

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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

**RESPONSE OF WESTMORELAND MINING HOLDINGS, LLC
TO (I) THE MLP LENDERS' STATEMENT IN CONNECTION WITH
THE PROPOSED SETTLEMENT BETWEEN MCKINSEY AND THE UNITED
STATES TRUSTEE AND (II) THE UMWA'S RESPONSE TO JOINT MOTION**

Westmoreland Mining Holdings, LLC and its affiliates (the "**WLB Purchaser**")² hereby file this response to the *MLP Lenders' Statement in Connection with the Proposed Settlement Between McKinsey and the United States Trustee* [Docket No. 1693] (the "**MLP Lenders Statement**")³ and the United Mine Workers of America's (the "**UMWA**") *Response to Joint Motion* [Docket No. 1691] (the "**UMWA Response**") filed in connection with the *Joint Motion by the Acting United States Trustee and McKinsey Recovery & Transformation Services U.S.*,

¹ Due to the large number of debtors in these chapter 11 cases, for which joint administration has been requested, 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' proposed 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 WLB Debtors and WLB secured lenders consummated the sale of substantially all of Westmoreland Coal Company and its affiliates' (other than WMLP and its affiliates) ("**WLB**") assets on March 15, 2019.

³ As defined in the MLP Lenders Statement, the MLP Lenders are 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).

LLC and Certain of Its Affiliates in Furtherance of Mediation Agreement [Docket No. 1589] (the “**Joint Motion**”). The WLB Purchaser respectfully states as follows:

1. The WLB Purchaser takes no position on the Joint Motion – however, the WLB Purchaser is constrained to respond to the MLP Lenders Statement and the UMWA Response to the Joint Motion because those pleadings ask the Court to allocate McKinsey’s \$5 million settlement payment in violation of WLB Purchaser’s rights under the WLB Debtors’ consummated Plan⁴ and related Stalking Horse Purchase Agreement.⁵

2. The Joint Motion, filed on March 7, 2019, seeks approval of the settlement (“**Proposed Settlement**”) reached between Acting United States Trustee and McKinsey Recovery & Transformation Services U.S., LLC and certain of its affiliates (“**McKinsey**”), through the entry of an Agreed Order which provides, *inter alia*, that:

2. The Parties have agreed that “McKinsey shall make a \$15 million payment (the “Settlement Payment”) allocated as follows:

- \$5 million to the reorganized debtors in the Alpha Case.
- \$5 million to the reorganized debtors in the SunEdison Case.
- \$5 million to the bankruptcy estates in the Westmoreland Case.***

3. ***The payment identified in Paragraph 2 will be distributed in accordance with the terms of the confirmed plans in those cases or other applicable law.*** If any of the \$15 million is distributed to McKinsey, it will be refunded by McKinsey to the distributing party.

15. ***This Order will not bind or prejudice the rights and claims of any non-party.*** This order binds McKinsey and its successors and assigns.”

(Emphasis added.)

⁴“**Plan**” shall mean the *Amended Joint Chapter 11 Plan of Westmoreland Coal Company and certain of its Debtor Affiliates* [Docket No. 1561].

⁵ Capitalized terms used but not defined herein shall have the meaning ascribed to them in the Plan. The Stalking Horse Purchase Agreement may be found in the *Notice of Sixth Amendment to the Plan Supplement*, Exhibit H-6 [Docket No. 1621].

3. The UMWA Response states as follows:

11. The issue that the UMWA specifically seeks to have this Court rule upon is how the \$5,000,000 payment contemplated under the Joint Motion should be treated. The UMWA respectfully suggests that these funds should be applied [to] obligations owed to the remaining creditors of Westmoreland Coal. Since an agreement has been reached between the Debtors and the Unsecured Creditors Committee, the UMWA [respectfully] suggests be at least partially allocated to the resolution of the dispute with the UMWA.

See UMWA Response, ¶ 11.

4. The UMWA Response further notes that the UMWA has reached an agreement in principle with the parties that is conditioned upon a successful sale to the prospective purchaser of the Kemmerer Mine on its retiree health benefits but that the purchase may not consummate, and states further:

14. The remaining request of the UMWA is that in the event a consensual settlement is not available as a result of the failure of the sale of the Kemmerer mine to the Prospective Purchaser, that the Court direct that the proceeds recovered pursuant to the Joint Motion be directed, at least to some extent, to further satisfy the retiree healthcare benefits that are sought by the UMWA.

See UMWA Response, ¶ 14.

5. The MLP Lenders Statement does not ask the Court to direct the allocation of the \$5 million; it is limited to a 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.” See MLP Lenders Statement at ¶ 1.

6. The MLP Lenders argue that the “Westmoreland Settlement Payment” should be used to address “critical outstanding inter-debtor issues that require funding”, including (a) a potential retiree healthcare settlement with the UMWA, (b) the demand by [Zurich] for additional collateral in connection with the sale of [the Kemmerer mine] and (c) a settlement

between the Unsecured Creditors Committee and the WMLP Debtors. MLP Lenders Statement at ¶ 2.

7. The relief sought by the UMWA is premature under the Rules of Bankruptcy Procedure.

8. Nowhere does the Proposed Settlement provide for any specific allocation of the \$5 million, let alone make the funds available to the MLP estates. Allocation is now being raised for the first time in the UMWA Response (and suggested in the MLP Lenders' Statement). The UMWA has filed no motion or complaint seeking an order to allocate the \$5 million. Thus, the affirmative relief sought by the UMWA is not properly before the Court and the issue should not be addressed before parties have had sufficient time to respond.

9. However, should a response be necessary, the WLB Purchaser opposes the relief sought by the UMWA (and suggested by the MLP Lenders) for the following reasons.

10. First, the \$5 million payable to the WLB estates constitutes a receivable in existence as of March 7, 2019, prior to the closing of the sale of the WLB estates' assets. WLB Purchaser acquired "all of the Sellers' right, title and interest in, to and under the Purchaser US Business and all of the Sellers' assets,...rights, interests,...and claims...wherever situated or located,...whether identifiable or contingent,...relating to the Purchased US Business...and whether or not reflected on the books and records of Sellers, as the same shall exist immediately prior to the Closing." See Stalking Horse Purchase Agreement § 2.01. This includes all receivables in existence as of March 15, 2019 pursuant to Section 2.01(d) of the Stalking Horse Purchase Agreement. Despite the request of the UMWA and the suggestions of the MLP Lenders, the \$5 million receivable is property of WLB Purchaser because it is a purchased asset under the Stalking Horse Purchase Agreement, the Plan (which incorporates and implements the

Stalking Horse Purchase Agreement, *See* Plan Art. IV.C.1), and the Confirmation Order⁶, which approves and directs compliance with the Stalking Horse Purchase Agreement (which is part of the Plan Supplement) *See* Confirmation Order ¶¶ 3-4.

11. Second, if the \$5 million is paid to the WLB estates, it must be used under the Plan to satisfy administrative and priority claims of the WLB estates and the costs of the Wind-Down. The WLB Purchaser is funding the Wind Down and the payment of allowed administrative and priority claims and therefore has an interest in ensuring that funds available to the estate are used for those purposes. *See* “*Wind-Down Funds*,” Plan, Art. I.237; Art. IV.F.

12. If any excess cash remains in the WLB estates after payment of administrative expenses and priority claims, such excess cash is to be delivered to the WLB Purchaser pursuant to the Liquidating Trust Agreement. *See* Liquidating Trust Agreement; § 2.5(b). The only parties entitled to any excess cash are either the WLB Purchaser or the former secured lenders of the WLB Debtors.⁷

13. The UMWA has no right to excess cash to fund retiree medical benefits – this Court already entered an order providing for the satisfaction of those benefits for \$6 million, the implementation of which commenced on March 16, 2019 through continuation of existing benefits under the WLB Debtors’ welfare plan for a period of time. The parties, however, have continued to negotiate payment of additional sums to the UMWA in order to maintain labor relations at the Kemmerer mine.

⁶ “**Confirmation Order**” shall mean *Order Confirming the Amended Joint Chapter 11 Plan of Westmoreland Coal Company and Certain of Its Debtor Affiliates* [Docket No. 1561].

⁷ The Plan provides that excess funds are distributed to Holders of Allowed First Lien Claims. *See* Plan, Art. I.U; Art. VII.E. The Liquidating Trust Agreement, as noted above, provides that excess funds are distributed to WLB Purchaser. Resolution of this conflict is premature at this time and is likely to be consensual, in as much as Holders of Allowed First Lien Claims own the equity of the WLB Purchaser.

14. General unsecured creditors of the WLB Debtors have no right to excess cash – the Plan provides for the settlement of their claims for a sum certain of \$3.25 million.

15. Because the settlement resolves a dispute related to the retention of McKinsey absent adequate disclosures by McKinsey, it would be entirely inappropriate and without merit to allocate any of the settlement proceeds to the WMLP Debtors, who are specifically carved out from those debtors who sought court approval to retain McKinsey. *See Debtors' Application for Entry of an Order Authorizing the Retention and Employment of McKinsey Recovery & Transformation Services U.S., LLC as Performance Improvement Advisors to the Debtors Nunc Pro Tunc to the Petition Date* [Docket No. 452].

16. Thus, earmarking the \$5 million as requested by the UMWA, and suggested by the MLP Lenders, would contravene the terms of the Plan, the documents implemented by the Plan and Confirmation Order, the priority scheme of the Bankruptcy Code and the rights of the WLB Purchaser. The \$5 million is not unrestricted cash available to fund the UMWA's retiree medical benefits, to pay the MLP unsecured creditors additional distributions or to solve the bonding issues of the MLP Lenders and their prospective purchaser.

17. Third, the WLB Purchaser understands that McKinsey has accrued fees and expenses of approximately \$8 million. The WLB Purchaser has agreed to pay McKinsey's fees and expenses, if McKinsey is retained and if its fees are allowed. Among the assets acquired by WLB Purchaser was any "Transferred Action" defined to include "any right of setoff, counterclaim or recoupment, and any claim...for breach of duties imposed by law." *See Stalking Horse Purchase Agreement* § 2.01(l).⁸

⁸ For the sake of expeditiously filing this Response, it is assumed that the funds to be paid by McKinsey and the fees accrued by McKinsey arise from the same transaction – namely, McKinsey's retention by the WLB Debtors. All rights are expressly reserved to provide further support to this argument.

18. Finally, the Proposed Settlement provides that “[t]his Order will not bind or prejudice the rights and claims of any non-party.” See Joint Motion, Proposed Settlement, Art. V, ¶ 15. Granting the affirmative relief sought by the UMWA (and suggested by the MLP Lenders) prejudices the rights of the WLB Purchaser.

RESERVATION OF RIGHTS

19. The WLB Purchaser reserves its rights to further object or respond on any grounds whatsoever, including the right to raise additional arguments at or before any further hearings on the Joint Motion.

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WHEREFORE, the WLB Purchaser agrees with the MLP Lenders that the Court should not determine the use and allocation of the \$5 million. Any payment, application or allocation of the \$5 million should be deferred pending further order of this Court after such matters are properly brought before the court through the commencement of a contested matter, an adversary proceeding, or a settlement under Rule 9019.

Dated: April 11, 2019

/s/ John F. Higgins
John F. Higgins
State Bar No. 09597500
Eric M. English
State Bar No. 24062714
PORTER HEDGES LLP
1000 Main Street, 36th Floor
Houston, Texas 77002
Telephone: (713) 226-6000
Facsimile: (713) 226-6248
E-mail: jhiggins@porterhedges.com
eenglish@porterhedges.com

-and-

KRAMER LEVIN NAFTALIS & FRANKEL LLP
Thomas Moers Mayer
Anupama Yerramalli
1177 Avenue of the Americas
New York, New York 10036
Telephone: (212) 715-9100
Facsimile: (212) 715-8000
E-mail: tmayer@kramerlevin.com
ayerramalli@kramerlevin.com

Counsel to the WLB Purchaser

CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2019, a copy of the foregoing Response was served through the Court's CM/ECF notification system to all parties who have appeared in this case through counsel or who have submitted a request for service by CM/ECF.

/s/ John F. Higgins

John F. Higgins