

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

In re:

Westmoreland Coal Company, *et al.*,¹

Debtors.

Chapter 11

Case No. 18-35672 (DRJ)

(Jointly Administered)

**MLP LENDERS' STATEMENT IN CONNECTION WITH THE PROPOSED
SETTLEMENT BETWEEN MCKINSEY AND THE UNITED STATES TRUSTEE**

The MLP Lenders,² by and through their undersigned counsel, file this statement (the "Statement") in connection with the joint motion [Dkt. No. 1589] to approve a settlement agreement (the "Proposed Settlement") between the Acting United States Trustee for Region 7 ("U.S. Trustee") and McKinsey³ requesting that the Court defer the distribution of the Westmoreland Settlement Payment (as defined below) until it can determine a fair and equitable allocation of such payment, and respectfully state as follows:

STATEMENT

1. The Proposed Settlement provides for a \$5 million payment from McKinsey to the "bankruptcy estates in the *Westmoreland* case" (the "Westmoreland Settlement Payment") to be "distributed in accordance with the terms of the confirmed plans in those cases or other applicable law." See Proposed Settlement Art. II, ¶¶ 2, 3. The MLP Lenders do not object to the

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

² The "MLP Lenders" refers to the lenders under that certain Financing Agreement, dated December 31, 2014, with Westmoreland Resource Partners, LP and its subsidiaries (as amended, supplemented or modified from time to time).

³ Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Proposed Settlement.

Proposed Settlement, but request that any order approving the Proposed Settlement expressly provide that the Westmoreland Settlement Payment not be distributed to any of the Debtors (and the allocation of such funds among the Debtors shall be deferred) pending further order of the Court.

2. The Westmoreland Settlement Payment should be used to address critical outstanding inter-debtor issues that require funding, including (a) a potential retiree healthcare settlement, (b) the demand by Zurich American Insurance Company and its affiliate Fidelity & Deposit Company of Maryland (collectively, “Zurich”) for additional collateral in connection with the sale of the assets of the Debtors Westmoreland Kemmerer, LLC and Westmoreland Kemmerer Fee Holdings, LLC (collectively, the “Kemmerer Assets”), and (c) the settlement between, among others, the Official Committee of Unsecured Creditors and the WMLP Debtors⁴ (the “Committee Settlement”).

- a. The Westmoreland Settlement Payment can be used to facilitate a resolution with the United Mine Workers of America of the issues related to new collective bargaining agreements and treatment of retiree healthcare benefits, and help fund a settlement with respect to such benefits. As part of the Intercompany Settlement⁵, the WMLP Debtors agreed to fund \$1 million towards such a settlement with respect to retirees who had worked at the Kemmerer mine (notwithstanding the fact that the WMLP Debtors had not employed such retirees). To the extent the WMLP Debtors may need to fund more than their already capped \$1 million contribution under the Intercompany Settlement (in order to avoid business interruption at, and preserve the value of, the Kemmerer mine), any such additional amount should be funded from the Westmoreland Settlement Payment.
- b. Utilizing the Westmoreland Settlement Payment to satisfy part of Zurich’s demand for additional collateral may provide a path for the consummation

⁴ The “WMLP Debtors” are: (a) Westmoreland Resource Partners, LP (“WMLP”); (b) Westmoreland Kemmerer, LLC; (c) Oxford Mining Company, LLC; (d) Harrison Resources, LLC; (e) Oxford Mining Company-Kentucky, LLC; (f) Daron Coal Company, LLC; (g) Oxford Conesville, LLC; and (h) Westmoreland Kemmerer Fee Coal Holdings, LLC.

⁵ The “Intercompany Settlement” shall mean the settlement approved by the *Order Authorizing and Approving Intercompany Settlement Term Sheet* [Docket No. 1548].

of the sale of the Kemmerer Assets (which sale will provide numerous benefits, including help preserve jobs and address environmental obligations) and the WMLP Debtors' emergence from Chapter 11.

- c. The WMLP Debtors' estates have incurred higher than anticipated administrative expenses (mostly on account of professional fees) as a result of the delay in the closing of the sale of the Kemmerer Assets and the actions of the WMLP Debtors' former fiduciaries that have contributed to such delay and additional expenses. This, in turn, has diminished the cash position of the WMLP Debtors and jeopardizes their ability to satisfy their administrative expense claims, make payments under the Committee Settlement (the effectiveness of which depends upon the consummation of the sale of the Kemmerer Assets to the proposed Kemmerer Purchaser⁶ and in certain other instances), and consummate an orderly winddown of their estates. Accordingly, the Westmoreland Settlement Payment can be used to provide incremental liquidity to help mitigate the risk of administrative insolvency and the risk that there will be insufficient funding to make the payments under the Committee Settlement.

3. Any argument that the WMLP Debtors should not receive the benefit of the Westmoreland Settlement Payment, because the WMLP Debtors did not seek to retain McKinsey, fails for the following reasons.

4. First, the plain language of the Proposed Settlement provides that the \$5 million Westmoreland Payment shall be allocated to all of "**bankruptcy estates in the Westmoreland case**", which is defined in the Proposed Settlement as the lead Case No. 18-35672-DRJ and "**all jointly administered cases**," which necessarily includes the chapter 11 cases of the WMLP Debtors. *See* Proposed Settlement at pp. 3 & 4 (emphasis added). The Proposed Settlement, therefore, does not specify or require that such payment be made only to the estates of the WLB Debtors⁷.

⁶ The "**Kemmerer Purchaser**" shall mean the purchaser of the Kemmerer Assets under the *Asset Purchase Agreement Among Westmoreland Resource Partners, LP, Westmoreland Kemmerer, LLC, Westmoreland Kemmerer Fee Coal Holdings, LLC, Western Coal Acquisition Partners, LLC and Merida Natural Resources, LLC* [Docket No. 1401].

⁷ The "**WLB Debtors**" refer to all of the Debtors in these chapter 11 cases (including those Debtors whose chapter 11 cases have been closed), other than the WMLP Debtors.

5. Second, even though the Proposed Settlement provides that the Westmoreland Settlement Payment is to be distributed to the Debtors' "estates", the Proposed Settlement only seeks to resolve and compromise the *U.S. Trustee's claims* against McKinsey, rather than any claim or cause of action of the WLB Debtors' (or any of the other Debtors') estates. As the U.S. Trustee notes, the Debtors' "estate causes of actions ... are in no way compromised here." *See U.S. Trustee Statement*, ¶ 9. In fact, the WLB Debtors do not believe they have been harmed by McKinsey at all, and have "requested that McKinsey continue to serve as its financial advisor in the Westmoreland bankruptcy cases... Westmoreland believe[s] that McKinsey has provided unvarnished and independent advice to Westmoreland in these cases... Westmoreland has observed no conflict and believes that it has received unconflicted advice." Mediator's Notice to Court, Ex. B. [Dkt. No. 1406]. Rather, the Proposed Settlement is meant to "hold McKinsey accountable" and "ensure a definitive consequence for McKinsey." *See the United States Trustee's Statement in Support of Settlement Agreement Between United States Trustee Program and McKinsey & Company, Inc. and Certain of Its Affiliates* [Dkt. No. 1685] (the "U.S. Trustee Statement"), ¶ 1.

6. Third, under the Proposed Settlement, McKinsey is only required to make payments to debtors in three active bankruptcy cases but is actually receiving a release from the U.S. Trustee in fourteen separate bankruptcy cases. As the U.S. Trustee notes, the "Settlement requires McKinsey to make the monetary payments in these three open cases, thereby obviating the need to reopen earlier cases that have been closed and fully administered years ago." *See U.S. Trustee Statement* n.3. Thus, the Debtors' estates are the beneficiaries of the Westmoreland Settlement Payment not because they have been specifically harmed by

McKinsey, but because it is easier to distribute the proceeds of the Proposed Settlement to the estates of those debtors that have active, pending bankruptcy cases.

7. Fourth, the Court has the discretion and authority to direct how the Westmoreland Settlement Payment is allocated and distributed among the various Debtors' estates. *See* 11 U.S.C. §105(a).

8. In sum, the Westmoreland Settlement Payment should be used to fairly and equitably resolve the substantial issues noted above, and to facilitate the WMLP Debtors' emergence from chapter 11.

WHEREFORE, the MLP Lenders respectfully request that the Court (a) defer the distribution of the Westmoreland Settlement Payment pending a further order of the Court, and (b) grant such other and further relief as the Court may deem proper.

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Dated: April 8, 2019

Respectfully submitted,

/s/ Joseph E. Bain

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Counsel to the MLP Lenders

CERTIFICATE OF SERVICE

I certify that on April 8, 2019, I caused a copy of the foregoing document to be served by electronic transmission to all registered ECF users appearing in this case.

/s/ Joseph E. Bain

Joseph E. Bain