

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:

WESTMORELAND COAL COMPANY,
ET AL.,¹

DEBTORS

CHAPTER 11

CASE NO. 18-35672 (DJR)

(JOINTLY ADMINISTERED)

**OBJECTION TO THIRD INTERIM AND FINAL FEE APPLICATION OF MORRISON
& FOERSTER LLP FOR ALLOWANCE OF COMPENSATION FOR SERVICES
RENDERED AS COUNSEL TO THE OFFICIAL COMMITTEE OF UNSECURED
CREDITORS FOR THE PERIOD FROM
OCTOBER 22, 2018 THROUGH JUNE 21, 2019**

NOW INTO COURT, through undersigned counsel, come the MLP Lenders,² (collectively the “Objectors”), who submit this objection (the “Objection”) to the *Third Interim and Final Fee Application of Morrison & Foerster, LLP* [Docket No. 2173] (the “Morrison Fee Application”) filed by Morrison & Foerster, LLP (“Morrison”). In support of this Objection, the Objectors respectfully represent as follows:

1. Morrison was duly engaged counsel to the Official Committee of Unsecured Creditors (the “Committee”) pursuant to the Bankruptcy Code. As a professional in a Chapter 11 case, Morrison must ensure that the services it provided are necessary to the administration of the proceeding, that the services were performed within a reasonable period of time, that its services and bills comply with the orders of this court and the contractual agreements of the other parties

¹ Due to the large number of debtors in these chapter 11 cases, for which joint administration has been requested, 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 claims and noticing agent in these chapter 11 cases at www.donlinrecano.com/westmoreland. Westmoreland Coal Company’s service address for purposes of these chapter 11 cases is 9540 South Maroon Circle, Suite 300, Englewood, Colorado 80112.

² The “MLP Lenders” refers to the lenders under that certain Financing Agreement, dated December 31, 2014, with Westmoreland Resource Partners, LP and its subsidiaries (as amended, supplemented or modified from time to time).

to the proceeding as to the professional services to be rendered and billed for, and that its time records are sufficiently detailed to allow potential objectors and the Court to adequately determine whether the above criteria have been satisfied.

2. Here, Objectors maintain that Morrison's services, and its current bill, do not comply with the prior orders of this Court regarding professional services and compensation. Near the outset of this proceeding, on November 15, 2018, this Court entered a Final Order (I) Authorizing the MLP Debtors to Use Cash Collateral (II) Granting Certain Protection to Prepetition Lenders, (III) Modifying the Automatic Stay and (IV) Granting Related Relief [Docket No. 521] (the "Cash Collateral Order"), in which this Court ordered that "no more than \$100,000 in the aggregate of proceeds of any Prepetition Collateral or Adequate Protection Collateral, including Cash Collateral, may be used by the Creditors' Committee only to investigate but not prepare, initiate, or prosecute any Claims and Defenses against any of the MLP Secured Parties prior to the termination period." [*Id.* at 53-54]. Nonetheless, in the Morrison Fee Application, Morrison seeks as much as \$497,000 for services relating to investigating claims against the MLP Secured Parties. This bill is far in excess of the cap created by the Cash Collateral Order.

3. Further, Objectors also maintain that Morrison's services have often not been necessary to the administration of the proceeding. In these cases, while serving as counsel to the Committee, Morrison has applied for compensation in excess of \$4.3 million, despite achieving only \$3.25 million of recovery for the general unsecured creditors. Even more acutely, in the present application Morrison seeks over \$1.76 million in fees for services rendered in connection with the WMLP Debtors' proceeding even though Morrison obtained zero (\$0) recovery for general unsecured creditors in the WMLP Plan. The Disclosure Statement for the WMLP Plan [Doc. 1613] filed on March 15, 2019 made clear that general unsecured creditors would receive no proceeds from the WMLP Plan. Nonetheless, Morrison is seeking over \$300,000 in

professional fees for services rendered since March 15, 2019 in this matter, on behalf of a client who could receive no benefit. These services could certainly not be described as a “good gamble.” Finally, in its bill for this final period, Morrison’s billing practices are sloppy, including as much as \$6,600 billed for work on an unrelated file.

4. For those reasons, as explained in further detail below, the WMLP Lenders object to the Final Fee Application of Morrison and suggest that the total should be reduced by at least \$397,000, to comply with the Cash Collateral Order, and that a lodestar reduction should be applied given that Morrison’s services secured no recovery for general unsecured creditors in the WMLP Plan.

BACKGROUND

5. The *Order Establishing Procedures for Interim Compensation and Reimbursement of Expenses for Professionals* [Docket No. 495] (the “Interim Compensation Procedures Order”), among other things, (a) specified procedures for the allocation of professional fees and expenses between the WLB Debtors and the WMLP Debtors, (b) expressly reserved the rights of any party-in-interest to contest any such allocation and (c) provided that any payments to Professionals would be subject to the *Final Order (I) Authorizing the MLP Debtors to Use Cash Collateral (II) Granting Certain Protection to Prepetition Lenders, (III) Modifying the Automatic Stay and (IV) Granting Related Relief* [Docket No. 521] (the “Cash Collateral Order”), including the Budget (as defined in the Cash Collateral Order), with the Cash Collateral Order and the Budget governing in the event of any inconsistency with the Interim Compensation Procedures Order.

6. Additionally, the *Order Authorizing and Approving Intercompany Settlement Term Sheet* [Docket No. 1548] (the “Intercompany Settlement Order”), among other things, specified allocations as between the WLB Debtors and the WMLP Debtors for professional fees and expenses incurred in connection with performing certain tasks for each of the Debtor’s estates and

the percentage allocation as between the WLB Debtors and the WMLP Debtors for shared professional fees and expenses. Further, all parties to the Intercompany Settlement Term Sheet (as defined in the Intercompany Settlement Order) reserved their respective rights to contest whether services are appropriately attributable to the WLB Debtors and/or the WMLP Debtors, and to contest any fees and/or expenses related thereto.

7. Morrison's employment as counsel for the Committee was approved by an Order entered on November 28, 2018 (the "Morrison Employment Order"). According to the Morrison Employment Order, Morrison's employment was approved "pursuant to 11 U.S.C. § 328 and 1103" of the Bankruptcy Code as Committee counsel consistent with the terms of Morrison's application. The Morrison Employment Order further mandated that Morrison's fee applications shall be submitted "in compliance with sections 330 and 313 of the Bankruptcy Code and applicable provisions of the Bankruptcy Rules, Local Rules, and any other applicable procedures and orders of the Court."

LEGAL STANDARDS

8. Pursuant to the Morrison Employment Order, Section 330 of the Bankruptcy Code governs the compensation sought by Morrison. Section 330 permits the court to grant reasonable compensation for actual, necessary services rendered to the debtor or a creditor body and instructs the court shall consider all relevant factors including:

- a. The time spent on such services;
- b. The rates charged for such services;
- c. Whether the services were necessary to the administration of, or beneficial at the time for which the services were rendered toward the completion of, a case under the Bankruptcy Code;
- d. Whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
- e. With respect to a professional person, whether the person seeking compensation is board certified or otherwise has demonstrated skills and experience in the bankruptcy field; and

- f. Whether the compensation is reasonably based on the customary compensation charged by competent, skilled practitioners in other cases under the Bankruptcy Code.³

9. Furthermore, § 330 mandates that “the court shall not allow any compensation for” unnecessary duplication of services; or for services which were not reasonable or necessary.⁴

10. In analyzing fee applications, a court must begin with determining whether the services for which compensation is sought are reasonable and necessary, and then the court will consider whether the actual time purportedly incurred is appropriate. In order to make those determinations, courts require that a professional’s time entries be sufficiently specific in detail to permit the court to determine the precise service rendered. As a corollary, the application must inform the court of the specific time incurred with respect to each task; lumping of multiple tasks in a single time entry is not permitted. The burden of proof in a fee application case rests with the applicant.⁵

BASES OF OBJECTION

11. In the Morrison Fee Application, Morrison requests approval of \$1,764,820.80 in fees and \$23,516.14 in expenses from the WMLP Debtors.⁶

Fees Billed in Excess of the Cap on Claims Investigation

12. The Interim Compensation Procedures Order, among other things, provided that any payments to professionals in this matter would be subject to the Cash Collateral Order.

13. In the Cash Collateral Order, the MLP Secured Lenders, as defined in that Order, secured several significant limitations on incurring of professional fees by the Committee. First,

³ 11 U.S.C §330(a)(3).

⁴ 11 U.S.C §330(a)(4)

⁵ See, e.g., *In re Digerati Technologies, Inc.*, 537 B.R. 317 (Bankr. S.D. Tex. 2015).

⁶ See Morrison Fee Application at 11-12 & n.2.

they obtained an overall limitation on professional fees for Committee professionals of \$550,000 for fees incurred after January 15, 2019. *See* Cash Collateral Order at § 8(a). Although the date that this limitation began has moved, this limitation is still in effect.

14. Second, and separately, the MLP Secured Lenders obtained the following limitation on billing for investigations or prosecutions of claims by the Committee against the MLP Secured Lenders (the “Claim Investigation Cap”):

[N]otwithstanding anything to the contrary herein, no more than \$100,000 in the aggregate of proceeds of any Prepetition Collateral or Adequate Protection Collateral, including Cash Collateral, may be used by the Creditors’ Committee only to investigate but not prepare, initiate, or prosecute any Claims and Defenses against any of the MLP Secured Parties prior to the termination of the Challenge Period. Cash Collateral Order at § 20(a).

The Claim Investigation Cap was never lifted in any subsequent agreement.

15. Morrison’s bills reveal that they have billed the WMLP Debtors for \$497,927.55 worth of fees for services relating to claim investigations:

| Category of Service | Billed to WMLP Directly | WMLP Share of Joint Billing |
|----------------------|-------------------------|-----------------------------|
| Claims Investigation | \$54,748 | \$55,067.25 |
| Lien Investigation | \$74,961 | \$45,214.95 |
| Discovery | \$63,998 | \$203,938.35 |
| Total | \$193,707 | \$304,220.55 |
| Grand Total | | \$497,927.55 |

16. A review of Morrison’s billing entries reveals that many of these categories are obviously for investigation into claims against the MLP Secured Parties.

Claims Investigation

| | | | | |
|-----------|---|-------------------|------|----------|
| 02-Jan-19 | Analyze MLP leases for anti-assignment provisions. | Harris, Daniel J. | 4.20 | 3,759.00 |
| 05-Jan-19 | Correspond with internal working group regarding depositions and complaint. | Kissner, Andrew | 0.50 | 312.50 |

| | | | | |
|-----------|--|--------------------|------|----------|
| 05-Jan-19 | Correspond with D. Hillman (Schulte) regarding potential challenges to MLP lender claims. | Marinuzzi, Lorenzo | 0.60 | 780.00 |
| 07-Jan-19 | Analyze updated draft MLP lender complaint. | Goren, Todd M. | 0.40 | 460.00 |
| 10-Jan-19 | Correspond with internal working group regarding standing motion (.1); correspond with D. Harris regarding edits to standing motion (.1); correspond with A. Kissner regarding document review (.1); draft standing motion for MLP claims (1.8). | Gambier, Lauren M. | 2.10 | 1,774.50 |

17. Other entries, such as the time entries for “Discovery” below, are clearly about claims investigation, but are too vague to conclusively determine if they concern claims against the MLP Secured Parties. Likely these entries are too vague to be compensable under the test articulated by this Court in *In re Digerati Technologies, Inc*, 537 B.R. 317, 333 (Bankr. S.D. Tex. 2015) (“Time entries that do not provide sufficient detail to determine whether the services described are compensable may be disallowed due to vagueness.”). Given the contemporaneous investigations into claims against the MLP Secured Parties, however, this Court can reasonably infer that these entries do relate to claims against the MLP Secured Parties.

| | | | | |
|------------------|--|------------------------|------|----------|
| Discovery | | | | |
| 02-Jan-19 | Analyze documents produced by Debtors in connection with Committee's claims investigation. | Effendowicz, Alexander | 2.10 | 840.00 |
| 02-Jan-19 | Analyze documents produced by Debtors in connection with Committee's claims investigation. | Frost, Alison | 3.10 | 1,581.00 |
| 02-Jan-19 | Analyze documents produced by Debtors in connection with Committee's claims investigation. | Konjuhi, Alex | 0.70 | 280.00 |
| 02-Jan-19 | Analyze documents produced by Debtors in connection with Committee's claims investigation. | Rosenberg, Adam N. | 2.10 | 1,071.00 |
| 03-Jan-19 | Analyze documents produced by Debtors in connection with Committee's claims investigation. | Effendowicz, Alexander | 1.40 | 560.00 |
| 03-Jan-19 | Analyze documents produced by Debtors in connection with Committee's claims investigation. | Frost, Alison | 0.30 | 153.00 |
| 03-Jan-19 | Analyze deposition exhibits. | Guido, Laura | 2.00 | 750.00 |
| 04-Jan-19 | Analyze documents produced by Debtors in connection with Committee's claims investigation. | Frost, Alison | 2.20 | 1,122.00 |
| 04-Jan-19 | Analyze documents produced by Debtors in connection with Committee's claims investigation. | Konjuhi, Alex | 0.20 | 80.00 |
| 07-Jan-19 | Analyze documents produced by Debtors in connection with Committee's claims investigation. | Frost, Alison | 1.30 | 663.00 |
| 08-Jan-19 | Analyze documents produced by Debtors in connection with Committee's claims investigation. | Frost, Alison | 2.80 | 1,428.00 |

In total, there are 202 time entries in Morrison’s bills to the WMLP Debtors or jointly to both debtors with the description “Analyze documents produced by Debtors in connection with

Committee’s investigations,” or slight variants thereupon. These entries, which never provide specification about the claims being investigated, represent over 675 hours of time.

18. Finally, some entries clearly go beyond claim investigation to claim prosecution, and the Claim Investigation Cap excludes Morrison from billing the WMLP Debtors for these services entirely.

Lien Investigation

| | | | | |
|-----------|---|--------------------|------|----------|
| 01-Jan-19 | Analyze draft MLP complaint. | Gambier, Lauren M. | 0.40 | 338.00 |
| 01-Jan-19 | Draft and revise lien perfection complaint with respect to MLP Debtors (3.8); analyze recent mortgage analysis to identify unencumbered properties (1.1); correspond with internal working group regarding same (.4). | Harris, Daniel J. | 5.30 | 4,743.50 |

19. The \$497,927.55 that Morrison seeks to bill for services relating to claim investigation are plainly far in excess of the Claim Investigation Cap. Accordingly, Morrison’s submission for payment of professional fees by the WMLP Debtors should be reduced by \$397,927.55, to reflect proper application of the Claim Investigation Cap.

Lodestar reduction for services provided after the Plan Disclosure Statement

20. “Section 330 provides that a bankruptcy court, in its discretion, determines the amount of reasonable compensation for professionals retained under section 327 of the Bankruptcy Code. Bankruptcy courts have considerable discretion when determining whether an upward or downward adjustment of the lodestar is warranted.” *In re 1002 Gemini Interests LLC*, No. 11-38815, 2015 WL 913542, at *13 (Bankr. S.D. Tex. Feb. 27, 2015) (Isgur, J.). “The Fifth Circuit had held that the most important factor is the ‘degree of success obtained.’” *Id.* (citing *Singer v. City of Waco*, 324 F.3d 813, 829 (5th Cir. 2003); *Romaguera v. Gegenheimer*, 162 F.3d 893, 896 (5th Cir.1998)). Even under the Fifth Circuit’s revised *Woerner* standard, services must be “a good gamble,” and objectively reasonable at the time they were undertaken. *See In re Woerner*, 783 F.3d at 266 (5th Cir. 2015).

21. In this case, on March 15, 2019, the WMLP Debtors filed a Disclosure Statement indicating that no recovery would flow to the unsecured creditors. [Doc. 1613]. The Committee supported that Plan. [Doc. 1615 at 3]. That Disclosure Statement was conditionally approved on March 18, 2019 [Doc. 1620]. Nonetheless, Morrison is seeking payment for over \$300,000 worth of services rendered after March 18, 2019. Those services yielded no tangible benefit, nor could they reasonably be expected to, as the Committee at that point had already agreed to a Committee Settlement and a Plan in which general unsecured creditors would obtain no recovery.

22. A brief perusal of Morrison's April 2019 bill reveals services that could not have been expected to yield any benefit for the Committee. Morrison seeks \$23,164.50 in compensation for activities related to Asset Disposition, even though none of those proceeds could flow to general unsecured creditors. Morrison seeks \$10,138.50 in compensation for case administration, including the daily cost of a paraprofessional monitoring and circulating the docket. Morrison seeks \$14,807 for Meetings and Communications with Creditors, because every week between 5-6 attorneys would revise an agenda and then attend a weekly call with the Committee that never lasted more than 15 minutes because there was little left to discuss.

23. During this Third Interim Period, Morrison's bills appear to get sloppy as well. In at least one instance, it appears that a lawyer billed over \$6,000 in time from another file to the WMLP Debtors:⁷

| Claims Investigation | | | | |
|-----------------------------|---|----------------------|-------------|-----------------|
| 17-May-19 | Analyze documents in connection with solvency analysis (1) and coordinate additional discovery requests (1); review memo regarding claims in connection with fraud, securities laws, and other related to Aurelius (2). | Marines, Jennifer L. | 4.00 | 4,400.00 |
| Total: 026 | Claims Investigation | | 4.00 | 4,400.00 |

⁷ See Morrison Fee Application, Doc. # 2173, at 408-09.

Schedules and Statements

| | | | | |
|-------------------|--|----------------------|-------------|-----------------|
| 17-May-19 | Review schedules in connection with claims analysis. | Marines, Jennifer L. | 2.00 | 2,200.00 |
| Total: 030 | Schedules and Statements | | 2.00 | 2,200.00 |

The \$6,600 billed to Claims Investigation and Schedules “related to Aurelius” are the only amounts billed by Morrison for Claims Investigation or Schedules during the Third Interim Period.⁸ While the Objectors are unaware of any role played by “Aurelius” in this case, a hedge fund named Aurelius is reported to have been involved in precipitating the bankruptcy of “Windstream Holdings, Inc.”⁹ Morrison was appointed to represent the Unsecured Creditors’ Committee in the Windstream Bankruptcy on May 16, 2019, the day before the billing entries in question.¹⁰

24. The Objectors maintain that a downward adjustment under the lodestar method is appropriate, because it is unclear that Morrison’s post-March 15 work could have objectively served any tangible benefit for the Committee at the time it was undertaken.

WHEREFORE, the Objectors request that the Court reduce Morrison’s Final Fee Application by \$397,927.55, to comply with the Cash Collateral Order, and that a lodestar reduction should be applied to reduce Morrison’s bill given that Morrison’s Post-Disclosure Statement services secured no recovery for general unsecured creditors in the WMLP Plan.

Dated: August 12, 2019

Respectfully submitted,

/s/ Jason W. Burge

Brent B. Barriere, *pro hac pending*

Jason W. Burge, *pro hac pending*

Alysson L. Mills, *pro ac pending*

D. Skylar Rosenbloom, *pro hac pending*

Rebekka C. Veith, *pro hac pending*

FISHMAN HAYGOOD LLP

⁸ See Morrison Fee Application at 34 & 37.

⁹ See <https://www.bloomberg.com/news/articles/2019-02-25/windstream-files-bankruptcy-after-losing-aurelius-default-fight>.

¹⁰ See *In re Windstream Holdings*, No. 19-22312-rdd (Bankr. S.D.N.Y.), Doc. # 539 (Order signed on 5/16/2019 Granting Application Authorizing the Retention and Employment of Morrison & Foerster LLP as Counsel to the Official Committee of Unsecured Creditors Nunc Pro Tunc to March 12, 2019).

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Counsel to the MLP Lenders

CERTIFICATE OF CONFERENCE AND SERVICE

I certify that on August 12, 2019, I discussed the above objection with counsel at Morrison & Foerster, LLP. We were unable to come to a resolution, and thus a hearing will be necessary.

I further certify that on August 12, 2019, I caused a copy of the foregoing document to be served by electronic transmission to all registered ECF users appearing in this case.

/s/ Jason W. Burge
Jason W. Burge