

United States Court
Southern District of Texas
FILED

MAY 28 2019

David J. Bradley, Clerk of Court

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

IN RE: :
: *18-35672*
WESTMORELAND COAL COMPANY, et al. : CASE NO. 18-~~36572~~
:
Debtors. :

**CREDITORS' COLLECTIVE RESPONSE IN OPPOSITION TO
THE THIRD OMNIBUS OBJECTION TO CERTAIN PROOFS OF CLAIM
(INCORRECT DEBTOR CLAIMS)**

Now come Creditors Floyd Cozort, Bob Post, Brian Post, Evan Pargeon, Robert McLaughlin, Todd Manring, Andrew Harper, Brent Grannon, Kalum Dixon, Jonathon Collins, Jason Carano, Luke Boone, and Michael Baisden pursuant to the Notice filed April 26, 2019 and hereby submit the following Response in Opposition to Debtors' Objection and Motion to Modify their Proofs of Claims (Docket No. 1786):

Nature of Objection:

Debtors Westmoreland Coal Company, et al, Object to Creditors' claims and seek to modify their claims on the basis that the claims were allegedly filed against the incorrect Debtor. Specifically, Debtors allege that Creditors' claims should be modified to identify Buckingham Coal Company, LLC as the sole correct Debtor.

Response in Opposition:

The Court should overrule the Debtors' Objection. In Case No. 2:18-cv-00814 (Southern District of Ohio) Cozort and the twelve opt-in co-plaintiffs (employees and former employees of Westmoreland Resource Partners LP and Buckingham Coal Company LLC) filed a proposed collective action under the Fair Labor Standards Act (FLSA). Plaintiffs named Buckingham Coal Company LLC and Westmoreland Resource Partners LP as co-defendants in the case alleging that

the two entities were joint employers of all plaintiffs, and therefore, jointly liable for unpaid overtime wages and other damages arising out of the Defendants' violation of the FLSA.¹ The case was stayed pursuant to this bankruptcy proceeding on November 2, 2018, before Defendants filed an Answer. As such, no discovery has been conducted.

Background Facts:

As alleged in the Complaint, and supported by the Declaration of Floyd Cozort (attached hereto as Exhibit A) Defendant Westmoreland Resource Partners, LP was the parent corporation of Defendant Buckingham Coal Company, LLC.² Defendants performed related business activities, under unified operations or common control and for a common business purpose. The entities operate as a common enterprise and were joint employers because employees of the entities perform work which simultaneously benefited both entities.

Defendant Westmoreland controlled the day to day operations of Defendant Buckingham. Defendant Westmoreland established and administered pay and personnel policies for Defendant Buckingham. Defendant Westmoreland had final decision making authority with regard to pay and personnel decisions of Defendant Buckingham. The Defendants had common ownership and management and were both employers of the plaintiffs as defined by the FLSA, 29 U.S.C. §203(d).

As further evidence of the joint employment relationship, consider the WLB Debtors' Motion for Entry of An Oder Approving the Sale of the Buckingham Mine (Docket No. 875) wherein the WLB Debtors' state: ¶4 "Westmoreland Coal Company and its Debtor and non-Debtor affiliates *operate* the sixth-largest coal mining enterprise in North America, including 19 coal mines in six states and Canada. The Debtors primarily produce and sell thermal coal to investment

¹ The Complaint was attached to the Creditors' Proofs of Claims.

² According to Defense Counsel who filed a Notice of Appearance in the FLSA Case, the "correct" Defendant is "Westmoreland Coal Company" See Stipulated Extension of Time to Move or Plead attached hereto as Exhibit B

grade power plants under long term, cost-protected contracts, as well as to industrial customers and barbeque charcoal manufacturers. Headquartered in Englewood, Colorado, the Debtors and their non-Debtor subsidiaries *employ approximately 2971 individuals.*”

Legal Argument

Federal Courts throughout the United States have consistently held that two or more employers may be held jointly liable for violations of the Fair Labor Standards Act.

As explained by the Fifth Circuit Court of Appeals in *Donovan v. Sabine Irrigation Co.*, 695 F.2d 190 (1983): “An employer is defined under Section 3(d) of the (Fair Labor Standards) Act as including ‘any person acting directly in the interest of an employer in relation to an employee.’ This term has been interpreted to encompass one or more joint employers. Whether a party is an employer or joint employer for purposes of the FLSA is essentially a question of fact. Our determination of [employer's] status is not circumscribed by formalistic labels or common-law notions of the employment relationship[.] Instead, our analysis must focus upon the totality of the circumstances, underscoring the economic realities of the [employees] employment. In so doing, we adhere to the firmly-established opinion that the FLSA must be liberally construed to effectuate Congress' remedial intent." *Id at 194.* In *Gray v. Powers*, 673 F.3d 352, 355 (2012) the court held that the economic realities test must be applied to each entity alleged to be an employer.

If the Creditors' FLSA case is permitted to go forward after the conclusion of this bankruptcy case, the Creditors' expect to prove that the two named Defendants were “horizontal joint employers.” Horizontal joint employment exists where the employee has employment relationships with two or more employers, and the employers are sufficiently associated or related concerning the employee such that they jointly employ the employee. *Joaquin v. Coliseum Inc.*, 2016 U.S. Dist. LEXIS 91265, 2016 WL 3906820, *2 (W.D. Tex. July 13, 2016); *see also* 29

C.F.R. § 791.2(a) ("if the facts establish that the employee is employed by two or more employers. . . all of the employee's work for all of the joint employers during the workweek is considered as one employment for purposes of the [FLSA]"); *Ferguson v. Texas Farm Bureau Business Corp.*, 2018 WL 1598675, *7 (W.D. Tex. April 2, 2018) (a person is jointly employed by two or more employers if the employment by one employer is not completely disassociated from employment by the other employer) (quoting *Gray*, 673 F.3d at 355). "[J]oint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the act, including the overtime provisions, with respect to the entire employment for the particular workweek." 29 C.F.R. § 791.2(a).


Buckingham Coal Company, LLC was owned, managed, and controlled by Westmoreland. Westmoreland dictated personnel policies and procedures, provided employee benefits and issued employee paychecks. Westmoreland should not be allowed to escape liability for overtime claims that arose because of their practices.

Conclusion

If Debtors are permitted to modify Creditors' Proof of Claims, the Creditors will have no recourse to pursue their FLSA wage claims because the contract effectuating the sale of Buckingham Coal Company, LLC effectively extinguished their claims as against Buckingham. Pursuant to Paragraph 2.4 of the Contract (Docket No. 875-1) Creditors' claims against Buckingham have been excluded from the liabilities assumed by the Purchaser.

Wherefore, Creditors' Floyd Cozort, et al. respectfully request that the Debtors' Objection be overruled because Westmoreland is jointly liable for Creditors' claims.

Respectfully submitted,


/s/Sharon Cason-Adams

Sharon Cason-Adams (0067550)

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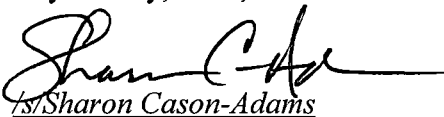
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Response was served on the Notice Parties listed on the page attached below on this 24th day of May, 2019, via electronic mail and/or priority U.S. Mail.


/s/Sharon Cason-Adams

Sharon Cason-Adams (0067550)

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<p>Kramer Levin Naftalis & Frankel LLP 1177 Avenue of the Americas New York, New York 10036 Attn.: Thomas Moers Mayer (tmayer@kramerlevin.com) and Stephen D. Zide (szide@kramerlevin.com)</p>	<p>Morrison & Foerster LLP 250 West 55th Street New York, New York 10019 Telephone: (212) 468-8000 Facsimile: (212) 468-7900 Attn: Lorenzo Marinuzzi, Esq. (lmarinuzzi@mof.com) Todd M. Goren, Esq. (tgoren@mof.com) and Jennifer L. Marines, Esq. (jmarines@mof.com)</p>
Counsel to the MLP Secured Lenders/MLP Ad Hoc Group	U.S. Trustee
<p>Schulte Roth & Zabel LLP 919 Third Avenue New York, New York 10022 Attn.: David M. Hillman (david.hillman@srz.com) and Kristine G. Manoukian (kristine.manoukian@srz.com)</p>	<p>Office of the United States Trustee for the Southern District of Texas 515 Rusk Street, Suite 3516 Houston, Texas 77002 Attn.: Stephen Statham</p>

United States Courts
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David J. Bradley, Clerk of Court

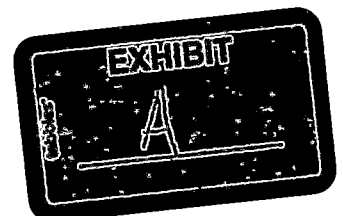
IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE: :
: :
WESTMORELAND COAL COMPANY, et al. : CASE NO. 18-36572
: :
Debtors. :

DECLARATION OF FLOYD COZORT
IN SUPPORT OF CREDITORS' RESPONSE IN OPPOSITION TO
THE THIRD OMNIBUS OBJECTION TO CERTAIN PROOFS OF CLAIM
(INCORRECT DEBTOR CLAIMS)

I Floyd Cozort, hereby declare under penalty of perjury:

1. I am the named plaintiff in the case captioned Floyd Cozort v. Buckingham Coal Co., LLC, et al. Case No. 2:18-cv-00814
2. I am a former employee of Buckingham Coal Company and Westmoreland Resource Partners, LP.
3. I was employed by Defendants at the Buckingham Coal mine located in Glouster, Ohio.
4. My dates of employment were September 26, 2003 until March 8, 2018.
5. At the time of my termination, I was employed as a scoop operator, but had previously worked in several other positions throughout the mine, including Section Foreman.
6. I was employed at the mine when Westmoreland first acquired the business.
7. When Westmoreland took over the mine, the employees became subject to all of Westmoreland's policies and procedures. Our handbook and other procedures were written by Westmoreland.
8. Paychecks were issued by Westmoreland from Westmoreland accounts.



9. Our employee benefits were administered by Westmoreland.
10. Human Resources operated out of Westmoreland's corporate office in Colorado.
11. Our local supervisors and managers reported to management at the corporate headquarters in Colorado and took direction from them regarding the day to day operation of the mine.
12. I sued my former employers for violations of the Fair Labor Standards Act.
13. We were unlawfully denied overtime pay for hours worked in excess of forty hours per week.
14. My Co-Plaintiffs signed on to the case because they agreed with my claims.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the facts set forth in the foregoing declaration are true and correct to the best of my knowledge, information and belief.

Dated: May 24, 2019



Floyd Cozort

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Floyd Cozort,	:	
	:	
Plaintiff,	:	Case No. 18-CV-00814
	:	
v.	:	
	:	Judge Michael H. Watson
Buckingham Coal Co., LLC, et al.,	:	
	:	
Defendants.	:	Magistrate Judge Chelsea M. Vascura

STIPULATED EXTENSION OF TIME FOR DEFENDANTS TO MOVE, ANSWER, OR OTHERWISE RESPOND TO PLAINTIFF'S COMPLAINT

Pursuant to Local Rule 6.1(a), Defendants Buckingham Coal Co., LLC (“Buckingham”) and Westmoreland Coal Company (“Westmoreland”) (incorrectly identified in Plaintiff’s Complaint as “Westmoreland Resource Partners, LP”) and Plaintiff Floyd Cozort hereby stipulate to a twenty-one day extension, up to and including November 5, 2018, within which to move, answer, or otherwise respond to the Complaint in this matter. This is the first requested extension of time to move, answer, or otherwise respond, and the requested extension does not exceed twenty-one days.

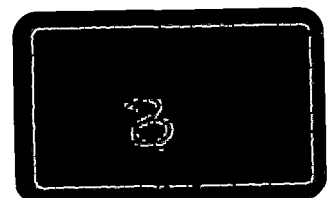
Respectfully submitted,

/s/Sharon Cason-Adams / email authorization
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Attorneys for Defendants



CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2018, a copy of the foregoing was filed with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties registered to receive electronic notice, including:

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/s/ Leigh Anne Benedic
Attorney for Defendants