine pension plan (as frozen);

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[9] *See Second Stipulation and Agreed Order (A) Extending Challenge Period Termination Date in Final DIP Order and (B) Resolving Possible Confirmation Objections Pursuant to Settlement Term Sheet* [Docket No. 1115].

[10] The terms described herein are for information purposes only and are qualified in their entirety by the terms of the Committee Settlement set forth in the Committee Settlement Term Sheet, attached as **Exhibit A** to the *Second Stipulation and Agreed Order (A) Extending Challenge Period Termination Date in Final DIP Order and (B) Resolving Possible Confirmation Objections Pursuant to Settlement Term Sheet* [Docket No. 1115].

- the payment of unpaid amounts authorized for payment under certain of the WLB Debtors' first day orders,[11] subject to the DIP Order; and

- the agreement by the WLB Debtors and the Consenting Stakeholders not to propose or support any settlement of the 1113/1114 Motion that specifically provides for the allowance of a General Unsecured Claim payable from the $3.25 million Committee Settlement Amount.

20. On January 24, 2019, the Committee filed a *Statement in Support of Confirmation of the Joint Chapter 11 Plan of Westmoreland Coal Company and Certain of Its Affiliates* [Docket No. 1140], wherein the Committee explained that it "supports confirmation of an Amended Plan reflecting the terms of the Settlement Term Sheet." The WLB Debtors subsequently amended the Plan to reflect the terms of the Committee Settlement.

21. The Committee Settlement resolves lengthy, costly, and uncertain litigation that would have otherwise been prosecuted by the Committee, which would have generated substantial administrative costs, and would have presented substantial risks of significantly reduced creditor recoveries. Therefore, the WLB Debtors believe that the Committee Settlement is in the best interests of the WLB Debtors, the Estates, and all parties in interest, and that the Court should approve the Committee Settlement.

iii. The WMLP Settlement.

22. WLB holds an approximate 94 percent limited partner ownership interest in WMLP and 100 percent of the equity interests of WMGP, which, in turn, owns 0.164 percent of WMLP.

23. The board of directors of WMLP has appointed the Conflicts Committee to address potential conflicts of interest between WMLP and WMGP, as circumstances warrant.

[11] *See Final Order (I) Authorizing the Payment of Specified Trade Claims and Outstanding Orders, and (II) Confirming Administrative Expense Priority of Outstanding Orders* [Docket No. 512] and *Final Order Authorizing the Debtors to (I) Honor Prepetition Obligations to Customers in the Ordinary Course of Business and (II) Continue, Renew, Replace, Implement, or Terminate Customer Programs* [Docket No. 510].

The Conflicts Committee consists solely of independent directors and has separate legal and financial advisors from WMLP.

24. Given this separation, the WMLP Debtors have been conducting their own marketing and sale process for their assets, separate from the Sale Transaction. Prior to the Petition Date, the WMLP Debtors engaged various professionals to assist in the exploration and analysis of strategic alternatives, including Lazard Frères & Co., LLC ("Lazard"). With Lazard's assistance, the WMLP Debtors developed and negotiated with WMLP's term loan lenders and WLB a sale protocol for the WMLP Debtors' assets, which was finalized in June 2018. The WMLP Debtors then launched a three-phase marketing and sale process.

25. As detailed above, on February 4, 2019, the Court authorized the Debtors' sale of the Buckingham Mine and the Oxford Assets. The Oxford sale was a key achievement in these chapter 11 cases that addresses the Debtors' asset retirement obligations related to Oxford. The Oxford sale paved the way for the Debtors' Intercompany Settlement. As further discussed in the *Debtors' Emergency Motion for Entry of an Order Authorizing and Approving Intercompany Settlement Term Sheet* [Docket No. 1367] (the "Intercompany Settlement Motion"), there are numerous intercompany relationships between the WLB Debtors and the WMLP Debtors, including: (a) the WLB Debtors provide all personnel and management services necessary for the WMLP Debtors' operations; (b) WLB is the employer under the UMWA collective bargaining agreement with respect to the employees who work at the WMLP Debtors' assets; and (c) the WLB Debtors provide back-office support, including enterprise-wide insurance coverage, health and benefits coverage, and compensation administration for the employees who work at the WMLP Debtors' assets.

26. Following months of good faith, arm's-length discussions between the WLB Debtors, the WMLP Debtors, the WLB Secured Lenders (as defined in the Intercompany Settlement Motion), and the MLP Secured Lenders, the parties have agreed, subject to Court approval, to resolve all disputes between the estates (collectively, the "Intercompany Settlement") on the terms set forth in the Intercompany Settlement Term Sheet. The Intercompany Settlement represents a significant achievement for these cases that will facilitate confirmation of the WLB Debtors' chapter 11 plan, resolve potentially costly and distracting litigation regarding the estates' relative responsibilities regarding the now-transferred Oxford mining complex in Ohio, and provide certainty to the market regarding the extent of the WLB Debtors' support for the Kemmerer sale process.

27. On February 26, 2019, in conjunction with confirmation of the Plan, the Debtors are seeking entry of an order from the Bankruptcy Court authorizing the Debtors' entry into the Intercompany Settlement Term Sheet, granting the Intercompany Settlement Motion, and approving the Intercompany Settlement.

iv. The Coal Act Retirees Committee Settlement.

28. 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. On October 23, 2018, the WLB Debtors made a proposal to the UMWA pursuant to sections 1113 and 1114 of the Bankruptcy Code in which the WLB Debtors proposed, among other things, to terminate their obligations to make retiree medical payments pursuant to the Coal Act. That same day, the Coal Act Funds requested the appointment of an official retiree committee

pursuant to section 1114(b) of the Bankruptcy Code to represent the interests of all retirees, spouses, and eligible dependents who receive retiree benefits pursuant to the Coal Act.[12]

29. On November 16, 2018, the Court issued an order directing the U.S. Trustee to appoint an official retiree committee to serve as the authorized representative of affected Coal Act retirees, their spouses, and their eligible dependents.[13] Despite the U.S. Trustee's diligent efforts to solicit Coal Act retirees to serve on the committee, no Coal Act-eligible retiree was willing to serve.

30. Accordingly, the Debtors moved the Court to appoint an independent fiduciary to represent the interests of the Coal Act Retirees in the section 1114 process.[14] The Court held a hearing and appointed three independent representatives for the Coal Act Retirees to facilitate negotiations and serve on the Coal Act Retirees Committee.[15] The Debtors subsequently met with the Coal Act Retirees Committee, presented their proposal pursuant to section 1114 of the Bankruptcy Code to the Coal Act Retirees Committee, and provided substantial diligence.

31. The Coal Act Funds objected to the Debtors' 1113/1114 Motion,[16] and the Coal Act Retirees Committee subsequently filed a response and joinder to the Coal Act Funds'

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[12] *See Coal Act Funds' Motion in the Alternative to Appoint Official Retiree Committee Pursuant to 11 U.S.C. § 1114* [Docket No. 248].

[13] *See Order Directing Appointment of Committee of Retired Employees Pursuant to 11 U.S.C. § 1114* [Docket No. 526].

[14] *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].

[15] *See Order Granting Emergency Motion* [Docket No. 1023].

[16] *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].

objection.[17] In the CARC Objection, the Coal Act Retirees Committee contested the necessity of the relief sought by the Debtors, the alleged lack of fairness and equity of the relief sought by the Debtors, and the Debtors' request for retroactive application of the proposed modifications.[18] Further, the Coal Act Retirees Committee argued that "the Debtors must remain obligated to facilitate the transition of Coal Act Retirees from the Debtors' individual employer plan ("IEP") to the UMWA 1992 Plan so as to assure that there is no gap in benefit coverage and a smooth process."[19]

32. 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, and ultimately, the WLB Debtors and the Coal Act Retirees Committee were able to reach the Coal Act Retirees Committee Settlement. Pursuant to the Coal Act Retirees Committee Settlement, the WLB Debtors have agreed to provide an orderly transition for their 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 Purchaser has agreed to pay the costs of this Coal Act Retirees Committee Settlement (not including the surety bonds, which are an additional approximate $9 million in consideration going directly to the Coal Act Funds). Part of the settlement, however, is that the WLB Debtors would have no further obligations to make any premium contributions to the Coal Act Funds following the Sale Transaction, and the Purchaser

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[17] *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 "CARC Objection").

[18] *See* CARC Objection ¶ 6.

[19] *See* CARC Objection ¶ 8.

shall be deemed to qualify under the "safe harbor" provisions of the Coal Act such that it will have no obligations under the Coal Act whatsoever.

33. Absent this settlement, the WLB Debtors would have no choice but to pursue their Section 1113/1114 Motion in full and ask that all Coal Act-related obligations be terminated immediately. There is no obligation under the Coal Act or under section 1114 of the Bankruptcy Code to provide a transition period. The result for Coal Act retirees would be the same—*i.e.*, their benefits would ultimately be paid by the Coal Act Funds. But the Coal Act Retirees Committee Settlement ensures a generous contribution from the Stalking Horse, of money the WLB Debtors do not otherwise have, to provide a smooth transition and ensure that no Coal Act retiree will be left with a gap in medical benefit coverage.

34. On February 22, 2019, the WLB Debtors filed the *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* [Docket No. 1467]. The Coal Act Retirees Committee Settlement is memorialized therein. The WLB Debtors are seeking entry of an order approving the Coal Act Retirees Committee Settlement concurrently with confirmation of the Plan, which includes an obligation to provide the transition services described in the Term Sheet, a finding that the Purchaser is not responsible for Coal Act benefits and a finding that the WLB Debtors have no further obligations under the Coal Act, pursuant to the settlement and section 1114 of the Bankruptcy Code.

II. Entry of Disclosure Statement Order.

35. On December 18, 2018, the Bankruptcy Court entered the Disclosure Statement Order, which, among other things, approved the Disclosure Statement and established procedures for soliciting votes on the Plan. As required by section 1126 of the Bankruptcy Code, the Debtors solicited votes from the Holders of Claims in Classes 3 and 4 (collectively, the "Voting Classes"),

with all other Classes of Claims and Interests being deemed to either accept or reject the Plan, as applicable, pursuant to sections 1126(f) and 1126(g) of the Bankruptcy Code. As set forth in the Voting Report, all Voting Classes voted to accept the Plan.

Argument

I. Overview of the Applicable Standards.

36. For the Bankruptcy Court to confirm the plan, the Bankruptcy Court must find that the WLB Debtors have satisfied the provisions of section 1129 of the Bankruptcy Code by a preponderance of the evidence.[20] As described in detail below, the Plan complies with all relevant provisions of the Bankruptcy Code and all other applicable law. The WLB Debtors will produce evidence to support these conclusions by a preponderance of the evidence at the Confirmation Hearing. The WLB Debtors thus respectfully request that the Bankruptcy Court confirm the Plan.

II. The Plan Satisfies the Applicable Confirmation Requirements.

A. The Plan Complies Fully with the Applicable Provisions of the Bankruptcy Code—Section 1129(a)(1).

37. Section 1129(a)(1) of the Bankruptcy Code requires that a plan comply with the applicable provisions of the Bankruptcy Code.[21] The principal aim of this provision is to ensure compliance with the sections of the Bankruptcy Code governing classification of claims and interests and the contents of a chapter 11 plan.[22] Accordingly, the determination of whether the

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[20] *E.g.*, *Heartland Fed. Savs. & Loan Ass'n v. Briscoe Enters., Ltd., II (In re Briscoe Enters., Ltd. II)*, 994 F.2d 1160, 1165 (5th Cir. 1993), *cert. denied*, 510 U.S. 992, 114 S. Ct. 550 (1993); *In re Cypresswood Land Partners, I*, 409 B.R. 396, 422 (Bankr. S.D. Tex. 2009); *In re J T Thorpe Co.*, 308 B.R. 782, 785 (Bankr. S.D. Tex. 2003).

[21] 11 U.S.C. § 1129(a)(1).

[22] *See* S. Rep. No. 95-989, 95th Cong., 2d Sess., at 126 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5912; H.R. Rep. No. 95-595, 95th Cong., 1st Sess., at 412 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5936, 6368.

Plan complies with section 1129(a)(1) of the Bankruptcy Code requires an analysis of sections 1122 and 1123 of the Bankruptcy Code.

i. The Plan Satisfies the Classification Requirements of Section 1122 of the Bankruptcy Code.

38. Section 1122 of the Bankruptcy Code provides that "a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class."[23] Because claims only need to be "substantially" similar to be placed in the same class, plan proponents have broad discretion in determining to classify claims together.[24] Likewise, the Fifth Circuit has recognized that plan proponents may place similar claims into different classes, provided there is a rational basis to do so.[25]

39. The Plan's classification of Claims and Interests satisfies the requirements of section 1122 of the Bankruptcy Code because the Plan places Claims and Interests into eight separate Classes, with each Class differing from the Claims and Interests in each other Class in a legal or factual nature or based on other relevant criteria. Specifically, the Plan provides for the separate classification of Claims and Interests into the following Classes:

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[23] 11 U.S.C. § 1122(a).

[24] *E.g.*, *In re General Homes Corp.*, 134 B.R. 853, 863 (Bankr. S.D. Tex. 1991) ("A debtor enjoys considerable flexibility in the manner in which it classifies claims.").

[25] *E.g.*, *In re Pacific Lumber Co.*, 584 F.3d 229, 251 (5th Cir. 2009) ("[C]laims can be separated into different classes for 'good business reasons.'") (quoting *In re Greystone III Joint Venture*, 995 F.2d 1274, 1281 (5th Cir. 1991)).

Class	Claims and Interests
Class 1	Other Priority Claims
Class 2	Other Secured Claims
Class 3	First Lien Secured Claims
Class 4	General Unsecured Claims
Class 5	WLB Intercompany Claims
Class 6	WLB Intercompany Interests
Class 7	Section 510(b) Claims
Class 8	WLB Interests

40. The Claims and Interests assigned to each particular Class described above are substantially similar to the other Claims and Interests in such Class. In addition, valid business, legal, and factual reasons justify the separate classification of the particular Claims or Interests into the Classes created under the Plan, and no unfair discrimination exists between or among Holders of Claims and Interests. Namely, the Plan separately classifies the Claims because each Holder of such Claims or Interests may hold (or may have held) rights in the Estates legally dissimilar to the Claims or Interests in other Classes or because substantial administrative convenience resulted from such classification. For example, Claims (rights to payment) are classified separately from Interests (representing ownership in the business) and Secured Claims are classified separately from General Unsecured Claims. This classification structure serves the purpose of facilitating ease of distributions on the Plan Effective Date. For the foregoing reasons, the Plan satisfies section 1122 of the Bankruptcy Code.

ii. The Plan Satisfies the Seven Mandatory Requirements of Section 1123(a) of the Bankruptcy Code.

41. Section 1123(a) of the Bankruptcy Code contains seven mandatory requirements to confirm a plan, generally related to the specification of claims treatment and classification, the

equal treatment of claims within classes, and the mechanics of implementing the plan. Here, the Plan satisfies each of these requirements.

42. ***Specification of Classes, Impairment, and Treatment.*** The first three mandatory requirements of section 1123(a) of the Bankruptcy Code are that a plan must specify: (a) the classification of claims and interests; (b) whether such claims and interests are impaired or unimpaired; and (c) the precise nature of their treatment under the Plan.[26] Article III of the Plan satisfies these three requirements by setting forth these specifications in detail.[27]

43. ***Equal Treatment.*** The fourth mandatory requirement of section 1123(a) of the Bankruptcy Code is that a plan must "provide the same treatment for each claim or interest of a particular class."[28] The Plan meets this requirement because Holders of Allowed Claims and Interests will receive the same rights and treatment as other Holders of Allowed Claims and Interests within such Holders' respective Class.[29]

44. ***Adequate Means for Implementation.*** Section 1123(a)(5) of the Bankruptcy Code requires that a plan must provide adequate means for its implementation.[30] The Plan, the Disclosure Statement, and the various documents included in the Plan Supplement provide, in detail, adequate and proper means for the Plan's execution and implementation. The precise terms

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[26] 11 U.S.C. §§ 1123(a)(1)-(3).

[27] Plan, Art. III.A–B8.

[28] 11 U.S.C. § 1123(a)(4).

[29] Per the Committee Settlement, First Lien Deficiency Claims shall waive their rights to receive their Pro Rata share of recovery afforded to General Unsecured Claims.

[30] 11 U.S.C. § 1123(a)(5). Section 1123(a)(5) of the Bankruptcy Code specifies that adequate means for implementation of a plan may include: retention by the debtor of all or part of its property; the transfer of property of the estate to one or more entities; cancelation or modification of any indenture; curing or waiving of any default; amendment of the debtor's charter; or issuance of securities for cash, for property, for existing securities, in exchange for claims or interests or for any other appropriate purpose. *Id.*

governing the execution of these transactions are set forth in greater detail in the Plan, as modified, and/or the applicable definitive documents or forms of agreements included in the Plan Supplement. Thus, the Plan satisfies section 1123(a)(5) of the Bankruptcy Code.[31]

45. ***Non-Voting Stock***. The sixth mandatory requirement of section 1123(a) of the Bankruptcy Code is that a plan must contemplate a provision in the reorganized debtor's corporate charter that prohibits the issuance of non-voting equity securities or, with respect to preferred stock, adequate provisions for the election of directors upon an event of default.[32] Here, the WLB Debtors comply with the requirements of section 1123(a)(6) of the Bankruptcy Code because, following the Plan Effective Date, the Purchaser shall only have one class of voting securities and shall not issue any nonvoting equity securities. Accordingly, the Plan satisfies the requirements of section 1123(a)(6) of the Bankruptcy Code, to the extent applicable.[33]

46. ***Selection of Officers and Directors***. Finally, section 1123(a)(7) of the Bankruptcy Code requires that a plan "contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan."[34] As of the Plan Effective Date, the Plan Administrator shall act as the Remaining WLB Debtors' sole officer, director, and manager, as applicable, with respect to the WLB Debtors' affairs to the extent that the Purchaser does not acquire the equity interests of any such Remaining WLB Debtor pursuant to the Sale Transaction. The identity and compensation of the Plan Administrator is part of the Plan Supplement.

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[31] Plan, Art. IV.

[32] *See* 11 U.S.C. § 1123(a)(6).

[33] Plan, Art. XI.I.1.(g).

[34] 11 U.S.C. § 1123(a)(7).

B. The WLB Debtors Have Complied Fully with the Applicable Provisions of the Bankruptcy Code—Section 1129(a)(2).

47. Section 1129(a)(2) of the Bankruptcy Code requires a plan proponent to comply with applicable provisions of the Bankruptcy Code. Case law and legislative history indicate that this section principally reflects the disclosure and solicitation requirements of section 1125 of the Bankruptcy Code,[35] which prohibits the solicitation of plan votes without a court-approved disclosure statement.[36]

i. The WLB Debtors Complied with Section 1125 of the Bankruptcy Code.

48. Section 1125 of the Bankruptcy Code prohibits the solicitation of acceptances or rejections of a chapter 11 plan "unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information."[37] Section 1125 ensures that parties in interest are fully informed regarding the debtor's condition so that they may make an informed decision whether to approve or reject the plan.[38]

49. Section 1125 is satisfied here. Before the WLB Debtors solicited votes on the Plan, the Bankruptcy Court approved the Disclosure Statement in accordance with section 1125(a)(1) of the Bankruptcy Code.[39] The Bankruptcy Court also approved the contents of the Solicitation

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[35] *See In re Cypresswood Land Partners, I*, 409 B.R. at 424 ("Bankruptcy courts limit their inquiry under § 1129(a)(2) to ensuring that the plan proponent has complied with the solicitation and disclosure requirements of § 1125.").

[36] 11 U.S.C. § 1125(b).

[37] *Id.*

[38] *See*, *e.g.*, *Momentum Mfg. Corp. v. Emp. Creditors Comm. (In re Momentum Mfg. Corp.)*, 25 F.3d 1132, 1136 (2d Cir. 1994) (finding that section 1125 of the Bankruptcy Code obliges a debtor to engage in full and fair disclosure that would enable a hypothetical reasonable investor to make an informed judgment about the plan).

[39] *See generally* Disclosure Statement Order.

Packages provided to Holders of Claims and Interests entitled to vote on the Plan, the non-voting materials provided to parties not entitled to vote on the Plan, and the relevant dates for voting and objecting to the Plan.[40] The WLB Debtors, through their Notice and Solicitation Agent, complied with the content and delivery requirements of the Disclosure Statement Order, thereby satisfying sections 1125(a) and (b) of the Bankruptcy Code.[41] The WLB Debtors also satisfied section 1125(c) of the Bankruptcy Code, which provides that the same disclosure statement must be transmitted to each holder of a claim or interest in a particular class. Here, the WLB Debtors caused the Disclosure Statement to be transmitted to all parties entitled to vote on the Plan in accordance with the Disclosure Statement Order.[42] Accordingly, the WLB Debtors submit that they have complied in all respects with the solicitation requirements of section 1125 of the Bankruptcy Code and the Disclosure Statement Order.

ii. The WLB Debtors Complied with Section 1126 of the Bankruptcy Code.

50. Section 1126 of the Bankruptcy Code provides that only holders of allowed claims and equity interests in impaired classes that will receive or retain property under a plan on account of such claims or equity interests may vote to accept or reject a plan.[43]

51. Under section 1126(f) of the Bankruptcy Code, Holders of Claims in Class 1 (Other Priority Claims) and Class 2 (Other Secured Claims) (collectively, the "Deemed Accepting Classes") are Unimpaired and conclusively presumed to have accepted the Plan. While the WLB

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40 *See id.*

41 *See generally Affidavit of Donlin, Recano & Company, Inc. Regarding Service of Solicitation Packages with Respect to Disclosure Statement for Joint Chapter 11 Plan of Westmoreland Coal Company and Certain of Its Debtor Affiliates* [Docket No. 902] (the "Solicitation Affidavit").

42 *See id.*

43 *See* 11 U.S.C. § 1126.

Debtors did not solicit votes from the Deemed Accepting Classes, the WLB Debtors, where applicable, mailed Holders in such Classes a *Confirmation Hearing Notice*, a *Notice of Non-Voting Status to Holders of Unimpaired Claims Conclusively Presumed to Accept the Plan*, and an *Opt-Out Form for Holders of Unimpaired Claims Conclusively Presumed to Accept the Plan* as required under the Disclosure Statement Order.

52. Under section 1126(g) of the Bankruptcy Code, the Holders, if any, of Claims and Interests in Class 7 (Section 510(b) Claims) and Class 8 (WLB Interests) (collectively, the "Deemed Rejecting Classes") will not receive any recovery under the Plan and are therefore deemed to conclusively reject the Plan. While the WLB Debtors did not solicit votes from Holders of Claims or Interests in the Deemed Rejecting Classes, the WLB Debtors mailed them a *Confirmation Hearing Notice*, a *Notice of Non-Voting Status to Holders of Impaired Claims and Equity Interests Deemed to Reject the Plan*, and an *Opt Out Form for Holders of Impaired Claims and Equity Interests Deemed to Reject the Plan* as required under the Disclosure Statement Order.

53. With respect to Class 5 (WLB Intercompany Claims) and Class 6 (WLB Intercompany Interests), the WLB Debtors retained the ability to either reinstate or cancel and release such Claims or Interests on the Plan Effective Date to facilitate ordinary operations or the maintenance of existing organizational structures. The WLB Debtors holding these Claims and Interests are deemed to have accepted or rejected the Plan. The WLB Debtors did not solicit votes from Holders of WLB Intercompany Claims and WLB Intercompany Interests.

54. Rather, the WLB Debtors solicited votes only from holders of Claims in the Voting Classes because each of these Classes is impaired and entitled to receive a distribution under the Plan.[44] The voting deadline was January 25, 2019, at 4:00 p.m. (prevailing Central Time).

[44] *See* Plan, Art. III.A; *see generally* Solicitation Affidavit.

On February 21, 2019, the WLB Debtors filed the Voting Report. The Voting Report reflects the results of the voting process in accordance with section 1126 of the Bankruptcy Code.[45] As set forth in the Voting Report, all Voting Classes voted to accept the Plan.

C. The WLB Debtors Proposed the Plan in Good Faith and Not by Any Means Forbidden by Law—Section 1129(a)(3).

55. Section 1129(a)(3) of the Bankruptcy Code requires a plan proponent to propose the plan "in good faith and not by any means forbidden by law."[46] In assessing the good faith standard, courts in the Fifth Circuit consider whether a plan was proposed with "the legitimate and honest purpose to reorganize and has a reasonable hope of success."[47] A plan must also achieve a result consistent with the Bankruptcy Code.[48] Whether a plan is proposed in good faith must be determined in light of the totality of the circumstances of the cases.[49]

56. The WLB Debtors have proposed the Plan in good faith and not by any means forbidden by law, with the legitimate and honest purposes of restructuring the WLB Debtors' Estates to maximize stakeholder recoveries. The Plan is the culmination of these efforts and follows extensive arm's-length negotiations among the WLB Debtors, the Ad Hoc Group, the

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[45] "A class of claims has accepted a plan if such plan has been accepted by creditors, other than any entity designated under subsection (e) of [section 1126], that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors, other than any entity designated under subsection (e) of [section 1126], that have accepted or rejected such plan." 11 U.S.C. § 1126(c). "A class of interests has accepted a plan if such plan has been accepted by holders of such interests, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in amount of the allowed interests of such class held by holders of such interests, other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan." *Id.* § 1126(d).

[46] 11 U.S.C. § 1129(a)(3).

[47] *See*, *e.g.*, *In re Sun Country Dev., Inc.*, 764 F.2d 406, 408 (5th Cir. 1985).

[48] *See In re Block Shim Dev. Co.-Irving*, 939 F.2d 289, 292 (5th Cir. 1991).

[49] *See*, *e.g.*, *id.*; *Pub. Fin. Corp. v. Freeman*, 712 F.2d 219, 221 (5th Cir. 1983); *In re Cypresswood Land Partners, I*, 409 B.R. at 425.

WMLP Debtors, the Conflicts Committee, the MLP Secured Parties, the Committee, the Coal Act Retirees Committee, the International Union of Operating Engineers, the Sureties (as defined in the *Final Order Approving Continuation of Surety Bond Program* [Docket No. 514]), and other interested parties to ensure that the WLB Debtors' stakeholders realize the highest possible recoveries under the circumstances. Importantly, the Plan is supported by many of the WLB Debtors' primary stakeholders, including the Committee, a fiduciary for, and representative of, all unsecured creditors in the Chapter 11 Cases. The Plan is also supported by the WMLP Debtors, the Conflicts Committee, the MLP Secured Parties, and the Coal Act Retirees Committee. The totality of the circumstances surrounding the filing of the Chapter 11 Cases, the Plan, and the Disclosure Statement and the process leading to Confirmation, including the overwhelming support of Holders of Claims for the Plan and the transactions to be implemented pursuant thereto, all support Confirmation of the Plan.

57. The Plan is the only transaction that would permit the WLB Debtors to complete their restructuring and exit chapter 11 in an expeditious manner, which would, among other things, reduce the Estates' future liability for Administrative Claims, and permit the WLB Debtors to make distributions to Holders of Allowed Claims. The Chapter 11 Cases were filed, and the Plan was proposed, with the legitimate purpose of allowing the WLB Debtors to implement the Restructuring Transactions and the Sale Transaction. There is no question that the Plan satisfies section 1129(a)(3) of the Bankruptcy Code.

D. The Plan Provides that the WLB Debtors' Payment of Professional Fees and Expenses are Subject to Bankruptcy Court Approval—Section 1129(a)(4).

58. Section 1129(a)(4) of the Bankruptcy Code requires that certain fees and expenses paid by the plan proponent, by the debtor, or by a person receiving distributions of property under

the plan, be approved by the court as reasonable or subject to approval by the court as reasonable.[50] The Fifth Circuit has held that this is a "relatively open-ended standard" that involves a case-by-case inquiry and, under appropriate circumstances, does not necessarily require that a bankruptcy court review the amount charged.[51] As one court explained, as to routine legal fees and expenses which have been approved as reasonable in the first instance, "the court will ordinarily have little reason to inquire further with respect to the amount charged."[52]

59. In general, the Plan provides that Professional Fee Claims of the Professionals and corresponding payments are subject to prior Bankruptcy Court approval and the reasonableness requirements under sections 328 or 330 of the Bankruptcy Code. Article II.B of the Plan, moreover, provides that the Professionals shall file all final requests for payment of Professional Fee Claims no later than 30 days after the Plan Effective Date, thereby providing an adequate period of time for interested parties to review such Professional Fee Claims.[53]

E. The WLB Debtors Have Complied with the Bankruptcy Code's Governance Disclosure Requirement—Section 1129(a)(5).

60. The Bankruptcy Code requires the proponent of a plan to disclose the identity and affiliation of any individual proposed to serve as a director or officer of the debtor or a successor to the debtor under the plan.[54] It further requires that the appointment or continuance of such

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[50] 11 U.S.C. § 1129(a)(4).

[51] *See*, *e.g.*, *In re Cajun Elec. Power Coop., Inc.*, 150 F.3d 503, 517-18 (5th Cir. 1998) ("What constitutes a reasonable payment will clearly vary from case to case and, among other things, will hinge to some degree upon who makes the payments at issue, who receives those payments, and whether the payments are made from assets of the estate.").

[52] *Id*.

[53] Plan, Art. II.B.

[54] 11 U.S.C. § 1129(a)(5)(A)(i).

officers and directors be consistent with the interests of creditors and equity security holders and with public policy.[55] Lastly, the Bankruptcy Code requires a plan proponent to disclose the identity of insiders to be retained by the reorganized debtor and the nature of any compensation for such insider.[56] Courts have held that these provisions are meant to ensure that the post-confirmation governance of a reorganized debtor is in "good hands."[57]

61. In accordance with Article IV.M of the Plan, the Remaining WLB Debtors' existing board of managers shall be dissolved, and any remaining officers and directors, managers, or managing members of the Remaining WLB Debtors shall be dismissed to the extent that the Purchaser does not acquire the equity interests of any such Remaining WLB Debtors pursuant to the Sale Transaction.

62. As of the Plan Effective Date, the Plan Administrator shall act as the Remaining WLB Debtors' sole officer, director, and manager. The identity and compensation of the Plan Administrator will be disclosed in the Plan Supplement. Accordingly, the WLB Debtors have satisfied the requirements of section 1129(a)(5) of the Bankruptcy Code.

F. The Plan Does Not Require Government Regulatory Approval of Rate Changes—Section 1129(a)(6).

63. Section 1129(a)(6) of the Bankruptcy Code permits confirmation only if any regulatory commission that has or will have jurisdiction over a debtor after confirmation has

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[55] 11 U.S.C. § 1129(a)(5)(A)(ii).

[56] 11 U.S.C. § 1129(a)(5)(B).

[57] *See In re Landing Assocs., Ltd.*, 157 B.R. 791, 817 (Bankr. W.D. Tex. 1993) ("In order to lodge a valid objection under § 1129(a)(5), a creditor must show that a debtor's management is unfit or that the continuance of this management post-confirmation will prejudice the creditors." (citation omitted)).

approved any rate change provided for in the plan. This provision is inapplicable to these chapter 11 cases.[58]

G. The Plan Is in the Best Interests of Holders of Claims and Interests—Section 1129(a)(7).

64. The best interests of creditors test under the Bankruptcy Code requires that, "[w]ith respect to each impaired class of claims or interests," members of such class that have not accepted the plan will receive at least as much as they would in a hypothetical chapter 7 liquidation.[59] The best interests test applies to each non-consenting member of an impaired class, and is generally satisfied through a comparison of the estimated recoveries for a debtor's stakeholders in a hypothetical chapter 7 liquidation of that debtor's estate against the estimated recoveries under that debtor's chapter 11 plan.[60]

i. The Plan Satisfies the Best Interests of Creditors Test.

65. The Plan satisfies the best interests test with respect to Holders of Claims and Interests that did not vote to accept the Plan, including Holders in the Deemed Rejecting Classes. To demonstrate compliance with section 1129(a)(7) of the Bankruptcy Code, the WLB Debtors, with the assistance of their restructuring advisor, Alvarez & Marsal North America, LLC, analyzed the probable result of a hypothetical chapter 7 liquidation of the WLB Debtors' assets.[61]

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[58] Plan, Art. X.I.6.

[59] 11 U.S.C. § 1129(a)(7).

[60] *Bank of Am. Nat'l Trust & Savs. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 441 n.13 (1999) ("The 'best interests' test applies to individual creditors holding impaired claims, even if the class as a whole votes to accept the plan."); *In re Texas Extrusion Corp.*, 844 F.2d 1142, 1159 n.23 (5th Cir. 1988) (stating that under section 1127(a)(7) of the Bankruptcy Code a bankruptcy court was required to determine whether impaired claims would receive no less under a reorganization than through a liquidation).

[61] Disclosure Statement, Art. VII.I.1 and VIII.F; *see also Declaration and Expert Report of Robert A. Campagna in Support of Confirmation of the Amended Joint Chapter 11 Plan of Westmoreland Coal Company and Certain of Its Debtor Affiliates* [Docket No. 1445].

As described in the declaration and expert report filed in connection herewith [Docket No. 1145] hypothetical chapter 7 liquidation would not result in any greater value to non-consenting Holders of Claims and Interests as compared to distributions contemplated under the Plan because each Holder of Allowed Claims or Interests in each Class will recover as much or more value under the Plan on account of such Claim or Interest, as applicable, as of the Plan Effective Date, than the amount such Holder would receive if the WLB Debtors were liquidated on the Plan Effective Date under chapter 7 of the Bankruptcy Code.

66. The recovery to Holders of General Unsecured Claims under the Plan is expected to be more than such creditors' recovery in a hypothetical chapter 7 liquidation. More specifically, the Required Consenting Stakeholders have agreed to provide the $3.25 million Committee Settlement Amount to fund a distribution to Holders of Allowed General Unsecured Claims as part of the Committee Settlement. Furthermore, the Plan provides for the waiver of any distribution on account of the First Lien Deficiency Claims of approximately $319 million (about 45% of their claims). Such waiver is highly beneficial to Holders of Allowed General Unsecured Claims, as it meaningfully increases the percentage recovery for such Holders. In contrast, under a chapter 7 liquidation, Allowed General Unsecured Claims would receive no distribution because the Committee Settlement would not take place, meaning that there would be no Committee Settlement Amount to be distributed to Holders of Allowed General Unsecured Claims. Furthermore, in a chapter 7 liquidation, the Holders of First Lien Claims would not waive the First Lien Deficiency Claims, which would significantly diminish the recovery of Holders of Allowed General Unsecured Claims, to the extent that there was any value to distribute. Under the Plan, the amount of the credit bid that Holders of First Lien Claims made was approximately $500 million (comprised of $390 million of First Lien Secured Claims, plus the assumption of the

$110 million DIP Facility). This is approximately $319 million less than they are owed for their secured debt. In a chapter 7 liquidation, the value of the WLB Debtors' assets would likely be substantially lower than the credit bid amount due to the passage of time and a less efficient marketing process by a chapter 7 trustee. Therefore, there would be less value to distribute to Holders of General Unsecured Claims.

67. Additionally, if the Chapter 11 Cases were converted to cases under chapter 7, the WLB Debtors' Estates would incur the costs of payment of a statutorily allowed sliding-scale commission to the chapter 7 trustee, as well as the additional costs of replacement counsel and other professionals retained by the trustee to get up to speed and assist with the liquidation. Such amounts, together with other wind-down costs, would likely exceed the amount of costs that the Plan Administrator and its professionals and agents would be expected to incur in connection with completing the liquidation of the Estates. Additionally, under the Plan, the Purchaser is assuming the DIP Facility (in the form of the New First Lien Debt). This accommodation would not occur in a chapter 7 case, resulting in approximately $110 million in senior Claims that must be satisfied in cash before any Holder of a General Unsecured Claims receives a recovery.

68. The Estates would continue to be obligated to pay all unpaid expenses incurred by the WLB Debtors during the Chapter 11 Cases (such as Professional Fee Claims) which may constitute Allowed Claims in any chapter 7 case. Moreover, a chapter 7 case would trigger a new bar date for filing claims that would be more than 90 days following conversion of the case to chapter 7. Because no Holder of Claims or Interests would receive more in a chapter 7 liquidation than it would receive under the Plan, the Plan therefore satisfies the best interests test. As a result, the WLB Debtors have demonstrated that the Plan is in the best interests of Holders of Claims and Interests, and the requirements of section 1129(a)(7) of the Bankruptcy Code are satisfied.

H. The Plan Satisfies the Voting Requirements—Section 1129(a)(8).

69. The Bankruptcy Code generally requires that each class of claims or interests must either accept the plan or be unimpaired under the plan.[62] If not, the plan must satisfy the "cramdown" requirements with respect to the claims or interests in that class.[63]

70. Here, the Deemed Accepting Classes are Unimpaired under the Plan and are deemed to have accepted the Plan pursuant to section 1126(f) of the Bankruptcy Code. Nevertheless, because the Plan has not been accepted by the Deemed Rejecting Classes, the WLB Debtors seek Confirmation under section 1129(b), rather than section 1129(a)(8), of the Bankruptcy Code. Although section 1129(a)(8) has not been satisfied with respect to the Deemed Rejecting Classes, the Plan is confirmable because the Plan does not discriminate unfairly and is fair and equitable with respect to the Deemed Rejecting Classes and thus satisfies section 1129(b) of the Bankruptcy Code with respect to such Classes as described further below. As a result, the requirements of section 1129(b) of the Bankruptcy Code are satisfied.

I. The Plan Complies With Statutorily Mandated Treatment of Administrative and Priority Tax Claims—Section 1129(a)(9).

71. The Bankruptcy Code generally requires that claims entitled to administrative priority must be repaid in full in cash or receive certain other specified treatment.[64] Here, the Plan treats Allowed Administrative Claims, Priority Tax Claims, and Other Priority Claims in

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[62] 11 U.S.C. § 1129(a)(8). A class of impaired claims accepts a plan if holders of at least two-thirds in dollar amount and more than half in number of the claims in that class actually vote to accept the plan. 11 U.S.C. § 1126(c). A class that is not impaired under a plan, and the creditors in that class, are conclusively presumed to have accepted the plan. 11 U.S.C. § 1126(f). A class is deemed to have rejected a plan if the plan provides that the holders of claims or interests in that class do not receive or retain any property under the plan on account of such claims or interests. 11 U.S.C. § 1126(g).

[63] 11 U.S.C. § 1129(b).

[64] 11 U.S.C. § 1129(a)(9).

accordance with the Bankruptcy Code, rendering them Unimpaired.[65] Therefore, the WLB Debtors submit that the Plan complies with section 1129(a)(9) of the Bankruptcy Code.

J. At Least One Impaired Class of Claims Has Accepted the Plan, Excluding the Acceptances of Insiders—Section 1129(a)(10).

72. Section 1129(a)(10) of the Bankruptcy Code provides that, to the extent there is an impaired class of claims, at least one impaired class of claims must accept the plan, "without including any acceptance of the plan by any insider," as an alternative to the requirement under section 1129(a)(8) of the Bankruptcy Code that each class of claims or interests must either accept the plan or be unimpaired under the plan. Acceptance of the Plan by either Class 3 or 4 would satisfy section 1129(a)(10). As detailed herein, Class 3 and Class 4 have voted to accept the Plan, exclusive of any acceptances by insiders. Accordingly, the Plan satisfies the requirements of section 1129(a)(10) of the Bankruptcy Code, and no party has asserted otherwise.

K. The Plan Is Feasible—Section 1129(a)(11).

i. Overview of the Feasibility Requirement.

73. Section 1129(a)(11) of the Bankruptcy Code permits confirmation of a plan if "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor . . . unless such liquidation or reorganization is proposed in the plan."[66] In the context of liquidating plans, courts have held that debtors do not need to establish feasibility when a plan contemplates a liquidation of the debtor,[67] because

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[65] Plan, Art. II.

[66] 11 U.S.C. § 1129(a)(11).

[67] *See*, *e.g.*, *In re Heritage Org., L.L.C.*, 375 B.R. 230, 311 (Bankr. N.D. Tex. 2007); *In re Drexel Burnham Lambert Grp., Inc.*, 138 B.R. 723, 772 (Bankr. S.D.N.Y. 1992) ("Section 1129(a)(11) requires that a plan must be 'feasible,' that is, ***if the plan is not a liquidating plan***, a Court must determine that a debtor, or its successor under a plan, is not likely to require liquidation or further financial reorganization, except as provided under a plan." (emphasis added)); *In re Travelstead*, 227 B.R. 638, 651 (Bankr. D. Md. 1998); *In re 47th and Belleview Partners,* 95 B.R. 117, 120 (Bankr. W.D. Mo. 1988); *In re Pero Bros. Farms, Inc.,* 90 B.R. 562, 563 (Bankr.

section 1129(a)(11) of the Bankruptcy Code is satisfied where "such liquidation . . . is proposed in the plan."[68] In such cases, a plan proponent "need only demonstrate that there exists a reasonable probability that the plan provisions can be performed,"[69] and "speculative prospects of failure cannot defeat feasibility."[70]

74. To the extent that the feasibility requirement is applicable, a debtor need only prove a plan's feasibility by a preponderance of the evidence,[71] and the Fifth Circuit has held that a plan need only have a "reasonable probability of success" to satisfy section 1129(a)(11) of the Bankruptcy Code.[72] Further, courts in this district have held that a "relatively low threshold of proof" will satisfy the feasibility requirement.[73] In the Fifth Circuit, "[w]here the projections are credible, based upon the balancing of all testimony, evidence, and documentation, even if the projections are aggressive, the court may find the plan feasible."[74]

D. Fla. 1988); *In re Statepark Bldg. Grp.*, No. 04-33916 (HDH), 2005 WL 6443615, at *9 (Bankr. N.D. Tex. May 19, 2005) ("The Plan is a liquidating plan and, therefore, satisfies the feasibility requirement of 11 U.S.C. § 1129(a)(11).").

68 *In re Cellular Info. Sys., Inc.*, 171 B.R. 926 (Bankr. S.D.N.Y. 1994).

69 *In re Idearc Inc.*, 423 B.R. 138, 167 (Bankr. N.D. Tex. 2009), *subsequently aff'd sub nom.* 662 F.3d 315 (5th Cir. 2011) (citing *Fin. Sec. Assurance, Inc. v. T-H New Orleans Ltd. P'ship (In re T-H New Orleans Ltd. P'ship)*, 116 F.3d 790, 801 (5th Cir. 1997)).

70 *In re Couture Hotel Corp.*, 536 B.R. 712, 737 (Bankr. N.D. Tex. 2015) (quoting *In re Cajun Elec. Power Coop., Inc.*, 230 B.R. 715, 745 (Bankr. M.D. La. 1999)).

71 *See*, *e.g.*, *In re T-H New Orleans*, 116 F.3d at 801; *In re Brisco Enters., Ltd., II*, 994 F.2d 1160 (5th Cir. 1993).

72 *See*, *e.g.*, *In re T-H New Orleans*, 116 F.3d at 801 (quoting *In re Landing Assocs., Ltd.*, 157 B.R. 791, 820 (Bankr. W.D. Tex. 1993)); *see also In re Brisco Enters., Ltd., II*, 994 F.2d at 1166 ("[T]he [bankruptcy] court need not require a guarantee of success . . . [o]nly a reasonable assurance of commercial viability is required.").

73 *In re Star Ambulance Serv., LLC*, 540 B.R. 251, 266 (Bankr. S.D. Tex. 2015) (internal quotation marks omitted) (quoting *Mercury Capital Corp. v. Milford Conn. Assoc., L.P.*, 354 B.R. 1, 9 (D. Conn. 2006)).

74 *In re T-H New Orleans*, 116 F.3d at 802 (internal quotation marks omitted) (quoting *In re Lakeside Global II, Ltd.*, 116 B.R. 499, 508 n.20 (Bankr. S.D. Tex. 1989)).

75. To the extent that the feasibility requirement is applicable, when evaluating the feasibility of a chapter 11 plan, courts generally consider the following probative factors, none of which is dispositive:[75]

- the prospective earnings of the business or its earning power;
- the soundness and adequacy of the capital structure and working capital for the business which the debtor will engage in post-confirmation;
- the prospective availability of credit;
- whether the debtor will have the ability to meet its requirements for capital expenditures;
- economic and market conditions;
- the ability of management, and the likelihood that the same management will continue; and
- any other related matter which determines the prospects of a sufficiently successful operation to enable performance of the provisions of the plan.[76]

ii. The Plan Satisfies the Feasibility Requirement (If Applicable).

76. Here, the Plan is predicated on the Sale Transaction, pursuant to which the WLB Debtors will sell substantially all of their assets to the Purchaser. The WLB Debtors are fully capable of consummating the proposed Sale Transaction. Therefore, section 1129(a)(11) of the Bankruptcy Code is inapplicable to the Plan.

77. In any event, to the extent that section 1129(a)(11) of the Bankruptcy Code is applicable, the Plan is feasible. Confirmation of the Plan will enable the WLB Debtors to

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[75] *See*, *e.g.*, *In re Save Our Springs*, 632 F.3d at 173; *In re Briscoe Enters., Ltd., II*, 994 F.2d at 1166 (failing to recite the test and considering only three factors).

[76] *See*, *e.g.*, *In re M & S Assocs., Ltd.*, 138 B.R. 845, 849 (Bankr. W.D. Tex. 1992) (citation omitted); *see In re Save Our Springs (S.O.S.) Alliance, Inc.*, 632 F.3d 168, 173 (5th Cir. 2011); *In re Star Ambulance*, 540 B.R. at 267; *In re Couture Hotel*, 536 B.R. at 737; *In re Geijsel*, 480 B.R. 238, 257 (Bankr. N.D. Tex. 2012); *see also In re Worldcom, Inc.*, No. 02-13533 (AJG), 2003 WL 23861928, at *58 (Bankr. S.D.N.Y. Oct. 31, 2003); *In re Leslie Fay Cos., Inc.*, 207 B.R. 764, 789 (Bankr. S.D.N.Y. 1997); *In re Texaco Inc.*, 84 B.R. 893, 910 (Bankr. S.D.N.Y. 1988); *In re Prudential Energy Co.*, 58 B.R. 857, 862–63 (Bankr. S.D.N.Y. 1986).

consummate the Sale Transaction and make distributions to Holders of Allowed Claims without delay depending on their respective treatments.[77] Furthermore, the Stalking Horse Purchase Agreement and the Wind-Down Budget demonstrates that the WLB Debtors will have sufficient liquidity to meet their obligations under the Plan until all timely asserted administrative and priority Claims are satisfied or otherwise addressed pursuant to the Plan.

L. The Plan Provides for the Payment of All Fees Under 28 U.S.C. § 1930—Section 1129(a)(12).

78. The Bankruptcy Code requires plans to provide for the payment of all fees payable under 28 U.S.C. § 1930.[78] Here, Article XIV.C of the Plan provides that all fees payable pursuant to section 1930(a) of the Judicial Code, as determined by the Bankruptcy Court at the Confirmation Hearing in accordance with section 1128 of the Bankruptcy Code, will be paid by the WLB Debtors for each quarter (including any fraction of a quarter) until the Chapter 11 Cases are converted, dismissed, or closed, whichever occurs first.[79] The Plan, therefore, complies with section 1129(a)(12) of the Bankruptcy Code.

M. The Plan Complies with Section 1129(a)(13) of the Bankruptcy Code.

79. The Bankruptcy Code requires that all retiree benefits continue post-confirmation at any levels established in accordance with section 1114 of the Bankruptcy Code.[80] Following entry of the *Order Granting Debtors' Motion Seeking Authority to (A) Reject Certain Collective Bargaining Agreements, (B) Implement the Debtors' Proposal, and (C) Modify Certain*

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[77] Disclosure Statement, Art. II.I.

[78] 11 U.S.C. § 1129(a)(12).

[79] Plan, Art. XIV.C.

[80] 11 U.S.C. § 1129(a)(13).

Retiree Benefits [Docket No. 1412] (the "1113/1114 Order"), the WLB Debtors do not have any remaining obligations to pay retiree benefits (as defined by the Bankruptcy Code) except as set forth in the Proposal (as defined in the 1113/1114 Order, and except with respect to Coal Act obligations that the Debtors are seeking to modify consistent with the Coal Act Retirees Settlement, as described in more detail below). As a result, the Plan satisfies the requirements of section 1129(a)(13) of the Bankruptcy Code.[81]

N. Section 1129(a)(14) Through Section 1129(a)(16) of the Bankruptcy Code Do Not Apply to the Plan.

80. A number of the Bankruptcy Code's confirmation requirements are inapplicable to the Plan. The WLB Debtors do not owe any domestic support obligations, are not individuals, and are not nonprofit corporations. Therefore, sections 1129(a)(14), 1129(a)(15), and 1129(a)(16) of the Bankruptcy Code do not apply to the Chapter 11 Cases.[82]

O. The Plan Satisfies the Cramdown Requirements—Section 1129(b).

81. If an impaired class does not vote to accept a plan, the plan must be "fair and equitable" and not "unfairly discriminate" with respect to that class.[83] As described below, the Plan satisfies both of these cramdown requirements with respect to the Deemed Rejecting Classes, and all Voting Classes voted to accept the Plan.

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[81] The WLB Debtors discuss in further detail the Plan's compliance with section 1129(a)(13) of the Bankruptcy Code in their below response to the Coal Act Funds' Objection (as defined below).

[82] *See* 11 U.S.C. §§ 1129(a)(14), 1129(a)(15), 1129(a)(16).

[83] *See* 11 U.S.C. § 1129(b)(1).

i. The Plan Is Fair and Equitable with Respect to the Deemed Rejecting Classes.

82. A plan is "fair and equitable" with respect to an impaired class of claims or interests that rejects the plan (or is deemed to reject the plan) if it follows the "absolute priority rule."[84] With respect to any dissenting classes of creditors, such creditors must be fully satisfied before any junior creditor receives anything on account of its claim.[85] With respect to a class of equity interests that is receiving no recovery under a plan, the absolute priority rule requires only that no class junior to such equity interest receive any distribution under a plan.[86] The corollary of the absolute priority rule is that senior classes cannot receive more than a 100 percent recovery on their claims or interests.[87]

a. The Plan Satisfies the Absolute Priority Rule.

83. Under the Plan, no Holder of a Claim or Interest junior to an impaired class of Claims or Interests will receive any recovery on account of such Claim or Interest. Accordingly, the Plan satisfies the "fair and equitable" requirements of section 1129(b) of the Bankruptcy Code with respect to all impaired classes of Claims and Interests.

ii. The Plan Does Not Unfairly Discriminate Against the Deemed Rejecting Classes.

84. The Bankruptcy Code does not provide a standard for determining when "unfair discrimination" exists.[88] Rather, courts typically examine the facts and circumstances of the

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[84] *Bank of Am. Nat'l Trust & Savs. Ass'n*, 526 U.S. at 441-42; *In re Mirant Corp.*, 348 B.R. 720, 738 (Bankr. N.D. Tex. 2006).

[85] *In re Mirant Corp.*, 348 B.R. at 738.

[86] 11 U.S.C. § 1129(b)(2)(C)(ii).

[87] *See In re Idearc Inc.*, 423 B.R. at 171.

[88] *See In re Idearc Inc.*, 423 B.R. at 171.

particular case to determine whether unfair discrimination exists.[89] At a minimum, the unfair discrimination standard prevents creditors and interest holders with similar legal rights from receiving materially different treatment under a proposed plan without compelling justifications for doing so.[90] The unfair discrimination requirement, which involves a comparison of classes, is distinct from the equal treatment requirement of section 1123(a)(4), which involves a comparison of the treatment of claims within a particular class.

85. Here, each of the Deemed Rejecting Classes are junior in priority to the rest of the Classes reflected in the Plan. The remaining Classes—Class 1 (Other Priority Claims), Class 2 (Other Secured Claims), Class 3 (First Lien Secured Claims), and Class 4 (General Unsecured Claims)—have either voted to accept the Plan or are deemed to have accepted the Plan, rendering section 1129(b) of the Bankruptcy Code inapplicable to such Classes. Thus, the Plan does not discriminate unfairly in contravention of section 1129(b)(1) of the Bankruptcy Code, and the Plan may be confirmed notwithstanding the deemed rejection by the Deemed Rejecting Classes.[91]

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[89] *See In re Kolton*, No. 89-53425-C (LMC), 1990 WL 87007 at *5 (Bankr. W.D. Tex. Apr. 4, 1990) ("'[W]hether or not a particular plan does [unfairly] discriminate is to be determined on a case-by-case basis'") (quoting *In re Bowles*, 48 B.R. 502, 507 (Bankr. E.D. Va. 1985)); *see also In re Freymiller Trucking, Inc.*, 190 B.R. 913, 916 (Bankr. W.D. Okla. 1996) (holding that a determination of unfair discrimination requires a court to "consider all aspects of the case and the totality of all the circumstances").

[90] *See In re Idearc Inc.*, 423 B.R. at 171, ("[T]he unfair discrimination standard prevents creditors and equity interest holders with similar legal rights from receiving materially different treatment under a proposed plan without compelling justifications for doing so." (citation omitted)); *Liberty Nat'l Enters. v. Ambanc La Mesa Ltd. P'ship (In re Ambanc La Mesa Ltd. P'ship)*, 115 F.3d 650, 654 (9th Cir. 1997); *In re Aztec Co.*, 107 B.R. 585, 589-91 (Bankr. M.D. Tenn. 1989); *In re Johns-Manville Corp.*, 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1986), *aff'd*, 78 B.R. 407 (S.D.N.Y. 1987), *aff'd sub nom. Kane v. Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988).

[91] The UMWA alleges, without explanation, why the Plan's treatment of its claims constitute unfair discrimination, but such assertion is meritless and should be overruled.

P. The Plan Complies with the Other Provisions of Section 1129 of the Bankruptcy Code—Sections 1129(c), 1129(d), and 1129(e).

86. The Plan satisfies the remaining provisions of section 1129 of the Bankruptcy Code—sections 1129(c), 1129(d), and 1129(e).

87. Section 1129(c) of the Bankruptcy Code prohibits confirmation of multiple plans.[92] Other than the Plan (including previous versions thereof), no other plan has been filed in the Chapter 11 Cases. Accordingly, the requirements of section 1129(c) of the Bankruptcy Code are satisfied.

88. No Governmental Unit has requested that the Bankruptcy Court refuse to confirm the Plan on the grounds that the principal purpose of the Plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act. As evidenced by its terms, the principal purpose of the Plan is not such avoidance. Accordingly, the Plan satisfies the requirements of section 1129(d) of the Bankruptcy Code.[93]

89. The Chapter 11 Cases are not small business cases. Accordingly, section 1129(e) of the Bankruptcy Code does not apply to the Chapter 11 Cases.[94] Thus, the Plan satisfies the Bankruptcy Code's mandatory confirmation requirements.

III. The Discretionary Contents of the Plan Are Appropriate.

90. The Bankruptcy Code identifies various additional provisions that may be incorporated into a chapter 11 plan, including "any appropriate provision not inconsistent with the

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92 11 U.S.C. § 1129(c).

93 *See* 11 U.S.C. § 1129(d).

94 *See* 11 U.S.C. § 1129(e). A "small business debtor" cannot be a member "of a group of affiliated debtors that has aggregate non-contingent liquidated secured and unsecured debts in an amount greater than $2,566,050[] (excluding debt owed to 1 or more affiliates or insiders)." 11 U.S.C. § 101(51D)(A).

applicable provisions of this title."[95] Among other discretionary provisions, the Plan contains releases by the WLB Debtors and certain third parties of Claims and Causes of Action, exculpation and injunction provisions, settlement of Claims and Causes of Action, Assumption and Rejection of Executory Contracts and Unexpired Leases, and the treatment of alleged liens, easements, and similar interests.[96] All such discretionary provisions comply with section 1123(b) of the Bankruptcy Code, and are not inconsistent with the applicable provisions of the Bankruptcy Code. Accordingly, the Bankruptcy Court should approve these discretionary provisions.

A. The Settlements.

91. The Bankruptcy Code states that a plan may "provide for . . . the settlement or adjustment of any claim or interest belonging to the debtor or to the estate."[97] A court may approve a settlement under a plan only when it is "fair and equitable."[98] In particular, the Fifth Circuit applies a five-factor test for considering motions to approve settlements under Bankruptcy Rule 9019, weighing:[99]

> (1) the probability of success in litigation with due consideration for uncertainty in fact and law; (2) the complexity and likely duration of the litigation and any attendant expense, inconvenience, and delay, including the difficulties, if any to be encountered in the matter of collection; (3) the paramount interest of the creditors and a proper deference to their respective views; (4) the extent to which the

[95] 11 U.S.C. §§ 1123(b)(1)-(6).

[96] Plan, Art. IV, V, VII, and VIII.

[97] 11 U.S.C. § 1123(b)(3)(A).

[98] *See Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746, 754 n.22 (5th Cir. 1995) (citing *In re AWECO, Inc.*, 725 F.2d. 293, 297 (5th Cir. 1984)).

[99] Fed. R. Bankr. P. 9019.

> settlement is truly the product of arm's-length bargaining and not fraud or collusion; and (5) all other factors bearing on the wisdom of the compromise.[100]

92. The Plan embodies the various settlements between the WLB Debtors and their key stakeholders: (a) the Committee Settlement; (b) the Coal Act Retirees Committee Settlement; (c) the Intercompany Settlement between the WLB Debtors, the WMLP Debtors, and their respective secured lenders; (d) the resolution of the objections to the Plan by the Colstrip Plant Co-Owners (as defined in the *Confidentiality Agreement and Stipulated Protective Order* [Docket No. 1430]); and (e) the Sureties, all of which have the support and consent of the Consenting Stakeholders. The settlements represent significant achievements for these cases that will facilitate confirmation of the Plan and resolve potentially costly and distracting litigation relating thereto.

93. 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*); s*ee also Official Comm. of Unsecured Creditors v. Moeller (In re Age Ref., Inc.)*, 801 F.3d 530, 540 (5th Cir. 2015).

94. Under the rubric of the third factor referenced above, 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

[100] *See In re Moore*, 608 F.3d 253, 263 (5th Cir. 2010).

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).

95. As reflected by the overwhelming support of creditors for the Plan, the settlements embodied therein, which were negotiated at arm's-length and in good faith, are in the best interests of the WLB Debtors' estates and their stakeholders. Moreover, the settlements are critical to bringing closure to the WLB Debtors and all parties in interest and to permit the Sale Transaction to close and the WLB Debtors to emerge from chapter 11. Finally, the settlements will obviate any possible litigation between the estates regarding certain intercompany claims and causes of action (including possible fraudulent transfer and preferential transfer claims with respect to the Prior Shared Services Agreement), and the sharing of the costs of the fees, expenses, and certain amounts to be paid by the respective estates on account of legacy liabilities.

B. Assumption and Rejection of Executory Contracts and Unexpired Leases.

96. Article V of the Plan provides for the rejection on the Plan Effective Date of the WLB Debtors' Executory Contracts and Unexpired Leases, other than: (a) those that are identified on the Schedule of Assumed Executory Contracts and Unexpired Leases, which schedule can be modified by the WLB Debtors with the consent of the Buyer in accordance with and to the extent provided in the Stalking Horse Purchase Agreement; (b) those that have been previously assumed, assumed and assigned, or rejected by a Final Order; (c) those that are the subject of a motion to

assume, assume and assign, or reject Executory Contracts or Unexpired Leases that is pending on the Confirmation Date; (d) those that are subject to a motion to assume, assume and assign, or reject an Executory Contract or Unexpired Lease pursuant to which the requested effective date of such assumption, assumption and assignment, or rejection is after the Plan Effective Date; (e) those Executory Contracts and Unexpired Leases that expired pursuant to the terms thereof before the Petition Date; or (f) those Executory Contracts and Unexpired Leases that are Assigned Contracts under the Stalking Horse Purchase Agreement.

C. The Plan's Release, Exculpation, and Injunction Provisions Are Appropriate and Comply with the Bankruptcy Code.

97. The Plan includes certain WLB Debtor and third-party releases, an exculpation provision, and an injunction provision. These provisions comply with the Bankruptcy Code and prevailing law because, among other reasons, they are the product of extensive good faith, arm's-length negotiations, were a material inducement for parties to enter into the Settlements embodied in the Plan, and are supported by the WLB Debtors and other key stakeholders, including the Ad Hoc Group, the Committee, the WMLP Debtors, the MLP Secured Parties, and the vast majority of parties entitled to vote to accept or reject the Plan.

i. The WLB Debtor Release Is Appropriate and Complies with the Bankruptcy Code.

98. Section 1123(b)(3)(A) of the Bankruptcy Code provides that a chapter 11 plan may provide for "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate." Accordingly, pursuant to section 1123(b)(3)(A), the WLB Debtors may release estate causes of action as consideration for concessions made by their various stakeholders pursuant to the Plan.[101] In considering the appropriateness of such releases, courts in the Fifth Circuit

[101] *See*, *e.g.*, *In re Bigler LP*, 442 B.R. 537, 547 (Bankr. S.D. Tex. 2010) (plan release provision "constitutes an acceptable settlement under § 1123(b)(3) because the Debtors and the Estate are releasing claims that are property

generally consider whether the release is (a) "fair and equitable" and (b) "in the best interests of the estate."[102] While courts sometimes conflate the two prongs of the foregoing analysis, the "fair and equitable" prong is generally interpreted, consistent with that term's usage in section 1129(b) of the Bankruptcy Code, to require compliance with the Bankruptcy Code's absolute priority rule.[103] Courts generally determine whether a release is "in the best interest of the estate" by reference to the following factors:

a. the probability of success of litigation;

b. the complexity and likely duration of the litigation, any attendant expense, inconvenience, or delay, and possible problems collecting a judgment;

c. the interest of creditors with proper deference to their reasonable views; and

d. the extent to which the settlement is truly the product of arm's-length negotiations.[104]

Ultimately, courts afford debtors some discretion in determining for themselves the appropriateness of granting plan releases of estate causes of action.[105]

99. Article IX.D of the Plan provides for releases by the WLB Debtors and the Estates of any and all Causes of Action that the WLB Debtors or the Estates could assert against the Released Parties based on or relating to, in general, the WLB Debtors, the Chapter 11 Cases, the

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of the Estate in consideration for funding of the Plan"); *In re Heritage Org., LLC*, 375 B.R. at 259; *In re Mirant Corp.*, 348 B.R. at 737-39; *In re General Homes*, 134 B.R. at 861.

[102] *In re Mirant*, 348 B.R. at 738; *see also In re Heritage*, 375 B.R. at 259.

[103] *In re Mirant*, 348 B.R. at 738.

[104] *Id.* at 739-40 (citing *Official Comm. of Unsecured Creditors v. Cajun Elec. Power Coop.* (*In re Cajun Elec. Power Coop.*), 119 F.3d 349, 355–56 (5th Cir. 1997)).

[105] *See In re General Homes*, 134 B.R. at 861 ("The court concludes that such a release is within the discretion of the Debtor.").

Sale Transaction, or the Restructuring Transactions (the "Debtor Release").[106] The Debtor Release easily meets the controlling standard. As described herein, the Plan, including the Debtor Release, complies with the Bankruptcy Code's absolute priority rule. To the extent any Class is found to have rejected the Plan, no Class of equal priority is receiving more favorable treatment and no Class that is junior to such rejecting Classes will receive or retain any property on account of the Claims or Interests in such junior Class in a manner that violates the absolute priority rule.

100. In addition to being fair and equitable, the Debtor Release is in the best interest of the WLB Debtors' Estates. ***First***, the probability of success in litigation with respect to claims, if any, the WLB Debtors may have against the Released Parties is very low. No party in interest has challenged this conclusion in connection with Confirmation. ***Second***, any potential claims against the Released Parties are exceedingly complex and, even if successful, may be difficult to collect in light of the sophisticated nature of the underlying transactions and certain structural barriers. ***Third***, all Voting Classes voted in favor of the Plan, including the Debtor Release, and the Committee supports the Plan, including the Debtor Release. Thus, the Bankruptcy Court should defer to the creditor body's view—*i.e.*, the overwhelming support for the Plan. And ***fourth***, the Plan, including the Debtor Release, was heavily negotiated by sophisticated entities that were represented by able counsel and financial advisors. The result is a compromise that reflects the give-and-take of a true arm's-length negotiation process.

101. Ultimately, the WLB Debtors are giving up very little by way of the Debtor Release. In return, under the terms of the Plan, the WLB Debtors will complete the Sale Transaction and sell their operating businesses to the Purchaser, which result would not be possible

[106] The foregoing description is meant as a summary of the operative plan provisions only. Certain of the Released Parties are defined as such in multiple capacities. To the extent there is any conflict between the forgoing summary and the definition of "Released Parties" contained in Article I of the Plan, the Plan shall control.

without Ad Hoc Group's agreement to waive approximately $319 million in obligations under the First Lien Deficiency Claims, the assumption of ARO and other Assumed Liabilities, and the funding of the Funded Liabilities pursuant to the terms and conditions of the Plan, all necessary to confirm a chapter 11 plan. The other Released Parties similarly made substantial, valuable contributions to the efficient administration of the Chapter 11 Cases or are otherwise facilitating the WLB Debtors' successful emergence from the Chapter 11 Cases. Accordingly, the Debtor Release is fair, equitable, and in the best interest of the WLB Debtors and of their Estates, is justified under the controlling Fifth Circuit standard, and should be approved.

iii. The Third-Party Release Is Consensual, Appropriate, and Complies with the Bankruptcy Code.

102. The Fifth Circuit has a limited prohibition against third-party releases,[107] but these decisions only prohibit certain *non-consensual* third-party releases.[108] Here, as contemplated by and specifically stated in the WLB Debtors' solicitation materials and notice of the Confirmation Hearing, the third-party release provision in Article IX.E of the Plan (the "Third-Party Release") only applies to parties who did not vote to accept the Plan or affirmatively opt out of the Third-Party Release. The WLB Debtors discuss the propriety of the Third-Party Release below as part of their response to the U.S. Trustee's and SEC's Objections.

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[107] *See Ad Hoc Group of Vitro Noteholders v. Vitro S.A.B. de C.V.* (*In re Vitro S.A.B. de C.V.*), 701 F.3d 1031, 1059 (5th Cir. 2012); *Bank of New York Trust Co. v. Official Unsecured Creditors' Comm.* (*In re Pacific Lumber Co.*), 584 F.3d 229, 252 (5th Cir. 2009); *Feld v. Zale Corp.* (*In re Zale Corp.*), 62 F.3d 746, 760-61 (5th Cir. 1995).

[108] *See*, *e.g.*, *In re Pilgrim's Pride Corp.*, No. 08-45664 (DML), 2010 WL 200000, at *5 (Bankr. N.D. Tex. Jan. 14, 2010) (under *Pacific Lumber*, "the court may not, *over objection*, approve through confirmation of the Plan third-party protections" (emphasis added)). *See also In re Camp Arrowhead, Ltd.*, 451 B.R. 678, 701-2 (Bankr. W.D. Tex. 2011) ("[T]he Fifth Circuit does allow permanent injunctions *so long as there is consent*." (emphasis in original)).

iv. The Exculpation Provision Is Appropriate and Complies with the Bankruptcy Code.

103. Article IX.F of the Plan provides that the WLB Debtors and each Released Party shall be released and exculpated from any Cause of Action arising out of acts or omissions in connection with the Chapter 11 Cases and certain related transactions (the "Exculpation Provision").[109] The WLB Debtors discuss the propriety of the Exculpation Provision below in their response to the U.S. Trustee's and SEC's Objections.

v. The Injunction Provision Is Appropriate and Complies with the Bankruptcy Code.

104. The injunction provision set forth in Article IX.G of the Plan (the "Injunction Provision") merely implements the Plan's release and exculpation provisions, in part, by permanently enjoining all Entities from commencing or maintaining any action against the WLB Debtors or the Released Parties on account of, in connection with, or with respect to any such claims and interests released, exculpated, or settled under the Plan. The Injunction Provision is thus a key provision of the Plan because it enforces the release and exculpation provisions that are centrally important to the Plan. Further, as described above, the injunction provided for in the Plan is consensual as to any party that did not specifically object thereto. As such, to the extent the Bankruptcy Court finds that the Plan's exculpation and release provisions are appropriate, the Bankruptcy Court should approve the Injunction Provision.[110]

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[109] The foregoing description is meant as a summary of the operative plan provisions only. To the extent there is any conflict between the forgoing summary and the Plan, the Plan shall control.

[110] *See*, *e.g.*, *In re Camp Arrowhead*, 451 B.R. at 701–02 ("the Fifth Circuit does allow permanent injunctions *so long as there is consent* . . . [w]ithout an objection, this court was entitled to rely on . . . silence to infer consent at the confirmation hearing") (citing *In re Pacific Lumber*, 584 F.3d at 253; *In re Pilgrim's Pride*, 2010 WL 200000, at *5).

D. The WLB Debtors May Transfer the Acquired Assets Free and Clear of Liens, Claims, and Other Encumbrances.

105. Pursuant to the Plan, the WLB Debtors seek to sell the Transferred Assets free and clear of all liens, claims, encumbrances, and other interests. Sections 363(f) and 1123(a)(5) of the Bankruptcy Code authorizes a debtor to sell assets free and clear of any interest in such property if:

> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
>
> (2) such entity consents;
>
> (3) such interest is a lien and the price at which such property is sold is greater than the aggregate value of all liens on such property;
>
> (4) such interest is in bona fide dispute; or
>
> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.[111]

Because section 363(f) of the Bankruptcy Code is drafted in the disjunctive, satisfaction of any one of its five requirements is sufficient to permit the sale of the Transferred Assets "free and clear" of liens and interests.[112]

106. The WLB Debtors respectfully submit that sections 363(f)(2) and 1123(a)(5) of the Bankruptcy Code will be satisfied with respect to the Transferred Assets pursuant to the Stalking Horse Purchase Agreement. More specifically, with respect to the Consenting Stakeholders, the Stalking Horse Purchaser proposes to credit bid its First Lien Secured Claims to acquire the Transferred Assets as contemplated by sections 363(k) and 1123 of the Bankruptcy Code, thereby evidencing its consent to the proposed Sale Transaction. Accordingly, the WLB Debtors

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[111] 11 U.S.C. § 363(f).

[112] *In re Kellstrom Indus., Inc.*, 282 B.R. 787, 793 (Bankr. D. Del. 2002).

respectfully submit that sections 363(f)(2) and 1123 of the Bankruptcy Code will be satisfied with respect to the Consenting Stakeholders. Furthermore, as set forth below, the WLB Debtors have satisfied the requirements under the Bankruptcy Code to transfer the Transferred Assets free and clear of any other purported liens, claims or other encumbrances on the Transferred Assets other than with respect to Permitted Encumbrances (as defined in the Stalking Horse Purchase Agreement). As such, the WLB Debtors respectfully request that, upon the closing of the Sale Transaction, the Transferred Assets shall be transferred to the Purchaser, free and clear of all liens, claims, and other encumbrances other than Permitted Encumbrances. The WLB Debtors further request that, upon the closing of the Sale Transaction, the Transferred Assets shall be transferred to the Purchaser, free and clear of all obligations of the WLB Debtors under any Contract (as defined in the Stalking Horse Purchase Agreement), unless and to the extent such obligation is a Permitted Encumbrance or an Assumed Liability (as defined in the Stalking Horse Purchase Agreement) pursuant to the terms of the Stalking Horse Purchase Agreement or Confirmation Order.

IV. The Modifications to the Plan Do Not Require Resolicitation and Should Be Approved.

107. The Bankruptcy Code provides that a plan proponent may modify a plan "at any time" before confirmation.[113] It further provides that all stakeholders that previously have accepted a plan should also be deemed to have accepted such plan as modified.[114] The Bankruptcy Rules provide that such modifications do not require resolicitation where the court determines, after notice and a hearing, "that the proposed modification does not adversely change the treatment

[113] 11 U.S.C. § 1127(a).

[114] *Id.* § 1127(d).

of the claim of any creditor or the interest of any equity security holder who has not accepted in writing the modification."[115]

108. Only those modifications that are "material" require resolicitation.[116] A plan modification is not material unless it "so affects a creditor or interest holder who accepted the plan that such entity, if it knew of the modification, would be likely to reconsider its acceptance."[117] Thus, an improvement to the position of the creditors affected by the modification will not require resolicitation of a modified plan.[118] Nor will a modification that is determined to be immaterial require resolicitation.[119]

109. Here, to implement the resolutions reached with the Consenting Stakeholders, the WMLP Debtors, the Committee, the MLP Secured Lenders, the Coal Act Retirees Committee, the U.S. Trustee, the SEC, the Colstrip Plant Co-Owners, and the Sureties, and to address and settle various formal and informal objections, the WLB Debtors filed an amended Plan on February 22, 2019 [Docket No. 1457]. These changes are permissible modifications to the Plan. They are supported by the WLB Debtors, the WMLP Debtors, the Debtors' respective secured lenders, the

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[115] Fed. R. Bankr. P. 3019.

[116] *See In re American Solar King*, 90 B.R. at 824 (approving plan modification with *de minimis* effect on creditor recoveries pursuant to Bankruptcy Rule 3019); *In re R.E. Loans, LLC*, No. 11-35865 (BJH), 2012 WL 2411877 at *10 (Bankr. N.D. Tex. June 26, 2012) (finding that none of the modifications adversely changed the treatment of the claim of any creditor or the interest of any equity security holder so as to require resolicitation pursuant to Bankruptcy Rule 3019).

[117] *In re American Solar King*, 90 B.R. at 824.

[118] *See In re Mangia Pizza Invs., LP*, 480 B.R. 669, 689 (Bankr. W.D. Tex. 2012) ("[A]nyone who voted to accept the previous plan will be deemed to have accepted the modified plan if the modified plan 'does not adversely change the treatment of [that creditor's] claim.'") (citing *In re Dow Corning Corp.*, 237 B.R. 374, 378 (Bankr. E.D. Mich. 1999)).

[119] *See In re American Solar King*, 90 B.R. at 826 ("[I]f a modification does not 'materially' impact a claimant's treatment, the change is not adverse and the court may deem that prior acceptances apply to the amended plan as well.").

Committee, and the Coal Act Retirees Committee and either improve or do not reflect material differences to recoveries of each affected class—*i.e.*, no holder is "likely" to reconsider its acceptance. The Committee and the Consenting Stakeholders—the parties most affected by the modifications to the Plan—do not oppose the modifications and have agreed that resolicitation is not necessary. Thus, these Plan modifications do not require resolicitation, and the WLB Debtors should not be required to incur the significant costs associated with a resolicitation.

Overview of Remaining Objections

110. The WLB Debtors received a number of timely objections to Confirmation of the Plan (each, an "Objection," and together, the "Objections"), prior to the deadline to object. As a result of the WLB Debtors' subsequent discussions with parties in interest, the WLB Debtors have either resolved or anticipate resolving all Objections other than those filed by the U.S. Trustee, the Securities and Exchange Commission (the "SEC"), the UMWA, and the Coal Act Funds, prior to the Confirmation Hearing. For the reasons set forth herein, the WLB Debtors respectfully request that the Bankruptcy Court confirm the Plan.

I. The Remaining Objections Should be Overruled.

111. The WLB Debtors have been engaged in discussions with various objecting parties to resolve their Objections to the Plan, and are pleased to report that the only remaining Objections are from the U.S. Trustee, the SEC, the UMWA, and the Coal Act Funds.

A. The U.S. Trustee's and the SEC's Objections.

i. The Plan's Release, Exculpation, and Injunction Provisions Are Appropriate and Comply with the Bankruptcy Code.

112. The U.S. Trustee and the SEC object to the Plan's third-party release, exculpation, and injunction provisions. The U.S. Trustee's objection primarily focuses on releases and exculpation granted to certain "Former Parties" affiliated with the primary released and exculpated

parties.[120] The SEC's objection serves as a blanket objection against any non-debtor benefiting from these provisions, with some specific emphasis on the rights of public shareholders. Both the U.S. Trustee and the SEC assert that the Plan's release and exculpation provisions are overly broad, relying on the Fifth Circuit's *Pacific Lumber* prohibition on ***non-consensual*** third-party releases. However, as the WLB Debtors made clear in the Disclosure Statement, the Plan's third-party releases are consensual. All parties, including even those parties that were not entitled to vote on the Plan, had the opportunity to "opt out" of the releases. Disclosure Statement Order ¶¶ 13, 22, Schedules 3A, 3B, 3C, 3D, 4A, 5A, and 6A. Courts in the Fifth Circuit routinely approve consensual third-party releases such as those contained in the Plan.[121] For these reasons and the reasons described more fully below, the Plan's release and exculpation provisions fall squarely within Fifth Circuit precedent and should be approved.

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[120] Specifically, the U.S. Trustee defines "Former Parties" as the "former officers, directors, representatives, professionals, affiliates, and equity holders (unless opted out of being a Releasing Party and Released Party) of the WLB Debtors, the Committee, the Successful Bidder, the Stalking Horse Purchaser, the Consenting Stakeholders, the Holders of First Lien Claims, the Holders of Bridge Loan Claims, the DIP Lenders, the Bridge Loan Agent, the Credit Agreement Agent, the DIP Agent, and the First Lien Notes Trustee." *See* U.S. Trustee Objection, ¶ 21.

[121] *See*, *e.g.*, *In re iHeartMedia, Inc.*, No. 18-31274 (MI) (Bankr. S.D. Tex. Jan. 22, 2019) (approving third-party releases as consensual over objection from parties including the SEC and the U.S. Trustee); *In re GenOn Energy, Inc.*, No. 17-33695 (DRJ) (Bankr. S.D. Tex. Dec. 12, 2017) (approving third-party releases as consensual over objections from parties in interest, including U.S. Trustee); *Ameriforge Grp., Inc.*, No. 17-32660 (DRJ) (Bankr. S.D. Tex. May 22, 2017) (overruling U.S. Trustee objection and confirming chapter 11 plan where general unsecured creditors were unimpaired and deemed to have consented to third-party release provisions unless they asserted an objection to same); *In re Ultra Petrol. Corp.*, No. 16-32202 (MI) (Bankr. S.D. Tex. Mar. 14, 2017) (confirming chapter 11 plan where general unsecured creditors were unimpaired and deemed to have consented to third-party release provisions unless they asserted an objection to same); *In re CJ Holding Co.*, No. 16-33590 (DRJ) (Bankr. S.D. Tex. Dec. 16, 2016) (confirming chapter 11 plan where general unsecured creditors were impaired and deemed to have consented to third-party release provisions unless they asserted an objection to same); *In re Light Tower Rentals, Inc.*, No. 16-34284 (DRJ) (Bankr. S.D. Tex. Sept. 30, 2016) (confirming chapter 11 plan where general unsecured creditors were unimpaired and deemed to have consented to third-party release provisions unless they asserted an objection to same); *In re Southcross Holdings LP*, No. 16-20111 (MI) (Bankr. S.D. Tex. Apr. 11, 2016) (same).

a. The Third-Party Release Is Consensual, Appropriate, and Complies with the Bankruptcy Code.

113. The Fifth Circuit's limited prohibition against non-consensual third-party releases—*i.e.*, when the plan would force parties to release claims even if they opted out of the releases—is inapplicable here, where the third-party release provision in Article IX.E of the Plan (the "Third-Party Release") expressly only applies to parties that voted to accept the Plan or did not affirmatively opt out of the Third-Party Release.[122] Accordingly, the Third-Party Release is appropriate under Fifth Circuit law as a ***consensual*** third-party release.[123]

114. The Fifth Circuit has not directly addressed the parameters of what constitutes a consensual third-party release, but it has previewed the issues in a series of decisions addressing the *res judicata* effect of a confirmed chapter 11 plan that contains a third-party release provision.[124] The *Republic Supply* court found that the Bankruptcy Code does not preclude a third-party release provision where "it has been accepted and confirmed as an integral part of a plan of reorganization."[125] The *Republic Supply* court ultimately found that the third-party release provision at issue—which no party timely objected to in connection with plan confirmation—was

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[122] *See*, *e.g.*, *In re Pilgrim's Pride Corp*., No. 08-45664 (DML), 2010 WL 200000, at *5 (Bankr. N.D. Tex. Jan. 14, 2010) (under *Pacific Lumber*, "the court may not, *over objection*, approve through confirmation of the Plan third-party protections") (emphasis added); *see also In re Camp Arrowhead, Ltd.*, 451 B.R. 678, 701-2 (Bankr. W.D. Tex. 2011) ("[T]he Fifth Circuit does allow permanent injunctions *so long as there is consent*.").

[123] *See Ad Hoc Group of Vitro Noteholders v. Vitro S.A.B. de C.V.* (*In re Vitro S.A.B. de C.V.*), 701 F.3d 1031, 1059 (5th Cir. 2012); *Bank of New York Trust Co. v. Official Unsecured Creditors' Comm*. (*In re Pacific Lumber Co.*), 584 F.3d 229, 252 (5th Cir. 2009); *Feld v. Zale Corp*. (*In re Zale Corp.*), 62 F.3d 746, 760-61 (5th Cir. 1995).

[124] *See Hernandez v. Larry Miller Roofing, Inc.*, 628 Fed. Appx. 281, 286–88 (5th Cir. 2016); *FOM Puerto Rico S.E. v. Dr. Barnes Eyecenter Inc.*, 255 Fed. Appx. 909, 911–12 (5th Cir. 2007); *Applewood Chair Co. v. Three Rivers Planning & Dev. Dist.* (*In re Applewood Chair Co.*), 203 F.3d 914, 919 (5th Cir. 2000); *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1050 (5th Cir. 1987).

[125] *Republic Supply*, 815 F.2d at 1050.

binding and enforceable.[126] The Fifth Circuit has subsequently addressed the exact issue in *Republic Supply* on three occasions, focusing on the specificity of the third-party release provision at issue to determine its *res judicata* effect.[127] *Republic Supply* and its progeny stand for the proposition that "[c]onsensual nondebtor releases that are specific in language, integral to the plan, a condition of the settlement, and given for consideration do not violate" the Bankruptcy Code.[128]

115. Accordingly, courts in the Fifth Circuit have acknowledged that "[t]he Fifth Circuit has held that a nondebtor release violates section 524(e) when the affected creditor *timely objects* to the provision."[129] Courts in this District have applied this standard in approving third-party releases similar to the Third-Party Release in recent oil and gas industry bankruptcies.[130] In doing so, these courts have focused on ***process***—*i.e.*, whether "notice has gone out, parties have actually gotten it, they've had the opportunity to look over it, [and] the disclosure is adequate so that they can actually understand what they're being asked to do and the options that they're being given."[131]

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[126] *Id*. at 1053.

[127] *See generally Hernandez*, 628 Fed. Appx. 281 (comparing the septicity of the third-party release provisions at issue in *Republic Supply*, *Applewood*, and *Dr. Barnes Eyecenter*).

[128] *In re Wool Growers*, 371 B.R. 768, 776 (Bankr. N.D. Tex. 2007) (citing *Republic Supply*, 815 F.2d at 1050; *Dr. Barnes Eyecenter*, 255 Fed. Appx. at 911–12).

[129] *Id*. (citing *Zale*, 62 F.3d at 761) (emphasis added).

[130] *See*, *e.g.*, *In re GenOn Energy, Inc.*, No. 17-33695 (DRJ) (Bankr. S.D. Tex. Dec. 12, 2017) (approving third-party releases as consensual over objections from parties in interest, including U.S. Trustee); *In re Ultra Petrol. Corp.*, No. 16-32202 (MI) (Bankr. S.D. Tex. Mar. 14, 2017) (confirming chapter 11 plan where general unsecured creditors were unimpaired and deemed to have consented to third-party release provisions unless they asserted an objection to same); *In re CJ Holding Co.*, No. 16-33590 (DRJ) (Bankr. S.D. Tex. Dec. 16, 2016) (confirming chapter 11 plan where general unsecured creditors were impaired and deemed to have consented to third-party release provisions unless they asserted an objection to same); *In re Southcross Holdings LP*, No. 16-20111 (MI) (Bankr. S.D. Tex. Apr. 11, 2016) (same).

[131] Confirmation Hr'g Tr. at 47, *In re Energy & Exploration Partners, Inc.*, No. 15-44931 (Bankr. N.D. Tex. April 21, 2016) [Docket No. 730] (hereinafter "ENXP Tr.").

Ultimately, these courts acknowledge that parties in interest waive their rights with respect to a third-party release if they vote to accept the Plan or do not opt out of the releases.[132]

116. The U.S. Trustee and the SEC argue that the Third-Party Release is not consensual on the grounds that an opt-out mechanism does not establish consent. The SEC made this argument at the Disclosure Statement hearing, arguing that "releases are only consensual when affected parties are given the opportunity to affirmatively grant the release" and that "silence and inaction generally are not sufficient to constitute an acceptance of [a] contract."[133] The Court responded that "[requiring an opt-in mechanism] just doesn't work . . . . It's not practical and it's also not required."[134] The Court's position is consistent with Fifth Circuit precedent and a practical necessity in these Chapter 11 Cases. Therefore, the WLB Debtors ask the Court to again overrule the objections to the opt-out process and find that the Third-Party Release is consensual.

117. The U.S. Trustee and the SEC have also objected to the sufficiency of the consideration supporting the Third-Party Release. Crucially, however, the Third-Party Release is reciprocal in that every party approving the Third-Party Release is both a Released Party and a Releasing Party.[135] The reciprocal releases serve as mutual consideration—this is true even with

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[132] ENXP Tr. at 47 ("[T]he [*Republic Supply*] case being that the Debtor is authorized, I think, I don't think there's anything that's necessarily bad faith about the Debtor putting release provisions like this into a plan. And if we assume that the Debtor has otherwise satisfied procedural due process . . . and then they choose not to participate one way or the other, can they be bound by it? I would say that this is one of those situations where [*Republic Supply*] says those people can waive substantive rights by not affirmatively participating in the case."); Confirmation Hr'g Tr. at 42, *In re Southcross Holdings, LP*, No. 16-20111 (Bankr. S.D. Tex. April 11, 2016) [Docket No. 191] (approving as consensual a third-party release provision in favor of the debtors' prepetition equity sponsors that bound all holders of claims and interest).

[133] Disclosure Statement Approval Hr'g Tr. at 104-06, *In re Westmoreland Coal Company*, No. 18-35672-H2-11 (Bankr. S.D. Tex. Nov. 18, 2018) (hereinafter "D.S. Hr'g Tr.")

[134] *Id.* at 106.

[135] The foregoing description is meant as a summary of the operative Plan provisions only. Certain of the Releasing Parties are defined as such in multiple capacities. To the extent there is any conflict between the forgoing summary and the definition of "Releasing Parties" contained in Article I of the Plan, the Plan shall control.

respect to parties releasing claims of minimal value. The *Cobalt* case is particularly instructive on this point. In *Cobalt*, the SEC objected to the debtors' shareholders granting third-party releases on these same grounds of insufficient consideration. As in the instant case, the SEC questioned the value of the releases the shareholders received.[136] Despite multiple opportunities, however, the SEC did not present evidence of any bona fide claims shareholders were releasing.[137] Considering this complete absence of evidence, the bankruptcy court found that a "proverbial peppercorn-for-peppercorn" mutual exchange of releases of unknown claims constituted adequate consideration to support the mutual releases: "I simply find that this is, in effect, the proverbial peppercorn-for-peppercorn and that is adequate consideration for the release, given its mutuality."[138] In questioning the SEC's counsel on the issue of adequacy of the consideration, the *Cobalt* court highlighted the precise value of a mutual release: "Let's assume that no one needs a release because of anything they've done wrong; we need the release because of stopping the fight and just all we're going to do is save both sides legal fees. Why isn't that equivalent?"[139] The answer, as the court recognized in its ruling, is that it ***is*** equivalent.[140]

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[136] *In re Cobalt Int'l Energy, Inc.*, Ch. 11 Case No. 17-36709 (MI) (Bankr. S.D. Tex.), Apr. 4, 2018 Hr'g Tr. 209 ("And whether or not the Debtors are giving a release to equity holders, whether or not that's material consideration, I don't think that that's worth the release they're giving back.").

[137] *Id.* at 244 ("The evidence before me is that the public shareholders have no claims that they can assert. I have allowed every party to introduce every piece of evidence that they wanted to in that regard. No one chose to introduce any evidence that the public shareholders had any bonafide [sic] claims.").

[138] *Id.*

[139] *Id.* at 210.

[140] *Id.* at 244.

118. The sufficiency of mutual releases as consideration has been recognized in this District.[141] The ultimate effect of the Third-Party Release is to "end the fight"[142]—all parties settle their respective claims as part of the Chapter 11 Cases, allowing all parties to focus on one common goal with the knowledge that the recoveries obtained through the Chapter 11 Cases will settle all potential Causes of Action relating to the WLB Debtors or their restructuring. The Third-Party Release therefore easily meets the standard set forth in *Republic Supply* and its progeny and otherwise complies with controlling Fifth Circuit standards as it is consensual, sufficiently specific,[143] supported by mutual consideration, and integral to the Plan. Accordingly, the Third-Party Release should be approved.

a. The Exculpation Provision Is Appropriate, and Complies with the Bankruptcy Code.

119. The Plan provides that the Debtors, the Holders, agents, and trustees of the Debtors' funded debt, the Consenting Stakeholders, and various related parties are Exculpated Parties.[144] A bankruptcy court has the power to approve an exculpation provision in a chapter 11 plan because a bankruptcy court cannot confirm a chapter 11 plan unless it finds that the plan has been proposed

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141 *In re iHeartMedia, Inc.*, No. 18-31274 (MI) (Bankr. S.D. Tex. Jan. 22, 2019) (approving third-party releases over SEC objection that they were unsupported by consideration); *In re Cobalt In'l Energy, Inc.*, No. 17-36709 (MI) (Bankr. S.D. Tex. Apr. 5, 2018) (same).

142 *Cobalt Int'l Energy, Inc.*, Ch. 11 Case No. 17-36709 (MI) (Bankr. S.D. Tex.), Apr. 4, 2018 Hr'g Tr. 244.

.143 *See*, *e.g.*, *Dr. Barnes Eyecenter*, 255 Fed. Appx. at 910, 912 (finding release language that provided for release of any and all claims "based in whole or in part on any act or omission, transaction, or occurrence from the beginning of time through the Effective Date in any way relating to [the debtor], its Bankruptcy Case, or the Plan").

144 Unlike the Third-Party Release, the Exculpation Provision sets a standard of care of gross negligence or actual fraud in hypothetical future litigation against an Exculpated Party for acts arising out of the WLB Debtors' restructuring. *See, e.g.*, *In re PWS Holding Corp.*, 228 F.3d 224, 246 (3d Cir. 2000) (holding that an exculpation provision "is apparently a commonplace provision in Chapter 11 plans, [and] does not affect the liability of these parties, but rather states the standard of liability under the Code.").

in good faith.[145] As such, an exculpation provision represents a legal conclusion that flows inevitably from several different findings a bankruptcy court must reach in confirming a plan.[146] Once the court makes its good faith finding, it is appropriate to set the standard of care of the fiduciaries involved in the formulation of that chapter 11 plan.[147] Exculpation provisions, therefore, appropriately prevent future collateral attacks against fiduciaries of the WLB Debtors' estates and other core parties supporting the Plan. Here, the Exculpation Provision is likewise appropriate and vital because it provides protection to those parties who served as fiduciaries during the restructuring process, and certain integral parties (*i.e.*, the Consenting Stakeholders, the MLP Secured Lenders, and related parties) who provided critical support for the Plan and the settlements contained therein.

120. There can be no doubt that the Debtors themselves are entitled to the relief embodied in the Exculpation Provision. Having acted in "good faith" within the meaning of section 1125(e) of the Bankruptcy Code, the Debtors are entitled to the protections afforded by section 1125(e) of the Bankruptcy Code and the Exculpation Provision.[148] Further, granting such relief falls squarely within the "fresh start" principles underlying the Bankruptcy Code.[149] The *Pacific Lumber* court also carved out an exception in favor of exculpatory relief for non-debtor

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[145] *See* 11 U.S.C. § 1129(a)(3).

[146] *See* 11 U.S.C. § 157(b)(2)(L).

[147] *See* PWS, 228 F.3d at 246-247 (observing that creditors providing services to the debtors are entitled to a "limited grant of immunity . . . for actions within the scope of their duties . . . .").

[148] *See In re Sears Methodist Ret. Sys., Inc.*, No. 14-32821-11, 2015 WL 1066882, at *9 (Bankr. N.D. Tex. Mar. 6, 2015).

[149] *See Pacific Lumber*, 584 F.3d at 252.

parties where such parties owe duties in favor of the debtors or their estates and act within the scope of those duties (*i.e.*, excluding acts of fraud or gross negligence).[150]

121. Here, in addition to the Debtors, the principal exculpated parties owe duties in favor of the Debtors' estates. The directors, officers, and advisors that have acted on the Debtors' behalf in these chapter 11 cases owe the Debtors similar duties.[151] Further, the *Pacific Lumber* court specifically recognized that official committees and their members are entitled to exculpatory relief—thus, exculpation in favor of the Committee and the Coal Act Retirees Committee and their members is appropriate.[152] Although the Consenting Stakeholders, the MLP Secured Lenders, and the holders, agents, and trustees of the Debtors' funded debt do not, strictly speaking, owe fiduciary duties to the Debtors, they were integral participants and funding sources for the settlements embodied in the Plan or reached contemporaneously therewith, and are therefore properly included in the Exculpation Provision. In the *GenOn Energy* case, the Court approved an exculpation provision that included exculpations for parties unrelated to the debtors over the objection of the U.S. Trustee, where such parties were integral to the settlements set forth in the Plan. Here, too, the Consenting Stakeholders should be protected by the Exculpation Provision because their instrumental support for the Plan—through entry into the RSA, agreeing to vote for the Plan, and supporting the various settlements that are incorporated into the Plan—makes them *de facto* plan

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[150] *Id.* at 253.

[151] *See, e.g. Pilgrim's Pride*, 2010 WL 200000, at *5 ("Debtors, serving through their management and professionals as debtors in possession, acted in the capacity of trustees for the benefit of their creditors . . . [t]o the extent Debtors acted in the Chapter 11 Cases, other than in bad faith, pursuant to the authority granted by the Code or as directed by court order, Debtors' management and professionals presumptively should not be subject to liability").

[152] *Pacific Lumber*, 584 F.3d at 253; *see also In re GenOn Energy, Inc.*, No. 17-33695 (DRJ) (Bankr. S.D. Tex. Dec. 12, 2017) (approving exculpation provision of non-debtor plan proponents who were integral participants to the settlement embodied in the chapter 11 plan over objections from parties in interest, including U.S. Trustee).

proponents. Accordingly, the Exculpation Provision complies with the Bankruptcy Code and is consistent with *Pacific Lumber* and its progeny.

122. The Exculpation Provision represents an integral piece of the overall settlement embodied by the Plan and is the product of good faith, arm's-length negotiations. The Exculpation Provision is narrowly tailored to exclude acts of fraud and gross negligence, relates only to acts or omissions in connection with, or arising out of the administration of the Debtors' chapter 11 cases and their restructuring, and ultimately inures to the benefit of only those parties that may owe fiduciary duties to the Debtors and their estates. Accordingly, the Exculpation Provision should be approved.[153]

ii. The WLB Debtors Are Entitled to a Discharge.

123. The U.S. Trustee argues that the WLB Debtors are not entitled to a discharge pursuant to section 1141(d)(3) of the Bankruptcy Code.[154] Section 1141(d)(3) provides that "[t]he confirmation of a plan does not discharge a debtor if—(A) the plan provides for the liquidation of all or substantially all of the property of the estate; (B) the debtor does not engage in business after consummation of the plan; ***and*** (C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title."[155] Critically, all

[153] *Cf. Wool Growers*, 371 B.R. at 775 ("[t]he validity of a consensual release is primarily a question of contract law because such releases are no different from any other settlement or contract."); *Pilgrim's Pride*, 2010 WL 200000, at *5.

[154] *See* U.S. Trustee Objection at ¶¶ 24–26.

[155] *See* 11 U.S.C. § 1141(d)(3) (emphasis added).

three elements of section 1141(d)(3) must be established before a chapter 11 debtor's discharge may be denied.[156]

124. Here, the U.S. Trustee cannot establish the first element because the Plan does not provide for the liquidation of all or substantially all of the property of the WLB Debtors' chapter 11 estates.[157] Rather, the Plan contemplates the value-maximizing, going-concern sale of all of the WLB Debtors' assets, which will be operated by the Purchaser on and after the Plan Effective Date. It appears that part of the U.S. Trustee's Objection rests on the fact that the Plan is structured as an "asset sale." While particular WLB Debtors will sell their hard assets to the Purchaser, the WLB Debtors may transfer the equity of certain WLB Debtors to the Purchaser, and those WLB Debtor entities will continue to operate under the ownership of the Purchaser in the same way they do presently under the ownership of WLB. Several reasons support the Plan's transfer of assets of certain WLB Debtors and the equity of other WLB Debtors to the Purchaser.

125. Among other things, certain WLB Debtors hold mining licenses from state regulators, and those regulators require those WLB Debtors to maintain surety bonds. It is far simpler to transfer mining permits in certain states as an equity transfer rather than an asset transfer. Likewise, it is easier to transfer surety bonds in some locales as part of an equity sale than an asset sale. This varies from state to state, so the Plan attempts to maintain the flexibility to transfer the operations to the Purchaser in the most efficient manner possible.

126. In sum, even though the WLB Debtors' restructuring is structured in part as an asset sale, there will be no functional difference between the Plan and a traditional reorganization: the

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[156] *See id.*; *In re Berg*, 423 B.R. 671, 677 (B.A.P. 10th Cir. 2010) (reversing an individual chapter 11 debtor's denial of discharge because the bankruptcy court only made findings as to one of the three elements).

[157] *See* 11 U.S.C. § 1141(d)(3).

Consenting Stakeholders will own the entire business enterprise and continue to operate it as a going concern. Further, the Bankruptcy Code expressly provides that a chapter 11 plan may provide for the "sale of all or substantially all of the property of the estate,"[158] and bankruptcy courts have regularly approved discharges as part of chapter 11 plans that implement a sale of substantially all of a debtor's assets.[159] A discharge is similarly appropriate here, and the WLB Debtors accordingly submit that a discharge is warranted.

iii. The Initial Board of Directors of the Purchaser May Adopt and Implement the Employee Incentive Plan Without Court Approval and Such Plan Is Not Governed by Section 503(c) of the Bankruptcy Code.

127. The terms and conditions and the implementation of the Employee Incentive Plan are ***entirely*** up to the new board of directors (which will be based on post-Plan Effective Date results of the Purchaser, and will not be subject to the supervision of this Court). The negotiation of the Employee Incentive Plan itself has not yet taken place and remains subject to the discretion of the board of directors of the Purchaser. The Plan merely vests the new board of directors with the power to set the terms and conditions (including the timing of any grants) of the Employee Incentive Plan and to determine how to best incentivize the employees of the Purchaser.

128. Furthermore, "[t]he language of section 503(c) is clear and unambiguous that *only administrative claims* are subject to section 503(c) restrictions."[160] As contemplated in the Plan, the Employee Incentive Plan would not involve the allowance or payment of any claims against

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158 *See* 11 U.S.C. § 1129(b)(4).

159 *See, e.g.*, *In re BCBG Max Azria Global Holdings, LLC*¸ No. 17-10466 (SCC) (Bankr. S.D.N.Y. July 26, 2017) (confirming a chapter 11 liquidating plan and granting a discharge); *In re Patriot Coal Corp.*, No. 15032450 (KLP) (Bankr. E.D. Va. Oct. 9, 2015) (same).

160 *In re Dana Corp.*, 358 B.R. 567, 578 (Bankr. S.D.N.Y. 2006); *see also In re Journal Register Co.*, 407 B.R. 520, 535 n.8 (Bankr. S.D.N.Y. 2009) ("Like the rest of § 503, subsection 503(c) applies only when the proposed bonuses are to be paid as administrative expenses of a bankruptcy estate.").

the WLB Debtors or their estates;[161] instead, the ***Purchaser*** will be the entity responsible for the obligations arising under the Employee Incentive Plan, not the WLB Debtors or their estates.[162] Accordingly, section 503(c) of the Bankruptcy Code is simply inapplicable.

B. The UMWA's Objection.

129. The WLB Debtors respectfully submit that the UMWA Objection is rendered moot by the Court's entry of the 1113/1114 Order. The UMWA Objection essentially repeats the same arguments that were made—and overruled—at the section 1113/1114 hearing. For the reasons the Court granted the section 1113/1114 Order, the WLB Debtors respectfully request that the UMWA Objection be overruled (to the extent it is not already moot).

C. The Colstrip Plant Co-Owners' Objections.

The WLB Debtors are pleased to report that their productive discussions with the Colstrip Plant Co-Owners have resolved their objections to the Plan, subject to the inclusion in the Plan of agreed-upon language.

D. The Sureties' Objections.

130. The WLB Debtors are pleased to report that their productive discussions with certain of the Sureties who filed objections to the Plan have resolved the Sureties' objections, subject to the inclusion in the Confirmation Order of agreed-upon language.

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[161] *Journal Register*, 407 B.R at 534 (post-emergence incentive payments did not fall under section 503(c) because they were not administrative expenses); *see also In re Airway Indus., Inc.*, 354 B.R. 82, 87 (Bankr. W.D. Pa. 2006) (declining to apply section 503(c) to bonuses paid by a secured creditor and explaining that "[s]ection 503 applies to 'Administrative Expenses of the Estate'" and that "[t]he payments will not be allowed administrative expenses to be paid from the Debtor's estate").

[162] *Journal Register*, 407 B.R at 535 (upon confirmation of a plan of reorganization, "the estate ceases to exist, 'a reorganized debtor' comes into being, and its obligations arise").

E. The Coal Act Funds' Objection.[163]

131. In their 1113/1114 Motion, the WLB Debtors requested this Court grant permission to "modify the [WLB] Debtors' obligations to make payments on account of all retiree benefits (as such term is defined in 11 U.S.C. § 1114), including Coal Act benefits."[164] The Coal Act Funds objected.[165] Because the WLB Debtors were able to reach a settlement with the Coal Act Retirees Committee, as described in Section I.B.iv, *supra*, the parties agreed to defer any ruling on the Coal Act Funds' Objection to the Confirmation Hearing.[166] Accordingly, the WLB Debtors now ask that the Court approve their settlement with the Coal Act Retirees Committee (as detailed above), and enter their previously requested relief with respect to termination of their Retiree Benefits under the Coal Act, which will be incorporated into the Confirmation Order.

132. The WLB Debtors clearly established their right to section 1114 relief with respect to their Coal Act obligations during the hearing held on February 13–15, 2019 regarding the 1113/1114 Motion (the "1113/1114 Hearing"), and will provide further evidence of this at the

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[163] Capitalized terms used but not defined in this section shall have the meanings ascribed to such terms in the 1113/1114 Motion.

[164] 1113/1114 Motion at 1; *see also* 1113/1114 Motion at Ex. 1, Proposed Order, ¶ 4 (Proposed Order granting Debtors authority to terminate Retiree Benefits by "(a) ceasing contributions to the group health and welfare and/or benefit plans described in the Motion, including individual employer plans pursuant to which the Debtors provide medical benefits to retirees of the Debtors, or any of their predecessors, current or prior affiliates, or controlled group companies, pursuant to the provisions of the Coal Act; (b) discontinuing remitting contributions or payments to the UMWA 1992 Benefit Plan; (c) discontinuing remitting contributions or payments to the UMWA Combined Benefit Fund and any other contributions or payments made by the Debtors pursuant to the Coal Act regardless of whether a claim under the Coal Act has arisen prior to the date hereof; and (e) modifying or terminating any other Retiree Benefits (as described in the Motion).").

[165] *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] (the "Coal Act Funds' Objection").

[166] *See* 2/14/2019 Hr'g Tr. at 105:5-8) ("[W]ith respect to the Coal Act liabilities, we're going to ask Your Honor to continue our 1113/1114 Motion to confirmation."); *see also id*. 109:21-110:22 (overruling Coal Act Funds' oral motion to dismiss the Debtors' 1114 Motion as it relates to the Coal Act as having been obviated by the Coal Act Retirees Committee Settlement).

Confirmation Hearing. Even prior to the upcoming termination of the WLB Debtors' IEP (which will occur as a matter of law upon closing of the Sale Transaction), the Debtors paid net over $1.1 million to the Combined Benefit Fund (as that term was defined in the Coal Act Stipulation)[167] in 2018, or approximately $100,000 on average per month on account of Coal Act beneficiaries.[168] Following the termination of the WLB Debtors' IEP (upon which all participants would be transferred from the IEP to the 1992 Fund), the Coal Act Funds' position is that the WLB Debtors would have an obligation to pay premiums to the 1992 Fund and Combined Benefit Fund that are approximately $600,000 per month until the WLB Debtors no longer exist. The Coal Act Funds' position is that "the only real issue is how long that remaining set of entities has to pay premiums," and that "given how little is at stake" during that interim period before the Debtors cease to exist, the WLB Debtors could not meet their burden with respect to terminating their Retiree Benefit obligations under the Coal Act Funds.[169]

133. There is no evidence to support the notion that the WLB Debtors have the ability to pay a "mere" $100,000 per month under their Wind-Down Budget, let alone the $600,000 per month that the Coal Act Funds would seek following termination of the IEP. Indeed, all evidence was to the contrary. The WLB Debtors will have no assets, no cash flow, no revenue, and no business operations at that point. Thus, as Jeffrey Stein, the Debtors' Chief Restructuring Officer, testified, "[a]fter the company's assets are sold," there will not be "sufficient funds to pay the company's Coal Act Premiums," because the only cash the WLB Debtors will have is the cash that "is funded by [the Debtors'] lenders in advance of their concluding the acquisition of the assets

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[167] *See Stipulation Regarding the Debtors' Coal Act Obligations* [Docket No. 1349].

[168] *See* Coal Act Stipulation, ¶ 2.

[169] February 14, 2019 Hr'g Tr. at 50:2-24.

of the company."[170] And the lenders have been extremely clear: they are not willing to fund the Coal Act premiums during the wind down period.[171]

134. The Wind-Down Budget was still being negotiated at the time of the 1113/1114 Hearing. Negotiations are now complete and the Purchaser's position has not changed. The Purchaser will not agree to pay premiums to the Coal Act Funds or anything more than is absolutely necessary to fund the necessary costs of the Wind Down (as reflected in the Wind-Down Budget), nor is it reasonable to demand that it do so to supplement the coffers of fully-funded, government-backstopped entities. The WLB Debtors have been able to secure funds to protect some of their most vulnerable constituents, but there is no more money available. The WLB Debtors therefore must reject the Coal Act Fund Retiree Benefits because they simply will not have the cash to pay them going forward (outside of the cash provided in the Coal Act Retirees Committee Settlement). Moreover, the relatively smaller size of the Coal Act Fund premium obligations is a red herring that has been rejected by other courts before.[172] This Court's analysis should be no different.

135. For essentially the same reasons this Court has already held that the WLB Debtors have met their burden with respect to termination of the Kemmerer and Beulah Retiree Benefits under section 1114, the Court should also find that the WLB Debtors have met their burden with

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[170] February 13, 2019 Hr'g Tr. at 89:4-11.

[171] *Id*. at 89:12-16; *see also id.* at 143:18-144:7; February 14, 2019 Hr'g Tr. at 28:6-17 (Debtors' financial advisor Marc Puntus testifying that "[t]he secured lender group was clear and unequivocal from Day One that they were not going to assume any retiree benefit liabilities, period, the end, whether Coal Act or not Coal Act," and there were not really any other buyers available).

[172] *See In re Alpha Natural Res. Inc*., 552 B.R. 314, 334 (Bankr. E.D. Va. 2016) (mere fact that the debtors' Coal Act obligations represented very little compared to their other liabilities did not render modification or termination of their Coal Act obligations unnecessary).

respect to the Coal Act Funds, and permit the WLB Debtors to reject those Coal Act benefits as well.[173]

F. PacifiCorp.

136. PacifiCorp did not object to the Plan, but filed a reservation of rights [Docket No. 1172] and an objection to the WMLP Debtors' motion for the sale of the Kemmerer mine [Docket No. 1437], each of which mention that the WLB Debtors and/or the Purchaser should have to demonstrate adequate assurance of their ongoing obligations to the Kemmerer mine. But pursuant to the Intercompany Settlement, the WLB Debtors shall continue to provide services to the Kemmerer mine under new transition services agreements negotiated as part of the Intercompany Settlement. And no party has asserted that the WLB Debtors or the Purchaser will be unable to provide such services to the Kemmerer mine, which is unsurprising given that the WMLP Debtors will pay ***more*** for such services than they were required to pay pursuant to the historical Shared Services Agreement that will be replaced by the new transition services agreements. Accordingly, to the extent PacifiCorp argues that the WLB Debtors or Purchaser have not demonstrated that they will be able to continue to provide services to the Kemmerer mine, the WLB Debtors respectfully submit that such argument should be overruled.

II. Good Cause Exists to Waive the Stay of the Confirmation Order.

137. Bankruptcy Rule 3020(e) provides that "[a]n order confirming a plan is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise." Bankruptcy Rule 6004(h) provides a similar stay to orders authorizing the use, sale, or lease of property (other than cash collateral). Each Bankruptcy Rule also permits modification of the

[173] *See id.*; *see also* 1113/1114 Order ¶ 2 (finding Debtors had satisfied their burden with respect to rejection of Kemmerer and Beulah Retiree Benefits).

imposed stay upon court order.[174] To implement the Plan and the transactions contemplated thereunder, the WLB Debtors seek a waiver of the 14-day stay of an order confirming a chapter 11 plan,[175] which courts in this district regularly grant.[176]

138. The WLB Debtors submit that ample cause exists for waiving and eliminating any stay of the Confirmation Order pursuant to Bankruptcy Rules 3020(e) and 6004(h), such that the Confirmation Order should be effective immediately upon its entry. Where a plan represents a fair and equitable compromise by and among the most significant parties in interest, good cause exists for waiving and eliminating any stay of the confirmation order, as to allow the plan to be consummated as expeditiously as possible.[177] Additionally, ample support from voting parties weighs in favor of waiving a confirmation order's stay.[178] As noted above, the Chapter 11 Cases and the related transactions have been negotiated and implemented in good faith and with a high degree of transparency and public dissemination of information. Moreover, the Voting Classes all voted in favor of the Plan, further supporting a stay waiver.

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[174] Fed. R. Bankr. P. 3020(e) (imposing a stay, "unless the court orders otherwise"); Fed. R. Bankr. P. 6004(h) (same).

[175] Plan, Arts. XI.B.1., XII.A.

[176] *See, e.g.*, *In re Light Tower Rentals, Inc.*, No. 16-34284 (DRJ) (Bankr. S.D. Tex. Sept. 30, 2016) (waiving stay of confirmation order and causing it to be effective and enforceable immediately upon its entry by the court); *In re Midstates Petroleum Co., Inc.*, No. 16-32237 (DRJ) (Bankr. S.D. Tex. Sept. 28, 2016) (same); *In re Sandridge Energy, Inc.*, No. 16-32488 (DRJ) (Bankr. S.D. Tex. Sept. 20, 2016) (same); *In re Global Geophysical Servs., LLC*, No. 16-20306 (DRJ) (Bankr. S.D. Tex. Sept. 19, 2016) (same); *In re Autoseis, Inc.*, No. 14-20130 (RSS) (Bankr. S.D. Tex. Feb. 6, 2015) (same); *In re Energy Partners, Ltd.*, No. 09-32957 (JB) (Bankr. S.D. Tex. Aug. 3, 2009) (same).

[177] *E.g.*, *In re Idearc*, 423 B.R. at 158; *In re Pisces Energy, LLC*, No. 09-36591 (KKB), 2009 WL 7227880, at *7 (Bankr. S.D. Tex. Dec. 21, 2009).

[178] *E.g.*, *In re Penton Bus. Media Holdings, Inc.*, No. 10-10689 (AJG), 2010 WL 2881419, at *11 (Bankr. S.D.N.Y. Mar. 5, 2010).

139. The Sale Transaction is critical to the WLB Debtors' ability to wind-down and make payments or distributions pursuant to the Plan. Additionally, each day the WLB Debtors remain in chapter 11, the administrative and professional costs to the WLB Debtors' Estates increase. As detailed in the Disclosure Statement, in light of the WLB Debtors' precarious financial condition, the WLB Debtors have undertaken great efforts to exit chapter 11 as soon as practicable. The WLB Debtors believe that an expeditious effectuation of the Plan, including the Sale Transaction, will reduce administrative and professional costs and facilitate the maximization of value of the Estates.

140. Based on the foregoing, the WLB Debtors respectfully request that the Bankruptcy Court authorize a waiver of any stay imposed by the Bankruptcy Rules so that the Confirmation Order may be effective immediately upon its entry.

Conclusion

141. For the reasons set forth herein, the WLB Debtors respectfully request that the Bankruptcy Court confirm the Plan and enter the Confirmation Order.

Houston, Texas
February 22, 2019

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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/ Matthew D. Cavenaugh
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