

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

IN RE:

WESTMORELAND COAL COMPANY,

et al

Debtors.

Chapter 11

Case No. 18-35672 (DRJ)

(Jointly Administered)

**LIMITED OBJECTION OF TRAVELERS CASUALTY AND SURETY COMPANY  
OF AMERICA TO JOINT PLAN OF LIQUIDATION FOR THE WMLP DEBTORS**

Travelers Casualty and Surety Company of America (“Travelers”) states the following in support of this limited objection (this “Objection”) to Joint Plan of Liquidation for the WMLP Debtors [Doc. 1612](the “WMLP Plan”).<sup>1</sup>

**I. BACKGROUND**

1. Westmoreland Coal Company and its Debtor and non-Debtor affiliates operate numerous coal-mining operations in North America that include 19 coal mining complexes in six states and Canada.<sup>2</sup>

2. Associated with these mining operations, the WLB Debtors and the WMLP Debtors have obtained from commercial surety companies over \$500 million in reclamation and other surety bonds for the benefit of federal, state, and local obligees.<sup>3</sup> As evidenced by Exhibit

---

<sup>1</sup> Capitalized terms not otherwise defined herein are as defined in the Disclosure Statement.

<sup>2</sup> Debtors’ Emergency Motion for Entry of Interim and Final Orders Approving Continuation of Surety Bond Program (Doc. 14) (the “Surety Motion”) at ¶ 4.

<sup>3</sup> Surety Motion at ¶ 8.

1 to the Surety Motion, at least eight (8) separate commercial surety companies, including Travelers, have issued surety bonds on behalf of the Debtors and their related entities.<sup>4</sup>

3. The WMLP Plan includes extensive release, exculpation, and injunction provisions.<sup>5</sup> These provisions are contrary to law. As a commercial surety, Travelers has extensive rights under common law, mining and other statutory provisions, and its contractual indemnity agreements. Without further description or limitation, the current broad language of the WMLP Plan's release, exculpation, and injunction provisions could be argued to impermissibly release third parties and/or impermissibly limit Travelers' extensive surety rights. Moreover, certain rights afforded to Travelers under agreed terms incorporated into the WLB Plan would be impermissibly impacted if the WMLP Plan is confirmed without revision.

4. The WMLP Plan provides as follows:

On the Plan Effective Date, except as otherwise specifically provided for in the Plan: all notes, instruments, certificates and other documents evidencing Claims against or Interests in the WMLP Debtors shall be deemed canceled and surrendered and of no further force and effect against the WMLP Debtors or the Liquidation Trust....<sup>6</sup>

Except as otherwise expressly provided in the Plan, on the Plan Effective Date, all Liens on the property of any WMLP Debtors' Estate shall be fully released and discharged, and all of the right, title and interest of any Holder of such Liens shall be released and discharged....<sup>7</sup>

5. Finally, broad settlement, release, exculpation, and injunction provisions have been included in Article VII of the Plan.

#### Releases by Holders of Claims and Interests

As of the Effective Date, except as otherwise provided herein, each

---

<sup>4</sup> Surety Motion, Exhibit 1 (Doc. 14, page 24 of 129).

<sup>5</sup> Doc. 1612, pp. 28-29; 40-42.

<sup>6</sup> Plan, Article VII, Doc. 1612, p. 28. (Emphasis added).

<sup>7</sup> Plan, Article VII, Doc 1612, pp. 28-29.

Releasing Party is deemed to have released and discharged each WMLP Debtor and Released Party from any and all Claims and Causes of Action, whether known or unknown, including any derivative claims asserted on behalf of the WMLP Debtors, that such Entity would have been legally entitled to assert (whether individually or collectively), based on or relating to, or in any manner arising from, in whole or in part, the WMLP Debtors....

Injunction

Except as otherwise expressly provided in this Plan or for Distributions required to be paid or delivered pursuant to this Plan or the Confirmation Order, all Entities that have held, hold, or may hold Claims or Interests that have been released pursuant to this Plan shall be discharged pursuant to this Plan, or are subject to exculpation pursuant to section VII.F.3 of this Plan, are permanently enjoined, from and after the Effective Date, from taking any of the following actions against, as applicable, the WMLP Debtors, the Released Parties or the Exculpated Parties (to the extent of the exculpation provided pursuant to section VII.F.3 of this Plan with respect to the Exculpated Parties): (a) commencing or continuing in any manner any action or other proceeding of any kind on account of or in connection with or with respect to any such Claims or Interests; (b) enforcing, attaching, collecting, or recovering by any manner or means any judgment, award, decree, or order against such Entities on account of or in connection with or with respect to any such Claims or Interests; (c) creating, perfecting, or enforcing any Lien or encumbrance of any kind against such Entities or the property or the Estates of such Entities on account of or in connection with or with respect to any such Claims or Interests; (d) asserting any right of setoff, subrogation, or recoupment of any kind against any obligation due from such Entities or against the property of such Entities on account of or in connection with or with respect to any such Claims or Interests unless such Entity has timely asserted such setoff right in a document Filed with the Bankruptcy Court explicitly preserving such setoff, and notwithstanding an indication of a Claim or Interest or otherwise that such Entity asserts, has, or intends to preserve any right of setoff pursuant to applicable law or otherwise; and (e) commencing or continuing in any manner any action or other proceeding of any kind on account of or in connection with or with respect to any such Claims or Interests released or settled pursuant to this Plan.<sup>8</sup>

---

<sup>8</sup> Plan, Doc. 1612, pp. 41-42.

## II. LEGAL FRAMEWORK

### A. Travelers Has Extensive Rights Under Common Law, Statutes, and Contractual Indemnity as well as under the WLB Plan.

6. Surety bonds issued by compensated sureties are meant to function as credit accommodations in which the surety anticipates no loss.<sup>9</sup>

7. Included among the many rights that commercial sureties exercise to minimize their chances of loss is the extensive underwriting that may include analysis of the principal, the principal's affiliates, the principal's financial health and business plan, and the specifics of the obligations subject to the bonded liability.<sup>10</sup> The particular underwriting evaluations and decisions may be unique to each surety and may require detailed inspections and documentation. No simple formula exists.

8. A surety will also require protection in the form of contractual indemnity agreements in addition to the common law obligations of indemnity by the bonded principal and by the taking and holding of collateral. The WMLP Debtors and the WLB Debtors have executed numerous such indemnity agreements and have provided Travelers and other sureties with collateral.<sup>11</sup> The entities that the surety requires to execute the indemnity agreements and the amounts of collateral required depend on the surety's evaluation of the principal and the bonded obligations in the due course of the underwriting process.

9. Travelers also has rights under the WLB Plan that would be violated by confirmation of the WMLP Plan. If confirmed, the WMLP Plan could jeopardize specific rights

---

<sup>9</sup> See, e.g., Armen Shahinian, *The General Agreement of Indemnity*, in *The Law of Suretyship* 487 (Edward G. Gallagher ed. 2<sup>nd</sup> ed. 2000).

<sup>10</sup> See generally George W. Thompson, *et al.*, *Reclamation Bonds*, in *The Law of Commercial Surety and Miscellaneous Bonds* 261, 264-65 (Bruce Charles King, *et al.*, eds. 2012) (describing the process of underwriting reclamation bonds) and Stewart R. Duke and Mary Jeanne Anderson, *How Contract Bonds Are Underwritten*, in *The Law of Suretyship*, 4-1 (Edward G. Gallagher ed. 2000).

<sup>11</sup> Surety Motion, at ¶¶ 7 and 8.

preserved to Travelers and other sureties by the WLB Plan and Order confirming that plan.

Among other terms, the WLB Plan as confirmed provides for the Sureties to retain all rights in the collateral securing the WLB Bonds and WMLP Bonds until such time as those bonds are released.

Existing Surety Collateral posted for the benefit of a Surety will secure the obligations and liabilities arising under both the Existing Indemnity Agreements and Replacement Indemnity Agreements of such Surety until all Existing Surety Bonds of an applicable Surety are either satisfied, replaced, terminated, performed or released after regulatory authority approval; and (ii) each Surety will maintain first priority security interest on both its Existing Surety Collateral and its NewCo Surety Collateral to secure all obligations under any Existing Indemnity Agreement or Replacement Indemnity Agreement. Nothing in the Plan, the Confirmation Order, the Stalking Horse Purchase Agreement, or otherwise shall be deemed to limit such Surety's right to draw any Existing Surety Collateral....<sup>12</sup>

### III. ARGUMENT

#### A. The Plan Cannot Be Confirmed Under 11 U.S.C. §§ 1123(a)(5) and 1129(a).

10. Among the requirements for plan confirmation, Section 1123(a)(5) requires that the plan “provide adequate means for the plan’s implementation.” Section 1129(a) allows the court to confirm a plan only if:

(1) The plan complies with the applicable provisions of [Title 11].

.....

(3) The plan has been proposed in good faith and not by any means forbidden by law.

.....

Because the WMLP Plan violates each of these subsections of Section 1129, the Court must not confirm the WMLP Plan.

---

<sup>12</sup> Confirmation Order, Doc. 1561, ¶ 31.

11. The Plan is contrary to the well-established laws of suretyship. The WMLP Plan provides releases and injunctive relief contrary to applicable law, provisions of Chapter 11, and the terms of the WLB Plan. The Court cannot approve the Plan that fails to provide adequately for the WMLP Debtors compliance with law.

**B. The Plan's Release, Discharge, and Injunction Provisions Violate Section 1129 of the Code.**

12. Section 1129(a)(1) requires that the Plan comply with the provisions of the Bankruptcy Code.

13. Because of its excessively broad terms, if approved, Article VII of the WMLP Plan could be interpreted to prejudice the Sureties' rights under their existing Indemnity Agreements, impair the collateral support that they hold, release third parties, and enjoin the Sureties from exercising their rights under surety law and the regulatory programs under which the surety bonds were written.<sup>13</sup> The overreaching terms of the Article VII of the WMLP Plan are unlawful as applied to Travelers.

14. As discussed above, the Surety Bonds are the result of a three-party relationship which includes: (1) the principal who is the primary obligor (the permittee or the applicable Debtor in this case); (2) the obligee (the regulatory agency) to whom the principal and surety owe a duty; and (3) the surety, which is the secondary obligor. This three-party relationship provides the Sureties with numerous rights, including, among others, the common law rights of indemnity and subrogation. In addition to a surety's rights under common law, it is common for a surety to seek protection in the form of collateral and a contractual general agreement of indemnity from the bonded principal.<sup>14</sup> The WMLP Debtors and the WLB Debtors' obligations

---

<sup>13</sup> Plan, Article VII, Doc. 1612, p. 42.

<sup>14</sup> See, e.g., *Fidelity & Deposit Co. of Maryland v. Bristol Steel & Iron Works, Inc.*, 722 F.2d 1160, 1163 (4th Cir. 1983); see also, *United States Fidelity & Guaranty Co. v. Feibus*, 15 F. Supp. 2d 579, 584 (M.D. Pa. 1998).

to Travelers are secured both by letters of credit and liens on deposit accounts of the WLB Debtors which can be drawn in accordance with contractual and common law rights and the WLB Plan. Travelers holds collateral subject to multiple agreements that include five Master Pledge and Security Agreements and accompanying Control Agreements (the “Collateral Agreements”). These Collateral Agreements secure all of the Obligations of the WMLP Debtors to Travelers that include the broad obligations under the indemnity agreements.

15. The Plan purports to satisfy, discharge, release, and terminate all claims or other debts of the WMLP Debtors. If interpreted broadly, these provisions could be read to include the Sureties’ indemnity agreements and collateral agreements which are an integral part of the surety relationship.

16. Article VII of the Plan releases the “Released Parties,” which is a term defined by the Plan to include not only the WMLP Debtors, but also (a) the WMLP Debtors; (b) the WLB Debtors; (c) the WLB Stalking Horse Purchaser; (d) the WLB Consenting Stakeholders; (e) Holders of WLB First Lien Claims; (f) Holders of WLB Bridge Loan Claims; (g) the WLB DIP Lenders; (h) the WLB Bridge Loan Agent; (i) the WLB Credit Agreement Agent; (j) the WLB DIP Agent; (k) the WLB First Lien Notes Trustee; (l) the WMLP Secured Parties; (m) the Creditors’ Committee, the members thereof, and their respective professionals (solely in their capacity as such); (n) the Kemmerer Noteholders; (o) the Conflicts Committee; (p) each current and former Affiliate of each Entity in clauses (a) through (o); and (q) with respect to each Entity in clauses (a) through (p), each such Entity’s Representatives.<sup>15</sup> Furthermore, the injunction provided in Article VII of the WMLP Plan purports to prohibit actions against any of the Released Parties. The injunction appears to negate the Sureties’ long-recognized right of

---

<sup>15</sup> Plan, Doc. 1612, p. 10.

subrogation and other sureties' rights, and their rights under the WLB Plan and therefore, is contrary to law.

17. In its simplest terms, subrogation is “the substitution of one party in the place of another with reference to a lawful claim, demand, or right so that the party that is substituted succeeds to the rights of the other.”<sup>16</sup> If the WMLP Debtors do not fulfill their obligations under bonds issued by Travelers, then Travelers will be called on to fulfill those obligations under the bonds.<sup>17</sup> Once a surety performs its obligation either by paying the bond amount to the obligee, then the surety is subrogated to the obligee's rights. The Sureties' subrogation rights are well-established by legal precedent, and that right is not eliminated by bankruptcy law. For over 100 years, courts have recognized that “a surety who pays the debts of another is entitled to all the rights of the person he paid to enforce his rights to be reimbursed.”<sup>18</sup> The surety's right to subrogation is the same “whether its bond be for performance or for payment.”<sup>19</sup>

18. The doctrine allows a surety to step into the shoes of the obligee who has been paid by the surety.<sup>20</sup> The surety's subrogation right relates back to the date of the bond under which the surety obligated itself.<sup>21</sup> Furthermore, the surety's subrogation rights are superior to a perfected security interest of a bank in estate proceeds.<sup>22</sup> Title 11 U.S.C. § 509(a) does not

---

<sup>16</sup> *First A. Title Ins. Co. v. Western Surety Co.*, 722 S.E.2d 637, 642 (Va. 2012)(citations and quotations omitted).

<sup>17</sup> *Mort v. U.S.*, 86 F.3d 890, 893 (9<sup>th</sup> Cir. 1996).

<sup>18</sup> *Pearlman v. Reliance Insurance Co.*, 371 U.S. 132, 137, 83 S. Ct. 232, 9 L. Ed.2d 190 (1962). *See also Prairie State National Bank v. United States*, 164 U.S. 227, 17 S. Ct. 142, 41 L. Ed.2d 412 (1896).

<sup>19</sup> *Pearlman*, 371 U.S. at 139.

<sup>20</sup> *National Shawmut Bank of Boston v. New Amsterdam Cas. Co.*, 411 F.2d 843, 845 (1<sup>st</sup> Cir. 1969).

<sup>21</sup> *Prairie State*, 164 U.S. at 240.

<sup>22</sup> *Id. Henningsen v. United States Fid. & Guar. Co.*, 208 U.S. 404, 410, 28 S. Ct. 389, 52 L. Ed.2d 547 (1908).

supersede other “applicable non-bankruptcy law” providing subrogation rights.<sup>23</sup> By these general principles, the Sureties are subrogated to all of the rights of the bond obligees.

**C. Plan Modifications Required to Comply with Applicable Law.**

19. In order to preserve the rights of Travelers in accordance with law, certain limited provisions should be added to the WMLP Plan or any Order confirming the WMLP Plan with general terms consistent with the following:

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 WLB Debtors, their affiliates, including certain non-Debtor affiliates (and, together with the WLB Debtors, the “**WLB Entities**”), and the WMLP Debtors (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 WLB Entities and the WMLP Debtors 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 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”), 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. 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

---

<sup>23</sup> *In re Spiritos*, 103 B.R. 240, 243-45 (Bankr.C.D. Cal. 1989) See also, *In re Missionary Baptist Foundation of America, Inc.*, 667 F.2d 1244, 1246 (5th Cir. 1982); 4 *Collier on Bankruptcy*, §509.08 (King, 15<sup>th</sup> Ed. 1996); *Ram Construction Co, Inc. v. American States Insurance Co.*, 749 F.2d 1049, 1054-55 (3d Cir. 1984).

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 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 WLB Plan, any related indemnity agreements, coal bond reclamation agreements, deposit agreements, control agreements, trust agreements, deposit accounts, letters of credit or applicable law, including SMCRA 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.

20. Travelers respectfully asks the Court not to approve the WMLP Plan because, the Plan is unconfirmable under 11 U.S.C. §§ 1123(a)(5) and 1129 because (1) it does not provide evidence that the WLB Debtors can comply with applicable law; (2) the Plan does not provide for compliance with bonded obligations related to the WMLP Debtors; and (3) it purports to modify the nature of the WMLP Debtors' obligations to Travelers and contains release and

injunctive provisions that could be interpreted to prejudice the rights of the Sureties with regard to their valid and existing rights under indemnity agreements, the laws of suretyship, and the applicable regulatory programs and the WLB Plan.

21. Travelers reserves the right to supplement this Objection in writing or orally as further information is disclosed or discovered, or to object to the adequacy of time provided to review and object to further changes in the WMLP Plan or related information.

Respectfully submitted,

/s/ Elizabeth Lee Thompson

William T. Gorton III

Elizabeth Lee Thompson

W. Blaine Early, III

Stites & Harbison, PLLC

250 West Main Street

Suite 2300

Lexington, KY 40507

Telephone: (859) 226-2300

E-mail address: [ethompson@stites.com](mailto:ethompson@stites.com)

COUNSEL FOR TRAVELERS CASUALTY  
AND SURETY COMPANY OF AMERICA

**CERTIFICATE OF SERVICE**

I hereby certify that on May 24, 2019, I electronically filed the document, with the clerk of court for the U.S. Bankruptcy Court, Southern District of Texas, using the electronic case filing system of the court. The electronic case filing system sent a “Notice of Electronic Filing” to the attorney(s) of record, who has consented in writing to accept this Notice as service of the document, by electronic.

/s/ Elizabeth Lee Thompson