

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

In re:

Westmoreland Coal Company, et al.,  
Debtors.

Chapter 11

Case No. 18-35672 (DRJ)

(Jointly Administered)

**DECLARATION OF GERALD A. TYWONIUK IN SUPPORT OF  
(A) APPROVAL OF THE KEMMERER CREDIT BID SALE, (B) APPROVAL OF THE  
NEW WMLP COMMITTEE SETTLEMENT, (C) APPROVAL OF THE OXFORD  
SETTLEMENT, (D) CONFIRMATION OF THE WMLP PLAN,  
(E) FURTHER EXTENDING EXCLUSIVITY AND (F) MOTION FOR FINAL DECREE**

I, Gerald A. Tywoniuk, hereby declare under penalty of perjury and pursuant to 28 U.S.C. § 1746 that the following is true and correct to the best of my knowledge and belief:

1. I am the Acting Chief Executive Officer and Acting Secretary of Debtor Westmoreland Resource Partners, LP ("WMLP") and each of its direct and indirect Debtor-subidiaries (the "WMLP Debtors") and a member of the Board of Directors of Debtor Westmoreland Resources GP, LLC ("WMGP"), the general partner of WMLP. Until March 15, 2019, I was the Chairman of the Conflicts Committee (the "Conflicts Committee") of the Board of Directors of WMGP when I resigned that position to take on my officer roles for each of the WMLP Debtors.

2. I submit this declaration in support of: (a) the *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* (Docket No. 1863) (the "Kemmerer Credit Bid Sale

Motion"); (b) the *Expedited Motion of the WMLP Debtors for Entry of an Order Authorizing and Approving the New WMLP Committee Settlement* (Docket No. 1901) (the "Motion to Approve the New WMLP Committee Settlement"); (c) the *Emergency Joint Motion of Westmoreland Coal Company, Westmoreland Resource Partners, LP, the Oxford Entities and CCU Coal and Construction, LLC for Entry of an Order Authorizing and Approving the Settlement of Claims Asserted in Adversary Proceeding Number 19-03354* (Docket No. \_\_) (the "Oxford Settlement Motion"); (d) confirmation of the amended *Joint Plan of Liquidation for the WMLP Debtors* (Docket No. 1612) (as may be further amended, modified, or supplemented from time to time, the "WMLP Plan"); (e) the *WMLP Debtors' Motion to Further Extend the Exclusivity Periods for the WMLP Debtors to File a Chapter 11 Plan and Solicit Acceptances Thereof* (Docket No. 1839) ("Motion to Further Extend Exclusivity"); and (f) the *Emergency Motion of the WMLP Debtors for Entry of Final Decree Closing the WMLP Debtors' Chapter 11 Cases* (Docket No. \_\_) ("Motion for Final Decree").

3. Except as otherwise indicated, all statements set forth in this declaration are based on (a) my personal knowledge, (b) my review of relevant documents, (c) information provided to me by, or discussions with, the members of the Conflicts Committee or its advisors, and/or (d) information provided to me by, or discussions with, the current and former management teams of Westmoreland Coal Company ("WLB") and its affiliated debtors (including the WMLP Debtors) (collectively, the "Debtors") or their advisors. If called to testify, I could and would testify to the facts set forth herein.

### **Background**

4. When the WMLP Debtors filed for bankruptcy, they were primarily in the business of operating thermal coal mines in Ohio and Wyoming. As of the petition date, the WMLP Debtors had funded indebtedness of approximately \$326.8 million under that certain

December 31, 2014 Financing Agreement, as amended (the "WMLP Term Loan"), which is secured by substantially all the assets of the WMLP Debtors. Prior to the filing of these cases, WLB and the WMLP Debtors negotiated with WMLP Term Loan lenders (the "MLP Secured Lenders") regarding a restructuring of the WMLP Debtors' outstanding indebtedness under the WMLP Term Loan. In connection with those negotiations, the WMLP Debtors entered into certain waivers of default under the WMLP Term Loan that, among other things, required the WMLP Debtors to sell all of their assets. Based on that and other factors, the WMLP Debtors determined that it was in the best interest of their respective estates to sell substantially all their assets on a going concern basis.

5. In August 2018, Lazard Frères & Co. LLC ("Lazard"), on behalf of the WMLP Debtors, launched a formal sale process for the WMLP Debtors' assets. Following a nearly six-month marketing process, the WMLP Debtors successfully sold their Ohio mining operations (along with an inactive Kentucky mine) (the "Oxford Sale") on a going concern basis to CCU Coal and Construction, LLC ("CCU").<sup>1</sup> Nearly a month later, the ongoing marketing process yielded a buyer—Western Coal Acquisition Partners, LLC ("Western Coal")—for the Kemmerer mine in Wyoming. After the Court approved the sale of the Kemmerer mine to Western Coal<sup>2</sup>

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<sup>1</sup> See *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* [Docket No. 1289] (the "Oxford Sale Order" and collectively with the Oxford APA (as defined in the Oxford Sale Order), the "Oxford Sale Documents")

<sup>2</sup> See *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* (Docket No. 1560) (the "Prior Kemmerer Sale Order").

and the WMLP Debtors built consensus through good faith, arm's-length negotiations,<sup>3</sup> the WMLP Debtors filed the original version of the WMLP Plan. That version of the WMLP Plan was predicated on the WMLP Debtors' consummating the Western Coal sale.

6. At the time the Court approved the Western Coal sale, Western Coal was the only viable buyer for the Kemmerer mine. As the parties approached the closing of the Western Coal sale transaction, it became apparent that Western Coal likely would not secure bonding to replace the bonds that Zurich American Insurance Company ("Zurich") had issued with respect to the Kemmerer mine until after the closing given the then-current status of its negotiations with Zurich. Given Western Coal's interim operations of the Kemmerer mine were expressly contemplated in the Prior Kemmerer Sale Order and the Intercompany Settlement and given the WMLP Debtors' understanding that Zurich and Western Coal were negotiating for terms under which Zurich would eventually agree to bond Western Coal for the Kemmerer mine, the WMLP Debtors considered closing the Kemmerer sale before Western Coal secured replacement bonds.

7. Subsequent events, however, caused the WMLP Debtors to pivot to a sale of the Kemmerer mine to the MLP Secured Lenders pursuant to a credit bid. On March 20, 2019, Westmoreland Mining Holdings, LLC and its affiliates (collectively, the "WLB Purchaser") informed the WMLP Debtors that closing the Western Coal sale without a commitment for replacement bonds would in their view be inconsistent with the Prior Kemmerer Sale Order and, at the same time, that the WLB Purchaser would be seeking the Court's involvement. Shortly

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<sup>3</sup> See, e.g., *Order Authorizing and Approving Intercompany Settlement Term Sheet* (Docket No. 1548) (the "Intercompany Settlement"); *Order Authorizing and Approving the Settlement Term Sheet between the WMLP Debtors, the MLP Secured Lenders, and the Committee* (Docket No. 1545) (the "Prior WMLP Committee Settlement").

thereafter, the WLB Purchaser filed a lawsuit seeking to prevent the Western Coal sale from closing.

8. Positions taken by Zurich after the hearing in the WLB Purchaser's lawsuit and other considerations caused the WMLP Debtors and the MLP Secured Lenders to reassess potential options with respect to the sale and transfer of the Kemmerer mine. While the MLP Secured Lenders performed their due diligence on potential alternative transaction structures for the Kemmerer mine, the deadline to close the Western Coal sale passed, and Western Coal terminated the underlying asset purchase agreement. Thereafter, the WMLP Debtors determined to enter into the Credit Bid APA (as defined in the Kemmerer Credit Bid Sale Motion) with Kemmerer Operations, LLC (the "Credit Bid Purchaser"), an acquisition entity formed by the WMLP Secured Lenders, to acquire the Kemmerer mine and certain other assets (the "Kemmerer Credit Bid Sale").

9. Because the original version of the WMLP Plan was predicated on the consummation of the Western Coal sale, the WMLP Debtors amended the WMLP Plan to account for changes to the terms of the Kemmerer Credit Bid Sale. While the WMLP Debtors were pivoting to the Kemmerer Credit Bid Sale, the WMLP Debtors reengaged with their constituents to rebuild the consensus they had enjoyed for the original Plan when it was predicated on the Western Coal sale. As a result of good faith and arm's-length negotiations, the WMLP Debtors have achieved a global resolution of issues among the WMLP Debtors, the WMLP Secured Lenders, and the Official Committee of Unsecured Creditors (the "Creditors' Committee") and won their support for the current version of the WMLP Plan. See New WMLP Committee Settlement (as defined in the Motion to Approve the New WMLP Committee Settlement).

**Approval of the Kemmerer Credit Bid Sale**

10. As noted above, Lazard ran an extensive sale process for the WMLP Debtors' assets. During the over-six month sale process, the WMLP Debtors worked closely with Lazard and its other professionals to ensure the WMLP Debtors would receive the highest and best offer for all the WMLP Debtors' assets, including the Kemmerer mine. Lazard kept the WMLP Debtors apprised of the sale process. Among other things, Lazard provided summaries and analyses of bids received during the sale process, including those bids received for the Kemmerer mine.

11. The WMLP Debtors determined in February 2019 that they should pursue a sale of the Kemmerer mine to Western Coal. Based on the bids and indications of interest received up until that time, after consultation with Lazard and its other professionals, the WMLP Debtors determined that Western Coal was the only viable buyer for the Kemmerer mine in February.

12. As described above, after a material change in circumstances, the MLP Secured Lenders began exploring potential alternative transaction structures for the Kemmerer mine, and Western Coal terminated the Western Coal sale. Given Western Coal's termination and that Lazard's sale process had yielded no other viable buyers, the WMLP Debtors determined, after consultation with Lazard and their other professionals, that the best way maximize the value of the Kemmerer mine and certain other assets was to pursue the Kemmerer Credit Bid Sale. Accordingly, the WMLP Debtors entered into negotiations with the MLP Secured Lenders regarding the Credit Bid APA. I believe those negotiations were conducted in good faith and at arm's length. For these and other reasons, the WMLP Debtors entered into the Credit Bid APA.

13. During the negotiations of the Credit Bid APA, I understand that the MLP Secured Lenders identified certain executory contracts and unexpired leases (the "Executory Contracts") associated with the Purchased Assets (as defined in the Kemmerer Credit Bid Sale

Motion) that they wanted the WMLP Debtors to assume and assign under the Credit Bid APA. The MLP Secured Lenders were unwilling to pursue the Kemmerer Credit Bid Sale without the WMLP Debtors' agreeing to assume and assign the Executory Contracts. Moreover, the Credit Bid Purchaser agreed in the Credit Bid APA to pay cure costs, if any, associated with the assumption of the Executory Contracts. As a result and because the WMLP Debtors determined that pursuing the Kemmerer Credit Bid Sale would maximize the value of the Purchased Assets and be in the best interests of the WMLP Debtors' estates, the WMLP Debtors determined, after consultation with Lazard and their other professionals, that assuming and assigning the Executory Contracts was also in the best interests of the WMLP Debtors' estates.

#### **The New WMLP Committee Settlement**

14. During the course of these chapter 11 cases, the Creditors' Committee engaged in an investigation regarding, among other things, the validity of the MLP Secured Lenders' prepetition liens and potential claims with respect to various prepetition transactions of the WMLP Debtors. In addition, the Creditors' Committee raised potential objections to the sale of the Kemmerer mine and confirmation of the WMLP Plan. The WMLP Debtors, after consultation with their advisors, determined that: (a) the Creditors' Committee's litigation of potential claims against the MLP Secured Lenders would have caused the WMLP Debtors' Estates (as defined in the WMLP Plan) to incur significant administrative expenses and would have created significant risks for reduced creditor recoveries; and (b) resolving the various disputes regarding the sale of the Kemmerer mine and confirmation of the WMLP Plan would be costly and would have created significant risks that those disputes would not be resolved favorably for the WMLP Debtors. Accordingly, the WMLP Debtors decided to pursue a global resolution of these potential claims and disputes with the Creditors' Committee and the MLP Secured Lenders.

15. When the WMLP Plan was predicated on the Western Coal sale, the WMLP Debtors, the MLP Secured Lenders and the Creditors' Creditor Committee reached a global resolution of these potential claims and disputes in the Prior WMLP Committee Settlement after extensive arm's-length, good faith negotiations. However, the proposed sale to Western Coal was a key assumption for entry into the Prior WMLP Committee Settlement, and consummation of that sale was a condition to its effectiveness. As a result of Western Coal's termination of the Western Coal sale and other changed circumstances, the WMLP Debtors' reengaged with the Creditors' Committee and the MLP Secured Lenders on the terms of a global resolution.

16. After extensive arm's-length negotiations, the WMLP Debtors, WMGP, the MLP Secured Lenders and the Creditors' Committee entered into the New WMLP Committee Settlement, which, subject to Court approval, would resolve all claims and disputes between the WMLP Debtors, the Creditors' Committee and the MLP Secured Lenders. After consultation with their advisors, the WMLP Debtors determined that the global settlement embodied in the New WMLP Committee Settlement is fair, equitable and in the best interests of the WMLP Debtors' Estates because, among other reasons: (a) it will facilitate the WMLP Debtors' winding down their affairs and paying any allowed claims entitled to Distributions (as defined in the WMLP Plan) under the WMLP Plan in a prudent, responsible manner; (b) it provides for the payment of administrative and priority claims; and (c) it clears the path for the Kemmerer Credit Bid Sale, thereby substantially reducing the risk that the Kemmerer mine and related assets will have to be liquidated, which could have devastating consequences on the hundreds of individuals who work at the Kemmerer mine, the environment and the cost of electricity produced at the nearby Naughton Power Plant.

### **Oxford Settlement Motion**

17. After the Oxford Sale closed, two post-closing disputes arose under the Oxford Sale Documents. The first dispute (the "Permit Dispute") concerns the scope of what CCU purchased and the scope of liabilities CCU assumed under Oxford Sale Documents. In February, the State of Ohio and the Ohio Environmental Protection Agency (collectively, "Ohio") filed an application for the payment of administrative expenses with respect to approximately fifty water quality certifications/isolated wetland permits ("Ohio WQCs"). The Debtors objected to that application based upon, among other things, the Debtors' assertion that CCU had purchased all the Ohio WQCs and assumed all liabilities of the Oxford Sellers (as defined in the Oxford Sale Order) related to the Ohio WQCs under the Oxford Sale Documents. CCU disagrees with the Debtors' interpretation of the Oxford Sale Documents, and asserted that it did not purchase, or acquire liability under, all of the Ohio WQCs. The second dispute (the "Working Capital Dispute") concerns the calculation of the Closing Net Working Capital (as defined in the Oxford APA). In particular, CCU and the Oxford Sellers dispute whether a \$1,000,000 payable should or should not be included in the calculation of the Closing Net Working Capital.

18. Following months of good faith, arm's-length discussions and negotiations between WLB, the Oxford Sellers and CCU, they have agreed, subject to Court approval, to resolve both the Permit Dispute and the Working Capital Dispute. After consultation with their advisors, the WMLP Debtors determined that the settlement (the "Oxford Settlement") set forth in the Oxford Settlement Motion is fair, equitable and in the best interests of the WMLP Debtors' Estates because, among other reasons: (a) it ensures that CCU will address any liabilities the Oxford Sellers have with respect to the permits covered by the Oxford Settlement; (b) the Oxford Sellers will be able to exclude two-thirds of a payable from the calculation of Closing Net

Working Capital, which will result in their Estates receiving two-thirds of the value of that payable; and (c) the WMLP Debtors will avoid the costs and risks attendant to litigation.

**Confirmation of the WMLP Plan**

19. The WMLP Plan is the culmination of the WMLP Debtors' efforts to sell substantially all of their assets on a going concern basis. As discussed above, the WMLP Debtors sold their Ohio mining operations to CCU and will sell their Wyoming mining operations to the Credit Bid Purchaser if the Court approves the Kemmerer Credit Bid Sale. Once the Kemmerer Credit Bid Sale is consummated, the WMLP Debtors will need to orderly liquidate their remaining Estates and exit chapter 11 in an expeditious manner. After extensive arm's-length negotiations with numerous constituents, and consultation with their professionals, the WMLP Debtors determined that the WMLP Plan is the best way to facilitate their orderly liquidation and exit from chapter 11. Accordingly, the WMLP Debtors proposed the WMLP Plan to achieve these objectives.

**Further Extension of Exclusivity**

20. The WMLP Debtors are asking the Court to approve the Kemmerer Credit Bid Sale and confirm the WMLP Plan before the WMLP Debtors' exclusive period to file a chapter 11 plan expires on June 6, 2019. The WMLP Plan, however, will not go effective until the Kemmerer Credit Bid Sale closes. The WMLP Debtors have determined, after consultation with their professionals and their review of, among other things, various bonding and financing commitments with respect to the Kemmerer Credit Bid Sale, that the risk the Kemmerer Credit Bid Sale will not close is low. Nonetheless, the WMLP Debtors are seeking a further extension of the exclusivity period to provide themselves breathing room to close the Kemmerer Credit Bid Sale, and, in the very unlikely event that the Kemmerer Credit Bid Sale does not close, to formulate an alternative path forward without the distraction of competing alternative plans.

21. Since the entry of the Original Exclusivity Extension Order (as defined in the Motion to Further Extend Exclusivity), the WMLP Debtors have made significant progress in their restructuring efforts. Among other things, the WMLP Debtors: (a) closed the Oxford Sale; (b) negotiated the Intercompany Settlement and related transition services agreements; (c) negotiated the Prior WMLP Committee Settlement and the New WMLP Committee Settlement; (d) negotiated the Oxford Settlement; (e) filed an original version of the WMLP Plan predicated on the sale of the Kemmerer mine to Western Coal and amended the WMLP Plan to account for changes to the terms of the Kemmerer Credit Bid Sale; (f) made substantial progress on reconciling, objecting to, and otherwise addressing claims filed against the WMLP Debtors; and (g) are pursuing, among other things, confirmation of the WMLP Plan and approval of the Kemmerer Credit Bid Sale at the hearing currently scheduled for June 5, 2019.

22. Moreover, the WMLP Debtors are not requesting this extension to pressure creditors. Should the Court approve the Kemmerer Credit Bid Sale and confirm the WMLP Plan, it is my current belief that the Kemmerer Credit Bid Sale will likely close and the creditors entitled to receive Distributions under the WMLP Plan will receive those Distributions. Finally, since these chapter 11 cases were filed, to the best of my knowledge, the WMLP Debtors have paid their undisputed post-petition debts in the ordinary course of business or as otherwise provided by Court order.

#### **Motion for Final Decree**

23. The WMLP Debtors presently anticipate that the Kemmerer Credit Bid Sale will close, and thus the WMLP Plan Effective Date (as defined in the WMLP Plan) will occur, as soon as June 14, 2019 if the Court approves that Kemmerer Credit Bid Sale. Following the occurrence of the WMLP Plan Effective Date, I anticipate taking on the role of Liquidation Trustee (as defined in the WMLP Plan), and I will, in that capacity, focus, in part, on resolving

any remaining claims consensually or by filing one or more claims objections as appropriate, and winding down the Estates all the way through dissolution of the WMLP Debtors. The WMLP Debtors have determined, after consultation with their professionals, that it is unlikely that any additional substantive or other significant contested matters will arise in their chapter 11 cases once the WMLP Plan goes effective. While the lawsuit with respect to the Oxford Sale remains pending, as explained above, the WMLP Debtors have asked the Court to approve the Oxford Settlement.

Dated: June 2, 2019



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Gerald A. Tywoniuk  
Acting Chief Executive Officer and Acting  
Secretary of each of the WMLP Debtors