

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

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In re:

Chapter 11

WESTMORELAND COAL COMPANY., *et al.*,  
Debtors<sup>1</sup>.

Case No. 18-35672

Jointly Administered

**Related doc. 1612 & 1599**

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**STATEMENT AND RESERVATION OF RIGHTS OF LEXON INSURANCE COMPANY,  
SOMPO INTERNATIONAL INSURANCE AND BOND SAFEGUARD INSURANCE  
COMPANY TO THE JOINT PLAN OF LIQUIDATION FOR THE WMLP DEBTORS**

Lexon Insurance Company, Sompo International Insurance and Bond Safeguard Insurance Company, (collectively “Lexon”), by and through their undersigned counsel, Harris Beach PLLC, and their local counsel, Locke Lord LLP, submit this Statement and Reservation of Rights (“Statement”) to the *Joint Plan of Liquidation for the WMLP Debtors* [Dkt No. 1612], and in support thereof respectfully states as follows:

**I. BACKGROUND**

1. On October 9, 2018, (the “Petition Date”), the Debtors commenced with this Court voluntary cases under Chapter 11 of Title XI of the United States Code (the “Bankruptcy Code”) in the United States Bankruptcy Court of the Southern District of Texas, Houston Division (the “Bankruptcy Court”).

2. The Debtors’ bankruptcy cases have been consolidated for procedural purposes and are being jointly administered.

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<sup>1</sup> A complete list of the debtors (the “Debtors”) may be obtained on the website of the Debtors’ proposed claims and noticing agent at [www.donlinrecano.com/westmoreland](http://www.donlinrecano.com/westmoreland).

3. The Debtors are authorized to operate their business as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

4. The Debtors' business operations relate, *inter alia*, to mining in the United States and Canada. The Debtors primarily produce and sell thermal coal to investment grade power plants under long-term, cost-protected contracts, as well as to industrial customers and barbeque charcoal manufacturers. The Debtors are the largest producer of surface-mined coal in Ohio, and market their coal primarily to large electric utilities with coal-fired, base-load-scrubbed power plants under long-term coal sales contracts. The Debtors' focus on acquiring thermal coal reserves that they can efficiently mine with their large-scale equipment. The Debtors' primary markets are in the Midwest and Rocky Mountain regions of the United States and, according to the First Day Declaration of Jeffrey S. Stein, Chief Restructuring Officer of Westmoreland Coal Company (the "First Day Declaration") [Dkt. No. 54], their operating assets are comprised of mines located in Montana, North Dakota, Texas, Ohio and New Mexico.

5. As the Debtors acknowledge in the *Debtors' Emergency Motion for Entry of Interim and Final Orders Approving Continuation of Surety Bond Program* (the "Surety Bond Motion") [Dkt. No. 14], they are required under applicable state and federal laws and regulations relating to mining to provide surety bonds to certain third parties, or obligees, to secure the Debtors' payment or performance of certain obligations related to the Debtors' coal mining and administrative activities.

6. These obligations include, among other things: (a) obligations relating to obtaining and maintaining coal mining permits or licenses, including environmental reclamation obligations; (b) obligations owed to states and municipalities for wages and worker's compensation; and (c) obligations related to notary public services performed.

7. Lexon has issued the Lexon Bonds to the Debtors to secure payment or performance of certain obligations. Additionally, as partial consideration for the execution of the Lexon Bonds, Westmoreland Coal Company, Oxford Resources, GP, LLC, and Oxford Resources Partners, L.P., and “all [s]ubsidiaries and affiliates now owned and/or hereinafter [c]reated, controlled, managed or acquired” (the “Indemnitors”), executed General Agreements of Indemnity (the “Indemnity Agreements”) in which the Indemnitors agreed to indemnify and hold Lexon harmless from every claim that Lexon may pay as a result of the Lexon Bonds.

8. Lexon has executed over 100 Lexon Bonds on behalf of the Debtors, as Principals, totaling approximately \$24.5 million, in favor of various third-party obligees but primarily various governmental authorities and agencies (the “Lexon Bonds”).

9. As the Court is aware, the surety relationship is a tri-party arrangement under which the Principal – the Debtors – remain primarily liable. Notably, the Debtors’ obligations may not simply be handed over to the surety to perform.

10. As the Debtors accurately point out in the Surety Bond Motion, the failure to maintain the Lexon Bonds may cause the Debtors to be in violation of their obligations under federal and state law, including, the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §1201 *et seq.* (“SMCRA”), and related regulations. Furthermore, if the Debtors fail to post a surety bond when requested, various governmental entities can refuse to issue the licenses that the Debtors require in order to operate their business. “As noted, the Debtors’ failure to provide, maintain, or timely replace the surety bonds may jeopardize the Debtors’ ability to operate their business.” *Id.* at ¶ 21.

11. The Debtors also recognize the importance of maintaining their Surety Bond Program with Lexon since it is unlikely that the Debtors will be able to renew or obtain replacements bonds on terms more favorable than those offered by Lexon, given the Debtors' current circumstances. *Id.* at ¶ 28.

12. In sum, maintaining the Lexon Bonds is essential for the Debtors in order to continue to operate their business. Any disruption to the Surety Bond Program could severely disrupt the Debtors' operations to the detriment of not only the Debtors, but creditors as well. As a result, the importance of the Lexon Bonds to the Debtors cannot be understated.

13. On February 5, 2019 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, was entered by this court [Dkt. 1289].

14. After the Oxford Sale was approved by this court, Lexon has gone to great lengths to work with the Buyer and the Debtors to insure a smooth transition in the issuance of new bonds and the continued use of collateral to allow the Debtors to continue to utilize the permits in place until new permits can be issued to the Buyer.

15. Thereafter on March 2, 2019, this court entered an Order (the "WLB Confirmation Order") [Dkt. 1651] confirming the Amended Joint Chapter 11 Plan of Westmoreland Coal Company and certain of its Debtor affiliates (hereinafter the "WLB Plan").

16. The WLB Plan effective date occurred on March 15, 2019.

17. At some point a controversy arose between the Debtors and the Buyers of the Oxford Mining Facilities, CCU Coal and Construction Company, LLC (“CCU). That controversy has now been embodied in a Complaint for Declaratory Relief filed with this court on March 13, 2019 [Dkt. 1599].

18. The Order approving the Oxford Sale (“Oxford Sale Order”) [Dkt. 1289] contained very specific language that was negotiated for and made its way into the Oxford Sale Order that provided substantial protection for Lexon.

19. On March 15, 2019, the Joint Plan of Liquidation for the WMLP Debtors (the “WMLP Plan”) [Dkt. 1612] was filed.

20. The current WMLP Plan contains overly broad, wide ranging release provisions.

21. Article VII.F.4.b of the WMLP Plan provides for extensive releases by holders of claims in interest which would greatly impair the interests of Lexon and would virtually eviscerate the protections that were negotiated, and received and approved by this Court, in the Oxford Sale Order.

22. While Lexon is not a party to the complaint for declaratory relief it is concerned potential outcomes of that litigation could negatively impact the protections afforded to Lexon in the Oxford Sale Order.

23. A similar provision affording Lexon its protections which was negotiated in the WLB Confirmation Order has been submitted to the WMLP Debtors’ counsel for review (the “Surety Language”). However, as of the date of filing of this Statement, there has been no response by Debtors’ counsel regarding the Surety Language.

24. Unless and until Surety Language is agreed upon by the WMLP Debtors, Lexon must reserve its rights to be able to object to the extensive releases contained in the WMLP Plan.

25. Upon information and belief the Combined Hearing on Disclosure Statement and Plan Confirmation is currently scheduled for June 5, 2019.

26. The deadline to file objections to the WMLP Plan is May 24, 2019, and while the WLMP Debtors, Lexon and the other sureties are still undertaking good faith negotiations to resolve any and all disputes regarding the Plan, Lexon deems it necessary to file this Statement to protect its interests.

## II. STATEMENT AND RESERVATION OF RIGHTS

27. The Debtors and sureties, including Lexon, have been in negotiations regarding the Surety Language to be included in the order confirming the WMLP Plan (the “WMLP Confirmation Order”), in an effort to resolve various issues/objections the sureties, including Lexon, have with the WMLP Plan.

28. In the event the Debtors and sureties, including Lexon, are not able to agree as to the Surety Language, Lexon’s objections to the WMLP Plan would include: (a) potential *Midlantic*<sup>2</sup> issues in relation to the potential change of sale of its mining operations, and the WMLP Debtors being left so administratively insolvent as to prevent them from performing their environmental obligations; (b) the improper treatment of Lexon’s Bonds; and (c) that the WMLP Plan was not feasible because: (i) the Oxford Sale is now in jeopardy; and (ii) sound business judgment requires the confirmed closing of the Oxford Sale before being able to confirm the WMLP Plan (the “Lexon Objections”).

29. Lexon has no objection to the confirmation of the WMLP Plan so long as the WMLP Confirmation Order contains the Surety Language which has been previously submitted to Debtors’ counsel.

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<sup>2</sup> *Midlantic Nat’l Bank v. New Jersey Dept. of Environmental Protection*, 474 U.S. 494 (1986).

30. In the event the Debtors or other interested parties object to the inclusion of the Surety Language in the WMLP Confirmation Order, or if the Surety Language is not included in the WMLP Confirmation Order, Lexon reserves the right to: (a) withdraw its support of the WMLP Plan; (b) amend and supplement this Statement to include the Lexon Objections to the WMLP Plan, and any additional objections which may arise from the filing of this Statement to the WMLP Confirmation Hearing; and/or (c) join in any other objections to the WMLP Plan.

31. Furthermore, Lexon reserves the right to further amend the Surety Language as the negotiations with the Debtors and other sureties continues, and the sale and confirmation process unfolds.

32. Nothing herein shall be considered a waiver of any rights or claims that Lexon might have against the Debtors, its subsidiaries and affiliates. Lexon reserves the right to amend and supplement this Statement and/or join in any other statements and/or objections related to the relief requested by the Debtors. The submission of this Statement by Lexon is not intended as, and shall not be construed as:

- a. Lexon's admission of any liability or waiver of any defenses or limitations of any rights of Lexon with respect to any claims against one or more of the Lexon Bonds or under the Indemnity Agreements;
- b. Lexon's waiver or release of any rights to exoneration it may have against any one with respect to its obligations pursuant to Lexon's Bonds;
- c. Lexon's waiver or release of its right to be subrogated to the rights of one or more parties paid pursuant to the Lexon Bonds;
- d. An election of remedies; or

- e. Consent to the determination of Debtors' liability to Lexon by a particular Court, including, without limitations, the Bankruptcy Court.

### III. CONCLUSION

For the foregoing reasons, Lexon respectfully requests that this Court approve the Surety Language as outlined herein, confirm the WMLP Plan, and grant such other and further relief as this Court deems just and proper.

Dated: May 24, 2019  
Houston, Texas

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**CERTIFICATE OF SERVICE**

I certify that on May 24, 2019, I electronically filed a copy of the foregoing *Statement and Reservation of Rights* with the Clerk of the Court for the U.S. Bankruptcy Court in the Southern District of Texas using the electronic case filing system of the Court. I further certify that all parties entitled to notice via the Court's electronic notification system were served at the time of the electronic filing.

/s/ Simon R. Mayer  
Simon R. Mayer