

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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

**WMLP DEBTORS' EMERGENCY MOTION FOR
ENTRY OF AN ORDER (I) APPROVING COMPENSATION FOR
ACTING CHIEF EXECUTIVE OFFICER AND (II) GRANTING RELATED RELIEF**

<p>THIS MOTION SEEKS ENTRY OF AN ORDER THAT MAY ADVERSELY AFFECT YOU. IF YOU OPPOSE THE MOTION, YOU SHOULD IMMEDIATELY CONTACT THE MOVING PARTY TO RESOLVE THE DISPUTE. IF YOU AND THE MOVING PARTY CANNOT AGREE, YOU MUST FILE A RESPONSE AND SEND A COPY TO THE MOVING PARTY. YOUR RESPONSE MUST STATE WHY THE MOTION SHOULD NOT BE GRANTED. IF YOU DO NOT FILE A TIMELY RESPONSE, THE RELIEF MAY BE GRANTED WITHOUT FURTHER NOTICE TO YOU. IF YOU OPPOSE THE MOTION AND HAVE NOT REACHED AN AGREEMENT, YOU MUST ATTEND THE HEARING. UNLESS THE PARTIES AGREE OTHERWISE, THE COURT MAY CONSIDER EVIDENCE AT THE HEARING AND MAY DECIDE THE MOTION AT THE HEARING.</p> <p>EMERGENCY RELIEF HAS BEEN REQUESTED. IF THE COURT CONSIDERS THE MOTION ON AN EMERGENCY BASIS, THEN YOU WILL HAVE LESS THAN 21 DAYS TO ANSWER. IF YOU OBJECT TO THE REQUESTED RELIEF OR IF YOU BELIEVE THAT THE EMERGENCY CONSIDERATION IS NOT WARRANTED, YOU SHOULD FILE AN IMMEDIATE RESPONSE.</p> <p>REPRESENTED PARTIES SHOULD ACT THROUGH THEIR ATTORNEY.</p>

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.

TO THE CHIEF U.S. BANKRUPTCY JUDGE DAVID R. JONES:

The WMLP Debtors,² as debtors and debtors in possession herein, respectfully state the following in support of this motion (this “Motion”).

Introduction

1. Prior to the occurrence of the effective date of the *Amended Joint Chapter 11 Plan of Westmoreland Coal Company and Certain of Its Debtor Affiliates* (the “WLB Plan”) on March 15, 2019 (the “WLB Plan Effective Date”),³ all of the WMLP Debtors’ officers served in a joint capacity as officers of certain WMLP Debtors and certain WLB Debtors.⁴ On the WLB Plan Effective Date, all of the officers serving the WMLP Debtors resigned, effective immediately. Recognizing that it would be difficult, if not impossible, for the WMLP Debtors to continue to operate and take the steps necessary for them to resolve their chapter 11 cases without any officers, on the WLB Plan Effective Date, the Board of Directors (the “WMGP Board”) of Debtor Westmoreland Resources GP, LLC (“WMGP”), the general partner in Debtor Westmoreland Resource Partners, LP (“WMLP”), appointed Gerald A. Tywoniuk to the positions of Acting Chief Executive Officer (“Acting CEO”) and Acting Secretary for each of the WMLP Debtors, each on a part-time basis. On that same date, Mr. Tywoniuk resigned from the Conflicts Committee (the “Conflicts Committee”) and the Audit Committee of the WMGP Board, on which he had served during, and prior to the commencement of, these chapter 11 cases.⁵ Mr. Tywoniuk has served on

² The “WMLP Debtors” consist of the following entities: Westmoreland Resources GP, LLC; Westmoreland Resource Partners, LP; Westmoreland Kemmerer, LLC; Westmoreland Kemmerer Fee Coal Holdings, LLC; Oxford Mining Company, LLC; Harrison Resources, LLC; Oxford Mining Company-Kentucky, LLC; Daron Coal Company, LLC; and Oxford Conesville, LLC.

³ See *Notice of Entry of Order Confirming the Amended Joint Chapter 11 Plan of Westmoreland Coal Company and Certain of Its Debtor Affiliates and (II) Occurrence of the Plan Effective Date* [Docket No. 1608].

⁴ Prior to the WLB Plan Effective Date, the “WLB Debtors” consisted of Debtor Westmoreland Coal Company and its Debtor-subidiaries other than the WMLP Debtors.

⁵ In addition to his new roles as Acting CEO and Acting Secretary of the WMLP Debtors, Mr. Tywoniuk remains a member of the WMGP Board.

the WMGP Board since 2009, has extensive knowledge of the WMLP Debtors, and has been closely involved in the WMLP Debtors' chapter 11 cases as both a member of the WMGP Board and the Conflicts Committee.

2. Mr. Tywoniuk has agreed to serve as Acting CEO and Acting Secretary of the WMLP Debtors beginning on March 15, 2019 until the earlier of (a) the Effective Date (as defined in the *Joint Plan of Liquidation for the WMLP Debtors* [Docket No. 1612] (the "WMLP Plan")) (b) the date agreed to by Mr. Tywoniuk and the WMLP Secured Lenders (as defined in the WMLP Plan) or (c) further order of the Court (such period, the "Interim Period") at a rate of \$475 per hour (the "Proposed Compensation") on a part-time basis.⁶ Given Mr. Tywoniuk's familiarity with the WMLP Debtors and their chapter 11 cases – and the WMLP Debtors' immediate need for an officer with institutional knowledge to act on behalf of the WMLP Debtors and assist the WMGP Board and the Conflicts Committee in resolving the WMLP Debtors' chapter 11 cases in the coming weeks – the WMLP Debtors believe, in their business judgment, that the proposed compensation is reasonable and necessary under the circumstances, and should be approved by the Court.

Jurisdiction and Venue

3. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334.
4. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).
5. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

⁶ In addition to the Proposed Compensation, Mr. Tywoniuk will also continue to receive an annual retainer for his role as a WMGP Board member, in the amount of \$110,000, and for his role as Chairman of the WMGP Board, in the amount of \$40,000, for a total of \$150,000 annually, which equates to a monthly amount of \$12,500, both of which are unchanged. Furthermore, as a result of Mr. Tywoniuk's appointment as Acting CEO and Acting Secretary as described herein, he has resigned from his position as Chairman of the Audit Committee, and thus will no longer receive the \$10,000 annual payment with respect to his chairperson role on the Audit Committee and will also no longer receive the \$5,000 annual payment for serving as a member of the Audit Committee, for a total of \$15,000 annually. On a monthly basis, those payments equal approximately \$1,250, and will no longer be paid to Mr. Tywoniuk.

6. The statutory bases for the relief requested herein are §§ 105(a) and 363(b) of title 11 of the United States Code (the “Bankruptcy Code”) and Rule 6004 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

7. This Court has constitutional authority to enter final orders with respect to the relief requested herein. The WMLP Debtors further confirm their consent to this Court’s entry of final orders or judgments on this Motion if it is later determined that, in the absence of the consent of the parties, this Court does not have constitutional authority to enter final orders or judgments.

Relief Requested

8. By this Motion, the WMLP Debtors seek entry of an order authorizing the WMLP Debtors to pay the Proposed Compensation to Gerald A. Tywoniuk in exchange for Mr. Tywoniuk’s services as Acting CEO and Acting Secretary of each of the WMLP Debtors during the Interim Period.

Basis for Relief

9. Although the WMLP Debtors do not believe Court approval is required for their senior leadership hiring decisions, including payment of the Proposed Compensation, out of an abundance of caution, and a desire to be as transparent as possible, the WMLP Debtors seek this Court’s approval under § 363(b)(1) of the Bankruptcy Code to provide Mr. Tywoniuk with the Proposed Compensation in exchange for his services as Acting CEO and Acting Secretary to the WMLP Debtors. Based upon Mr. Tywoniuk’s extensive knowledge of the WMLP Debtors and familiarity with these chapter 11 cases, the WMLP Debtors believe, in their business judgment, that their provision of the Proposed Compensation is reasonable and necessary under the circumstances, and should be approved.

10. Section 363 of the Bankruptcy Code provides, in relevant part, that a debtor in possession “after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate[.]” *See* 11 U.S.C. § 363(b)(1). Bankruptcy Code § 363(b) does not specify a standard for determining when it is appropriate for a court to authorize the use, sale, or lease of property of the estate; however, bankruptcy courts in this District and elsewhere have required that the authorization of such use, sale, or lease of property of the estate outside the ordinary course of business be based upon sound business justification. *See Institutional Creditors of Continental Air Lines, Inc. v. Continental Air Lines, Inc., et al. (In re Continental Air Lines, Inc.)*, 780 F.2d 1223, 1226 (5th Cir. 1986) (“[F]or a debtor-in-possession or trustee to satisfy its fiduciary duty to the debtor, creditors and equity holders, there must be some articulated business justification for using, selling, or leasing the property outside the ordinary course of business.”); *see also In re Asarco, L.L.C.*, 650 F.3d 593, 601 (5th Cir. 2011); *In re Cowin*, No. 13-30984, 2014 WL 1168714, at *38 (Bankr. S.D. Tex. Mar. 21, 2014); *In re St. Marie Clinic PA*, No. 10-70802, 2013 WL 5221055, at *9 (Bankr. S.D. Tex. Sept. 17, 2013); *In re Particle Drilling Techs., Inc.*, No. 09-33744, 2009 WL 2382030, at *2 (Bankr. S.D. Tex. July 29, 2009); *In re San Jacinto Glass Indus., Inc.*, 93 B.R. 934, 944 (Bankr. S.D. Tex. 1988). Once the WMLP Debtors articulate a valid business justification, “[t]he business judgment rule is a presumption that in making the business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action was in the best interests of the company.” *In re S.N.A. Nut Co.*, 86 B.R. 98 (Bankr. N.D. Ill. 1995); *see also In re Integrated Res., Inc.*, 147 B.R. 650, 656 (Bankr. S.D.N.Y. 1992); *In re Johns-Manville Corp.*, 60 B.R. 612, 615-16 (Bankr. S.D.N.Y. 1986) (stating that “a presumption of reasonableness attaches to a Debtor’s management decisions.”).

11. The WMLP Debtors believe that providing the Proposed Compensation in exchange for Mr. Tywoniuk's services as Acting CEO and Acting Secretary during the Interim Period is a sound exercise of the WMLP Debtors' business judgment and thus should be approved pursuant to section 363(b) of the Bankruptcy Code. Mr. Tywoniuk's services are necessary and essential to the WMLP Debtors' efforts to continue to operate and take necessary steps towards the resolution of their chapter 11 cases. Even if it were possible for the WMLP Debtors to locate a qualified candidate with the requisite institutional knowledge willing to serve as Acting CEO and Acting Secretary during the Interim Period at a lower rate than the Proposed Compensation (which is unlikely), there is simply no time for the WMLP Debtors to locate such a candidate and bring him or her up to speed. The WMLP Debtors believe that Mr. Tywoniuk is the ideal candidate to fulfill the duties of Acting CEO and Acting Secretary given his knowledge of the WMLP Debtors and their chapter 11 cases, and that the Proposed Compensation should be approved as a reasonable exercise of their business judgment. Based on the foregoing, the WMLP Debtors believe that the Proposed Compensation is reasonable under the circumstances, particularly given the part-time nature of Mr. Tywoniuk's appointment as Acting CEO and Acting Secretary.

12. Given the exigent nature of the relief requested, the WMLP Debtors respectfully request a waiver of the 14-day stay of effectiveness imposed by Bankruptcy Rule 6004(h) (to the extent it applies) so that the relief requested herein can take effect immediately upon entry of an order approving this Motion.

WHEREFORE, the WMLP Debtors respectfully request that the Court enter an order substantially in the form of the proposed order attached hereto, granting the relief requested herein and such other relief as the Court deems appropriate under the circumstances.

/s/ Matthew D. Cavanaugh

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*Conflicts Counsel to the WMLP Debtors and Counsel
to the Conflicts Committee of the WMGP Board of
Directors*

Certificate of Service

I certify that on the 27th day of March 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. Cavanaugh

Matthew D. Cavanaugh