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

IN RE:	)	**Chapter 11**
	)	
WESTMORELAND COAL COMPANY, *et al.*,[1]	)	**Case No. 18-35672 (DRJ)**
DEBTORS.	)	
	)	**(Jointly Administered)**
	)	
	)	

OBJECTION AND RESERVATION OF RIGHTS
OF ZURICH AMERICAN INSURANCE COMPANY AND AFFILIATE
TO JOINT PLAN OF LIQUIDATION FOR THE WMLP DEBTORS
(Relates to Dkt. No. 1612)

TO: THE HONORABLE DAVID R. JONES,
UNITED STATES BANKRUPTCY JUDGE

Zurich American Insurance Company, and its affiliate, Fidelity and Deposit Company of Maryland, (collectively, "**Zurich**") file this *Objection and Reservation of Rights of Zurich American Insurance Company and Affiliate to Joint Plan of Liquidation of WMLP Debtors* ("**Objection**") and respectfully state as follows:

I. SUMMARY OF OBJECTION

1. Throughout this case, Zurich has largely supported the efforts of the Debtors to reorganize its debts through the transfer of the mines and related permits as contemplated by the WMLP Debtors' ("**Debtors**") Plan and the Kemmerer Sale efforts[2]. To date, the WMLP

[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 listed. A complete list of such information may be obtained on the website of the claims and noticing agent in these chapter 11 cases at www.donlinrecano.com/westmoreland.

[2] Unless otherwise described herein, all capitalized terms shall have the meaning ascribed to them in the *Joint Plan of Liquidation for the WMLP Debtors* (the "**Plan**"). Dkt No. 1612.

Debtors, the WMLP Lenders, and the surety bond providers ("**Sureties**")[3], have engaged in good faith efforts to arrive at a consensual transaction that accomplishes the Debtors' goals, yet also fairly treats the Sureties under the Bankruptcy Code and applicable law. However, the Kemmerer Sale and Plan include provisions that are inconsistent with the contracts between Debtors and Zurich, inconsistent with previous orders entered by the Court, and contrary to established suretyship law and certain regulatory requirements as they may relate to Zurich's bonds, collateral and third party rights. The Kemmerer Sale and Plan must adequately protect Zurich's and all Sureties' rights under their respective bonds, indemnity agreements and collateral. Zurich's Objection can be resolved by inclusion of additional language in the proposed confirmation order in a form substantially similar to the proposed language attached hereto as *Exhibit A*.[4] To the extent this Objection relates to the Kemmerer Sale Motion, it is specifically adopted as such.[5] Zurich reserves its right to assert additional objections to the Plan and to the Kemmerer Sale.

II. FACTUAL BACKGROUND

Zurich's Bonds and Agreements with the Debtors

2. Prepetition, Zurich issued numerous surety bonds ("**Zurich Bonds**") on behalf of and at the request of the Debtors in connection with various coal mining and related activity permits issued to the Debtors in various states pursuant to applicable state and federal laws. As of the Petition Date, the aggregate penal limit of the Zurich Bonds was approximately $246 million. In the absence of the Zurich Bonds or a replacement surety/security, the Debtors would be unable to operate the corresponding mines.

[3] As defined in the *Final Order Approving Continuation of Surety Bond Program* [Dk. No. 514].
[4] Subject to final approval from Zurich and other Sureties.
[5] *Exhibit A* does not address all objections Zurich maintains as to the Kemmerer Sale.

3. As consideration for and as a condition precedent to the issuance of the Zurich Bonds, certain Debtors executed and granted to Zurich certain rights pursuant to three General Agreements of Indemnity ("**GAIs**"). The Debtors secured their obligations to Zurich under the GAIs by providing Zurich with collateral in the form of certain cash accounts subject to control agreements.

4. Zurich currently controls cash collateral under the trust agreements totaling approximately $96 million (the "**Zurich Collateral**"). The Zurich Collateral is held as collateral for all of the Debtors' obligations under the Zurich Bonds and is not segregated by or allocated to specific bonds. On December 12, 2018, Zurich filed a proof of claim, Claim No. 760 ("**Claim No. 760**"), as a secured proof of claim in the Westmoreland Coal Company bankruptcy case, as well as similar proofs of claim in other certain Debtors cases. Actual losses under the Zurich Bonds have increased since the filing of Claim No. 760. It is possible that Zurich's claim could exceed the Zurich Collateral and Zurich could be a secured creditor with an unsecured deficiency claim. Zurich has reserved the right to amend and supplement Claim No. 760 to include any losses on the Zurich Bonds, the amount of any past due premiums, any paid claims, and loss adjustment expenses.

5. The nature and scope of the Zurich Bonds vary, but several of the Zurich Bonds relate to the WMLP Debtors, the Kemmerer Mine and its operations. Other Zurich Bonds relate to the WLB Debtors and other non-Debtor affiliates, including the Canadian subsidiaries, as defined in the WLB Plan and Order approving same. See Dkt No. [1561].

Debtors' Plan and Sale Transaction

6. On October 9, 2018 (the "**Petition Date**"), each of the Debtors filed petitions for relief under chapter 11 of title 11 of the United States Code (the "**Bankruptcy Code**"), thereby

commencing these jointly-administered chapter 11 cases (the "**Bankruptcy Cases**"). The Debtors continue to operate and manage their businesses as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

7. On or about January 18, 2019, the WLB Debtors filed their *Motion of Westmoreland Coal Company and Certain of its Subsidiaries for Entry of An Order (I) Authorizing Westmoreland Coal Company and Certain Debtor Affiliates to Enter Into and Perform Under the Stalking Horse Purchase Agreement, (II) Approving Bidding Procedures with Respect to Substantially All Assets, (III) Approving Contract Assumption and Assignment Procedures, (IV) Scheduling Bid Deadlines and an Auction, (V) Scheduling Hearings and Objection Deadlines with Respect to the Disclosure Statement and Plan Confirmation, and (VI) Approving the Form and Manner of Notice Thereof* ("**Kemmerer Sale Motion**")[Dkt. No. 1101].

8. On March 2, 2019, the Court entered its *Order (i) Approving the Sale of the Kemmerer Mine and Substantially All Assets Related Thereto Free and Clear of All Non-assumed Liens, Claims, Encumbrances and Interests, (ii) Approving the Assumption and Assignment of Certain Executory Contracts and unexpired Leases and (iii) Granting Related Relief* ("**Original Kemmerer Sale Order**") approving Western Coal Acquisitions, LLC, or approved subsidiaries or assigns ("**WCA**") as the winning bidder for the Kemmerer Assets [Dkt. No. 1561].

9. On or about December 14, 2018, the WMLP Debtors filed their Amended Disclosure Statement and Joint Chapter 11 Plan of Liquidation ("**Plan**"). [Dkt. Nos. 1617 and 1612, respectively].

10. The Amended Disclosure Statement was conditionally approved on March 18, 2019 [Dkt No. 1620] and final approval was ordered to be combined with approval of the Plan. The original deadline to file objections to the plan and proposed sale and to submit a ballot was April 17, 2019, but the Debtors extended such deadlines several times to an including May 24, 2019, as defined in the *Notice of Reset of WMLP Debtors' Combined Disclosure Statement and Confirmation Hearing and Modification of Certain Associated Deadlines*. [Dkt No. 1804].

11. WAC ultimately failed to meet the conditions precedent to close on the Kemmerer Sale and the asset purchase agreement approved by the Original Kemmerer Sale Order was terminated.

12. On May 23, 2019, the WMLP Lenders filed their *Expedited Motion of Westmoreland Resource Partners, LP and its Subsidiaries For Entry of An Order (i) Approving the Sale of the Kemmerer Mine and Certain Other Assets Free and Clear of Substantially All Liens, Claims, Encumbrances and Interests Pursuant to a Credit Bid from Secured Lenders, (ii) Authorizing the Assumption and Assignment of Executory Contracts and Unexpired Leases In Connection Therewith and (iii) Granting Related Relief* (the "**Second Kemmerer Sale Motion**")[Dkt No. 1863]. Hearing on the Second Kemmerer Sale Motion is set for June 5, 2019 at 1:00 pm CT. [Dkt No. 1846].

13. The Plan and Second Kemmerer Sale Motion intend to sell the Kemmerer Assets to an entity formed by the WMLP Secured Lenders and the purchase price will be paid in the form of a credit bid. Closing of the Kemmerer Sale is a pre-condition to confirmation and the effectiveness of the Plan. See Art. VI.A and B of the Plan.

14. On March 2, 2019, the Court confirmed the chapter 11 plan of the WLB Debtors (the "**WLB Confirmation Order**"). [Dkt No. 1561]. The sale contemplated therein closed on

or about March 15, 2109. [Dkt No. 1608]. Numerous rights to all sureties were granted by the WLB Confirmation Order, which is still binding on all parties.

Debtors' Regulatory Environment

15. The Debtors operate underground and surface coal mining operations under the authority of state and federal environmental and mine safety laws, including the federal Surface Mining Control and Reclamation Act ("**SMCRA**"), the Mine Safety and Health Act of 1977 ("**Mine Safety Act**"), and the Clean Water Act ("**CWA**"). SMCRA allows states to implement the program through federally approved programs. The states where the Debtors operate have been granted authority by the United States Department of Interior's Office of Surface Mining ("**OSM**") to implement SMCRA according to approved state statutory, regulatory, and administrative programs.

16. To conduct mining, operators must obtain a permit from the SMCRA regulatory authority. The permit binds the operator to specific obligations intended to mitigate the potential adverse impacts on the environment, including restoring the land to an approved post-mining land use through reclamation and mitigating or treating any impacts on water. As discussed at length in the following section, to obtain the required mining authorizations, the Debtors must provide financial assurances, such as surety bonds, sufficient to guarantee completion of their obligations under the applicable permits. Such bonds ensure a source of funds sufficient to complete reclamation and other environmental mitigation obligations under the permit are met and to avoid these costs falling on the state or federal government.

17. Maintenance of existing bonds or replacement is critical to implementation of the Plan and Kemmerer Sale. As discussed further below, the bonds may not be transferred without the consent of the surety and regulatory authority approval. In the context of this Chapter 11

proceeding, 28 U.S.C. § 959 requires the Debtors to operate their businesses in compliance with valid laws. In every state, permit transfer applications require posting a new, or substitute, bond determined by the regulatory authority as sufficient to cover obligations assumed under the new permits. Until the permit transfer action is finalized, the existing bond remains in place. Once approved, the new bond is deemed to replace the existing bond and the Debtors' bond may be released, subject to regulatory authority approval. Even where permits are transferred, Debtors remain liable for compliance or payment to meet any reclamation and environmental mitigation obligations not assumed in the transferred permit and surety bond obligations are not released until the regulatory authority determines obligations are met. Failure to maintain adequate funds to complete all required reclamation and mitigation obligations, assuming obligations do not transfer or the intended transfer is not realized will result in non-compliance by the Debtors and prevent the practical implementation of the Plan by disrupting the ability to continue operations or obtain permit transfers. This Court should evaluate and scrutinize any relief sought by the Debtors with respect to any of their assets by determining how that relief will ultimately impact the Debtors' ability to comply with applicable environmental laws and address their environmental obligations.

18. Debtors contemplate authorizing the Credit Bid Purchaser to operate under existing permits during the period during which permit transfer actions are pending. The timing of permit transfer finalization is uncertain as the regulatory actions are subject to public comment and third-party objection actions. During the interim operating period, a new owner like the Credit Bid Purchaser would typically post a substitute bond, limited to cover obligations associated with actions taken consistent with the permit during the interim period. During this

time, Debtors remain liable for all other obligations until such time as permit transfer is complete and replacement bonds are approved.

III. THE SURETY RELATIONSHIP

19. Surety bonds are three-party instruments between the operator (Debtors), who is named as principal on the bond and remains primarily liable for all permit obligations, the state regulatory authority (obligee), to which Debtors owe performance and payment of their obligations under the permits, and the surety, who is secondarily liable to the obligee. *Nat'l Am. Ins. Co. v. Boh Bros. Constr. Co.*, 700 So. 2d 1363, 1366 (Ala. 1997) (citing *Balboa Ins. Co. v. United States*, 775 F.2d 1158, 1160 (Fed. Cir. 1985)). In the event of a default by the primary obligor, the surety is answerable to the obligee to perform the bonded obligation. See *A.J. Kellos Constr. Co. v. Balboa Ins.* Co., 495 F. Supp. 408, 412 (S.D. Ga. 1980) (citing Restatement of Security § 82 (1941)).

20. As discussed in the preceding section, under the Zurich Bonds at issue here, certain Debtors are the named permittees under the applicable permits, and are primarily obligated to the obligees (the applicable state regulatory authorities) to perform all reclamation obligations required by applicable law. Zurich, as secondary obligor, is obligated to perform the permittee's reclamation obligations in the event the permittee-Debtor fails to do so. Zurich will not be released by any obligee from its obligations under the Zurich Bonds until after (i) the permittee-Debtor performs its reclamation obligations to the obligee's satisfaction, or (ii) each obligee approves transfer of the Debtors' respective permits to a third party purchaser and accepts the new replacement security required to be provided by the third-party. Here, the latter will need to occur in order to release the Zurich Bonds because the Plan contemplates the sale of

certain of the Debtors' mining assets to the Credit Bid Purchaser and it is clear the Debtors do not intend to perform any reclamation work.

21. The Credit Bid Purchaser must obtain its own new bonds and cannot rely on the Zurich Bonds or other existing surety bonds issued on behalf of the Debtors to secure its obligations to the state regulatory authorities, whether during an interim operating period or following transfer of the applicable permits to the Credit Bid Purchaser. The existing Zurich Bonds cannot be transferred to the Credit Bid Purchaser because (i) assumption and assignment of the Zurich Bonds is prohibited by § 365(c), and (ii) the surety is discharged by any alteration of its named bond principal. Specifically, the Zurich Bonds are non-assumable financial accommodations. 11 U.S.C. § 365(c)(2); *In re Wegner Farms*, 49 B.R. 440 (N.D. Iowa 1985); *In re Edwards Mobile Home Sales, Inc*., 119 B.R. 857 (Bankr. M.D. Fla. 1990). Even if § 365(c)(2) did not prohibit assumption of the Zurich Bonds, the Debtors cannot assign the Zurich Bonds to the Credit Bid Purchaser without Zurich's consent. Zurich does not consent to substitution of the Credit Bid Purchaser as its bond principal under any of the Zurich Bonds. A surety is discharged from its liability under its bond if there is an involuntary substitution of the principal under the bond because such change constitutes a material alteration of the surety's risk. See, e.g., *95 Lorimer, LLC v. Insur. Co. of State of Pennsylvania*, 789 N.Y.S.2d 833 (N.Y. Sup. Ct. 2004) (holding that a change in "composition or structure" of the principal discharged the surety from its bond obligations); *Becker v. Faber*, 19 N.E.2d 997, 999 (N.Y. 1939) ("This court has said that the '[surety]'s obligation is *strictissimi juris*, and he is discharged by any alteration of the contract to which his guaranty applied, whether material or not, and the courts will not inquire whether it is or is not to his injury'"); *Leila Hosp. & Health Ctr. v. Xonics Medical Sys., Inc*., 948 F.2d 271, 275 (6th Cir. 1991) ("surety law suggests that a substitution of obligors releases the

surety because it creates a different contract on which they never intended to become liable"). Accordingly, the Plan must require that the Credit Bid Purchaser obtain new bonds for any interim operations or permit transfer.

22. The Plan and Kemmerer Sale also contemplate that Zurich's collateral will be transferred to the Credit Bid Purchaser, ostensibly to serve as collateral for new bonds issued on behalf of the Credit Bid Purchaser either by Zurich or another surety. Zurich has the right to retain and control all of its collateral until such time as all of the Zurich Bonds are released by the obligees and all indemnity obligations of the Debtors are satisfied in full. The Debtors cannot use the Plan to effectuate any encumbrance or transfer of Zurich's security interest or its collateral to the Credit Bid Purchaser without Zurich's consent and prior to release of all of Zurich's obligations under the Zurich Bonds. Zurich has not agreed to any such release or other encumbrance. It is willing to consider same only on conditions satisfactory to Zurich, which is the subject of ongoing negotiations.

IV. OBJECTION

23. Bankruptcy Code § 1129 lists the confirmation standards for a plan of reorganization. The Court has a mandatory and independent duty to ensure that the Plan complies with all the requirements of 11 U.S.C. § 1129. *In re Williams*, 850 F.2d 250, 253 (5th Cir. 1988); *In re MCorp Financial, Inc.*, 137 B.R. 219, 255 (Bankr. S.D. Tex. 1992). The Debtors, as the Plan proponents, bear the burden of proving that the Plan satisfies each and every element of § 1129 by a preponderance of the evidence. See, e.g., *In re Cypresswood Land Partners, Inc.*, 409 B.R. 396, 422 (Bankr. S.D. Tex. 2009); *see also In re Briscoe Enterprises, Ltd., II*, 994 F.2d 1160, 1165 (5th Cir. 1993). In its review, the Court considers the plan in light of the facts and circumstances of the case. *In re D & F Constr., Inc.*, 865 F.2d 673, 675 (5th Cir.

1989). If the plan does not satisfy the requirements of § 1129(a) and (b), confirmation must be denied. *See Premiere Network Services, Inc.*, 2005 Lexis 2298, 2299 (Bankr. N.D. Tex. 2005).

The plan is not feasible and fails to satisfy 11 U.S.C. §1129(a)(11)

24. The Plan is not feasible because it fails to properly implement the Kemmerer Sale, transfers of mining permits and ensure that proper bonding is established pursuant to applicable regulatory law and consistent with Zurich rights as a surety under the Zurich Bonds and related agreements. This is a pre-condition to the effectiveness of the Plan. Among other things, section 1129(a)(11) of the Code requires the Court to find that confirmation of the plan is not likely to be followed by the need for further financial reorganization of the debtor or any successor to the debtor under the plan. *See In re Save Our Springs Alliance*, 632 F.3d 168, 172 (5th Cir. 2011) (citing 11 U.S.C. § 1129(a)(11)). Feasibility is also a question of whether the debtor can actually carry out the proposed plan. *In re M & S Assoc., Ltd*., 138 B.R. 845, 849 (Bankr. W.D. Tex. 1992) (stating that feasibility is a test of "whether the things to be done under the plan can be done as a practical matter under the facts"); *In re Lakeside Global II, Ltd*., 116 B.R. 499, 506 (Bankr S.D. Tex. 1989). One purpose of the feasibility test is to weed out plans that promise more than debtors can deliver. *Id.* at 507. While the proponents of a plan need not establish a certainty of success, they do bear the burden of proving feasibility by a preponderance of the evidence. *Save Our Springs*, 632 F.3d at 172.

25. The traditional factors of the feasibility test as stated by the Fifth Circuit are: "(1) the adequacy of the debtor's capital structure; (2) the earning power of a debtor's business; (3) economic conditions; (4) the ability of the debtor's management; (5) the probability of the continuation of the same management; and (6) any other related matter which determines the prospects of a sufficiently successful operating to enable performance of the provisions of the

plan." *Save Our Springs*, 632 F.3d at 173 n.6 (citing *M & S Assoc.*, 138 B.R. at 849). While not all of these factors apply in the liquidation context, the Debtors' proposed transaction involving the transfer of certain mines and mining permits does not properly provide for interim operations or account for the regulatory environment and bonding structure under which these transfers must take place under applicable non-bankruptcy law. As a result of these limitations, there is a high likelihood that the Kemmerer Sale cannot be consummated and a pre-condition to confirmation of the Plan would fail.

26. As set forth in the Plan and the Second Kemmerer Sale Motion, the WMLP Debtors seek to sell the Kemmerer Assets to Kemmerer Operators, LLC (the "**Credit Bid Purchaser**") through the approved sale process[6]. The Credit Bid APA ("**APA**") described in the Second Kemmerer Sale Motion anticipates a process of transferring mining permits in a manner that does not assure the continued effectiveness of the surety bonds during the transfer period and any interim operating period, and as such, does not comport with applicable state law. For instance, Section 8.6 of the APA contemplates that Credit Bid Purchaser would be allowed to operate the mines during the period of time from the closing to the date the mining permits are transferred. However, the only indemnified parties during this "interim period" are the "Sellers and their respective Affiliates." There is no indemnification of any surety. A surety's bond does not assure performance of any party other than the principal named in the bond. Once the bonded obligation is transferred away from the bond principal, the surety is discharged without further obligation. In the absence of a substitute bond or other financial security, the permit itself is impaired. The APA incorrectly assumes that the surety bonds would continue in place to assure the buyer's operations and related the reclamation obligations to the applicable state

[6] As defined in the Plan.

mining authority under the permit to be transferred. The Credit Bid Purchaser must be required to obtain substitute bonds associated with any interim operating permit and grant indemnity acceptable to Zurich and the other Sureties during the interim period.

27. The regulatory process of transferring permits in each state can be onerous and lengthy, often requiring months to complete. During that "interim period" between the submission of the permit transfer application and its approval, if that occurs at all, the ability to operate may be significantly constrained because those operations will not be supported by a bond to assure those operations.

28. The Plan provisions and the APA assumes that the bonds issued by the Sureties, including Zurich, on behalf of the Debtors will be applicable to the mining activities of the Credit Bid Purchaser during the post-Closing period until such time as the permits are transferred. However, as of this filing, Zurich has not agreed to provide substitute or replacement bonds, which it may decline to do in its discretion. Upon information and belief, the Credit Bid Purchaser has secured replacement surety bond providers, but those providers may require use of Zurich Collateral in order to issue replacement surety bonds. Zurich has not agreed, nor is it required to agree, to release any Zurich Collateral for any purpose other than to protect Zurich's exposure under the existing Zurich Bonds. In the absence of express written agreement by Zurich in form and substance satisfactory to Zurich in its discretion, the Zurich Bonds that were issued on behalf of the Debtors, as principals, and the Zurich Collateral (as defined later herein) cannot be used to cover operations of the Credit Bid Purchaser post-Closing or post-transfer of the permits. It is unlikely that the Credit Bid Purchaser can obtain substitute or replacement surety bonds without additional encumbrances on some of the Zurich Collateral. The relevant mining authorities would not allow the Credit Bid Purchaser to continue to operate

without substitute or replacement bonds and without the consent of any existing sureties. As stated above, Zurich remains willing to discuss the transition of some of its collateral to facilitate the transfer of the permits, subject to satisfactory conditions, but such conditions have not been agreed to by the Credit Bid Purchaser.

29. The law of suretyship is clear that a surety is discharged from liability under its bond if there is an involuntary substitution of the principal under the bond, since such a change is a material modification to the underlying bonded contract that is prejudicial to the surety. See, e.g., *Leila Hospital and Health Center v. Xonics Medical Systems, Inc*., 948 F.2d 271, 275 (6th Cir.1991) ("surety law suggests that a substitution of obligors releases the surety because it creates 'a different contract on which they never intended to become liable") (citations omitted); *Becker v. Faber*, 19 N.E. 2d 997, 999 (N.Y. 1939)(surety's obligation is discharged by any alteration of the contract to which its guaranty applied, whether material or not). To the extent that the State of Wyoming, which is the obligee under the Zurich Bonds applicable to the Kemmerer Mine, accept the Credit Bid Purchaser or its contractual agents as the new operator, or even interim operator, under the bonded permits without the consent of Zurich, such action would constitute an involuntary substitution of principal prejudicial to the surety. Under this scenario, Zurich would be discharged from liability under the Zurich Bonds. The Plan and any Credit Bid Sale Order does not currently contemplate or suggest that the state agencies would allow the Credit Bid Purchaser to operate on or permit transfer of the mining permits without (1) consent of the existing sureties or (2) substitute or replacement surety bonds being posted. Thus, contrary to the terms of the Plan, to the extent that Zurich, or any other surety, does not consent to a substitution of its principal under the existing bonds, the Credit Bid Purchaser will not be authorized to conduct mining operations under the existing permits until substitute bonds are

provided or replacement bonds are issued in contemplation of the transfer of the permits. Since the Plan is dependent upon the sale and continuation of mining operations after confirmation in order to consummate the Sale, the Plan is not feasible.

The WLB Confirmation Order Must Be Incorporated Into the Plan

30. As stated above, the WLB Confirmation Order granted rights to and imposed obligations on several parties in this case, many of which directly affect the Sureties. The Plan does not state that it or the Kemmerer Sale Order shall incorporate the WLB Confirmation Order. Zurich objects to the Plan unless and until the WLB Confirmation Order is specifically reserved and unaffected by the Plan.

The Plan fails to properly treat Zurich as a secured creditor pursuant to 11 U.S.C. §1129(b)(2)(A).

31. As stated above, Zurich is a secured creditor because it maintains control of cash accounts owned by the Debtors pursuant to Trust Control Agreements (the "**Zurich Cash Collateral**").[7] The approximate amount of all Zurich Collateral is $96,383,510.17. The Zurich Bond penal limit is approximately $246,130,674.00. It is possible that Zurich's claim, under Claim No. 760, may exceed the Zurich Collateral. The treatment of Zurich does comply with the Bankruptcy Code and is unacceptable to Zurich.[8]

32. First, the Plan, as it relates to Zurich, fails to provide for the treatment in 11 U.S.C §1129(b)(2)(A). Zurich is ostensibly classified in Class 3, Other Secured Claims. The treatment of Class 3 is such that each holder of a Class 3 claim will receive (i) payment in full in cash, (ii)

[7] See admissions of Debtors and ruling of the court pursuant to the Final DIP Financing Order. Docket No. 520.

[8] Certain conditions related to the Zurich Collateral was approved under the WLB Plan for the purchase of the assets described therein. Zurich's objection here relates to the use and exposure of all of the Zurich Collateral, which is not released under the WLB Plan and Confirmation Order unless and until certain conditions are met, namely release of all Zurich Bonds and satisfaction of all obligations thereunder and under any indemnity or collateral agreements.

collateral securing the claim, (iii) reinstatement of the secured claim or (iv) such other treatment rendering the claim unimpaired. See Plan Art. II.C.2. However, the Plan does not adequately address Zurich's Claim in any of these respects. To the contrary, Article III.I of the Plan clearly states that all Liens on any property of any WMLP Debtors' estate shall terminate, shall be released, and automatically discharged upon receiving unspecified distributions. There is no preservation of Zurich's claim or the Zurich Collateral. Article IV.E of the Plan also contains restrictions on "WMLP Insurance Policies." Although Zurich asserts that surety bonds are different from traditional insurance policies, this language may be interpreted to restrict Zurich's rights under the Zurich Bonds and Zurich Collateral, and thus, impairs Zurich's claim. Article VII.F also contains broad release and exculpatory provisions further restricting Zurich's rights and, as further set out below, only some of which may be the subject of any opt out. As a result, the Plan violates 11 U.S.C. §1129(b)(2)(A), unfairly discriminates against Zurich and is not fair and equitable. Pursuant to the laws of suretyship, all rights of Zurich under the Zurich Bonds, Zurich Collateral, any Zurich GIAs and any rights against third parties must be retained and preserved.

33. Second, the Credit Bid APA and proposed Credit Bid Sale Order make clear that the Kemmerer Assets being acquired by the Credit Bid Purchaser contain numerous questionable provisions, rights and restrictions to which Zurich objects. Zurich will reserve its objections to the Credit Bid Sale Order, but to the extent those objectionable provisions are adopted and ratified by the Plan, Zurich's objections are applicable herein and expressly reserved.

34. Finally, Zurich was ostensibly placed in Class 3, but some of Zurich's claim may ultimately constitute a Class 4 deficiency unsecured claim. Zurich hereby rejects the Plan as

both a Class 3 and Class 4 claimant and elects to opt out of the releases required of holders of all Claims.

The Plan Has Not Been Proposed in Good Faith and Fails to Satisfy 11 U.S.C. 1129(a)(3).

35. Under 11 U.S.C. § 1129(a)(3), this Court may confirm the Plan only if it "has been proposed in good faith and not by any means forbidden by law." The Debtors' attempt to release other third parties from claims pursuant to the Plan fails this requirement for confirmation because the specific releases are not sought in good faith and are forbidden under Fifth Circuit precedent.

36. Pursuant to Fifth Circuit law and 11 U.S.C. §524(e), injunctive provisions that attempt to alter the liability of third parties for any discharged debt of a debtor. The Fifth Circuit has unambiguously stated its view with respect to non-consensual third party releases:

> In a variety of contexts, this court has held that Section 524(e) only releases the debtor, not co-liable third parties. *See, e.g., In re Coho Resources, Inc.*, 345 F.3d 338, 342 (5th Cir. 2003); *Hall v. National Gypsum Co.*, 105 F.3d 225, 229 (5th Cir. 1997); *Matter of Edgeworth*, 993 F.2d 51, 53-54 (5th Cir. 1993); *Feld v. Zale Corporation*, 62 F.3d 746 (5th Cir. 1995). These cases seem broadly to foreclose non-consensual nondebtor releases and permanent injunctions.

Bank of New York Trust Co., NA v. Official Unsecured Creditors' Comm. (In re Pacific Lumber Co.) 584 F.3d 229, 252-53 (5th Cir. 2009). *See Applewood Chair Co. v Three Rivers Plan. & Dev.*, 203 F.3d 914 (5th Cir. 2000) (The general rule is that a discharge in bankruptcy does not affect a guarantor's liability); *see also In re Zale Corp*., 62 F.3d 746 (5th Cir. 1995) ("... the stay may not be extended post-confirmation in the form of a permanent injunction that effectively relieves the nondebtor from its own liability to the creditor."). An opinion from a bankruptcy case in the Southern District of Texas demonstrates that third-party releases in Chapter 11 plans may be narrowly approved, but only if the language is restrictive enough, such as releasing claims of

negligence against members of the creditors' committee or releasing claims of parties who have consented to such releases and received consideration as a result. *In re Bigler LP*, 442 B.R. 537, 549 (Bankr. S.D. Tex. 2010).

37. Other Circuit Courts have come to a similar conclusion regarding third-party releases. *See FB Acquisition Prop. I, LLC v. Gentry (In re Gentry)*, 807 F.3d 1222 (10th Cir. 2015) (discharge of borrower's debt in bankruptcy does not affect liability of guarantor of borrower's debt); *see also Nat'l Heritage Found., Inc. v. Highbourne Found.*, 760 F.3d 344, 347 (4th Cir. 2014); *see also In re Continental Airlines*, 203 F.3d 203, 212–13 (3d Cir.2000) (surveying circuit law on non-debtor releases); *see also Bunker L.P v. West One Bank (In re Star Phoenix Mining Co.)*, 147 F.3d 1145 (9th Cir. 1998) (discharge of principal debtor in chapter 11 plan would not discharge liabilities of co-debtors or guarantors). In the Fourth Circuit, third-party releases, like those sought in the Plan, "should only be approved 'cautiously and infrequently.'" *Nat'l Heritage Found., Inc.*, 760 F.3d at 347.

38. The Plan provides, in relevant part:

> On the Effective Date and concurrently with the applicable Distributions made pursuant to 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, without any further action on the part of any WMLP Debtor or the Liquidation Trust . . .
>
> On the Effective Date and concurrently with the applicable Distributions made pursuant to this Plan, 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 upon such Holder receiving its Distribution in accordance with the terms of this Plan.

See, Plan, Art. III.H and I, respectively. With respect to releases, the Plan provides:

> On the Effective Date, except as otherwise provided herein, each 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, the WMLP Debtors' in- or out-of-court restructuring efforts, intercompany transactions between or among a WMLP Debtor and another WMLP Debtor, the Chapter 11 Cases, the formulation, preparation, dissemination, negotiation, or filing of the Disclosure Statement, the Plan, the Asset Sales, or any Dissolution Transaction, contract, instrument, release, or other agreement or document created or entered into in connection with the Disclosure Statement, the Plan, the Asset Sales, the filing of the Chapter 11 Cases, the n of this Plan, or the distribution of property under this Plan or any other related agreement, or upon any other related act or omission, transaction, agreement, event, or other occurrence taking place on or before the Effective Date, except for any claims related to any act or omission that is determined in a Final order to have constituted actual fraud, willful misconduct or gross negligence.

See, Plan, VII.F(4)(b). The injunction provision in Article VII.F(5) also restricts Zurich from pursuing claims.

39. The Plan does not satisfy 11 U.S.C. § 1129(a)(3) because it was not filed in good faith. More specifically, it improperly releases third parties, enjoins creditors from pursuing claims against third parties, and impermissibly modifies the rights of secured parties, all in contravention of Fifth Circuit precedent. Section VII.F of the Plan purports to broadly release non-debtor third parties from all claims of creditors of the estate. If enforceable, this provision could be read to insulate third parties that are adjunct to surety bonding facilities (like the Zurich Cash Collateral). Although the Plan permits certain opt out provisions, which Zurich expressly elects in all instances, such provisions would be wrongful as to any surety to the extent it purported to change third-party indemnity rights.

40. The Debtors have failed to allege any facts supporting the broad third-party releases in the Plan. The third-party releases contemplated under the Plan do not satisfy the requirements of a valid settlement that there must be "consent and consideration by each

participant in the agreement to be valid." *In re Bigler LP*, 442 B.R. at 544; *In re Wood Growers Central Storage Co.*, 371 B.R. 768, 776 (Bankr. N.D. Tex. 2007) (*citing Republic Supply Co., v. Shoaf*, 815 F.2d 1046, 1050 (5th Cir. 1987). Zurich does not consent to the releases provided for in the Plan given the current language.

41. The third-party releases contemplated under the Plan do not allege an identity of interests between the debtor and the pre-petition lenders, any assets contributed by the pre-petition lenders or any mechanism to protect affected classes. Moreover, the third-party release provisions could have a preclusive effect on rights and defenses that may be available to Zurich, as well as the Debtors' other sureties. To the extent that any confirmation order and the Plan constitute a final order on the merits, the Plan has not been proposed in good faith and should not be confirmed. *See In re Trans World Airlines, Inc.*, 261 B.R. 106, 118-19 (Bankr. D. Del. 2001) (stating that confirmation order is a final judgment to which claim preclusion may apply) (citing *CoreStates Bank N.A. v Huls Am. Inc*., 176 F.3d 187, 205 (3d Cir. 1999)). The Debtors have failed to meet their burden for approval of the third-party releases found in the Plan.

Reservation of Rights and Joinder

42. Zurich reserves the right to assert additional objections. All other rights that Zurich may have against third parties are also reserved.

43. Zurich also adopts and joins in on the objections filed by other sureties at docket numbers 1870 and 1872.

WHEREFORE, Zurich prays that the Court deny confirmation of the Plan and grant such other and further relief to which Zurich may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Objection was served via CM/ECF for the United States Bankruptcy Court for the Southern District of Texas to all parties entitled to such notice, and also on the parties listed below, on this the 24th day of May, 2019.

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