

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

)	
In re:)	Chapter 11
)	
WESTMORELAND COAL COMPANY, <i>et al.</i> , ¹)	Case No. 18-35672 (DRJ)
)	
Debtors.)	(Jointly Administered)
)	

**JOINT MOTION OF
THE WLB DEBTORS
AND THE WMLP LIQUIDATION
TRUST (AS SUCCESSOR TO THE WMLP
DEBTORS) FOR ENTRY OF AN ORDER
AUTHORIZING AND APPROVING (I) THE
SETTLEMENT AGREEMENT BY AND AMONG
THE WLB DEBTORS, THE WLB PURCHASER, THE
WMLP LIQUIDATION TRUST (AS SUCCESSOR TO
THE WMLP DEBTORS), THE KEMMERER PURCHASER,
THE UNITED MINE WORKERS OF AMERICA AND THE OTHER PARTIES
THERE TO, AND (II) THE OPT-OUT PROCEDURES IN CONNECTION THEREWITH**

THIS MOTION SEEKS AN ORDER THAT MAY ADVERSELY AFFECT YOU. IF YOU OPPOSE THE MOTION, YOU SHOULD IMMEDIATELY CONTACT THE MOVING PARTY TO RESOLVE THE DISPUTE. IF YOU AND THE MOVING PARTY CANNOT AGREE, YOU MUST FILE A RESPONSE AND SEND A COPY TO THE MOVING PARTY WITHIN TWENTY-ONE DAYS. YOUR RESPONSE MUST STATE WHY THE MOTION SHOULD NOT BE GRANTED. IF YOU DO NOT FILE A TIMELY RESPONSE, THE RELIEF MAY BE GRANTED WITHOUT FURTHER NOTICE TO YOU.

REPRESENTED PARTIES SHOULD ACT THROUGH THEIR ATTORNEY.

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 provided herein. A complete list of such information may be obtained on the website of the Debtors’ claims and noticing agent in these chapter 11 cases at www.donlinrecano.com/westmoreland. Westmoreland Coal Company’s service address for the purposes of these chapter 11 cases is 9540 South Maroon Circle, Suite 300, Englewood, Colorado 80112. References in this Motion to “Debtors” includes those entities that were previously debtors and debtors in possession in the Chapter 11 Cases (as defined below).

Westmoreland Coal Company and certain of its subsidiaries (collectively, the “WLB Debtors”) and the WMLP Liquidating Trust respectfully state the following in support of this motion (this “Motion”).²

Preliminary Statement

1. As detailed in the 1113/1114 Motion, in order for the Debtors’ business to survive as a going concern, significant modifications to the WLB Debtors’ retiree obligations were required. After negotiations with the UMWA regarding consensual modifications to the then-existing collective bargaining agreements covering WCC’s employees at the Beulah and Kemmerer mines (collectively, the “Prior CBAs”) and the “retiree benefits” (as such term is defined in section 1114 of the Bankruptcy Code) for the non-Coal Act retirees from the Debtors’ various mines and such retirees’ covered beneficiaries (the “Retiree Benefits”) stalled, the Debtors had no choice but to file the 1113/1114 Motion and seek nonconsensual modification of the applicable Debtors’ labor and retiree obligations.

2. Following a three-day trial, on February 19, 2019, the Court entered the 1113/1114 Order, which authorized the rejection of the Prior CBAs and the modification of Retiree Benefits in accordance with the Debtors’ final proposal, made on January 9, 2019 (the “January 9 Proposal”), which included providing up to \$6 million in retiree medical coverage to UMWA-represented non-Coal Act retirees. Although the Prior CBAs were ultimately rejected, negotiations continued with the parties regarding the terms of new labor agreements with the respective purchasers of the Kemmerer and Beulah mines for certain employees at the Kemmerer

² Capitalized terms used but not defined in this section shall have the meanings ascribed to them elsewhere in this Motion. If such terms are not otherwise defined in this Motion, they shall have the meanings ascribed to them in the Settlement Agreement (as defined below).

and Beulah mines, and the Retiree Benefits. The allocation of up to \$6 million was agreed upon in the Intercompany Settlement Term Sheet and approved by the Intercompany Settlement Order.

3. Separately, after the closing of the sale of the Kemmerer mine on June 21, 2019, counsel to the Kemmerer Purchaser sent a letter to the WLB Debtors and the WLB Purchaser wherein the Kemmerer Purchaser claimed to have (or have acquired from the WMLP Debtors) certain alleged claims and causes of action related to the Western Coal Transaction against the WLB Debtors, the WLB Purchaser, and certain individuals employed or formerly employed by the WLB Debtors and/or the WLB Purchaser (the “Kemmerer Purchaser Allegations”). The WLB Debtors, the WLB Purchaser, and certain other potential defendants disputed the Kemmerer Purchaser Allegations, and the Parties subsequently discussed the resolution and mutual release of those claims in connection with the consensual settlement of the labor and retiree issues described herein.

4. Following months of arm’s-length and good faith negotiations, the Parties have agreed to the Settlement Agreement, which, among other things, provides for (a) the payment of potentially up to an additional **\$3 million** in retiree medical coverage to the Covered Retirees over and above what was in the January 9 Proposal, subject to and in accordance with the terms and conditions of the Settlement Agreement, (b) the entry into new labor agreements covering certain employees at the Kemmerer mine and the Beulah mine, and (c) mutual releases of certain Claims, including but not limited to, the Kemmerer Purchaser Allegations, subject to the provisions of the Settlement Agreement and the Opt-Out Procedures. The WLB Debtors respectfully request that the Court approve the Settlement Agreement.

Relief Requested

5. The WLB Debtors seek entry of an order, substantially in the form attached hereto as **Exhibit A** (the “Order”), authorizing the entry into the settlement agreement attached hereto as

Exhibit 1 to **Exhibit A** (the “Settlement Agreement”) by and among the WLB Debtors and the other Parties thereto, and approving the opt-out procedures in connection therewith.

Jurisdiction, Venue and Procedural Background

6. The United States Bankruptcy Court for the Southern District of Texas (the “Court”) has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and the *Amended Standing Order of Reference from the United States District Court for the Southern District of Texas*, dated May 24, 2012. The WLB Debtors and the WMLP Liquidation Trust confirm their consent, pursuant to rule 7008 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), to the entry of a final order by the Court in connection with this Motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

7. The bases for the relief requested herein are sections 105(a) and 363(b) of title 11 of the United States Code, 11 U.S.C. §§ 101–1532 (the “Bankruptcy Code”), and Bankruptcy Rules 2002 and 9019.

Background

I. Section 1113/1114 Motion.

8. On January 16, 2019, the Debtors filed the *Debtors’ Motion Pursuant to 11 U.S.C. §§ 105, 1113 and 1114 for an Order Authorizing (But Not Directing) the Debtors to (A) Reject Certain Collective Bargaining Agreements, (B) Implement the Debtors’ Proposal, and (C) Modify Certain Retiree Benefits* (the “1113/1114 Motion”) [Docket No. 1091], seeking, among other

things, authority pursuant to sections 1113 and 1114 of the Bankruptcy Code to (a) reject the Prior CBAs, (b) modify the Retiree Benefits, and (c) implement the terms of the January 9 Proposal.³

9. On February 19, 2019, following a 3-day trial on the 1113/1114 Motion, the Court entered the *Order Granting Debtors' Motion Seeking Authority to (A) Reject Certain Collective Bargaining Agreements, (B) Implement the Debtors' Proposal, and (C) Modify Certain Retiree Benefits* (the "1113/1114 Order") [Docket No. 1412], which (a) authorized the WLB Debtors to reject the Prior CBAs, and (b) authorized the modification of all Retiree Benefits in accordance with the January 9, 2019 Proposal, thereby providing up to \$6 million in retiree medical coverage to the Covered Retirees. The allocation of up to \$6 million was agreed upon in the Intercompany Settlement Term Sheet and approved by the Intercompany Settlement Order.

10. Notwithstanding the entry of the 1113/1114 Order, the WLB Debtors, the UMWA, the WLB Purchaser, and the Kemmerer Purchaser continued to negotiate in the hopes of consensually agreeing on the terms of new labor agreements for certain of the respective purchaser's employees and a settlement of Retiree Benefits that would provide potentially more than the \$6 million in coverage than was authorized by the 1113/1114 Order, subject to and in accordance with the terms and conditions of the Settlement Agreement.

11. Following months of arm's-length and good faith negotiations, the Parties have reached an agreement to consensually resolve these matters, and to settle certain of their Claims against one another on the terms and conditions set forth more fully in the Settlement Agreement, including the payment of potentially up to **\$9 million** in retiree medical coverage to the Covered Retirees and the entry into new labor agreements with respect to the Kemmerer and Beulah mines.

³ The Motion also sought elimination of the Debtors' obligations to the Coal Act retirees. The Debtors entered into a settlement with the Coal Act retiree committee (embodied in the WLB Confirmation Order) to effectuate a smooth transition of the Coal Act retirees to the Coal Act Funds' plan.

Following the entry into the Settlement Agreement, the UMWA sought the ratification of the new labor agreement from its members employed at the Kemmerer mine, and the Kemmerer CBA was ratified on July 18, 2019. Consistent with the Settlement Agreement, the UMWA ratified the new Beulah CBA on July 23, 2019.

II. The Kemmerer Sale Claims.

12. On March 2, 2019, the Court entered an order approving the sale of the Kemmerer mine to Western Coal Acquisition Partners, LLC (“Western Coal,” the “Western Coal Sale,” and the “Western Coal Sale Order,” respectively) [Docket No. 1560]. Under the Western Coal Sale Order, the WMLP Debtors obtained authority to sell all or substantially all of the Kemmerer Assets pursuant to that certain Asset Purchase Agreement (both as defined in the Western Coal Sale Order) among the WMLP Debtors and Western Coal (the “Western Coal APA”). However, the Western Coal Sale did not close, and Western Coal terminated the Western Coal APA on April 25, 2019. The Kemmerer mine was ultimately sold to the Kemmerer Purchaser (the “Credit Bid Sale”), as approved by the Court on June 5, 2019 [Docket No. 1966], and the closing of this Credit Bid Sale occurred on June 21, 2019 [Docket No. 2067].

13. Following the closing of the Credit Bid Sale, the Kemmerer Purchaser asserted the Kemmerer Purchaser Allegations. The WLB Debtors and the WLB Purchaser vigorously dispute the Kemmerer Purchaser Allegations.

14. However, following negotiations, and as part of a global settlement that (among other things) provided additional medical coverage for Covered Retirees and paved the way for the ratification of the WLB Purchaser’s and Kemmerer Purchaser’s new labor agreements with the UMWA, the Parties agreed to mutual releases among themselves of certain Claims, including the Kemmerer Purchaser Allegations, as set forth in the Settlement Agreement.

III. Summary of the Material Terms of the Settlement Agreement.

15. To settle these matters, the Parties engaged in good faith negotiations to consensually resolve their disputes and avoid the significant cost, delays and uncertainty of litigation. Those productive discussions have resulted in the Settlement Agreement, which includes the following material terms:⁴

- ***Retiree Medical Coverage.***

- Up to \$9 million (the “Retiree Cap”) will be provided in retiree medical coverage under WCC’s current health care plans to Covered Retirees, and will be applied to Retiree Claims and Administration Costs on and after 12:01 AM on February 28, 2019 and prior to the Termination Date, as described more fully in the Settlement Agreement. The Retiree Cap shall be funded as follows, as set forth in greater detail in, and subject to the provisions of, the Settlement Agreement:
 - i. up to \$1 million by the WMLP Debtors (which amount has already been pre-funded and no further funding obligation exists)⁵ solely with respect to Kemmerer-related Retiree Claims and Administration Costs (the “WMLP First Payment”);
 - ii. up to \$5 million by the WLB Debtors, WLB Secured Lenders and/or the WLB Purchaser to pay for the Retiree Claims and Administration Costs (the “WLB First Payment”);
 - iii. up to \$1.5 million by the WLB Purchaser for Retiree Claims and Administration Costs after the WLB First Payment has been fully expended; and
 - iv. the remaining Retiree Claims and Administration Costs (if any) up to the Retiree Cap shall be funded by the Kemmerer Purchaser; provided that in no event shall the contributions by the Kemmerer Purchaser combined with the

⁴ The following summary is provided for illustrative purposes only and is qualified in its entirety by reference to the Settlement Agreement. In the event of any inconsistency between this summary and the Settlement Agreement, the Settlement Agreement controls in all respects.

⁵ For the avoidance of doubt, even if any funding obligation of the WMLP Debtors were found to exist, such obligation is not and shall not be an obligation of the WMLP Liquidation Trust.

WMLP First Payment contributed by the WMLP Debtors in the aggregate exceed \$2.5 million.

- The Parties agreed on certain reporting requirements, as detailed in the Settlement Agreement, in order to ensure compliance with the terms of the Settlement Agreement.
- For the avoidance of doubt, none of the Parties, the WMLP Liquidation Trust, nor the WLB Liquidation Trust, (a) shall be considered a successor to WCC's plans (including health care plans) for purposes of ERISA, COBRA or otherwise; or (b) shall have any liability under ERISA or COBRA with respect to WCC's plans (including health care plans), to any of the Covered Retirees, any Retiree Claims or for any other reason.
- ***New CBAs and UMWA Covenants.*** Effective as of the date of the Settlement Agreement, the UMWA agreed and covenanted, among other things, that
 - it shall recommend (by the deadlines set forth in section 2 of the Settlement Agreement) to its members that they ratify the Kemmerer CBA and the Beulah CBA;
 - it shall not cause, encourage or support any strike, work slow-down, work stoppage or use of any "memorial" days or leave by the UMWA members through the Settlement Effective Date, and it shall take all actions to cause any such action by UMWA members to immediately cease; and
 - it shall not seek any additional funds for Retiree Claims and Administration Costs in excess of the Retiree Cap from any Non-UMWA Release Party.
- ***Releases.*** The Settlement Agreement includes the following releases and related provisions:
 - ***Non-UMWA Release.*** As of the Settlement Effective Date, except as otherwise provided in the Settlement Agreement, each Non-UMWA Release Party is deemed to have released, discharged, and exculpated each other Non-UMWA Release Party from any and all Claims existing as of, or arising or occurring prior to and including, the date of the Settlement Agreement, based on or relating to, or in any manner arising from, in whole or in part, (a) the Chapter 11 Cases, (b) the consummation of the WLB Debtors' sale transaction in the Chapter 11 Cases and any transactions effectuated in connection therewith, (c) the WMLP Debtors' proposed sale of certain of its assets to Western Coal Acquisition Partners, LLC and its affiliates (the "Western Coal Transaction"), (d) the adversary proceeding

captioned *Westmoreland Mining Holdings, LLC et. al v. Western Coal Acquisition Partners, LLC, et al.* (Adv. Proc. No. 19-03369) and any pleading filed therein by any party, (e) the assertions regarding or relating to the Western Coal Transaction set forth in any correspondence from the Kemmerer Purchaser, the lenders to the WMLP Debtors, or others purportedly on behalf of the WMLP Debtors or the Kemmerer Purchaser, including but not limited to, the correspondence dated June 28, 2019 from Peter H. White, (f) any Kemmerer Purchaser Allegations or any other allegations or claims regarding or relating to the Western Coal Transaction that were made or could be made by the Kemmerer Purchaser, any of the WMLP Debtors, or any other Non-UMWA Release Party against any of the Individual Signatories or any other WLB D&Os, (g) any Non-UMWA Release Party's discussions, communications, and/or agreements with Zurich American Insurance Company and its affiliates regarding the Debtors' surety bonding program, (h) the consummation of the WMLP Debtors' sale transactions in the Chapter 11 Cases and any transactions effectuated in connection therewith, (i) the WMLP Plan, (j) the WLB Plan, and (k) the formulation, preparation, dissemination, negotiation, filing or implementation of any related contract, instrument, release, or other agreement or document created or entered into in connection with items (a) through (j) specified in this subparagraph.

- UMWA Release. As of the Settlement Effective Date, except as otherwise provided in the Settlement Agreement, (a) each UMWA Release Party is deemed to have released, discharged, and exculpated each Non-UMWA Release Party, and (b) each Non-UMWA Release Party is deemed to have released, discharged, and exculpated each UMWA Release Party, from any and all Claims existing as of, or arising or occurring prior to and including, the Settlement Effective Date based on or relating to, or in any manner arising from, in whole or in part, (i) the Chapter 11 Cases, (ii) the consummation of the WLB Debtors' sale transaction in the Chapter 11 Cases and any transactions effectuated in connection therewith, (iii) the Western Coal Transaction, (iv) the consummation of the WMLP Debtors' sale transactions in the Chapter 11 Cases and any transactions effectuated in connection therewith, (v) the WMLP Plan, (vi) the WLB Plan, (vii) any and all employee, compensation, benefits or other retiree and labor matters related to any of the Debtors, WLB Purchaser and/or Kemmerer Purchaser, including, among other things, any Claims for violations of any prior collective bargaining agreements with any of the Debtors, violations of labor law or any other applicable law, including, but not limited to, unfair labor practices for bad faith or regressive bargaining, or otherwise related to any retiree or employee compensation or benefits, and (viii) the formulation, preparation, dissemination, negotiation, filing or implementation of any related contract, instrument, release, or

other agreement or document created or entered into in connection with items (i) through (vii) specified in this subparagraph.

o Exclusions.

- i. Notwithstanding anything to the contrary contained in the Settlement Agreement, nothing contained in the Settlement Agreement shall: (a) release, discharge, exculpate, or enjoin any Claims, rights and/or obligations arising (i) under the Settlement Agreement and/or the Settlement Order, (ii) with respect to the releases set forth in section 6.b of the Settlement Agreement, after the date of the Settlement Agreement, and with respect to the releases set forth in section 6.c of the Settlement Agreement, after the Settlement Effective Date, (iii) under the WMLP Plan (including the rights of Holders of Allowed Claims and/or Interests to receive Distributions under the WMLP Plan), (iv) under the WLB Plan (including the rights of Holders of Allowed Claims and/or Interests to receive Distributions under the WLB Plan or rights of insureds to seek protection and coverage under the D&O Policies (as defined in the WLB Plan)), (v) under the ratified Kemmerer CBA and/or the ratified Beulah CBA, and/or (vi) between any of the WMLP Debtors, the WMLP Secured Parties, the WMLP Liquidation Trust and/or the Kemmerer Purchaser and any of their respective successors or assigns under or relating to the Kemmerer APA and/or any document, agreement or transaction entered into in connection with the Kemmerer Sale; (b) release, discharge, exculpate, or enjoin (i) any Claims and/or rights of any of the WMLP Secured Parties, the Kemmerer Purchaser, and their respective successors and assigns against (and/or with respect to) any of the WMLP Debtors, their Estates, the WMLP Liquidation Trust and/or their respective successors and assigns, arising under or relating to the Liquidation Trust Agreement and any other related agreements entered into in connection therewith, (ii) any obligations of any of the WMLP Debtors, their Estates, the WMLP Liquidation Trust and/or their respective successors and assigns to any of the WMLP Secured Parties, the Kemmerer Purchaser and/or their respective successors and assigns, and/or (iii) any obligations of any of the WLB Debtors, their Estates (as defined in the WLB Plan), the WLB Liquidation Trust, the WLB Purchaser and/or their respective successors and assigns to any of the WLB Debtors, the WLB Secured Parties, the WLB Purchaser and/or their respective successors and assigns with respect to the WLB Plan or any

of the documentation entered into in connection therewith, including the sale documentation; and/or (c) limit, discharge, impair, prohibit, preclude, release, or terminate (i) any rights and/or obligations arising under any order entered in the Chapter 11 Cases (including the Interim Compensation Order, the Intercompany Settlement Order, WMLP Committee Settlement Order, the Kemmerer Sale Order, the Confirmation Order, and the WLB Confirmation Order) and/or any document, agreement or transaction entered into pursuant thereto (including the Back-Office TSA) (provided, however, that any breach of the Back-Office TSA or the Intercompany Settlement Term Sheet occurring prior to the date of the Settlement Agreement is deemed to be waived), and/or (ii) any Claims, rights and/or obligations with respect to (including any right to object to or defend) any fees and/or expenses of any professional, including any professional that is or was retained or employed by any of the WLB Debtors, the WMLP Debtors and/or the Creditors' Committee.

- ii. For the avoidance of doubt, and notwithstanding anything to the contrary in the Settlement Agreement, the Exclusions in section 6.d.i of the Settlement Agreement shall not affect: (a) any releases provided under the Settlement Agreement to or from any of the Individual Signatories or the other WLB D&Os, (b) any releases related to the Kemmerer Purchaser Allegations, (c) any release or exculpation already given or received under the WMLP Plan and the WLB Plan, (d) any waiver of a breach of the Back-Office TSA or the Intercompany Settlement Term Sheet occurring prior to the date of the Settlement Agreement as set forth in section 6.d.i of the Settlement Agreement; or (e) the procedures set forth in the WLB Plan, the WMLP Plan, and/or the Interim Compensation Order regarding the compensation of Professionals (including any Professional's right to seek compensation and any other party's rights to object to such compensation).
- Mutuality. The releases, discharge and exculpations in section 6 of the Settlement Agreement are intended to be mutual and reciprocal, and to the extent that any release, discharge and/or exculpation provided under section 6 of the Settlement Agreement by any person or entity (the "First Party") to any other person or entity (the "Second Party") is invalid or unenforceable for any reason, the reciprocal release, discharge and/or exculpation provided to such First Party by the Second Party shall also be deemed invalid and unenforceable. An invalidation

of a release granted under section 6 of the Settlement Agreement shall not affect the other releases granted under the Settlement Agreement.

16. After extensive discussions to resolve the outstanding labor and retiree issues, and to mutually release certain Claims, including the Kemmerer Purchaser Allegations, the Parties entered into the Settlement Agreement. The Settlement Agreement is a consensual resolution of these disputed matters that avoids potential litigation and will resolve all outstanding labor and retiree issues among the UMWA, the WLB Debtors, the WMLP Debtors, the WLB Purchaser, the Kemmerer Purchaser, and others, and is in the best interest of the Debtors' estates. Accordingly, the Court should approve the Motion and authorize the WLB Debtors to effectuate the Settlement Agreement and implement its terms.⁶

IV. The Opt-Out Procedures.

17. As discussed above, the Settlement Agreement provides all Non-UMWA Release Parties that are not Parties or signatories to the Settlement Agreement (the "Non-Signatories") the ability to opt out of the releases contained in the Settlement Agreement. This Motion seeks approval of the following procedures to solicit such opt-outs (the "Opt-Out Procedures"):

- Within three (3) days of entry of the Order, Donlin, Recano & Company, Inc. (the "Claims Agent") will: (a) send an opt-out form, substantially in the form attached hereto as Exhibit 2 to Exhibit A (the "Opt-Out Form") (which Opt-Out Form will clearly state that any person or entity that exercises a right to opt out will neither grant nor receive any of the releases under the Settlement Agreement), to the Non-Signatories for whom the Claims Agent or the Debtors have addresses, and (b) cause a notice regarding the releases and the Opt-Out Procedures to be published in the *Houston Chronicle*.
- Unless otherwise agreed to by the WLB Debtors, the WMLP Liquidation Trust (as successor to WMLP Debtors), the WLB Purchaser, and the Kemmerer Purchaser, the Non-Signatories will have 14 days from the date of service (the

⁶ For the avoidance of doubt, the WMLP Liquidation Trust shall not bear or be in any way responsible for any costs and fees associated with the prosecution of this Motion or the implementation of the Settlement Agreement, including the procedures proposed herein.

“Opt-Out Deadline”) to submit an Opt-Out Form in either electronic or paper form, in each case following the procedures set forth in the Opt-Out Form.

- Within seven days of the Opt-Out Deadline, the Claims Agent shall file on the docket a list of persons and/or entities who have submitted an Opt-Out Form.
- The Opt-Out Procedures may be modified with the consent of the WLB Debtors, the WMLP Liquidation Trust (as successor to WMLP Debtors), the WLB Purchaser, and the Kemmerer Purchaser to facilitate the opt-out process.

18. The Settlement Agreement (including both the granting and receiving of releases as set forth therein) shall be binding upon any Non-Signatory that does not affirmatively opt out in accordance with the Opt-Out Procedures approved by the Court.

Basis for Relief

19. Bankruptcy Rule 9019(a) provides, in relevant part: “On motion by the [debtor in possession] and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, . . . and indenture trustee as provided in Rule 2002 and to any other entity as the court may direct.” Fed. R. Bankr. P. 9019(a).

20. “To minimize litigation and expedite the administration of a bankruptcy estate, compromises are favored in bankruptcy.” *Myers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3d Cir. 1996) (internal quotations omitted). Settlements are considered a “normal part of the process of reorganization” and a “desirable and wise method[s] of bringing to a close proceedings otherwise lengthy, complicated, and costly.” *Rivercity v. Herpel (In re Jackson Brewing Co.)*, 624 F.2d 599, 602 (5th Cir. 1980) (citations omitted) (decided under the Bankruptcy Act).

21. Pursuant to Bankruptcy Rule 9019(a), a bankruptcy court may, after appropriate notice and a hearing, approve a compromise or settlement so long as the proposed settlement is fair, equitable, and in the best interest of the estate. *See In re Age Ref. Inc.*, 801 F.3d 530, 540 (5th Cir. 2015). Ultimately, approval of a compromise is within the “sound discretion” of the

bankruptcy court. *United States v. AWECO, Inc. (In re AWECO, Inc.)*, 725 F.2d 293, 297 (5th Cir. 1984); *see also Jackson Brewing Co.*, 624 F.2d 599, 602-603 (same).

22. Generally, the role of the bankruptcy court is not to decide the issues in dispute when evaluating a settlement. *Watts v. Williams*, 154 B.R. 56, 59 (S.D. Tex. 1993). Instead, the court should determine whether the settlement as a whole is fair and equitable. *Protective Comm. for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968).⁷

23. The standard set forth under Bankruptcy Rule 9019(a) is similar to the requirements for relief of section 363(b)(1) of the Bankruptcy Code.⁸ It is well established in this jurisdiction that a debtor may use property of the estate outside the ordinary course of business if there is a good business reason for doing so. *See, e.g., ASARCO, Inc. v. Elliott Mgmt. (In re ASARCO, L.C.C.)*, 650 F.3d 593, 601(5th Cir. 2011) (“[F]or the debtor-in-possession or trustee to satisfy its fiduciary duty to the debtor, creditors, and equity holders, there must be some articulated business justification for using, selling, or leasing the property outside the ordinary course of business.”) (quoting *In re Cont'l Air Lines, Inc.*, 780 F.3d 1223, 1226 (5th Cir. 1986)); *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1308 (5th Cir. 1985) (holding that the standard to assume a lease is the business judgment standard).

24. “Great judicial deference is given to the [debtor’s] exercise of business judgment.” *GBL Holding Co., Inc. v. Blackburn/Travis/Cole, Ltd. (In re State Park Bldg. Grp., Ltd.)*, 331 B.R.

7 Further, under section 105(a) of the Bankruptcy Code, the Court “may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code].” Authorizing the WLB Debtors to proceed with the Settlement Agreement falls squarely within the spirit of Bankruptcy Rule 9019, if not the letter, as well as the Bankruptcy Code’s predilection for compromise. Thus, to the extent necessary, section 105(a) relief is appropriate in this instance and would best harmonize the settlement processes contemplated by the Bankruptcy Code.

8 The Bankruptcy Code authorizes a debtor in possession to “use, sell, or lease, other than in the ordinary course of business, property of the estate,” after notice and a hearing. 11 U.S.C. § 363(b)(1).

251, 254 (Bankr. N.D. Tex. 2005). “As long as [the decision] appears to enhance a debtor’s estate, court approval of a debtor-in-possession’s decision . . . should only be withheld if the debtor’s judgment is clearly erroneous, too speculative, or contrary to the provisions of the Bankruptcy Code.” *Richmond Leasing Co.*, 762 F.2d at 1309.

25. The Fifth Circuit has established a three-factor balancing test under which bankruptcy courts are to analyze proposed settlements. The factors a court must consider in determining whether a compromise is “fair, equitable, and within the best interest of the estate are: ‘(1) the probability of success in litigating the claim subject to settlement, with due consideration for the uncertainty in fact and law; (2) the complexity and likely duration of litigation and any attendant expense, inconvenience, and delay; and (3) all other factors bearing on the wisdom of the compromise.’” *In re Roqumore*, 393 B.R. 474, 479 (Bankr. S.D. Tex. 2008) (citing the factors set forth by the court in *Jackson Brewing*); *see also Age Ref. Inc.*, 801 F.3d at 540 (same).

26. Under the rubric of the third factor referenced above, the Fifth Circuit has specified two additional factors that bear on the decision to approve a proposed settlement. **First**, the court should consider “the paramount interest of creditors with proper deference to their reasonable views.” *Conn. Gen. Life Ins. Co. v. United Cos. Fin. Corp. (In re Foster Mortg. Corp.)*, 68 F.3d 914, 917 (5th Cir. 1995); *see also Age Ref. Inc.*, 801 F.3d at 540 (noting the *Foster Mortgage* factors). “While the desires of the creditors are not binding, a court ‘should carefully consider the wishes of the majority of the creditors.’” *Foster Mortgage*, 68 F.3d at 917 (quoting *In re Transcontinental Energy Corp.*, 764 F.2d 1296, 1299 (9th Cir. 1985)). **Second**, the court should consider the “extent to which the settlement is truly the product of arms-length bargaining, and not of fraud or collusion.” *Age Ref. Inc.*, 801 F.3d at 540; *Foster Mortg. Corp.*, 68 F.3d at 918 (citations omitted).

27. The WLB Debtors and the WMLP Liquidation Trust respectfully submit that the Settlement Agreement satisfies the standards for approval thereof pursuant to Bankruptcy Rule 9019 and section 363 of the Bankruptcy Code, and that the Court should therefore approve the Settlement Agreement. The Settlement Agreement, which is the product of extensive good-faith, arm's-length discussions by and among the Parties, resolves Claims related to Retiree Benefits and settles and mutually releases certain other Claims as set forth in the Settlement Agreement, including but not limited to the Kemmerer Purchaser Allegations, and, by extension, obviates possible litigation regarding these matters. Accordingly, the WLB Debtors and the WMLP Liquidation Trust respectfully request that the Court approve the Settlement Agreement.

Waiver of Bankruptcy Rule 6004(a) and 6004(h)

28. To implement the foregoing successfully, the WLB Debtors and the WMLP Liquidation Trust request that the Court enter an order providing that notice of the relief requested herein satisfies Bankruptcy Rule 6004(a) and that cause exists to exclude such relief from the 14-day stay period under Bankruptcy Rule 6004(h).

Notice

29. The WLB Debtors, on behalf of themselves and on behalf of the WMLP Liquidation Trust, will provide notice of this Motion and the Opt-Out Procedures to the following parties or their respective counsel: (a) the Office of the United States Trustee for the Southern District of Texas; (b) the WLB Purchaser; (c) the Kemmerer Purchaser; (d) the UMWA; (e) the WMLP Liquidation Trust; (f) the United States Attorney's Office for the Southern District of Texas; (g) the Internal Revenue Service; (h) the Environmental Protection Agency and similar state environmental agencies for states in which the Debtors conduct business; (i) the offices of the attorneys general for the states in which the Debtors operated; (j) the Securities and Exchange Commission; (k) all Non-Signatories (to the extent their address is known by the Debtors or

Claims Agent, and/or by publication notice); (l) the WLB Secured Lenders; (m) the WMLP Secured Parties; and (n) any other person or entity that has requested notice pursuant to Bankruptcy Rule 2002. The WLB Debtors submit that, in light of the nature of the relief requested, no other or further notice need be given.

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WHEREFORE, the WLB Debtors and the WMLP Liquidation Trust respectfully request that the Court enter the Order, granting the relief requested herein and such other relief as the Court deems appropriate under the circumstances.

Houston, Texas
August 8, 2019

/s/ Gregory F. Pesce

James H.M. Sprayregen, P.C.
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Certificate of Service

I certify that on August 8, 2019, I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas.

/s/ Gregory F. Pesce

Gregory F. Pesce