

\$18 million. The First Surety Bonds were issued by First Surety to various states, including primarily West Virginia and Ohio, to secure the Debtors' obligations in connection with the various and coal mining and related activity permits issued to the Debtors pursuant to applicable state and federal law (the "First Surety Bonded Permits"). In the absence of the First Surety Bonds or other forms of security, the Debtors would be unable to operate their mines in those states.

4. First Surety issued the First Surety Bonds as consideration for (i) the execution by certain of the Debtors of that certain Coal Reclamation Bond Agreement dated December 16, 2016, and related Collateral Agreement, and (ii) the execution by certain of the Debtors of that certain Coal Reclamation Bond Agreement dated June 28, 2017, and related Collateral Agreement (items (i) and (ii), collectively the "CBRA"). The Debtors obligations under the First Surety Bonds and the CBRA are secured by cash in the possession of First Surety of approximately \$2.8 million the "First Surety Collateral").

5. Under the CBRA, the applicable Debtors agreed, among other things, to indemnify and save harmless First Surety from and against all liability, loss, costs, damages, attorneys' fees and other expenses that First Surety may sustain or incur by reason of having issued the First Surety Bonds.

6. Moreover, under the CBRA, the applicable Debtors agreed that

all funds earned or unearned, due or to become due under any permit/s covered by a Bond issued by [First Surety] are and shall at all times be and constitute trust funds, whether in the possession of the Principal or another, for the benefit and payment of all obligations in the performance of such permit/s, and for which [First Surety] would be liable under the Bond, or any applicable law, statute, ordinance or regulation applicable to the Bond.

7. Therefore, among other things, the CBRA (i) creates a contractual right of indemnification in favor of First Surety; (ii) grants a security interest in the cash delivered to First

Surety pursuant to the CBRA, (iii) imposes an express trust on all funds generated from the extraction of coal or from the sale and/or transfer of any mines/permits.

8. Prior to the Petition Date, Westchester issued certain bonds on behalf of and at the request of the Debtors (the “Westchester Bonds”) in the aggregate penal amount of approximately \$372,475.00. The Westchester Bonds were issued by Westchester to the State of Ohio as obligee, to secure the Debtors’ obligations in connection with the various and coal mining and related activity permits issued to the Debtors pursuant to applicable state and federal law (the “Westchester Bonded Permits”). In the absence of the Westchester Bonds or other forms of security, the Debtors would be unable to operate their mines in those states.

9. Westchester issued the Westchester Bonds as consideration for the execution by certain of the Debtors of that certain General Agreement of Indemnity dated December 16, 2016 (the “Westchester Indemnity Agreement”).

10. Under the Westchester Indemnity Agreement, the applicable Debtors agreed, among other things, to indemnify and save harmless Westchester from and against all liability, loss, costs, damages, attorneys’ fees and other expenses that Westchester may sustain or incur by reason of having issued the Westchester Bonds. The First Surety Bonds and the Westchester Bonds are collectively referred to as the “Bonds”. The First Surety Bonded Permits and Westchester Bonded Permits are collectively referred to as the “Permits”.

11. On January 22, 2019, the WMLP Debtors² filed the *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*

² All capitalized terms not defined in this Limited Objection have the meanings ascribed them in the Plan.

Contracts and Unexpired Leases in Connection therewith, and (III) Granting Related Relief, Including Approval of the Related Sale Process (the “Oxford/Buckingham Sale Motion”) [Dkt Entry No. 1116]. On February 5, 2019, the Court entered the *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* (the “Oxford/Buckingham Sale Order”) [Dkt Entry No. 1289]. On March 2, 2019, the Court entered the *Order Confirming the Amended Joint Chapter 11 Plan of Westmoreland Coal Company and Certain of Its Debtor Affiliates* (the “WLB Confirmation Order”) [Dkt Entry No. 1561]. The Oxford/Buckingham Sale Order and the WLB Confirmation Order address treatment of the Bonds, the CBRA, the Westchester Indemnity Agreement, and the First Surety Collateral.

12. The Plan generally provides for the liquidation and monetization of the WMLP Debtors’ remaining assets with subsequent distributions being made to the WMLP Debtors’ creditors. The Plan contains broad third-party release, exculpatory, and injunctive provisions in Article VII.F. Although the release provisions are subject to opt-out, the exculpatory and injunctive provisions are not.

III. LIMITED OBJECTION

A. The Plan should be Modified to Incorporate the Treatment of the Bonds, the CBRA, the Westchester Indemnity Agreement and First Surety Collateral from the Oxford/Buckingham Sale Order and the WLB Confirmation Order.

13. First Surety and Westchester object to the Plan to the extent it is intended to modify, limit, alter or affect the treatment of the Bonds, the CBRA, the Westchester Indemnity Agreement,

and the First Surety Collateral under the Oxford/Buckingham Sale Order and the WLB Confirmation Order.

14. The Oxford/Buckingham Sale Order addresses the disposition of mining assets of certain of the WLB Debtors and mining assets of certain of the WMLP Debtors, along with the treatment of the related Bonds, the CBRA, the Westchester Indemnity Agreement and First Surety Collateral. Among other things, the WLB Confirmation Order preserves the treatment of the Bonds, the CBRA, the Westchester Indemnity Agreement, and the First Surety Collateral under the Oxford/Buckingham Sale Order. In contrast, the Plan does not expressly incorporate the treatment of the Bonds, the CBRA, the Westchester Indemnity Agreement, and the First Surety Collateral set forth in the Oxford/Buckingham Sale Order and the WLB Confirmation Order, and should be modified accordingly. The Sureties are working with the WLMP Debtors to address the Sureties' concerns, and anticipate resolving those concerns prior to the hearing on confirmation.

15. While Plan's classification scheme deems the Sureties to accept the Plan because they are unimpaired, this classification is incorrect. In order for the Sureties to be unimpaired, the Sureties' rights under the Bonds, the CBRA, the Westchester Indemnity Agreement, and the First Surety Collateral, as those are treated under the Oxford/Buckingham Sale Order and the WLB Confirmation Order, cannot be modified by the Plan. As explained previously, the Plan currently does not incorporate treatment of the Sureties consistent with the Oxford/Buckingham Sale Order and the WLB Confirmation Order. Accordingly, the Sureties are impaired and should be entitled to vote on the Plan.

B. The Sureties are Entitled to Opt out of the Exculpatory and Injunctive Provisions in the Plan

16. Additionally, although the Sureties have opted-out of the release provisions contained in Article VII.F.4.b. of the Plan, under the opt out form provided to the Sureties, they

do not have the option to opt-out of the Plan's exculpatory and injunctive provisions. The inclusion of these provisions, without the option for out-out, contravenes 11 U.S.C. § 524(e) and established Fifth Circuit precedent, thereby making the Plan unconfirmable.³ The Sureties are working with the Debtors to resolve the Sureties' objections in this regard and anticipate that those objections will be resolved prior to the hearing on confirmation.

17. Section 524(e) of the Bankruptcy Code explicitly limits the discharge and injunction provisions of the Bankruptcy Code to debts owed by the debtor. *Bank of New York Trust Co. v. Official Unsecured Creditors' Committee (In re Pac. Lumber Co.)*, 584 F.3d 229, 251-52 (5th Cir. 2009). It does not grant a discharge or an injunction to any non-debtor parties. Indeed, the Fifth Circuit has explicitly recognized that "[a] discharge in bankruptcy does not extinguish the debt itself, but merely releases the debtor from personal liability for the debt. Section 524(e) specifies that the debt still exists and can be collected from any other entity that might be liable." *Houston v. Edgeworth (In re Edgeworth)*, 993 F.2d 51, 53 (5th Cir. 1993). Even more relevantly, as the *Pacific Lumber* court observed:

There are no allegations in this record that either MRC/Marathon or their or the [d]ebtors' officers or directors were jointly liable for any of Palco's or Scopac's pre-petition debt. They are not guarantors or sureties, nor are they insurers. Instead, the essential function of the exculpation clause proposed here is to absolve the released parties from any negligent conduct that occurred during the course of the bankruptcy. The fresh start § 524(e) provides to debtors is not intended to serve this purpose.

³ Preliminarily, the Court likely lacks both the subject matter jurisdiction and the constitutional authority to enter a non-consensual permanent injunction of non-debtor claims in favor of another non-debtor. Bankruptcy courts lack subject matter jurisdiction to enjoin actions by third-parties against other third-party non-debtors on a non-consensual basis. *Callaway v. Benton*, 336 U.S. 132, 147 (1949); *In re Washington Mutual, Inc.*, 442 B.R. 314, 352 (Bankr. D. Del. 2011); *In re Coram Healthcare Corp.*, 315 B.R. 321, 335 (Bankr. D. Del. 2004). Moreover, this Court does not possess the constitutional authority to issue a final order granting a permanent injunction in favor of a non-debtor on a non-consensual basis. *C.f. Opt-Out Lenders v. Millennium Lab Holdings II, LLC (In re Millennium Lab Holdings, LLC)*, 242 F.Supp.3d 322, 339 (D. Del. 2017) (noting potential constitutional infirmities posed by non-debtor injunctions and releases); *In re Grove Instruments, Inc.*, 573 B.R. 307, 315 (Bankr. D. Mass. 2017) (same).

584 F.3d at 253. *Pacific Lumber* is not an outlier; a long line of Fifth Circuit cases foreclose non-consensual non-debtor releases, exculpatory provisions, and permanent injunctions. *Id.* at 252 (listing cases); *see also In re Thru, Inc.*, No. 3:17-CV-1958-G, 2018 WL 5113124, at *22-23 (N.D. Tex. Oct. 19, 2018); *In re Pilgrim's Pride Corp.*, No. 08-45664-DML-11, 2010 WL 200000, at *5 (Bankr. N.D. Tex. Jan. 14, 2010).

The inclusion of the non-consensual third-party exculpatory and injunctive provisions renders the Plan unconfirmable. However, if WMLP Debtors alter the treatment of the Sureties to truly reflect their status as being unimpaired, this issue would be resolved.

C. Proposed Language for Confirmation Order

18. In an effort to resolve this Limited Objection, the Sureties have proposed that the following language be added to the order confirming the Plan (the “Confirmation Order”):

Certain commercial surety companies (collectively, the “**Sureties**” and each, individually, a “**Surety**”) — including, but not limited to, ACE American Insurance Company, Argonaut Insurance Company (“**Argonaut**”), Fidelity & Deposit Company of Maryland, First Surety Corporation, Lexon Insurance Company, Travelers Casualty and Surety Company of America, Westchester Fire Insurance Company, and Zurich American Insurance Company (together with Fidelity & Deposit Company of Maryland, “**Zurich**”) — have issued commercial surety bonds on behalf of the WMLP Debtors and the WLB Debtors, their affiliates, including certain non-Debtor affiliates (and, together with the WLB Debtors, the “**WLB Entities**”), (collectively, the “**Existing Surety Bonds**” and each individually, an “**Existing Surety Bond**”. Existing Surety Bonds include the Existing Kemmerer Surety Bonds (as defined below).

Certain of the WMLP Debtors and the WLB Entities entered into, or are potentially otherwise liable under, certain indemnity agreements and/or related agreements with one or more of the Sureties (collectively, the “**Existing Indemnity Agreements**” and, each, an “**Existing Indemnity Agreement**”). Notwithstanding anything to the contrary in this Order, the WLB Entities and the WMLP Debtors reserve all rights and defenses with respect to the Existing Indemnity Agreements.

Debtor Bonded Obligations. Nothing in the Plan or this Order shall alter, limit, modify, release, discharge, preclude or enjoin any obligation of the WMLP Debtors and/or the WLB Debtors to the Sureties under the Joint Chapter 11 plan of Westmoreland Coal Company and Certain of its Debtor Affiliates (the “**WLB Plan**”), the Order Confirming the Amended Joint Chapter 11 Plan of Westmoreland

Coal Company and Certain of its Debtor Affiliates (Docket Entry No. 1561) (the “WLB Confirmation Order”), the Oxford Sale Order, the Kemmerer Sale Order, the Existing Surety Bonds, Existing Indemnity Agreements, and obligations under the common law of suretyship and such obligations to the Sureties are not being released, discharged, precluded or enjoined by the Plan, this Order, or agreements with third parties.

Existing Collateral and Related Agreements. Except as otherwise provided in the Kemmerer Sale Order with respect to the Kemmerer Surety Bonds, all collateral, on which an applicable Surety had a perfected lien as of the Plan Effective Date, and all control agreements, trust agreements, deposit accounts, letters of credit and proceeds therefrom issued to the Sureties as security for a Debtor’s obligations under the Existing Surety Bonds (collectively, the “**Existing Surety Collateral**”) shall remain in place to secure all payment and performance obligations under the Existing Surety Bonds or for obligations arising under the Existing Indemnity Agreements. Notwithstanding any other provisions of the Plan, nothing in the Plan or Confirmation Order, including, without limitation, the discharge, injunction and release provisions of the Plan and Article VII, shall be deemed to apply to the Sureties’ claims to pursue the Existing Surety Collateral, nor shall these provisions be interpreted to bar, impair, prevent or otherwise limit the Sureties from exercising their valid rights under or with respect to any of the Existing Surety Bonds, the Existing Indemnity Agreements, the WLB Plan, the WLB Confirmation Order, the Oxford Sale Order, the Kemmerer Sale Order, or any related indemnity agreements, coal bond reclamation agreements, deposit agreements, control agreements, trust agreements, deposit accounts, letters of credit or applicable law, including SMCR A or the common law of suretyship.

Nothing herein shall be deemed to provide a Surety’s consent to the involuntary substitution of any principal under any Existing Surety Bond.

Notwithstanding the foregoing, nothing contained herein relieves any non-Debtor affiliate of any obligations under the Existing Indemnity Agreements.

Surety Rights as to Third Parties Unaffected; No Waiver. Nothing in the Plan, and/or this Order shall be interpreted to alter, diminish or enlarge the rights or obligations of the Sureties in regard to state and federal agencies, third parties or otherwise under any surety bonds, any indemnity agreements or applicable law nor shall any of the foregoing be deemed to enjoin the Sureties from asserting any rights, claims or defenses, in regard to or against any state and federal agencies, third parties including, without limitation, any of the Sureties’ indemnitors, insurers, or otherwise under any surety bonds, any indemnity agreements, coal bond reclamation agreements, the WLB Plan or applicable law.

Further, nothing contained in paragraphs [●] through [●] of this Order relating to Surety matters shall constitute or be deemed a waiver of any Cause of Action that any WMLP Debtor may hold against any entity.

Article VII(F). Nothing in Article VII(F) of the Plan, or any amendments thereto, shall be deemed to apply to the Existing Surety Bonds.

19. Adding these provisions to the Confirmation Order will resolve this Limited Objection.

20. The Sureties reserve the right to supplement this Objection at any time up to and including on the date of the confirmation hearing, and to incorporate by reference any argument raised by any of the other parties in this case.

WHEREFORE, the Sureties respectfully requests that the confirmation of the Plan be denied unless the Plan is modified include the language proposed by the Sureties.

Respectfully submitted,

/s/ Michael E. Collins

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CERTIFICATE OF SERVICE

I certify that on May 23, 2019, I caused a copy of the foregoing document to be served on the parties listed below via U.S. Mail and e-mail. I further certify that all parties entitled to notice via the Court's electronic notification system were served at the time of electronic filing.

/s/ Michael E. Collins

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